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Tory bill takes aim at consumers

Ontario's minister of consumer and business services, Norm Sterling, has finally introduced Bill 152, his proposed new Real Estate and Business Brokers Act. The bill, which received its first reading Dec. 12, the day before the before the Legislature's winter recess, is intended to "improve consumer protection" and "encourage the development of a level playing field for this important economic sector," a ministry statement says.

Although some parts of the bill are progressive such as the prohibition of false or misleading advertising in my opinion it's the worst piece of consumer legislation introduced by this government in recent memory. It sets consumer protection back by years, if not decades.

It encourages the continuation of monopolies designed to restrict freedom of choice for the consumer, and it ensures that sales people for a large segment of the new home and condominium industry can continue to make blatant misrepresentations to consumers without any fear of government sanction.

Let's start with the sales of new houses and condos, an area untouched in Bill 152. As I previously reported in this column, in the Toronto area alone as many as 10,000 new homes representing \$3 billion in consumer spending are sold by unlicensed sales people. Although most are responsible, well-trained, competent and polite, there are some bad apples in the barrel and consumers have no recourse for misrepresentations, or worse.

Under Bill 152, full-time salaried employees of builders retain their exemption from licensing, registration, training, insurance, regulation, ethics and discipline. I have a thick file of letters from readers who have been misled by unregistered sales staff at the sales offices of a small number of builders. It's hard to take Sterling seriously when he told the Legislature that the new act will "increase consumer protection." I'll be sure to tell that to those readers who have no recourse against their builder's unregistered sales staff.

All builder sales agents should be provincially licensed and members of their local real estate boards.

The other major flaw in the new legislation has to do with lawyers selling real estate. Bill 152 significantly tramples on the ability of consumers to choose who will act for them on the purchase and sale of real estate.

Under the current legislation, lawyers are exempt from registration as real estate agents where a transaction is negotiated in the course of and as a part of the solicitor's practice. For decades, consumers have had the option to have their lawyers represent them in purchasing or selling real estate.

Many stakeholders in the real estate industry believe that lawyers should not be allowed to buy and sell real estate on behalf of clients without registering as agents. But that's not the issue because the registration exemption has been in place for about 70 years.

The new act significantly alters the exemption. The bill's legalese, translated into English, states that lawyers would be exempt from registration only if the "dominant purpose" for which the lawyer is hired is the "provision of legal services" and the trade in real estate is "incidental to and directly arising from the provision of such legal services" to the client.

"I want to make it clear that this act allows a lawyer to buy and sell property on behalf of a client as long as it's incidental to his legal business," Sterling told the Legislature on Dec. 12.

The simple fact that Sterling fails to understand is that the business of 8,000 Ontario lawyers has always included "trading" in real estate, since a trade is defined in Bill 152 as any conduct or act which furthers a real estate transaction and that's what lawyers do every day.

We act, we conduct our affairs, we negotiate, and we assist clients in thousands of other ways "in furtherance of" their real estate trades. All of these actions fall under the definition of a trade even if the lawyer does not actually list or sell the property.

"It's really a circular argument," says Steven Pearlstein, chair of the Ontario Bar Association real property section. "The 'trade' can't be 'incidental to' our services, because the trade is the true essence of our services."

Pearlstein is right: the draft law is very badly worded. In simple terms it says lawyers have to be registered as real estate agents unless the "dominant purpose" of the retainer is providing legal services, and the trade in real estate (defined as any conduct which furthers a transaction) is only incidental to the retainer.

So if Tom and Penelope walk into my office after the bill is passed (if it's passed) and ask me to review an offer prepared by the real estate agent who showed them the house, and if I advise them on it, negotiate changes, and then close the transaction for them, I apparently will have violated the act. The main purpose of the retainer by Tom and Penelope is the legal services, but the essential element of those legal services is to further a trade in real estate. So 8,000 Ontario lawyers would fall on the wrong side of the law's badly worded intentions.

What Sterling really wants to do is to prevent lawyers from setting up a Scottish model of real estate sales like the Edinburgh Solicitors Property Centre. The real issue is advertising, but that is largely a matter for the federal government to regulate.

In Edinburgh, solicitors control the real estate sales market and make a good living charging about 1.5 per cent commission. The typical commission in Ontario is three or four times that figure. Why should this type of choice be denied to Ontario consumers? Sterling has never answered that question because he refuses to allow it to be asked.

During the so-called consultation process, Sterling personally spoke to a large group of real estate agents and put a link to their Web site on his ministry's Web site, but he refused to meet with representatives of the Canadian Bar Association's real property section. Sterling did meet with top officials of the Law Society, but that body does not advocate on behalf of lawyers: it governs the legal profession in the public interest.

Sterling told the Legislature he wants to "increase consumer protection" and "eliminate red tape and obstacles to market."

The best way this could happen would be for the Ontario's next premier to find a consumer affairs minister who would truly place the consumer first.

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