Caveat Emptor v. Duty to Disclose

In general:

* A vendor is not obligated to volunteer information on a patent defect that the purchaser could have reasonably discovered - *caveat emptor* applies
* A vendor cannot rely on *caveat emptor* if they have made representations or warranties that (knowingly or unknowingly) turn out to be false
* If the vendor actively conceals a defect, this is fraud or misrepresentation and the vendor cannot rely on *caveat emptor*
* If a property is sold on an “as is” basis, *caveat emptor* (usually) applies
* If a vendor did not know about the defect (and made no representations about it), they cannot be held responsible for it - *caveat emptor* applies
* A vendor is *sometimes* required to disclose a latent defect, especially if it is dangerous or makes the property unsuitable for the use for which it is sold. Whether a defect is patent or latent, or whether it is a defect at all (and in turn, whether the vendor has a duty to disclose or not) seems to depend partly on the sophistication of the parties, whether it was a commercial or residential property transaction, the obvious prior use and existing state of the land, the vendor’s reason for silence (taking into account environmental awareness at the time, and the vendor’s knowledge of the purchaser’s intended use of the land), and whether or not the purchaser otherwise acted prudently.
* East coast courts seem to be slightly less likely than Ontario and B.C. courts to find that there was a duty to disclose - *caveat emptor* seems more dominant out east.

***Heighington v. Ontario* (1987), 41 D.L.R.4th 208 (Ont. H.C.), aff’d (1989)61 D.L.R. (4th) (Ont. C.A.)**

Radioactive contamination was discovered in a residential community. The contamination was a latent defect. If the vendor knew of the contamination, it had a duty to disclose it, but the vendor did not know of the contamination, and made no express representations or warranties to the purchasers regarding the fitness of the land (and no warranty of fitness can be implied).

***Jung v. Ip* (1988), 47 R.P.R. 113 (Ont. Dist. Ct.)**

Vendors replaced some flooring and drywall to cover termite damage and did not disclose the termite problem to the real estate agents or the purchasers. The purchasers has asked the selling agent to confirm that the property had no termites, and were advised it did not. The vendors were found 50% liable for the damages, the listing agent and broker 20% liable, and the selling agent and broker 30% liable. The termite damage was a latent defect not easily visible to the untrained eye, and vendors are required to disclose latent defects of which they are aware. The doctrine of *caveat emptor* does not apply to fraud, and fraud can arise where there is active concealment or silence about a known major latent defect.

***688350 Ontario Ltd. v. Piron* (1994), 51 A.C.W.S. (3d) 1378, supp. reasons 5 R.P.R. (3d) 69 (Ont Ct. (Gen. Div.)), appeal allowed in part 88 A.C.W.S. (3d) 491 (C.A.)**

Vendor sold property to purchaser knowing that the purchaser intended to build houses on it. The vendor did not disclose the significant amount of construction debris and wood that he had accepted as fill over the years, and subsequently covered with clean fill and grass. This did not constitute “concealment of a defect,” as that was not his intent - therefore there was no fraud, mistake or misrepresentation, and the purchaser bore the risk.

***Antorisa Investments Ltd.v. Petro Canada Ltd.* (1996), 29 C.E.L.R. (N.S.) 52, 67 A.C.W.S. (3d) 286 (Ont. Ct. Gen. Div.))**

Plaintiff purchased a service station property from the defendant petroleum company on an "as is" basis under an agreement of purchase and sale that excluded liability after closing for the condition of the property and for any representations other than those contained in the agreement. As part of the divestiture, the defendant had conducted a risk assessment of each of its properties and concluded that this one was low risk and didn’t merit further investigation. The plaintiff received this report and carried out his own shallow vapour testing that did not reveal the deep contamination. Absent any fraud or misrepresentation, and in the face of an “as is” agreement of purchase and sale that expressly excluded any representations or warranties, *caveat emptor* applies.

