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How To Buy and Sell Your Home With Confidence



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REAL ESTATE
ASSOCIATION

Courtesy of:
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WORKING WITH A REAL ESTATE SALESPERSON

Buying or selling a home is often one of the largest financial transactions a person makes. It is important to consider the kind of legal relationship you might be entering into with the real estate agent you choose to assist you.

The term “agent” is often used interchangeably with a real estate salesperson, broker, licensee or the real estate firm they are employed with. This brochure will refer to the individual representative as the “salesperson” and the real estate firm he/she works for as “the real estate firm” or “agent”.

YOUR RELATIONSHIP WITH THE SALESPERSON

When you engage a salesperson to represent you or act on your behalf in a particular matter an agent/client relationship arises between you and his/her real estate firm. This relationship can be created by contract such as when you sign a listing contract for the sale of your home or a buyer’s agency contract for representation in buying a home. It can also arise through the implied conduct and activity between you and the salesperson such as when the salesperson takes on the role of representing you in viewing properties, obtaining information, or assisting in negotiations. Through these actions and conduct, it may become evident that the salesperson has undertaken to represent you even though your legal relationship has never been discussed. In the absence of any written listing or buying contract with the real estate firm, an agent/client relationship can be created when a salesperson undertakes to do something on your behalf which results in your reliance and acceptance of the salesperson’s actions on your behalf.

THE SALESPERSON’S DUTIES AND OBLIGATIONS

Once an agent/client relationship is formed, the salesperson and his/her real estate firm take on duties and obligations intended to protect and promote your best interest in the transaction. The following outlines some of their duties arising out of an agent/client relationship in a typical real estate transaction:

1. **Loyalty** to serve your best interests ahead of anyone else’s, including his/her own and at all times to exercise good faith and to disclose all known facts and information which may influence your decision.
2. **Obedience** to follow all of your lawful instructions.
3. **Discretion** to keep confidential your private circumstances, motivations, and confidences which you shared with the salesperson or which the salesperson or the real estate firm has learned.
4. **Competence** to exercise reasonable care and skill in performing all assigned duties.
5. **Accounting** of all money, deposits, or other property entrusted to them.



TYPES OF AGENCY RELATIONSHIPS

AGENT REPRESENTS ONE PARTY:

In Manitoba, the approach to real estate agency relationships is one that reflects the general understanding and expectation of buyers and sellers. It is generally understood that whether selling or buying, the salesperson and his/her real estate firm that you engage and rely on for representation has formed an agency relationship with you whereby some or all of these agent/client duties arise. It is this approach that is reflected in your local real estate board's multiple listing contract for residential property and the statutory residential offer to purchase form that the salesperson is required to use for residential properties. It is assumed, that unless the parties otherwise agree, the salesperson and the firm representing the seller is the seller's agent and the salesperson and the real estate firm representing the buyer is the buyer's agent.

AGENT REPRESENTS BOTH PARTIES:

It may arise that your salesperson or his/her real estate firm also represents the person who wishes to buy your home (or represents the owner of the home you are interested in buying). This may occur (even though the salespeople are different individuals) when both salespeople are employed by the same firm. When this happens, a conflict of interest arises and the real estate firm can only continue to represent both parties if both parties consent to the joint representation and acknowledge the impact that the joint representation will have on the agent's duties. You may be asked to sign an Acknowledgement of Limited Joint Representation. The terms of that acknowledgement will set out the agreed limits of the agency duties outlined earlier in this brochure. When both parties agree to limited joint representation, the salesperson and his/her firm's relationship to both parties is tempered by the requirement for fairness and evenhandedness resulting in the firm being unable to favour the interests of either party. Subject to the terms of the Acknowledgement of Limited Joint Representation, the salesperson may no longer be able to keep confidential certain types of information relevant to the transaction from the other party and may be compelled to disclose these facts in an exercise of openness and fairness. Even though this conflict arises, if both seller and buyer consent to limited joint representation and agree to a variation of the agent's duties, the agency relationship may continue.

If you have any questions or concerns about joint representation and the impact it will have on the agency duties you expect from your salesperson you should discuss your concern with the salesperson involved before entering an agent/client relationship. The terms of any listing or buying contract that you sign may include your consent to the real estate firm representing both parties jointly; if that is not your desire, the agreement should be amended accordingly.





