

# Disclosure in Real Estate Transactions

By Mark Weisleder, LLB, REI

**T**he main principle of successful investing in real estate has always been about “location, location, location.” However, when it comes to being able to successfully complete a real estate transaction without any potential legal claims, the new principle is “disclosure, disclosure and more disclosure.”

When it comes to potential issues in real estate transactions, they relate to three specific areas, namely: Legal or Title Defects, Physical Defects and Psychological Defects.

When it comes to legal or title defects, the Agreement of Purchase and Sale is clear that if a buyer discovers any defect in title that cannot be corrected by the seller prior to closing, then the buyer has the right to terminate the agreement or accept the title defect and complete the

transaction. It is for this reason that careful salespeople recommend to buyers that transactions are always conditional upon receipt and approval by the buyer of an up-to-date survey of the property, which will reveal most title defects, whether they are easements or encroachments. In the case of *Ridgely v. Neilson*, 2007 CanLII 14624, decided April 27, 2007 in the Ontario Superior Court of Justice, the buyer discovered a 20-foot drainage easement, which covered 25% of the property and was able to successfully terminate the transaction. This was due to the fact that a buyer only accepts “minor” easements for utility services when they sign the standard agreement of purchase and sale form. This was clearly a major easement, which should have been disclosed. Had this defect been

disclosed immediately at the time the offer was prepared, it would probably not have been an issue. The defect was in fact disclosed in advance to a subsequent buyer and the property sold without incident.

When it comes to physical defects, there is a difference between a patent defect and a latent defect. A patent defect is a defect that is readily observable when you conduct an ordinary inspection on a property. An example would be a broken window. For patent defects, the principle of caveat emptor, or buyer beware, applies, as the buyer should have noticed the defect and is deemed to accept it. A seller is thus not obligated to disclose patent defects. A latent defect is by its nature, hidden and not observable upon an ordinary inspection. The law states that if a seller knows about a latent defect

that renders a property uninhabitable, dangerous or unfit for a buyer's intended purpose, then it must be disclosed. This would include any problems with the structure or foundation of a property, an illegal basement apartment or serious leaks in the roof or basement. Sellers should be encouraged to completely disclose all defects up front, as it not only establishes credibility, but also reduces any risk of the seller being sued by the buyer after closing.


Buyers should always make all purchase transactions conditional on obtaining their own home inspection, to review any defect that may have been disclosed by the seller as well as doing additional checks on the wiring, plumbing, roof, basement and the furnace, as well as environmental or insurance concerns that may be raised regarding asbestos, mould or radon in the home itself. For rural properties, this would include inspections on any well, septic system and perhaps any buried oil tanks. In all cases, if the seller is aware of any defects in any of these areas, they should be encouraged to be up front and disclose them.

The third area, psychological defects, raises many new and interesting issues, most of which have yet to be determined in

a court proceeding. For example, what if there has been a suicide, murder, or home invasion in a home. Should this be disclosed to a potential buyer? What if there is a registered pedophile living next door? An argument could well be made that this could render a property uninhabitable for a family with young children. The point is, as a seller, your goal should be that you do not want to become the next legal precedent, to see whether or not something should have been disclosed. If you do disclose the problem, you eliminate the risk altogether. Furthermore, most buyers can now "google" a property address and if there has been any criminal act which occurred on the property itself, including a grow house activity, it will probably show up due to the fact that the event was probably covered by a newspaper that put the information onto the Internet.

In the case of *Summach v. Allen*, 2003 BCCA 176 (CanLII), a couple in Kelowna B.C. purchased a beachfront property. They asked the seller about the empty lot next door and were told it was a public beach. While driving by the property prior to closing, the buyers noted that it was in fact a nude beach, a fact the sellers knew but failed to disclose. ("I know what you are thinking; wouldn't

this add value to the property?") The buyers didn't think so and refused to close. The sellers sued. The case went to the Court of Appeal in BC and the court ruled that in their opinion, naked people running around should not be considered a latent defect, so the sellers won. In fact, the only winners were the lawyers, due to the expensive fees that were paid by both sides. The entire case could have been avoided if the fact of the nude beach had been disclosed in advance.

By obtaining a survey, sellers have the tool from which to make full disclosure regarding most if not all title defects affecting a property. If sellers use the same principles of disclosure for all physical and psychological defects, they will greatly reduce, if not eliminate, any risk of being involved in unnecessary and expensive litigation after the closing of a real estate transaction. 

**Mark Weisleder, LLB, REI, is a lawyer, author, course developer and public speaker for the real estate industry. Mark's book, *Real Estate Salespeople Beware!*, is currently one of the top selling books for real estate salespeople in the Province of Ontario. Mark can be contacted at [mark@markweisleder.com](mailto:mark@markweisleder.com).**