***Tony’s Broadloom & Floor Covering Ltd. v. NMC Canada Inc.* (1996), 141 D.L.R. (4th) 394, 31 O.R. (3d) 481, 95 O.A.C. 358 (C.A.)**

Purchaser brought an action to rescind the agreement of purchase and sale. The vendor of the industrial site had dumped varsol (which was classified as hazardous industrial waste) on the ground behind the factory, which the vendor knew was migrating offsite. The vendor did not tell the purchaser about the contamination, but also did not take steps to conceal it - the vendor made no misrepresentations. The purchaser had access to the property for an extended period of time, and took soil samples, but did not have the samples analyzed until after closing. The presence of the contaminant was neither a latent nor patent defect, as the purchaser got exactly what was bargained for, i.e., industrial land. If it was a defect, it was patent. The rule of *caveat emptor* applied.

***Sassy Investments Ltd. v. Minovitch* 21 C.E.L.R. (N.S.) 126, [1996] B.C.W.L.D. 2308, 64 A.C.W.S. (3d) 1245; additional reasons: (1997), 68 A.C.W.S. (3d) 31 (B.C.S.C.)**

Purchasers of a gas station sued when it was discovered that a distribution line was leaking and contaminating residential wells. The leak had commenced but was not detected prior to the sale. There were warranties in the agreement of purchase and sale that there were no contingent liabilities and that the equipment was in good condition. Previous owners found 50% liable because they had not kept proper dip records (which would have revealed the leak) and failed to investigate variances in the dips. Shell Canada (supplier) found 30% liable in negligence because it did not investigate the known discrepancies in inventory. Equipment installers also found 10% liable. And purchasers found 10% contributorily negligent as the failed to obtain an independent environmental appraisal prior to purchase.

***862590 Ontario Ltd. v. Petro Canada Inc.* (2000), 33 C.E.L.R. (N.S.) 107 (Ont. S.C.J.)**

Plaintiff purchased lands from Petro Canada that had previously contained a bulk petroleum terminal. Closing date was extended, pending the receipt of a letter from the MOE stating that the lands had been cleaned up in accordance with Ministry guidelines. Purchaser did not hire his own environmental consultant. Defendant Petro Canada received a second consultant’s report prior to closing, but did not provide this to the plaintiff purchaser. Court held that vendor did not warrant that the purchaser had all relevant information, and was not required to disclose the second report. Plaintiff signed an agreement at closing, giving indemnity to vendors with respect to claims arising from environmental damage. The agreement of purchase and sale contained an “entire agreement” clause. There was no fraud or misrepresentation (and even if there was a misrepresentation, the purchaser had not relied on it). *Caveat emptor* applies.

***801438 Ontario Inc. v. Badurina* (2000), 34 R.P.R. (3d) 306, [2000] O.J. No. 3178**

Corporate purchaser purchased land from group of vendors, with the intention to use it for residential development. Vendors also owned adjacent property that was an automobile scrapyard and toxic waste dump. After closing, purchaser discovered that development of land for residential purposes would be difficult due to environmental problems caused by adjacent property. Purchaser had waived condition in agreement which allowed it to conduct soil tests and to terminate agreement if dissatisfied with results. Condition of land was not latent defect that could not reasonably be discovered - the fact that rezoning would be difficult would have been readily discoverable had the purchaser been vigilant. *Caveat emptor*.

***Holtby's Design Service Inc. v. Campbell Chevrolet Oldsmobile Inc.* (2002), 46 C.E.L.R. (N.S.) 192, 1 R.P.R. (4th) 227, affd 5 C.E.L.R. (3d) 163 (C.A.)**

C sold the land (used as car dealership) to J - prior to closing, C provided J with an environmental audit of the property. At the time of closing, C gave an undertaking to J that indicated that “the property was not in contravention of any environmental laws and to the best of their knowledge and belief, there are no hazardous substances situate on or under the property, no outstanding work orders from the Ministry of the Environment and the property has never been used as a waste disposal site.” J later had 5 underground storage tanks removed from the property, and was issued a report by the contractor. The plaintiff purchaser purchased the property from J. J provided to the purchaser all of the reports he had, as well as a statutory declaration that: “To the best of my knowledge and belief the property does not contain any contaminants as defined in the Environmental Protection Act (Ontario) and there are no underground storage tanks located on, in or under the property.” Final agreement was “as is.” Purchaser later had environmental assessment conducted that revealed extensive contamination. There was no fraud, misrepresentation or intention to conceal, and no implied warranty that soil was not contaminated. *Caveat emptor*.