NO AGENCY REPRESENTATION:

Apart from a single agency relationship (where the firm represents one party) or joint agency relationship (where the firm represents both parties), it is possible to engage the services of a salesperson without you and the real estate firm establishing an agent/client relationship. An example of this might be when you call a salesperson in response to an ad or a sign on a property, or when you attend an open house and deal with the salesperson representing the seller. In these instances, the salesperson you ask to assist you should make it clear to you that in showing you a particular property he or she is representing the seller alone. Even though it is clear between you and the salesperson that the salesperson is not representing you, the salesperson may still owe certain legal and ethical responsibilities to you which include the following:

1. **Honesty and Fairness** in response to all of your questions concerning real property the salesperson is promoting.
2. **Care and Skill** in providing accurate information and assistance with the offer to purchase contract, in presenting the offer you submit, in dealing with conditions, in explaining legalities, and overall general assistance.

One of the disadvantages of dealing with the other party's agent or not having an agent/client relationship with the salesperson you have assisting you is that you cannot expect the salesperson to negotiate price and terms on your behalf, or in your best interest, or disclose all information that may influence your decision because the salesperson may not have those obligations and such activity may be contrary to the best interests of the client whom the salesperson represents.

Making an Informed Choice

Your brokerage representative has the responsibility of explaining the options you have when choosing to work with a real estate brokerage. It is in your best interests to understand what duties you are owed and what limitations there are or might be when you choose a certain relationship. Ask questions and be sure you are satisfied with the answers before you enter into a relationship with a particular brokerage. That's the surest path to success!

Contracts

AUTHORITY TO CONTRACT

In order to enter into a brokerage service agreement, agreement of purchase and sale, or other contractual arrangement, you must have the lawful capacity to enter into such contracts, (i.e, you must be the buyer or seller, or have a lawful power of attorney for the seller or buyer, or be the lawfully appointed executor of the deceased owner's estate, etc.). If you do not have such authority, you may incur personal liability for misrepresenting your authority.

VERBAL CONTRACTS

Licensed real estate salespeople in Manitoba are obligated by provincial legislation to communicate all offers, counter-offers, withdrawals, and acceptances in writing. Having all such offers, acceptances, etc. in writing also helps to minimize the risk of misunderstandings and disappointments at a later date.

OFFER TO PURCHASE

In Manitoba, the government prescribes forms of offers to be used by real estate registrants in the purchase and sale of single family residential houses and condominiums.

The offer to purchase (agreement of purchase and sale) is the standard form document used to set out the terms and conditions of a transaction – the contract between a buyer and seller.

As a potential buyer or seller, whether you are a client or customer, you should ask for a copy of this document early in the relationship so you can become familiar with its basic clauses. Familiarity with the clauses will help you:

- be better equipped to understand the process of negotiating a purchase or sale of a property;
- know what questions to ask your brokerage representative or your lawyer; and
- have a better appreciation for what is involved in the preparation of an offer or acceptance.

OFFERS, COUNTER OFFERS & ACCEPTANCES

When a buyer finds a property he/she wishes to purchase, it is customary for him/her to make an offer through the brokerage representative. The offer may be accepted by the seller or modified and returned to the buyer as a counter offer. If the buyer receives a counter offer, he/she may accept or reject it. If the buyer rejects the counter offer, he/she must make a new offer to continue negotiations.

The exchange of offers and counter offers will continue until the buyer or the seller accepts the terms proposed by the other party or withdraws from the negotiations. Where buyers and sellers are working with brokerage representatives, the exchange of offers, counter offers, and acceptances is conducted through their representatives.





Buyers and sellers must understand that their brokerage representatives:

- cannot make or accept an offer on their behalf;
- are their representative for the purposes of communicating and receiving notice of offers, counter offers, and acceptances unless written instructions to the contrary have been given by the buyer or seller.

