

## Commission Entitlement



**By Brian Madigan LL.B.**

If the deal doesn't close, does the vendor have to pay a commission? If, the deal didn't close, and it was the purchaser's fault, does the vendor have to pay the commission? What if it was the vendor's own fault?

And, for the big question, what if the vendor doesn't accept an Offer, does he have to pay a commission? And, if it's a full price offer, does the vendor have to sell?

These questions come up everyday. The most surprising thing, is that I hear different answers to these same simple questions all the time.

So, here are the quick answers: yes, yes, yes, maybe, and no.

If you want to know where the answers are to be found, you will find most of them in the standard form listing agreement. Here's the operative clause dealing with commission:

“COMMISSION: In consideration of the Listing Brokerage listing the Property, the Seller agrees to pay the Listing Brokerage a commission of.....% of the sale price of the Property **for any valid offer to purchase** ..... the Property from any source whatsoever obtained during the Listing Period and on the terms and conditions set out in this Agreement ....”

The triggering event giving rise to the obligation to pay a commission is the presentation of any valid offer. The only limitations or restrictions are:

- 1) **Who:** “from any source whatsoever”, so this can be the next door neighbour, or a relative who wanted to buy the property,
- 2) **When:** “obtained during the listing period”, so the listing must be current. It will not apply before the listing comes into force, nor will it apply after it expires,
- 3) **What:** “on the terms and conditions set out in this agreement”, so here you need to look at the terms and conditions related to sale, ordinarily this will include a purchase price, a date for closing and perhaps some other special conditions. If these requirements are met, then that will be sufficient.

There are other situations that are covered under a standard listing agreement, but this is the basic fundamental agreement and accordingly, it should be understood by both realtors and consumers.

The issue at stake will always be whether the Offer presented was “on the terms and conditions set out in this agreement”, It will have to meet the price, the closing date specified and any other special conditions forming part of the agreement. But, in many cases, this will be possible. And, if that is the case, the seller will be obligated to pay the commission to the agent. It should be noted that there is no requirement for a valid and enforceable agreement of purchase and sale, nor is there a requirement that the transaction be successfully completed. That is just pure and simple folklore. There is nothing to it.

So, a vendor can refuse to sell, but may still be liable for a commission. If you’re not happy with this situation, then you’ll have to change it.

Another interesting question is how does the commission become payable in most cases?

Let’s have another look at the relevant clause in the agreement:

“COMMISSION: In consideration of the Listing Brokerage listing the Property, the Seller agrees to pay the Listing Brokerage a commission of.....% of the sale price of the Property for any valid offer to purchase ..... the Property from any source whatsoever obtained during the Listing Period and on the terms and conditions set out in this Agreement **OR** such other terms and conditions as the Seller may accept.”

This time we will have to look at part 2, of the commission entitlement provision.

You will see that it says:

**“OR such other terms and conditions as the Seller may accept.”**

This is the provision that will apply generally. This covers the Offer that comes in at less than the asking price, but is otherwise acceptable to the vendor. The vendor accepts the Offer and this results in an agreement of purchase and sale. Does this deal have to go through for the commission to be payable?

Here is another provision which is relevant to our discussion:

“The Seller further agrees to pay such commission ..... even if the transaction contemplated by an agreement to purchase ..... agreed to or accepted by the Seller ..... is not completed, if such non-completion is owing or attributable to the Seller’s default or neglect, .....”

What does this mean? Quite simply, if there is an actual agreement of purchase and sale and the deal falls through for some reason due to the vendor’s fault or neglect, then the commission is still owing.

And, the remaining question is the entitlement to commission in the event of the purchaser's default. You might think here that I would quote the provision in the standard listing agreement that says that if the purchaser defaults or neglects to complete the transaction as agreed, then there is no commission owing.

I will agree to one point, and that is, if there were such a clause, I would quote it right now. Certainly, it would be relevant! Only, one little problem, there is no such clause. So, when people talk about it, they are just making it up. It's not there. They must simply be confused or have extended the meaning of some other clause. The mere fact that the agreement specifically makes the point that the commission is owing, even if the deal falls through due to the vendor's "fault or neglect", does not mean that there is no commission if deal falls through due to the buyer's "fault or neglect". That may happen, and the commission is still owing.

Again, if you're not happy with this provision, then you will have to change it.

In most cases, vendors who wish to list their properties should amend their listing agreements to ensure that the commission will be payable only in the event of **successful completion** of the agreement of purchase and sale.

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