



**ASSOCIATION DES CONSOMMATEURS  
POUR LA QUALITÉ DANS LA CONSTRUCTION**

**CAN SELLER DISCLOSURE BE IMPROVED  
TO BETTER PROTECT PARTIES DURING A REAL ESTATE  
TRANSACTION?**

Final Report of the Research Project Presented to  
Industry Canada's Office of Consumer Affairs

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**ASSOCIATION DES CONSOMMATEURS  
POUR LA QUALITÉ DANS LA CONSTRUCTION**

65 Sherbrooke Street East, Suite 105  
Montreal (Quebec) H2X 1C4

Telephone: 514-384-2013

Toll free outside Montreal: 1 877 MAISONS (1 877 624-7667)

Fax : 514 384-4739

[info@acqc.ca](mailto:info@acqc.ca)

<http://acqc.ca>

### **Research and writing of the report**

- Madeleine Bélisle, B.Sc. Architecture, MA Architecture

### **With the collaboration of**

- Board of Directors of the Association des consommateurs pour la qualité dans la construction
- Louise Coutu, Architect
- Marie J. Lachance, Professor, Sciences de la consommation, Université Laval, as methodologist
- Me Nelson Larrivée, Lawyer and Architect
- Charles Tanguay, Founding President of the ACQC

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The Association des consommateurs pour la qualité dans la construction is a member of Union des consommateurs.

The masculine is used generically in this report.

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## ASSOCIATION DES CONSOMMATEURS POUR LA QUALITÉ DANS LA CONSTRUCTION

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### **The organization**

The Association des consommateurs pour la qualité dans la construction (ACQC) was founded in 1994 by a group of consumers concerned by the issue of residential construction work quality and organized by the Association coopérative d'économie familiale (ACEF) of Montreal East.

A non-profit organization incorporated under Part III of the Quebec Companies Act, the ACQC is managed by a board of directors comprised of victims, legal experts and real estate professionals (certified architect and appraisers) to whom the coordinator reports, assisted by regular and contractual employees and by volunteers.

In 2005, the ACQC joined Union des consommateurs, which groups numerous ACEFs and is a member of the International Consumer Organization.

### **Its mission**

- To bring together consumers of construction and renovation goods and services in order to defend and promote consumer interests;
- To educate and raise the awareness of consumers of construction and renovation goods and services with regard to their rights, obligations and responsibilities;
- To promote, in collaboration with the various construction stakeholders, any action likely to improve construction quality.

### **Consumer services**

Since its foundation, the ACQC has endeavoured to guide consumers in the complex world of construction. It provides advice and information, notably through its publications and website. The organization answers consumers' questions by telephone or e-mail, and if necessary refers consumers to organizations, professional associations or specialists who can best inform or help them.

The ACQC keeps apprised of complaints and information, fosters the association of consumers facing a similar problem, and thus promotes research, the sharing of solutions, and the development and implementation of non-partisan political action. Some problematic situations may give rise to class actions. In particular, ACQC supports collective action in the face of problems such as cracked houses, ocher deposits, the pre-purchase inspection or other related to the lack of consumer protection against the industry. The ACQC supports any action that might improve the quality of the construction field. As such, it joins the Coalition Proprio-Béton in the case of pyrrhotite in Mauricie.

## EXECUTIVE SUMMARY

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The use of the Property Disclosure Statement (PDS) is not a legal obligation under the Civil Code or the common law in any Canadian province or territory. In Quebec, PDS use is recommended by the OACIQ, professional orders whose members conduct home inspections, and building inspector associations. Elsewhere in the country, some question its use, particularly since the Court of Appeal for Ontario's ruling in *Krawchuk v. Scherbak* (2011 ONCA 352). However, we have noted that offer to purchase forms used by real estate brokers in Manitoba and Nova Scotia contain standard clauses for requesting a PDS from the seller and annexing it to the offer to purchase contract, thus increasing PDS use.

The present report concerns the context in which the PDS is used in Canada. It aims at identifying how the PDS could be improved to better protect the parties during a real estate transaction and to answer the following corollary questions:

- What are the best types of PDS forms, and what should the form contain?
- Who should present the PDS to the seller and in what context should it be completed?
- How to ensure that both the seller and buyer correctly assess the PDS's legal scope?
- What ethical rules apply to information to be provided about the PDS?

The necessary data for writing the report originate from many sources. A documentary research on the Internet focused on the various aspects of the study. An inventory of organizations overseeing real estate brokerage was made, and their websites were examined to determine which ones publish a PDS and to obtain a copy of it. Those websites were also studied to identify the information provided on the PDS's legal status, the training dispensed to real estate brokers, and the information provided to consumers in this regard. An information request to those organizations made it possible to complete the information collected on the websites, and seven PDS forms were obtained and compared. Finally, a qualitative study of recent Canadian case law focused on 104 rulings involving a PDS, so that the pros and cons of its use were determined, as well as the status attributed to the SPIS by the courts, while verifying whether the latter specify how to use it.

PDS forms were first introduced in the United States by real estate broker associations, in order to protect their members from legal actions brought against them by dissatisfied buyers. There are benefits to using a PDS for the real estate broker, the seller and the buyer:

- Enabling real estate brokers to carry out their duty of disclosure;
- Protecting the seller by retaining a trace of the information provided;
- Lessening the seller's liability by demonstrating that all necessary information was provided to the buyer;
- Establishing a balance between the seller's and the buyer's knowledge of a property;
- Providing the buyer with a basis for comparing similar properties;
- Providing the buyer with information that can guide the home inspection;
- Disclosing latent defects known to the seller, including some non-material defects;

- Retaining a trace of the information provided, in case a legal action for misrepresentation or latent defect is brought by the buyer;
- Reducing the number of nasty surprises following purchase of the property, and thus helping reduce the amount of litigation.

Considering that there are several benefits to using the PDS, the ACQC is making recommendations to the organizations charged with overseeing real estate brokerage, in order to counter current drawbacks:

- Provide consumers with more tools:
  - Provide consumers with more information about the PDS (brochure, leaflet, website) and give free access to the form;
  - Disseminate the best real estate brokerage practices regarding the PDS, with references to the code of ethics, to facilitate consumer remedies and claims;
- Improve the drafting of PDS forms:
  - Create working groups for each province that report to government organizations charged with applying real estate brokerage laws, and are comprised of all the stakeholders, to develop and periodically revise PDS forms;
  - Prepare specific forms for urban, rural and condominium properties;
  - Validate PDS forms before their use, so that their questions are clear and not subject to interpretation by the target publics;
- Improve the training of real estate brokers:
  - Ensure that they know the real estate brokerage best practices regarding the use of PDS;
  - Ensure that they are trained in all aspects of the PDS use, including their duties of care and disclosure;
  - Include training on the information they should provide verbally to the seller and buyer when the PDS is presented.

For real estate transactions made without a real estate broker access to a validated and tested PDS form will remain a problem. Selling this form to interested individuals and building inspectors could be a solution.

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Ontario.....	<b>Erreur ! Signet non défini.</b>
Saskatchewan.....	<b>Erreur ! Signet non défini.</b>

## LIST OF ABBREVIATIONS

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AB	Alberta
ABPC	Alberta Provincial Court
ABQB	Alberta Court of Queen Bench
ACAIQ	Association des courtiers et agents immobiliers du Québec. Became the OACIQ in 2010.
ACEF	Association coopérative d'économie familiale
ACQC	Association des consommateurs pour la qualité en construction
AIBQ	Association des inspecteurs en bâtiment du Québec
AREA	Alberta Real Estate Association
ASR	Association of Saskatchewan REALTORS
ATF	Agency Task Force, group of delegates from the real estate brokers associations and the Real Estate Institute of Canada.
BC	British Columbia
BCPC	British Columbia Provincial Court
BCREA	British Columbia Real Estate Association
BCSC	Supreme Court of British Columbia
CA	Board of Directors ( <i>Conseil d'administration</i> )
CAHPI	Canadian Association of Home & Property Inspectors
CanLII	Canadian Legal Information Institute
CCQ	Civil Code of Québec
CPD	Continuing Professional Development
CREA	Canadian Real Estate Association
DPV	Déclaration du propriétaire vendeur
FAQ	Frequently Asked Questions
FCIQ	Fédération des chambres immobilières du Québec
MACA	Municipal and Community Affairs, Government of the Northwest Territories
MBCA	Manitoba Court of Appeal
MBQB	Manitoba Court of Queen Bench
MLS	Multiple Listing Service
MN	Manitoba
MREA	Manitoba Real Estate Association
MSC	Manitoba Securities Commission
NAR	National Association of Realtors, USA
NB	New Brunswick
NBQB	New Brunswick Court of Queen Bench
NBREA	New Brunswick Real Estate Association
NL	Newfoundland and Labrador
NLAR	Newfoundland and Labrador Association of REALTORS
NS	Nova Scotia
NSAR	Nova Scotia Association of REALTORS

NSREA	Nova Scotia Real Estate Association, maintenant la NSAR
NSREC	Nova Scotia Real Estate Commission
NSSC	Supreme Court of Nova Scotia
NSSM	Small Claims Court of Nova Scotia
OACIQ	Organisme d'autoréglementation du courtage immobilier du Québec
ON	Ontario
ONCA	Court of Appeal for Ontario
ONSC	Superior Court of Justice of Ontario
Ont.	Superior Court of Justice of Ontario
S.C.J.	
OREA	Ontario Real Estate Association
OTPD	Ordre des technologues du Québec
PCDS	Property Condition Disclosure Statement
PCS	Property Condition Statement
PDS	Property Disclosure Statement
PEI	Prince Edward Island
PEIRA	Prince Edward Island Real Estate Association
QC	Quebec
QCCA	Court of Appeal for Québec
QCCQ	Court of Québec
QCCS	Superior Court of Québec
REBBA	Real Estate and Business Brokers Act, Ontario
RECA	Real Estate Council of Alberta
RECBC	Real Estate Council of British Columbia
RECO	Real Estate Council of Ontario
SCC	Supreme Court of Canada
SK	Saskatchewan
SKPC	Provincial Court of Saskatchewan
SKQB	Saskatchewan Court of Queen Bench
SPCS	Seller Property Condition Statement
SPDS	Seller Property Disclosure Statement
SPIS	Seller Property Information Statement
SREC	Saskatchewan Real Estate Commission
US	United States
YK	Yukon
YKSM	Yukon Small Claims Court
YREA	Yukon Real Estate Association

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## 1. INTRODUCTION

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The frequency of use of the Property Disclosure Statement (PDS)<sup>1</sup>, or its equivalent, varies from province to province. In Quebec, its use is recommended both by home inspector associations and the Organisme d'autoréglementation du courtage immobilier du Québec (OACIQ), but elsewhere in the country its use is being questioned.

The present report concerns the context in which the PDS is used in Canada. It aims at identifying how the PDS could be improved to better protect the parties during a real estate transaction and to answer the following corollary questions:

- What are the best types of PDS forms, and what should the form contain?
- Who should present the PDS to the seller and in what context should it be completed?
- How to ensure that both the seller and buyer correctly assess the PDS's legal scope?
- What ethical rules apply to information to be provided about the PDS?

This report contains 10 parts. Following the *Introduction*, the *Methodology* presents the methods used for collecting information. Those methods consist of documentary research on the various issues studied; an inventory of organizations publishing the PDS; a study of those organizations' websites and, if necessary, a request for information to complete the information obtained; and a qualitative study of Canadian case law on 104 recent rulings involving PDS usage.

A brief history of the PDS's implementation in Canada is presented in part three, to help the reader understand the events that led to its use and to compare the latter with what is done in the US.

The fourth part summarizes an online literature review on the PDS. The number of articles about the Canadian situation is limited, so the research was extended to include two other common law countries, the US and Australia.

The legal rules that apply to the seller's warranty and to the PDS are examined in part five. It should be noted that buyers are protected differently if they buy a used home in Quebec or elsewhere here in Canada.

Part six of the report presents an inventory of organizations supervising real estate practices in each province, as well as information collected from those organizations (study of their websites and requests for information) about the training of real estate broker in PDS usage.<sup>2</sup> The information provided to buyers and vendors of used homes by those organizations is also examined.

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<sup>1</sup> Translator's note: although the form *Déclaration du vendeur sur l'immeuble* is translated as *Declarations by the Seller of the Immovable* in Quebec, in Ontario this form is known as the *Seller Property Information Statement* (SPIS) and in the other provinces as the *Property Disclosure Statement* (PDS). The latter will be used in this document.

<sup>2</sup> Since the new law on real estate brokerage took effect on May 1, 2010, the OACIQ issues only real estate brokerage or broker's licences. The term "**real estate broker**" will therefore be used to designate the professional who acts as middleman in a property sale, although the term "real estate agent" is also used in the other provinces.

Part seven consists of a qualitative study of recent Canadian case law involving the PDS (from January 1, 2006 to June 30, 2012), to determine the pros and cons of its use for buyers and sellers, the status granted to it by the courts, and whether the latter specify how to use it.

In part eight, seven residential property PDS forms obtained from an Internet search or from an information request to the organizations administering the PDS are compared for the forms' content: PDS information, components covered, signatures required. The range of possible answers and the formulation of questions are also addressed.

Part nine, *Discussion and Recommendations*, assesses PDS usage in Canada. The role of real estate brokers in PDS usage is discussed, as well as the PDS's usefulness in protecting sellers, buyers and real estate brokers. Several points to be considered in order to improve PDS forms are examined, along with lessons learned from the case law study.

In part ten, the *Conclusion* presents the ACQC's position with regard to the PDS's content and usage context, and to information provided to buyers and sellers about the PDS.

## 2. METHODOLOGY

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This section presents the data collection methods used for meeting the research's main objective which is to identify how the Property Disclosure Statement (PDS) could be improved to better protect the parties during a real estate transaction, and answering the following questions:

- What are the best types of PDS forms, and what should the form contain?
- Who should present the PDS to the seller and in what context should it be completed?
- How to ensure that both the seller and buyer correctly assess the PDS's legal scope?
- What ethical rules apply to PDS information to be given?

Those data collection methods consist of documentary research on the various aspects studied; an inventory of organizations administering the PDS; a study of those organizations' websites and, if necessary, a request for information to complete the information obtained; and a qualitative study of recent case law on PDS usage.

### 2.1 Documentary Research

The documentary research was conducted on the Internet, mainly between May 14 and July 16, 2012. It pertains to the points studied in this study and uses the Google Scholar and Google search engines. When provided in a document or Web page consulted, the text's publication date is included in the reference. Otherwise, only the date when the document was consulted appears.

The Web page addresses were verified as the report was written and it is those verification dates that appear in the footnote references and the bibliography.

### 2.2 Information Request to Organizations Supervising Real Estate Brokerage

Following an Internet search, the organizations ensuring the application of real estate laws as well as agents' associations were identified for each province and territory, and are presented in Table 1. A description of those organizations is provided in Annex 1. The websites of those organizations were studied to determine which publish a PDS form. The organizations that publish an PDS and those about which this remained uncertain after an examination of their website were contacted by e-mail on June 6, 2012, to obtain a copy of the form and to complete the information on the PDS's legal status, the training dispensed to real estate brokers, and the information provided to buyers and sellers on the subject (see Annex 2). Of the 24 organizations identified, 18 were thus contacted. A follow-up letter was mailed on July 12, 2012 to the 12 organizations that had not answered the e-mail of June 6, 2012 (see Annex 3). A total of seven forms were obtained, directly from the publishing organizations (five) or from an Internet search (two), and belonging to the following provinces: British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec and Saskatchewan.

