

2011 CarswellOnt 1094
Ontario Superior Court of Justice

Sutton Group-Admiral Realty Inc. v. Statsenko

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**Sutton Group-Admiral Realty Inc., Plaintiff and
Vadim Statsenko and Marina Statsenko, Defendants**

Elliott Goldstein D.J.

Heard: June 29 - November 4, 2010

Judgment: February 3, 2011

Docket: Richmond Hill SC-09-79797-00

Counsel: None given

Subject: Contracts; Property; Torts; Corporate and Commercial

Related Abridgment Classifications

Real property

IV Real estate agents

IV.10 Agent's duties to principal

IV.10.a General principles

Headnote

Real property --- Real estate agents — Agent's duties to principal — General principles

Table of Authorities

Statutes considered:

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A

s. 15 — referred to

s. 17 — referred to

s. 18 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 19.01 — referred to

Elliott Goldstein D.J.:

The Claim

1 The Plaintiff, Sutton Group-Admiral Realty Inc., is a real estate brokerage company (the "Brokerage"). Two of its sale representatives, Vladimir Bilyak ("Bilyak") and Olga SopiInikow ("Olga") testified for the Plaintiff. The Plaintiff sues for a real estate commission, in the amount of \$10,000.00, allegedly owed to it by the Defendants pursuant to a Buyer Representation Agreement (the "BRA"). The Plaintiff claims that the Defendants breached the BRA when they purchased a residential property (the "Oster Property" described below) through another real estate agent.

2 The Defendants, Vadim Statsenko ("Vadim") and Marina Statsenko ("Marina"), are spouses who purchased a property, known as 89 Samuel Oster Avenue, Vaughan, Ontario (the "Oster Property") on December 4, 2008, which closed on December 29, 2008.

3 Vadim and Marina (together "the Statsenkos") signed the BRA on November 5, 2008. Pursuant to its provisions, the Statsenkos agreed to pay the Plaintiff a commission of 2.75% of the sale price of any property they purchased through the period of November 5, 2008 and May 5, 2009, inclusive (the "Term"). Such commission was payable whether or not the purchased property came to the attention of the Statsenkos through the Plaintiff, and irrespective of who made the offer to purchase (e.g., the Plaintiff, the Statsenkos, or a third party real estate agent).

The Defence

4 In their Amended Defence, the Statsenkos deny liability and specifically deny "they were ever told that they were signing an exclusive agreement for the Plaintiff to act for them on *all properties for a period of six months*, and the penalty for failure to comply with this agreement, ..."

Emphasis added by Deputy Judge.]

5 The Defendants also plead that the Plaintiff "breached its fiduciary duty, and therefore the Plaintiff breached its contract, and as such the contract no longer had any force or effect."

6 Furthermore, the Defendants plead they were not given the opportunity to obtain independent legal advice before signing the BRA.

7 Finally, the Defendants plead and rely upon certain provisions (ss. 15, 17, 18) of the *Consumer Protection Act, 2002*, which relate to unconscionable representation and unfair business practice. Therefore, the Defendants seek rescission of the BRA.

8 Some factual background may be helpful.

9 Based on the testimony of the Plaintiffs witnesses set forth below, I find that both Bilyak and Olga are sophisticated real estate agents with extensive (real estate) business experience. Bilyak and Olga speak, read, and write English and Russian. They market to, and most of their client base is, Russian speaking persons. Bilyak and Olga advertise properties for sale in Russian language publications, which is how the Statsenkos first learned of them.

10 Based on the testimony of the Defendants' witnesses set forth below, I find that Vadim and Marina are not sophisticated or experienced business persons. On the contrary, they have been in Canada for five years and this was the first time they dealt with real estate agents. At the time of purchase, the Statsenkos had been in Canada only 2 ¹/₂ years.

11 Based on Vadim's testimony, I find that he does not speak, read, or write English. However, Vadim fluently speaks, reads, and writes Russian. He was educated in Russia as a veterinarian and automobile mechanic. He now works as an unlicensed auto mechanic for a Russian speaking employer. I find him to be intelligent and reserved, but dependent upon his wife when it comes to matters of family finance and decision making. Vadim looks to his wife for guidance, and follows her example.

12 Based upon Marina's testimony, I find that she speaks a small amount of English, but not well. Marina also reads a very small amount of simple English but cannot write it. Marina is in charge of family finances and clearly the "boss" in her family. Marina works at a Russian-speaking bakery as a quality control expert.

13 Based on the testimony of all witnesses, I find that neither Vadim nor Marina was able to read the numerous legal documents, written entirely in English, that they signed on November 5, 2008. The Statsenkos were totally dependant on Bilyak and Olga to orally translate such documents into Russian and explain their content, meaning and significance to the Statsenkos.

14 The Statsenkos trusted and relied upon Bilyak and Olga to act in the Statsenkos' best interests when purchasing a house. Bilyak and Olga failed act in the Statsenkos' best interests.

15 The trial of this action consumed two full days of court time because everything said at trial — including questions and answers during the examinations and cross-examinations, submissions and objections of counsel and agent, deputy judge's questions and rulings on objections, etc., — had to be interpreted into either Russian or English. Also, portions of some exhibits were read aloud in English and then orally translated into spoken Russian. The interpreter was Olga Apollonova. She is a Russian-English/English-Russian interpreter certified by the Association of Translators and Interpreters of Ontario (ATIO cert. # 2773). Ms Apollonova was retained by the Defendants and sworn prior to interpreting. She performed her duties admirably given the difficulties in interpretation and the fact that sometimes two or more persons would be speaking simultaneously. The Court thanks Ms Apollonova for her exemplary efforts.

The Testimony of the Plaintiff's 1st witness Vladimir Bilyak

16 Mr. Bilyak is a licensed real estate agent in the City of Toronto and has been a member of the Toronto Real Estate Board (TREB) since 2003. He works mostly with Russian speaking clients as he speaks their language and it is easier for them to communicate with them. In fact, 65% of his clients are Russian speaking. He works with Olga.

17 Toward the end of October 2008, he received a telephone call from the Defendants. He and Olga met the Defendants, the Statsenkos, who were looking to buy their first house.

