

## RECO Discipline: Sewage Systems Disclosure

By Brian Madigan



William Holden is a friend of Bernie Johnson an elderly and unsophisticated owner of a waterfront property. Holden takes the listing and takes a few liberties with the facts. He says it's "all season", when really this is stretching the truth.

He recommends that Johnson give a warranty about the "sewage system", when really Johnson doesn't know anything about the sewage system. You will appreciate that the septic system required substantial repair, and the purchaser sued Johnson and Johnson sued him in Small Claims Court (all successfully, I might add).

So, this is the RECO decision concerning Holden's role as the listing agent.

### AGREED STATEMENT OF FACTS

1. Mr. William Holden is a member of RECO and a sole proprietor registered under the Real Estate and Business Brokers Act, 2002.

At all material times, Mr. William Holden was registered under the Real Estate and Business Brokers Act R.S.O. 1990, Ch. R-4.

***Comment: Please note that when everything took place, the old Act, and the old Code of Ethics apply.***

2. Ted Williamson is a member of RECO and a salesperson registered under the REBBA. At all material times Ted Williamson was also an employee of Brokerage ABC Realty.

3. Bernie Johnson owned 1-A Concession, A Township and listed the Property with Mr. William Holden on March 29, 2004.

4. Raymond Brown purchased the Property; he was represented by Ted Williamson.

***Comment: Actually, this is good for Holden. It would have been much worse if Holden also acted for Brown, called "dual agency" at the time or "multiple representation" today.***

5. By a listing agreement Mr. William Holden listed the Property for \$92,000.00.

6. In the listing, Mr. William Holden indicated that the Property had septic sewage system and electricity and telephone services.

He described the Property as “All season ‘WATERFRONT’ cottage at Lake A on large lot with 290 feet of waterfrontage. Lots of privacy and breathtaking sunsets. Ready to use and enjoy.”

***Comment: The only problem with the listing is “all season”, otherwise this part is fine. There is a problem noted later with the sewage system, an a Court will decide that “ready to use and enjoy” is also a false statement.***

7. Brown submitted an offer on April 11, 2004, which was rejected as being too low. He submitted an improved offer for \$81,000.00.

8. On April 13, 2004, William Holden advised Johnson to accept the improved offer. The resulting Agreement of Purchase and Sale included a warranty on the sewage system that stated:

“The Vendor represents and warrants, to the best of his knowledge and belief, that, during his occupancy of the building, the sewage system has operated satisfactorily. The Parties agree that this representation and warranty shall survive and not merge on completion of this transaction, but apply only to the state of the property existing at completion of this transaction.”

***Comment: This is fairly standard wording. It seems somewhat innocuous. But, it is supposed to have meaning, and look at the circumstances later as viewed by the Small Claims Court.***

9. On the Canada Day long weekend of July 2004 (being the second time Brown was using the Property) he perceived the odour of sewage and rotting food (from kitchen drain) on the Property. Consequently, he retained Company A to pump out the tank at a cost of \$107.00. After the pumping, the odour persisted; as a result, Brown requested the public health service to attend.

10. On July 21, 2004, after inspecting the Property, the County A Health Unit issued an Order under the Building Code, to

(a) discontinue use of plumbing fixture units and sewage system,

(b) to apply for and obtain sewage permit for the replacement of the existing unsafe sewage system,

(c) to install an approved sewage system within eight weeks of the Order.

***Comment: A mere 3 months after the agreement, the sewage system needs full replacement. And, of course, that was not full time attendance. Note: without the warranty, this was a buyer beware situation.***

11. In summary, Brown discovered the following about the Property:

- a. The “septic tank” had a huge hole in it and was one third full disclosing that it has been leaking for a long time; also he discovered that a metal tank that supported the trailer (that formed part of the building on the Property) was actually part of the sewage system;
- b. The drain system from the kitchen discharged on the ground surface under the building;
- c. The connection to hydro was by industrial extension cords;
- d. The Property was not “four seasons” usable because there were fully exposed copper wires and drains;
- e. The front deck was defective (the Brown’s guest fell through it);
- f. The roof was leaking despite some new tiling; and
- g. It would cost an amount to fix the Property and bring it to the state that was represented in the listing.

