The Law Society of Manitoba

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REAL ESTATE

Chapter 1

Introduction to Real Property Conveyancing and Real Estate Brokers

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TABLE OF CONTENTS

A. INTRODUCTION TO REAL PROPERTY CONVEYANCING

1. Stages of a Real Estate Transaction

Real estate transactions typically involve a process in which a vendor transfers ownership and possession of real estate to a purchaser in exchange for payment of the price.

This process usually involves three stages:

- **Contract Formation** - Once a binding contract is made between the purchaser and the vendor, the vendor is no longer free to sell to another party and is committed to the sale.
- **Satisfying Conditions** – Often, the contract is subject to conditions precedent, such as the purchaser arranging financing, and will not proceed to closing unless the conditions are satisfied.
- **Closing** - At this stage the contract is performed; the purchaser pays the price and receives possession and title.

2. Conveyancing Practice

It is usual in Manitoba for the vendor and the purchaser to each retain their own lawyer because of the large stake each party has in the transaction. It is common for commercial lenders, like financial institutions, to give their instructions to the purchaser's lawyer, who then represents both of them, and the purchaser pays for the legal services given to the lender.

The services performed by lawyers in such transactions are usually described as "conveyancing," which term is defined in Jowitt's, The Dictionary of English Law, as:

> *The art of the alienation of property by means of appropriate instruments or conveyances; that part of the lawyer's business which relates to the alienation and transmission of property and other rights from one person to another, and to the framing of legal documents intended to create, define, transfer or extinguish rights. It therefore includes the investigation of the title to land, and the preparation of agreements, wills, articles of association, private Acts of Parliament operating as conveyances, and many other instruments, in addition to conveyances properly so called.*

In most law offices many of the important steps in a real estate conveyance are carried out by someone other than a lawyer. While you are likely to rely heavily on trained assistants such as paralegals, you, as the lawyer, remain responsible to see that all the necessary steps are carried out in a timely and proper fashion, and you are ultimately responsible for any errors or omissions.

The Real Property Act, C.C.S.M. c. R30 *section 72.5(1)* (transfers) and *section 72.7(1)* (mortgages) provide that if a transfer or a mortgage is signed within Canada, the transferor's or the mortgagor's signature must be witnessed by a lawyer entitled to practice in the jurisdiction where the transfer or mortgage is signed. Exceptions apply to British Columbia and Quebec where a notary public can witness. There are some other very limited exceptions set out in *The Real Property Act*; however, in most instances, those sections have the effect of requiring a transferor or mortgagor to visit a lawyer in order to sign the necessary document.

If someone comes to you as a lawyer in Manitoba and wants you to witness their signature on a transfer or a mortgage, and you agree to do that, be mindful of your obligation to ensure that the person is competent and understands what they are signing, including the consequences of any breach of the document. The bottom line is summed up in this excerpt from page 10 of the December 2015, Communiqué 2.0 article, "Just a Witness?" by Darcia Senft, Director - Policy and Ethics and Kate Craton, Insurance Counsel, The Law Society of Manitoba.

> *To be clear, if you are asked to "just witness the document", it is not enough to say, or even to write on the instrument, that no legal advice was sought and no legal advice given. You cannot turn a blind eye to the facts behind the disposition.*

For more detail on your obligations owed when witnessing a signature on a transfer or a mortgage in Manitoba, read the Fundamentals module on Retainers under the section on Witnessing a Signature.

3. Parties Other than Vendor and Purchaser

In real estate transactions, you, as the lawyer, will need to be aware of and deal with the rights of parties other than the vendor and purchaser who might also be involved in a transaction. These additional parties may include:

- **Real Estate Brokers** - Most contracts of purchase and sale of real estate are drafted and negotiated by real estate brokers, who expect to receive payment of a commission from the vendor on the completion of the transaction. The vendor's obligations to the real estate broker are thus vitally affected by your legal services in closing out a transaction. Further information on this topic will be found later in this chapter under the heading "The Role of Real Estate Brokers in Conveyancing Practice".

- **Mortgagee** - Mortgage financing is often a vital part of real estate transactions, whether mortgages are being freshly arranged to finance the purchase, or assumed by the purchaser, or discharged out of the sale proceeds. Mortgagees are often financial institutions, but they can also be individuals who are privately lending money to the purchaser in return for a mortgage on the property.

  The financing transaction between mortgagee and purchaser goes through the same three stages (contract, conditions satisfied and closing) simultaneously with the purchase and sale. For further information on this topic see Chapter 3 Mortgages.

- **Tenants** - There are occasions when the real estate that is sold is occupied by a tenant and you must consider the rights and obligations of the tenant in the process of completing the purchase. Tenant issues relating to purchase and sale are dealt with in Chapter 2.
- **Taxing Authorities** – You will have tax issues to deal with including Land Transfer tax, real property taxes, withholding taxes under the *Income Tax Act,* and GST. Further information on taxes is found in Chapter 2.

From time to time you may be consulted on and have a role in one or more of the contracting processes: between the vendor and the real estate broker, between the vendor and the purchaser, between the purchaser and the mortgagee, and/or with tenants. In such cases you may be instrumental in the formulation of a binding contract, in the negotiation or the rectification of a defectively made contract, or in dealing with issues that arise that were unexpected or unforeseen at the time of the contract.

4. Applicable Legislation

In addition to general law of contract and tort applicable to determining the rights of various parties involved in a real estate transaction, you must also be familiar with relevant statutory provisions. The following statutes are relevant to conveyancing:

Manitoba Legislation – Consolidated Acts: CCSM

The Builders' Liens Act, R.S.M. 1987, c. B91

The Condominium Act, C.C.S.M. c. C170

The Contaminated Sites Remediation Act, C.C.S.M. c. C205

The Corporations Act, R.S.M. 1987, c. C225

The Court of Queen's Bench Act, C.C.S.M. c. C280

The Environment Act, C.C.S.M. c. E125

The Manitoba Evidence Act, R.S.M. 1987, c. E150

The Executions Act, R.S.M. 1987, c. E160

The Family Farm Protection Act, C.C.S.M. c. F15

The Family Property Act, C.C.S.M. c. F25

The Farm Lands Ownership Act, R.S.M. 1987, c. F35

The Homesteads Act, C.C.S.M. c.H80

The Income Tax Act, C.C.S.M c. I10

The Insurance Act, R.S.M. 1987, c. I40

The Judgments Act, R.S.M. 1987, c. J10

The Landlord and Tenant Act, R.S.M. 1987, c. L70

The Law of Property Act, R.S.M. 1987, c. L90

The Life Leases Act, R.S.M. 1998, c. 42

The Mortgage Act, R.S.M. 1987, c. M200

The Mortgage Brokers Act, C.C.S.M. c. M210

The Municipal Act, C.C.S.M. c. M225

The Municipal Assessment Act, C.C.S.M. c. M226

The Municipal Board Act, R.S.M. 1987, c. M240

The Noxious Weeds Act, C.C.S.M. c. N110

The Personal Property Security Act, C.C.S.M c. P35

The Planning Act, C.C.S.M. c. P80

The Powers of Attorney Act, C.C.S.M. P97

The Property Tax and Insulation Assistance Act, R.S.M. 1987, c. P143

The Real Estate Brokers Act, R.S.M. 1987, c. R20 (to be repealed by *The Real Estate Services Act* SM 2015 c 45 which is to come into force on a date to be fixed by proclamation.)

The Real Property Act, R.S.M. 1988, c. R30

The Residential Tenancies Act, C.C.S.M. c. R119

The Safer Communities and Neighbourhoods Act, C.C.S.M. c S5

The Tax Administration and Miscellaneous Taxes Act, C.C.S.M. c. T2

The Transportation Infrastructure Act, C.C.S.M. c. T147

The Trustee Act, R.S.M. 1987 c. T160

The Unconscionable Transactions Relief Act, R.S.M. 1987, c. U20

The City of Winnipeg Charter Act, S.M. 2002, c.39

Federal Legislation

Criminal Code, R.S.C. 1985, c. C-46

Farm Debt Mediation Act, S.C.1997, c.21

Income Tax Act, R.S.C. 1985, c.1 (5th Supp)

Interest Act, R.S.C., 1985, c. I-15

5. The Materials

The Real Property resource materials proceed in a roughly chronological order based on the usual steps involved in a real estate transaction.

Chapter 1 addresses the important general responsibilities that you, the lawyer, owe to the client and others. It is important that you understand these responsibilities before reviewing the conveyancing process because:

- You must fully consider the matters in Chapter 1 at the beginning of your involvement, specifically at the time you are hired by a client for a real estate transaction;
- If you do not comply with the rules explained in Chapter 1 at all stages of a real estate transaction, you can cause harm both to yourself and other parties to the transaction. Chapter 1 also deals with real estate brokers, who often initiate the real estate transaction and may have interactions with you during your work on the file.

Chapter 2 is titled Conveyancing Practice: Residential. It covers everything about a basic sale and purchase of a residential property, from the formation of the contract through to the post-closing report to the client, including how to review the contract, conduct searches and prepare land titles documents.

As you will see from Chapter 2, doing conveyancing work in Manitoba will involve The Property Registry. In Manitoba, The Property Registry includes the Land Titles Office and the Personal Property Registry and since 2014 it has been owned and operated by *Teranet Manitoba*, a private service provider. The *Office of the Registrar-General* exercises general oversight of Teranet Manitoba's operations and ensures that the land registration systems and the personal property registry are provided in accordance with the applicable legislation. When you represent a party in a real estate transaction, you will be working with Teranet Manitoba and using its systems and forms to register the relevant documentation in the Land Titles Office.

Chapter 3 deals with mortgage transactions and Chapter 4 deals with mortgagee remedies. Chapter 5 deals with special considerations in transactions involving condominiums and new construction. Chapter 6 deals with real estate transactions relating to farm land.

Lawyers in Manitoba are proud to say that, as a matter of long standing practice, conveyancing in Manitoba is carried out on a cooperative rather than on a litigious basis (except in the enforcement of remedies). Although your first duty is to the client, in a well-conducted real estate transaction all the lawyers involved will assist each other and the various persons involved to realize, to the extent reasonably possible, full performance of the parties' respective obligations in the transaction.

B. THE DUTIES OF A LAWYER TO THE CLIENT AND OTHERS

The Law Society of Manitoba's *Code of Professional Conduct* (the Code) sets out the minimum standards of conduct expected of all lawyers.

If you breach the Code, you invoke the jurisdiction of the Law Society to review your conduct as a lawyer. A serious breach may lead to discipline that affects your licence to continue practising law in Manitoba.

The legal obligations you have to clients and third parties in real property conveyancing matters can also be enforced by court action.

In order to understand your role as the lawyer in conveyancing procedures you must first understand the general duties of all lawyers. Some of the most important of these duties may be summarized as follows:

1. To Be Careful and Competent

> Competence
>
> *3.1-2* A lawyer must perform all legal services undertaken on the client's behalf to the standard of a competent lawyer.

