



## CONFLICT OF INTEREST – BUYING A CLIENT'S PROPERTY

**Summary: A real estate broker who wishes to buy a client's property is in a significant conflict of interest. The real estate broker must comply with the requirements outlined in the *Real Estate Act* Rules [s.41(d), s.51(f), s.62(2)(3)] as well as those established by the courts (common law). In such cases, it is up to the client to determine whether the client relationship will continue or whether they will obtain independent representation. If a real estate broker buys a client's property, the price obtained must be as advantageous to the client as any other price the real estate broker could, by the exercise of diligence on his client's behalf, have obtained from a third party. Not only must the price paid be adequate but also the transaction must be a righteous one. In all cases, if there is any question or concern arising from the transaction, the burden of proof lies with the real estate broker to establish they fulfilled their duties and the transaction met the standards set by the *Real Estate Act* Rules and the courts.**

*Note: For the purposes of this Information Bulletin, where the context permits "real estate broker" or "real estate brokers" refers to all three categories of real estate licences that may be held by an individual, i.e. broker, associate broker and associate. A "client" refers to the seller of a property that is listed by the brokerage, whether that client is represented by the real estate broker who wishes to buy the property or is represented by another real estate broker associated with the same brokerage.*

Because of their education and work experience, real estate brokers have specialized knowledge and information to which the general public is not usually privy. Real estate brokers have information, for example, regarding current market conditions, property values and land use that the general public does not have. Uneven playing fields may result.

In addition to this real estate expertise, when a real estate broker wishes to buy a property from a client of the brokerage, in a common law brokerage, that real estate broker has direct knowledge of, or is deemed to know, all the confidential information provided by the client to the brokerage. This includes information regarding motivation, the price the seller is prepared to accept, and any other personal or property information disclosed at anytime in confidence by the seller to the brokerage. In addition to knowing the client's confidential information, that real estate broker's interests will be diametrically opposed to the best interests of the client in the course of negotiating the price, deposit, terms and conditions in any purchase contract.

Accordingly, if a real estate broker wishes to buy a client's property (listed by their brokerage) this constitutes an inherent and significant conflict of interest.

In a common law brokerage, there is an inherent conflict of interest because the agency relationship is between the seller and the brokerage. The agency relationship and fiduciary obligations extend to all the real estate brokers registered with the brokerage.

This conflict of interest exists regardless of whether the real estate broker interested in buying the client's property is the individual who represents the client, or if another real estate broker in the same brokerage represents the client, under a seller brokerage agreement. This agency relationship, once created, means all real estate brokers with the brokerage must act in the best interests of the client (seller) and fulfill all related fiduciary obligations.

It is critical for a brokerage and all of its real estate brokers to conduct themselves in a manner that maintains the trust and confidence of the client in the brokerage. The general and fiduciary duties of a real estate broker to act in a client's best interests at all times, maintain utmost loyalty, avoid conflicts of interest, exercise care and skill, not misuse a client's confidential information, act honestly and obey a client's lawful instructions are the foundation of the trust and confidence clients place in their agents.

## Requirements

When a real estate broker registered with a brokerage wishes to acquire an interest in a property listed for sale with or managed by the brokerage, the *Real Estate Act* Rules, s.62(2), place an obligation on the brokerage to take the following actions immediately:

- disclose to the seller of the property the existence of a conflict of interest;
- disclose to the seller the name of the buyer and the nature of the relationship between the buyer and the brokerage;
- disclose to the seller any of the seller's confidential information that the buyer may have already received;
- disclose to the seller who the buyer's representative will be; and,
- provide the seller with the opportunity to seek independent legal advice.

The disclosures outlined above must be made in writing, acknowledged by the client and maintained in the brokerage file. A copy of the written disclosure should also be provided to the client.

It should be noted, the brokerage's obligation to take the steps outlined above applies when the individual who wishes to buy the client's property is the broker, an associate broker, an associate, director, shareholder, official or an employee of the brokerage or any of their immediate family members. [*Real Estate Act* Rules, section 62(3)].