Keep in mind the following exceptions which may apply:

- an offer may generally be withdrawn by the buyer at any time before the seller's acceptance of the offer has been communicated to the buyer;
- an acceptance of an offer or counter offer may only be effective once the acceptance is communicated to the party who made the offer or counter offer or to his/her duly authorized agent;
- an acceptance must be communicated in the manner specified and by the time prescribed, if any, in the offer or counter offer; and
- when an offer or counter offer has been accepted, there is a binding contract between the buyer and seller, even though the contract may be subject to certain conditions that must be met (for example, the buyer being approved for a mortgage).

MULTIPLE OFFERS

Sellers may receive multiple offers for their property, particularly in an active real estate market. Buyers and sellers should have an understanding of the process they may encounter if a multiple offer situation arises.

While a seller's brokerage representative must communicate all offers to the seller as they are received, there are no rules that govern the order in which the seller must respond to the multiple offers. The seller is not obligated to accept the highest offer. The seller decides which offer to accept, which offer to counter offer, or if all offers should be rejected.

In Manitoba, it is a rule imposed on salespersons that listing agents inform buyers (through their agent) when they are in a competing offer situation without disclosure of the terms of any of the competing offers, either directly or by implication. The intention of this rule is to allow buyers the opportunity to make an informed decision as to whether or not to make any amendment to the offer to purchase. Likewise, if circumstances arise where the buyers are no longer in competition with another buyer, the buyer is to be advised of that fact.

Members of the public can expect that when they deal with a real estate registrant in Manitoba, the contents of any offer to purchase that they are a party to will be treated with utmost confidence.

It is also acceptable for a seller, through his/her listing agent, to seek clarification of the buyer's offer, and identify a "short list" of offers that he/she may choose to work with. At the conclusion (with an acceptance of one offer) buyers can expect that the seller/listing agent will provide his/her signatures on rejected offers, confirming that they have been considered. A buyer/buyer agent is also entitled to receive a list from the listing agent confirming the identities of the buyer agents (but never the identity of the buyer or the terms of those offers).

This is only a brief discussion of multiple offer protocols. For a more complete review of these policies which have been issued jointly by The Manitoba Securities Commission and Manitoba Real Estate Association, you can view the protocol at the MSC website as follows: www.msc.gov.mb.ca/real_estate/policies_legislation/policies/offers_dir.html.

CONDITIONAL OFFERS

In the purchase of real estate, buyers may want additional information and clarification to learn more about the condition of the property and to identify major defects as well as to ensure that the information given, and representations made, by the seller are in fact accurate. A prudent buyer should consider an inspection from a qualified individual.

Your real estate salesperson can write conditions in your offer to purchase to allow sufficient time to complete the requested inspections. It is understood that in most instances the buyer is responsible to pay any costs associated with inspections and reports. The following list is not all-inclusive, but includes the more common reports or inspections usually requested:

- obtaining a home inspection to your satisfaction;
- obtaining an engineering inspection to your satisfaction;
- securing satisfactory financing;
- receiving approval of a third party to the transaction (e.g. a parent, lawyer, employer, etc.);
- having the seller complete a Seller's Voluntary Property Condition Statement to your satisfaction;
- obtaining satisfactory tests for well water and septic system;
- inspection of wood burning device and confirmation of satisfactory insurance coverage;
- selling their current property.

INSPECTIONS AND REPORTS

The following are items for buyers to consider when they are preparing an offer to purchase.

APPLIANCES: A condition can be placed in the offer which has the seller warrant that the existing appliances will be in working order on possession date. The buyer should record the model and serial numbers as a precaution.

APPRAISAL: An appraisal provided by an accredited appraiser with respect to the fair market value of the property. These reports may be required by mortgage companies to determine if the value of the property warrants the requested amount of mortgage to be applied against the property.

ELECTRICAL INSPECTION: by an accredited electrician of the electrical components in a home with a report outlining any deficiencies.

ENGINEER'S REPORT: by an engineer on any number of issues including the structural integrity of the building(s).

ENVIRONMENTAL TESTING: by an accredited environmental company to determine if there are any problems with the



property. For example, it can cover issues like air quality, soil contamination, presence of mould, etc. If it is a purchase of a rural or former commercial property, the buyer should consider a “site analysis” (phase I and/or phase II).

FINANCING: If the buyer is obtaining mortgage financing, a clause should be inserted in the offer to ensure that the buyer is able to get financing on terms acceptable to them. A financial institution considers both the buyer and the property itself in considering approval of financing.