Generally speaking, as a practicing lawyer, you hold yourself out to the public as possessing adequate skill, knowledge and learning for the purpose of conducting all business that you undertake. You are not, required to be infallible. You are, however, bound to exercise care in representing your client and you will be liable to your client for negligence in performing your legal services.

Your obligation to exercise due care in protecting the interests of a client in a real estate transaction is to act in accordance with the general and approved practice followed by solicitors unless such practice is inconsistent with prudent precautions against a known risk. The enquiry is: What steps would an ordinarily competent solicitor in position have taken to protect the client's interests in the transaction? (See *LAC Mortgage Company Ltd. v. Tolton,* 1986 CanLII 4851 (MB QB) at para. 16.)

You can also find Information on the general practices followed by lawyers in various conveyancing matters from the following sources:

- *Western Law Societies Conveyancing Protocol* (this is discussed in more detail in Chapter 2);

- *Law Society Practice Directions* (available online);
- Consultation with more experienced lawyers. If you do not have an experienced lawyer in your firm, contact one outside of your firm. Such a professional consultation is usually given without charge to less experienced lawyers;
- Case law where lawyers' conveyancing mistakes are identified and analyzed with respect to the ordinarily competent solicitor.

2. To be Cautious if Giving Non-Legal Advice

Code 3.1-2 Commentary [10] provides:

> In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social implications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

A lawyer who gives business advice may be liable for negligence if the advice is not given with due care.

Although ordinarily clients retain lawyers for legal advice and not business advice, on some transactions the two are intermingled and no clear dividing line is obvious. Thus a lawyer may give advice on the financial or business aspect of a transaction, depending on the client's instruction and sophistication, and on whether the client is relying on the lawyer for that kind of advice.

In *Brock and Petty v. Gronbach,* 1953 CanLII 60 (SCC), [1953] 1 S.C.R. 207, [1953] 1 D.L.R. 785, a solicitor was held not to have any obligation to advise his clients, who were intent on proceeding, as to the reasonableness or adequacy of the price factor in a transaction which was considered by a number of Judges who dealt with the matter, to have been improvident to the extent of being unconscionable. The trial Judge, Montague, J., whose reasons were endorsed by the Supreme Court of Canada, stated, *1951 CanLII 537 (MB QB)*, 4 W.W.R. (N.S.) 49 at p. 61:

> *...when they retained the solicitor to act for them he undertook only to properly conduct the legal business of closing the deal, using adequate skill, knowledge and learning. He undertook no obligation to make, or to cause to be made, inquiries as to whether the sale price was a sufficient one. He did not contract to advise them as to this.*

In most cases, real estate clients retain their lawyer after they have already signed a contract of sale and purchase thereby limiting what the lawyer can negotiate for them.

In *Wong v. 407527 Ontario Ltd.*, 1999 CanLII 3788 (ON CA) the plaintiffs entered into an agreement to purchase a commercial building. They then instructed their solicitor, one of the defendants, to "close the transaction". Part of the transaction involved a rental income warranty given by a numbered company in relation to the rents being paid by the tenants in the building. In the year following the purchase, a number of tenants vacated the premises or otherwise defaulted on their rent such that the rental income warranty clause was engaged. The plaintiffs were unable to recover pursuant to it because the numbered company had insufficient assets. They sued their solicitor alleging that he had a duty to negotiate better security for the warranty. At trial, the solicitor was found liable. On appeal that finding was reversed.

Laskin J.A. noted at para. 43 that:

> *A lawyer's duty to a client will vary depending on the client's instructions and the limits on the lawyer's retainer…the trial judge was not sensitive enough to the limitation on [the lawyer's] retainer implicit in his being consulted after the agreement had been signed…I find it hard to admonish [the lawyer], let alone make a finding of negligence against him, for failing to try to negotiate something to which his clients had no legal entitlement.*

The Court of Appeal held that because the solicitor had only been retained after the agreement had been concluded (and there is no suggestion that the agreement itself was in anyway unenforceable) and had not been instructed to do anything other than conclude the commercial transaction with which he was presented, his duty did not extend to attempting to negotiate better security for the purchasers.

3. To Make Full Disclosure

The fiduciary nature of the lawyer–client relationship includes the duty of candour to the client. The duty of candour to your client means that you must openly share with your client all relevant information in your knowledge; you must not "keep the client in the dark about matters [you know] to be relevant to the retainer" (*Strother v. 3464920 Canada Inc.,* 2007 SCC 24 (CanLII) at para. 55). You must fully disclose to the client all material facts affecting the client's matter of which you are aware or of which you become aware. In *Caliguri v. DeLucia* (1983), 25 Man. R. (2d) 98 (Q.B.) the lawyer for a lender found out before advancing money on behalf of his client on a secured loan, that a bank judgment had been entered against the borrower, for whom he also acted. The lawyer failed to inform the lender of this fact. The court held that such information would have deterred the lender from making the loan and found the lawyer liable for the damage which ensued by virtue of his breach of duty.

In *Watson v. Johnson*, 1990 CanLII 11156 (MB QB), the court found the lawyer was obliged to advise a client of the risks involved in proceeding in a transaction where the lawyer had particular knowledge of risks as a result of his involvement in prior transactions with the property. The land had been used in "flips" whereby the values were being inflated upon

each transfer, a highly questionable procedure. In finding liability, Mr. Justice Scollin stated as follows at p. 18:

> *[12] Much of the legal system is predicated on a rather cynical view of the well-springs of human behaviour and by its very nature law brings the lawyer, in many cases, into contact with unpleasant people and also with generally pleasant people who sometimes do unpleasant things. The realization of this is the foundation of the rule in the Code of Professional Conduct that the lawyer must be both candid and honest when advising his client...*
>
> *[13] It follows that, as a general rule, if proper and timely advice might have prevented loss or damage, the responsibility of the lawyer should not be diluted by the moral inadequacies of the client... Where the client's conduct, if continued, would be dishonest or contrary to law and he rejects the advice, then obviously the lawyer cannot continue to act...*
>
> *[14] In respect to the solicitor-client relationship,... His duty was to advise his clients in the light of what he himself knew, not in the light of what he thought they knew.... In these circumstances, nonadvice is bad advice."*

See *Watson v. Johnston, Oliphant, Van Buekenhout and Deans* (1990), 66 Man.R. (2d) 10, at 18-19 (Q.B.).

4. To Warn

Analogous to the duty of full disclosure, is the duty of the lawyer to warn the client of any risks in the client's proposed course of action so that the client can make an informed decision as to whether to assume that risk or not.

For example, if you act for a private mortgagee who instructs you not to obtain a survey or building location certificate or title insurance for the lot and new house which the mortgagee's daughter is building on the lot, you have an obligation to warn the mortgagee that without one of those steps, there is a danger that the house, which is intended to form part of the security for the mortgage, might not be properly situated within the bounds of the land secured by the mortgage. See *LAC Mortgage Company Ltd. v. Tolton,* 1986 CanLII 4851 (MB QB).

On the other hand, if you give your clients adequate warning of the risks and consequences, you will have fulfilled the duty. If the client proceeds with the transaction in the face of the known risk, you will have the defence that you warned the client in advance and the client acted against your advice. In that case it is prudent to provide the client with the warning in writing and to get written instructions from the client to proceed despite the warning and your advice to the contrary. If you cannot get the written instructions, it is prudent to withdraw from representation.

In *Millican et al. v. Tiffin Holdings Ltd.*, 1967 CanLII 102 (SCC), [1967] SCR 183, 60 D.L.R. (2d) 469, 59 W.W.R. 31, a rogue gave a chattel mortgage on equipment which he did not own and it was held that the solicitor who had drawn the mortgage on behalf of the lender could not

reasonably have foreseen the criminal conduct of the mortgagor. It was held that the solicitor was not negligent in dispersing funds upon what proved to be inadequate security in circumstances where the client gave express instructions and, in effect, undertook the risk involved. The solicitor could not reasonably have anticipated fraudulent conduct on the part of the opposite party.

5. To Not Exceed Authority

You must not exceed the authority expressly or impliedly given to you by your client. If the other party to a transaction proposes a course of action which would modify your client's strict rights under the original agreement, you should seek the client's instructions and approval before agreeing to any modification. Examples of such modifications that are commonly requested include requests for extensions of time to meet conditions or attempts to impose trust conditions that modify the obligations of your client under the contract.

6. To Avoid Conflicts of Interest

If you are asked to act for more than one party to a transaction, you must first determine whether there are conflicting interests between the parties that preclude you from acting for more than one of them. Consider the entire course of the proposed transaction to determine if there is any likelihood of a conflict arising between the parties at any time before completion. If such a conflict is foreseeable then do not act for more than one of the parties to the transaction. You have a positive duty not to act or continue to act for a client where there is a conflict of interest, except as permitted under the *Code*. See 3.4-1 and the Commentary there.

If you determine that there is little risk of conflicting interests arising and you are willing and able to risk acting for more than one party on the transaction on a joint retainer, you must first follow all the rules relating to joint retainers which are set out in the Code in *Chapter 3.4* on Conflicts.

You must explain conflicts of interests to the proposed joint clients under *Rule 3.4-5*.

Joint Retainers

> *3.4-5* Before a lawyer acts in a matter or transaction for more than one client, the lawyer must advise each of the clients that:
>
> (a) the lawyer has been asked to act for both or all of them;
>
> (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
>
> (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

If the clients still want to proceed with the joint retainer where you will represent both of them, you must have each individual client's informed consent to act on the joint retainer before proceeding. Note as well, that if you accept the joint retainer and then later a conflict arises that is not resolved by the parties without your help, you must withdraw from the joint retainer.

Here are some examples of problems with conflicts of interest that can arise with joint retainers gone wrong:

1. A lawyer acted for the vendor and the purchaser on a joint retainer. The lawyer also acted for the lender (mortgagee) on a series of real property purchase and sale transactions involving a high ratio residential mortgage insured by Central Mortgage Housing Corporation, in which the net mortgage advance could not exceed 95% of the value of the property. The mortgage instructions from the lender expressly prohibited the lawyer from acting for the vendor without the lender's consent. Even though the parties' interests seemed compatible because the vendor wanted the sale to go through, the purchaser wanted the sale to go through and all agreed that the lender would have a mortgage security registered against the property, the lawyer did not have the consent of the lender. The lawyer should never have accepted the joint retainer of the vendor and purchaser because that was in direct conflict with the lender's instructions.

To make matters worse, after the contract was created, there were changes or adjustments to the amount owed by the purchaser on closing that, in effect, reduced the amount of the purchase price so that it was below the mortgage advance. The changes that the vendor and purchaser agreed to make included subsequently increased deposits, repair and renovation credits, loan repayments by vendor to purchaser, and loans by vendor to purchaser. As soon as the lawyer learned that the requests for adjustments to the purchase price would make it less than the mortgage advance to be made by the lender, the lawyer's duty of candour required that the facts be disclosed to the lender who would likely not advance the mortgage upon learning of those facts. Unfortunately, the lawyer did not make that disclosure to the lender. See *Law Society of Ontario v. James,* 2018 ONLSTA 9 (CanLII).

2. In *Law Society of Upper Canada v. Thomas,* 2018 ONLSTH 32 (CanLII) the lawyer, Thomas, acted in a joint retainer but took instructions from one client without consulting the other.

