

## THE REAL ESTATE BROKER AND PLAIN LANGUAGE TRANSACTIONS

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Law Now, Jun/Jul 1996, Vol. 20, Iss. 6; pg. 8

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*"The language of the law may be peculiar, but it is not precise"*

David Mellinkoff, *Legal Writing: Sense and Nonsense*

### THE REAL ESTATE SALES INDUSTRY

If one recognizes that over 90% of real estate transactions involve a real estate broker in some way, many Canadians have dealt with brokers. This article describes the role of the real estate broker in a real estate transaction and the phenomenon of plain language forms.

A real estate broker, agent or salesperson<sup>1</sup> is engaged usually by the seller of real estate to find a willing and qualified buyer for the property.<sup>2</sup> A prospective purchaser may also hire a broker directly and pay for the broker's services by way of a finder's fee or commission, but that contractual relationship is rare. Even where the broker is legally being paid out of the proceeds of the purchase price (ie. by the seller), one might consider the extent to which this cost of selling the property is actually passed on to the purchaser through the sale price.

Why do most people turn to brokers to sell and buy property? Perhaps a better formulation of this question is why people turn to brokers to sell their property. Buyers, in addition to the seductive notion of viewing and buying property without having to pay the broker, will be attracted to the source and system where property is offered for sale.

Real property is often the largest asset that one owns. It is usually bought and sold only a few times in one's lifetime. One entrusts its sale to a professional who is current in marketing techniques and has hardy access to prospective buyers. This way the best price can be obtained. The Multiple

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<sup>1</sup> The term "Realtor" is a trademark owned by the Canadian Real Estate Association, the national organization responsible for representation of its members interests at the national level. This identification is licensed to local boards and their members. See, Barry J. Reiter, Bradley N. McLellan and Paul M. Perell, *Real Estate Law* (Emond Montgomery, 4th edition, 1992) pp. 57 - 118. For the purposes of this article, the terms "agent", "broker" and "salesperson" will be used interchangeably.

<sup>2</sup> Brokers, as a profession, are regulated in Alberta by the *Real Estate Agents' Licensing Act*, R.S.A. 1980, chap. R-5. For the most part, they are self-regulated. See, William F. Foster, *Real Estate Agency Law in Canada*, (Carswell, 2nd edition, 1994).

Listing Service (MLS) often provides that important connection between buyers and sellers. The MLS is a centralized computer-based listing of all properties for sale. Brokers who can access the MLS can serve their prospective buyers with a selection of properties for sale within a certain price range, in a defined geographical zone in a city or province, and with stipulated purchaser preferences such as size, age and type of home, all with the ease of a few key strokes on a computer. Likewise, sellers are accorded this kind of exposure to prospective buyers. People who attempt to sell their own property without the services of a broker routinely find that "getting the word out" about their property is the greatest challenge.

Brokers are also hired because of the short time that one may have to sell the property or because the seller cannot spare the work and time involved in selling it. Perhaps the main reason other than exposure to buyers is the value in having a third party sell the property. Many sellers are clearly uncomfortable selling their own property to strangers. They find it difficult to qualify prospective buyers and convert the interest into closure. Likewise, many buyers would prefer to deal with a third party broker, rather than the actual owner, when buying a property. They believe that they can be more candid, which is important during negotiations.

A final reason why sellers choose to hire real estate salespeople relates to documentation. The broker has printed standard form agreements that have been used for many years. These agreements are time tested and attempt to balance the interests of both buyer and seller. A vendor selling his or her own home would have to draft the agreement, or pay for a lawyer to do that as well as the actual sale and purchase transaction. Standard brokers' forms are convenient for the seller and buyer but both would be well advised to have a lawyer review the agreement in any case before finally agreeing to it. This is infrequently done and often a party later discovers an issue that cannot be unilaterally addressed or altered in the binding contract once the signatures are affixed to it. One should remember that the brokers are primarily interested in getting agreement to the sale and that emotions are at their highest peak when the agreement is being made. Brokers seldom encourage a legal review of the proposed contract, and some assiduously discourage it, before it becomes binding on the parties.

Before returning to documentation, one should identify some other disadvantages of dealing with real estate agents. The first is cost and the absence of true price competition for an agent's services. Most agents in Alberta charge a commission equal to 7% of the first \$100,000<sup>3</sup> plus 3% of the balance of the selling price, for residential property. If the average house price in a major city is \$128,000, the average full commission would be \$7840. The Goods and Services Tax is chargeable on this amount as well. This formula, which is effectively non-negotiable because of corporate policies of the real estate broker firms,<sup>4</sup> is one of the highest in the world.<sup>5</sup>

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<sup>3</sup> 6% if the listing is "exclusive", meaning that it can be sold only by the broker's office.