18 The Statsenkos told him and Olga their price range and location (Thornhill, Ontario area). He and Olga showed the Statsenkos a total of 24 properties. Before making an offer on their behalf, he and Olga insisted the Statsenkos sign the BRA (Exhibit 1) and a document titled "Working with a Realtor" (Exhibit 2).

19 The purpose of the BRA was for the buyers to acknowledge that they had entered into an agreement, which gave the buyer's agents exclusive authority to act for the buyers for a six month time period. It is the obligation of the sales agent to work for the clients, to protect them. On its first page, the BRA states that the Buyer gives the Brokerage the exclusive and irrevocable authority to act as the Buyer's agent commencing on November 5, 2008 until May 5, 2009.

20 The Statsenkos signed the BRA and other documents at their home — an apartment located at 25 Fisherville Drive, Apt. 1210, North York, Ontario (the "Fisherville Apartment") - on Wednesday, November 5, 2008 at approximately 11:00 p.m., after Marina returned home from work. It was normal for buyers to sign such documents at their home.

21 On the evening of November 5, 2008, he explained to Marina and Vadim the contents and meaning of Exhibits 1 and 2, the Agreement of Purchase and Sale and all schedules thereto (Exhibit 4), and the "Confirmation of Cooperation and Representation" (Exhibit 4(a)).

22 He believes that the Marina and Vadim understood what was explained to them and they understood the BRA was exclusive to the Brokerage.

23 The meeting took place in Russian, not in English, because all present — Bilyak, Olga, Marina and Vadim — speak Russian fluently.

24 He believes that the Statsenkos understood the consequences of signing the BRA.

25 The BRA is the TREB (Toronto Real Estate Board) form © 2008 OREA (Ontario Real Estate Association). There were no independent witnesses to its signing as BRA does not require witnessing.

26 It is not common practice for buyers to obtain independent legal advice ("ILA") before signing a BRA.

27 The Statsenkos never asked for an independent person to review the agreement with them. He did not suggest that the Statsenkos seek ILA before signing the BRA or any of the other documents.

28 The initials "VS" and "MS" which appear on numerous exhibits are the Statsenkos initials. The Statsenkos initialed the BRA after it was reviewed, in its entirety, with them. The Statsenkos never told him or Olga that they did not understand any of the documents they were signing. The Statsenkos were asked if they had any questions, but replied in the negative. The Statsenkos never asked for an interpreter.

29 Bilyak and Olga found a property on which the Statsenkos wanted to make an offer — 32 Pilkington Crescent, Vaughan, Ontario (the "Pilkington Property"). The MLS listing for the Pilkington Property (the "Pilkington MLS listing") is Exhibit 3.

30 The Statsenkos were shown approximately 10 other properties by Bilyak and/or Olga before being shown the Pilkington property, described in Exhibit 3. The Pilkington Property was in the Statsenkos price range and in the area the Statsenkos wanted to live. The Statsenkos saw the Pilkington property twice.

31 The Statsenkos liked the Pilkington Property and wanted to put in an offer (i.e., sign the Agreement of Purchase and Sale and present it to the Seller). The Statsenkos did specify the amount of the offer. The offer was made and it was conditional on financing and inspection. However, no inspection was ever conducted as the Statsenkos decided to not do an inspection.

32 The Statsenkos had a problem obtaining financing and so decided not to do the inspection. Mortgage approval was never received by the Statsenkos.

33 The sale of the Pilkington Property did not close because financing was not obtained. The Statsenkos informed him (Bilyak) that the reason they could not obtain financing is because their bank, Royal Bank of Canada, ("RBC") did not want to finance a property that was once a grow-op.

34 Eventually, a Mutual Release (marked as Exhibit 5) was exchanged between the seller/vendor, CIBC Mortgages Inc., (the "Bank") and the Statsenkos and the deposit was returned to the Statsenkos.

35 Schedule "C" to the Agreement of Purchase and Sale, which is part of Exhibit 4, was prepared by the seller or its agent, and the lender was given a copy of the Agreement of Purchase and Sale. Schedule "C", the original of which was marked as Exhibit 8, was initialed by the Statsenkos.

36 The Statsenkos knew, when they signed Exhibit 4 and its schedules, that the Pilkington Property had been a marijuana grow-op ("grow-op"). This was explained to the Statsenkos by Bilyak and Olga, who also told the Statsenkos about the potential problem with the mould.

37 Schedule "C" (Exhibit 8) states "The buyer(s) acknowledge that the premises have been previously used as a marijuana grow operation, which has been associated with an increased risk and toxic mould may be present. The mould may not be readily apparent and may develop at some point in the future. Toxic mould may cause serious health problems." Schedule "C" is dated November 5, 2008 and is initialed by Marina and Vadim.

38 The contents of Schedule "C" were explained to the Statsenkos when the Agreement of Purchase and Sale (Exhibit 4) was reviewed by the Statsenkos, with him and Olga at the Statsenkos apartment on the evening of November 5, 2008.

39 The Statsenkos wanted to make the offer even though they knew about the past use of the Pilkington Property. Bilyak stated that it is not illegal to sell a house that was used as a grow-op as long as that fact was disclosed to the potential purchasers.

40 The Statsenkos initialed the entire offer after it was reviewed with them. The Statsenkos were offered an opportunity to 'walk away from that offer' after being told (about the grow-op) but did not. The conditions of inspection and the financing were for ten (10) days.

41 A deposit was delivered to the seller's agent, Royal LePage. The Statsenkos provided Olga and him with a \$30,000.00 RBC bank draft, dated November 17, 2008, payable to "Gowlings", a law firm.

42 The deposit was returned to the Statsenkos and they received back the deposit cheque when the deal did not close. The Statsenkos went to their own bank (RBC) to obtain financing.

43 The Statsenkos notified Olga and him that they (the Statsenkos) could not obtain financing and a Mutual Release was prepared.

44 The Mutual Release is marked as Exhibit 5 and is signed November 19, 2008 by the Statsenkos and on November 20, 2008 by the seller/vendor CIBC.

45 The Agreement of Purchase and Sale for the Pilkington Property fell through because the Statsenkos were not able to obtain financing. The parties released one another and the \$30,000.00 deposit was returned to the Statsenkos.

46 After November 29, he and Olga still maintained contact with the buyers. Their conversations were friendly and he was not aware of any issues. He tried to find the Statsenkos another property.