Mr. Thomas had a continuing client relationship and friendship with R. In 2008 and 2009, he acted for R and J on two mortgage transactions where they were joint lenders. J was a friend of R but did not know Mr. Thomas. Mr. Thomas did not ask R and J to sign a joint retainer, although he believed he did advise them, inadequately, about the risks of a joint retainer. Mr. Thomas did not specifically tell J of his ongoing relationship with R nor recommend that J seek independent legal advice as required by the Code.

When the property owners had financial difficulty in 2011, they entered into a creditor proposal that included transferring the property into R's name, in trust for the mortgagees,

with J remaining as a first mortgagee. J was in Florida at the time and Mr. Thomas did not contact or try to get instructions from J.

By transferring the property to R without instructions from J, Mr. Thomas preferred the interests of R to those of his other client on the joint retainer, J.

The Law Society disciplined Mr. Thomas because he failed to follow the clear guidance in the Rules of Professional Conduct about what to do when taking on a joint retainer. Further, he took instructions from one of his two clients without consulting the other.

In sum, joint retainers have some risk for the lawyer, and some disadvantages for the clients. Read the Code section *3.4 Conflicts*, and make special note of Rules 3.4-5 Joint Retainers, 3.4-6 Independent Advice, 3.4-7 Consent, 3.4-8 and 3.4-9 Contentious Issues and 3.4-12 to 3.4-16 Acting for Borrower and Lender.

Often where the parties are proceeding in concert in a transaction, as in the case of spouses purchasing property, there may seem to be little prospect of a conflict of interest between the two, and therefore little risk in one lawyer looking after the interests of both parties on a joint retainer. However, in the case of any co-purchasers, you can enter into a joint retainer but only in accordance with the Code, and the duty of candour requires that you inform both of the parties of the legal options available for co-ownership by explaining the differences between joint tenancy and tenants in common before accepting instructions for how they will hold title together. Of course, if such parties should have an unexpected falling out in the course of the transaction, you cannot take sides and will be obliged to withdraw from the joint retainer. The disputing parties may have to retain new counsel to settle their differences and complete the transaction if possible.

Where you are contemplating acting for parties opposite in interest, as in the case of vendor and purchaser, it may appear superficially attractive for you to engage in such a risky venture. Some of the common reasons given for acting for both vendor and purchaser are:

- the vendor and purchaser think the fees will be less if both sides share one lawyer – they may assume they will be splitting one fee;
- the vendor and purchaser tell you they have a common interest in completing the transaction;
- you may think that if you provide legal services to both parties you will earn a larger fee than if you only represent one;
- you assume that if you are representing everyone in the transaction you can ensure that there are no snags to hold up the closing;
- sometimes purchaser and vendor want to retain different lawyers in the same law firm and neither lawyer wants to turn away the business by requiring that one of them get outside representation.

However, the potential disadvantages of representing both vendor and purchaser on one transaction are:

- you are more likely to face a complaint to the Law Society or a lawsuit if a client perceives that you favoured the other client because your loyalties have necessarily been divided, even where you are ultimately found to have done nothing wrong;
- neither client has the benefit of confidentiality from the other when you represent more than one party because you are obliged to share all information with all clients under the joint retainer. For example, a client may not disclose important information that they do not want the other side to know or they may tell you something that is in their own best interest to keep confidential from the other side. Your obligation to disclose may bring the whole retainer to an end;
- the clients will face delay and extra expense by each being required to retain new counsel if you have to withdraw because of an unresolvable conflict between them;
- if it is determined after the fact that the matter was not appropriate for a joint retainer and that you should not have commenced acting for both parties you may face discipline from the Law Society for breaching the conflict of interest rules or a finding by a court that you are disqualified from acting for both parties because of the inherent conflict.

You must use your own experience and judgement to weigh the risks and benefits before accepting a joint retainer. More often than not, the extra fee is not worth the potential for problems.

7. To Comply with Trust Conditions and Undertakings

Trust Conditions and Undertakings are an essential part of your conveyancing practice. You will impose and accept trust conditions and give and ask for undertakings that are necessary to the exchange of original documents and money.

The Code *Rule 7.2-11* provides that "A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted."

a) What is an Undertaking?

Think of an undertaking as an unbreakable promise that you, in your capacity as a lawyer, give to another person either in writing, or orally or gives up something that they would not otherwise have done but for your promise as a lawyer.

An undertaking may be imposed through trust conditions that you accept directly or are deemed to accept through your actions. *Witten, Vogel, Binder & Lyons v. Leung),* 1983 CanLII 1028 (AB QB) (*Witten)*.

Your undertaking to another cannot be overridden by instructions from your client.

An undertaking is not a contract; it does not require consideration to be binding on you and enforceable in court. A court will enforce an undertaking regardless of any contractual defence on the merits between the parties (*Carling Development Inc. v. Aurora River Tower Inc.,* 2005 ABCA 267 (CanLII) (*Carling*) at para. 13).

Your undertaking remains binding and enforceable against you until it is satisfied or until you and the recipient of the undertaking mutually agree to modify the undertaking or it is otherwise withdrawn. You cannot reject or repudiate an undertaking while you retain or use the subject of it (for example - a transfer document or mortgage documents). *Richardson (Re)*, 2009 LSBC 7 (CanLII) applying *Carling*.

You should not give an undertaking that is not within your complete ability to control. For example, "I undertake to have my client sign this before Friday" is not an undertaking you should give because you cannot control whether your client will sign the document and you cannot control the time the client signs it. By contrast, "I undertake to send an email today informing my client that the document is in my office and that you want it signed before Friday," is something you control completely so you could undertake to do that.

Do not give or accept an undertaking "on behalf of the client". The courts have taken a broad view of what undertakings will be held to be given by the lawyer and enforceable against the lawyer personally, so do not think you will avoid responsibility by saying "On behalf of our client G, I undertake to…". See *Re Solicitors,* 1916 CanLII 408 (BC CA).

This was re-enforced in Manitoba in *The Law Society of Manitoba v. Wang*, 2015 MBLS 12 (CanLII) at paragraph 67:

> *…Undertakings are not just important; they are fundamental to our legal system. Failures of members to honor them must be firmly dealt with. The public has the right to expect that lawyers will keep their promises. The Law Society is charged with the responsibility of ensuring that members of the legal profession do exactly that.*

b) What is a Trust Condition?

Trust conditions are conditions imposed on you by another person that you must personally fulfill before making any use of the items (documents, monies and other property) to which the trust conditions apply. You may reject trust conditions and send the items back or seek amendment of the trust conditions, but if you make any use of the property to which the trust conditions apply you will be bound by the trust conditions and you are bound to fulfill them. The trust conditions imposed on you essentially become undertakings by you once they are accepted or deemed to be accepted by your actions.

Trust conditions should always be in writing and communicated at the same time the property is delivered to you so that you can decide whether the conditions are acceptable or if you need to request amendments to them before they will be acceptable to you. Otherwise, the conditions must be rejected and the property returned to the sender, unused in any way.

Trust conditions should be clear, unambiguous and explicit and should state a specific time frame within which the conditions are to be met. They should state the consequence should the trust conditions not be accepted as drafted (e.g. "X must be returned to my office, unused, by Friday, June 4, XXXX if you do not accept these trust conditions"). They must not be used to attempt to re-write the parties' contract.

Acceptance of trust conditions should also be in writing to prevent misunderstandings, especially where amendments to the trust conditions have been made by agreement. Amendments should only be sought from the person who imposed the conditions, not their assistant.

If you accept or are deemed by your actions to have accepted trust conditions imposed on you, you must fully comply with the trust conditions personally and cannot alter the conditions unilaterally, even if the terms of the trust conditions seem unreasonable in hindsight or they are not in accord with the contract between clients.

As set out by the Alberta Court of Appeal in Carling, a trust is created. Coté JA, for a unanimous Alberta Court of Appeal in *Carling* at paragraph 38 wrote as follows:

> *38 However, are "trust conditions" something else as well? In particular, do they create a trust? Does the ordinary law of trusts apply? The answer to that will help decide many questions, such as remedies available, and who is bound.*

And at paragraphs 51-52,

> *51 In courts of equity, there is an accepted three-part test for creation of an express trust. It is normally satisfied when one solicitor imposes trust conditions upon another. The first part of the test is words which show that the recipient must take the property for described persons or objects, not beneficially. The words "in trust" suffice, but are not necessary. Between two solicitors, handing over money or property to create a mere moral obligation is highly unlikely. The second part of the test for a new trust is clear identification of the property which is the subject matter. Ordinarily that property is the documents or money enclosed in the letter containing the trust conditions, and said to be subject to the conditions. Occasionally the conditions refer to documents sent previously in a named letter. Usually that part of the test is clearly satisfied. The final part of the test is certain or ascertainable persons or objects who are to benefit. That is even more easily satisfied, as usually the required performance is to be given to the solicitor sending the documents and letter. Occasionally, performance is to be to someone else, such as a mortgagee, but that person is usually clearly identified…*

52 Therefore, solicitors' trust conditions do create a trust. [emphasis added].

…the recipient solicitor holds the document entrusted as a trustee for the entrusting solicitor, not as the agent or trustee of the recipient's client…

The court added at paragraphs 60-63,

[60] Needless to say, a client's instructions not to obey trust conditions are no excuse for breach of trust conditions: Witten, Vogel v. Leung, supra, at 54 (para. 6).

[61] The practical corollary of all this is that the recipient of trust conditions should carefully consider whether or not to accept them. Is it safe and proper to do so? Has he or she personal power to ensure their performance? If not, he or she should at once return the documents or money unused. See the Canadian Bar Association's Code of Professional Conduct, Chap. 16, Commentary 7 end (1987).

. . .

[63] If a party has his solicitor impose a trust condition which is inconsistent with the existing sale contract, that may be a breach of the sale contract. And if a solicitor imposes a trust condition inconsistent with an existing binding sale contract, may also be professional misconduct. But the recipient has a cheap easy solution. He or she should at once refuse in writing to accept the trust condition. At the same time, he or she should either get an acceptable written variation of the trust condition, or return the entrusted documents unused.

CAUTION: You have an enforceable legal obligation to fulfill any undertakings you give to others and to comply with trust conditions imposed by self-represented persons or other lawyers if you accept the trust conditions as written.

8. To Not Make Negligent Misstatements

In addition to obligations to your clients and to other lawyers, you also risk being sued in tort by others, with whom you have no contractual relationship, for negligent misstatements. For example, an unrepresented lender to a transaction may rely on the vendor's lawyer's statements regarding the solvency of the borrower/purchaser or the security for the loan. Any incorrect statements made carelessly which are relied upon could give rise to liability.