<sup>4</sup> One should be careful at this point to distinguish between the binding commission rate on the listing agreement with the seller and the broker's oral representations to adjust the commission once a buyer has been found. The first is legally enforceable, the second is not.

<sup>5</sup> Logically, this formula should be inverted. Since the "easiest" part of the sale is the first \$100,000 and the hardest is the last dollar, the seller would be best served with the highest percentage being

Price competition has recently been an issue in the Canadian real estate sales industry. In 1988, the Federal Court of Canada ordered a number of real estate boards across Canada to compete on price<sup>6</sup> in accordance with the federal *Competition Act*.<sup>7</sup> Still some brokers and their firms are being convicted of engaging in business practices which discriminate against "discount brokers", the effect of which is to drive them out of business.<sup>8</sup>

The broker-seller contractual relationship has traditionally been non-negotiable and one-sided in other respects as well. Brokers are able to secure their commissions in a manner that would make any purveyor of services blush with envy. The listing agreements did not specify what efforts, if any aside from registering the property on the MLS, the broker would take on behalf of the seller.<sup>9</sup> The seller, however, is interested in selling the property, not merely listing it. The courts have had to read in a common law duty of the broker to make "reasonable efforts" to sell.<sup>10</sup>

The listing agreement is often ambiguous as to when a commission is payable,<sup>11</sup> several commissions can be payable to sell the property once and termination of the listing agreement may be a difficult practical matter for the seller. Agents occasionally express an interest in themselves purchasing the property or guaranteeing a certain price or working for both buyer and seller, all of which present conflict of interest concerns.

Finally, it is important to realize that, like others in the service business, not all brokers are equal in terms of knowledge, volume of contacts, expertise, inter-personal skills and work ethic. Elementally, brokers are salespeople in their own business. They are not legal or business advisors for buyers or sellers. They are interested, ultimately, in sales. The buyer and seller dealing with a real estate agent must always ensure that his or her own interests are being met in any sale.<sup>12</sup>

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earned on the last dollar.

<sup>6</sup> *Canada (Attorney General) v. Chambre d'Immeuble du Saguenay-Lac St. Jean Inc. et al.* [1988] F.C.J. No. 1122.

<sup>7</sup> R.S.C. 1985, Chap. C-34, section 34(2).

<sup>8</sup> *R. v. Royal LePage Real Estate Services Ltd. et al.* (unreported), sentence in the sum of \$230,000 in fines was pronounced on December 20, 1994.

<sup>9</sup> The sales efforts range from erecting a sign, to calling buyers and discussing the subject property, to conducting open houses, to advertising in the market area. Some of these efforts cost the broker money as well as time and effort. Many brokers will provide a standard written marketing plan which is intended to remain outside of their legal obligations.

<sup>10</sup> *Styles v. Rogers Realty Ltd.* (1987) 43 D.L.R. (4th) 629 (Alta. C.A.).

<sup>11</sup> See, eg. *Alex Duff Realty Ltd. v. Eaglecrest Holdings Ltd. et al* (1983) 44 A.R. 67 (C.A.).

<sup>12</sup> For the buyer, for example, standard sale agreements commonly exempt the broker from any liability arising from representations made leading up to the sale. For the seller, a broker may be expected to strongly recommend acceptance of a sale in the 3% commission/sale price range. The broker will be

## **THE PLAIN LANGUAGE TRANSACTION**

The collapse of the Principal Group of financial companies in 1987 provided the impetus in Alberta for plain language statutes<sup>13</sup> and legal documents. The then Minister of Consumer and Corporate Affairs made plain language his personal campaign.<sup>14</sup> The real estate sales industry was selected as the first to showcase the benefits of plain language in practice.