47 Specifically, on November 23, 2008 Bilyak showed 6 or 7 properties to the Statsenkos. One of those properties was "Oster Property. Both Marina and Vadim viewed the Oster Property for about one-half hour on November 23, 2008. According to Bilyak, they were shown 6 or 7 properties that day but they stayed the longest at the Oster Property.

48 Bilyak found out later that the Statsenkos had purchased the Oster Property through another agent and another brokerage. Exhibit 6 is the MLS Listing for the Oster Property. Exhibit 6 discloses that the Oster Property was sold December 4, 2008 with a closing date of December 29, 2008. Bilyak estimates that the Agreement of Purchase and Sale for the Oster Property was signed approximately November 25 or 26, 2008.

49 He was not the buyers' agent for the sale of the Oster Property and neither was his partner Olga.

50 The December 4th sale date was within the six (6) month time period covered by the BRA, which did not expire until May 5, 2009.

51 In late January or early February 2009 he became aware that the Oster Property had been sold. When he inquired as to who the purchasers were he discovered that the purchasers were the Statsenkos.

52 He was advised by the Statsenkos that they did not want to look for new houses on November 25 or 26, 2008, which is before the sale date of the Oster Property. He was told by Olga that the Statsenkos would not be buying a property until the spring of the following year, (i.e. 2009).

53 The Statsenkos never asked the Plaintiff to terminate the BRA.

54 The \$10,000.00 the Plaintiff claims is the commission due to the Brokerage. This amount represents 2.5% of the selling price of the Oster Property, namely \$430,000.00, which equals \$11,825.00 plus GST for a total of \$12,416.25. The Plaintiff abandoned the excess to bring it within the monetary jurisdiction (i.e. \$10,000.00) of the Small Claims Court, as it then was when the action was commenced in 2010.

Cross-examination of Bilyak

55 On cross-examination of Vladimir by the Defendant's agent, Bilyak testified that the BRA was not signed at the beginning of their arrangement because he trusted the Statsenkos.

56 Bilyak acknowledges that the address given for the buyers (the Statsenkos) on the BRA is erroneous. The address shown is 32 Pilkington Crescent, Vaughan, Ontario, L4J 7J4. However, the Statsenkos did not reside at that address when they made the offer; they resided at the Fisherville Apartment. The address is that of the property on which the Statsenkos were making an offer. It should have been the address of the Fisherville Apartment.

57 Bilyak acknowledges the error was made when he prepared the BRA on November 5, 2008 during the day in his office. He admits that there is an error on the face of the document and that he made it.

58 Apparently, neither Bilyak nor Olga nor the Statsenkos noticed the error when they reviewed and signed the documents on November 5, 2008.

59 The reason the Statsenkos wanted to purchase the Pilkington Property was for their personal use to live in it.

60 Without the BRA, he could not prepare any offers and it was standard policy in his office to have potential buyers sign a BRA before an Agreement of Purchase and Sale is prepared for a property.

61 According to Bilyak, if Exhibit 4 and the BRA were not signed, then the Plaintiff would not get a commission. He has never sold a house without a BRA. His employer requires him to sign a BRA with all buyers. The BRA referred to a commission of 2.75% however the Agreement of Purchase and Sale discloses a commission of only 2.5%. [I note that the BRA says that if there is a difference between the two commissions then the buyer must pay the agent the difference. So the Statsenkos would have had to pay the difference between 2.5% and 2.75%, namely .25% had the deal closed.]

62 He did not lower the commission to 2.5% on the BRA because the deal did not close. Bilyak claimed that if the deal had closed on the Pilkington Property, then the commission would have been lowered as his practice was to reduce the commission. He did explain this to the Statsenkos and they would either be responsible for the difference or the difference would be waived.

66 He and Olga were at the Fisherville Apartment for a total of 45 minutes to an hour. He started to explain everything at approximately 10:45 p.m. and it took him 20 to 25 minutes to explain all of the documents that were signed and initialed by the Statsenkos.

67 The BRA was explained first, then the Agreement of Purchase and Sale. Schedule "C" was explained to the Statsenkos in Russian. Bilyak told them that the house *may* be a grow-op and there *may* be mould on the Property. (Deputy Judge's note - the wording on the Schedule "C" clearly states that the house *is* a grow-op. The "may be" part refers to the mould.) According to Bilyak, Schedules A, B and C to the Agreement were prepared by the seller/vendor.

68 The Statsenkos first visited the Pilkington Property on November 1, 2008. That property was one of 6 houses shown to the Statsenkos that day. He remembers the house as being a nice house but not updated and there was nothing irregular about the basement. The Statsenkos visited the Pilkington Property again on November 5, 2008. Bilyak claimed he did not know that the house was a grow-op until he received Schedule "C" from the Bank on November 5, 2008.

69 Bilyak claims he told Vadim about Schedule "C" during a phone conversation with Vadim before they met that evening. He told the Statsenkos that they may have problems obtaining financing from their lender. He claimed that he informed them that the lender may ask for a larger deposit (a bigger down payment) because marijuana had been grown at the house.

70 The Pilkington Property was a Power of Sale property.

71 Bilyak did not ask the Statsenkos if he was their first real estate agent. All showings took place in the Russian language.

72 Bilyak said he fully explained to the Statsenkos what would happen if BRA was breached.

73 He did not tell the Statsenkos after Nov 20 or 23rd 2008 that if they purchased any property using any other real estate agent(s), the Statsenkos would owe him money under the BRA

74 The Statsenkos never told him that they were dissatisfied with his service, nor did they tell him that they wanted to terminate the BRA.

75 The BRA would have to be terminated in writing and signed by him and his broker and the Statsenkos.

76 He explained to the Statsenkos that they could terminate the BRA with no problem — but such termination must be in writing.

77 The Statsenkos never asked him about termination of the BRA. But he did not explain to the Statsenkos what would happen if only one party wanted to terminate the BRA.

78 He said that there were problems obtaining financing of the Pilkington Property as the Statsenkos could not get financing. He talked to a mortgage broker, but she could not arrange mortgage in this deal. No one wanted to finance this purchase.

79 Bilyak admitted that the Statsenkos did qualify because they both had jobs and a substantial down payment (\$200,000.00) for down payment. The Statsenkos qualified for financing but the Pilkington property did not.