**Table 1: Organizations supervising the application of laws on real estate brokerage and broker associations contacted**

Province or territory	Organization	Contacted (Yes/No)
Alberta	Alberta Real Estate Association (AREA)	Yes
	Real Estate Council of Alberta (RECA)	Yes
British Columbia	Real Estate Council of British Columbia (RECBC)	No
	British Columbia Real Estate Association (BCREA)	Yes
Manitoba	Manitoba Securities Commission (MSC)	Yes
	Manitoba Real Estate Association (MREA)	Yes
New Brunswick	Government, attn. Officer, Consumer Affairs Branch, Justice and Attorney General	Yes
	New Brunswick Real Estate Association (NBREA)	Yes
Newfoundland and Labrador	Newfoundland and Labrador Association of REALTORS (NLAR) <sup>3</sup>	Yes
	Service Newfoundland and Labrador (Service NL)	Yes
Nova Scotia	Nova Scotia Real Estate Commission (NSREC)	Yes
	Nova Scotia Association of REALTORS (NSAR)	
Ontario	Real Estate Council of Ontario (RECO)	No
	Ontario Real Estate Association (OREA)	Yes
Prince Edward Island	Government, attn. Superintendent of Insurance	Yes
	Prince Edward Island Real Estate Association (PEIRA)	Yes
Quebec <sup>4</sup>	Organisme d'autorégulation du courtage immobilier du Québec (OACIQ)	No
	Fédération des chambres immobilières du Québec (FCIQ)	No
Saskatchewan	Saskatchewan Real Estate Commission (SREC)	Yes
	Association of Saskatchewan REALTORS (ASR)	Yes
Northwest Territories	Government, attn. Consumer Affairs and Senior Policy Officer, Department of Municipal and Community Affairs	Yes
Nunavut	Government, attn. Manager, Homeownership Programs	Yes
Yukon	Government, attn. Director, Consumer Services	Yes
	Yukon Real Estate Association (YREA)	Yes

<sup>3</sup> The request for information was mailed to the Newfoundland & Labrador Association of REALTORS, because the organization's website provides no e-mail address.

<sup>4</sup> No Quebec organization was contacted because all the information sought was available on the OACIQ website.



## 2.3 Case Law Study

An Internet search allowed the finding of articles targeting real estate brokers and consumers, as well as some research reports, for which the authors examined the case law regarding PDS usage, particularly to point out related problems or to denounce an increase in related litigation; 19 articles citing at least one case were identified, for a total of 112 court rulings under the common law regime only, between 1979 and 2010. A list of those rulings was compiled (see Annex 4).

### 2.3.1 Purpose of the case law study:

- To identify recent rulings involving the PDS;
- To determine the pros and cons of its use for buyers and sellers;
- To determine the status granted to the PDS by the courts;
- To verify whether the courts specify how to use it.

### 2.3.2 Qualitative study

This study of Canadian case law was conducted from August 29 and October 29, 2012 using the online database of the Canadian Legal Information Institute (CanLII).<sup>5</sup> As the study's primary goal was to identify recent rulings, the research focused on rulings made between January 1, 2006 and June 30, 2012 in order to obtain a sufficient number of relevant rulings. Cases involving property sales are handled by Canadian civil courts, including small claims courts.

Searches in CanLII are done with keywords. We chose to use keywords related to the names given to the PDS in each province. Those names are provided in Table 2 below.

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<sup>5</sup> Non-profit organization managed by the Federation of Law Societies of Canada and offering free Internet access to Canadian law. The website gives access to certain Canadian court rulings and other decisions and to Canadian laws and regulations. According to a personal communication of June 19, 2012, CanLII publishes all the rulings that reach it, but is reliant on its supply sources. The organization's website is at <http://www.canlii.org/en/index.html>, April 10, 2013.

**Table 2: Names given to the PDS depending on the province or territory**

Province or Territory	Names Given to the PDS
Alberta	Seller Property Disclosure Statement
British Columbia	Property Disclosure Statement – Residential
Manitoba	Property Disclosure Statement. We also find Seller Property Condition Statement in written legal decisions.
New Brunswick	Residential Property Disclosure Statement / Déclaration de divulgation relative au bien-fonds. We also find Property Condition Statement in written legal decisions.
Newfoundland and Labrador	Property Disclosure Statement
Nova Scotia	Property Condition Disclosure Statement
Ontario	Seller Property Information Statement, but we also find the Vendor Property Information Statement in written legal decisions.
Prince Edward Island	Property Condition Disclosure Statement
Quebec	<i>Déclarations du vendeur sur l'immeuble</i> , but <i>Déclaration du propriétaire vendeur</i> was also found in written legal decisions.
Saskatchewan	Property Condition Disclosure Statement
Northwest Territories	Not found
Nunavut	Not found
Yukon	Property Disclosure Statement

To verify the number of available decisions by using the CanLII database, the use of keywords related to the name given to the PDS in the various provinces was tested on July 11 and 17, 2012. The following list of keywords was retained because it yielded the most rulings, i.e., 307 rulings:

“Property Disclosure Statement” or “Property Condition Disclosure Statement” or “Seller Property Information Statement” or “Déclaration du vendeur sur l'immeuble” or “Déclaration du propriétaire vendeur” or “Property Condition Statement.”

Table 3 breaks down those decisions by province and territory.

**Table 3: Breakdown of the rulings identified using the CanLII database, by province**

Province or Territory	Number of Decisions Identified*	% of the Total
Canada (Supreme Court)	1	0.3
Alberta	4	1.3
British Columbia	55 (3)	17.9
Manitoba	6	2.0
Newfoundland and Labrador	0	0
New Brunswick	14	4.6
Nova Scotia	43	14.0
Ontario	20 (2)	6.5
Prince Edward Island	0	0
Quebec	144 (1)	46.9
Saskatchewan	19 (1)	6.2
Northwest Territories	0	0
Nunavut	0	0
Yukon	1	0.3
<b>Total number of rulings</b>	<b>307</b>	<b>100</b>

\*The number in brackets indicates the number of rulings of the Court of Appeal, if applicable.

The rulings were examined one by one to ensure that they meet the study's criteria. To be retained, each ruling had to meet the following selection criteria:

- A buyer initiates legal proceedings against the seller for a latent defect or a misrepresentation;<sup>6</sup>
- The seller must have completed an PDS form, or the ruling report must mention that the document has not been requested by the buyer or provided by the seller;
- A residential used property must have been sold, including condominium units and duplexes and triplexes;
- Neither the buyer nor the seller are real estate professionals.

The rulings identified by the literature review that corresponded to the period chosen for the study and were available in the CanLII database were also examined according to these selection criteria. The *King vs. Barker* ruling<sup>7</sup> was thus added to the study. This Ontario Superior Court ruling identified the PDS under the name *Vendor Property Information Statement*, which is no longer used.

All the common law court rulings that meet the selection criteria were retained for the study, i.e., a total of 85 rulings. Of those, 34 were cited at least once in another ruling. To avoid obtaining a disproportionate number of rulings made by Quebec courts, only rulings that were cited at least once in another ruling and met the selection criteria were retained for the study, for a total of 19 Quebec rulings.

The examination of rulings selected for the case law study was documented using a standardised reading record. The information collected was then compiled using a six-

<sup>6</sup> In Quebec, legal proceedings mentioning the PDS are usually for a hidden defect because of the vendor's warranty prescribed in the Civil Code. In the other provinces, those proceedings are mainly for negligent misrepresentations, because the seller's warranty is more limited there.

<sup>7</sup> CanLII. *King v. Barker*, 2006 ONSC 23150, 2006-07-10, <http://www.canlii.org/en/on/onsc/doc/2006/2006canlii23150/2006canlii23150.html>, April 10, 2013.

point analysis grid in accordance with the study's purposes and the ruling selection criteria (see Annex 5).

### **2.3.3 Disproportion between the number of rulings in Quebec and the rest of Canada**

As can be noted in Table 3 above, the number of Quebec rulings mentioning the PDS is very high, with almost 47% of the rulings. This percentage is disproportionate if compared with the number of houses sold in one year, i.e., 458,412 houses in Canada vs. 77,182 (16.7%) in Quebec according to statistics for year 2011 provided by the Multiple Listing Service (MLS).<sup>8</sup>

The following reasons may explain the over-representation of Quebec court decisions:

- PDS use is probably more widespread in Quebec than in most other provinces, because real estate brokers as well as home inspectors belonging to the two main Quebec inspector associations make the seller complete the form. In addition, given that Alberta is no longer using the PDS since at least 7 years, it is normal to find a small number of cases there;
- The selection of rulings transmitted to CanLII is made at the provincial level, and seems stricter in other provinces than in Quebec. For example, we evaluated that Newfoundland and Labrador transmit less than 10% of the Provincial Court in civil matters to CanLII; Ontario transmits less than 3% of the Superior Court's civil rulings; British Columbia transmits less than 2% of the Provincial Court's civil rulings; whereas Quebec transmits around 26% of the rulings of the Quebec Court, civil chamber and small claims (see Annex 6 for more details);
- Another effect of the selection of rulings transmitted to CanLII by the provinces is that Quebec's small claims courts are much more numerous in CanLII than those of other provinces are, notably Ontario.

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<sup>8</sup> CREA. *Updates Resale Housing Forecasts*, June 15, 2012, <http://creanews.ca/2012/06/>, April 10, 2013.

### 3. HISTORY OF IMPLEMENTATION IN CANADA

No document describing the introduction of the Property Disclosure Statement (PDS) was found. The British Columbia Real Estate Association reports introducing such a document in 1991.<sup>9</sup> BC court rulings as early as 1993 on transactions using a PDS were identified by means of the CanLII database.<sup>10</sup> BC is possibly the province where the PDS was first introduced in Canada. The Nova Scotia Real Estate Association (NSREA) introduced a PDS slightly before 1995.<sup>11</sup> A PDS was used in Alberta in 1998.<sup>12</sup> In Quebec, the ACQC published a PDS in 2000, jointly with the Ordre des technologues du Québec (OTPQ), in complement to the home inspection. Afterward the OACIQ published its own document in 2003, which is now a mandatory form.<sup>13</sup> In March 2004 the Central Newfoundland Real Estate Board recommended to its members to use the PDS.<sup>14</sup>

As opposed to the laws in effect in Canada, where the PDS is not legally required in any province, most Australian states have legislated to require it for residential real estate transactions. The state of Victoria was the first to do so, in 1982.<sup>15</sup>

In the US, a California Court of Appeal ruling, *Easton vs. Strassburger* (152 Cal.App.3d 90, 1984), broadened the duties and responsibilities of real estate brokers, by making them liable if they sold defective houses without having notified buyers regarding the defects. Since the California Supreme Court refused to hear an appeal, the Court of Appeal ruling was used as a precedent for all subsequent cases of the same type. The legal obligation to provide a PDS appeared in California in the late eighties, following pressure by broker associations wanting to protect their members against law suits brought by dissatisfied buyers. Those associations succeeded in having the legislators render the use of seller property information statement forms mandatory in about two

<sup>9</sup> Real Estate Board of Greater Vancouver. *The Value of Working with a Realtor*, February 25, 2011, Vancouver Sun, <http://www.rebgv.org/value-working-realtor%C2%AE>, April 10, 2013.

<sup>10</sup> CanLII. *Doan v. Killins*, 1996 BCSC 3415, 1996-10-10 Supreme Court of British Columbia, <http://www.canlii.org/en/bc/bcsc/doc/1996/1996canlii3415/1996canlii3415.html>, April 10, 2013.

<sup>11</sup> Chornoby, Warren. *Property Condition Disclosure Statements*, April 1995, Lawyer's Insurance Association of Nova Scotia, p.1, <http://www.lians.ca/documents/PropertyConditionDisclosureStatements.pdf>, April 10, 2013.

<sup>12</sup> CanLII. *Young v. Areshenko*, 1999 ABPC 104, 1999-11-01, Provincial Court of Alberta, <http://www.canlii.org/en/ab/abpc/doc/1999/1999abpc104/1999abpc104.html>, April 10, 2013.

<sup>13</sup> Since June 2012, Quebec real estate brokers are obliged, with rare exceptions, to complete the OACIQ's PDS form with the seller, during the signing of the brokerage contract. The PDS then becomes an annex to the offer to purchase. The seller may choose not to complete the PDS - there is no legal obligation for him - but in that case the broker cannot sign a brokerage contract with him. OACIQ. *Contexte d'utilisation du formulaire obligatoire Déclarations du vendeur sur l'immeuble*, September 18, 2012, revised November 2012, article 121838, <http://www.oaciq.com/articles/contexte-utilisation-du-formulaire-obligatoire-declarations-du-vendeur-immeuble>, April 10, 2013.

<sup>14</sup> Can LII. *Donald Murray and Kara Murray v. Donna Tilley and Owen Grimes Realty (2000) Inc.*, 2005 NLTD 2, 2005-01-06, ¶39-40, Supreme Court of Newfoundland and Labrador, Trial Division, <http://www.canlii.org/en/nl/nlsctd/doc/2005/2005nltd2/2005nltd2.html>, April 10, 2013.

<sup>15</sup> Christensen, Sharon A. and Duncan, William D. and Stickle, Amanda P. *Evaluating Information Disclosure to Buyers of Real Estate – Useful or Merely Adding to the Confusion and Expense?* 2007, Queensland University of Technology Law and Justice Journal 7(2) p. 149, <http://eprints.qut.edu.au/14205/1/14205.pdf>, April 10, 2013.

thirds of the American states, thus transferring to the seller the obligation to provide the buyer with accurate information.<sup>16,17</sup>

## 4. LITERATURE REVIEW

This section summarizes the online literature review on the Property Disclosure Statement (PDS). The number of articles about the Canadian situation being limited, the research was extended to two other common law countries, the US and Australia.

### 4.1 The Canadian Situation

Real estate brokers<sup>18</sup> have a duty of disclosure toward their clients. This duty is interpreted more or less broadly depending on the province where brokers work. Laws governing real estate brokerage fall under provincial jurisdiction and describe real estate brokers' disclosure obligations. For example, in Quebec, real estate brokers are obliged to disclose to buyers and sellers any fact that may be unfavourable to the latter.

#### 4.1.1 Reports of the Canadian Regulators Group

In June 2004, the Canadian Regulators Group, an association of real estate regulatory organizations' senior officers and of industry members such as the Canadian Real Estate Association and the Real Estate Institute of Canada, published a report containing recommendations for, among other things, resolving certain problems related to the management of brokerage firms and to the dual agency practice.<sup>19</sup> That practice arises when a broker represents both the seller and the buyer in the real estate transaction or when real estate brokers employed by the same brokerage firm represent the seller and the buyer in the transaction.

The 2004 final report is based on a series of three analyses ordered from William Foster of McGill University in the early 2000s to make an assessment in order to reform real estate brokerage laws in Canada. We found those reports on the websites of organizations ensuring the application of real estate laws in Nova Scotia and Saskatchewan. The reports would have been handed to all the authorities responsible for real estate laws in Canada.<sup>20,21</sup> The Real Estate Council of Ontario (RECO), for instance, participated in the work of this group in 2003-2004.<sup>22</sup>

<sup>16</sup> Nanda, Anupam. *Property Condition Disclosure Law: Why Did States Mandate 'Seller Tell All'?* June 2006, *Economics Working Papers*, Paper 200616, [http://digitalcommons.uconn.edu/econ\\_wpapers/200616](http://digitalcommons.uconn.edu/econ_wpapers/200616), April 10, 2013.

<sup>17</sup> Nanda, Anupam. *Property Condition Disclosure Law: Does 'Seller Tell All' Matter in Property Values?* July 2006, *Economics Working Papers*, University of Connecticut, Paper 200547, p. 3, [http://digitalcommons.uconn.edu/cgi/viewcontent.cgi?article=1088&context=econ\\_wpapers](http://digitalcommons.uconn.edu/cgi/viewcontent.cgi?article=1088&context=econ_wpapers), April 10, 2013.

<sup>18</sup> In Quebec, since the new law on real estate brokerage came into effect on May 1, 2010, the OACIQ only issues real estate brokerage or broker's licences. The term "**real estate broker**" will thus be used to designate the professional who serves as a middleman in a property sale, although the term "real estate agent" is also used in the other provinces.

<sup>19</sup> Drouillard, Michael. *A Critique of the British Columbia Residential Real Estate Brokerage Industry's Use of Dual Agency*, 2011, Appeal, vol. 16, p. 97, [journals.uvic.ca/index.php/appeal/article/download/5956/2419](http://journals.uvic.ca/index.php/appeal/article/download/5956/2419), April 10, 2013.

<sup>20</sup> NSREC. *Commission News*, January 25, 2005, <http://www.nsrec.ns.ca/mediacd4e.pdf?mid=123>, April 10, 2013.

