



DEALING IN MORTGAGES – JURISDICTION AND THE *REAL ESTATE ACT*

Summary: Individuals who wish to deal in mortgages in Alberta as mortgage brokers are required to obtain an authorization from the Real Estate Council of Alberta. When a deal in mortgages contains components outside of Alberta's boundaries, application of the Act may become more complicated with respect to whether an authorization as a mortgage broker is required. The *Real Estate Act* will apply to dealing in mortgages by mortgage brokers in usual cases and in cases where a substantial connection to Alberta is present. [See: *Real Estate Act* s.1]]

The *Real Estate Act* section 1 defines "business of an industry member" and the meaning of dealing in mortgages as a "mortgage broker." Apart from statutory exclusions, the Act requires that people who wish to deal in mortgages as mortgage brokers obtain an authorization from the Real Estate Council of Alberta. This requirement applies to all licensing classifications. The facts in any particular case will be determinative of whether or not a person is dealing in mortgages as a mortgage broker pursuant to the Act. RECA, courts and other decision makers are in a position to regularly make this decision.

When there is a question as to whether or not the Act applies, the decision will likely be made on the basis of criteria related to a legal test known as the "real and substantial connection" test. "Substantial connection" is not defined in the Act. The concept is most commonly used when a decision maker is determining which jurisdiction is the most appropriate to deal with a dispute or a legal action. In reviewing the facts, the decision maker considers the connectors present in competing jurisdictions and determines which connectors are the more significant, thus creating the "substantial connection", as opposed to a more casual or tangential connection.

A deal in mortgages by a mortgage broker authorized under the Act which is wholly completed within the geographic boundaries of Alberta would, in ordinary circumstances, be covered by the Act. When the deal in mortgages contains components in a jurisdiction other than Alberta, application of the Act may become more complicated.

The following are some of the factors which will likely be considered by a decision maker in determining whether there is a substantial connection to a jurisdiction:

- the province in which the mortgage broker holds an authorization to deal in mortgages
- whether or not the authorized mortgage industry member was dealing in mortgages as a mortgage broker as defined in the Act
- the geographic location of the property for which a mortgage is being obtained
- the place where a corporate party was incorporated
- the usual business operations of a corporation in relation to dealing in mortgages
- the place dealing records are held
- the place receipt of deposits into a trust account occurs

- the method and place from which documents, such as disclosure documents and mortgage commitment letters, are sent or provided to parties
- the place where advertisements appear
- the place from which advertisements originate
- the place where money originates and is delivered to conclude a deal in mortgages
- any choice of law clauses adopted by parties in any agreement

Today, the reality is that in addition to more traditional mortgage brokerage practices, dealing activity takes place in an electronic age. Components of mortgage deals may occur in several jurisdictions using internet and faxes. The *Act* will apply to deals in mortgages by mortgage brokers in usual cases and in cases where a substantial connection to Alberta is present.