80 Bilyak stated the he had past experience with grow-op houses — two other properties — both of which closed. But the financing was arranged through (mortgage) brokers, not banks.

81 The Statsenkos told Bilyak they were pre-approved for a mortgage and they had a mortgage broker they were working with. Bilyak did not know the amount of the pre-approval.

82 The last day he saw the Statsenkos was Nov 23, 2008. They did not discuss the BRA.

83 After Nov 23 2008 — believed Bilyak believed that the Statsenkos were still his clients. He found another property to show to them. The Statsenkos told Olga that they did not want house now — they would wait until spring of next year (i.e., 2009).

84 Bilyak spoke to Marina and she told him that the Statsenkos still intended to buy with them (Olga and Bilyak) in mid December 2008.

85 Bilyak said he told Marina that the Statsenkos have to purchase with them (Bilyak and Olga). Bilyak never mentioned there would be a penalty if the Statsenkos purchased through a different real estate agent. Bilyak described it as a friendly conversation. Bilyak says that Marina understood she was still under an agreement.

The Testimony of the Plaintiff's 2nd witness Olga SopiInikow

- 86 Ms SopieInikow has been a licenced realtor in Toronto and Ontario since 2006. She works for the Plaintiff.
- 87 She showed two properties to the Statsenkos before the BRA was signed. It was her understanding that under the TREB rules, she cannot represent a buyer without a BRA. Its purpose is to convey to the buyer the rules of the purchase.
- 88 Most of her clients (approx. 70%) are Russian speaking.
- 89 She met the Statsenkos' at their Fisherville apartment where they discussed the purchase of the Pilkington Property. In total, the Statsenkos were shown 10 to 12 properties.
- 90 The purpose of the BRA is to set out the commission and other information that is necessary before Bilyak and she can present an offer. It is standard procedure for TREB real estate agents.
- 91 Without the BRA, they cannot receive a commission.
- 92 The meeting with the Statsenkos started at 11:00 p.m. at the Fisherville apartment where Vadim and Marina reside. Olga arrived together with Bilyak at 10:45 p.m. They came in same car.
- 93 She explained it takes time to explain the BRA — approximately one hour. They spoke Russian only because Vadim is not fluent in English. Marina works for a Canadian based company. Bilyak, Olga, Vadim and Marina all spoke the same dialect of Russian.
- 94 She and Bilyak explained the BRA to the Statsenkos and took them through every step of it.
- 95 She explained that the BRA was exclusive and explained the consequences of them using a different agent.
- 96 The Statsenkos did not ask any questions because she explained it so well to them.
- 97 She uses a BRA several times a month.
- 98 All initials on BRA are those of the Statsenkos.
- 99 She and Bilyak also explained every other document to the Statsenkos and went through them line by line.
- 100 The Statsenkos never said they did not understand the BRA during the meeting.
- 101 No interpreter was present, the Statsenkos never asked for one. Bilyak interpreted — never asked for interpreter.
- 102 The Statsenkos did not request the documents be translated or that they be allowed to take the documents to their own lawyers for translation.
- 103 When the offer on the Pilkington Property lapsed, she was in touch with the defendants. They still wanted her and Bilyak to be their real estate agents. After November 20 2008, she called the Statsenkos. Their relationship throughout was very pleasant. She did not think that they would buy a house using another agent. The Statsenkos never indicated to Olga that they were unhappy with her services.
- 104 Olga referred to Exhibit 7 — Sutton Group — list of pager messages created by a Web based program that releases any messages of bookings to show properties. The 4th item on the list, a message sent on November 21, 2008 at 4:47 p.m. indicates that the Oster Property was scheduled to be shown to the Statsenkos on November 23, 2008. Bilyak, not her, showed the Oster Property to the Statsenkos on that day. After viewing the Oster Property, the Statsenkos did not discuss their impression of that property with Olga.

105 Olga and Bilyak stayed in touch with the Statsenkos by telephone. Olga asked the Statsenkos about future purchase plans. The Statsenkos informed Olga in late November 2008, that the Statsenkos were postponing any purchase until middle of next year (2009). Olga spoke to the Statsenkos twice thereafter in early January 2009. The Statsenkos said they might use her services in the future. The Statsenkos never told Olga they wanted to terminate the BRA.

The Testimony of the Defendants' 1st witness Marina Statsenko.

106 Mrs. Statsenko, age 44 has lived in Canada for 5 years. When the Statsenkos purchased the Oster Property they had been living in Canada for approximately two and one-half (2 1/2) years. She worked for a Russian speaking bakery at time of the purchase of the Oster Property and at the time of trial worked for a different bakery where they also speak Russian. In both jobs, her position was a quality control technician.

107 She worked the afternoon/evening shift from and her hours of employment were 3:00 pm to 11:00 p.m. or 11:30 pm., depending upon the day. She usually arrives at the apartment she shared with her family and relatives just before midnight.

108 She graduated from school in Russia in public catering.

109 The first time she met Olga and Bilyak was in early October 2008 when she and her husband saw an advertisement in a Russian newspaper and decided to buy a house.

110 The Statsenkos were 1st time home buyers with no prior experience and needed Russian speaking realtors. They called Olga and Bilyak and met with them on a Saturday and were shown several houses (5 or 6), including the Pilkington Property. They liked it because its low price suited them, and it was in a good area. When they were shown the Pilkington Property they were never advised that it was or may have been a grow-op.

111 Marina was alarmed to find black rot in basement bathroom and that the drywall and floors were removed. She asked Bilyak why the floors and walls were removed. She was told that the house was being sold under Power of Sale by the Bank. The former occupants of the house were "kicked out" by the Bank and when they did not want to leave, they damaged the house.

112 Bilyak and Olga came to the Fisherville Apartment on November 5, 2008 while Marina was still working. She received a phone call from her husband, Vadim while she was at work and Vadim told her that the real estate agents were at the apartment waiting for her to return so they could sign the paperwork to purchase the Pilkington Property. She arrived at the Fisherville Apartment at approximately 11:45 p.m. or 11:50 p.m. Olga and Bilyak were there waiting for her about an hour. The real estate agents placed documents in front of her and Vadim for signing. They discussed the price and the down payment of \$30,000.00. She asked Bilyak why the down payment was that high as she thought it should be approximately \$10,000.00. Bilyak informed her that the down payment is high because the Statsenkos have to prove to bank their purchasing capacity and houses don't linger on market and they would lose deal otherwise. The Statsenkos signed what was given to them.