In his report of May 2003, Foster observes that PDS use by real estate brokers representing sellers may be problematic. Indeed, to the extent that the PDS provides buyers with information that sellers are not legally bound to disclose, it may be questioned whether, by so acting, brokers representing sellers are acting in the higher interest of their clients. This transfer of information is rendered legally acceptable if the seller formally authorizes the real estate broker to disclose that information.<sup>23</sup> A paragraph to that effect is generally included at the end of the form. In his text of March 2003, Foster compares the disclosure obligations of real estate brokers from different provinces.<sup>24</sup> However, a search of the CanLII database revealed that the current version of real estate laws in the great majority of provinces is more recent than 2007, thus probably making that analysis obsolete.

The courts have provided a few indications on the content of the form, as described in the *Rampersad vs. Rose* case reported by Foster (January 2003):

a form of disclosure ostensibly used to provide potential [buyers] with information about the property. The questions posed [in the statements] to the [seller] ... are those with which a knowledgeable, diligent and serious potential [buyer] would normally ask.<sup>25</sup>

The Canadian Regulators Group's report makes several recommendations to provincial authorities supervising the work of real estate brokers. The report lists the disclosures that the seller should have to make to the broker when signing a brokerage contract, including a disclosure of all of the property's latent defects known to the seller; and the report recommends that the seller should have to certify that all his disclosures are accurate to the best of his knowledge:

"(f) the Seller has disclosed to the Brokerage all material latent defects affecting the Property known to the Seller;

/.../

(h) all information provided to the Brokerage is accurate to the best of the Seller's knowledge;"<sup>26</sup>

The same report also contains the text of a brochure that should be provided to sellers and buyers. That brochure recommends that the seller disclose to the buyer all latent defects known to the seller, particularly those that would make the property dangerous

<sup>21</sup> RECBC. *Report from Council*, February 2005, vol. 40, No. 4, p. 4, <http://www.recbc.ca/pdf/rfc/2005february.pdf>, April 10, 2013.

<sup>22</sup> RECO. *Waves of change*, <http://www.reco.on.ca/tc-212/sc-271.html>, April 10, 2013.

<sup>23</sup> Foster, William. *Review of Industry Standard Form Representation Agreements*, May 2003, Canadian Regulators Group, Supplementary paper No. 3, p. 9, <http://www.srec.ca/pdf/FosterPaperMay2003.pdf>, April 10, 2013.

<sup>24</sup> Foster, William. *Licensee Duties within the Real Estate Industry Regulatory Frameworks - A Review of the Obligations Owed Clients And Customers and Incidental Issues*, March 2003, Canadian Regulators Group, Supplementary paper No. 2, p. 9-20, <http://www.nsrec.ns.ca/media0a60.pdf?mid=409>, April 10, 2013.

<sup>25</sup> Foster, William. *Agency Law and Real Estate Brokerage: Current Issues - A Review of the Case Law and Some Industry Practices*, January 2003, Canadian Regulators Group, Supplementary paper No. 1, p. 34, <http://www.srec.ca/pdf/FosterPaperJanuary2003.pdf>, April 10, 2013.

<sup>26</sup> Anonymous. *Report of the Agency Task Force*, June 2004, Canadian Regulators Group, p. 22, <http://www.srec.ca/pdf/ATFReport.pdf>, April 10, 2013.

or hazardous to the occupants' health; those that render a property unfit for habitation; and those that would make the property unfit for the use intended by the buyer, if the latter has informed the seller or his broker about that use. The brochure also specifies that those defects may include those costly to correct; notices received from local or other authorities and having an impact on the property; and work done without a permit. Finally, the brochure recommends that buyers hire an inspector for a home inspection, and ask specific questions about all of the property's major elements, particularly the structure, roof, water management and sewers, mechanical systems, and any notice received from local or municipal authorities. The report's reference to the PDS is intended to minimally explain what type of report it is.<sup>27</sup>

#### 4.1.2 The Chornoby report – Nova Scotia

The Nova Scotia Real Estate Association (NSREA) introduced PDS usage in the mid-nineties. Warren Chornoby then produced a report describing the PDS's possible benefits. The benefits he lists are:

- The PDS provides a written account of the seller's disclosures to the buyer, which is useful to the parties since most law suits against sellers and real estate brokers are for misrepresentations;
- The buyer can make a better informed purchase, because he obtains additional information on the property's condition. This can reduce surprises experienced by some buyers when taking possession, and thus lower the chances of subsequent litigation;
- The PDS can encourage buyers to have a home inspection done;
- The PDS can help reduce the seller's liability by providing written proof of his disclosures;
- The PDS can help buyers choose a house. Similar properties can be compared based on information received from the form;
- The PDS can help reveal latent defects known to the seller, as well as patent defects that the seller was not obliged to disclose under common law;
- The PDS clearly makes the seller liable for the disclosure, which can reduce the number of law suits against real estate brokers;
- Given that the PDS provides information on most of the buyers' questions, a broker may have to provide less information.<sup>28</sup>

In conclusion, Chornoby reiterates that the PDS can reduce the number of law suits by making buyers more aware of what they are buying. Given that the law has not changed, once litigation is underway the rules are the same. Therefore, brokers should not blindly assume that the Statement will protect them against all liability: their professional obligations are not reduced, and they must at least always verify the property's condition. A negligent broker cannot justify his conduct by saying that the representations were made by the seller. He must ensure that when the PDS is used, both the seller and buyer are aware of its impact.<sup>29</sup>

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<sup>27</sup> Report of the Agency Task Force, *op. cit.*, Appendix J, p. 1.

<sup>28</sup> Chornoby, *op.cit.*, p. 13.

<sup>29</sup> Chornoby, *op.cit.*, p. 16.



### 4.1.3 The Neufeld report – Manitoba

In 2009, John E. Neufeld prepared a report for the Manitoba Securities Commission (MSC) to determine how the PDS would best be used. The form is now attached to the offer to purchase, and a standard clause is provided in the latter for buyers who want to obtain the PDS and include it in the agreement. In his report, Neufeld describes the erosion of the *caveat emptor* rule<sup>30</sup> in the US, and the ensuing sellers' difficulty in determining what defects they must disclose to buyers. Mandatory PDS forms thus provide the advantage of specifying those defects.<sup>31</sup>

To solve the problem of a seller's incomplete disclosure of property defects known to him, as well as the problem of the *caveat emptor* rule's application, Neufeld then examines various options, including:

- No change. Some favour this option, since the *caveat emptor* rule is still applied, but others disagree because sellers have much more information on the property than a buyer can obtain, even by having a home inspection done.<sup>32</sup>
- Education. Some recommend better efforts to train real estate brokers and inform buyers and sellers. But Neufeld is sceptical of the real potential of this approach.<sup>33</sup>
- A home information pack for each property. Great Britain chose this option after a 2004 consultation, arguing that buyers need information before concluding the transaction, rather than compensations in the event of a problem. A home information pack must be available as soon as a property is up for sale, with part of the information being mandatory and another part being available on a voluntary basis.<sup>34,35</sup>
- The "Property Information Statement" (another name for the PDS). If a seller chooses to disclose information, he should do so honestly and fully. Moreover, as a seller may make misrepresentations without prejudice if they are not part of the offer to purchase and the deed, the buyer should request the inclusion of the PDS to the offer to purchase. Neufeld gives the example of Nova Scotia's offer to purchase form, which incorporates the PDS to the contract by default. The parties however have the option to cross out this provision.<sup>36</sup>

An American study reveals that the number of dissatisfied homebuyers fell from 15 to 5% after implementation of a law requiring PDS usage in Ohio. The adoption of a similar law in California has tripled the number of home inspections once buyers realized that the PDS is not a warranty and that the buyer is responsible of ascertaining the property's

<sup>30</sup> The seller's warranty is more limited under a common law regime. The main applicable principle is *caveat emptor*, which translates as "buyer beware." For more information, consult section 5.1.

<sup>31</sup> Neufeld, John E. *Summary of Recommendations on Vendor Disclosure*, followed by *Vendor Disclosure in Real Estate Transactions: A Proposal for Reform*, November 12, 2009, p. 15, Manitoba Securities Commission, [http://www.msc.gov.mb.ca/real\\_estate/neufeld.pdf](http://www.msc.gov.mb.ca/real_estate/neufeld.pdf), April 10, 2013.

<sup>32</sup> Neufeld, *op.cit.*, p. 16.

<sup>33</sup> Neufeld, *op.cit.*, p. 24.

<sup>34</sup> Neufeld, *op.cit.*, p. 25-26.

<sup>35</sup> The legislation came into effect in 2007 but was suspended on May 21, 2010. See: Communities and Local Government. *Housing - Suspension of Home Information Packs: Questions and Answers*, <http://webarchive.nationalarchives.gov.uk/20120919132719/www.communities.gov.uk/housing/homeownership/homeinfopackquestions/>, April 10, 2013.

<sup>36</sup> Neufeld, *op.cit.*, p. 29-32.

condition.<sup>37</sup> One of the shortcomings of the forms used in the US is their infrequent updates. This is not the case in Manitoba, where the form has been revised several times. Neufeld however suggests that the PDS be prepared not only by real estate experts, but also by a team formed by laymen, lawyers, real estate brokers, engineers, architects, home inspectors and other stakeholders.<sup>38</sup>

Neufeld suggests that the MSC adopt a three-phase approach to make the seller-buyer relationship more equal by means of the PDS:

1. Annex the PDS by default to the mandatory offer to purchase form;
2. If this action does not suffice in increasing PDS usage, modify the offer to purchase form to eliminate the bias in favour of *caveat emptor*, for example by obliging the seller to disclose all material defects known to him. However, given that this clause would not be enforced by law, the seller could always choose not to complete it;
3. Finally, if the above measures still have no effect on PDS usage, it remains possible to reverse the *caveat emptor* rule legislatively by requiring the seller to disclose all defects known to him; this requirement had already been proposed by the Manitoba Law Reform Commission in 1973.<sup>39</sup>

## 4.2 The American Situation

The PDS was originally introduced in the US to limit the risk of law suits against the sellers' real estate brokers. Anupam Nanda reports that the National Association of Realtors (NAR) – the principal American real estate brokers' association – lobbied in several states for laws on seller's disclosure in the early nineties. According to Nanda, one might question the soundness of legislating to require the seller to complete the PDS. The most obvious argument in favour of a law is that the rate of adherence would thus be higher, which is important for meeting the NAR's objective to reduce the number of law suits against real estate brokers.<sup>40</sup> In addition, the seller has information that may not be detected by the home inspection, due to the latter's physical limitations.<sup>41</sup>

In 2006, around two thirds of the American states had legislation requiring a PDS. According to Nanda, it appears that the states where the real estate brokers were subject to a greater number of disciplinary measures have favoured such legislation. Moreover, the states where real estate brokers were well supervised and made aware of the problem of law suits have not felt the same need.<sup>42</sup>

In an article published in 2010, Katherine Pancak *et al* mentions that recent American court rulings tend to broaden the duty of disclosure. Their opinion is that a buyer's real estate broker has a fiduciary duty under the common law and must conduct his own investigations in order to discover a property's defects for the benefit of his client.<sup>43</sup>

<sup>37</sup> Neufeld, *op.cit.*, p. 39-40.

<sup>38</sup> Neufeld, *op.cit.*, p. 44.

<sup>39</sup> Neufeld, *op.cit.*, p. 42, 55.

<sup>40</sup> Nanda, June 2006, *op.cit.*, p. 5.

<sup>41</sup> Nanda, June 2006, *op.cit.* p. 7.

<sup>42</sup> Nanda, June 2006, *op.cit.* p. 20.

<sup>43</sup> Pancak, Katherine A., Miceli, Thomas J., and Sirmans, C. F. *Evolving Property Condition Disclosure Duties: Caveat Procurator?* November 3, 2010, University of Connecticut, US, p. 1, <http://www.business.uconn.edu/Realestate/publications/pdf%20documents/425%20ABLJ%20Sub%20mission%20Caveat%20Procurator%20032610.pdf>, April 10, 2013.

According to Roberts, there is no consensus regarding the extent of the elements subject to the seller's disclosure in the US, particularly for the localisation of the defects.<sup>44</sup> Material defects located on the property, such as foundation or roofing problems, are not being questioned. However, some disappointed buyers launched law suits for defects external to the property, such as noisy neighbours, a nearby highway, a wastewater treatment plant, or a toxic contamination in the vicinity. The courts have not handled these cases consistently. Some jurisdictions have applied the same test as if the defect were located on the property, whereas others have enacted rules or legislation for defects beyond the site. But most American courts apply a rule similar to the one used for defects located on the property, i.e., that the defect must be:

- a) Known to the seller;
- b) Unknown to the buyer and not readily observable by him;
- c) Material, i.e., directly affecting the property's value or desirability.

Adopting the rule of the property line limits for the disclosing requirements would have the advantage of promoting stability in real estate transactions. Sellers would not fear law suits, while buyers would pay more attention to the vicinity. Roberts recommends that the courts not make the seller liable for off-site defects except in the event of a misrepresentation.<sup>45</sup>

#### 4.2.1 Stigmatized properties

In 2010, over half of American states had legislated to limit the liability of sellers and/or real estate brokers regarding the disclosure of psychological defects. Defects that do not have to be disclosed and those that must be vary from one state to another, whereas the liability limitation applies at times to both the seller and the real estate broker and at times only to the latter. Edmiston proposes a rationalization of circumstances in which it is not desirable to require disclosure: all stigmas for which there is no direct or continuous risk to occupants – such as haunted houses, a previous occupant's death by natural causes or suicide, the fact that a previous occupant was living with HIV/AIDS, etc. In the case of violent crimes or the illegal use of the property for producing drugs, the continuous presence of a physical hazard would require disclosure. If a buyer asks a specific question about a stigma, the seller should be protected from insensitive questions (e.g., cases of HIV/AIDS), while allowing a buyer sensitive to certain stigmas to obtain answers.<sup>46</sup>

Roberts also addresses the issue of stigmatized properties. According to him, if there is no obligation to disclose a stigma located on the property, it should also apply if such a stigma is located beyond the property. The case of sex offenders is more sensitive. Some American states require the seller to inform the buyer where to find information on this subject.<sup>47</sup>

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<sup>44</sup> Roberts, Florrie Young. *Off-Site Conditions and Disclosure Duties: Drawing the Line at the Property Line*, October 25, 2006, Brigham Young University Law Review, vol. 957, p. 958-960, <http://lawreview.byu.edu/archives/2006/4/2ROBERTS.FIN.pdf>, April 10, 2013.

<sup>45</sup> Roberts, *op.cit.*, p. 993.

<sup>46</sup> Edmiston, Stuart C. *Secrets Worth Keeping: Toward a Principled Basis for Stigmatized Property Disclosure Statutes*, 2010, UCLA Law Review, vol. 58, p. 281-310, <http://www.uclalawreview.org/pdf/58-1-5.pdf>, April 10, 2013.

<sup>47</sup> Roberts, *op.cit.*, p. 977-981.

#### 4.2.2 Arguments supporting PDS usage

Nanda verified whether introducing legislation requiring PDS usage had had an impact on property prices in the US. He measured an increase of 3 to 4%, spread over approximately four years, after such measures were introduced.<sup>48</sup> The author reports that the mandatory PDS improved buyer satisfaction as well as the quality of properties sold. Indeed, because sellers have to disclose recent work on the property, they are less tempted to make cosmetic changes to facilitate the sale. Moreover, sellers more often decide to make at minimum the least costly repairs before putting their property up for sale.<sup>49</sup>

Jauregui and Hite verified if the price of a property located near an environmental nuisance such as a dump site varied depending on whether it was put on sale by the owner or through a real estate broker. In a study of almost 3,000 transactions in Ohio in 1990, before the introduction of a mandatory PDS, the authors found that brokers obtained higher prices than owner sellers, particularly for properties located nearer dump sites, and that the difference lessened with increasing distance. Buyers relocating from outside the area were thus disadvantaged compared to local buyers due to ignorance of regional realities.<sup>50</sup>

In a report prepared for the Ohio Real Estate Commission in 2008, Moore reports that a study of the case law reveals a reduction of law suits after a mandatory PDS and laws for real estate brokerages were introduced in the mid-nineties. The training of real estate brokers was also improved at the same time.<sup>51</sup> The author does not notice a reduction of law suits for roofing problems, so he suggests improving the PDS to include more details on that subject.<sup>52</sup>

According to Pancak *et al*, the introduction of a mandatory PDS has increased the number of complaints against real estate brokers for non-disclosure of property defects, because such a written document makes the facts easier to prove. But the authors have not verified if this larger number of complaints translated into a greater number of disciplinary measures.<sup>53</sup>

<sup>48</sup> Nanda, July 2006, *op. cit.*, p. 29.

