



“Lending Clients” and the *Rules of Professional Conduct*

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BAR ASSOCIATION  
A Branch of the  
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## Introduction

The Ontario Bar Association (the “**OBA**”) is pleased to provide comments to the Law Society of Ontario (the “**Law Society**”) on an issue raised by the OBA’s Real Property Law Executive in respect of the definition of a “lending client” in rule 3.4-13 of the Law Society’s *Rules of Professional Conduct* (the “**Rules**”). Rule 3.4-13 currently reads as follows:

**3.4-13** In rules 3.4-14 to 3.4-16 “lending client” means a client that is a bank, trust company, insurance company, credit union or **finance company** that lends money in the ordinary course of its business.<sup>1</sup> (emphasis added)

As explained in detail below, the OBA calls on the Law Society to review and clarify the definition of a lending client in Rule 3.4-13 by particularizing the definition of a “finance company”. Unlike the other institutions listed in the Rule, “finance company” is not defined clearly in the Rules or otherwise defined by reference to other sources. Consistent with the intent of the Rule, we also recommend that the definition of lending client be amended to add a reference to approved lenders as follows:

**3.1-13** In rules 3.4-14 to 3.4-16 a “lending client” is any of the following:

- (a) a bank, trust company, insurance company, credit union or loan company;
- (b) a finance company, as that term is defined in regulations under the *Mortgage Brokers, Lenders and Administrators Act, 2006*; or
- (c) a person designated as an approved lender under the *National Housing Act* (Canada).

A detailed analysis of the issue and proposed changes is presented below.

## The OBA

Established in 1907, the Ontario Bar Association is the largest legal advocacy organization in the province, representing more than 16,000 lawyers, judges, law professors and students. The Real Property Law Section constitutes approximately 600 lawyers who serve as legal counsel to virtually every stakeholder in the industry, including both landlords and tenants.

## Lending Clients

Lawyers are frequently asked to act for both borrower clients and lenders. However, concerns have arisen with respect to whether or not the current Rules of Professional Conduct comprehensively address situations in which lenders are “lending clients”.

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<sup>1</sup> The complete Rules can be [reviewed here](#). A direct link to Rule 3 [is here](#).



Rule 3.4-12 provides that, unless an exemption in Rule 3.4-14 applies, a lawyer (or two or more lawyers practicing in partnership or association) must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

The typical exemption in Rule 3.4-14 is the one permitting a lawyer to represent both lender and borrower where the lender is a “lending client”. “Lending client” is defined in Rule 3.4-13 as a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

The commentary on Rules 3.4-14 to 3.4-16 indicate that these Rules are “intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act.”

While banks, trust companies, insurance companies and credit unions are defined clearly, the term “finance company” is, unfortunately, not defined in the Rules or the Law Society By-laws. It is, however, defined elsewhere.

## Defining a Finance Company

Finance company is defined in two regulations under the *Mortgage Brokers, Lenders and Administrators Act, 2006*.<sup>2</sup> In each case, a “finance company” must meet two criteria: a material business activity of the corporation or partnership involves making or refinancing loans, or entering into other similar arrangements; and, the shares or ownership of the corporation or partnership, or of another person or entity with which it is affiliated, are listed on a stock exchange in Canada or outside Canada that is a prescribed stock exchange for the purposes of the *Income Tax Act (Canada)*.

Our members have sought guidance from the Law Society’s Practice Management department on the appropriate definition of a finance company. We have been advised that, while the Law Society does not have an official definition of “finance company”, the Law Society accepts that companies listed on Financial Services Commission of Ontario (“FSCO”) “Loan and Trust Companies registry” are finance companies for the purposes of the rule.<sup>3</sup> However, we note that this registry only lists companies registered with FSCO as a loan or trust company, which is not the definition of “finance company” in the regulations noted above.

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<sup>2</sup> O. Reg. 409/07 (Licensing, under the Mortgage Brokers, Lenders and Administrators Act, 2006) and O. Reg. 407/07 (Exemptions from the Requirements to be Licensed, under the Mortgage Brokers, Lenders and Administrators Act, 2006).