***Comment: The deck, the roof and related repairs are simply thrown in as additional items that might influence the trial Judge. Actually, the buyer beware provisions apply, but the sympathy is with the purchaser.***

12. Brown replaced the sewage system and fixed the plumbing in August 2004; he also fixed the electric supply and the telephone.

13. On November 6, 2004, the Brown engaged an appraiser who inspected the Property and concluded that, after the renovations done by the Brown, it was “suited to 3 season use”.

14. The appraiser’s conclusion was contrary to the representation in the listing that the Property was “all season’ and “ready to use and enjoy”.

15. Brown brought an action in the Small Claims Court in City A for breach of warranty and misrepresentation. As a result of the lack of sewage system on the

Property and the warranty signed by the Johnson, he was found liable for the maximum allowed 10,000.00 plus 15% in costs.

***Comment: The total amount that can be claimed in Small Claims Court is \$10,000. So, in all likelihood the actual losses exceeded that amount. Plaintives frequently abandon the excess and sue in Small Claims Court since there is a significant saving in court costs.***

***Also, note that the only item of compensation was the “lack of a sewage system”. However, one other point to note is that other items might have been included, but the sewage system itself was over \$10,000, so they were probably abandoned. In another case where the monetary jurisdiction of the Court was not in issue, they might have resulted in an increased claim.***

16. The Small Claims Court also concluded that Mr. William Holden “egregiously failed the Vendor in his duties as an agent and fiduciary in the transaction” The Court, therefore, assessed \$5,000.00 against him to be paid to Johnson.

***Comment: In the Small Claims Court, Brown sued Johnson, and Johnson took third party proceedings against Holden. It is interesting that Brown obtained \$10,000 from Johnson but Johnson was only able to get \$5,000 from Holden. The reasoning of the Court is not set out. You would think that this would have been an “all or nothing” decision. Either Holden was negligent or not!***

17. The Small Claims Court found the following facts:

- a. The description of the Property in the listing was intended to convey that there was a satisfactorily operating and legal sewage system on it;
- b. There was no sewage system within the definition and requirement of the Building Code or within the common accepted practice of health and sewage system inspectors in the area;
- c. Johnson did remedial work on the sewage system without a permit during his tenure on the property;

***Comment: This might be the reason the Court only awarded \$5,000 to Johnson. After all, perhaps he really did know a lot more about the sewage system than he was prepared to let on. However, it was Holden who told him that it was safe to sign the warranty.***

- d. Johnson made negligent and false representation and warranty regarding the sewage system in the Sale Agreement;

e. The representation and warranty made by Johnson was not reasonably fair or truthful;

***Comment: Again probably a reason for the Court not to provide full compensation to Johnson. Please note d) above, that can be an innocent mistake, but in e) the Court says it was not truthful, which of course means that it was “intentional”.***

f. William Holden should not have accepted without question Johnson’s statement as to the status of the sewage system;

***Comment: This is a quite interesting point here. If Johnson is lying (in part), Holden is placed on inquiry. He has a duty to look into it further. He cannot simply say “well, I wouldn’t really believe it myself, but I will just pass on the information as I heard it”. That’s not acceptable conduct for a professional.***

g. William Holden knew or ought to have known from his long association with Johnson that he had limited capacity and expertise in making representations and warranties in the Sale Agreement; and

***Comment: Johnson is elderly and unsophisticated but he knows enough that he has to say the sewage system is fine. If it’s not, a buyer will pay less. So, from Holden’s point of view, why accept these obvious self-serving statements from Johnson as the truth? He’s not an expert in sewage systems. In fact, he didn’t even have a permit. Holden knows that, but he chooses to ignore his “second thoughts”. However, he proceeds with the matter at his own risk.***

h. William Holden was instrumental in presenting, reviewing and opining on the offer from Brown.

