

Unfair Business Practices



By Brian Madigan LL.B.

The Business Practices Act was a very good piece of legislation, but not too many people knew about it, so last year the Ontario Government replaced it with the *Consumer Protection Act*.

When it comes to real estate there are some important provisions. While the conveyance of real estate is exempt from the Act, advertising, the conveyance of chattels and agreements with realtors are all affected.

No one is allowed to engage in an “unfair practice” with a consumer, and specifically it is an unfair practice for a person to make a false, misleading or deceptive representation. These will include the following:

1. A representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have.
2. A representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection the person does not have.
3. A representation that the goods or services are of a particular standard, quality, grade, style or model, if they are not.
4. A representation that the goods are new, or unused, if they are not or are reconditioned or reclaimed, but the reasonable use of goods to enable the person to service, prepare, test and deliver the goods does not result in the goods being deemed to be used for the purposes of this paragraph.
5. A representation that the goods have been used to an extent that is materially different from the fact.
6. A representation that the goods or services are available for a reason that does not exist.
7. A representation that the goods or services have been supplied in accordance with a previous representation, if they have not.
8. A representation that the goods or services or any part of them are available or

can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed.

9. A representation that the goods or services or any part of them will be available or can be delivered or performed by a specified time when the person making the representation knows or ought to know they will not be available or cannot be delivered or performed by the specified time.

10. A representation that a service, part, replacement or repair is needed or advisable, if it is not.

11. A representation that a specific price advantage exists, if it does not.

12. A representation that misrepresents the authority of a salesperson, representative, employee or agent to negotiate the final terms of the agreement.

13. A representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive.

14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.

15. A representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer.

16. A representation that misrepresents the purpose of any charge or proposed charge.

17. A representation that misrepresents or exaggerates the benefits that are likely to flow to a consumer if the consumer helps a person obtain new or potential customers. (s. 14 (2))

It is also an unfair practice to make an unconscionable representation, and there are some “rules” which will help determine if this is the case.

A Court may take into that the person making the representation or the person’s employer or principal knows or ought to know,

(a) that the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors;

(b) that the price grossly exceeds the price at which similar goods or services are readily available to like consumers;

(c) that the consumer is unable to receive a substantial benefit from the subject-matter of the representation;

(d) that there is no reasonable probability of payment of the obligation in full by the consumer;

(e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;

(f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;

(g) that a statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment; or

(h) that the consumer is being subjected to undue pressure to enter into a consumer transaction. (s.15(2))

Section 18 provides that “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.” These common law remedies are available in addition to the opportunity to report the matter to the Director and have the dispute investigated and resolved under the Act. The Director has been given rather broad powers by the legislation.

And further, “each person who engaged in an unfair practice is liable jointly and severally with the person who entered into the agreement with the consumer for any amount to which the consumer is entitled under this section.” So, this means that the particular salesperson is responsible as well as the company.

Although, the actual “conveyance” of real property is not subject to the provisions of the Act, the matter of advertising is specifically noted as an included matter.

Under section 109 of the Act, “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 order the person to cease making the representation; and further order the person to retract the representation or publish a correction of equal prominence to the original publication”.

This section applies to any representations involving residential real property. If the purchaser cannot be described as a “consumer”, then the Act will not apply. So, commercial transactions are not affected. Houses, and vacation properties are included. There is a real grey area when it comes to farms. Large commercial operating farms would not be included, but a hobby farm might.

You will recall earlier that both principals and agents were jointly and severally responsible. This means that a vendor who provides false and misleading information to his realtor is jointly and severally responsible to the purchaser.

All in all, the new Consumer Protection Act should be quite helpful to purchasers and consumers in Ontario.

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