113 She said that schedule "C" to Exhibit 4, (which was also separately marked as Exhibit 8) was blank at the top (no handwriting) when she initialed it. She does not specifically recall initialing it.

114 Bilyak and Olga stayed about 15 or 20 minutes that night.

115 She said that Vadim and she were told that the BRA was to purchase only the Pilkington Property and it was signed so the real estate agents could bargain about price of house.

116 She believed that the signing of the papers (e.g., BRA, Agreement of Purchase and Sale) was a mere formality to purchase that house. She and her husband relied upon the real estate agents and thought they were dealing with honest people.

117 She could not read the documents because they were too complicated. She understands only simple English. When she came to Canada as an immigrant she was given a "British" test and passed with 4 out of 10.

118 She cannot read real estate documents.

119 She was not told about the documents, but initialed every page because she was told to sign by the realtors as it was late (past midnight).

120 She remembers seeing Exhibit 1, the BRA for the first time on November 5, 2008 at midnight at the Fisherville Apartment. It was the last document they were asked to sign.

121 She was able to read the title of the document and asked what it meant. Bilyak explained the BRA is an agreement that allows Bilyak and Olga to represent them for that particular house — the Pilkington Property, as the Statsenkos were planning to buy it.

122 She noticed that her address was listed as "32 Pilkington Crescent, Vaughan, Ontario, L4J 7J4", but she lived on Fisherville. She thought that it (the Pilkington Property) was listed because that was the house that they were going to buy — she did not realize that it was a mistake.

123 She was not told the address was a mistake. She was told to initial "everywhere" and sign on the last page. She did not notice the date range of November 5, 2008 to May 5, 2009 because the pages were flipped quickly by the realtors.

124 Her understanding of what she was signing was that the realtors, Bilyak and Olga were going to represent the Statsenkos on the purchase of that house (the Pilkington Property) only and nothing else.

125 She signed a single copy.

126 Bilyak and Olga left the Fisherville Apartment at approximately 12:10 a.m. They (the Statsenkos) were not left copies as they (Bilyak and Olga) took everything with them. Bilyak and Olga said they would fax the documents to the Bank the next morning.

127 Marina was adamant that the meaning of the documents they signed at midnight on November 5, 2008 was never explained to her and her husband Vadim.

128 She never again saw the BRA at later meetings, she saw only Exhibit 4, the Agreement of Purchase and Sale.

129 She never saw Schedule C to Exhibit 4 (i.e., Exhibit 8) re: the marijuana grow-op.

130 She saw Exhibit 8 for the first time when she received documents from the Court.

131 She said that Bilyak told her to obtain a \$30,000 down payment and discuss the mortgage with Bilyak's mortgage people, because of her low salary

132 She wanted to obtain financing through Royal Bank of Canada (RBC). She met with a mortgage specialist at RBC on in late November 2008, and asked for a mortgage from RBC. The RBC mortgage specialist, who spoke fluent Russian, asked Marina for a copy of the Agreement of Purchase and Sale, and was surprised when she did not have it. RBC said it would give Marina a mortgage as her credit history was good.

133 When Bilyak came to the Fisherville Apartment he was given the RBC bank draft and Marina informed him that she wanted to get mortgage from RBC.

134 Later that day, Marina received a telephone call from the RBC mortgage specialist and was told that RBC would not issue a mortgage for "these types of houses". Marina did not understand what she meant or why she was being refused a mortgage. The RBC mortgage specialist explained to Marina that the Pilkington Property was a grow-op house and had been used by criminals in the past. So it may be contaminated with mould and other things harmful to health. Marina was told that RBC won't issue a mortgage. Marina was upset and called Vadim and told him what happened. Marina then went on her computer and looked up the topic of "grow houses" and read about it.

135 The Pilkington Property would not be acceptable for her family because her son (now 13 years old) has bronchial asthma. Her son had many asthma attacks in Russia, but only a few in Canada. Vadim also has asthma problems. Marina did not want to bring her sick son into that type of house.

136 Had Bilyak or Olga explained Schedule "C" (Exhibit 8) to Marina and informed her that the Pilkington Property was a former grow-op, Marina would have refused to make an offer on the Pilkington Property because she did not want to expose her son or husband to mould.

137 Marina says she told Vadim to call Olga and tell her that the Statsenkos refused to buy the Pilkington Property. The Statsenkos were upset and wanted back their deposit.

138 Marina said that Bilyak and Olga refused to give back to the Statsenkos their RBC draft. Bilyak said they had to sign a Mutual Release and that would take a certain amount of time to prepare, have signed, and then the deposit would be returned. Marina was worried that she would not get back the RBC draft.

139 Marina concluded that she was "in hands of swindlers" and she no longer trusted the realtors Bilyak and Olga. Marina felt that they were tricked into purchasing "criminal house".

140 Marina demanded the return of the RBC bank draft and documents they had signed. She did not get it at that time'

141 Bilyak offered to show her other houses, valued at \$520,000 and above, houses the Statsenkos could not afford to buy. Marina was not willing to work with Olga and Bilyak and instead found a different real estate agent, Semion Sorovaiski of HomeLife/Cimerman Real Estate Limited, ("Semion"). Semion spoke Russian. He asked Marina about documents they signed before, but she did not have any to give him.

142 Semion told them to call the Bank to get their RBC bank draft returned.

143 Marina asked her daughter, who spoke English well, to call and ask about the RBC bank draft. Eventually, it was returned to Marina by Bilyak in late November 2008 or early December 2008, about 3 weeks after the Statsenkos refused to purchase the Pilkington Property. Marina says that she never received copies of the documents that she signed.

144 The RBC bank draft was returned to the Statsenkos after Bilyak showed them some other houses.

145 Marina was upset that when she demanded the return of the RBC bank draft, Bilyak proposed showing the Statsenkos more houses. But Marina no longer wanted to work with Bilyak and Olga because she felt she was being misled.

146 Marina could not be sure that the next offer would not be similar to first.

147 Marina was never told by Bilyak and Olga that the Statsenkos had a BRA with them; she was never told what would happen if the Statsenkos did not buy through Bilyak and Olga. Marina was never told that the Statsenkos would owe commission. Had she known that she would have cancelled the BRA.