9. To Not Assist a Fraudulent Scheme

A lawyer who knowingly assists a client or others in a fraudulent scheme masquerading as a legitimate transaction may be sued for fraud by a third party. Examples of lawyers' actions that assisted clients in fraudulent schemes include: creating false documents, publishing fictitious prices for land transactions to be registered, or misrepresenting a factual aspect of a transaction. An area of particular concern involves understating fair market values of

properties at the time of title registration in order to reduce land transfer taxes. Land Title offices are quite diligent about monitoring declared values and anyone caught under-declaring a value could be subject to the punitive provisions of *The Tax Administration and Miscellaneous Taxes Act* which include fines and jail. A lawyer caught participating in, or turning a blind eye to, such actions may face disciplinary proceedings in addition to potential charges under the *Act*. As well, if you are found to be assisting in fraud you will not be covered by your liability insurance if you are sued for damages.

CAUTION: Actionable fraud need not be overt action to constitute fraud, and may result from half-truths or through the failure to correct innocent misrepresentations once the truth is known.

10. Interactions with Self-Represented Parties

Code of Professional Conduct:

> *7.2-9 When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:*
>
> *(a) urge the unrepresented person to obtain independent legal representation;*
>
> *(b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and*
>
> *(c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client. [emphasis added]*
>
> *Commentary*
>
> *[1] If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in Rules 3.4-5 through 3.4-9 (Joint Retainers).*

C. THE ROLE OF REAL ESTATE BROKERS IN CONVEYANCING PRACTICE

Before proceeding with the balance of this section, here are some useful definitions:

Definitions from the *Winnipeg Realtors website*:

BROKER (ALSO KNOWN AS AUTHORIZED OFFICIAL — MANAGER)

A real estate broker is a person who is licensed by the Manitoba Securities Commission as an Authorized Official - Manager; and operates a licensed and registered real estate brokerage. A broker will have been a practicing licensed salesperson for a minimum of two years who undertakes additional education and training to gain increased licensing so as to create and/or lead a real estate business. The broker is responsible for all of the activities of the brokerage, the alternate brokers and all salespersons who are licensed with that brokerage. A broker must be actively engaged in the management of the real estate brokerage and ensure that there is an adequate level of supervision for associates and employees within the brokerage.

ALTERNATE BROKER (ALSO KNOWN AS AUTHORIZED OFFICIAL)

An alternate broker is a person who is licensed by the Manitoba Securities Commission as an Authorized Official. An alternate broker will have been a practicing licensed salesperson for a minimum of two years who undertakes additional education and training and is employed by or associated with a licensed real estate brokerage in Manitoba and is registered with and approved to trade in real estate on behalf of that brokerage.

SALESPERSON (ALSO KNOWN AS REAL ESTATE AGENTS)

An individual who holds the qualifications of a real estate salesperson; is licensed as a real estate salesperson by the Manitoba Securities Commission; is employed by or associated with a licensed real estate brokerage in Manitoba and is registered with and approved to trade in real estate on behalf of that brokerage.

MANITOBA SECURITIES COMMISSION (MSC)

The Manitoba Securities Commission (MSC), a division of the Manitoba Financial Services Agency, is an independent agency of the Government of Manitoba that protects investors and promotes fair and efficient capital markets throughout the province. The Real Estate Division is responsible for administering the Real Estate Brokers Act and the Mortgage Brokers Act. This division registers real estate brokers, salespersons and mortgage brokers, monitors brokers' trust accounts and investigates complaints against real estate brokers, salespersons and mortgage brokers.

MANITOBA REAL ESTATE ASSOCIATION (MREA)

The Manitoba Real Estate Association (MREA) leads over 2,100 Manitoba real estate professionals through education, professional standards, advocacy and related services for the benefit of organized real estate throughout Manitoba. They provide education to ensure members maintain high industry standards, deliver training for becoming a real estate practitioner and protect consumers involved in real estate transactions.

CANADIAN REAL ESTATE ASSOCIATION (CREA)

The Canadian Real Estate Association (CREA) is one of Canada's largest single-industry trade associations. They represent the interests of its members to the federal government and its agencies on existing or proposed legislation that will affect those members, and/or impact home ownership.

CREA owns the trademarks for REALTOR® and MLS®, and is the operator of REALTOR.ca. Only when you are a member of CREA do you officially become a REALTOR®.

The Manitoba Real Estate Association (from its website) provides a reimbursement fund to protect the public, has errors and omissions insurance for its members and has a complaint process to resolve issues between the public and its members.

CAUTION:

The Real Estate Brokers Act will be repealed by *The Real Estate Services Act***

Bill 70, *The Real Estate Services Act*,** received royal assent on November 5, 2015 and will come into force on a date to be fixed by proclamation upon proclamation. The *Act* will repeal *The Real Estate Brokers Act* and the intention is that it will modernize the industry. Updates on policies and directives can be found on the Manitoba Securities Commission website, *www.msc.gov.mb.ca* under "real estate."

1. Registration Requirements

a) Regulation under *The Real Estate Brokers Act*

The Real Estate Brokers Act, C.C.S.M, c. R20 regulates brokers and salespeople. Registration requires that the broker files a surety bond or a valid certificate of membership in the Manitoba Real Estate Association Inc. under *section 4(1)* and the commission may require additional bonding under *section 4(2).* Salespeople (real estate agents) are employed by registered brokers and they must also be registered. A salesperson's registration is dependent upon the continued registration of their broker employer (*s. 11(2)*).

Under *section 15(6)* only a broker registered under the *Act* is allowed to charge the public a real estate commission. Salespeople are only entitled to collect payment for a transaction from their broker.

By virtue of *section 40* and the special definitions of the words "transaction" and "broker" under *section 1* of the *Act*, all real estate transactions in Manitoba must be conducted through registered brokers unless excepted under *sections 41(1) (a-j),* and *41(2-4)* of the *Act*.

b) Exceptions to Registration Requirements

Under *section 41* of the *Act*, registration with the *Manitoba Securities Commission* in order to deal in real estate is not required in certain exceptional cases. These exceptions include the following:

- An isolated trade in real estate on behalf of the owner or potential purchaser where no commission is paid;
- The showing of real estate by the owner to potential purchasers dealing through a registered broker;
- A sale by the owner of subdivision or other bare land owned for at least one year, where a lawyer prepares the contract and holds all deposits, all the negotiations are conducted by the owner or lawyer, and there is no remuneration paid on a commission basis;
- The leasing of real estate by the owner where no commission is paid;
- A receiver, trustee in bankruptcy, or like person acting under any statute or by order of a court; a trustee acting under the terms of a will or like situation; a bank, loan, trust or insurance company dealing with its own property or property that it administers; any person acting for a government agency; and an auctioneer performing duties at an auction sale;
- The managing of property or collecting of rent by a company in certain specified situations;

- Transactions made or trades negotiated on behalf of a client in the course of and as part of the practice of any member of The Law Society of Manitoba entitled to practise as a lawyer in the province (except transactions falling under Part VI of the Act dealing with subdivision of lots outside of Manitoba).

2. Listing Agreements

A real estate broker is hired to sell real estate by an agreement called a listing agreement. The term "listing agreement" means any agreement or arrangement, whether written or oral, authorizing a person, for a reward or hope or promise thereof, to negotiate a sale, lease or other disposition of real estate. The listing agreement may be oral or in writing, unless it is an exclusive listing, in which case it must be in writing (see definition of "exclusive listing" in *s. 1* of the *Act*).

The listing agreement usually describes the terms on which the vendor authorizes the broker to offer the property for sale and spells out the terms of remuneration in the event of sale. Your client will most often deal directly with one of the broker's salespeople, also known as a real estate agent. In the explanations below, the term "agent" is used to refer to the broker and includes the salesperson employed by the broker.

There are three types of listing agreements:

a) Open Listing

Under an open listing the engagement of the agent is not exclusive and the owner is free to sell the property privately or through other agents. In other words, under an open listing the vendor may have several agents working at the same time to find a buyer and is free to sell through any agent without being obligated to use any of them.

b) Exclusive Listing

Under *section 1* of the *Act,* "exclusive listing" means an agreement in writing between a broker and a vendor of real estate, under which the broker has the exclusive right to negotiate a sale or lease of the real estate described therein. Under an exclusive listing, the authority of the agent is generally irrevocable during the listing period and is exclusive. That means that the vendor is usually required to pay a commission on any sale made of the property during the period of the exclusive listing to the agent holding the exclusive listing, whether the sale is made by the agent holding the listing or through any other source.

Section 20 sets out practical requirements for a listing to be exclusive:

> ***Exclusive listing to be in duplicate, etc.***
> *20 Two or more copies of each exclusive listing shall be completed and executed, and shall clearly show*
> *(a) the date on which it was executed;*
> *(b) the date on which it expires;*

and an executed copy thereof, immediately upon execution shall be furnished by the broker, salesman or authorized official to the person granting the listing.

Section 30 addresses commissions where there is an exclusive listing:

> ***No commission where another broker holds exclusive listing***
> *30(1) Where a broker, authorized official or salesman negotiates a trade in real estate which he knows is listed with another broker under an unexpired exclusive listing agreement, neither he nor his employer is, unless otherwise agreed to in writing by the vendor, entitled to a commission or other remuneration from the vendor.*

c) Multiple or Co-operative Exclusive Listing

A multiple or co-operative exclusive listing is not defined in the *Act*. It is a form of exclusive listing which authorizes the listing agent to appoint co-operating agents to find a purchaser on the basis that the commission will be divided between the listing agent and the selling agent if the property is sold during the listing period. The selling agent may be the listing agent, or one of the co-operating agents. The co-operating agent may act for the purchaser (a buyer's representative) or may be a sub-agent of the vendor (a seller's representative), or may represent both the vendor and the purchaser with their consent. Multiple listings are administered through a real estate board which has jurisdiction over the area where the property is located. (e.g. Winnipeg Area REALTORS® (formerly Winnipeg Real Estate Board), Brandon Area REALTORS® (formerly Brandon Real Estate Board).

d) Minimum Requirements for Listing Agreements

In order for a listing agreement to be valid, the minimum requirements are that the broker must give a signed copy of the listing agreement to the person at the time of signing if the listing agreement is in writing and the written listing agreement must contain either an expiry date (only one) or a method of terminating the agreement. (See the *Act s. 31.*)

3. Commission

a) Statutory Requirements

Agreements to pay commission to real estate brokers are regulated under the *Act* as follows:

- Under *section 32(1)* payment to a broker must be an agreed sum or a sum based on a percentage of the sale price or rental value of the real estate.
- Under *section 32(2)(a)* brokers are prohibited from asking for a commission based on the difference between the listing and selling price.
- Under *section 19(2*) if the buyer of the listed property is the listing broker (or an associate of the listing broker, any nominee for the listing broker or any

associate of the nominee), then the vendor is not liable to pay any commission on the sale.

