

Facts a seller has a legal obligation to disclose

This bulletin explains an agent's obligations with respect to facts a seller is legally obligated to disclose to a buyer.

Summary

If the seller's agent is aware of a fact or facts the seller is legally obligated to disclose, then the seller's agent must:

1. Disclose the fact(s) to every buyer that expresses an interest in the property.
2. Use best efforts to obtain an acknowledgement from each buyer who receives the disclosure.
3. If a buyer makes the acknowledgement, provide a copy to the buyer.

The seller's obligation to disclose and the facts or defects they must disclose are based on current case law, not TRESA.

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For more information, contact:
registration@reco.on.ca
reco.on.ca

P: 416-207-4800
TF: 1-800-245-6910
F: 416-207-4820

Understanding patent and latent defects

The law in Canada on property defects sets out two categories: patent defects and latent defects. The type of defect will determine what disclosure, if any, a seller must make to a potential buyer.

PATENT DEFECTS

A patent defect is one that can be detected by a potential home buyer or their home inspector by reasonable observation and inquiry.

LATENT DEFECTS

A latent defect is one that would make a property unfit for habitation, dangerous, or potentially dangerous, and is generally not apparent to someone exercising reasonable care in the inspection of the property. Keep in mind that "unfit for habitation" does not necessarily mean that a person cannot live in the property — there are other factors a court might consider in making the determination.

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A seller does not have to disclose a patent defect to a potential buyer — it is a case of "*buyer beware*" — the buyer is expected to do their own inspections and due diligence before fulfilling or waiving conditions in the accepted offer and entering into a binding Agreement of Purchase and Sale. However, a seller should not attempt to conceal the patent defect or "*buyer beware*" may not apply.

A seller must disclose latent defects. The law of latent defects is complicated. An agent representing a seller should advise the seller to seek a legal opinion if there are any concerns about whether a particular defect is a latent defect and needs to be disclosed.

Failing to disclose a latent defect might be considered misrepresenting the state of the property and lead to litigation. Even if a seller does not have direct knowledge of a latent defect, they may still be liable if they were willfully blind about the existence of the defect. A seller who attempts to hide or cover up a defect faces additional liability.

An agent representing a seller should explain to their seller client that even when due diligence is exercised, including a home inspection, a latent defect is unlikely to become known to the buyer. The seller might face litigation when the buyer discovers the latent defect after the sale closes, or it could jeopardize the transaction before it is completed.

Real estate agent's obligation to disclose

The obligations of the agent representing the seller are tied to the seller's obligations. If a seller has a legal obligation to disclose a fact to the buyer and the fact is known to the seller's agent, the seller's agent must disclose the fact to every buyer who expresses an interest in the real estate.

The seller's agent must make best efforts to obtain a written acknowledgement from each buyer who receives the disclosure indicating that the disclosure has been received and, if a buyer makes the acknowledgement, provide them with a copy of it.

Related information

Bulletin No. 3.1 Disclosures, consents, and acknowledgements

Bulletin No. 7.3 Material facts

Bulletin No. 7.5 Stigmas