FOUNDATIONS: In Manitoba, the single most common cause for concern between buyers and sellers is related to structural and foundation problems. Buyers are strongly cautioned to review this issue as part of their purchase, and consider possible inspections or seek a specific warranty from the seller related to knowledge of previous problems such as water seepage.

FURNACE & CHIMNEY INSPECTION: to determine if the furnace and chimney meet current safety standards.

GROW OP: If you know or suspect that the property was used to grow or manufacture illegal drugs, you should ask specific questions of the seller and listing salesperson, have a property inspection done, and/or insert a clause into the offer to purchase asking the seller to warrant that his/her property has not been used as a grow op.

HOME INSPECTION: a general inspection of the condition of the property. .

INSURABILITY: a report to determine if the house is insurable in its current state. There may be issues related to items such as wood burning devices and boiler heating systems. It is important to ensure that the property can be insured at a rate which is satisfactory to the buyer.

LAWYER'S APPROVAL: A clause can outline that the offer is subject to review of both form and content of the contract within a reasonable amount of time.

PLUMBING: An accredited plumber can complete an inspection to identify any evident problems.

SELLERS VOLUNTARY PROPERTY CONDITION STATEMENT: A written statement provided by the seller dealing with common concerns of buyers.

SEPTIC/SEWER: An inspection to determine if the existing system is operating properly and meets with existing standards.

SURVEYOR'S CERTIFICATE/ZONING MEMORANDUM: The survey shows the boundaries of the property and the location of all improvements. The memorandum in conjunction with the survey, determines if the location of the improvements comply with the zoning by-law. There is another product called “title insurance” which insures some of these issues in place of obtaining a report or inspection. For more details, you can discuss title insurance with your lawyer or financial institution.

VERMICULITE INSULATION: There are opinions that suggest that the presence of zonalite/vermiculite insulation can be a health hazard to susceptible individuals if the insulation is not contained. The buyer can seek an environmental inspection (e.g. from an environmental consultant) to investigate potential environmental issues.

WATER QUALITY/QUANTITY: Water can be tested to determine the recovery rate of the water supply and the quality of the water for consumption.

WOOD STOVE/FIREPLACE: Codes and standards for wood burning devices change quite frequently. Even though existing wood burning devices are being used by the seller, they may not meet current standards. The new owner will have to comply with the latest standards in order to be insurable.





CAVEAT EMPTOR (LET THE BUYER BEWARE)

Almost all used residential real estate has an existing defect or deficiency of some sort. Caveat Emptor ("Buyer Beware") is a time tested legal maxim that applies to the purchase and sale of most real estate in Manitoba. This rule places the responsibility on the buyer for existing defects and deficiencies, making it important for the buyer to conduct his or her own inspections of the property before entering into a purchase and sale agreement. Unless the agreement states otherwise, it is assumed that the buyer has had an opportunity to inspect the property, is satisfied with its condition (including all defects and deficiencies), and accepts the property "as is".

A seller has no legal obligation to point out any property defects or deficiencies and is entitled to remain silent. There are, however some exceptions to this rule as follows:

1. The seller must disclose a defect or deficiency if it is **hidden and not easily discoverable on inspection** by the buyer (or the buyer's engineer, property inspector or other expert), **and is known** to the seller, **and** it is of such significance that it would result in a health or safety hazard, or would otherwise render the property unusable. The real estate salesperson who is representing the seller has the same duty to disclose such property defects as the seller.
2. If the seller volunteers to break the silence and answer any questions or make any statements concerning the condition of the property, the seller must answer all questions fully, completely and accurately so as not to mislead the Buyer.

As a result of the impact of Caveat Emptor, the buyer is strongly advised to make appropriate enquiries about the property or obtain expert advice from a qualified engineer, property or building inspector, or other expert. In the absence of disclosure made by the seller (Sellers Voluntary Property Condition Statement for example) a seller does not usually disclose all known facts **discoverable upon inspection** concerning the condition of the property (unless specifically asked) because the buyer is expected to make the inspections and accept the defects and deficiencies, independent of the seller's involvement.

If the buyer wishes to obtain a warranty from the seller on the condition of the property, or any component thereof, the buyer is strongly advised to use the services of a real estate salesperson or lawyer who will be able to incorporate a specific warranty into the purchase and sale contract.

