



# DAMAGE TO PROPERTY BEFORE CLOSING

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A decorative graphic at the bottom of the slide consisting of a dark blue wave-like shape on the left, a black horizontal line, and a light blue wave-like shape on the right.

- Patent vs. Latent Defects
- Rights under the Agreement of P&S
- Damage arising between Offer and Closing
- Impact of SPIS - misrepresentation

- *Patent defects are defects that would be discovered through the exercise of reasonable vigilance in the course of an inspection of a property. Buyers are deemed to be aware of such defects whether or not they in fact inspect the property or have it inspected on their behalf.*
- While it is clear that there is no duty on sellers and their brokers, to disclose patent defects, sellers and their brokers cannot hide from, or otherwise mislead buyers as to the existence of such defects.
- There is no duty on Sellers or their brokers to disclose patent defects

*Latent defects are those defects which are not discoverable through the exercise of reasonable vigilance in the course of an inspection of a property; whereas latent material defects are both not discoverable and:*

- render the property dangerous or potentially dangerous to the occupants;
  - render the property un-fit for habitation;
  - render the property unfit for the purpose for which the buyer is acquiring it where the buyer
  - has made this purpose known to the seller or broker;
  - concern local authority and similar notices received by the seller that affect the property;
  - concern the lack of appropriate municipal building and other permits.
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- **Sellers and their brokers must disclose latent material defects of which they are aware.**

- **Section 8 - Title Search**, allows the Buyer's lawyer, up to five (5) days prior to closing to "requisition" the Seller's lawyer if the Buyer cannot obtain fire insurance. If the Buyer cannot obtain fire insurance (perhaps because of existing water/flooding damage to a basement) the Buyer may be able to terminate or rescind the Agreement.
- **Section 14 – Insurance**, provides that in the event of substantial damage, the Buyer may (i) terminate the Agreement and have deposit returned, without interest or (ii) accept the insurance proceeds from the Seller's insurer and complete the transaction.

- Before 1979, Caveat Emptor was the rule
- In *McGrath v. Maclean 1979*, the courts imposed a duty on the Seller for the first time to disclose a latent defect where the defect renders the premises unfit for habitation or dangerous
- This was the start of “good faith” obligation in contract
- Can’t be dishonest or unfair in negotiations – below community standards

- **Basic Facts**

- Soboczynski bought a house from Beauchamp with a finished bedroom in basement. Private Offer.
- January 9, 2008 (9 days before closing), water seeped into basement and flooded the basement rug. Seller dried rug and replaced the underpad – cost \$1,650
- Seller did not disclose leak or repair to Buyer. Deal closed as scheduled.
- February 6, 2008 (about 3 weeks after closing) the basement flooded again – Buyers spent about \$16k to try to remedy future flooding
- SPIS completed and delivered after Offer signed, at the Buyer's request

- Impact of SPIS in this case
  - SPIS concludes “The Sellers state that the above information is true, based on current actual knowledge as of the date below. Any important changes to this information known to the sellers will be disclosed by the sellers prior to closing. Sellers are responsible for the accuracy of all answers.”
  - Judge held that the SPIS did NOT form part of the Agreement. It was not attached to the Agreement and it was completed and delivered to the Buyers after the date of their Offer (same day as they waived their conditions)
  - The Judge relied on the “Entire Agreement” clause which prevented the Buyers from relying on disclosure in the SPIS as representations or warranties



- Judge Dismissed Buyers Claim and held:
  - The Agreement of P&S had only two conditions (financing & home inspection) and both were satisfied.
  - SPIS did NOT form part of the Agreement could not be relied upon by the Buyers due to the “Entire Agreement” clause
  - **The flood on January 9, 2008, was a “one off” event and did not amount to an important change in the minds of the vendors at the time requiring notice to the purchasers in any event.**
  - There was no prior problem with ponding or flooding on the property that was proven on the balance of probabilities.

- In *Kaufmann v. Gibson [2007]*
  - Seller had water damning and repaired damage (almost \$12k). Seller thought he should disclose – brought notes. Agent advised to complete SPIS based on current conditions. Seller answered “No” they were not aware of (i) moisture and/or water problems, (ii) damage due to .. .water, and (iii) roof leakage.
  - Judge held SPIS is not limited to “current” condition and that Sellers answers amounted to negligent misrepresentation. Held for defendants.
- In *Krawchuk v. Scherbak [2011]*
  - Seller completed SPIS and disclosed “NW corner settled”. Repairs to remedy the house cost the Buyer more than the house itself.
  - Title insurance covered \$105k of repair cost. Buyer still able to sue Seller.
  - Judge held SPIS was a representation forming part of the Offer and was not complete. Held for Buyer.
  - Listing Agent held 50% liable for not making further investigations and repeating information provided by Sellers.

- Require Seller to remedy before closing - e.g.
  - Seller to fix leak and replace damaged carpet etc..
- Price Abatement
  - Buyer assumes risk and makes repairs
- Holdback
  - To be used by Buyer or Seller to cover cost of post-closing repairs
  - Not an abatement
- Termination/Rescission – refuse to complete transaction
  - Must be material
  - May arise from misrepresentation in SPIS

- Negotiated Settlement
- Sue Seller (usually in Small Claims Court)
  - Time consuming and sometimes expensive
  - Not a quick resolution
  - Have to show pre-existing condition, that knew about and that would have a material impact on Buyers, negligent misrepresentation
- Title Insurance – in some limited cases, where renovations done without permits and not up to code

- Leaks usually happen due to heavy end of summer rains or spring thaw
- Leak and damage before closing:
  - usually represents a material change to the condition of the property and is discloseable
  - May not be discloseable if it is a “one-time” event, not material, and Seller thinks it is properly fixed
- Post-Closing
  - Risk passes to Buyer
  - Have to sue the Seller and demonstrate that Seller knew about hidden or latent defect in order to obtain a remedy from Seller

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