<sup>49</sup> Nanda, July 2006, *op. cit.*, p. 5-6.

<sup>50</sup> Jauregui, Andres and Hite, Diane. *Don't ask, don't tell: the impact of real estate agents on house prices near environmental disamenities*, November 2005, US, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=837404](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=837404), April 10, 2013.

<sup>51</sup> Moore, Gary S. *Real Estate Broker Liability Limitation*, January 2008, document prepared for the Education and Research Committee, Ohio Real Estate Commission, Ohio Department of Commerce Division of Real Estate & Professional Licensing, p. 44, [http://www.com.ohio.gov/real/docs/real Real Estate Broker Liability Limitation Study final.pdf](http://www.com.ohio.gov/real/docs/real%20Real%20Estate%20Broker%20Liability%20Limitation%20Study%20final.pdf), April 10, 2013.

<sup>52</sup> Moore, *op. cit.*, p. 44 and 89-90.

<sup>53</sup> Pancak, Katherine A. and Sirmans, C. F. *The Effect of Agency Reform on Real Estate Service Quality*, 2005, University of Connecticut working paper, US, p. 16 and 18, <http://www.business.uconn.edu/Realestate/publications/pdf%20documents/363%20Agency%20Reform%20and%20Service%20Quality.pdf>, April 10, 2013.

### 4.3 The Australian Situation

A report prepared in view of tabling legislation requiring an PDS in Tasmania (Australia) found that the form contains questions that buyers too often forget to ask sellers.<sup>54</sup> The introduction of the mandatory form is seen as a way to establish a balance between seller and buyer so that the latter can negotiate a fairer price. The form allows the buyer to learn facts that may have an impact on his decision, because the seller knows more about the property than the buyer can discover, and because the buyer becomes aware of the full obligations related to possession of a real estate property only after a moment of reflection, out of range of a real estate broker's selling points.<sup>55</sup>

Miller *et al* (2006) conducted in-depth interviews with five experts of Queensland's real estate industry (two lawyers, two real estate brokers and one mortgage broker). The prevailing view was that a standard form should be prepared, concisely summarizing disclosure requirements and the results in a user-friendly list or an executive summary. The challenge, as noted by the participants, is to develop a PDS that (1) provides useful information in a format that is simple, easy to read and understand; (2) balances the needs of seller and buyer; and (3) clarifies and simplifies the role of industry professionals in the disclosure process.<sup>56</sup> The article points out that disclosure requirements can be very complex in Australia, and mentions the form used in Minnesota as an example of a user-friendly one.

The PDS is mandatory in several Australian states, and pertains mainly to errors in titles, whether registered or not, such as the certificate of location, mortgages or other financial lien, easements, documents of title, mining or other rights, leases, etc.<sup>57</sup> The PDS also addresses the quality of titles: planning and zoning information; building prohibitions; government notices affecting the land; judgments, orders or writs affecting the property; possibilities of property repossession; road widening; demolition notices; plan and building approvals; heritage or national estate; contaminated land; energy efficiency rating; building and pests reports; presence of asbestos; fences; vegetation; structural defects; mining tenement; environmental protection orders and assessments; no right of access to the property via road; land flooding.<sup>58</sup>

In 2007, Christensen *et al* wanted to verify if implementation of the mandatory PDS form in Australia had met its objectives, i.e., to establish a balance between seller and buyer under a common law regime, while minimizing the cost of vendors' preparation of information documents.<sup>59</sup> Indeed, it appears that some Australian states require the seller to disclose information issued by local administrations in the form of certificates that need regular updating, which is not the case in Canada.<sup>60</sup> In concluding, the authors

<sup>54</sup> Tasmania Law Reform Institute. *Vendor Disclosure*, June 2004, Issues Paper No. 6, p. 2, [http://www.utas.edu.au/data/assets/pdf\\_file/0004/283837/VendDiscJune15A4.pdf](http://www.utas.edu.au/data/assets/pdf_file/0004/283837/VendDiscJune15A4.pdf), April 10, 2013.

<sup>55</sup> Tasmania Law Reform Institute, *op. cit.*, p. 8.

<sup>56</sup> Miller, Evonne *et al.* *Is mandatory disclosure an effective consumer protection mechanism in Australian real estate markets? The perspective of Queensland industry experts*, 2006, Proceedings Social Change in the 21st Century Conference, Brisbane, Australia, p. 7-10. <http://eprints.qut.edu.au/6637/1/6637.pdf>, April 10, 2013.

<sup>57</sup> Christensen *et al*, 2007, *op. cit.*, p. 161.

<sup>58</sup> Christensen *et al*, 2007, *op. cit.*, p. 163.

<sup>59</sup> Christensen *et al*, 2007, *op. cit.*, p. 149.

<sup>60</sup> Christensen *et al*, 2007, *op. cit.*, p. 155.

recommend that elements subject to disclosure be standardized and simplified, to reduce both the property transfer cost to the seller and the incidence of litigation between consumers.

From their research, Christensen *et al* suggest that before establishing a mandatory disclosure regime, governments consider the following points:

- What information is relevant to the buyer in his decision to proceed or not with the real estate transaction?
- In what format should the information be provided so that the buyer reads and uses it for the real estate transaction?
- Should the buyer receive limited rights to obtain compensation for defects not disclosed by the seller and discovered after the sale?
- Should the buyer be obliged to verify information provided by the seller and make sure it is accurate?
- What is the cost of preparing the PDS for the seller?<sup>61</sup>

The prevailing view on the sale of complex products such as residential properties or financial products is that more information should be provided to consumers to assist their decision-making. Legislation and regulations to better protect consumers have been developed based on traditional economic theories using the notion of “rational consumer.”<sup>62</sup> Following studies of actual consumer behaviour, recent behavioural economics research questions those traditional ideas.<sup>63</sup> It appears that consumers understand or interpret situations differently from economists. Accordingly, while information should be disclosed to protect the buyer from a poor decision, it should not be assumed that the buyer will use that information to make a rational decision, that the information will be read or understood, or that his decision will be based on the information provided. Therefore, it cannot be assumed that after disclosure of a property defect, the buyer will be able to identify the defect, understand its effect, and attempt to renegotiate the purchase price or withdraw from the transaction.<sup>64</sup>

Thus, Christensen *et al* (2009) identified problems to be addressed before implementing a PDS:

- It must be ensured that the buyer reads the form. A form that consists of a list with a space under each item to describe the nature and scope of defects is more likely to be read than a form that simply refers to a series of inspections or certificates attached in appendix. An American study (2000) on forms used for disclosure in real estate transactions revealed that only 3% of respondents found list forms too complex.<sup>65</sup>

<sup>61</sup> Christensen *et al*, 2007, *op. cit.*, p. 171.

<sup>62</sup> Encyclopaedia Universalis. *Le fondement de la science économique*, 2012, <http://www.universalis.fr/encyclopedie/rationalite-economique/1-le-fondement-de-la-science-economique/>, April 10, 2013.

<sup>63</sup> Christensen, Sharon A. and Duncan, William D. and Stickle, Amanda P. *Behavioural biases and information disclosure laws relating to residential property sales: narrowing the gap between existing laws and calls for future reforms*, 2009, Queensland University of Technology Law and Justice Journal 9(2) p. 1, <http://eprints.qut.edu.au/32485/1/c32485.pdf>, April 10, 2013.

<sup>64</sup> Christensen *et al*, 2009, *op. cit.*, p. 23.

<sup>65</sup> Moore GS and Smolen G. *Real Estate Disclosure Forms and Information Transfer*, 2000, 28 Real Estate Law Journal p. 319-332. Article quoted in Christensen *et al*, 2009, *op. cit.*, p. 24.

- The timing of information disclosure is also relevant so that the buyer can benefit from the latter. Cognitive psychology studies demonstrate that when information is provided late in the process, consumers tend to persist in transactions once the commitment has been made.<sup>66</sup> Studies using fictitious companies reveal that when consumers make initial investments, they tend to continue investing despite information favouring withdrawal. Consumer education in irrecoverable costs does not appear to diminish the tendency to persist with the initial line of conduct. Due to this effect, buyers are not very inclined to renegotiate a property's price when defects are discovered after the offer to purchase.<sup>67</sup>

Christensen *et al* (2009) summarize as follows the elements that should be taken into account before establishing a mandatory PDS form:

- Determine when the information should be provided to the buyer;
- Determine whether the information is relevant to the real estate transaction;
- Determine whether the information is helpful and useful for the buyer to make an informed decision about pursuing the transaction;
- Ensure that the information is in plain language, likely to be understood by the buyer;
- Ensure the document's presentation helps the buyer to read it.<sup>68</sup>

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<sup>66</sup> Stern, Stephanie. *Temporal Dynamics of Disclosure: The Example of Residential Real Estate Conveyancing*, 2005, Utah Law Review Society, p. 57-91, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=959726](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=959726), April 10, 2013.

<sup>67</sup> Christensen *et al*, 2009, *op.cit.*, p. 26-27.

<sup>68</sup> Christensen *et al*, 2009, *op.cit.*, p. 28-29.

## 5. LEGAL STATUS

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The legal rules for the seller's warranty and the Property Disclosure Statement (PDS) are examined in this section.

A consumer is protected differently if he buys a used home in Quebec or elsewhere in Canada. In Quebec, private law is subject to the Civil Code of Québec (CCQ). In the other Canadian provinces, private law is governed by the common law, "a legal system of British origin, based on court decisions, on expert writings and on usage and custom. It differs from statutory law, which is a legal system based on codified laws (such as the CCQ)."<sup>69</sup>

### 5.1 Seller's Warranty

The CCQ that came into effect in 1994 provides a seller's legal warranty in order to protect buyers against eventual latent defects (sections 1726 to 1728). It is possible for the seller to limit his liability within the contract, and even for a non-professional seller to offer no warranty, if the contract stipulates that "a buyer buys property at his own risk."<sup>70</sup> Another way to limit the seller's liability is to honestly fill out a PDS form, with the effect of making apparent any latent defect thus disclosed.

Mr. Jeffrey Edwards provides an interpretation of the seller's warranty specific to the field of real estate:

The idea underpinning the law is the following: the buyer has the right to have his reasonable expectations about the building's conditions protected. The seller will have the burden of proof with regard to the defect and to the applicability of the warranty of quality. The buyer must demonstrate the absence of reasonably expected quality, for the seller to be held liable for such absence.<sup>71</sup>

The buyer's remedies are generally a demand for a reduction of the sale price, or a demand for cancellation of the sale. He may also demand that the defect be repaired. In addition to being liable for defects of which he is unaware, a seller who does not mention a latent defect that is known to him at the time of the sale is held liable for prejudice caused to the buyer. Thus, in addition to the remedies mentioned above, the seller may have to pay damages.

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<sup>69</sup> Our translation of: "un système juridique d'origine britannique, basé sur les décisions des tribunaux, sur la règle (écrits d'experts) et sur les usages et coutumes. Il diffère du droit statutaire qui est un système juridique basé sur des lois codifiées (tel le CcQ)." The Quebec Law Network. *Notre système de justice – Qu'est-ce que la Common Law?*, legal FAQ, [http://www.avocat.qc.ca/faq/faq\\_systeme.htm](http://www.avocat.qc.ca/faq/faq_systeme.htm), April 10, 2013.

<sup>70</sup> CCQ, sections 1732 and 1733.

<sup>71</sup> Our translation of: "L'idée qui soutient la loi est la suivante : l'acheteur a le droit de s'attendre à ce que ses attentes raisonnables quant à l'état de l'immeuble soient protégées. L'acheteur aura le fardeau de la preuve du vice et des conditions d'existence de la garantie de qualité. L'acheteur doit démontrer l'absence de qualité raisonnablement attendue pour que le vendeur en soit tenu responsable." Edwards, Jeffrey. *La garantie de qualité ou contre les vices cachés en matière d'immeubles*, The Quebec Law Network, <https://www.avocat.qc.ca/public/iivicescaches.htm>, April 10, 2013.



The seller's warranty is more limited under a common law regime.<sup>72,73</sup> The main applicable principle is that of *caveat emptor*, which translates as "buyer beware." This principle protects the seller in case of a patent defect or a latent defect not known to him. If the buyer has not requested that a warranty clause be written in the contract for sale, the seller is broadly protected against any liability regarding latent defects following the property's sale. Moreover, the seller has no legal obligation to identify patent defects. His disclosure obligations are limited to latent defects known to him and so serious that they may have an impact on the residents' safety, or make the property unfit for habitation, or make the property unfit for the stated use the buyer wants to make of it. The seller may also have to disclose notices from authorities, the absence of permits to modify the property, and latent defects known to him that require costly repairs.

However, developments in consumer rights have led to legislation prescribing mechanisms to better protect consumers. Under the common law, if the seller voluntarily hides a defect or makes a misrepresentation, or if he omits to mention a fact he must disclose according to the law, the courts will be more inclined to protect the buyer. They will sometimes allow the cancellation of the sale, but will more often award damages. For more discussion on the *caveat emptor* rule, see section 7.4, *Case Law and Principles Invoked by the Courts*.

Quebec's civil law regime thus imposes on the seller a broader liability regarding the sold property's warranty than does the common law regime. In return, the CCQ better protect the buyer than the common law.

## 5.2 Property Disclosure Statement

The use of the Property Disclosure Statement (PDS) is not a legal obligation under the CCQ or the common law in any Canadian province or territory.<sup>74</sup> In Quebec, use of the PDS is recommended by the OACIQ, by professional orders whose members conduct home inspections, and by home inspector associations. Since July 1, 2012, the OACIQ has made its use mandatory for real estate brokers. The latter may not sign a brokerage contract with a natural person wanting to sell a property of five units or less declining to complete the PDS.<sup>75</sup> Given that under civil law, sellers are obliged to offer a legal warranty on the home, barring specific provisions to the contrary in the sales contract, the interest in completing the PDS is that a latent defect disclosed before the sale can no longer become the object of a law suit.

Elsewhere in the country, the PDS's very use is being questioned, particularly since the Court of Appeal for Ontario's ruling in *Krawchuk v. Scherbak* (2011 ONCA 352). Following that ruling, lawyer and Toronto Star columnist Bob Aaron wrote an article maintaining that the PDS's use is disastrous for the legal system, because its use – or rather, its misuse – leads to too many law suits.<sup>76</sup>

<sup>72</sup> Chornoby, *op.cit.*

<sup>73</sup> Neufeld, *op.cit.*

<sup>74</sup> Lamb, Michael J. *A Commentary on Practice Issues of Relevance to Real Estate Lawyers*, August 2011, p. 11, [http://www.stewart.ca/multimedia/LectureSeries/Michael\\_Lamb.pdf](http://www.stewart.ca/multimedia/LectureSeries/Michael_Lamb.pdf), April 10, 2013.

<sup>75</sup> OACIQ. *Contexte d'utilisation du formulaire obligatoire Déclarations du vendeur sur l'immeuble*, *op.cit.*

<sup>76</sup> Aaron, Bob. *Use SPIS forms at your own peril - Krawchuk v. Scherbak*, May 28, 2011, Toronto Star Column, <http://www.aaron.ca/columns/2011-05-28.htm>, April 10, 2013.