DEPOSITS

It is customary for a buyer to include a deposit with an offer. There is no rule of law that requires a buyer to pay a deposit on making an offer or that determines the amount of a deposit. In practice, sellers are often not prepared to consider offers that are not accompanied by a significant deposit.

A deposit serves at least two purposes: it will be credited towards the price the buyer agrees to pay and it is a clear signal that the buyer is serious about purchasing the seller's property. Once the seller accepts the buyer's offer the seller may lose other potential buyers. Sellers may have the right to retain the deposit when buyers fail to complete the transaction without a valid reason.



The monies are held in trust on behalf of both parties to the transaction. Usually, if a buyer terminates an agreement under one of the conditions and the notice is given within the specified timeframes, the seller will release the deposit. Occasionally, the seller will dispute the release of the deposit and this could result in the buyer having to take legal action to recover the deposit.

TAX IMPLICATIONS

The purchase and sale of property, including residential property, may have tax implications. You should seek appropriate advice regarding possible tax implications for a transaction before you enter into a contract either as a buyer or a seller.

PROPERTY INSURANCE

Most buyers will want to arrange for property insurance on the property for their own personal protection. Should there be financing on the property, then the lender would normally require property insurance to be in place on closing. Normally, the insurance must be arranged early in the transaction so that the buyer knows he/she is able to obtain the necessary insurance.

Some insurers will require that an insurance inspector view the property to ensure it meets the insurer's requirements. Sometimes issues will be raised about the property's condition or a specific item, such as a woodstove installation.

FINTRAC

The real estate salesperson you are working with is required by federal law to ask for and verify personal information. The law requires salespeople to obtain, record, and retain the personal information of their clients, including date of birth and occupation. To do this, they must ask for a government-issued identification document such as a driver's license, passport, etc. You should not provide your Social Insurance card or Manitoba Health card as identification. Real estate firms are required to keep this information confidential and to retain it for five years.

Also, every time funds, such as a deposit, are received by a salesperson during the course of a real estate transaction, he/she is required to record the amount received and how it was obtained. Remember that these two requirements are federal law (the Proceeds of Crime (Money Laundering) and Terrorist Financing Act) and all real estate salespeople must adhere to its provisions.

LEGAL ADVICE

It is very important that buyers and sellers are comfortable with the documents they are signing. At any time throughout the buying and selling process, you should feel free to contact your lawyer for legal advice.

Sometimes a buyer or seller may insert a clause in an Offer to Purchase or acceptance that allows either party a specified period of time, after acceptance, to have their lawyer review and approve the agreement. Normally, the lawyer would review the agreement to ensure the proper protections are contained for their client and all the necessary issues have been covered off properly.

CLOSING COSTS

When buying or selling a home, please remember that there will be additional costs associated with the closing of the transaction.

As a Seller

The following is a list of some of the typical closing costs when selling a home:

- real estate commission plus GST
- lawyer's fee (discuss this with your lawyer)
- miscellaneous charges incurred by your lawyer; e.g., courier services, title search, ordering copies of encumbrances, photocopying, fax charges, etc.
- your portion of any property taxes
- mortgage discharge fees for any mortgage on your property (your bank and Land Titles both will have discharge fees);
- any penalty for discharging your mortgage earlier if you have a closed mortgage
- interim financing costs if you are also purchasing a home
- costs of discharging any judgements, builders' liens against your home
- all utilities will have to be paid up to the date of possession

As a Buyer

The following is a list of some of the typical closing costs when buying a home:

- lawyer's fee (discuss this with your lawyer)
- miscellaneous charges incurred by your lawyer such as for title searches, tax search, attending at Land Titles to register documents such as transfer of title or mortgage, photocopying, courier services, etc.
- buyer's portion of property taxes
- fee to verify zoning and obtain zoning memorandum if necessary
- interest on your mortgage between possession date and when Land Titles office registers the transfer
- Land Transfer Tax
- cost of new survey if not available from the seller
- fee for title insurance if required

This has been a short summary of some of the issues you should consider in the purchase or sale of residential real estate. For more information on real estate issues please visit www.realestatemanitoba.com.





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