

REAL ESTATE LITIGATION 2026  
PAPER 6.1

# Topics in Misrepresentation - Property Condition Disclosure Statements in British Columbia

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## TOPICS IN MISREPRESENTATION - PROPERTY CONDITION DISCLOSURE STATEMENTS IN BRITISH COLUMBIA

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Disputes regarding property condition disclosure statements (PDS) are a frequent source of litigation in residential real estate transactions. As a vendor, there is no legal requirement to complete a PDS for a residential sale, but market convention typically expects a vendor to provide a PDS. The PDS also exists as an industry protective measure that helps licensees comply with their statutory disclosure obligations, which are different than what vendors of real estate owe at common law.

In essence, by completing a PDS, a vendor voluntarily exposes themselves to increased litigation risk to induce a purchaser to buy their property. This paper summarizes the current law and practice regarding disclosure in residential real estate transactions.

### *Positive obligations to disclose information – almost non-existent in the common law*

At common law, a vendor of real estate has almost no positive disclosure obligations. A vendor of real estate only has a positive obligation to disclose a latent defect that renders the home unfit for human habitation.<sup>2</sup> This positive obligation is connected to the long-standing common law rule of *caveat emptor*, which requires a purchaser of real property to satisfy themselves as to the quality of the property being sold.<sup>3</sup>

A latent defect is typically described by the courts as a defect that cannot be discerned through a reasonable inspection of the property.<sup>4</sup>

Although the Courts have suggested legislatures create statutory disclosure obligations for residential real estate<sup>5</sup>, that has not occurred in British Columbia, except in an indirect way through the regulation of real estate licensees. Legislation has imposed greater disclosure obligations upon real estate licensees than are owed by members of the public, as explained below.

### *British Columbia Real Estate Rules and the statutory definition of “latent defects”*

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- 1 Michael’s solicitor practice focuses upon commercial real estate transactions, and his litigation practice is focused upon real estate disputes and the regulation of the real estate industry. Michael is a former real estate licensee and has been qualified as an expert witness by the B.C. Supreme Court in the subject of licensee duties, obligations, and standard of care in real estate transactions.
  - 2 *Cardwell v. Perthen*, 2007 BCCA 313 at paras. 22-23.
  - 3 See also the Supreme Court of Canada decision of *Fraser-Reid v. Droumtsekas*, 1979 CanLII 55 (SCC) [“**Fraser-Reid**”] which discusses the common law position of why the scope is so limited in real estate transactions, compared to the sale of goods.
  - 4 *Nixon v. MacIver*, 2016 BCCA 8 [“**Nixon**”] at para. 34.
  - 5 *Fraser-Reid* at page 731.

## 6.1.2

Real estate licensees are regulated in British Columbia pursuant to the *Real Estate Services Act* (“**RESA**”). RESA only regulates the industry. In particular, it only applies to persons who provide real estate services to others for or in expectation of remuneration.<sup>6</sup>

The Real Estate Services Rules, BC Reg 209/2021 (the “**Rules**”) are regulations created pursuant to RESA to regulate licensee conduct. The Rules create a concept known as a “material latent defect” and imposes a positive obligation on licensees to disclose them and to refuse to serve a customer who instructs the licensee to withhold disclosure:

### **Disclosure of material latent defects**

**59** (1) In this section, “**material latent defect**” means a material defect that cannot be discerned through a reasonable inspection of the property, including any of the following:

- (a) a defect that renders the real estate
  - (i) dangerous or potentially dangerous to the occupants,
  - (ii) unfit for habitation, or
  - (iii) unfit for the purpose for which a party is acquiring it, if
    - (A) the party has made that purpose known to the licensee, or
    - (B) the licensee has otherwise become aware of that purpose;
- (b) a defect that would involve great expense to remedy;
- (c) a circumstance that affects the real estate in respect of which a local government or other local authority has given a notice to the client or the licensee, indicating that the circumstance must or should be remedied;
- (d) a lack of appropriate municipal building and other permits respecting the real estate.

(2) A licensee who is providing trading services to a client who is disposing of real estate must disclose to all other parties to the trade, promptly and before any agreement for the acquisition or disposition of the real estate is entered into, any material latent defect in the real estate that is known to the licensee.

(3) If a client instructs a licensee to withhold a disclosure required under subsection (2), the licensee must refuse to provide further trading services to or on behalf of that client in respect of the trade in real estate.

(4) Disclosure to a party is not required under subsection (2) if the party has already received written disclosure of the material latent defect from the client who is disposing of the real estate.

In addition to this expanded disclosure obligation, licensees also have a positive duty to use reasonable efforts to discover relevant facts respecting real estate that a client is considering acquiring.<sup>7</sup>

No section of the Rules specifically requires a listing agent to use efforts to discover relevant facts about the property they are listing for sale. However, licensees have general duties to act honestly and with reasonable care and skill.<sup>8</sup> These general obligations may include an obligation to discover facts regarding the property they are listing for sale.

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6 RESA, Section 2.