The *Alevizos v. Nirula* (2003 MBCA 148, 2003-12-05) ruling by the Manitoba Court of Appeal is frequently cited (23 quotations listed in CanLII) in cases involving the PDS. Subsection 36 of the written judgment contains a summary of then-existing case law:<sup>77</sup>

- Declarations made in a PDS are representations as opposed to terms of the contract. In the case of misrepresentations, the appropriate remedy is the avoidance or rescission of the contract, and, possibly, a tort action for damages;
- The PDS does not constitute a warranty, but to put purchasers on notice, to make purchasers aware of a problem if there is one;
- Since the purpose of the PCS is to give the purchasers a “heads up” with respect to potential problems, liability will ordinarily be disallowed when the problem in question is obvious. This is because in such circumstances it cannot be said that the misrepresentation actually caused the person to act upon it;
- If the vendor answers the PCS honestly and does not deliberately intend to mislead, then liability will not follow even if the representation turns out to be inaccurate.

The mandatory offer to purchase forms issued by the NSREC and the MSC both contain standard clauses to request a PDS and include it to the contract of the offer to purchase. Indeed, the courts appear to attach more importance to the seller’s representations in that event:

Third, the disclosure statement was not incorporated into the residential contract of purchase and sale. The conditions of that contract of purchase and sale, as set out on that contract, were that the offer was to be subject to the inspection and approval of the heating and air-conditioning systems, and of the central vac system. The checking of the heating system was to be at the buyer’s expense. Had the plaintiff wished to rely on the property disclosure statement such that reliance on that would become a condition of the offer to purchase, it would have been a simple matter to insert it into the contract itself.<sup>78</sup>

For more discussion on the legal principles concerning the PDS, see section 7.4, *Case Law and Principles Invoked by the Courts*.

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<sup>77</sup> CanLII. *Alevizos v. Nirula*, 2003 MBCA 148, 2003-12-05, ¶ 36, <http://www.canlii.org/en/mb/mbca/doc/2003/2003mbca148/2003mbca148.html>, April 10, 2013.

<sup>78</sup> CanLII. *Franks v Wade*, 2011 SKPC 45, 2011-07-28, ¶ 68, <http://www.canlii.org/en/sk/skpc/doc/2011/2011skpc45/2011skpc45.html>, April 10, 2013.

## 6. ORGANIZATIONS SUPERVISING THE WORK OF REAL ESTATE BROKERS

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### 6.1 Inventory of the Organizations

To become a real estate broker in Canada, the prescribed training must be taken and a licence must be obtained from the province where one wants to practice. The licence must then be renewed regularly, and renewal requirements may include training obligations.

In most provinces, responsibilities under real estate brokerage provincial legislation are shared between two organizations. One is a government or government-affiliated organization that is mainly comprised of licence holders and is responsible for applying the law. The second organization is mainly responsible for defending the interests of real estate brokers and is generally affiliated to the Canadian Real Estate Association (CREA). In Prince Edward Island, application of the law is ensured by one individual, the Superintendent of Insurance. See Annex 1 for further information on those organizations.

As shown in Table 5, responsibilities overlap in some provinces. In Alberta, both RECA and AREA dispense training. This situation is temporary, since all training activities are scheduled to be transferred to RECA in 2013.<sup>79</sup> Training responsibilities also overlap in Quebec and Saskatchewan. This situation should not be problematic, if training requirements for obtaining a licence are clear.

In Manitoba, a consumer may file a complaint to the MSC for violations of the *Real Estate Brokers Act*.<sup>80</sup> If the problem involves the Code of Ethics or professional practices standards, he must address himself to the MREA.<sup>81</sup> Such a subdivision of responsibilities can add to the procedures that consumers must follow.

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<sup>79</sup> RECA. *Building consumer Trust and Confidence, Annual Report 2010-2011*, p. 10-11, [http://www.reca.ca/consumers/content/about-reca/PDF/Annual\\_Report\\_2010-2011.pdf](http://www.reca.ca/consumers/content/about-reca/PDF/Annual_Report_2010-2011.pdf), April 10, 2013.

<sup>80</sup> MSC. *Complaint Process*, [http://www.msc.gov.mb.ca/protecting\\_the\\_public/complaint.html](http://www.msc.gov.mb.ca/protecting_the_public/complaint.html), April 10, 2013.

<sup>81</sup> MREA. *When Things Go Wrong*, [http://www.realestatemanitoba.com/articles\\_realtor/n\\_sec1whenwrong.htm](http://www.realestatemanitoba.com/articles_realtor/n_sec1whenwrong.htm), April 10, 2013.

**Table 4: Responsibilities of organizations supervising the work of real estate brokers, by province and territory**

Province	Organization	Application of the Law	Issuance of Licences	Complaints	Evaluation of Qualifications	Training	PDS Form
Alberta	Real Estate Council of Alberta (RECA)	√	√	√	√	√	
	Alberta Real Estate Association (AREA)					√	*
British Columbia	Real Estate Council of British Columbia (RECBC)	√	√	√	√		
	British Columbia Real Estate Association (BCREA)					√	√
Manitoba	Manitoba Securities Commission (MSC)	√	√	√			√
	Manitoba Real Estate Association (MREA)			√	√	√	
New Brunswick	Department of Justice and Consumer Affairs	√	√				
	New Brunswick Real Estate Association (NBREA)			√	√	√	√
Newfoundland and Labrador	Service NL	√	√	√			
	Newfoundland & Labrador Association of REALTORS (NLAR)				√	√	√
Nova Scotia	Nova Scotia Real Estate Commission (NSREC)	√	√	√	√		√
	Nova Scotia Association of REALTORS (NSAR)					√	
Ontario	Real Estate Council of Ontario (RECO)	√	√	√	√		
	Ontario Real Estate Association (OREA)					√	√
Prince Edward Island	Superintendent of Insurance, Office of the Attorney General, Consumer, Corporate & Insurance Services	√	√	√			
	Prince Edward Island Real Estate Association (PEIREA)				√	√	√
Quebec	Organisme d'autoréglementation du courtage immobilier du Québec (OACIQ)	√	√	√	√	√	√
	Québec Federation of Real Estate Boards (FCIQ)					√	
Saskatchewan	Saskatchewan Real Estate Commission (SREC)	√	√	√	√	√	
	Association of Saskatchewan REALTORS (AREA)					√	√
Northwest Territories	Department of Municipal and Community Affairs	√	√				
Nunavut	Government	√	√				
Yukon	Consumer Service	√	√	√			
	Yukon Real Estate Association (YREA)						√

\*The organization withdrew the PDS from its forms around 2004.

## 6.2 Training Dispensed to Real Estate Brokers Regarding the PDS

The websites of organizations supervising the work of real estate brokers were studied to determine what training the latter received regarding the PDS. This question was also asked directly of the organizations (see Annex 2). No information was obtained on the content of the training dispensed in certain provinces (Prince Edward Island, Manitoba, New Brunswick, Newfoundland and Labrador, and the territories) (see Annex 7).

PDS training comes from several sources. It may be dispensed in the courses needed to obtain a licence, through continuous training, articles in bulletins intended for brokers, etc. The information found does not claim to be exhaustive, since detailed content of courses given to real estate brokers was not available on the websites studied, and many of the latter contain sections accessible only to licence holders.

The various sources of information found regarding the PDS, as well as the guidelines given to brokers, are listed in Annex 7. Guidelines issued by eight organizations in six provinces were found. Those guidelines were compared with those advocated by William Foster in the following Table 5.<sup>82</sup> The guidelines suggested by Foster mainly pertain to the PDS's legal aspect, whereas the organizations supervising the work of brokers issue not only legal guidelines, but also guidelines for record keeping and for the circumstances in which the PDS should be provided to buyers. From the sources consulted, it is not possible to conclude that Foster's recommendations on the information that should be provided to buyers and sellers about the PDS have been applied.

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<sup>82</sup> Foster, January 2003, *op.cit.*, p. 34-37.

**Table 5: Application of guidelines that should be provided to real estate brokers regarding the PDS, according to W. Foster**

W. Foster's Recommendations	AB	BC	BC	NS	ON	ON	QC	SK
	RECA	RECBC	BCREA	NSREC	RECO	OREA	OACIQ	SREC
<b>Brokers representing buyers should inform them about:</b>								
The need for additional investigations: home inspection or a more specific one, questions to the seller		√	√		√	√	√	
The broker's obligation to verify some of the information in order to fulfill his duty of care	√				√		√	√
Any apparently erroneous or doubtful answer			√					√
Limited use of the PDS, which can only attest the seller's knowledge of his property and not necessarily its actual condition					√			
The prevalence of the <i>caveat emptor</i> rule								
Limited use of the PDS as a contractual document								
The possible existence of defects not known to the seller								
The possibility of requiring specific warranties in the contract according to the buyer's concerns								
<b>Brokers representing sellers should notify them about:</b>								
The importance of providing accurate and complete information if the seller chooses to complete a PDS			√			√		√
Once the disclosure has begun, it must continue – half-truths are unacceptable			√		√	√		
The absence of a legal obligation to disclose non-material latent defects (e.g. stigmas)					√			√
The definition of a latent defect					√			√
The fact that although the PDS is not necessarily a contractual document, it constitutes a representation and may be used by buyers in a lawsuit for misrepresentation					√			
The fact that use of the PDS does not free sellers of their duty of disclosure to buyers		√						
The prevalence of the <i>caveat emptor</i> rule								
The absence of a legal obligation to disclose patent defects								

It should be noted that home inspectors outside Quebec consider that having the seller complete a PDS form is a real estate brokerage act. A search on the websites of inspector associations affiliated to the Canadian Association of Home and Property Inspectors (CAHPI) did not yield information on the PDS, except on the website of the

Association des inspecteurs en bâtiment du Québec (AIBQ), which recommends that its members have the seller complete the OACIQ form.<sup>83</sup>

### 6.3 Information Provided to Sellers and Buyers

The websites of government organizations supervising the work of real estate brokers were studied to determine what information about the PDS was provided to buyers and sellers. We have observed that information provided to consumers about the PDS and its legal implications is often minimal. Nine provinces publish a more or less elaborate brochure. Four of those brochures contain no information on the PDS. Three brochures only name it with very little information. Additional information on the PDS is also available on four of those agencies' websites.

#### Alberta

The two-page brochure prepared by RECA for sellers does not mention the existence of a PDS, given that this form was withdrawn. But the leaflet does mention that latent defects must be disclosed.<sup>84</sup> The two-page brochure addressed to buyers repeats about the same information.<sup>85</sup> The RECA website is slightly more complete, specifying what latent defects must be disclosed, that they must not be concealed, and that the seller must honestly answer any question from the buyer.<sup>86</sup>

#### British Columbia

The Homeowner Protection Office's 38-page brochure is mainly intended for buyers of new or recent homes. The brochure mentions the PDS in a list of information to verify.<sup>87</sup>

The RECBC's online brochure for buyers does not explain what the PDS is, but suggests that the buyer ask if one exists. There is also a list of other questions to ask the seller.<sup>88</sup> The online brochure for sellers does not mention the PDS. But there is a list of information and defects that the seller should disclose to the buyer.<sup>89</sup>

#### Manitoba

The MREA's 12-page brochure explains the real estate transaction's context in the province, the *caveat emptor* rule and the buyer's obligation to investigate. The seller has the right not to provide information beyond what is required by the common law, but if he

<sup>83</sup> AIBQ. *Documents relatifs à l'inspection – La déclaration du vendeur*, <http://aibq.qc.ca/fra/documents.php>, April 10, 2013.

<sup>84</sup> RECA. *The Selling Process*, 2008, 2p., [http://www.reca.ca/consumers/content/consumer-information/PDF/Seller\\_Brochure\\_08.pdf](http://www.reca.ca/consumers/content/consumer-information/PDF/Seller_Brochure_08.pdf), April 10, 2013.

<sup>85</sup> RECA. *The Buying Process*, 2008, 2p., [http://www.reca.ca/consumers/content/consumer-information/PDF/Buyer\\_Brochure\\_08.pdf](http://www.reca.ca/consumers/content/consumer-information/PDF/Buyer_Brochure_08.pdf), April 10, 2013.

<sup>86</sup> RECA. *Selling a Property*, 2012, <http://www.reca.ca/consumers/content/consumer-information/selling-process.html>, April 10, 2013.

<sup>87</sup> Homeowner Protection Office. *Buying a Home in British Columbia: A Consumer Protection Guide*, 2013, p. 38, <http://www.hpo.bc.ca/files/download/Bulletins/BuyingANewHome.pdf>, April 10, 2013.

<sup>88</sup> RECBC. *Buying a Home in British Columbia*, section: What Other Questions Should You Ask, <http://www.recbc.ca/consumer/buyinghome.html>, April 10, 2013.

<sup>89</sup> RECBC. *Selling a Home in British Columbia*, sections: Responsibilities of the Seller, Obligation to Disclose Defects, <http://www.recbc.ca/consumer/sellinghome.html>, April 10, 2013.

does provide information, he must do so honestly and fully so as not to mislead the buyer. The PDS is mentioned but its usefulness is not explained.<sup>90</sup>

The MREA also offers FAQs on its website. One of the questions pertains to disclosure of a property's defects, and another explains what the PDS is and its usefulness.<sup>91</sup>

Following amendments made to the offer to purchase contract in August 2011, the MSC published an online leaflet about those amendments, the advantages of using the PDS, and the home inspection.<sup>92</sup>

## New Brunswick

A legal organization prepares for the government legal information documents intended for consumers. In the guide intended for buyers, the PDS is not mentioned, but it is specified that the buyer must conduct investigations. It is recommended that the house be evaluated and inspected to determine what repairs must be made, and thus to be in a position to negotiate a fair price.<sup>93</sup> The sellers' guide does not mention the PDS.<sup>94</sup>

According to information obtained from NBREA, "The information provided to the vendors varies from REALTOR to REALTOR, but the information is fairly self-explanatory. Sellers should be reminded that the Residential Property Disclosure Statement forms part of the contract and that the seller is accountable for any fraudulent statement."<sup>95</sup>

## Nova Scotia

The 50-page guide prepared by the NSREC for buyers does not mention the PDS, whereas the sellers' guide (42 pages) mentions that the latter must provide any information that might reduce the property's value.<sup>96,97</sup>

The NSREC's website provides consumers with information on subjects related to real estate transactions. The PDS's advantages for the seller and buyer are explained, as well as those for the real estate brokers involved in the real estate transaction, the PDS's usefulness, and the circumstances that might justify its absence.<sup>98</sup>

<sup>90</sup> MREA. *Homeowner's Handbook - How to buy and sell your home with confidence*, p. 9, [http://www.realestatemanitoba.com/home\\_owners\\_mrea\\_brochure\\_online.pdf](http://www.realestatemanitoba.com/home_owners_mrea_brochure_online.pdf), April 10, 2013.

<sup>91</sup> MREA. *Frequently asked questions*, <http://www.realestatemanitoba.com/faq.htm>, April 10, 2013.

<sup>92</sup> MSC. *Protecting the Home Buyer's Interests*, 4 p., [http://www.msc.gov.mb.ca/education/resources/otp\\_info.pdf](http://www.msc.gov.mb.ca/education/resources/otp_info.pdf), April 10, 2013.

<sup>93</sup> Public Legal Education and Information Service of New Brunswick. *Planning for Buying a House*, 2009, [http://www.legal-info-legale.nb.ca/en/planning\\_for\\_buying\\_a\\_house](http://www.legal-info-legale.nb.ca/en/planning_for_buying_a_house), April 10, 2013.

<sup>94</sup> Public Legal Education and Information Service of New Brunswick. *Selling your house*, [http://www.legal-info-legale.nb.ca/en/selling\\_your\\_house](http://www.legal-info-legale.nb.ca/en/selling_your_house), April 10, 2013.

<sup>95</sup> Ryan, Jamie. Personal correspondence, letter of July 20, 2012, NBREA.

<sup>96</sup> NSREC. *Practical Guide for Buyers – Real Estate Brokerage*, 50 p., <http://www.nsrec.ns.ca/media66fa.pdf?mid=456>, April 10, 2013.

<sup>97</sup> NSREC. *Practical Guide for Sellers – Real Estate Brokerage*, p. 17, <http://www.nsrec.ns.ca/media2397.pdf?mid=457>, April 10, 2013.

<sup>98</sup> NSREC. *Property Condition Disclosure Statement*, 2011, <http://www.nsrec.ns.ca/extensiondb22.html?docex=12>, April 10, 2013.