<sup>3</sup> Online: <http://loanandtrust.fsco.gov.on.ca/loantrust.aspx>



## Other Institutional Lenders

In considering the appropriate scope of the exemption, the Law Society should also consider the list of *National Housing Act* (“NHA”) approved lenders, published by the Canada Mortgage and Housing Corporation (“CMHC”).<sup>4</sup>

In our view, adding the approved lenders set out by CMHC to the definition of lending clients would clarify which companies fall into the definition of “lending client” without broadening the definition too widely. It also maintains the requirement that to be a “lending client” the lender must be subject to governmental or quasi-governmental oversight. NHA approved lenders must satisfy the requirements set out by the NHA prior to approval, and any “lending client” qualifying under this definition would be an established, sophisticated lender.

Unless the company satisfies the requirements under the NHA, the proposed definition of “lending client” would not include mortgage investment corporations (“MICs”). MICs would remain private lenders, subject to the two-lawyer rule. The only exceptions would be a MIC that is publicly traded (in which case the MIC may already be a “lending client” since it would be a “finance company”). We do not believe any MICs are currently approved under the NHA.

While expanding the definition of “lending client” to include MICs may be worthy of discussion, we do not propose moving forward with this step at this time. In our view, if the Rule is intended to permit single-lawyer representation when dealing with a sophisticated lender, that suggestion would require greater consideration, as would the option of permitting two different lawyers in the same firm to act in certain lender/borrower situations, with consent and similar to where two different lawyers act for vendor and purchaser in relation to a conveyancing transaction.

## Conclusion

Accordingly, we would recommend that Rule 3.4-13 be amended to read as follows:

3.1-13 In rules 3.4-14 to 3.4-16 a “lending client” is any of the following:

- (a) a bank, trust company, insurance company, credit union or loan company;
- (b) a finance company, as that term is defined in regulations under the *Mortgage Brokers, Lenders and Administrators Act, 2006*; or
- (c) a person designated as an approved lender under the *National Housing Act* (Canada).

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<sup>4</sup> Online: <https://www.cmhc-schl.gc.ca/en/hoficlincl/moloin/agle/>.



In our view, the current rule is unclear and poses a significant practical risk for lawyers who are being invited by lenders, which may not be lending clients under the Rules, to act for both lender and the borrower client.

Accordingly, we would request that the Law Society consider the issues set out above and issue a clarification notice or guidance on this issue and, concurrently, consider whether amendments to the Rules are required.



## Appendix A – Definition of Finance Company

### O. Reg. 407/07: Exemptions from the Requirements to be Licensed

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17. (2)

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“finance company” means a corporation or partnership, other than a financial institution, that satisfies both of the following criteria:

1. A material business activity of the corporation or partnership involves making or refinancing loans, or entering into other similar arrangements for advancing funds or credit.
2. The shares or ownership interests of the corporation or partnership, or of another person or entity with which it is affiliated, are listed on a stock exchange in Canada or outside Canada that is a prescribed stock exchange for the purposes of the *Income Tax Act* (Canada). (“société de financement”) O. Reg. 407/07, s. 17 (2).

### O. Reg. 409/07: Mortgage Brokers and Agents: Licensing

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7. (2)

...

“finance company” means a corporation or partnership, other than a financial institution, that satisfies both of the following criteria:

1. A material business activity of the corporation or partnership involves making or refinancing loans, or entering into other similar arrangements for advancing funds or credit.
2. The shares or ownership interests of the corporation or partnership, or of another person or entity with which it is affiliated, are listed on a stock exchange in Canada or outside Canada that is a prescribed stock exchange for the purposes of the *Income Tax Act* (Canada). (“société de financement”) O. Reg. 409/07, s. 7 (2).



## Appendix B – Definition of Approved Lender

### National Housing Act, R.S.C. 1985, c. N-11

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approved lender means a person designated as an approved lender by the Corporation under section 5;

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