7 Rules, Section 30(h).

8 Rules, Sections 33 and 34.

### 6.1.3

The vast majority of licensees who sell residential real property are also members of a real estate board affiliated with the Canadian Real Estate Association (“**CREA**”), which is a private trade association of real estate licensees. Membership in a real estate board is technically voluntary, but only board members may advertise listings through the Multiple Listing Service (the “**MLS**”). The MLS is how the vast majority of residential real estate sells in Canada. It would be difficult to sell a typical residential home without using the MLS.<sup>9</sup>

Licensees who are real estate board members are Realtors – a trade-marked term. Realtors must agree to comply with the CREA Code of Ethics (the “**Code**”).<sup>10</sup> The Code imposes further obligations on licensees, including a general obligation to discover facts, although that obligation is not intended to increase the disclosure obligations of a licensee required by law.

## 4. Discovery of Facts

ARTICLE	INTERPRETATION
A REALTOR® has an obligation to discover facts pertaining to a property which a prudent REALTOR® would discover in order to avoid error or misrepresentation.	<p>4.1 <i>This Article applies equally to REALTORS® working with Buyers or Sellers.</i></p> <p>4.2 <i>This Article is not intended to increase the disclosure obligations of REALTORS® beyond those required by common or civil law or any other statutory or regulatory requirements.</i></p> <p>4.3 <i>The REALTOR® shall not be party to any agreement in any way to conceal any facts pertaining to a property.</i></p> <p>4.4 <i>Interpretations 1.1 &amp; 3.2 also apply to Article 4.</i></p>

In summary, disclosure obligations in residential real estate transactions can be seen as coming from several different sources. For vendors, primarily, the common law. For licensees, it comes from their standard of care, as defined by common law decisions, RESA, the Rules, and the Code.

*The PDS as a tool to help licensees comply with their regulatory and professional obligations*

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9 The MLS and the real estate industry’s connection to it is discussed in my paper published in the University of Victoria’s law journal. See Drouillard, “[A Critique of the British Columbia Residential Real Estate Brokerage Industry’s Use of Dual Agency](#)”, (2011) 16 Appeal 84-100, under the headings “II. Anatomy of a Typical Residential Real Estate Transaction” and “IV. The Problem With Dual Agency, subsection B “Underrepresentation and Lack of True Consent Due to the Industry’s Practice of Using Dual Agency, its Monopoly over the MLS, and its Use of Standard Forms.”

10 The Code may be accessed here: <https://www.crea.ca/files/REALTOR-Code-Eng.pdf>

#### 6.1.4

In the early 1990's, the industry – specifically, real estate boards – introduced the PDS. The PDS was designed to protect the licensee “by shifting reliance for information about a property to the seller”, regarded as the primary source of information.<sup>11</sup>

The fact the PDS was created by the industry to protect industry members is perhaps lesser known to the public which is asked to complete them. In any event, it has become an industry practice to use a PDS. Some real estate boards do not accept a listing unless a PDS is provided and so this led to the practice of submitting a crossed out PDS. Also, not completing a PDS could be seen by a buyer as a “red flag”; i.e., that the vendor knows something about the property which they are not disclosing through the PDS.

It has also been an industry practice to deliver a PDS, but with the questions crossed out. This convention arose decades ago, and there may be a few reasons for it, but one reason was that some real estate boards will not accept for submission to the MLS a listing without a PDS. If the PDS is delivered but crossed out, the real estate board would then accept the listing even though nothing is being disclosed.<sup>12</sup>

#### *Liability to Vendors created by the PDS*

The questions answered by the vendor in a PDS relate to various physical aspects of the property. The answers are not warranties. More accurately, the PDS requires the vendor to disclose their actual knowledge about the matter, and need say “no more than that he or she is or is not aware of problems”. A vendor must correctly and honestly disclose their knowledge, but that knowledge does not have to be correct.<sup>13</sup> The PDS states that the vendor will report “material changes” to the representations if known prior to the completion date.

It's important that the PDS be expressly incorporated into and form part of the underlying contract. Licensees are instructed to use a clause in their contracts providing that the contract may be conditional on the buyer approving the PDS, and that when the condition is satisfied or waived, the PDS then is incorporated into and forms part of the contract.<sup>14</sup>

The standard form residential real estate contract used by licensees also contains an entire agreement clause. Therefore, failing to expressly incorporate the PDS into the contract could result in a finding that the PDS was not part of the contract and that a claim for breach of contract is not available.<sup>15</sup> However, depending on the circumstances and individual facts of a case, a

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11 See e.g. Jennifer Clee's article in *Legally Speaking* (a BCREA publication), “[Property Disclosure Statement – Shield or Sword? #406](#)” published April 1, 2007.

12 See e.g., a discussion of this practice in *Legally Speaking*, “[Property Disclosure and Non-Disclosure: What Every REALTOR® Should Know #589](#)” by Peter Borszcz, published October 3, 2025.