148 Marina no longer wanted to purchase any property using Bilyak and Olga.

149 Marina admits being shown the Oster Property by Bilyak along with other houses. On way back to the Fisherville Apartment, the Statsenkos were finally given the RBC draft.

150 The Statsenkos were shown the Oster Property by Semion on November 21, 2008, but they never told Bilyak and Olga that they had already seen the Oster Property.

151 The day after they received the RBC draft, Vadim called Olga and told her that the Statsenkos no longer wanted to work with Bilyak and Olga.

152 Marina said she was never told that the Statsenkos had an obligation to work with Bilyak and Olga only.

153 Marina never told Bilyak and Olga that she was dealing with Semion. Marina does not know why she did not tell them.

154 Semion was told that the Statsenkos had worked with Bilyak and Olga. Semion asked to look at any documents the Statsenkos had signed, but Marina and Vadim had none. Marina does not know whether Semion contacted Bilyak or Olga. Marina never told Semion to call Bilyak or Olga.

155 In Marina's opinion Exhibit 1 was solely for the Pilkington Property, so when that deal fell through the documents she and Vadim had signed no longer applied.

156 Marina first learned of existence of BRA and its significance on May 6, 2009 from Vadim who said that Bilyak had informed Vadim that the Statsenkos had to pay \$10,000 to Bilyak and Olga. In June or July 2009 the Statsenkos obtained a copy of the BRA. Bilyak told Vadim that the \$10,000 represented the unpaid commission of 2.75% of purchase price of the Oster Property.

Cross-examination of Marina Statsenko

157 The Statsenkos signed the lease for the Fisherville Apartment with the landlord in English. The lease was explained to them by their friends who helped them rent it and spoke fluent Russian and English.

158 Prior to meeting Bilyak and Olga, the Statsenkos knew nothing about these two real estate agents. She trusted them but did not ask for, or receive, any references.

159 As their first meeting, Marina satisfied with Bilyak and Olga and was not suspicious of them. They spoke Russian and she understood what they said.

160 Marina does not remember being shown Exhibit 3, the MLS Listing for the Pilkington Property, Marina saw the entire Pilkington Property in 20 minutes. It was in area they wanted to live but the house was not in their price range. Despite that they put in an offer on the Pilkington Property, Which was priced higher than they were prepared to pay, because it was the least expensive house in that area.

161 Marine was not aware that if the Statsenkos made an offer, it may not be accepted. Were it not a former grow-op house, the Statsenkos would have purchased the Pilkington Property had they received financing.

162 The Statsenkos offer on the Pilkington Property was subject to two conditions. (See schedule "D" of Exhibit 4.)

163 1st condition — subject to financing — new first mortgage satisfactory to buyer — Marina says it could have been arranged, but for the fact the Pilkington Property was a former grow-op.

164 2nd condition — subject to inspection of subject property- no inspection took place.

165 Bilyak and Olga spent only 15 to 20 minutes with Marina and her husband when they met at the Fisherville Apartment to sign the documents. Marina never met with Bilyak and Olga alone, Vadim was always there.

166 Marina said Bilyak and Olga never went thru the BRA paragraph by paragraph. Marina and Vadim were simply asked to print their initial in the circles and sign at end. Marina understood the purpose of the BRA was to authorize Bilyak and Olga to bargain in the name of the Statsenkos to purchase only the Pilkington Property.

167 Bilyak and Olga never went through the Agreement of Purchase and Sale (Exhibit 4) paragraph by paragraph.

168 Bilyak and Olga explained to Marina that she must get a mortgage only through their (Bilyak's and Olga's) mortgage broker.

169 The inspection was discussed with her by Bilyak and Olga. Marina wanted a home inspection but was advised by Bilyak to not get one because it is expensive. Bilyak said there was no need for an inspection.

170 Marina said Schedule "C" contained no handwriting when she signed it. It was not explained to her. She did not ask to speak to a lawyer or independent translator. She was not denied the right to speak to a lawyer. It was never discussed. There was no chance to speak at the midnight meeting and Marina was never given copies of what she signed or initialed.

171 Marina did not ask the real estate agents to leave the documents with the Statsenkos so she could take those documents to a lawyer the next day.

172 Marina did know she was signing an Agreement of Purchase and Sale and she knew Bilyak wanted her to go to a mortgage broker — his mortgage broker.

173 Marina did not believe that Bilyak's broker would have told her the truth, because Bilyak was so insistent that Marina use his broker, not her own bank (RBC) to obtain financing. After being turned down by RBC, Marina did not go to Bilyak's broker or any other lender. Marina first learned that the Pilkington Property was a grow-op from the RBC mortgage specialist. After receiving the RBC bank draft, the Statsenkos were not shown any other houses by Bilyak and Olga.

174 Marina was disappointed she did not get to buy the Pilkington Property as she like the layout of the house.

175 Marina admits to signing the Mutual Release on November 19, 2008. She admits that the Statsenkos received back the RBC bank draft on November 23, 2008, three days after the seller Bank signed the Mutual Release.

176 The Statsenkos paid more (\$25,000.00) for the Oster Property than they offered to pay for the Pilkington Property.

Re-examination of Marina Statsenko

177 Marina was never told that if she did not buy through Bilyak and Olga she would have to pay any fees or that she would have to pay Bilyak and Olga for their time.

The Testimony of the Defendants' 2nd witness Vadim Statsenko.

178 Mr. Statsenko is 42 years old, he was educated in Russia as a veterinary doctor and a mechanical engineer, specializing in vehicle maintenance

179 He now works at a garage performing repairs on motor vehicles. He is an employee. The owner and many of the customers speak Russian.

180 Vadim received no English education in Russia and took no classes in Canada. Vadim does not read English. If he has to read something in English — his children read it and translate it for him.

181 Vadim wanted to buy the Pilkington Property because the price was attractive to him and he liked the layout of rooms. When show the house he notices that the basement was torn up and there was a blackish residue in bathtub

182 Vadim asked Bilyak why the basement was in such shape. He and Marina were told by Bilyak that the Bank is selling the house. Its former tenants were living there and when evicted those tenants vandalized the property in protest.