Giving the client an opportunity to seek independent legal advice is mandatory; however, it is recommended the client be given the opportunity to seek any independent advice that is appropriate given the circumstances. It is recommended the real estate broker make their offer *"subject to the Seller, on or before [a specific date which should ensure sufficient time is provided for the seller to obtain all required professional advice], receiving and being satisfied with, such professional advice as he deems appropriate, including but not limited to legal advice as to the terms and conditions of this contract, appraisal advices as to the current fair market value of the property and tax advice."*

The *Real Estate Act* Rules, s.51(f), places additional responsibilities on real estate brokers. All real estate brokers are required to have in place written policies and procedures for personal trades. Those policies and procedures must meet or exceed the requirements of section 62 of the *Real Estate Act* Rules.

In addition to these specific requirements in the *Real Estate Act* Rules, a real estate broker must always be aware of the ongoing requirement to fulfill their fiduciary obligations to their clients *Real Estate Act* Rules, s.41(d). Because of the fiduciary relationship that exists, the Courts have established a number of obligations that must be adhered to when a real estate broker wishes to buy a client's property:

- The real estate broker has a duty to make full disclosure of all facts within the knowledge of the real estate broker, which might affect the value of the property;
- The price obtained must be as advantageous to the principal as any other price the real estate broker could, by the exercise of diligence on his or her principal's behalf have obtained from a third person;
- Not only must the price paid be adequate but the transaction must be a righteous one, and the price obtained must be as advantageous to the principal as any other price that the real estate broker could, by the exercise of diligence on his principal's behalf, have obtained from a third person;
- A real estate broker shall not make any profit from his or her position except that remuneration agreed upon between the principal and the agent;
- A real estate broker should not use his or her position as agent, or information gained by virtue of the position, unjustly and to his or her own ends; and,
- The onus is upon the real estate broker to prove that he or she has complied with his or her duties.

### Practice Tip

Real estate brokers should be aware a client may have concerns in these situations. They may be uncomfortable with the brokerage continuing to act as their agent if one of its real estate brokers is interested in their property and wishes to make an offer. The client may be concerned the brokerage will not be able to properly advise them on price or other terms related to an offer. The client may be concerned about the brokerage's ability to maintain confidentiality of their information, remain completely loyal and to act in the best interests of the client when one of their real estate brokers would have such a direct interest in the outcome.

Real estate brokers must remember it is the client's right to decide whether or not they will allow the brokerage or any of its real estate brokers to represent them in this situation. The client may want to consider the offer, but be represented by another brokerage which is able to provide the advice, and undivided loyalty required to act solely in their best interests.

If a client is prepared to allow the brokerage to continue to represent them in this situation, the brokerage must make every effort to ensure the client receives independent and impartial advice. Although it is not a guarantee that all conflict of issues will be addressed to the satisfaction of the client, the services of the broker or a broker's delegate should be utilized to handle negotiations. It is critical the client is given the opportunity and time to seek legal advice and, if there is any question about the price being offered, an independent appraisal. There may be other types of independent advice required, e.g. accounting/tax advice, depending on the nature of the transaction.

The brokerage would be well advised to obtain written confirmation of the client's consent for the brokerage to continue to act as the agent, including any limitations the client and the brokerage may have agreed to with respect to the obligations and duties outlined in the seller brokerage agreement.

Common law has established it is difficult for a real estate broker to overcome the inherent conflict of interest that exists when the real estate broker wishes to buy a property from a client to whom the real estate broker and brokerage owe fiduciary duties. Indeed, how can a real estate broker be personally involved in a transaction yet profess to place his or her client's interests above his own? How can the brokerage and all of its brokers continue to act in the interest of the client?

RECA has conducted investigations of real estate transactions where real estate brokers have purchased a client's property. Typically, clients (sellers) will lodge their complaints after the transaction has closed and they receive information that leads them to believe they were taken advantage of or did not receive fair market value for their property. Such cases can result in significant harm to the consumers involved and often lead to disciplinary action and/or legal action against the real estate broker, brokerage and/or individual real estate broker. They also undermine public confidence in the industry, harm the integrity of the industry and bring the industry into disrepute.

The best practice, and recommended approach, is for a brokerage to have a policy that a real estate broker may not buy a property listed for sale by the brokerage. That policy avoids the inherent conflict of interest that arises and allows the brokerage to continue to act in the best interests of the client.