The Alberta plain language experience for the Listing Agreement and Agreement for Purchase and Sale is not a happy one.<sup>15</sup> The first casualty to plain language has been brevity. The Listing Agreement used to be one half a page. Now the model draft, which is circulating for use in Alberta, is three full legal-sized pages. The Sale Agreement, which was recently accommodated on one or two pages, is six pages of small print, including Appendices. Increased length of any legal document paradoxically increases the chances that the lay party (ie. "consumer") who is to benefit from the plain language, will not read the document in any case. Such a document, therefore, may risk becoming one which is "not intended to be read, much less understood."<sup>16</sup>

Part of the difficulty with the preparation of these new model forms was the Committee process used for developing and revising them. Lawyers, government officials, real estate agents and consumer groups were all involved. The exercise would inevitably shift from a simple re-writing endeavour to one which responded to pressures for substantive changes in the forms, and hence the contractual relationships.

In the Listing Agreement, one of these substantive changes is the requirement of the seller to provide title and other searches and surveys at his or her expense to the broker. The "duties of the seller" (primarily the events which trigger a commission) are much more detailed and comprehensive than was formerly the case.<sup>17</sup> The "duties of the agent" are essentially now codified

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reluctant to risk losing the sale for a few hundred dollars of commission by even casting around for another buyer when other buyers should be sought out, in the best interests of the seller.

<sup>13</sup> See, the *Financial Consumers Act*, R.S.A. 1980, Chap. F-9.5.

<sup>14</sup> Similar efforts were initiated in other jurisdictions. See, eg. *The Decline and Fall of Gobbledygook*, Joint Committee on Plain Language of the Canadian Bar Association and the Canadian Bankers' Association, 1990.

<sup>15</sup> See, Stephen G. Raby, "Plain But Not Simple: The New Form of Offer" in the Legal Education Society of Alberta, *Real Estate for Legal Secretaries and Legal Assistants*, 1994 and the Legal Education Society of Alberta, 27th Annual Banff Refresher Course, *Real Estate Law and Practice: Focus on New Perspectives*.

<sup>16</sup> *Levison v. Patent Steam Carpet Cleaning* [1977] 3 W.L.R. 90 (C.A.).

<sup>17</sup> For example, a commission is payable even if the broker was not the "effective cause" of the purchase where the buyer purchases within 60 days after the expiry of the listing agreement. This clearly fortifies the broker's position above the common law: *Bell-Irving v. Macauley, Nicolls, Maitland &*

as "reasonable efforts to find a buyer for the property", presumably, a seriously interested and qualified arms-length buyer. The commission is secured by exhaustive coverage in the new plain language form: first claim on the deposit, irrevocable assignment, direction to one's lawyer to pay the commission, a caveat on the land and the agent's recovery of full legal costs associated with collection of the commission. The old form did not contain such a complete catalogue of broker rights against the consumer.

The seller's warranties to the agent are very extensive and operate to free the agent from independently verifying information about the property being sold. Dual Agency is specifically mentioned, but even with "disclosure", it is unlikely that the seller will appreciate the ramifications of the broker "representing both [the seller] and a prospective buyer." Disputes between seller and broker must be decided by mediation or failing that, arbitration.

The latest iteration of the 1994 Purchase Contract is in trial use across the province. It is too early to say whether it will be widely adopted. As in the Listing Agreement, many of the changes have been minor: "vendor" to "seller", "purchaser" to "buyer", "fixture" to "attached goods" and "possession and adjustment date" to "completion date".

The substantive changes include clarification about closing on a weekend or holiday, higher interest for late payment, seller's obligations to provide the survey and compliance certificate, details of condominium documentation, and the reference point for the condition of the property changes from the date the offer was made to the date of last inspection.

With the last 1994 revision of the model Purchase Contract form, there are at least three forms in use in Alberta. The simplicity and consistency sought by the plain language exercise has to date been thwarted.

What are we left to conclude by the plain language initiative in the real estate sales industry? Although the law to some extent recognizes a consumer component to the purchase and sale of residential real estate, who between the buyer and seller is the "consumer" in the transaction? It is not clear between these two parties who needs protection. Both may refuse to adopt the plain language form and craft their own in any case, with negotiation on both sides.

We have seen that many protections that have developed from the plain language process, particularly in the Listing Agreement, are for the realtors themselves in their relationship to sellers. As in the Purchase Contract, the deal which is struck ultimately comes down to the bargaining power of the respective parties. Plain language cannot mitigate the influence of that.

Even with plain language documents, and one must question what truly has changed with any plain language revision, one's ability to capitalize upon more intelligible language in the contract depends upon one's knowledge of the law. Perhaps the initiative will not achieve its desired effect of reducing reliance upon lawyers. These documents suggest that independent legal advice is as

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*Co.*, [1931] S.C.R. 276.

important now as it has ever been when buying or selling one's real property.

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