- Under *section 19(3)* if the buyer of the listed property under a multiple or cooperative listing is also the selling broker (or an associate of that broker or a nominee or associate of that nominee of that broker) the broker who purchased the real estate is not entitled to a share of the commission. The vendor can reduce the commission payable to the listing broker by the amount that would have been payable to the other broker who bought the real estate
- Under *sections 19(1)* and *(2)* the term "associate" includes a salesperson, authorized official, or any director or person having a material interest (at least 5%) in the broker if the broker is a corporation, a spouse of the broker or any other associate, or any corporation or other incorporated association in which the broker or associate has a material interest.
- Under *sections 22(2)* and *23* where an offer to purchase real estate is submitted to a broker and is accepted, the acceptance must show the total amount of commission, if any, to be paid by the offeree to the broker, either stated as a lump sum or as a percentage of the sale price. Non-compliance with this requirement in bad faith results in forfeiture of any right to commission.
- Under *section 30(1)* a broker who negotiates a trade in real estate knowing that it is listed with another broker under an unexpired exclusive listing agreement is not entitled to a commission unless otherwise agreed to in writing by the vendor.

b) When is Real Estate Commission Payable?

As a general rule, the event which gives rise to the obligation on the part of the vendor to pay commission is to be determined from the terms of the listing agreement (*Luxor v. Cooper*, [1941] A.C. 108 (H.L.)). Vendors do not always realize that they are free to negotiate the terms of the listing agreement which may include amending the triggering event which gives rise to the obligation to pay a commission.

Typically the obligation to pay commission arises:

(a) out of the sale proceeds on completion of the sale; or

(b) upon a contract of purchase and sale being made on terms satisfactory to the vendor; or

(c) upon the agent producing an offer to purchase on terms stipulated in the listing agreement.

From the point of view of the vendor, the arrangement under (a) where no commission is payable until the sale is complete and the vendor has the sale proceeds is the most advantageous.

The vendor will be unhappy under (b), if required to pay a commission just because the contract of purchase and sale has been created on satisfactory terms but the sale does not proceed. Consider the possibility that the sale may not close because of the failure of some condition or default on the part of the purchaser with no fault on the part of the vendor.

The vendor would be required to pay a commission to the agent even if the vendor wanted to reject the offer if (c) was the negotiated term.

Generally in the past, the courts construed the various types of wording in listing agreements as obligating the vendor to pay commission only in the event of the completion of the sale and payment was made out of the sale proceeds (*Dennis Reed Ltd. v. Goody*, [1950] 1 A.E.R. 919 (C.A.), per Denning, L.J.) cited with approval in *Manitoba Securities Commission v. Aronovitch*, 1981 CanLII 3419 (MB QB).

In *Dennis Reed Ltd.,* at p. 924, Lord Denning put it this way:

> *When an agent gets an offer which the house owner does not accept, it might be quite reasonable for the agent to ask for his out-of-pocket expenses or even for a reasonable reward for his time and labour, but it is not reasonable for him to ask for full commission at the same rate as if he had actually procured a sale. The commission is a substantial remuneration, not based on the time, labour or money expended — which may be little —but on a percentage of the purchase price. Remuneration on such a scale cannot be justified except on the footing that it is to come out of the purchase money, and should, therefore, in reason only be payable on completion of the purchase. I know that agents often say that they have earned their commission when they have done their part. That, however, is a fallacy. An agent does not earn commission as a labourer earns wages. Even though he has done his part, he does not become entitled to his commission until the purchase is completed.*

Thus if the purchaser defaulted on closing, or if the transaction did not close because of the failure of a condition of the sale agreement through no fault of the vendor, there was no obligation on the part of the vendor to pay commission. Furthermore, if the purchaser defaulted, no commission was payable to the agent, and the vendor retained the purchaser's deposit, (*Carsted v. Gass,* 1980 CanLII 2480 (MB CA); *H.W. Liebig Co. v. Leading Investments Ltd.*, 1986 CanLII 45 (SCC), [1986] 1 SCR 70; *Bolohan v. Marsh* (1981), 20 R.P.R. 1 (Ont. C.A.). There at p. 4 Brooke J.A. says:

> *We are of the view that the agent cannot, in the circumstances of the case, rely upon the provisions of the agreement of purchase and sale to enlarge upon his right to a commission as specifically determined by the listing agreement. Very clear terms would be required to achieve this; terms which would bring home to the vendor that his rights and obligations were no longer as set out in the listing agreement.*

However, as to the deposit, in cases where the listing agreement set out specific provisions such as "the deposit to be shared with the broker on purchase's default", then the provisions of such an agreement would likely prevail.

The present forms of listing contracts in Manitoba commonly used by brokers provide that if the buyer defaults, the listing brokerage receives a payment of commission of 50% of the defaulted deposit, and in any event no more than the total commissions payable.

Likewise, the present listing contracts provide that if an offer is presented to the seller which matches the seller's expectations as outlined in the listing agreement, and the seller chooses not to sell, the listing agency is entitled to a full commission, since the brokerage has performed the service that they have been contracted to provide, by bringing a ready and willing buyer to the table with an offer on terms advertised as acceptable by the seller.

c) Vendor Obligations in Listing Agreements

A listing agreement does not obligate the vendor to sell even if the agent produces an offer on the listing terms.

Note, however, that while a vendor is never obligated to accept any offer to purchase, paragraph 5(b) of a standard MLS agreement does provide that commission may be payable in certain circumstances if the vendor does not accept certain offers.

Further, if an offer to purchase is accepted by the vendor and the vendor then refuses to close the transaction, or if the transaction aborts because of some non-permitted title defect or other fault on the part of the vendor, the agent may be entitled to a commission on a quantum meruit basis. This may range anywhere from a sum to cover out-of-pocket expenses to an amount equivalent to the full commission. In some circumstances the agent may also be entitled to remuneration on a quantum meruit basis even for procuring an offer which the vendor refuses to accept (*Manitoba Securities Commission v. Aronovitch & Leipsic Limited*, 1981 CanLII 3419 (MB QB), (1981), 8 Man. R. (2d) 185 (Q.B.) per Wilson, J.; *Brydges v. Clement*, 1904 CanLII 143 (MBC CA), (1904), 14 M.R. 588 (C.A.); *Allan v. Pope Investments Ltd.,* 1970 CanLII 1116 (MB QB) per Matas, J.; *Carsted v. Gass,*1980 CanLII 2480 (MB CA); *Bradley-Wilson (1954) Ltd. v. Canyon Gardens Ltd.,* 1965 CanLII 802 (BC CA).

d) Buyer Agency

In Manitoba, the industry standard is a model of presumed buyer agency which means that the selling agent is presumed to work for and owe fiduciary duties to the purchaser unless all parties knowingly agree otherwise.

The change across Canada and in Manitoba to a presumed buyer agency model altered the way commissions are paid in some transactions. In most cases, the purchaser's agent will be paid a portion of the listing agent's commission from the vendor out of the sale proceeds. However, there are some occasions where the

purchaser will simply pay the commission to the selling agent directly pursuant to a written or oral buyer agency agreement. This is especially prevalent in transactions where the vendor is selling privately and only the purchaser is represented by an agent.

The use of formal buyer agent contracts has increased in recent years. The industry recommended form of buyer agency contract obliges the buyer to pay the buyer's agent's commission if the buyer's agent is unable to secure a cooperative commission from the listing agent (or owner in the case of a private sale).

4. Advising the Vendor Respecting the Listing Agreement

When you get the chance to advise a vendor who is proposing to enter into a listing agreement you should review the terms of the listing agreement to ensure that the vendor is not obligated to pay a commission except in the case of a completed sale, and then, only out of the sale proceeds.

Often the vendor has already signed the listing agreement by the time you see it. If that is the situation and the terms of the listing agreement provide an arrangement more favourable to the agent, you should make sure that the vendor clearly understands the terms of the signed listing agreement that oblige the vendor to pay commission even if a purchaser does not complete the transaction.

Even if you are not involved in the vendor's agreement to list the property, when an offer is presented for acceptance, you will have an opportunity to modify or clarify the listing agreement terms if the vendor wants to do that. If you are retained by the vendor before the vendor accepts the offer, and if the acceptance clause includes "an undertaking to pay commission" you have an opportunity to modify the clause to state clearly that the commission will not become due and payable unless the transaction is completed and, only then will be payable out of the sale proceeds. Technically, this change to the offer to purchase is a proposed amendment to the listing contract between the vendor and the listing agent. Because the agent is not a party to the offer to purchase contract you should get the agent's written consent to this modification, so that there is no confusion or argument that the listing contract was not amended. If the offer to purchase is conditional, it is important that there be a clear understanding with the agent that the offer is being accepted on the basis that there will be no commission payable if the conditions are not satisfied or if the transaction does not close.

In *Youngblut v. Herzog*, 1967 CanLII 342 (ON CA), where a purchaser did not complete the purchase of the property, the court faced the question of whether the real estate agent was entitled to payment of the commission. The Court reviewed the commission agreement that the vendor signed. The term "I agree to pay the agent a commission of 5% of the sale price for having procured this offer upon completion of the sale of the property…" formed part of the acceptance of an offer to purchase presented to the vendor by the agent.

The sale did not close because a condition of the purchase failed through no fault of the vendor. The agent sued for commission claiming that it had been earned when the offer

was procured. The words "upon completion of the sale of the property" were not in the acceptance form when the offer was first presented by the agent. These words were inserted by the vendor's lawyer with the agent's consent prior to the offer being accepted specifically because the lawyer did not want the vendor to become obligated for commission if the purchaser did not close. The Court overturned the trial court's decision and determined no commission was payable. A majority of the court held that these added words relieved the vendor from having to pay commission on the aborted sale. The result might have been otherwise had those words been omitted.

See also *H.W. Liebig Co. v. Leading Investments Ltd.*, 1986 CanLII 45 (SCC), [1986] 1 SCR 70 which holds that the entitlement to a commission is a matter of contract between the vendor and the agent.

The form of residential offer and acceptance prescribed under section 21(3) of *The Real Estate Brokers Act* contains a commission agreement worded as follows:

> By the Seller's signature below, the Seller acknowledges (and agrees) to pay to the Listing Broker above named an agreed commission of _____.

The previous form of residential offer to purchase (discontinued in 1998), specifically stated that the Vendor was not obligated to pay the commission until the completion of the transaction.

The current industry form of listing contract indicates that commission is payable when the buyer assumes legal possession of the property. The only exceptions to this are found in paragraph 5(b), which outlines "alternate" compensation when a buyer defaults or when a seller chooses without cause not to accept an offer matching the listing contract.

A further consideration in making listing agreements is that any title defects or other detrimental matters which may otherwise cause a transaction to abort should be clearly spelled out in the listing agreement. A careful vendor or real estate agent will do a title search on the property prior to listing for sale to head off any surprises. For example, if there are encroachments, caveats, or other encumbrances, these should all be mentioned in the listing agreement so that the vendor will not be put in the position of possibly facing a quantum meruit claim by the agent if an offer is presented and rejected because the purchaser won't accept the unmentioned title defects. Also, if possible, the vendor's lawyer should make sure that the vendor does not accept an offer which the vendor may not be able to perform.

The vendor's lawyer should inform the vendor that the standard cooperative listing agreement allows the broker to file a caveat on the vendor's property because it contains wording that has the vendor pledging an interest in the property as security for the obligation to pay the commission. This amounts to an equitable mortgage. Finally, the vendor's lawyer should warn the vendor of the 60 day carry-over provisions found in the standard cooperative listing agreement which render a vendor liable to pay commission after expiry of the agreement if certain events take place.