## Ontario

RECO's 2-page leaflet for buyers and sellers does not mention the PDS. It briefly describes the real estate broker's role.<sup>99</sup>

RECO also provides information documents to potential buyers and sellers on its website. The document on home inspections mentions that the buyer should have an inspection done even if the PDS does not reveal any problem, because in the PDS the seller only discloses problems known to him.<sup>100</sup> The document on the PDS explains brokers' duties regarding the PDS, and emphasizes that it is based on the seller's knowledge.<sup>101</sup>

## Prince Edward Island

A legal organization prepares, on behalf of the Prince Edward Island government, legal information documents intended for consumers. In the guide intended for buyers, the PDS is not mentioned, but it is stated that the seller has the obligation to disclose latent defects known to him. Possible remedies are also explained in the event of non-disclosure or misrepresentation.<sup>102</sup>

## Quebec

The OACIQ's 43-page brochure intended for sellers describes the representations that will serve to prepare the property's description sheet, as well as those included in the offer to purchase. The PDS is only briefly mentioned.<sup>103</sup> A new edition is reportedly being produced following the coming into effect of the new *Real Estate Brokerage Act* on May 1, 2010.<sup>104</sup> The 52-page guide intended for the buyer mentions the PDS's usefulness in obtaining information from the seller, and the fact that some home inspectors also have it completed.<sup>105</sup> A new edition is also reportedly being produced.

The OACIQ's website provides information on the PDS, but that information is not written for consumers, and the website is not user-friendly.

<sup>99</sup> RECO. *Buying or Selling your House?*

<http://www.reco.on.ca/UserFiles/How%20RECO%20helps%20brochures/About%20RECO%20-%20English%20FINAL.pdf>, April 10, 2013.

<sup>100</sup> RECO. *Home Inspections*,

<http://www.reco.on.ca/UserFiles/Consumer%20Publications/Home%20Inspections.pdf>, April 10, 2013.

<sup>101</sup> RECO. *Seller Property Information Statement (SPIS)*,

<http://www.reco.on.ca/UserFiles/Consumer%20Publications/Seller%20Property%20Information%20Statements.pdf>, April 10, 2013.

<sup>102</sup> Community Legal Information Association of Prince Edward Island, Inc. *Buying Property in Prince Edward Island*, June 2003, 5 p., <http://www.clapei.ca/sitefiles/File/publications/GEN5.pdf>, April 10, 2013.

<sup>103</sup> OACIQ/ACAIQ. *Guide pratique du vendeur*, 2004, 43 p.,

<http://oaciq.com/sites/default/files/article/fichiers/guidevendeur.pdf>, April 10, 2013.

<sup>104</sup> Réseau juridique du Québec. *Guide pratique du vendeur*,

<http://www.avocat.qc.ca/public/iguide-vendeur.htm>, April 10, 2013.

<sup>105</sup> OACIQ/ACAIQ. *Guide pratique de l'acheteur*, 2005, p. 28-29,

<http://oaciq.com/sites/default/files/article/fichiers/guideacheteur.pdf>, April 10, 2013.

**Newfoundland and Labrador, Saskatchewan, the territories**

No information intended for buyers or sellers about the PDS was found for Saskatchewan, Newfoundland and Labrador or the territories.

## 7. STUDY OF CANADIAN CASE LAW

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### 7.1 Objectives of the Study

A quantitative study of Canadian case law involving the PDS was conducted in order to:

- Identify recent court decisions involving the PDS;
- Determine the pros and cons of its use for buyers and sellers;
- Determine the status granted to the PDS by the courts;
- Verify whether the courts specify how to use it.

The CanLII database was searched for court decisions rendered between January 1, 2006 and June 30, 2012, using the names given to the PDS in each province as keywords. A total of 307 decisions was obtained. Those decisions were classified according to the number of quotations in other decisions – an indication of the importance attributed by the courts. The decisions were then examined one by one according to predetermined criteria, so that 85 decisions by common law courts and 19 by civil law courts were retained.<sup>106,107</sup> For further details on the methodology used, see section 2, *Methodology*.

### 7.2 Results of the Study

Cases resulting from the sale of a property are handled by civil courts, including small claims courts. Table 6 presents the breakdown, by province and court, of the decisions selected for the study of case law.

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<sup>106</sup> The common law has evolved into a system of rules based on “precedents.” It is found in no “code,” or body of laws, but exists solely in past rulings. See: Department of Justice Canada. *Canada’s System of Justice*, August 3, 2012, <http://www.justice.gc.ca/eng/csj-sjc/just/>, April 15, 2013. All Canadian provinces excluding Quebec are common law jurisdictions.

<sup>107</sup> In the present study, the term “civil law” will be used in opposition to “common law” in reference to the legal system founded on the civil code, such as the Civil Code of Québec. See: Department of Justice Canada, *op.cit.*

**Table 6: Breakdown by province of court decisions  
selected for the study of case law**

Province or Territory	Court	Number of Decisions	% of the Total
Canada	Supreme Court (SCC)	0	-
Alberta	Provincial Court (ABPC)	1	1.9
	Court of Queen's Bench (ABQB)	1	
British Columbia	Provincial Court (BCPC)	6	17.3
	Supreme Court (BCSC)	12	
Manitoba	Court of Queen's Bench (MBQB)	4	3.8
New Brunswick	Court of Queen's Bench (NBQB)	10	9.6
Newfoundland and Labrador	None	0	-
Nova Scotia	Supreme Court (NSSC)	4	23.1
	Small Claims Court (NSSM)	20	
Ontario	Court of Appeal (ONCA)	1	12.5
	Superior Court (ONSC)	12	
Prince Edward Island	None	0	-
Quebec	Court of Appeal (QCCA)	1	18.3
	Superior Court (QCCS)	9	
	Court of Quebec (QCCQ)	9	
Saskatchewan	Court of Queen's Bench (SKQB)	6	12.5
	Provincial Court (SKPC)	7	
Northwest Territories	None	0	-
Nunavut	None	0	-
Yukon	Small Claims Court (YKSM)	1	1.0
<b>Total number of decisions</b>		<b>104</b>	<b>100</b>

In all the selected decisions a PDS was handed to the buyer except in four cases where the written decisions report that (1) the PDS was not requested by the buyer (one case) or (2) was not completed by the seller (three cases):

- *Fink v. Thorsteinson*, 2009 SKPC 89, 2009-07-08, ¶ 4. The buyers resided in the property for three months at the time of the purchase, and did not request a copy of the PDS. The written decision contains no comment about this omission.
- *St-Louis c. Morin*, 2006 QCCA 1643, 2006-12-13. The written decision contains no comment about the PDS's absence.
- *Rebillard v. Janzen et ux.*, 2009 MBQB 287, 2009-11-06, ¶ 9. Following the real estate broker's advice, the PDS was not requested, so that no conditions would be attached to the offer to purchase. Indeed, there were several competing offers to purchase the property. The written decision contains no comment about the PDS's absence.
- *Bourdages v. Chanathavone*, 2011 SKPC 69, 2011-04-29, ¶¶18, 23. The seller did not provide a PDS because the house was rented and he had not lived in it. The judge commented that a home inspection would have been all the more necessary given the PDS's absence.

The PDS is the basis for legal action in the majority of cases studied (77 cases out of 104, or 74%). As shown in Table 7, in common law courts the PDS is the basis for the majority of law suits (69 cases out of 85, or 81%), whereas in civil law courts this is true in only half of cases (9 cases out of 19, or 47%). The reason is probably the type of legal action studied. Under the common law a law suit is based on the PDS's

misrepresentations about the property; whereas under civil law the basis is a latent defect, so that the PDS is only one piece of evidence, as expert testimony would be.

**Table 7: Number of cases where the PDS is the basis for the legal action**

	Canada	Civil Law	Common Law
Yes	77	9	69
Partially	12	2	10
No	11	7	4
N/A*	3	1	2
	104	19	85

\*These are the three cases where there is no PDS.

The courts rule on the credibility of witnesses, and to render a judgment judges must give their reasons for it, particularly if they estimate that the seller has answered the PDS's questions honestly. As shown in Table 8, the sellers were found not to have answered honestly in 4 cases out of 19 (21%) in civil law courts, and in 43 cases out of 85 (50%) in common law courts. This result is doubtless not an indication of the populations' moral qualities, but rather a measure of the advantages of making the most complete disclosure possible under civil law, to avoid law suits based on the seller's warranty of quality.

**Table 8: According to the judge, the seller answered the PDS's questions honestly**

	Canada	Civil Law	Common Law
Yes	52	14	38
No	47	4	43
N/A*	4	1	3
Not mentioned	1	-	1
	104	19	85

\* These are the three cases where there is no PDS and the other where the PDS was not requested by the buyers.

### 7.3 Pros and Cons of Using the PDS

Only the pros and cons most often invoked in the court cases studied (see Annex 5) are presented here. They are grouped by theme. Most of the pros and cons apply whatever the legal system (common law or civil law).

#### Legal action

- The PDS was used as proof of the seller's erroneous answers;
- The buyer must prove that the seller knew of the latent defect not disclosed in the PDS;
- The PDS induced a false sense of security;
- The PDS's formulation of questions leaves room for interpretation;
- The PDS keeps a written record of representations made by the seller.

#### Seller

- A seller cannot disclose a defect unknown to him;
- The seller can make involuntary errors in completing the form;
- The seller had not resided in the house;
- The seller's use of half-truths may conceal a patent defect;

- The seller did not disclose a latent defect known to him in the PDS;
- The PDS's formulation of questions misled the seller;
- The broker did not properly advise the seller for completing the PDS.

#### Buyer

- The buyer did not follow up on a problem disclosed by the seller;
- The questions do not cover the buyer's problem;
- Obtaining the PDS does not allow the buyer to withdraw from his duty of investigation;
- The buyer did not read the PDS or did not read it carefully before concluding the sale;
- The buyer did not request a PDS.

#### Common law

- The PDS must be included in the offer to purchase in order to serve as the basis for a misrepresentation claim;
- If the seller answers the questions honestly, the *caveat emptor* rule applies;
- The seller's liability is not engaged by false information on or non-disclosure of patent defects if the buyer does not prove that he was induced to buy the property as a result;
- The buyer's hiring of a home inspector makes it more difficult for the buyer to prove his reliance on the PDS;
- The buyer has not succeeded in demonstrating that he had relied on the PDS to conclude the sale;
- A latent defect known to the seller should be disclosed, even under the common law.

## 7.4 Case Law and Principles Invoked by the Courts

Written decisions often contain a section in which the court invokes applicable case law or legal texts. Table 9 shows that indications on the PDS's legal status have been found more often under common law (47 cases out of 85, or 55%) than under civil law (4 cases out of 19, or 21%) jurisdictions. Indeed, in Quebec the form is often only one of the pieces of evidence in a latent defect case, whereas under the common law judges must begin by determining the value they attribute to the form if the misrepresentation case is based on the latter.

**Table 9: The written decision provides indications of the PDS's legal status**

	Canada	Civil Law	Common Law
Yes	51	4	47
No	53	15	38
	104	19	85

### 7.4.1 Common law courts

There is a consensus on several principles in the courts. One is that the PDS is not a warranty of the property's condition. This assertion is used by courts of British Columbia, Nova Scotia, Prince Edward Island, Ontario and Saskatchewan.<sup>108</sup> In addition:

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.<sup>109</sup>

The courts of British Columbia and Nova Scotia also agree in qualifying the PDS as a representation, i.e., a statement of the facts that is prepared by the seller and that, while not a contractual term, induces the buyer to enter into the contract. A misrepresentation is a representation that is untrue.<sup>110</sup> Thus, when a representation is incorporated in a contract, it may become a representation that a buyer can trust.<sup>111</sup>

According to Justice Killeen of the Ontario Superior Court, adding the PDS to the contract goes beyond the representation and demonstrates that the buyers trust it, not as an external document containing representations, but rather as a specific contractual pledge included in the agreement itself.<sup>112</sup> According to Justice Joyce of the British Columbia Supreme Court, a legal action for a misrepresentation made by negligence may be based on the content of the PDS if the latter is incorporated in the contract, so that any misrepresentation contained in the PDS is then likely to result in a claim for

<sup>108</sup> *Arsenault v. Pedersen* (1996 BCSC 3519, 1996-04-26, ¶ 22) cited in *Swift v. Kung and Kung et al* (2006 BCSC 1123, 2006-07-24, ¶ 64). *Arsenault v. Pedersen* (1996 BCSC 3519, 1996-04-26, ¶ 12) cited in *Zaenker v. Kirk* (1999 BCSC 3096, 1999-12-20, ¶ 19) and quoted in *Kiraly v. Fuchs* (2009 BCSC 654, 2009-05-14, ¶ 47). *Yue v. Stones & Emace* (2009 BCPC 81, 2009-02-23, ¶ 25). *Malenfant v. Janzen* (1994 BCSC 285, 1994-10-19, p. 9), cited in *Lind v. Macleod* (1997 BCSC 4416, 1997-10-20, ¶ 25) and quoted in *Coglon v. Ergas* (2009 BCSC 1170, 2009-08-27, ¶ 123). *Rogalinski v. Scorey* (2011 BCSC 1050, 2011-08-02, ¶ 27). *Morrill v. Bourgeois* (2007 ONSC 16635, 2007-05-01, ¶ 26). *Rybchinski v. McDonnell* (2007 SKQB 286, 2007-08-10, ¶ 23). *Stann v. Lukan* (2007 SKQB 366, 2007-10-15, ¶ 64). *Weiman v. Ediger* (2008 SKPC 109, 2008-07-31, ¶ 28). *Snider v. Karpinski* (2009 SKQB 394, 2009-10-06, ¶ 129). *Chrun v Rimmer* (2011 SKPC 157, 2011-11-10, ¶ 23).

<sup>109</sup> *Gesner v. Ernst* (2007 NSSC 146, 2007-05-18, ¶ 54), citing *Arsenault v. Pedersen* (1996 BCSC 3519, 1996-04-26, ¶ 12) and *Davis v. Kelly* (2001, PEIJ No 123). Cited in *Allen v. Thorne* (2007 NSSM 31, 2007-07-14, p. 9), *Moffatt v. Finlay* (2007 NSSM 64, 2007-10-30, ¶ 32, 34), *Brisbin v. Gilby* (2007 NSSM 66, 2007-11-15, ¶ 47), *Young v. Clahane* (2008 NSSM 16, 2008-03-20, p. 9), *Curran v. Grant* (2010 NSSM 29, 2010-04-04, ¶ 54), *Ranallo v. Ells* (2010 NSSM 59, 2010-10-14, ¶ 20), *Paterson v. Murray* (2011 NSSM 34, 2011-05-04, ¶ 13), *MacDonald v. Barbour* (2012 NSSC 102, 2012-03-15, ¶ 26).

<sup>110</sup> Cheshire, Fifoot & Furmston's Law of Contract, 14<sup>th</sup> edition, Butterworths LexisNexis, 2001, page 293, cited in *Rayne v. Martin and Buck* (2006 BCPC 422, 2006-07-31, ¶ 42-43), *Reeves v. Sherwood* (2007 NSSM 62, 2007-10-19, p. 29), *Marier v. Lalonde* (2007 NSSM 95, 2007-11-30, ¶ 20), *Young v. Clahane* (2008 NSSM 16, 2008-03-20, p. 12).

<sup>111</sup> *Ward v. Smith* (2001 BCSC 1366, 2001-10-24, ¶ 31) cited in *Kiraly v. Fuchs* (2009 BCSC 654, 2009-05-14, ¶ 46).