***66295 Manitoba Ltd. v. Imperial Oil Ltd.*, [2002] M.J. No. 234 (QL), 45 C.E.L.R. (N.S.) 240, [2002] 7 W.W.R. 732 (QB)**

Imperial Oil removed underground storage tanks (from its gas station) and sold land to W. W then sold the land to C on as “as is” basis. Many years later, C discovered petroleum contamination. W is not liable for failing to disclose contamination it was unaware of - he did not conceal anything, and, in any event, the contract negatived claims for misrepresentation.

***Cardwell v. Perthen*, 2006 BCSC 333, 41 R.P.R. (4th) 118, [2006] B.C.W.L.D. 2629, [2006] B.C.W.L.D. 2677, [2006] B.C.W.L.D. 2675, 38 C.C.L.T. (3d) 210**

The vendor had done extensive renovations to the home, but the workmanship was shoddy, and leaks, mould, faulty retaining walls and deterioration of structural components became apparent, and the purchasers soon sold the home at a significant loss. Although there were inaccuracies in the vendor’s disclosure statement (about the electrical system and roof leakage), the court found the purchasers had not relied on it in any case (so the claims for misrepresentation were struck out). Some of the defects were patent, and would have been discovered had the purchasers conducted a home inspection (so *caveat emptor* applies). Other defects were latent, could not have been discovered by reasonable inspections, and were not disclosed by the vendor - he was therefore responsible for the loss in value associated with these.

***Trihar Holdings Ltd. (In Trust) v. Lambton (County)* (2007), 67 R.P.R. (4th) 264 (Ont. S.C.J.)**

The plaintiff agreed to purchase property from the defendant county, conditional upon certain express terms. The scheduled closing was delayed, by agreement of the parties, to permit an environmental report at the plaintiff's expense and a building inspection. The study revealed asbestos, and the plaintiff refused to close the deal unless the purchase price was reduced to cover the cost of asbestos removal. The defect was patent - the asbestos was readily discoverable. The defendant county had no duty to disclose - the doctrine of *caveat emptor* applies. Motion granted striking out the statement of claim.

***Home Exchange (Alberta) Ltd. v. Goodyear Canada Inc.*, 2007 ABQB 371, [2007] A.W.L.D. 3258, 59 R.P.R. (4th) 133, 80 Alta. L.R. (4th) 143, [2007] 12 W.W.R. 456, 418 A.R. 1**

The corporate vendor sold the property on as “as is” basis. It was zoned “industrial.” The vendor knew of an underground storage tank that had not been properly decommissioned, but did not disclose this to the purchaser. The purchaser conducted soil samples that came back satisfactory, but did not discover the storage tank. Later, an environmental assessment revealed the tank, and removal and remediation were required - the purchaser sued. *Caveat emptor*. Whether or not a vendor has a duty to disclose something depends on whether or not the vendor knew or reasonably ought to have known that the thing was actually a hazard (taking into consideration environmental awareness at the time of the purchase and sale, and the vendor’s knowledge of the purchaser’s intended use of the land). While the underground storage tank might be a latent defect by today’s standards, it was not in 1988.

***Aldred v. Colbeck*, 2010 BCSC 57, [2010] B.C.W.L.D. 2290, [2010] B.C.W.L.D. 2293, [2010] B.C.W.L.D. 1797, 48 C.E.L.R. (3d) 207, 4 B.C.L.R. (5th) 364, 184 A.C.W.S. (3d) 1022**

Vendors disclosed a report regarding a buried oil tank on the residential property to the purchaser, but told her that they had done some work to conform with the recommendations in the report. When plaintiff purchaser later tried to sell the property, she discovered that the oil tank was still there and was required to remove it and the contaminated soil. Latent defect. Negligent misrepresentation. “Representation made by defendants was clearly intended to persuade plaintiff that tank had been decommissioned and did not affect or threaten environmental integrity of property.” *Caveat emptor* does not apply.

