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## Staying silent in home sale may equal fraud

### Court rules couple lied on PCS disclosure form

#### *Leaking windows should be reported*

It had always been my understanding of real estate law that if a vendor says nothing about the house he or she is selling, the purchaser takes all the risk of buying the house with any existing defects.

The traditional wisdom is that the doctrine of *caveat emptor* (buyer beware) is alive and well in Canada, as long as there is no fraud, mistake or misrepresentation.

Assuming this is the law, do sellers have to tell purchasers that their house has a defect, or can they simply keep quiet? Normally, silence by a seller with respect to a defect will not give rise to the risk of a lawsuit and damages for fraud or misrepresentation when the defect is discovered by the purchasers after closing.

Unfortunately a couple of homeowners in Winnipeg learned the hard way that silence in selling a home can sometimes amount to fraud.

Ioannis and Darcie Alevizos purchased a Winnipeg home from Jasbir and Sartaj Nirula. During the negotiations, the purchasers asked the vendors to complete a Property Condition Statement (PCS). The document was recently introduced by the Manitoba Real Estate Association. Although it is not mandatory, its use is fairly common now in that province.

The buyers had noticed a gap in a window and their agent suggested the PCS form to obtain more information. The document is two pages long and contains a number of questions about the condition of the property, followed either by boxes or blank spaces to be filled in.

One question asks if there has ever been any flooding or leakage into any portion of the house. The Nirulas filled in the form, stating that there had been some damage from the freezing of an exterior water tap. They made no comment on water leakage from the windows.

In fact, there was blackening and staining on the sills of some of the windows due to significant leakage caused by a lack of weather stripping or seals.

The case was tried in Small Claims Court, where the vendors argued that the blackening and staining around the windows should have been obvious to the purchasers, and they didn't conceal anything.

Ultimately, the trial judge concluded that the vendors had acted fraudulently by failing to provide a full and honest answer to the question about flooding and leakage in the home.

Their response, said the trial judge, was more than a "half truth," it was a falsehood. Once the vendors voluntarily undertook to complete the PCS form, they were under a duty to do so honestly and completely.

Unhappy with the result, the Nirulas took the case to the Manitoba Court of Appeal last year. There, Chief Justice Richard Scott ruled that the vendors' representation constituted both "fraud by silence" and by active concealment.

After reading *Alevizos v. Nirula*, I conducted an electronic search of reported court decisions for the term "fraud by silence." I was unable to find any reported Canadian or British case applying that doctrine, but I did discover about 90 American cases using it.

Whatever its origin, a Canadian appellate court has now introduced this unusual doctrine into Canadian law, and I doubt that we have heard the last of the "fraud by silence" rule.

The case of *Alevizos v. Nirula* (online at <http://www.canlii.org/mb/cas/mbca/2003/2003mbca148.html>) also presents a strong warning about the use of the Property Condition Statement (which, fortunately, is not a common practice in most of Ontario).

In a separate but concurring judgment, Justice Guy Kroft cautioned against the routine use of the PCS.

"The purchase and sale of a home is for many people the most significant business transaction they will ever enter into," he wrote. "Representations as to the condition of the property are inevitably going to be requested and given.

"I do not believe that these concerns are ever going to be safely dealt with by filling in the blanks on a short form, carried in the real estate agent's briefcase with his or her other supplies."

The judge expressed concern that use of the PCS is likely to increase the number of disputes in circumstances similar to those in the *Alevizos* case.

If the PCS form ever becomes compulsory or even commonly accepted in Ontario, many of my colleagues in the litigation bar will make a lot of money from the resulting litigation.

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ON THE ISSUE OF VENDOR DISCLOSURE STATEMENTS SEE ALSO: <http://www.aaron.ca/columns/2004-02-07.htm> and

<http://www.aaron.ca/columns/bremner%20paper.htm>

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