<sup>112</sup> *Kaufmann v. Gibson* (2007 ONSC 26609, 2007-07-10, ¶ 116), cited in *Riley v. Langfield* (2008 ONSC 23957, 2008-05-13, ¶ 102), *Soboczynski v. Beauchamp* (2011 ONSC 6791, 2011-11-17, ¶ 58).

damages for a negligent misrepresentation.<sup>113</sup> It should be noted that silence or half-truths may be equivalent to a fraudulent representation to the same extent as active concealment of a defect that would otherwise be patent.<sup>114,115,116,117</sup>

Given that the PDS is not a warranty, most legal actions for a faulty PDS are for a negligent misrepresentation, but it appears that a breach of collateral warranty may also be invoked in certain cases.<sup>118,119</sup>

The test for concluding that legal action based on a misrepresentation is valid was stated by Justices Sopinka and Iacobucci of the Supreme Court of Canada. That test is widely used by the courts of British Columbia, New Brunswick, Nova Scotia, Ontario and Saskatchewan:

The tort of negligent misrepresentation is an established principle of Canadian tort law. There are five general requirements for a successful claim:

1. There must be a duty of care based on a "special relationship" between the representor and the representee;
2. The representation in question must be untrue, inaccurate, or misleading;
3. The representor must have acted negligently in making the misrepresentation;
4. The representee must have relied, in a reasonable manner, on the negligent misrepresentation; and
5. The reliance must have been detrimental to the representee in the sense that damages resulted.<sup>120</sup>

Justice Scott of the Manitoba Court of Appeal stated the principle that if the seller answers the PDS's questions honestly and does intend to mislead, his liability is not

<sup>113</sup> 413255 B.C. Ltd. v. Jesson et al. (2006 BCSC 1070, 2006-07-10, ¶ 29-32) cited in Hanslo v. Barry (2011 BCSC 1624, 2011-11-29, ¶ 109-110).

<sup>114</sup> Alevizos v. Nirula (2003 MBCA 148, 2003-12-05, ¶ 24, 26) cited in Cutts et ux v. Okipnik (2006 MBQB 293, 2006-12-19, ¶ 13). Riley v. Langfield (2008 ONSC 23957, 2008-05-13, ¶ 88, 94). Snider v. Karpinski (2009 SKQB 394, 2009-10-06, ¶ 139).

<sup>115</sup> Desmond v. McKinlay (2001 NSCA 24, 2001-01-31, ¶ 2) cited in Reeves v. Sherwood (2007 NSSM 62, 2007-10-19, p. 32), Marierv. Lalonde (2007 NSSM 95, 2007-11-30, ¶ 20), Young v. Clahane (2008 NSSM 16, 2008-03-20, p. 14), Curran v. Grant (2010 NSSM 29, 2010-04-04, ¶ 8), Hipperson v. Williamson (2012 SKQB 119, 2012-03-20, ¶ 19).

<sup>116</sup> Rybachinski v. McDonnell (2007 SKQB 286, 2007-08-10, ¶ 26).

<sup>117</sup> Lyle et al v. Burdess et al (2008 YKSM 5, 2008-12-18, ¶ 56).

<sup>118</sup> Paterson v. Murray (2011 NSSM 34, 2011-05-04, ¶ 16).

<sup>119</sup> Brisbin v. Gilby (2007 NSSM 66, 2007-11-15, ¶ 65), Young v. Clahane (2008 NSSM 16, 2008-03-20, p. 14), Nicholson v. Pham (2007 SKPC 72, 2007-06-22, ¶ 37).

<sup>120</sup> Queen v. Cognos Inc. (1993, 1 SCR 87, 1993-01-21, p. 88-89) cited in Yue v. Stones & Emnace (2009 BCPC 81, 2009-02-23, ¶ 21), Hanslo v. Barry (2011 BCSC 1624, 2011-11-29, ¶ 108), Martell v. Reed and Success, (2012 BCPC 201, 2012-06-20, ¶ 29), Savoy v. McKinney, (2012 NBQB 181, 2012-05-28, ¶ 54), Lang v Knickle (2006 NSSC 177, 2006-07-21, ¶ 18), Reeves v. Sherwood (2007 NSSM 62, 2007-10-19, p. 31), Brisbin v. Gilby (2007 NSSM 66, 2007-11-15, ¶ 63), Marierv. Lalonde (2007 NSSM 95, 2007-11-30, ¶ 20), Young v. Clahane (2008 NSSM 16, 2008-03-20, p. 13), Curran v. Grant (2010 NSSM 29, 2010-04-04, ¶ 8), MacDonald v. Barbour (2012 NSSC 102, 2012-03-15, ¶ 11), Riley v. Langfield (2008 ONSC 23957, 2008-05-13, ¶ 95), Krawchuk v. Scherbak (2011 ONCA 352, 2011-05-06, ¶ 68), Nicholson v. Pham (2007 SKPC 72, 2007-06-22, ¶ 40), Stann v. Lukan (2007 SKQB 366, 2007-10-15, ¶ 71), Snider v. Karpinski (2009 SKQB 394, 2009-10-06, ¶ 138), Chrun v Rimmer (2011 SKPC 157, 2011-11-10, ¶ 29), Hipperson v. Williamson (2012 SKQB 119, 2012-03-20, ¶ 19).



engaged even if the representation proves to be untrue.<sup>121</sup> A strict interpretation of this principle is challenged by Justice Epstein of the Court of Appeal for Ontario :

For a number of reasons, I do not accept this submission. First, I note that the statement adopted by Killeen J. in *Kaufmann* is *obiter* since *Alevizos* is a case involving fraudulent misrepresentation. Second, I do not interpret the statement as meaning that honest intentions, by themselves, are sufficient to avoid liability for inaccurate representations. Third, if that is what the court meant in *Alevizos*, I respectfully disagree. The standard of care extends beyond honest intentions. The obligation is to provide, to the extent possible, accurate and complete information.<sup>122</sup>

Opinions are thus divided on the scope of the seller's duty of care in completing the PDS. Some courts point out that the form itself indicates the buyer's responsibility to verify the seller's representations.<sup>123</sup> Other courts state that the buyer of real estate property should not have to go beyond what is written and to assess the validity of answers to PDS questions.<sup>124,125</sup> However, Justice DJ Kovatch of the Provincial Court of Saskatchewan does not agree with the idea of requiring the seller to elaborate on certain questions or general problems, and recalls that under the common law, the seller has no obligation of disclosure and that the PDS does not change that rule: "The vendor is required to answer the specific questions put to him on the Property Condition disclosure Statement; nothing more and nothing less."<sup>126</sup>

Obtaining the PDS does not exonerate the buyer from his duty of care to discover patent defects, i.e., defects that might not be easily observable by an average buyer, but that would be by a qualified inspector.<sup>127</sup>

With the *caveat emptor* rule, only serious latent defects or fraud may lead to compensation:

- where the vendor fraudulently misrepresents or conceals;
- where the vendor knows of a latent defect rendering the house unfit for human habitation;
- where the vendor is reckless as to the truth or falsity of statements relating to the fitness of the house for habitation;

<sup>121</sup> *Taschereau v. Fuller* (2002 MBQB 183, 2002-07-10, ¶ 4), cited in *Alevizos v. Nirula* (2003 MBCA 148, 2003-12-05, ¶ 36); the latter case quoted in *Cartwright v. Fournier* (2006 ABPC 43, 2006-02-02, ¶ 8), *Gesner v. Ernst* (2007 NSSC 146, 2007-05-18, ¶ 152), *Kaufmann v. Gibson* (2007 ONSC 26609, 2007-07-10, ¶ 113), *Riley v. Langfield* (2008 ONSC 23957, 2008-05-13, ¶ 98).

<sup>122</sup> *Krawchuk v. Scherbak* (2011 ONCA 352, 2011-05-06, ¶ 79).

<sup>123</sup> *Allen v. Thorne* (2007 NSSM 31, 2007-07-14, p. 14), *Young v. Clahane* (2008 NSSM 16, 2008-03-20, p. 27).

<sup>124</sup> *Hansen v. Seely* (2003 NBQB 49, 2003-01-24, ¶ 74), cited in *Boreland v. Gilmore*, (2006 NBQB 34, 2006-01-30, ¶ 18). *Krawchuk v. Scherbak* (2011 ONCA 352, 2011-05-06, ¶ 90).

<sup>125</sup> *Lyle et al v. Burdess et al* (2008 YKSM 5, 2008-12-18, ¶ 76), cited in *Krawchuk v. Scherbak* (2011 ONCA 352, 2011-05-06, ¶ 89).

<sup>126</sup> *Friebe v. Ambrose* (2010 SKPC 24, 2010-02-24, ¶ 9).

<sup>127</sup> *Cardwell v. Perthen* (2007 BCCA 313, 2007-06-06, ¶ 25), cited in *Yue v. Stones & Emnace* (2009 BCPC 81, 2009-02-23, ¶ 23). *Bernstein v. James Dobney & Associates* (2003 BCSC 986, 2003-05-23, ¶ 17) cited in *Rogalinski v. Scorey* (2011 BCSC 1050, 2011-08-02, ¶ 25). *Friebe v. Ambrose* (2010 SKPC 24, 2010-02-24, ¶ 7-8).

- where the vendor has breached his duty to disclose a latent defect which renders the premises dangerous.<sup>128</sup>

The PDS's effect on the *caveat emptor* rule is important. If the seller makes misrepresentations that are fraudulent or negligent, *caveat emptor* does not apply.<sup>129</sup> In an Ontario case:<sup>130</sup>

Once a vendor "breaks his silence" by signing the SPIS, the doctrine of caveat emptor falls away as a defence mechanism and the vendor must speak truthfully and completely about the matters raised in the unambiguous questions at issue here.<sup>131</sup>

Legal action for misrepresentation also has the effect of broadening the possibility of remedy against latent defects well beyond the *caveat emptor* rule, by including any latent defect inaccurately reported in the PDS. Thus, according to Justice BM Joyce of the Supreme Court of British Columbia, PDS representations are:

./.../ representations as to the true state of knowledge of the vendor and may support a claim in breach of contract if the statement was untrue and did not accord with the vendor's true belief at the time. It is my view that insofar as a claim is based on breach of contract, it is not necessary that the representations relate to latent defects that are dangerous or that render the premises uninhabitable. It is sufficient if there is a breach of contract which caused damage.<sup>132</sup>

<sup>128</sup> *McCluskie v. Reynolds* (1998 BCSC 5384, 1998-07-10, ¶ 53) cited in *Yue v. Stones & Emace* (2009 BCPC 81, 2009-02-23, ¶ 19), *Rogalinski v. Scorey* (2011 BCSC 1050, 2011-08-02, ¶ 26), *Martell v. Reed and Surcess*, (2012 BCPC 201, 2012-06-20, ¶ 26-27). *Cardwell v. Perthen* (2007 BCCA 313, 2007-06-06, ¶ 117), cited in *Manghat v. Tchilinguirian* (2009 BCSC 1809, 2009-09-17, ¶ 22).

<sup>129</sup> *Reeves v. Sherwood* (2007 NSSM 62, 2007-10-19, p. 29), citing *McGrath v. MacLean et al* (1979, 22 OR (2d) 784), *William v. Durling* (2006, NSJ No 368, ¶ 18-19), *Allen v. Thorne* (2007 NSSM 31, 2007-07-14) and *Lewis v. Hutchinson* (2007 NSSM 4, 2007-01-16). *Young v. Clahane* (2008 NSSM 16, 2008-03-20, p. 10).

<sup>130</sup> In Ontario, the PDS is a Seller Property Information Statement or SPIS.

<sup>131</sup> *Kaufmann v. Gibson* (2007 ONSC 26609, 2007-07-10, ¶ 119), cited in *Krawchuk v. Scherbak* (2011 ONCA 352, 2011-05-06, ¶ 77), *Snider v. Karpinski* (2009 SKQB 394, 2009-10-06, ¶ 129), *Lyle et al v. Burdess et al* (2008 YKSM 5, 2008-12-18, ¶ 66).

<sup>132</sup> *Hanslo v. Barry* (2011 BCSC 1624, 2011-11-29, ¶ 96) following a review of case law citing the following cases: *Ward v. Smith* (2001 BCSC 1366, 2001-10-24, ¶ 3), *Arsenault v. Pedersen* (1996 BCSC 3519, 1996-04-26, ¶ 12, 23, 25, 31), *Malenfant v. Janzen* (1994 BCSC 285, 1994-10-19, p. 9) and *Zaenker v. Kirk* (1999 BC SC 3096, 1999-12-20, ¶ 19). Quoted in *Martell v. Reed and Surcess* (2012 BCPC 201, 2012-06-20, ¶ 31-33).

## 7.4.2 Civil law courts

Written decisions by Quebec courts contain less case law references than those under the common law regarding the PDS. Concepts not directly related to the PDS were also found, particularly regarding the legal warranty, the demonstration of a latent defect, the buyer's obligations, the way of handling indications of a potential defect, and the application of the warranty of quality in the case of old houses.

With regard to buyer-seller relations, Justices McCarthy, LeBel and Mailhot of the Appeal Court of Québec state that:

Relations between a seller and a buyer of a real estate property should not resemble a game of hide-and-seek. Sellers remain bound by obligations of honesty and fairness toward a potential buyer. If a serious problem is known to them, they must, at least, not mislead the other party by deliberately sending him on a false path or giving him a false sense of security.<sup>133</sup>

Accordingly, there is deceit if a seller dishonestly answers the PDS's questions, since he thus vitiates the buyer's consent.<sup>134,135</sup> The deceit's consequence is addressed in CCQ section 1401. Jeffrey Edwards states:

To win a case based on an error caused by deceit, the buyer must establish that the seller made a misrepresentation or omitted a fact that would have influenced the buyer's decision either to contract or to contract under different terms. The main inconvenience for the buyer in a legal action based on this theory is that, as opposed to the warranty, he must establish that the seller was aware of the fact and omitted to disclose it. Nevertheless, such an action may be useful to the buyer in certain circumstances. In particular, as opposed to the warranty of quality, the duty of disclosure is not limited to the latent defect but to any problem or fact that would have influenced the buyer's decision to contract or to contract under different terms.<sup>136</sup>

Moreover, a seller who acts in good faith and with due care is not liable toward the buyer by making a representation that "to the best of his knowledge, the insulation materials of the building sold do not contain asbestos," even if this statement proves inaccurate afterward.<sup>137</sup>

However, if misrepresentations in the PDS about latent defects known to the seller induce the buyer to conclude the transaction, the fact that an old residence is involved and that the buyer has not done a home inspection does not free the seller from his liability for his deceit and misrepresentations.<sup>138</sup> Thus, a voluntarily false PDS may contribute to conceal a patent defect:

<sup>133</sup> *Proulx-Robertson c. Collins* (1992 QCCA 3932, 1992-02-05, p. 4, our translation) cited in *Lawton c. Goulet* (2008 QCCQ 7300, 2008-04-16, ¶ 65), *Turgeon c. Boutin* (2011 QCCS 2574, 2011-05-10, ¶ 55).

<sup>134</sup> *St-Germain-Dacosta c. Tétreault* (2011 QCCQ 8261, 2011-07-11, ¶ 37).

<sup>135</sup> *Turgeon c. Boutin* (2011 QCCS 2574, 2011-05-10, ¶ 17).

<sup>136</sup> Edwards, Jeffrey. *Les limites de la bonne foi en matière de vente*, (2000) 79 R. du B. can., p. 420-434, our translation. Cited in *Lawton c. Goulet* (2008 QCCQ 7300, 2008-04-16, ¶ 63).

<sup>137</sup> *Thi c. Bernard* (2011 QCCS 278, 2011-01-20, ¶ 4-5, our translation).

<sup>138</sup> *Turgeon c. Boutin* (2011 QCCS 2574, 2011-05-10, ¶ 56-63, our translation).

In our opinion, the seller's omissions, representations and half-truths free the buyer from the obligation of pursuing his investigation before signing the act of sale and contribute to making the defect a latent one.<sup>139</sup>

The legal scope of a PDS that is not part of the agreement between a buyer and seller is limited because it "is only a document stating the defendant's representations and not an agreement between the contracting parties."<sup>140</sup>

The legal warranty and the parties' obligations in a sale are described in CCQ section 1726 and cited in most latent defect cases:

The seller is bound to warrant the buyer that the property and its accessories are, at the time of the sale, free of latent defects which render it unfit for the use for which it was intended or which so diminish its usefulness that the buyer would not have bought it or paid so high a price if he had been aware of them.

