

NOVEMBER 1, 1994



TO ALL REAL ESTATE BROKERS,  
AUTHORIZED OFFICIALS AND SALESPERSONS  
PROVINCE OF MANITOBA

## REFERRAL FEES

The Manitoba Securities Commission recently was asked to clarify the issue of referral fees or other incentives received by registrants in the real estate industry.

Various fees or incentives may flow or result from a real estate transaction, and this discussion encompasses all of these. The most common are mortgage referral fees or interest-free loans from lending institutions, market evaluation or appraisal fees, and referral fees that are paid by moving companies and other service industries which are indirectly associated with the real estate industry.

The questions which the Commission was asked to consider are: (1) Can a fee be paid directly to a salesperson or authorized official, or must the fee be paid to the employing broker? (2) If the fee must be paid to the broker, does it have to be paid into the trust account? and, (3) Does the arrangement to receive a fee or other benefit have to be disclosed by the person receiving it? If so, to whom must the disclosure be made, and must it be made in writing?

Section 15(6) of The Real Estate Brokers Act states:

“No authorized official or salesman shall collect or be entitled to collect any remuneration or reward in respect of a transaction in real estate from any person other than his employer.”

In the Commission's view, the purpose of subsection 15(6) is to ensure that all fees resulting from, and claimed or received in connection with, real estate transactions are disclosed and paid to the employing broker. Under the registration provisions in the Act, a broker is responsible for all real estate activities of its employees. The Commission's position is that subsection 15(6), which prohibits an authorized official or salesperson from receiving a fee from a person other than the employing broker, is an essential element in the broker's supervisory authority under the Act. Clearly, if a broker's employees were allowed to enter into private deals respecting fees, and be paid directly, the broker's supervisory role would be seriously limited.

Secondly, the fee must be paid into the broker's trust account, and be included in the broker's trust account audit at the end of the broker's year. This requirement flows from subsection 10(l) of Regulation 57/88 under the Act which in essence permits a broker to pay directly into the general account only those fees or commissions that are received from another broker.

With regard to disclosing the fee to the parties in a transaction, the Commission's position can be summarized as follows.

All payments received by a registrant in connection with a real estate transaction must be disclosed in advance by the registrant to the agent's principal or client in the real estate transaction. This is a basic principle of agency law. It is of little consequence that the fee being claimed or received by the agent is likely to be of little or no interest to the principal or client: it must be disclosed.

As for disclosure to the purchaser, the Commission takes the position that whether or not the purchaser is the agent's principal or client, the purchaser also must be fully informed in advance of the fact that the agent will be receiving a fee. This information will notify the purchaser that the agent has a personal interest in referring the purchaser to a particular mortgage lender, moving company, etc., from whom the agent will be receiving a referral fee.

If a fee happens to be received unexpectedly, i.e., not pre-arranged, it should be disclosed to the parties when it is received.

The Commission strongly suggests that the disclosure of the fee should be made in writing. In the event of a fitness hearing before the Commission, the registrant involved would be required to establish satisfactory evidence to show that advance disclosure of the fee or other benefit was made to all parties by the registrant.

Registrants should also be aware that the Criminal Code of Canada contains provisions dealing with secret commissions. In addition to disciplinary proceedings by the Commission, a registrant who receives a benefit which is not disclosed could be subject to criminal prosecution and/or civil liability for failing to meet the standards imposed on agents.

Please take note that this notice supersedes and replaces the notice previously issued by the Commission on April 21, 1989 regarding referral fees and incentives.

The Commission is requesting that brokers give a copy of this notice to all salespersons and authorized officials in their employ.

J. W. Storsley Registrar  
The Real Estate Brokers Act