East Coast (Contaminated Land Cases)

***Dupere v. Evans,* 2005 NSSM 39, 835 A.P.R. 1, 261 N.S.R. (2d) 1 (Small Claims)**

Vendors of a residential property had basement oil tank removed due to a small leak and installed oil tank outside. The outside oil tank was replaced again about 14 years later due to an oil smell. Several years later, defendant vendors again noticed an oil smell and hired a contractor to investigate. Plaintiffs inquired about house, and defendants told plaintiffs that environmental testing was being done. Plaintiffs contacted the environmental consultant and were told that there were no environmental problems, and that it was safe to inhabit the property. Plaintiffs made offer to purchase, with a clause that stated that they would be provided with a certificate from the consultant stating the environmental condition of the property. The consultant provided his report, but the Department of Environment then required further testing before it would issue its approval. The plaintiffs refused to close as scheduled, and sued to have their deposit returned. Action dismissed. There was no misrepresentation, and no duty to disclose the one small leak that had occurred over 25 years prior and was not hazardous.

***Cousins v.McColl-Frontenac Inc.* (2006), 300 N.B.R. (2d) 188, 782 A.P.R. 188, 2006 NBQB, supp. reasons 307 N.B.R. (2d) 95, 795 A.P.R. 95, 2006 NBQB 406, affd 829 A.P.R. 159, 322 N.B.R. (2d) 159, 2007 NBCA 83, leave to appeal to S.C.C. granted [2008] 1 S.C.R. vii, [2008] 2 S.C.R. vi**

Plaintiff purchased a closed service station from the defendant. He later acquired two neighbouring properties from other parties to increase the size of the lot. The plaintiff remembered being told that the station had closed because of a leak in an underground storage tank pipe. The agreement of purchase and sale required the vendor to remove the underground gasoline and waste oil storage tanks and to backfill the excavation (which was done). Otherwise, the agreement was “as is,” and there was an exclusion of representations and warranties. There was no fraud or misrepresentation, and the agreement was “as is” - there was no duty on the vendor to remove the contaminated soil.

But, the plaintiff successfully sued the defendant (under nuisance and Rylands v. Fletcher) for contamination of one of his adjacent properties (which he had bought from a third party). The defendant was liable for the escape of contaminants from the service centre land onto that neighbouring property only up until the time that the plaintiff purchased the service centre land. The second adjacent property was purchased later, after the plaintiff ought to have known that it was at risk of contamination, so he was not successful with respect to that property.

East Coast (Residential Property Cases)

There are a large number of reported residential property cases from Nova Scotia over the past six or seven years on *caveat emptor* v. duty to disclose (particularly small claims cases involving water damage or structural deficiencies). Here are a few not related to contaminated land:

***Edwards v. Boulderwood Development Co*. (1984) 34 R.P.R. 171, 9 C.L.R. 253, 30 C.C.L.T. 223, (sub nom. *Boulderwood Development Co. v. Edwards*) 64 N.S.R. (2d) 395, 143 A.P.R. 395 (N.S. Appeals)**

Defendant land development company had a number of lots available for sale in a residential subdivision. Purchasers purchased one and their house plans were approved by the development company. However, excavation and construction of the foundation revealed that the land was peat and would not support the structure, and the house had to be moved to another lot. Purchasers sued. The development company’s filling-in of the low-lying swamp-like land, and its statement that the land “appeared solid enough” did not constitute fraudulent or negligent misrepresentation. It was an innocent misrepresentation, and not the type that the purchasers should have relied on. Vendor not liable. Purchasers were successful against the engineer and contractor instead.

