

## Property disclosure statement truths

**Form is not intended to be a warranty; buyer must conduct own independent investigation**

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Basement flooding. Mould behind the walls. Cracks in the foundation. These are just some of the stories I have received from buyers who discovered defects in their home shortly after closing, which were not disclosed by the seller.

I have also reviewed many articles written by legal commentators who have taken the position that sellers should rarely complete a Property Condition Statement (PCS) because of potential liability that may result. In Ontario, this PCS form is called a Seller's Property Information Statement (SPIS).

In order to properly understand these issues, we need to first review the law as to what disclosure a seller is legally obliged to make to a buyer when selling their property.

There are two kinds of defects: patent defects and latent defects. A patent defect is a defect that is obvious when you walk into the home, for example a broken window. The buyer cannot complain about this defect because they can easily see it when viewing the home. They are thus governed by the legal doctrine of *caveat emptor* or buyer beware, and have to accept these defects on closing, unless they include a clause in their agreement that the seller will repair the defect.

A latent defect is a hidden defect, which cannot be observed on a normal inspection. The law here is that if the seller knows about a latent defect that makes the home either: uninhabitable by the buyer; unfit for the buyer's intended purpose; or dangerous, then the seller must disclose this defect to the buyer. In addition, the seller cannot intentionally conceal what would otherwise be a patent defect. Examples of latent defects that should be disclosed include a problem with the foundation, an illegal basement apartment or a very serious basement or roof water problem that has not been repaired.

The real estate industry introduced Property Condition Statements like the SPIS as a means for sellers to put buyers on notice of any physical problems with the property, to alert buyers and to provide buyers with the opportunity to make further inquiries when necessary. It states right on



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the form that it is not intended to be a warranty and the buyer must conduct their own independent investigation or property inspection. This is why almost every home purchase includes a home inspection condition for the benefit of the buyer.

When completing the statement, the seller is asked to respond either "yes, no, unknown" or "not applicable," to questions such as "are you aware of any water problems" or "are you aware of any structural problems."

Sellers have completed these statements for years in hundreds of thousands of real estate transactions across Canada, without any liability, especially when they completed the statement truthfully and to the best of their knowledge. In fact, in many communities across Canada, when the statement was not provided, buyers were suspicious that sellers had something to hide, and thus offered less money than they otherwise would have.

Yet, there have also been cases where sellers who signed the statement were held liable for the buyer's damages when problems were discovered after closing. In my review of most of these decisions, the judge determined on a factual basis that the seller either knew what they were saying was false or had deliberately concealed a defect which was found out afterwards. It was not the SPIS statement that got the seller in trouble. It was about not telling the truth when completing the statement. In other words, even if the statement was not completed, the sellers could still have been found liable, as they knew of a serious latent defect that was not disclosed.

In some cases, filling out the disclosure statement can save the seller from liability. In the case of *Gesner v. Ernst*, which was decided in Nova Scotia in 2007, the seller had provided a property condition statement to the buyer, which indicated that they had experienced water problems with the roof and had installed a new roof to try and repair the problem. The buyer did not investigate this further and it turned out after closing that the water leakage problem was much more serious and the home had to be destroyed. However, the buyer could not prove that the seller knew about any of these structural problems. The judge even commented that by answering "yes" on the property condition statement about the history of water problems, the sellers had made proper disclosure and the buyers should have investigated further. Since they didn't, they could not go after the sellers unless they could prove that the seller actually knew about the foundation problems.

I could sum up the discussion about Property Condition Statements as follows: for buyers, it is Buyers Beware; for sellers, it is Liars Beware.

However, there are many cases when sellers cannot complete the SPIS, such as when the property is rented and they have no personal knowledge about the physical condition, the seller is infirm and cannot understand the questions on the SPIS form, the property is being sold by an estate trustee or by a bank under power of sale.

Next week, I will discuss some practical solutions for buyers and sellers when a seller either cannot sign an SPIS, or is advised by their lawyer not to sign it.

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