

## Disclosure Issues for Realtors



By Brian Madigan LL.B.

There are basic rules that apply to realtors concerning disclosure. Everyone who is permitted to trade in real estate under the Real Estate and Business Brokers Act, 2002 is subject to both the common law and the RECO Code of Ethics.

Organized real estate, and that means registrants under the Act who have joined the MLS system have certain additional requirements. They are also subject to the CREA Code of Ethics.

Reproduced below is a document authored by OREA which offers some insight into this field. You will also notice the emphasis on the execution of the Seller Property Information Statement by the Seller and its review by the Buyer.

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### **CAVEAT REALTOR - DISCLOSING DEFECTS**

*Caveat emptor, qui ignorae non debuit quod jus alienum emit*

- Let a purchaser, who ought not to be ignorant of the amount and nature of the interest, exercise proper caution.

#### **Latent Defect of Quality**

- Those that are hidden and not readily apparent to a buyer by any reasonable inspection

#### **Patent Defect of Quality**

- Those that would be discovered by a buyer by inspection and ordinary vigilance

The common law for the resale of real estate does not imply any promises of quality, habitability or reasonable fitness for a particular purpose. In Ontario that doctrine has been changed for new homes by legislation such as the Ontario New Homes Warranties Plan Act.

### **Buyer and Seller Issues**

The doctrine of caveat emptor basically means that sellers need not be concerned

about the state of their resale property. However, there are some exceptions to the caveat emptor principle:

- The most usual exception is when the parties agree by contract (i.e. within the agreement of purchase and sale or other document related to the transaction) that the seller does state, represent or warrant certain matters.
- Another exception is if a court finds that there is a significant difference between that which was bargained for and that which was obtained - an error in substantialibus - where there is a total failure of consideration.
- Sellers can also be liable for misrepresenting the property, which would include lying when specifically asked about something or actively concealing known defects.
- While sellers do not generally need to voluntarily disclose most latent defects, the courts have found an obligation on sellers to disclose material latent defects of which they are aware, such as those that make the property unfit for habitation, or dangerous, or that pose a serious health or safety risk. And, of course they can't lie, if asked, even about a non-material latent defect ... that would fall under the above-noted misrepresentation exception to caveat emptor.

Sellers are generally not required to disclose patent defects and therefore buyers take the property "as is" unless the contract provides otherwise. "Absent fraud, mistake or misrepresentation, a purchaser takes existing property as he finds it, whether it be dilapidated, bug-infested or otherwise uninhabitable or deficient in expected amenities, unless he protects himself by contract terms."

– quote from the late Bora Laskin, former Chief Justice of the Supreme Court of Canada

## **REALTOR Issues**

Disclosing defects is a more difficult issue for REALTORS than sellers since REALTORS are bound by their Codes of Ethics, such as the new RECO Code of Ethics, and and CREA's revised REALTOR Code of Ethics:

### **RECO Code of Ethics**

There are several provisions in the new RECO Code (which is part of Regulation 580/05 of the Real Estate and Business Brokers Act, 2002) that require all registrants to deal with these property disclosure issues. Some are as follows:

#### **Fairness, honesty, etc.**

3. A registrant shall treat every person the registrant deals with in the course of a trade in real estate fairly, honestly and with integrity.

## **Best interests**

4. A registrant shall promote and protect the best interests of the registrant's clients.

## **Inaccurate representations**

37. (1) A registrant shall not knowingly make an inaccurate representation in respect of a trade in real estate.

## **Error, misrepresentation, fraud, etc.**

38. A registrant shall use the registrant's best efforts to prevent error, misrepresentation, fraud or any unethical practice in respect of a trade in real estate.

Registrants must also disclose material facts to clients and customers, as noted in Section 21 of the new RECO Code.

## **Material facts**

21. (1) A broker or salesperson who has a client in respect of the acquisition or disposition of a particular interest in real estate shall take reasonable steps to determine the material facts relating to the acquisition or disposition and, at the earliest practicable opportunity, shall disclose the material facts to the client.

(2) A broker or salesperson who has a customer in respect of the acquisition or disposition of a particular interest in real estate shall, at the earliest practicable opportunity, disclose to the customer the material facts relating to the acquisition or disposition that are known by or ought to be known by the broker or salesperson.

A "material fact" with respect to the acquisition or disposition of an interest in real estate, is defined in the RECO Code as – "a fact that would affect a reasonable person's decision to acquire or dispose of the interest".

## **REALTOR Code of Ethics**

There are several provisions in CREA'S revised REALTOR Code that require REALTORS to deal with these property disclosure issues. Some are as follows:

### **Article 3: Primary Duty to Client**

A REALTOR shall protect and promote the interests of his or her Client. This primary obligation does not relieve the REALTOR® of the responsibility of dealing fairly with all parties to the transaction.

3.2 A REALTOR shall not intentionally mislead anyone as to any matters pertaining to a property.

**Article 4: Discovery of Facts**

A REALTOR has an obligation to discover facts pertaining to a property which a prudent REALTOR would discover in order to avoid error or misrepresentation.

4.1 This Article applies equally to REALTORS working with Buyers or Sellers.

4.2 This Article is not intended to increase the disclosure obligations of REALTORS beyond those required by common or civil law or any other statutory or regulatory requirements.

4.3 The REALTOR shall not be party to any agreement in any way to conceal any facts pertaining to a property.

A careful reading of these provisions would indicate that a professional REALTOR has a higher ethical obligation of discovery and disclosure than does a seller at common law.

When acting for a seller, discover what a reasonably prudent REALTOR would discover; have the seller complete the OREA standard form SPIS; advise the sellers of your ethical obligations to them and to other members of the public. Then follow the Golden Rule: "Do unto others as you would have them do unto you." If the seller refuses to disclose a defect that you must disclose, do not accept the listing.

When acting for a buyer, ask whether an SPIS form has been completed and get a copy of same; discover what a reasonably prudent REALTOR would discover; make sure that you or your buyer ask lots of questions; and ensure that professional inspections are done.

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You will wonder why there is an advantage to hiring a realtor? If a seller is only obligated to disclose certain information, then why is the agent held to a higher standard? You can appreciate that in some cases, the realtor should decline the agency appointment and advise the seller accordingly.

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