5. Statutory Duties of Real Estate Brokers

The Real Estate Brokers Act sets out minimum requirements to be followed by a real estate broker in the process of bringing about a contract of purchase and sale of real estate.

- Under *section 21(1)* every offer to purchase obtained by a broker must be in writing, completed in quadruplicate and executed by the offeror in the presence of a witness. The broker must leave a copy with the offeror immediately upon execution.
- Under *section 21(2)* a broker presenting an offer to purchase to a vendor for acceptance must obtain the acceptance in writing signed by the vendor and duly witnessed, in not less than duplicate. The broker must also leave one copy with the vendor and immediately notify the purchaser of the acceptance by delivering a copy of the acceptance to the purchaser.
- Before execution by either the vendor or the purchaser, every offer to purchase must contain the particulars prescribed in *section 22(1).*
- Under *sections 21(3)* and *(4),* in the case of a sale of a single family residential house or of a single family unit in a condominium, the form prescribed under *The Real Estate Brokers Act* regulations must be used. This requirement does not apply in the case of an offer prepared by a lawyer, an offer to purchase real estate from CMHC, or an offer involving new construction in respect of which the deposit will be held by a lawyer or a registered real estate broker. Note that while *section 21* requires a real estate broker to obtain an offer or acceptance in writing, the Act does not state that failure to do so invalidates an otherwise valid agreement, so the normal common law relating to verbal agreements likely still applies. Therefore, a verbal acceptance or a verbal offer may be binding on the vendor and purchaser if same can be proven, notwithstanding that the broker may be in violation of the *Act* for presenting or accepting an offer verbally.
- Deposit monies received by a real estate broker or salesman must be turned over to the broker, deposited in a trust account and held on the agreed upon terms.

A copy of the form of offer and acceptance prescribed under the regulations to *The Real Estate Brokers Act* is found in the Chapter 2 precedents. This form is to be generally used only for single family homes. Separate forms are available from the Manitoba Real Estate Association and are to be used for properties other than single family homes. The statutory form of offer should not be used for properties that may have commercial or GST implications such as vacant land or farmland. Commercial transactions should be drafted on either a generic form of commercial contract available from the Manitoba Real Estate Association, or on a customized lawyer-drafted or reviewed form of contract. New construction agreements likewise should be customized (see Chapter 5 for further detail).

It has been recognized that the use of faxes and the internet has rendered certain portions of *The Real Estate Brokers Act* pertaining to "copies" impractical. As a result, the Manitoba Securities Commission has issued an "Electronic Forms Practice Directive" found at *http://www.mbrealestate.ca/law-policy/policies-legislation/policies/elec-forms.fr.html*.

The directive provides protocols dealing with faxed and electronically produced contracts.

6. The Duties of a Real Estate Broker to the Vendor

a) The Broker as Purchaser

For real estate listed with a real estate broker for sale, the standards of performance required of the broker are those established by the general common law of agency, tort and contract. In addition, the broker most likely takes on a fiduciary obligation to the vendor and the extra requirements of good faith dealing are superimposed on the general obligations. One of the principal fiduciary obligations of the broker to the vendor is set out in *sections 19(2)-(6)* of *The Real Estate Brokers Act.* A broker or an associate of a broker who wishes to purchase real estate listed with that broker, must disclose their identity to the vendor. In such cases, no commission is chargeable by the broker. On a multiple listing, where the purchaser is the selling agent or an associate thereof, the selling agent's portion of the commission is not chargeable. Not only must the identity of the purchaser be disclosed, but the vendor must be informed of the circumstances that make these requirements applicable and of the fact that no commission or a reduced commission is payable. The vendor may recover any commission paid if these requirements are not met and the transaction is voidable within thirty days of the vendor's discovery of the circumstances that make the requirements applicable.

b) The Broker Acting for Vendor and Purchaser

As a result of the fiduciary position of the broker with respect to the vendor, the broker is not entitled to receive remuneration from the purchaser without disclosing this arrangement to the vendor. A broker who violates this requirement loses the right to commission (*MacManus Realty Ltd. v. Bray*, 1970 CanLII 892 (NB CA), (1970), 14 D.L.R. (3d) 564 (N.B.C.A.)).

A broker acting for both vendor and purchaser risks a potential conflict between the competing fiduciary duties of full disclosure on the one hand and full confidentiality on the other hand. The Manitoba Real Estate Association has recommended certain guidelines and written acknowledgements in an effort to resolve such conflicts. Please note that the "broker" is the entity registered with the Securities Commission, not merely any individual salesperson.

c) Broker Ignoring Vendor's Instructions

In *Len Pugh Real Estate Ltd. v. Ronvic Construction Ltd.,* 1974 CanLII 1380 (ON CA), (1974), 53 D.L.R. (3d) 71 (Ont. C.A.) affirming (1973), 41 O.L.R. (3d) 48 (Ont. Co. Ct.), the agents had presented an offer for acceptance by the vendor containing a clause which contradicted the vendor's instructions. The agents had previously been asked by the vendor to remove the clause from the agreement, but ignored the request. The agents had also been acting for the purchaser and were in conflict of interest. The agents were held liable in damages and forfeited their right to a commission by virtue of the breach of their fiduciary obligations.

d) Duty to Obtain Highest Price

As part of their fiduciary obligations to the vendor, the salesperson for a real estate broker representing the vendor must bring to the attention of the vendor all facts which come to the broker's attention which have a bearing on the transaction or which would be to the advantage of the vendor. In particular when involved in a negotiation with a purchaser, the broker acting for the vendor has a duty to obtain the highest possible price for the vendor. In *Canada Permanent Trust Co. v. Hutchings* (1977), 3 R.P.R. 211 (Ont. Co. Ct.), the sales agent suggested to the vendor a nominal counter-offer without ascertaining the highest price the purchaser was willing to pay. The price suggested did not reasonably reflect what the market might bear. The court found that the sales agent's purpose was to make a quick commission and even possibly to assist the purchasers in obtaining as low a price as possible. In the circumstances the court deprived the agent of the commission and as well awarded damages for the breach of fiduciary obligations. In *Krasniuk v. Gabbes*, 2002 MBQB 14 (CanLII), the court deprived the agent of the commission because the sales agent failed to inform her seller clients that the purchaser had made a verbal offer despite *s. 21(1)* of *The Real Estate Brokers Act* which obligates agents to ensure offers are in writing. The court found it was a breach of fiduciary duty to have not disclosed the information.

See also *Watson v. Holyoake,* June 17, 1986, Ont. H.C., 38 A.C.W.S. (2d) 0517.

In *Jackson v. Packham*, 1980 CanLII 1691 (ON SC), (1980), 13 R.P.R. 1 (Ont. H.C.) the real estate broker allowed a vendor to accept an offer to purchase without informing the vendor that the sales agent of the broker knew of the probability of another purchaser being willing to pay a much higher price. After the sale concluded, the broker resold the property for the purchaser at a substantial profit. The vendor succeeded in recovering from the real estate broker the difference between the resale price and the sale price plus the amount of the additional commission payable on the sale at a higher resale price. The court held that the fiduciary relationship required the broker to disclose all information acquired which would be of an advantage to the vendor. By withholding from the vendor the identity of and potential information concerning a prospective purchaser, the broker violated a fundamental of that relationship.

e) Liability for Negligently Rendered Services

In addition to enforcement of the fiduciary obligations of real estate brokers in favour of vendors, the courts have held real estate brokers liable to their vendors for damages by virtue of incompetently rendered services resulting in the aborting of a transaction. Some examples are as follows:

- In *Charter-York Ltd. v. Hurst* (1970), 2 R.P.R. 272 (Ont. H.C.), the sale aborted because of a lack of consensus ad idem between the vendor and purchaser as to the location of the lands being sold. The situation resulted from the failure of the sales agent to familiarize himself with the location of the land by walking it off with the vendor. The contract was held to be void and because of his incompetently rendered service, the agent was held liable to compensate the vendor for the decline in value of the property.
- In *Price v. Malais*, 1982 CanLII 751 (BCSC), (1982), 24 R.P.R. 160 (B.C.S.C.) the sale aborted because the agreement required the property to be clear of all encumbrances and to the knowledge of the sales agent there was at least one easement on the property, which turned out to be of a highly material nature to the purchaser. The agent failed to search the title and failed to inform the vendor on acceptance of the offer that it contained a clause inconsistent with the known situation on the property. The sale aborted and the real estate broker was held liable for the consequential loss to the vendor.

f) Apparent Authority of Real Estate Brokers

A real estate broker generally does not have implied authority to contract on behalf of a principal. However the broker does have implied authority to receive, on behalf of a principal, a notice of acceptance or revocation of an offer, and express authority under the residential statutory form of offer to purchase to receive notice of satisfaction or waiver of a condition, unless such authority has been expressly withdrawn to the knowledge of the other party (*Island Properties v. Entertainment Enterprises*, 1986 CanLII 2426 (NL CA), (1986), 26 D.L.R. (4th) 347 (Nfld. C.A.), *Goodfellow v. Drschiwiski* , 1979 ABCA 253 (CanLII), (1979), 18 A.R. 561 (C.A.)).

In certain circumstances a real estate broker may bind their principal by apparent authority. If authorized by the principal, a real estate agent may sign an agreement for a client. Because real estate brokers are required to obtain all offer and acceptances in writing when it is not convenient to obtain a signature, agents may sign on behalf of the buyer or seller. The Manitoba Securities Commission issued a Notice regarding this practice in 1997 (which can be found on its website entitled *Signing Documents on Behalf of Clients*) and urges great caution and limited use. In such instances it is important for the lawyer to obtain verification that the agent's action has been ratified by the principal.

7. Duties of Broker to Third Parties

A real estate broker representing only the vendor also has a duty of care to the purchaser of real estate with respect to the representations made about the property being sold. The courts have repeatedly held that real estate brokers are liable for negligent misstatement causing damage to purchasers who rely on such misstatements to their detriment even though there is no fiduciary duty to the purchaser. The courts have found that a special relationship can exist between a real estate broker and a third party purchaser, which brings the case within the principle of Hedley Byrne v. Heller, [1964] A.C. 465.

On the other hand, agents are not liable for innocent misrepresentations which do not involve negligence.

In *Andronyk v. Williams*, 1985 CanLII 3681 (MB CA), (1985), 36 Man. R. (2d) 161 (C.A.), for example, the court held that an agent who misrepresented the amount of cultivated acreage was not liable to the purchaser because no special relationship existed between the vendor's agent and the purchaser.

A broker cannot rely on the waiver of reliance set out in the offer to purchase because the broker is not a party to the offer. However, the broker can ask for a waiver from the purchaser, thereby bringing to the purchaser's attention that the purchaser cannot rely on the agent's representations and will have to check matters out through other sources. Liability might be avoided through the use of such a waiver, provided that the purchaser genuinely understands the nature of the waiver.

