



Bob Aaron bob@aaron.ca

October 13, 2001

Why bar lawyers from real estate transactions?

Flawed proposal would inhibit legal advice to clients

Larry Peterson is a lawyer who practises real estate law from offices in Sault Ste. Marie, Bruce Mines, and Blind River. Serving the rural area of Northern Ontario, he often mentions properties for sale to clients he thinks might be interested in purchasing them. Sometimes he charges a small fee for the service; most times he does not.

Peter Fallis carries on an extensive real estate and commercial law practice from his office in Durham, Ont. He has 30 years of experience in matching buyers and sellers of real estate and in negotiating transactions of residential, commercial and industrial properties.

But under draft legislation proposed in July by Consumer and Business Services Minister Norm Sterling, they, and the 8,000 other lawyers who handle real estate law in Ontario, face fines of \$50,000 and two years in jail - not to mention disbarment - for doing what we have traditionally done since being called to the bar.

In the current Real Estate and Business Brokers Act (REBBA), lawyers are exempt from registration as real estate agents or brokers where a trade in real estate is made as part of the lawyer's practice. That exemption, which has been in force for decades, has been deleted from the draft legislation.

Sterling's proposals for a new REBBA prohibit any person from engaging in a "trade" in real estate unless that person is licensed as a real estate agent or broker.

In a wide-ranging definition of the term "trade," Sterling includes "any act, advertisement, conduct, or negotiation" which "directly or indirectly" furthers or advances "any disposition, acquisition, transaction, offer or attempt" to buy, sell, trade, exchange, lease, or list real estate.

Based on the plain wording of this overly broad definition, any lawyer who advises a client, assists in the negotiation of an offer in a real estate transaction, or does any other act to further the completion of a contract, is guilty of an offence unless he or she is a licensed real estate agent.

If passed in this form, the amended REBBA would significantly trample on the ability of lawyers to provide legal advice. It also improperly infringes on the jurisdiction of the Law Society to govern the legal profession in the public interest.

It is unlikely that the provincial cabinet could have seen Sterling's proposals before they were released in July. Had this flawed legislative proposal been reviewed in advance by the Attorney-General or his department (which is the ministry responsible for the Law Society Act), or Sterling's other cabinet colleagues, it is doubtful whether it would have gone forward in its current form.

The Ontario Bar Association (OBA) is an association of lawyers, judges, and law students in Ontario. It exists to advance the interests of its diverse membership and to promote the essential role of the legal profession in our society. Last month, OBA president James O'Brien submitted to Sterling the organization's response to his ministry's proposals.

Prepared by the OBA's real property section under Toronto lawyer Steven Pearlstein, the submission argues that the public "should have the most liberal access to the fullest range of legal advice and services in regard to trade in real estate."

"It is not in the best interests of the public to inhibit their access to legal advisers at any stage or in regard to any aspect of these trades in real estate," it continues.

On the topic of the exemption from registration as agents or brokers, the OBA report argues that lawyers are already heavily regulated by the Law Society. It notes the requirements for membership in the Law Society, in most cases, exceed those for registration under the draft REBBA.

Sterling proposes that lawyers who assist in real estate "trades" or negotiations should be registered under both the Law Society Act and the Real Estate and Business Brokers Act, but he presents no reasons why double registration is necessary to protect the public. Rather, the OBA argues, double registration will create significant confusion and increased costs to the public.

"Regulating lawyers under two regimes," says the OBA, "will not provide any greater protection for the public than simply maintaining the existing regulation of lawyers by the Law Society of Upper Canada which has been effective for many years and about which there appears to be no public complaint."

As a columnist, as an elected member of the board of the Law Society, and as a frequent spokesman for real estate lawyers, I have some questions I would like to ask Norm Sterling about his legislative proposals. Here are three:

- What harm was the minister trying to address by removing the exemption from registration for lawyers, bankers, lending institutions, auctioneers and securities dealers?
- What cogent reasons does the minister have for removing the registration exemption for lawyers before they can advertise and negotiate real estate transactions?
- What harm could consumers suffer if they used a solicitor rather than a licensed real estate broker or salesperson to consummate a transaction?

Bob Aaron is a leading Toronto real estate lawyer.

Please send your inquiries and questions to bob@aaron.ca or call 416-364-9366.