***Jenkins v. Foley* (2002), 2 R.P.R. (4th) 214, 2002 NFCA 46 (Nfld. C.A.)**

Purchasers experienced flooding in basement, removed wall covering, and also discovered crumbling walls allowing water into basement. Vendors knew about water and flooding problems, but did not know the extent of the damage to the basement walls. They made no representations concerning flooding, and did not attempt to conceal any defect. Vendors did not disclose the defect. *Caveat emptor* applies. Court disagrees with the statement in *Jung v. Ip* that: “a latent defect must be disclosed by a vendor who is aware of its existence."

***Thompson v. Schofield*, 2005 NSSC 38, 230 N.S.R. (2d) 217, 729 A.P.R. 217 (Small Claims)**

Vendors, in Property Condition Disclosure Statement, denied knowledge of structural problems or leakage, and denied that repairs had been carried out to the plumbing. Disclosure Statement was incorporated into the Agreement of Purchase and Sale. After moving in, purchasers discovered earwig infestation, water damage, flooding and structural damage. Building inspector had not noticed these problems - they were latent defects. Negligent misrepresentation. Vendors had a duty to disclose, and were therefore liable.

***Willman v. Durling*, 2006 NSSM 21, 249 N.S.R. (2d) 48, 792 A.P.R. 48 (Small Claims)**

Purchasers had home inspected prior to purchase and inspector did not discover water damage. After moving in, they experienced flooding in basement and discovered wood rot and insulation damage. Vendor was only aware of one incident with water, and thought that keeping the drain clear had solved the problem. This was a latent defect, but the vendor was not aware of the nature of the problem or extent of the damage. There was no attempt to conceal the defect, and no representations or warranties were made. Claim dismissed.

***Gesner v. Ernst*, 2007 NSSC 146, 56 R.P.R. (4th) 77, 810 A.P.R. 284, 254 N.S.R. (2d) 284**

Purchaser had property inspected by a registered home inspector. Only later were water damage and structural deficiencies discovered. Vendor had signed Property Condition Disclosure Statement in which she checked box to indicate that she was not aware of any structural problems, unrepaired damage, leakage or dampness in roof or walls. “A Property Condition Disclosure Statement is not a warranty provided by the vendor to the purchaser. Rather, it is a statement setting out the vendor's knowledge relating to the property in question. When completing this document the vendor has an obligation to truthfully disclose her knowledge of the state of the premises but does not warrant the condition of the property.”

***Allen v. Thorne*, 2007 NSSM 31 (Small Claims)**

Vendor had signed Property Condition Disclosure Statement that stated he had no knowledge of water damage. The purchaser experienced frequent basement leakage and flooding. The court found the vendor had been truthful in the disclosure statement - he was not aware of a defect. “The document itself warrants the purchaser of its limitations and puts the onus on the purchaser to verify its accuracy and to have the to property independently inspected. It becomes a powerful tool, [only] if the sellers are not truthful and tried to hide something from the purchasers.” *Caveat emptor* applies.

***Dennis v. Langille*, 2013 NSSC 42, 1033 A.P.R. 332, 326 N.S.R. (2d) 332, 226 A.C.W.S. (3d) 890**

Vendor of cottage was aware of erosion problem (property losing 3 feet per year), but did not mention it to purchaser, nor did he make any warranties. Susceptibility of property to coastal erosion was patent defect. Purchaser did not make reasonable inquiries. *Caveat emptor*.

***Smith v. Kencor Inc.* (2013), 225 A.C.W.S. (3d) 1166, 30 R.P.R. (5th) 107, 1037 A.P.R. 60, 334 Nfld. & P.E.I.R. 60**

“It is also noteworthy that in*Jenkins v. Foley* our Court of Appeal declined to follow decisions in other jurisdictions which imposed duties on vendors in certain circumstances to disclose defects in property. Given these considerations caution must be used in relying on caselaw from outside of our jurisdiction.” However, this case was distinguished, as there were verbal assurances about the concrete and express warranties in the agreement of purchase and sale about the weeping tile that turned out to be false. This was a latent defect - not something the purchaser could have reasonably discovered. *Caveat emptor* does not apply.