

False and Misleading Statements ~ Agents



By Brian Madigan LL.B.

We are all aware that sales agents like to pump their products, merchandise and services. That has been going on for years and the public who be naïve to think that there is never any “puffery” involved. However, there are times when it simply goes too far!

The *Consumer Protection Act* offers somewhat of a solution to this problem. The former Business Practices Act has been transferred to the CPA.

There are **two types** of representations that are **prohibited** under the Act:

- 1) **false, misleading or deceptive** statements, and
- 2) **unconscionable** statements.

First of all, the Act does not apply to real estate transactions as such. They are exempt. It does apply to many of the services that are provided in connection with a transaction. Here, the old common law prevails. There are a significant number of legal precedents concerning real estate. What must be disclosed and what may be withheld. These are matters that affect vendors and purchasers and fall within the purview of real estate law. Agents are obligated to follow those same laws. In part, they are somewhat consumer protection legislation since they righted wrongs in real property conveyancing hundreds of years ago.

It should also be pointed out that the Act contains a definition of “consumer” that excludes someone buying something for their business. In addition any transaction related to residential tenancies is not covered by the Act.

Nevertheless, agents are also affected by the new age of consumerism and the laws which protect all consumers. In this regard, the ancillary “services” that agents provide fall within the purview of the Act. This includes listing agreements, buyer agency agreements and all the many representations that an agent may offer as reasons or inducements to sign such agreements.

An agent might for example say “if you list with me, I’ll sell your house in 2 weeks for \$300,000.00”. The problem with this statement is that it is intended to serve as an inducement. It is likely that only another agent would be able to determine

the truth of the statement. The market is such that probably no house could be marketed and sold within 3 weeks, let alone one that sought a price at the upper end of the market range.

Another service that is frequently provided by an agent is the location of financing. An agent might make statements to the effect that financing will be easy to obtain. This is a “service” that falls under the Act. It is not an activity related to the purchase and sale of real property.

An unconscionable representation is one that demands, forces or takes advantage of a vulnerable individual. However, the definition is somewhat broader and includes statements that seek to take advantage of the consumer and are known to be untrue to the sales person (or their employer) including any one of the following:

- *price* grossly exceeds the competitive price
- consumer is unable to receive a substantial *benefit*
- no reasonable probability of *payment* in full by the consumer;
- transaction is excessively *one-sided*
- terms are so adverse to the consumer as to be *inequitable*
- statement of opinion is misleading and *detrimental* to the consumer

Some **examples** of possible unfair practices might include the following statements:

- “List with me, I have a buyer for your house.”
- “I charge the lowest commission of any agent in this area.”
- “The Board requires the listing to be at least 6 months.”

All of the above statements are either untrue, or they are made carelessly without regard to their truthfulness, and if that is the case, then that’s “unfair”

What is the result? The consumer can cancel the agreement (listing or buyer agency) and if he feels sufficiently aggrieved may report the matter, and this might result in a conviction under the Act. Further, such a conviction would need to be reported to the Registrar of the Real Estate Council of Ontario (RECO) and that might affect the registration status of the agent.

Specifically, the **Act provides:**

18. (1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.

The Act further provides that the consumer may seek exemplary or punitive

damages. The defendants will include both the person who made the unfair statement as well as the person who benefitted from the statement (contracting party). So, this would include both the agent and the principal (broker).

Before we simply leave the Act, we should consider the particular provisions related to the regulation of real estate advertising:

“False, misleading or deceptive representation

109. (1) If the Director believes on reasonable grounds that any person is making a false, misleading or deceptive representation in respect of any consumer transaction in an advertisement, circular, pamphlet or material published by any means, the Director may,

(a) order the person to cease making the representation; and

(b) order the person to retract the representation or publish a correction of equal prominence to the original publication. 2002, c. 30, Sched. A, s. 109 (1).

Real property

(2) Despite clause 2 (2) (f), this section applies to any representations involving real property. 2002, c. 30, Sched. A, s. 109 (2).”

The above provision is very important. It is only the actual real estate agreement and conveyancing that is exempt from the Act. When it simply comes to advertising, well false advertising is still false advertising!

So, real estate ads are subject to the Act and the Director may issue a cease order or require a retraction. An individual has the right to appeal the decision to the Licence Appeal Tribunal.

All in all, this legislation is significant and consumers who feel aggrieved should take advantage of the opportunities the Act provides rather than simply view themselves as victims without a proper remedy.

*Brian Madigan LL.B., Realtor is an author and commentator on real estate matters, Coldwell Banker Innovators Realty
905-796-8888
www.OntarioRealEstateSource.com*