## **SUMMARY OF ALLEGATIONS**

Accordingly, William Holden acted unprofessionally, including as follows:

i. Failed to live up to his ethical obligations of protection and promoting the best interests of his clients when he failed to confirm the representation Johnson made about the Property;

ii. Failed to comply with his primary duty to endeavour to protect and promote the best interest of his client when he did not ensure that he sold the property without incurring liability;

iii. Misrepresented the state of the Property by creating a listing document that

described the Property as “four seasons” and “ready to use and enjoy” when he did not know this information to be true;

iv. Failed to discover pertinent facts about his clients’ property by failing to find out whether the Property was actually “four seasons”, whether it was “ready to use and enjoy” and whether the septic tank was operating properly; and

v. Engaged in an act or omission in the practice of the profession that is unprofessional in the way he listed the Property, exposing his clients to liability.

Thereby breaching the following Rules of the RECO Code of Ethics:

**Rule 1 – Ethical Behaviour** – A member shall:

1) endeavour to protect and promote the best interests of the Member’s client.

**Rule 2 – Primary Duty to Client** – A member shall endeavour to protect and promote the best interests of the Member’s Client. This primary obligation does not relieve the Member of the responsibility of dealing fairly, honestly and with integrity with others involved in each transaction.

**Rule 10 – Misrepresentation or Falsification** – A member shall not make any statement or participate in the creation of any document or statement that the Member knows or ought to know is false or misleading.

**Rule 11 – Discovery of Facts** – A member shall discover and verify the pertinent facts relating to the Property and Transaction relevant to the Member’s Client that a reasonably prudent Member would discover in order to fulfill the obligation to avoid error, misrepresentation or concealment of pertinent facts.

**Rule 46 – Unprofessional Conduct** – A member shall not engage in an act or omission relevant to the practice of the profession, that, having regard to all the circumstances, would reasonably be regarded by members or the public as disgraceful, dishonourable or unprofessional.

We also direct you to refer to the Guiding Principles of the RECO Code of Ethics. Please particularly refer to the Guiding Principles under Rules 1, 2, 10, 11, and 46.

### **Decision of the Panel**

Having reviewed and considered the Agreed Statement of Facts, the Panel concluded that the Holden breached Rules 1(1), 2, 10, 11 and 46 of RECO’s Code of Ethics and assessed:

Administrative Penalty of \$6,000.00 payable to RECO within 60 days.

## COMMENT

So, this turns out to be quite a mess for Holden. First, his client is perhaps a little more worldly wise than he is letting on. He knows full well the sewage system is “crappy” (sorry, I couldn’t think of another word). No permits, no inspections, the tank has a large hole in it and the drains just dump out on the ground under the cottage. Anyone should know there is something wrong here!

Yet, Holden takes on the listing and makes the property seem quite nice. But, why does he assume the risk associated with the crappy sewage system? Why not just tell it, like it is? After all, it’s waterfront property and the sunsets are just fine.

By adding a little “gloss” to the listing he places himself in trouble.

The warranty was his fault. You can’t blame the owner for that. The wording seemed simple and casual, but nevertheless it was a warranty that did not merge. The Court is going to be sympathetic and offer some meaning to it.

A much better way to approach this situation would have been to insist that the purchaser have look at the sewage system and come to his own conclusion. If this was set up as a condition, the purchaser might not have even bothered to pay to have an inspection done. Then, the entire risk befalls the purchaser and the owner and the agent are both off the hook.

***As a rule, I use fictitious names. The actual case is published on RECO’s website and is available to the public. For educational purposes, the names of the parties really don’t have any bearing. If you need to quote the case, you will have to obtain the proper legal citation.***

*Brian Madigan LL.B., Realtor is an author and commentator on real estate matters, Coldwell Banker Innovators Realty  
905-796-8888  
[www.OntarioRealEstateSource.com](http://www.OntarioRealEstateSource.com)*