13 Nixon at para. 48.

14 See e.g., the standard clauses published by the BC Financial Services Authority, subsection “Disclosure”: <https://www.bcfsa.ca/industry-resources/real-estate-professional-resources/knowledge-base/clauses/clauses>

15 See e.g., *413255 B.C. Ltd. v. Jesson et al.*, 2006 BCSC 1070 at paras. 30-32.

## 6.1.5

claim for negligent or fraudulent misrepresentation may still be available even if the PDS was not expressly incorporated into the contract.<sup>16</sup>

### *Sewell v. Abadian, partial representations, and the Property No-Disclosure Statement*

In *Sewell v. Abadian*<sup>17</sup> (“**Abadian**”) the vendor provided a crossed out PDS to the purchaser as part of a transaction to buy a residential home. The vendor did write on the PDS “Tenanted Property, Owner has never occupied”. In fact, the vendor knew about an unpermitted addition to the home. The vendor instructed his licensee to disclose this to the buyer, but the licensee failed to do so, meaning the only information available to the buyer about the issue received from the vendor was the crossed out PDS.<sup>18</sup> The PDS was incorporated into and formed part of the contract.<sup>19</sup> The PDS also cautioned the buyer that the PDS was a starting point, and that the buyer had to make her own inquiries.

The lower court held that the seller was not liable for misrepresentation because the PDS was crossed out and did not disclose anything that the buyer could rely upon. After all, it was a crossed-out document.<sup>20</sup> A crossed out PDS could not be relied upon as a statement about the vendor’s knowledge; *i.e.*, that the vendor did not know anything about a particular issue, because there was an option for the vendor to select “Do not know” in answer to a question. As the justice put it, the PDS “cannot contradict itself.”<sup>21</sup>

The Court of Appeal disagreed, finding that the statement in the PDS “Tenanted Property, Owner has never occupied” was a partial representation that the buyer could rely upon to mean that the vendor did not have knowledge about any question in the PDS. The Court of Appeal’s reasoning was that the vendor chose to provide the form, albeit crossed out; therefore, he was “required to be responsive to the duties it required of complete disclosure, knowing that the buyer, Ms. Sewell, would rely on the form.”<sup>22</sup>

*Abadian* is an unusual decision. It is only 13 paragraphs and refers to no case law in the reasons. The Court of Appeal only stated that there was a “misrepresentation, whether negligent or fraudulent does not matter in this case.” Leave to appeal to the Supreme Court of Canada due to inadequate reasons and a failure to consider the differences between negligent or fraudulent misrepresentation, including whether it is a reasonable to rely on a crossed-out document, was refused.

In any event, *Abadian* serves as a good reminder of how a partial representation may be unpredictably received by the courts, and has probably reinforced the unpredictability in this

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16 See e.g., *Molsberry v. Serge*, 2025 BCSC 2132 at paras. 134-149. However, for a contrary decision, see *Mandl v. Fong*, 2024 BCSC 1990 at paras. 66-72, showing that the availability of a tort claim will depend on the facts of the case.

17 *Sewell v. Abadian*, 2024 BCSC 1116 rev’d on appeal in 2025 BCCA 158, leave to appeal to the SCC ref’d in 2026 CanLII 20159 (SCC). *Abadian* is cited in this paper to the BC Court of Appeal decision unless otherwise indicated.

18 See the trial level decision of *Abadian* at paras. 69-71.

19 See the trial level decision of *Abadian* at paras. 33 and 90.

20 See the trial level decision of *Abadian* at paras. 83-99.

21 See the trial level decision of *Abadian* at para. 94.

22 *Abadian* at paras. 7-9.

### 6.1.6

area of law. Depending on the facts of a case, partial representations, and in some circumstances, “representations by omission” will ground liability for fraudulent or negligent misrepresentation.<sup>23</sup> Therefore, if someone does not wish to disclose information about a subject and has no legal obligation to do so, then it is probably better to say nothing at all, rather than to say something that will be framed as a partial representation and misleading, later on.

The Court of Appeal’s decision in *Abadian* probably came as a surprise to the real estate industry. After all, it was a convention of the industry to use crossed out PDS’ in contracts and to sometimes provide a brief reason why the PDS was being crossed out. In response to the *Abadian* decision, The BC Real Estate Association released a revised PDS and a “Property No-Disclosure Statement” (the “**PNDS**”).

The PNDS simply states “In lieu of a detailed Property Disclosure Statement, the Seller is not making any representations or warranties about the Property. The Seller is aware of their obligation to disclose any known latent defects.”

The BCREA is trying to assist the public and its member Realtors with the implications of the *Abadian* decision. But, somewhat ironically, the PNDS may have introduced a new issue for sellers who choose to complete it. On one hand, it says the Seller is not making representations or warranties about the Property. On the other hand, and in the following sentence, the Seller is stating that they are aware of their obligation to disclose any known latent defects – a concept that is undefined in the contract and essentially legal in nature.

Because the concept of a “latent defect” is not defined in the PNDS or in the standard form contract and is otherwise defined through common law decisions, what the seller understood when they told the buyer in the PNDS that they are aware of their obligation to disclose any known latent defects will no doubt be explored by counsel in discoveries, and in future litigation that may involve this document.

Again, if a seller does not want to disclose anything, it is probably better to say nothing at all, because the standard form contract already contains an entire agreement clause confirming there are no representations or warranties except where stated in the contract.

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23 See e.g., *Kuhnke v. Karner*, 2022 BCCA 399 at para. 45.