

## Be careful with wording of home inspection clause

**Although it's a common condition in house deals, it's often misunderstood**

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SPECIAL TO THE STAR

The home inspection condition appears in almost every residential real estate transaction, yet it is surprising how many buyers and sellers do not really understand what the condition means and what their rights are once the condition is inserted.

I have received many emails from buyers and sellers on this subject. Some of the questions are as follows:



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Does a home inspection condition give a buyer an automatic right to cancel the agreement?

Is the seller entitled to a copy of the home inspection report?

If the report shows only minor problems, is the seller entitled to just fix the problems and force the buyer to complete the transaction?

What happens if the buyer does not carry out a home inspection at all and then tries to cancel the agreement?

In general, the courts have indicated that when buyers are trying to satisfy any condition, including a home inspection condition, they must act honestly, reasonably and in good faith. A decision of the Ontario Court of Appeal provides some guidance for answering each of the above questions related to the home inspection condition.

In the case of *Marshall vs. Bernard Corporation*, decided in 2002, the agreement contained the following home inspection condition:

"This agreement is conditional upon the inspection of the property by a home inspector of the purchaser's choice and expense, and receipt of a report satisfactory to him, in his sole and absolute discretion."

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The buyer was not satisfied with the inspection report and asked for the deposit to be returned.

The seller took the position that the buyer was not acting in good faith and refused to return the deposit, because the inspection report listed only minor deficiencies to the home itself.

The sellers felt that in accordance with any "objective standard," the buyers should have been satisfied with the report and completed the transaction.

The court however, disagreed and held that in this case, the words "sole and absolute discretion" indicated that the parties intended this to be more of a "subjective standard" and as long as the buyer acted reasonably, they could refuse to waive the condition.

In other words, as long as the buyer could prove that they were not happy with the result of the inspection report, they did not have to prove that anyone reading the inspection report would have been unhappy with the results.

As a result, many sellers try to remove the words "sole and absolute discretion" from home inspection condition clauses, or include additional language that if the amount to correct all deficiencies is less than \$1,000, then the seller has the right to correct the deficiencies and the buyer has to close the transaction.

If you are a buyer and any change is made to the home inspection condition clause, you need to review the changes carefully with your real estate salesperson or lawyer as your rights might be impacted.

Sellers are not entitled to a copy of the inspection report unless it says so in the clause itself.

If the buyer does not conduct the home inspection at all, or perhaps brings in an unqualified person to conduct the inspection, then I believe that these might be examples of not acting reasonably and in good faith and it would thus be difficult for a buyer to try and cancel the agreement based on the condition clause.

It is thus very important that buyers always use qualified home inspectors to conduct any inspection on a home.

In my view, sellers should not spend a lot of time negotiating conditions.

If the buyer does not want your home, it is better to just let them cancel the agreement and find a buyer who really wants your property.

However, buyers also need to understand that some sellers may not be so accommodating.

That is why any home inspection condition must be drafted carefully and carried out in good faith.

Please continue to email your questions and suggestions to me on topics for future articles. I appreciate all your feedback.

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