

Rural Risks: Water and Sewage



By Brian Madigan LL.B.

I thought that everyone knew this, that's the reason why most people live in the City. Rural life has its charm, but there are always issues with both water supply and waste water disposal. These two matters are an integral part of every rural real estate transactions, like it or not.

Well, apparently at least one agent seemed to be blissfully unaware, as was his supervising broker. They took a rather cavalier approach to both issues and failed to protect the purchasers.

The agent showed the rural property to his clients, first time home-buyers. They submitted an Offer at \$365,000 and accepted the seller's signback at \$380,000. There was just one condition and that was a "home inspection".

For some strange reason, the agent did not include any clauses about the water, either its quality or quantity, nor did he include any references to the septic system.

The home inspection condition was waived and the transaction which went firm was closed on 16 June 2005. You probably guessed it! Within days of moving into the property there were problems with the quality and amount of water, as well as the septic system.

The home inspection condition was waived without an actual inspection having been undertaken.

The matter came before a disciplinary committee of the Real Estate Council of Ontario (RECO) which regulates real estate professionals.

The agent incredulously offered the following comment: ".....the home inspection would, in all likelihood recommend that the water well be checked".

The supervising broker supported this position. The agent also indicated that a lengthy discussion took place at the property between the seller and the buyers, wherein she cautioned that the septic system must be pumped out every two years.

The agent did not advise the buyers:

- a) that they should insert a clause in their Offer, requesting for a potability test of the well water be undertaken (quality),
- b) the importance of conducting a flow test to determine that the well supplied adequate water for the Property (quantity),
- c) should request the Seller to produce the well certificate, and
- d) should have the Seller produce information in relation to the septic system.

Of course, these matters became issues. Why wouldn't they, after all, this was rural property.

Facts relating to Defects

A letter dated September 3, 2006 regarding Environmental Health Inspection – Water Quality and Septic System Inspection was provided to RECO which detailed the following:

- the sewage disposal system has a significant malfunction which poses both health and environmental risks,
- the sewage disposal system may have been installed incorrectly without a property building permit,
- the water from the well was bacterially unsafe for drinking as it showed total coliform count of 29,
- the existing bored well be decommissioned, and
- a new properly sited and constructed well be installed by a licensed well contractor.

On January 30, 2007 the municipality issued an Order requiring the new owners to obtain a permit to replace the on-site sewage disposal system and install a new septic system.

Allegations Against Agent

RECO claimed that the agent acted unprofessionally when he:

- a) Failed to advise his clients in writing, of the importance of conducting water potability test.
- b) Failed to insert into the Offer a condition that water potability test be conducted.
- c) Failed to advise his clients in writing of the importance of conducting a flow test for the well.
- d) Failed to insert into the Offer a condition requiring the Seller to produce a well certificate.
- e) Failed to insert into the Offer a condition requiring the Seller to produce a waste disposal certificate and/or a provision to have the septic system inspected by a qualified person.

In particular the agent breached 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,
- (2) endeavour to protect the public from fraud, misrepresentation or unethical practice in connection with real estate Transactions,
- (3) maintain and enhance the Member's degree of skill and competence.

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 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 42 – Competence

A Member shall render conscientious service with the knowledge, skill, judgment and competence, in conformity with the Code of Ethics and the standards which are reasonably expected of Members. When the member is unable to render such a service, either alone or with the aid of another Member, the Member shall decline to act.

Allegations Against Broker

RECO alleges that the broker acted unprofessionally when it:

- a) Failed to advise its clients in writing, of the importance of conducting water potability test.
- b) Failed to insert into the Offer a condition that water potability test be conducted.
- c) Failed to advise his clients in writing, of the importance of conducting a flow test for the well.
- d) Failed to insert into the Offer a condition requiring the Seller to produce a well certificate.
- e) Failed to insert into the Offer a condition requiring the Seller to produce a waste disposal certificate and/or a provision to have the septic system inspected by a qualified person.
- f) It failed to supervise the activities of the agent to ensure that the necessary advice and clauses were inserted to protect its clients.

In particular, the broker is responsible under 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,
- (2) endeavour to protect the public from fraud, misrepresentation or unethical practice in connection with real estate Transactions,
- (3) maintain and enhance the Member's degree of skill and competence,

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 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 43 – Broker Responsibility

A Broker shall be responsible for the professional conduct and professional actions of those Members registered with that broker.

Decision of the Discipline Committee

The Committee concluded that the allegations were sufficiently proven and assessed a \$10,000 fine against the agent and a \$5,000 fine against the broker.

COMMENT:

The negligence of the agent seems quite evident. Young children living in rural settings all know about the risks of water coming in and going out of their homes. However, the charm of a rural lifestyle to a young couple from the City doesn't

mean that they will know. These issues however are well known to real estate agents. They ought to know better. There is really no excuse.

The interesting aspect of this case is the liability of the broker. You will note that in addition to the lack of supervision of the agent, the broker should have:

- 1) advised the clients in writing about the risks, and
- 2) included sufficient protection for the Clients in the Offer.

So, ultimately, the broker should have stepped in and personally undertaken an active role in client communication and the negotiations.

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