183 Vadim admits that Exhibit 4 bears his signature. He signed the Agreement of Purchase and Sale at the Fisherville Apartment around midnight on November 5, 2008, after his wife, Marina came home at approx. 11:50 pm.

184 The realtors, Bilyak and Olga arrived at the Fisherville Apartment before Marina — Bilyak, Olga and Vadim discussed the weather before Marina arrived. They did not want to discuss the documents until Marina was there.

185 When Marina arrived, Bilyak and Olga took out the papers and told the Statsenkos they had to sign to start bargaining with the Bank. Bilyak and Olga flipped through the documents quickly and told the Statsenkos where to initial and sign. Nothing was filled in — no handwriting, just typewritten words.

186 Vadim asked what kind of papers they were signing and Bilyak and Olga answered that it was a mere formality and these papers would permit Bilyak and Olga to bargain with the Bank in the name of, and represent, the Statsenkos.

187 Exhibit 1 — bears Vadim's signature — but the declaration of insurance was not signed by Bilyak and Olga.

188 Vadim was told that the BRA must be signed to buy that particular house — 32 Pilkington Crescent, Vaughan, ON.

189 Vadim was told it was a formality and he initialed where told by Bilyak and Olga.

190 Vadim dealt with Bilyak and Olga because they are professionals. Vadim had no reason to mistrust Bilyak and Olga. Vadim thought the document was only for purchase of the Pilkington Property.

191 As regard Schedule C to Exhibit 4 (Exhibit 8), Vadim was never told what it was — the grow-op disclosure was never explained to him. Prior to his signing Exhibit 4, it was not translated to him. No one brought it to his attention. After he signed all the documents, he was not given any copies. None was left at the Fisherville Apartment.

192 Vadim admits to signing a stack of papers. Bilyak and Olga flipped through them and Vadim and Marina signed them.

193 Vadim suffers from bronchial asthma. He was trained as a veterinarian. He understands that asthma can be worsened by allergies. Acute attacks can impair a person's ability to breath. Without professional help, someone can die. Vadim is well aware that asthmatic attacks can be triggered by mould, vegetation and chemicals.

194 Vadim knew about his medical condition before he signed the documents in Nov 2008 — he has suffered from asthma since he was an infant. Vadim would not have been able to live in a house with mould. Had Vadim been told about mould, he would not have gone ahead and purchased the house. Vadim has 3 children and his son suffers from asthma. He would not knowingly subject his asthmatic son to a mouldy house. Vadim estimates that Bilyak and Olga spent no more than 10 to 15 minutes at the Fisherville Apartment after his wife arrived.

195 Vadim and Marina were both tired as it was late when they signed all the documents.

196 Vadim assumed that the Pilkington Property's address appeared on the front page of the BRA because that was the house they were offering to buy.

197 Vadim was never told that he would be obligated to Bilyak and Olga for six months. Vadim would not have signed the BRA had he been told it was for a term of six months.

198 Vadim learned about house — that it was a former grow-op and not acceptable to RBC — and told Bilyak and Olga that he and Marina did not want to buy it.

199 Vadim never attended at the real estate agency office. Vadim never met anyone from that office — all negotiations were at the Fisherville Apartment.

200 Vadim now resides at the Oster Property. After the RBC bank draft was returned to him he had no further meetings with Bilyak and Olga. He did call and speak with Olga and tell her that he was not working with Bilyak and Olga. The purpose of his call was to inform them that the Statsenkos no longer need their services. Vadim and Marina no longer trusted Bilyak and Olga.

201 When Vadim spoke to Olga, she did not tell him that if he bought using another realtor he would owe Bilyak and Olga money.

202 He left it to his wife to negotiate the financing of the house. Vadim never discussed the financing with Bilyak and Olga.

203 Vadim says he was told on May 6, 2009 by Bilyak that because he bought the Oster Property without using Bilyak and Olga as his agent, and he had signed an agreement with them, therefore, the Statsenkos had to pay Bilyak and Olga some money. Vadim told Bilyak that the Statsenkos were not going to pay Bilyak and Olga anything.

Cross-examination of Vadim Statsenko

204 Before moving to the Oster Property, Vadim resided at the Fisherville Apartment. The Statsenkos were assisted in renting the apartment by their friends who spoke Russian. He personally did not deal with the lease of apartment and does not recall if his wife did.

205 Vadim never met with other realtors before Bilyak and Olga. He chose because they spoke Russian.

206 Vadim was shown the MLS listing for the Pilkington Property (Exhibit 3) when he was shown the Pilkington Property. Bilyak took him through that property. Bilyak showed it to him. He did not compare Exhibit 3 to the house he was shown.

207 Vadim did not understand that his offer would have to be accepted before he could buy it. Vadim signed the offer at his apartment with Bilyak, Olga, and Marina present.

208 Vadim was very tired when he was given the documents to sign. It was late. He came home from work at 7:00 PM that night. Marina was even more tired.

209 Bilyak and Olga were with Vadim in the Fisherville apartment for a total of 35-45 minutes before Marina arrived home. While they waited for Marina to get home Bilyak, Olga and he discussed the weather but not the documents they were about to sign.

210 He thought that he was signing — it was a formality and it was a document to be signed to purchase they particular house.

211 Vadim said the Bilyak and Olga never discussed Exhibit 4 with him and never discussed the conditions or the financing. They did tell him that the inspection was not necessary.

212 No one explained to Vadim the documents paragraph by paragraph. Although, Schedule C of Exhibit 4 (Exhibit 8) does contain his initials it was not explained to him and he was not told what it meant

213 Vadim did not ask Bilyak and Olga to allow him to take to a lawyer the documents he was asked to, and did, initial and sign, to explain their meaning. This was his first house purchase. Vadim was never told that he could not go to a lawyer and did not even know that it is necessary to go to a lawyer.

214 Vadim did not ask anyone else to translation the documents for him as he trusted Bilyak and Olga

215 Vadim was not told that he needed a real estate lawyer to close the deal.

216 Vadim did not know the purpose of Exhibit 4. He did not know what it was for.

217 Marina signed the documents first, then she told him to sign the documents and Vadim listened to her because he obeys his wife.

218 As Vadim cannot read English, he did not go to the RBC Bank with Marina. He does not speak English.

219 Before being shown houses that day, the Statsenkos did not tell Bilyak and Olga that they did not want to work with them. The reason was that the Statsenkos were afraid that if they did so they would not get back the RBC draft.

