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## Vendors didn't reveal facts about nude beach

Vendors didn't mention nude beach next door

*'Hidden defect' claim rejected, buyers lose deposit*

Is the seller of a house obligated to disclose its hidden defects to a purchaser? Who determines what is and what is not a defect? Is a nude beach next door to a property a serious defect? Would failure to disclose it entitle a buyer to cancel the deal?

These questions were at the heart of a court case involving a luxury residence on Lake Okanagan in Kelowna, B.C. In November, 1998, Ron and Marlene Allen signed an offer to purchase the house from Kenneth and Dorothy Summach.

Four days after the offer was signed, the buyers waived the inspection condition and delivered a \$100,000 deposit cheque to the real estate agent.

When the buyers viewed the property in November, they were told that the vacant lot next door was a park used by families, and it was scheduled for improvements and upgrading. What they learned from the neighbours after handing over the \$100,000 deposit was that the land was in fact a nude beach. There was often nude frolicking on the beach in front of the house, and "sexual activity" took place on a nearby dock.

On learning of these facts from the neighbours, the Allens backed out of the deal and stopped payment on their cheque. Ultimately, the owners resold the property to a third party, and sued the Allens for the \$100,000 deposit.

The fact that there was a nude beach next door to the house was not apparent during the home inspection. As Judge Robert Metzger later noted at trial, the nude beach was not an obvious "defect" with the property, "as this occurred in the middle of November and even the sunny Okanagan weather cools off sufficiently to dissuade nude cavorting."

The Allens alleged that the existence of the beach and the overflow onto the subject property was a hidden defect in the house the sellers and their agent were obliged to disclose.

Over the years, many British and Canadian court cases have considered the issue of hidden, or latent, defects. Typically, a latent defect is a fault which an ordinary purchaser would not be expected to discover during a routine inspection. Toxic soil contamination, insect infestation and poor soil conditions that would not support building foundations have all been determined to be hidden defects.

Is a vendor of a house obligated to blurt out all of the property's hidden defects to prospective buyers, or is house buying a buyer-beware situation?

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**'The presence of nude bodies next door or parading in front of one's house may or may not be a defect. This requires a subjective test'**

**Judge Robert Metzger**

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Back in 1960, law professor (later Chief Justice of Canada) Bora Laskin delivered a special lecture at Osgoode Hall on what has been called "this dark corner of real estate law." It was Laskin's thesis that there was no such duty of disclosure under Ontario law.

At a Law Society lecture last year, Osgoode Hall Law School professor John D. McCamus confirmed that Laskin's view of the law of defects has gained wide acceptance in Ontario. The only exceptions would be a vendor is not permitted to be guilty of unreasonable or reckless failure to be accurate in describing or representing the land. As well, a vendor's actions cannot be deceitful or fraudulent. A vendor's silence, however, seems to be acceptable behaviour.

The legal authorities leave it up to purchasers to protect themselves by making appropriate investigations, and putting desirable warranties in the agreements of purchase and sale.

In virtually all of the recorded court cases in this area of law, the defects were all related to the building or the land. As such, objective standards could be used to determine if the complaint amounted to a defect.

When the Summach and Allen case got to court, the judge wrote that "the presence of nude bodies next door or parading in front of one's house may or may

not be a defect. This requires a subjective test."

The judge ruled against the purchasers, and ordered them to strip their bank account of \$100,000 for breach of the agreement. They were also left exposed to court costs and interest.

The law is settled, at least in B.C., that defects in a home cannot be determined by individual preferences, since this would "open the floodgates of litigation" by remorseful purchasers. It would also create an impossible standard of disclosure for vendors.

Last month, the British Columbia Court of Appeal delivered what will probably be the last word on the nude beach case. "The presence of a nude beach next door but one to the subject property is not a defect," the court said. "There is no duty on the vendor to disclose the existence of a nude beach."

Did the B.C. courts get it right? Is the nude beach a defect? Would you cancel your deal in the same circumstances? Bare your soul to [newhomes@thestar.ca](mailto:newhomes@thestar.ca) or fax us at 416-865-3635.

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