

Noisy Neighbours ~ Do You have to Tell?



By Brian Madigan LL.B.

Actually, it depends upon where you live. If you live in Ontario, you can keep this to yourself. But, one little problem, your agent may have to tell.

Listen, this is a mess! It is very difficult to solve. I know you don't want to be the "bad guy", but if you live next door to the neighbours from _ell, then you'll never sell your house.

However, don't forget about the English common law. Here, it's coming to your rescue. You don't have to say a thing. Just keep quiet. Remember that business about "buyer beware"? Well, that principle is alive and well, and applies in this case. Say, nothing! And, as long as you keep silent on the issue, there's nothing that they can do.

But, once you decide to speak up, you have to tell the truth. Half truths, and vague, evasive answers can all be interpreted as "lies" from a legal perspective. They can all amount to fraudulent representations intended to deceive the buyer and induce him to purchase your property. If you're trying to limit your legal exposure, this isn't the route.

So, you might say, "I'll tell my agent, and just let her handle it". At first, there appears to be some wisdom in that approach. The difficulty is that the agent is governed by the *Real Estate and Business Brokers Act*, and there are some important provisions that come into play. The *Code of Ethics* under the Act states:

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.

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.

Note: This applies no matter the legal arrangement between the agent and the prospective purchaser (client or customer status).

And here's the definition of material fact:

“material fact means, with respect to the acquisition or disposition of an interest in real estate, a fact that would affect a reasonable person's decision to acquire or dispose of the interest.”

So, all in all, a serious issue involving a nasty, noisy neighbour would likely constitute a material fact. That means your agent might have to tell, even if you don't.

Now, the obligations of the legal profession are quite different. This time, your lawyer is there to protect you and no one else. If you don't have to tell, then, they don't either. In part, this is solicitor-client privilege. You can be perfectly candid with your lawyer, tell all, you can even admit to murder, and your lawyer is sworn to secrecy.

This leads to a very simple conclusion if you have a serious issue with the neighbour. Seek legal counsel first. And, be careful about what you say to your agent. Also, if the problem is so self-evident that your agent will discover it on her own, then maybe you should consider selling this property yourself.

In Ontario, there is a document called a Seller Property Information Statement (SPIS). It is not mandatory or compulsory. It deals with a whole host of issues related to property ownership, physical condition, the structure, zoning and other matters. However, it does not touch on the issue here, namely, the disclosure of the noisy neighbours.

If you live in another jurisdiction, things might be different. A similar document to our SPIS may be mandatory and one of the questions may deal specifically with noise, and another with the social behaviour (or anti-social behaviour) of the neighbours.

So, as long as you live in Ontario, you can keep this secret to yourself. If, your conscience gets the best of you, and you feel obligated to provide complete disclosure, consider:

- Lowering the price
- Negotiating a truce with the neighbour
- Seeking a mediator
- Constructing noise attenuation walls
- Reporting the noise violations to by-law enforcement

- Reporting the noise violations to the police, if more serious
- Seeking damages by way of a **civil action in nuisance**

This final step may in fact be your best remedy. If you obtain a judgment for damages, you can get the neighbour's insurer to pay. You can rest assured that they won't like to pay you more than once. So, they will cancel the home insurance, and without home insurance, the mortgage goes into default. This all starts a vicious circle, but this time it is all to your benefit.

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