

Stigmatizing Issues

When representing a buyer, it is the obligation of a registrant to use their best efforts to identify properties that meet the buyer's criteria and to generally promote and protect the interests of the buyer.

REPRESENTING THE BUYER

Accordingly, a registrant representing a buyer must obtain as much information as possible from them before beginning the process of searching for a suitable property and representing them with third parties. Registrants must discuss in detail the buyer's needs and wants regarding property requirements, including constraints or restrictions, and any other issues or concerns the buyer may have with respect to the purchase of a property. Communication is a two-way street, of course, and RECO encourages buyers to be proactive and provide information to their representative and to ask questions regarding issues of specific importance to them and their families. Nonetheless, registrants are encouraged to communicate extensively and frequently with their buyer clients to best understand their wants, needs, priorities and concerns.

For the purpose of consistency and record keeping, a registrant should consider documenting their inquiries through the use of a questionnaire or similar tool.

DEALING WITH "STIGMA"

In the context of real estate, a "stigma" is a non-physical, intangible attribute of a property that may elicit a psychological or emotional response on the part of a potential buyer. There may have been an event or circumstance that occurred in or near the property that does not affect the property's appearance or function, but might be considered by some as emotionally disquieting. Unlike a latent or patent defect, which may exist at a property, there is nothing physically observable or measurable associated with a stigma.

The Real Estate and Business Brokers Act, 2002 (REBBA) does not define "stigma", but examples may include:

- the property was used in the ongoing commission of a crime (e.g., drug dealing, chop shop, brothel);
- a murder or suicide occurred at the property;
- the property was previously owned by a notorious individual (e.g., organized crime leader, known murderer);
- there are reports that the property is haunted;
- a former grow-op which has been remediated according to the local health or building authority.

The relevance and impact of a potential “stigma” or any other such non-physical circumstance will be determined by a buyer’s personal values and perceptions, ethnic background, religion, gender, age and other individual concerns. Given all the possible occurrences or circumstances that might exist for a given buyer to consider a property to be “stigmatized,” it is impossible for registrants to determine in advance what these might be. Again, communicating openly and early is key.

Registrants representing the buyer are advised to discuss their specific needs or requirements and any concerns and issues related to purchasing a property. In its communications to consumers, RECO advises buyers to carefully consider the areas of concern they may have and to discuss them with their real estate professional to ensure the necessary inquiries will be made to avoid purchasing a property they will not feel comfortable living in.

STIGMAS ARE DIFFERENT FOR DIFFERENT PEOPLE

The following questions and responses may demonstrate the difficulty, in practical terms, of defining a stigma. For example, think about the possible responses to this question: *Would it matter to you if a death had occurred in a property you were interested in buying?* Some would say “Yes, absolutely!” However, consider the following situations:

- Would it matter if the death was from natural causes, or accidental, versus being caused by a violent act or suicide?
- Would it matter if it was a crib death of an infant?
- Would you be as concerned by a death that occurred 20 years ago as you would with a recent one?

These examples illustrate how difficult it is to clearly define what constitutes a “stigma.” What one person might find completely unacceptable may not be of any concern to another.

SELLER DISCLOSURE OF STIGMA

Under the doctrine of *caveat emptor* (“buyer beware”), buyers are ultimately responsible to satisfy themselves that the property they are acquiring is suitable for their purposes. However, many buyers and their representatives will look to the seller and his or her representative to provide them with information about the property.

It is important for registrants to know that while sellers are required by law to disclose material latent defects affecting a property that are known to them (an obligation which also exists for the seller’s representative if the material latent defect is also known by the representative), there is no legislation or case law in Ontario to suggest that a seller, or his or her representative, is required to disclose the existence of stigmas to buyers. Registrants representing sellers should advise their clients to seek legal advice if they believe that stigmatizing issues may become a factor in selling the property.

If a registrant is representing a buyer who is concerned about specific types of stigmas, it is highly recommended that the registrant and buyer conduct their own investigation, which could include an internet search and also making direct inquiries of the seller or registrant representing the seller. To further protect the buyer, the registrant could include in any offer a representation/warranty regarding the status of the property. For example, “The seller represents and warrants that to the best of his/her knowledge and belief the property has not been the site of a murder.”

All registrants have an obligation to act with fairness, honesty and integrity when dealing with others in a real estate transaction. Similarly, registrants must use their best efforts to prevent error and misrepresentation while still promoting and protecting the best interests of their clients. Therefore, when the registrant representing the seller is asked about the existence of specific stigmas that might affect the property, that registrant may either answer the question and provide the information without qualification, or in the alternative, refuse to answer the question and suggest the buyer ascertain the answer for themselves.

The approach to be taken should be based on a detailed discussion with, and instructions from, the seller. Registrants are expected to use reasonable care and skill to ensure the accuracy and completeness of the information conveyed to the buyer and/or his or her representative, and should consider documenting such responses.

TREAD CAREFULLY

A registrant cannot anticipate all the areas of sensitivity that an individual buyer may have. This fact, combined with the fact that a seller may refuse to answer questions about potential stigmas, means that registrants must approach this subject carefully. They should keep in mind that a seller may have no knowledge of events that occurred before he or she owned the property, or the property may have been rented out and the seller may not know of the events that occurred during the rental period.

Registrants representing sellers should have a full and frank discussion with the seller regarding stigma. If it is determined that there may be stigmatizing issues associated with the property, the registrant should advise the seller to seek legal advice regarding their rights and obligations related to the issue, and get written instructions regarding the disclosure of the stigma to buyers. Registrants representing buyers should have detailed conversations with the buyer to identify relevant stigmatizing issues, and be prepared to do some additional investigation or research if the buyer indicates sensitivity to one or more such issues.

In a multiple representation scenario, the issues become a little more complicated. Before a seller is asked to consent to multiple representation, it must be explained that any information about stigma will have to be conveyed to the buyer, as part of the brokerage's duties to the buyer. If the seller objects to this, they should be advised that they do not have to consent to multiple representation. If consent is not given, the registrant must inform the buyer of this fact and the brokerage will have to release the buyer to seek alternative representation.

Taking a proactive, communicative and well-documented approach to stigmatizing issues will minimize the risk of buyers being uncomfortable with their home and filing a complaint, failing to complete a transaction or initiating a lawsuit.

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Real Estate Council of Ontario

Tel: 416-207-4800 Toll Free: 1-800-245-6910 Fax: 416-207-4820

Office of the Registrar
AsktheRegistrar@reco.on.ca



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visit: www.reco.on.ca