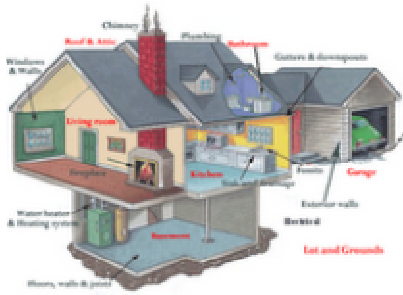


## The Right of Inspection



By Brian Madigan LL.B.

Once you buy a property are you allowed to have another look? Now, once you own it, you can look at it all you like, but by that time it may be too late.

The basic question is whether you have the legal right to inspect it before closing. From time to time, this issue is in “hot debate”.

The answer is really quite simple: it all depends. What did you agree to? What did the agreement say? What rights do you have at common law, over an above what is set out in the agreement?

First, let’s have a look at the standard form agreement of purchase and sale. Here’s what it says in Paragraph 13 dealing with issue.

**“13. INSPECTION: Buyer acknowledges having had the opportunity to inspect the property and understands that upon acceptance of this Offer there shall be a binding agreement of purchase and sale between Buyer and Seller.**

**The Buyer acknowledges having the opportunity to include a requirement for a property inspection report in this Agreement and agrees that except as may be specifically provided for in this Agreement, the Buyer will not be obtaining a property inspection or property inspection report regarding the property.”**

That statement is not all that helpful. It simply says that you have already been in. In fact, maybe you weren’t even there, just someone on your behalf. The next part of the paragraph is really a warning. It tells you that maybe you should have put in a request for an inspection report, and further, that unless you actually wrote something in somewhere, you are out of luck.

Now, that second part really pertains to a professional inspection, that is, a qualified building inspector assessing the building on your behalf. It also deals with the property or the land. In this regard, soil tests and environmental assessments come to mind.

But, the simple question of can you go back and look at the property prior to closing is not addressed. Actually, you can, but you have to stay across the street, so that's not much help. More technically, do you have permission to re-enter the building for purposes of a final inspection prior to closing?

Believe it or not, this was an unresolved issue in Ontario until 1979.

There is an Ontario Superior Court (County Court at the time) case called *Harkness vs. Cooney*.

It stands for the proposition that a purchaser has a right of final inspection, so as to ensure that the property is in suitable condition prior to closing. There is no need for a special clause in the agreement.

Now, that means "final inspection" before closing, not a month or so early to measure for drapes and take the in-laws through.

Standard builders' agreements will contain a specific clause since the inspection is a requirement for the Tarion warranty. The confusion among some brokers and sales representatives may have arisen prior to this Court decision. Also, if you need any additional opportunities to attend, then they have to be spelled out in the agreement.

The Court in *Harkness vs. Cooney* said that the purchaser did not have to close unless he could inspect the premises to see that it was in the same condition as it was when he bought it.

The practice of providing an opportunity to inspect was standard even before this case. Most lawyers thought that it was reasonable. And, if the purchaser demanded to see inside before he turned over his money, what was the point in refusing? However, on occasion there was a refusal, and then it became a matter of brinkmanship.

Here is what the Court said in *Harkness vs. Cooney*:

“I fail to see why the purchaser should have to wait to be notified by a vendor of defects in the property.....

I raised the matter of executory and executed contracts. It seems ridiculous that

the purchaser should have to move from his rights under the executory contract to the fewer rights he would have under the executed contract without having the right to inspect the premises while he was still in possession of such rights as the law gives him in an executory contract. It also seems ridiculous that he should have to complete the transaction and pay over his money before ascertaining whether or not he had been entitled to terminate the contract prior to completing it."

Basically, this makes a lot of common sense. Today, this case is quoted in most standard letters of requisition by purchaser's solicitors to vendor's solicitors:

**"REQUIRED: An opportunity to inspect the premises prior to closing, in accordance with the principle set forth in Harkness vs. Cooney (1979 131 DLR 765)."**

Oddly, the Court had to infer this common law right of inspection from other obligations under the agreement, namely that the property was at the risk of the vendor until closing and that the vendor held insurance policies in trust for the purchaser. The reference to the executory contract simply means a contract yet to be performed. After closing, the contract is finished, and unless there is something which then arises to enable a purchaser to sue, it's considered a "done deal".

So, just to summarize:

- 1) there is a common law right to inspect prior to closing,
- 2) that right is limited in scope,
- 3) the inspection is restricted to assessing for damage subsequent to purchase.

If you want something more then you will have to write it into the contract specifically, or no such right exists. Inspections by professionals must be set out in detail. In fact, they might be included as conditions.

The right to bring relatives, measure for drapes, drop by with contractors for quotations and allow prospective tenants to view the premises will just have to wait until you own the property unless you clearly outline such rights in the agreement.

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