8. Deposits

a) Held in Trust

The purchaser of real estate usually provides a deposit when signing an offer to purchase. The deposit may be paid directly to the vendor or may be held in trust by a lawyer. However, on transactions arranged by real estate brokers, the deposit is usually held by the listing real estate broker. Deposits received by real estate brokers must be held in the real estate brokers' trust account pursuant to the provisions of *The Real Estate Brokers Act* and regulations. The account must be a chequing account. Such deposits are deemed to be held in trust for the benefit of the vendor and the purchaser. Thus, if the transaction aborts, due to conditions precedent not being fulfilled or the default of the vendor, the deposit is returned to the purchaser; if the purchaser defaults, the vendor is entitled to receive the deposit subject to the "sharing" provisions with the broker set out in the standard MLS listing agreement. When commission becomes payable, the listing broker receives the commission and deposits it into trust and then pays the co-operating selling broker the selling portion from the trust account. (*Manitoba (Securities Commission) v. Showcase Realty Ltd.,* 1979 CanLII 2778 (MB CA), (1978), 84 D.L.R. (3d) 518 (Man. Q.B.); (1979), 96 D.L.R. (3d) 58 (Man. C.A.); 106 D.L.R. (3d) 679 (Man. C.A.)).

Disputes often arise between vendors and purchasers as to who is entitled to the deposit. *The Real Estate Brokers Act* states that the deposit held by the broker is held in trust for both parties. The real estate broker is entitled, as trustee for both the vendor and the purchaser, to make a determination as to who is entitled and to pay out the deposit accordingly, but the broker does so at their own risk. The Manitoba Securities Commission, by way of a Direction issued in 1998 (also on its website) encourages brokers to use good discretion and release deposits without the consent of the other party when the circumstances are obvious as to which party is entitled to the deposit. Nevertheless, most brokers are risk-adverse and will usually continue to hold the deposit in trust until the parties jointly agree as to disposition or until a court rules on the matter. Brokers are not to pay out the deposit to either purchaser or vendor if there is evidence of a bona fides dispute between the parties related to the deposit. Barring agreement, the brokerage can pay the money into court by interpleader (see Q.B. *Rule 43*). If no determination is made in a reasonable amount of time, the *Act* prescribes that the deposit is eventually paid to the Securities Commission.

b) As Security for the Broker's Commission

One of the advantages of the real estate broker holding the deposit is that it provides the broker some security for the commission. Accordingly, if the vendor goes bankrupt after the commission is earned or has a change of mind and does not want to pay the commission after agreeing to do so, the real estate broker may be entitled to retain the deposit on account of the commission and in the event of bankruptcy may not have to turn the money over to the vendor's trustee in bankruptcy (*Re F.T.D. Ltd.* (1980), 35 C.B.R. (N.S.) 48 (Man. Q.B.)). On the other hand, if it turns out that there are insufficient funds to clear the title or otherwise close a sale, absent the vendor funding the shortfall, the broker may have to return some or all of the deposit in order for the lawyers to be able to close the transaction. This may be the penalty a listing broker pays for failing do a title search when listing the property or enquiring as to all liabilities against the property.

c) Interest

The Real Estate Brokers Act permits the deposit held by the broker to be maintained in a separate interest bearing account on the written direction of all interested persons. It is advisable in any transaction involving a large deposit to be held for a period of time where the interest earned will be significant, for the offer and acceptance to have a clause setting out that the deposit is to be invested by the real estate broker in a separate interest bearing trust account. The clause should also indicate who gets the benefit of the interest. If there is no clause in the agreement, the funds can still be invested provided both purchaser and vendor sign a written direction.

d) Certifying the Deposit Cheque

Where the real estate broker receives the deposit, the broker becomes responsible to confirm that the cheque provided by the purchaser is good. If the vendor accepts an offer and the purchaser's deposit cheque is subsequently dishonoured, the broker may become liable to the vendor for the amount of the deposit. Therefore the real estate broker should see to it that the deposit cheque is certified at the time the offer is accepted (*Weinstein et al v. A.E. LePage,* 1984 CanLII 1869 (ON CA), (1984), 10 D.L.R. (4th) 717 (Ont. C.A.)).

9. Relations Between Real Estate Brokers and Lawyers

In some cases an offer is made or an acceptance is given subject to the approval of the lawyer for the purchaser or the lawyer for the vendor, as to the form and/or content of the offer. This will usually result in the sales agent of the broker attending on the lawyer to obtain approval before the offer to purchase is fully executed by both parties.

Where a lawyer's approval is not sought before the contract is made, the real estate broker will send a copy of the executed sale agreement to the lawyers for each of the parties. The letter to the vendor's lawyer might also include an invoice for payment of commission and a request that the commission be remitted out of the sale proceeds. Where there are conditions attached to the offer, the broker may confirm that they have been satisfied or indicate that the lawyers will be notified when the conditions have been satisfied.

While the communications between the broker and lawyer will indicate an expectation on the part of the broker to be paid a commission, the lawyer must always keep in mind that lawyer is acting for and in the interests of either the purchaser or the vendor, and not in the interests of the broker. Notwithstanding any pressure from the broker to complete the transaction so that the commission can be paid, the lawyer must keep in mind that the first duty is always to the client. The client's interest in the matter must be protected.

The basis on which the real estate broker expects the vendor's lawyer to pay the commission is the directive to do so invariably found in the acceptance portion of the offer to purchase. For example, in the prescribed form of residential offer under *The Real Estate Brokers Act*, it sets out:

> *The Vendor further directs and authorizes the Vendor's lawyer named below to pay promptly to the Listing Broker any unpaid balance of the commission out of the sale proceeds as soon as the same are properly payable to the Vendor. The Vendor agrees not to revoke the foregoing direction and authorizations unless such revocation is agreed to in writing by the Listing Broker.*

A similar directive is often found in the listing agreement entered into between the vendor and the broker. The effect of this clause in the acceptance is that the vendor assigns in favour of the broker an amount sufficient to pay the unpaid commission out of the proceeds received by the vendor's lawyer. Notice of this assignment is given to the lawyer when the agent transmits a copy of the accepted offer to the lawyer. This assignment has priority over

any subsequent assignments given by the vendor. In the normal course, the lawyer must attend to payment of the balance of the commission owing to the agent, in accordance with the vendor's direction. Of course, before honouring a commission claim, the lawyer should obtain written instructions directly from the client approving the payment.

The legal nature and effect of the vendor's directive in the acceptance is not entirely clear. It might be thought that this directive is not a valid assignment because the real estate broker is not a party to the offer or acceptance. However that is only a superficial view of the matter. Firstly, the offer and acceptance has the effect of creating a trust in relation to the deposit, of which the real estate broker is both a trustee and one of the beneficiaries. Secondly, neither the agreement to pay commission nor the direction to the lawyer to pay the balance of commission out of the sale proceeds really forms part of the sale agreement; there is nothing in the offer that contemplates these provisions forming part of the agreement between the purchaser and the vendor.

The acceptance portion of the offer to purchase form is intended to create not only a contract with the purchaser, but also a commission agreement with the real estate broker and an assignment of the proceeds to be received by the lawyer in favour of the broker. Although the language in the clause in question says "direct and authorize" rather than "assign," in *Aikins, MacAulay and Thorvaldson v. Damon* (1981), 12 Man. R. (2d) 277 (Q.B.) and in *Canadian Imperial Bank of Commerce v. The City of Winnipeg and Manitoba Hydro* (1981), 13 Man. R. (2d) 424 (Q.B.), irrevocable directions to pay were held to be valid equitable assignments. While the lawyer has no fund to be the subject of the assignment at the time the offer to purchase is accepted, it has been held that an assignment out of a fund to come into existence in the future is a valid assignment (*Wolch v. Wolch* (1981), [1981] 4 W.W.R. 628 (Man. Q.B.)).

For determining the enforceability of the vendor's assignment, the main issue appears to be the sufficiency of the consideration for it. In *Family Trust Corp. v. Morra* (1986), 39 R.P.R. 187, the Ontario District Court first held that the lawyer was bound by the written direction to pay commission in the acceptance form, even though the vendor subsequently withdrew the instructions to the lawyer. The direction was found to be an equitable assignment, the consideration for which was the procuring of a binding offer of purchase and sale, and the lower court held that the lawyer was obligated to account to the agent for it. However, that decision was reversed by the Ontario Divisional Court [at 39 D.L.R. (4th) 762] which held that, because the commission became due under the listing agreement which existed before the offer to purchase was presented, the agent's presentation of the offer to purchase to the vendor could not form the consideration for the direction to pay the commission out of the sale proceeds in the acceptance clause. The assignment being without fresh consideration, the vendor was free to withdraw his direction and the lawyer was bound to comply with the vendor's subsequent instruction not to pay the commission. The claim against the lawyer was dismissed.

A succinct statement of the governing principle is set out in *Van Melle v. Muir*, [2000] O.J. No. 5717 (S.C.) at paragraph 34:

> *An irrevocable direction for a valuable consideration requiring that funds shall be applied to the debt owing to a creditor, creates a beneficial property interest in favour of the creditor. Such a direction, followed by receipt of the funds, on closing, makes a solicitor liable for failure to honour the equitable assignment, provided there is consideration for the direction: Family Trust Corp. v. Morra (1987), 60 O.R. (2d) 30; Re/Max Garden City Realty Inc. v. 828294 Ontario Inc. (1992), 25 R.P.R. (2d) 11; Kuhn v. Thiebault, [1996] O.J. No. 2331.*

The *Morra* decision would presumably not apply where the vendor's assignment was made under seal, or in a case where the commission was arranged, and the assignment given, at the same time as the offer was presented. It may well also be distinguishable in the current Manitoba scenario, because of amendments to the standard listing agreement widely used by real estate brokers on MLS® sales. This agreement contains a comparable provision by which the vendor makes an assignment of the net sale proceeds to the broker to secure payment of the commission. Provided that a valid listing contract is in place at the time the offer to purchase is accepted, and so long as the lawyer receives proper notice of the existence of the assignment which secures the commission, the vendor's equitable assignment would presumably be binding on the lawyer. In other words, once the lawyer has received the sale proceeds and has satisfied all of the vendor's obligations to the purchaser (such as paying off mortgages which are not being assumed, paying the requisite real property taxes, etc.), the vendor's lawyer then has a legal obligation to the real estate brokers to pay any balance of commission owing out of the remaining proceeds. If the vendor's lawyer does not pay the commission pursuant to that direction, but pays the proceeds to the vendor, the lawyer would likely be held liable to the agent for the commission.

A vendor's lawyer faced with competing claims to the balance of sale proceeds may interplead rather than risk incurring liability to one or more of the claimants. If there is a shortage of proceeds to pay both the commission and the lawyer's fees and disbursements, a question arises as to whether the lawyer's lien would entitle the lawyer to be paid first ahead of the real estate broker. The lawyer's rights may be subordinate to that of the real estate broker by virtue of a decision of the Manitoba Court of Appeal in *MacDonald v. Arenson*, 1980 CanLII 3050 (MB CA), (1980), [1981] 1 W.W.R. 573, in which it was held that funds received by a lawyer which are impressed with a trust for the benefit of a third party cannot be the subject of a solicitor's retaining lien. It is arguable, however, that the particular wording in the acceptance form subordinates the agent's right to commission to the solicitor's lien. The wording indicates that the lawyer is to pay the listing broker any unpaid balance of commission out of the sale proceeds as soon as the same are properly payable to the vendor. Since the solicitor's lien comes ahead of the right of the vendor to receive the proceeds, it can be argued that this amounts to a waiver by the agent in favour of the rights of the lawyer. However, the matter is unclear, and therefore a lawyer should ascertain before commencing work that there will be enough money to pay for the legal services. If

there is any danger that there will not be sufficient funds, the lawyer should make arrangements with all interested parties to protect the fees for the legal services.