220 Bilyak and Olga told them to look at houses first, and then they will return the RBC draft. Vadim did not know that Bilyak had cheque with him.

221 Vadim was happy that the deal on the Pilkington Property did not close.

222 Prior to learning it was a former grow-op, Vadim liked the Pilkington Property.

223 Exhibit 5 was signed by Vadim, but he did not date it. The date was in his wife's handwriting and he knows Marina's handwriting in Russian.

224 The Mutual Release was not explained to Vadim before he signed it. Vadim did not know it was needed to get back the \$30,000.00 deposit.

225 Bilyak showed Vadim the Oster Property, which Vadim was previously shown by another real estate agent (i.e. Semion). Vadim did not tell Bilyak that had already seen the Oster Property with another agent, because Vadim no longer trusted Bilyak as Bilyak had tried to sell Vadim a grow-op house with mould.

226 When first shown the Oster Property by Semion, Vadim had no feelings toward the house. When shown same house by Bilyak, Vadim did not tell Bilyak he liked the house.

227 Vadim candidly admitted that he personally was not deciding anything regarding the purchase of a new house. Instead, his wife Marina decided everything. He really had no say in the matter. Marina was in charge and she handled the finances.

Issues:

228 The issues to be determined by this court are as follows:

- (i) Whether the Buyer's Representation Agreement is enforceable given the circumstances surrounding its execution, or whether it should be rescinded?
- (ii) If it is enforceable, was it breached by the Statsenkos?
- (iii) If it was breached, what loss was suffered by the Plaintiff?

Findings:

229 Generally speaking, where the evidence of the Plaintiff is in conflict with that of the Defendants, I find Defendants' evidence to be more credible and reliable.

230 The meeting on November 5, 2008 — at which the Statsenkos initialed and signed the Buyer Representation Agreement, the "Working with a Realtor" document, and the Agreement of Purchase and Sale with four detailed Schedules — took place in less than 25 minutes. It occurred just before and after midnight on November 5, 2008. Marina had just worked an 8 hour shift and was tired, as was Vadim, who had waited up for her.

231 The aforementioned documents were signed in a short period of time, late at night, by tired, potential purchasers. I do not believe the testimony of the Bilyak and Olga that they had sufficient time to adequately and properly orally translate (English into Russian) and explain the meaning and significance of these documents (Exhibits 1, 2, 4, and 8) that were written entirely in English, to the Statsenkos. I conclude that the Statsenkos did not know what they were signing and did not genuinely agree to the BRA.

232 Neither did the Statsenkos realize or appreciate or understand the meaning or significance of Schedule C to the Agreement of Purchase and Sale, which is the Buyers acknowledgement that "the premises have previously been used as a marijuana grow operation, which has been associated with an increased risk and toxic mould may be present." I believe the Statsenkos' evidence that they would not knowingly purchase a house where toxic mould may be present because Vadim and his son suffer from asthma. Asthma attacks can be triggered by the presence of mould.

233 That the Pilkington Property was a former grow-up property undoubtedly prevented the Statsenkos from obtaining financing and closing the Pilkington Property deal. It also caused the Statsenkos to distrust Bilyak and Olga and led to the eventual break up of the parties' relationship.

234 Marina commented that she did not notice the date range of November 5, 2008 to May 5, 2009 because the pages were flipped quickly by the realtors. I conclude that the Statsenkos were rushed into signing these documents and did not fully comprehend their meaning.

235 The Statsenkos lack of understanding is due entirely to a failure on the part of the Plaintiff — and specifically, its representatives, Bilyak and Olga - to fully and adequately explain the BRA, written entirely in English, to the - Statsenkos who, for all intents and purposes, do not read or write English, and speak little or no English.

236 The BRA presented to the Statsenkos by the Plaintiff for signing contained an error on its first page. This error incorrectly indicated the residence address of the Buyers (i.e., the Statsenkos) as the Pilkington Property. The Statsenkos resided at the Fisherville Apartment. However, the error, made by the Plaintiff, went unnoticed by Bilyak and Olga, who read, write, and speak English fluently.

237 The Statsenkos' noticed the address but they believed the Pilkington Property was listed on the first page of the BRA because that was the address of the property that they were planning to buy. The Statsenkos testified they believed that the BRA was restricted to that property alone and did not apply to all other properties (e.g. the Oster Property). The Statsenkos believed they had to sign the BRA to buy the Pilkington Property. I find their testimony to be credible.

238 Bilyak and Olga also failed to fully and adequately explain to the Statsenkos the other documents that the Statsenkos signed on the evening of November 5, 2008.

239 Based on all of the evidence presented above, I find that the Statsenkos did not understand that the term of the Buyer Representation Agreement (BRA) was for six months and that it gave the Brokerage the exclusive and irrevocable authority to act as their agent during this six month term. Nor did the Statsenkos understand that there is a penalty for failure to comply with the BRA.

240 I find that the Plaintiff and its representatives, Bilyak and Olga, owed a fiduciary duty to the Defendants and breached that duty when they failed to adequately and properly explain to the Defendants the content, meaning and significance of the BRA, and other documents signed by the Defendants on the evening of November 5, 2008.

241 Furthermore, Bilyak and Olga failed to ensure that the Statsenkos had a clear understanding of the nature and scope of the BRA, and other documents they signed late that night. Therefore, I find that the defendants did not give exclusive authority to the Plaintiff to act as their agent.

Ruling:

242 I find in favour of the Defendants, Vadim Statsenko and Marina Statsenko.

243 I order the Plaintiff to pay the Defendants their costs. But, as this action was heard prior to the end of 2010, it is only fair that the costs ordered be those that were in effect prior to January 1, 2011.

244 The Defendants are entitled to a representation fee of \$750.00 (7.5% of \$10,000) as they were represented at trial by agent, not counsel. The Defendants are also entitled to their reasonable disbursements under Rule 19.01.

245 The Court previously made an order on Oct 23, 2009 that "Defendants to retain qualified Russian interpreter. Costs at discretion of trial judge." I, therefore, exercise my discretion to order that the costs of the Russian interpreter (\$50.00 per hour plus applicable taxes, for two days), be paid by the Plaintiff.