What is the lawyer's position if the client purports to revoke the direction to pay the agent's commission out of the sale proceeds, directing that the entire proceeds be paid to the client and insisting on dealing with the agent without the involvement of the lawyer?

A similar dilemma arises where the vendor claims a right of set-off against the agent for some problem in the transaction, and so instructs the lawyer either to make a deduction out of the commission or not to pay it at all.

The lawyer must assess whether the vendor has already given an enforceable equitable assignment in favour of the broker, which is not capable of revocation, or whether through want of consideration or otherwise, the vendor is not bound by the "assignment" and is free to change the instructions. The difficulty is that the lawyer is hardly in a position to judge whether a court would find that consideration exists in the particular circumstances.

Another complicating factor can be the element of representation and reliance in the dealings between lawyer and broker. Under the MLS® listing contract, the agent is granted an equitable interest in the property to secure the amounts owed. The agent has the right to file a caveat against the title to give notice of that security, but seldom exercises that right. Arguably, the agent foregoes filing a caveat and so compromises the agent's own position in reliance on the "irrevocable" direction to pay from the vendor and the lawyer's inferred duty to comply with the direction. In light of the uncertainties as to the parties' legal rights, the prudent lawyer should either obtain the agent's consent to the vendor's revised instructions, or interplead to resolve the competing demands.

D. FORMS

1. Multiple Listing Contract

REAL ESTATE LISTING CONTRACT

BETWEEN: _____ AND _____
(Name of Owner(s) ("Seller")) ("Listing Brokerage")

_____ _____
Address

_____ _____

A member of the _____ Real Estate Board ("Board") and/or Manitoba Real Estate Association ("Association").

1. LISTING AUTHORITY AND TERM

A. The Seller hereby lists exclusively with the Listing Brokerage the property described in Paragraph 2 ("Property") until 11:59 p.m. on _____, _____ unless renewed in writing.

This contract comes into full force and effect on _____.

B. The Seller hereby:

i) authorizes the Listing Brokerage to obtain any and all information concerning the Property from any person, corporation or governmental authority;

ii) authorizes the Listing Brokerage to advertise the Property in any medium including the Internet, and if deemed appropriate by the Listing Brokerage, to publish, display and distribute any descriptive advertisement relating to the Property. The Seller acknowledges and agrees that it is not a breach of the Listing Brokerage's duty to the Seller if the publication of authorized information relating to the Property by the Multiple Listing Service(s)® results in the information becoming known to members of the public, including a prospective buyer and agents of a buyer;

iii) authorizes the Listing Brokerage to use, disclose and retain personal and property information provided for purposes relating to the listing and marketing of the property;

iv) agrees to give the Listing Brokerage full opportunity to show the Property to buyers during reasonable hours; and

v) agrees to allow the Listing Brokerage to place "For Sale" and "Sold" signs upon the Property and to allow other members of the Board/Association that cooperate with the Listing Brokerage ("Co-operating Agents") to show the property to prospective buyers.

2. PROPERTY

_____ _____
(Civic Address) (Name of City, Town or Municipality)

_____
(Insert brief legal description)

3. TERMS OF SALE

_____
(Listing price)

_____
(Possession date)

4. LISTING DETAILS AND CO-OPERATING AGENTS

The Seller authorizes the Listing Brokerage:

A. To list the Property with the Multiple Listing Service® of the Board/Association or any other real estate Board/Association in Manitoba that the Listing Brokerage selects and has access to, all of whose members I hereby expressly authorize to act as Co-operating Agents.

B. To publish in the Multiple Listing Service® of the Board/Association or of any other Board/Association that the Listing Brokerage selects and has access to, the information contained in this listing contract, the Data Input Form and the Sellers Property Condition Statement (when attached and signed by the Seller), and the sale price of the Property once an unconditional accepted offer exists. This information will also be provided to subscribers with contract access to these Multiple Listing Services®.

C. To place the listing information and any sale information in the database(s) of the appropriate MLS® system(s) and acknowledges that the MLS® database is the property of the Board/Association and can be licensed, resold, or otherwise dealt with by the Board/Association. The seller further acknowledges that the Board/Association may;

(i) distribute the information to any persons authorized to use such service which may include other brokers, government departments, appraisers, municipal organizations and others;

(ii) market the property, at its option, in any medium, including electronic media;

(iii) compile, retain and publish any statistics including historical MLS® data;

(iv) make such other use of information as the Board/Association deems appropriate.

5. LISTING BROKERAGE'S REMUNERATION

The Seller agrees;

A. To pay the Listing Brokerage a commission on the total selling price or rental value of the property listed as follows: (Insert commission arrangement expressed as a percentage(s) or dollar amount) _____ plus applicable Goods and Services Tax, if:

i) a legally enforceable contract of sale between a buyer and the Seller is entered into during the period of this contract (from any and all sources whatsoever); or

ii) a person inspects the Property during the period of this listing contract and purchases the Property within sixty (60) days (unless otherwise negotiated) after the expiry date of this contract; or

iii) a legally enforceable contract of sale between a buyer and the Seller is entered into within sixty (60) days (unless otherwise negotiated) after the expiry date of this listing contract in respect of which the efforts of the Listing Brokerage were an effective cause;

provided however that if the Property is subsequently listed after the expiration of this listing contract then the Seller shall be liable only for the payment of one commission on any sale, and such commission shall be payable to the Brokerage which has a current listing contract with the Seller.

B. To pay alternate compensation to the Listing Brokerage if:

i) a buyer presents an unconditional offer to purchase the Property upon the terms outlined in this listing contract but the Seller does not accept the offer to purchase without cause, in which case the full commission as outlined in 5A will be payable; or

ii) a legally enforceable contract of sale is entered into between a buyer and the Seller but the transaction is not concluded because the buyer defaults, in which case the compensation will be either 50% of the deposit or the commission payable as outlined in 5A, whichever is less.

C. That to assist in obtaining a buyer for the Property, the Listing Brokerage will offer to Co-operating Agents a portion of the Listing Brokerage's remuneration in the amount of $ _____ or _____ % (Fill in only one - lump sum or commission %) of the sale price plus applicable GST.

D. Exclusions: (if none, state "none") _____

E. The Seller hereby irrevocably assigns to the Listing Brokerage, from the proceeds of sale of the Property, the amount of remuneration due to the Listing Brokerage and authorizes the Listing Brokerage to retain this amount from the deposit moneys.

6. THE LISTING BROKERAGE AGREES AS FOLLOWS:

A. To act only as the agent for the Seller with respect to the Property except where the Seller consents to limited joint representation as outlined in sub-paragraph 7 C below.
B. To provide information about the Property to Co-operating Agents.
C. Not to accept remuneration from the buyer without the knowledge and consent of the Seller.

7. THE SELLER ACKNOWLEDGES AND AGREES AS FOLLOWS:

A. To promptly advise the Listing Brokerage of, and refer to the Listing Brokerage, all enquiries for the purchase of the Property, and to deliver to the Listing Brokerage all offers to purchase which may be received during the period of this listing contract or arising by reason of it.
B. That the real estate commission outlined herein is payable to the Listing Brokerage when the buyer assumes legal possession of the Property. The Seller further agrees that the Listing Brokerage is entitled to charge interest on unpaid commissions calculated at a date thirty (30) days from the date of legal possession at a rate of 2% per month (24% per annum).
C. The Listing Brokerage is permitted to list or show property of, or have agency relationships with, other sellers and buyers. When the Listing Brokerage also acts for a potential buyer or lessee of the listed property, both the buyer and seller will be asked to sign an acknowlegement of limited joint representation which will set out the limits of the Brokerage's agency duties.
D. Unless the Seller is otherwise advised, other Co-operating Agents will be representing the buyer or lessee of the Seller's property as the buyer's or lessee's agent.
E. The Seller hereby pledges all of the Seller's interest in the Property to the Listing Brokerage as security for payment of all money which may be owed by the Seller to the Listing Brokerage under this contract and hereby acknowledges that the Listing Brokerage is entitled to register and maintain a caveat at the Land Titles Office to give notice of this charge upon the Seller executing a legally enforceable contract of sale of the Property.
F. The Manitoba Real Estate Association and its Member Boards are collectors and distributors of information relating to the Property and are not responsible for its accuracy. The Seller agrees to release the Manitoba Real Estate Association and its Member Boards from any liability or legal action by the Seller concerning the accuracy of information relating to the Property.
G. Where the Seller's spouse is not an owner of the Property, the Seller will advise the Listing Brokerage if the Seller's spouse has occupied the Property at any time, or whether the Seller is otherwise aware that the Property is subject to a "homestead" interest.
H. To promptly advise the Listing Brokerage of any material change in the physical condition or status of the Property during the listing term, including any extensions to the term.

8. MISCELLANEOUS PROVISIONS

- "period" or "date of expiration" of this contract includes the period or date of expiration of any written extensions.
- "Property" may include a leasehold interest or a manufactured home, plus any other property designated by the Seller in the data input form or any addendum attached.
- "Sale" includes an exchange and "sale price" includes the value of the Property exchanged.
- For the purposes of interpretation and correlation between this document and the *Offer To Purchase Real Estate* pursuant to The Real Estate Brokers Act, the following terms are interchangeable in their use, namely: "buyer" and "purchaser"; "Seller" and "vendor"; "Listing Brokerage" and "listing broker"; "Co-operating Agent" and "selling broker".
- Interpretation of this listing contract and all matters concerning its enforcement by the parties shall be governed by the laws of the Province of Manitoba.
- The parties acknowledge that this contract fully sets out the terms of the agreement between them. Any alteration, variation or amendment to this agreement shall be made only in writing, signed by the Seller and by the Listing Brokerage's representative in multiple copies and a copy shall be delivered to each party to this listing contract.
- This listing contract shall be binding upon and benefit not only the parties but their respective heirs, executors, administrators, successors and assigns.

9. ENTIRE AGREEMENT

This Listing Contract means and includes this agreement, the data input form and Seller's Property Condition Statement (when attached and signed by the Seller). The Seller acknowledges having read and understood this listing contract; that it accurately describes the agreement with the Listing Brokerage; and a copy of it has been received by the Seller this date.

SIGNED THIS _____ DAY OF _____, 20____

_____
Seller's signature

_____
Seller's signature

_____
Witness to seller's signature

_____
Listing Brokerage's representative

REALTOR

BRANDON REAL ESTATE BOARD
MANITOBA REAL ESTATE ASSOCIATION
PORTAGE LA PRAIRIE REAL ESTATE BOARD
THOMPSON REAL ESTATE BOARD
WINNIPEG REAL ESTATE BOARD