The seller is not bound, however, to warrant against any latent defect known to the buyer or any apparent defect; an apparent defect is a defect that can be perceived by a prudent and diligent buyer without any need of expert assistance.<sup>141</sup>

Demonstrating a defect allowing the buyer to benefit from the legal warranty requires four steps, as stated by the Supreme Court of Canada and restated by many other courts:

Regardless of whether the defect is a material defect, a functional defect or a conventional defect, it must have four characteristics, all of which are essential to the warranty: it must be latent, must be sufficiently serious, must have existed at the time of the sale and must have been unknown to the buyer.<sup>142</sup>

The standard for establishing that the defect is latent is stated in CCQ section 1726, which introduces the concept of a prudent and careful buyer. His examination must be reasonable, attentive and serious<sup>143</sup> and differs from that conducted by a nit-picking

<sup>139</sup> *Trahan c. Girard* (2009 QCCS 1566, 2009-03-31, ¶ 134, our translation).

<sup>140</sup> *Thi c. Bernard* (2011 QCCS 278, 2011-01-20, ¶ 30, 35, our translation).

<sup>141</sup> *CanLII. Civil Code of Québec, RSQ c C-1991*, <http://www.canlii.org/en/qc/laws/stat/lrq-c-c-1991/latest/lrq-c-c-1991.html>, April 15, 2013.

<sup>142</sup> *ABB Inc. c. Dorstar Inc.* (2007 CSC 50, [2007] 3 RCS 461, 2007-11-22, p. 463-464) cited in *Payette c. Dumont* (2010 QCCS 1631, 2010-03-26, ¶ 57). See also: *Le Blanc c. Pigeon* (2010 QCCS 4401, 2010-09-08, ¶ 51), citing *ABB Inc. v. Dorstar Inc.* (2007 SCC 50, [2007] 3 SCR 461, 2007-11-22, ¶ 51-54) and *Marcoux c. Picard* (2008 QCCA 259, 2008-02-05, ¶ 20-21, 27). *Tremblay c. Valin* (2011 QCCS 348, 2011-01-24, ¶ 23). *Vallée c. Guimond* (2011 QCCQ 3647, 2011-04-27, ¶ 54). *Langlois c. Dumont* (2011 QCCS 452, 2011-01-24, ¶ 39). *Bettez c. De Broux* (2008 QCCQ 3602, Small Claims Division, 2008-04-30, ¶ 6). *Demers c. 9079-6905 Québec inc. (Pyritexpertise)* (2006 QCCQ 8314, 2006-08-28, ¶ 32), cited in *Laurendeau c. Arechavaleta* (2009 QCCS 5672, 2009-12-08, ¶ 29). *Ertan c. Forte* (2004 QCCQ 27712, Small Claims Division, 2004-05-26, ¶ 8) cited in *Laporte c. Guillette* (2009 QCCQ 15317, 2009-12-23, ¶ 23). *Béique c. Rodier* (2009 QCCS 1648, 2009-04-20, ¶ 29). *Caron c. Gauthier* (2011 QCCQ 7155, 2011-06-23, ¶ 158-159) citing *Gilbert c. Lambert* (2010 QCCQ 528, 2010-01-11, ¶ 38).

<sup>143</sup> *St-Louis c. Morin* (2006 QCCA 1643, 2006-12-13) cited in *Caron c. Gauthier* (2011 QCCQ 7155, 2011-06-23, ¶ 163). *Lavoie c. Comtois* (Superior Court of Québec, 2000, R.D.I. 36), cited in *Payette c. Dumont* (2010 QCCS 1631, 2010-03-26, ¶ 60), *Tremblay c. Valin* (2011 QCCS 348, 2011-01-24, ¶ 31), *Langlois c. Dumont* (2011 QCCS 452, 2011-01-24, ¶ 36).

expert.<sup>144</sup> However, this system does not protect a negligent or careless buyer.<sup>145</sup> Indeed, in case of doubt or indications that there may be a problem, the buyer has the duty to pursue his investigation, for example by calling upon an expert or questioning the seller.<sup>146</sup> In the case of older houses, the courts recommend making a more attentive examination, because it will be more difficult to avail oneself of the legal warranty, given that obsolescence or a change in building methods are not defects under the law.<sup>147</sup>

<sup>144</sup> Savoie c. Lirette (2003 QCCS 6636, 2003-12-15, ¶ 48), cited in St-Louis c. Morin (2006 QCCA 1643, 2006-12-13, ¶ 32). Marcoux c. Picard (2008 QCCA 259, 2008-02-05, ¶ 20) cited in Le Blanc c. Pigeon (2010 QCCS 4401, 2010-09-08, ¶ 58). Watier c. Chouinard, (QCCQ 460-22-000977-009, 2002-08-29, ¶ 31-32) cited in Truffa c. Barbeau (2007 QCCQ 4192, 2007-03-01, ¶ 25).

<sup>145</sup> Placement Jacpar inc. c. Benzakour (1989 QCCA 976, 1989-09-20, p.9) cited in Payette c. Dumont (2010 QCCS 1631, 2010-03-26, ¶ 57) and Tremblay c. Valin (2011 QCCS 348, 2011-01-24, ¶ 32)

<sup>146</sup> St-Louis c. Morin (2006 QCCA 1643, 2006-12-13, ¶ 39) cited in Caron c. Gauthier (2011 QCCQ 7155, 2011-06-23, ¶ 164-165, 169). Watier c. Chouinard (QCCQ 460-22-000977-009, 2002-08-29) cited in Truffa c. Barbeau (2007 QCCQ 4192, 2007-03-01, ¶ 25). Vachon c. Routhier (2005 QCCA 631, 2005-06-13, ¶ 15), cited in Truffa c. Barbeau (2007 QCCQ 4192, 2007-03-01, ¶ 26). Caron c. Gauthier (2011 QCCQ 7155, 2011-06-23, ¶ 164-165), citing Rouillard c. St-Martin (2009 QCCA 2321, 2009-12-01), O'Farrel c. Gauvin (J.E. 2005-567 (C.A.)); Blanchard c. Guertin (2004 QCCA 29542, 2004-04-23), Lavoie c. Comtois (QCCS [2000] R.D.I. 36); Naud c. Normand (2007 QCCA 1814, 2007-12-20). Carrier c. Malette (2004 QCCS 9721, 2004-02-23, ¶ 50) cited in Tremblay c. Valin (2011 QCCS 348, 2011-01-24, ¶ 33).

<sup>147</sup> Gélinas c. Beaumier (1989 QCCA 1171, 1989-11-14, p. 3) cited in Bettez c. De Broux (2008 QCCQ 3602, 2008-04-30, ¶ 9-10). Vallée c. Guimond (2011 QCCQ 3647, 2011-04-27, ¶ 58). Laporte c. Guillette (2009 QCCQ 15317, 2009-12-23, ¶ 15-17, 19). Edwards, Jeffrey. *La garantie de qualité du vendeur en droit québécois*, 2008, 2<sup>nd</sup> ed., Wilson & Lafleur, Montreal, p. 154, cited in Denault c. Laflamme (2003 QCCQ 49071, 2003-11-11, ¶ 4-6) and restated in Erten c. Forte (2004 QCCQ 27712, Small Claims Division, 2004-05-26, ¶ 17), and in Laporte c. Guillette (2009 QCCQ 15317, 2009-12-23, ¶ 23). Fecteau c. Pelosse (2004 QCCQ 25664, 2004-03-19, ¶ 25-27) cited in Erten c. Forte (2004 QCCQ 27712, Small Claims Division, 2004-05-26, ¶ 18), and restated in Laporte c. Guillette (2009 QCCQ 15317, 2009-12-23, ¶ 23). Other cases related to older building are cited in Laporte c. Guillette (2009 QCCQ 15317, 2009-12-23, ¶ 23) : Ross c. Savoie (2003 QCCQ 13436, 2003-03-21, ¶ 20-22), Laperrière c. Korczynski (AZ-97036517, B.E. 97-948), Gélinas c. Beaumier (1989 QCCA 1171, 1989-11-14), Chrétien c. Nadeau (AZ-01036171, B.E. 2001-361), Larochelle c. Gagné (2007 QCCQ 10730, 2007-05-30, ¶ 35-42). On the obsolescence of foundation drains: Lachapelle c. Swaine (2009 QCCQ 4317, 2009-04-24), Bilodeau c. Dufort (2009 QCCQ 2145, 2009-03-11), Raby c. Levac (2009 QCCQ 531, 2009-01-30), Wolkowicz c. Zouev (2008 QCCQ 4992, 2008-06-03), Lachance c. Carré (2007 QCCQ 413, 2007-01-29), Gervais, Robin, Michaud c. Bonin (2007 QCCQ 10152, 2007-08-07), Gravel c. Dubé (2006 QCCQ 7689, 2006-06-22), Patenaude c. Villeneuve (2006 QCCQ 3383, 2006-04-24), Leclerc c. Séguin (2005 QCCQ 37051, 2005-09-21).

## 7.5 Judges' Comments on PDS Use

Judges sometimes comment on correct use of the PDS. Quebec judges have issued such comments in 2 out of 19 (10%) cases, whereas their colleagues of other Canadian courts have done so in 41 out of 85 (48%) cases.

**Table 10: The written decision provides indications about use of the PDS**

	Canada	Civil Law	Common law
Yes	43	2	41
No	61	17	44
	104	19	85

Judges' comments on the use of the PDS were grouped by theme (see Annex 8). Among those most frequently noted, we find:

- Verb tense usage in the form's questions allows for interpretation;<sup>148</sup>
- The questions' vague formulation makes it more difficult to prove that a misrepresentation was made;<sup>149</sup>
- No question covers the problems experienced by the buyers;<sup>150</sup>
- The sellers should provide appropriate comments;<sup>151</sup>
- The guidelines for providing an up-to-date PDS are not always followed, and it is not always clear when the latter has been provided to the buyer and if it is appended or not to the contract;<sup>152</sup>
- The buyers or their brokers may be negligent by not requesting a copy of the PDS;<sup>153</sup>
- The buyers or their brokers may be negligent by not investigating potential problems disclosed in the PDS;<sup>154</sup>
- Use of the PDS is a cause of litigation;<sup>155</sup>

<sup>148</sup> *Swift v. Kung and Kung et al* (2006 BCSC 1123, 2006-07-24, ¶ 73), *Libby and Peng v. Godbout and St. Amand* (2010 BCPC 153, 2010-07-15, ¶ 59-62), *Allen v. Thorne* (2007 NSSM 31, 2007-07-14, p. 11-12), *Kaufmann v. Gibson*, 2007 ONSC 26609, 2007-07-10, ¶ 79, 101-108), *Usenik v. Sidorowicz*, 2008 ONSC 11373, 2008-02-25, ¶ 47), *Snider v. Karpinski* (2009 SKQB 394, 2009-10-06, ¶ 133-136), *Skinner v. Crowe* (2010 NSSM 66, 2010-11-16, ¶ 9), *Gesner v. Ernst* (2007 NSSC 146, 2007-05-18, ¶ 58) cited in *Moffatt v. Finlay* (2007 NSSM 64, 2007-10-30, ¶ 32).

<sup>149</sup> *Smith & Viitanen v. Chen & New World Realty Ltd.* (2008 BCPC 372, 2008-02-21, ¶ 16).

<sup>150</sup> *White v. Vincent* (2008 NBQB 271, 2008-08-21, ¶ 27), *Mari v. Lalonde*, 2007 NSSM 95, 2007-11-30, ¶ 32), *Yue v. Stones & Emnace* (2009 BCPC 81, 2009-02-23, ¶ 42), *Bond v. Richardson* (2007 NBQB 264, 2007-08-07, ¶ 40, 48-49), *Lunney v. Kuntova* (2009 ONSC 7173, 2009-02-24, ¶ 25), *Meslin v. Lee* (2011 BCSC 1208, 2011-09-07, ¶ 76),

<sup>151</sup> *Belzil v Walsh* (2011 NBQB 146, 2011-05-12, ¶ 37).

<sup>152</sup> *Lewis v. Hutchinson* (2007 NSSM 4, 2007-01-16, p. 17), *McDermott v. Allen* (2010 NSSM 65, 2010-06-08, ¶ 11-12).

<sup>153</sup> *Cardwell et al v. Perthen et al* (2006 BCSC 333, 2006-02-28, ¶ 143), *Ricchio v. Rota* (2011 ONSC 6192, 2011-10-20, ¶ 27).

<sup>154</sup> *Riley v. Langfield* (2008 ONSC 23957, 2008-05-13, ¶ 119), *Neilson v. Lam* (2010 BCSC 1702, 2010-12-01, ¶ 108), *Nicholson v. Pham* (2007 SKPC 72, 2007-06-22, ¶ 43), *Friebe v. Ambrose* (2010 SKPC 24, 2010-02-24, ¶ 5), *Franks v Wade* (2011 SKPC 45, 2011-07-28, ¶ 67, 69), *Chrun v Rimmer* (2011 SKPC 157, 2011-11-10, ¶ 33-34).

<sup>155</sup> *Agius v. Anderson et al* (2008 MBQB 189, 2008-06-27, ¶ 99-100), *Krawchuk v. Scherbak* (2011 ONCA 352, 2011-05-06, ¶ 166-167), *Lyle et al v. Burdess et al* (2008 YKSM 5, 2008-12-18, ¶ 81-82).

- Use of the PDS as a legal document is limited;<sup>156</sup>
- The PDS should serve to disclose latent defects known to the seller;<sup>157</sup>
- Use of a PDS is inappropriate for a property that has not been inhabited by the seller, as would be the case in an estate sale;<sup>158</sup>
- Use of a general PDS for a condominium requires using the usual definitions;<sup>159</sup>
- Better guidance on the use of the PDS should be made provided, and real estate brokers, sellers and buyers should be better informed of the document's legal implications.<sup>160</sup>

## 7.6 The Role of Real Estate Brokers According to the Courts

Although an examination of the real estate brokers' role was not included in the objectives of the case law study, the latter identified 22 decisions in which the broker reveals how he advised his client and how he uses the PDS in his work. But it should be kept in mind that the work of brokers is not usually examined in court unless their actions are questioned. A table identifying those decisions and grouping the quotations of relevant written decisions is presented in Annex 9.

In several cases, the buyer completed the PDS with the help of his real estate broker<sup>161</sup> or in the latter's presence.<sup>162</sup> In other cases, the broker proceeded differently by asking questions of the seller and completing the questionnaire himself.<sup>163</sup> Some brokers review the document completed by their clients with them before remitting it to eventual buyers.<sup>164</sup>

The courts do not expect real estate brokers to verify the accuracy of all of the seller's representations,<sup>165</sup> but they expect him to fulfill his duty of care by verifying the answers' accuracy within reasonable limits<sup>166</sup> or by disclosing defects of which he is aware.<sup>167</sup> In

<sup>156</sup> *Riley v. Langfield* (2008 ONSC 23957, 2008-05-13, ¶ 119), *Moffatt v. Finlay* (2007 NSSM 64, 2007-10-30, ¶ 31-32), *Ranallo v. Ells* (2010 NSSM 59, 2010-10-14, ¶ 20), *Crann v. Hiscock* (2012 NSSM 9, 2012-01-03, ¶ 13-14).

<sup>157</sup> *Paterson v. Murray* (2011 NSSM 34, 2011-05-04, ¶ 15), *Ricchio v. Rota* (2011 ONSC 6192, 2011-10-20, ¶ 26), *Rybachinski v. McDonnell* (2007 SKQB 286, 2007-08-10, ¶ 23, 36), *Lyle et al v. Burdess et al* (2008 YKSM 5, 2008-12-18, ¶ 11).

<sup>158</sup> *Belzil v Walsh* (2011 NBQB 146, 2011-05-12, ¶ 5-6).

<sup>159</sup> *Lawlor v. Currie* (2007 NSSM 60, 2007-09-26, ¶ 41-42, 45).

<sup>160</sup> *Lyle et al v. Burdess et al* (2008 YKSM 5, 2008-12-18, ¶ 81, 91, 105, 107).

<sup>161</sup> *Swift v. Kung and Kung et al* (2006 BCSC 1123, 2006-07-24, ¶ 48), *Krawchuk v. Scherbak* (2011 ONCA 352, 2011-05-06, ¶ 12), *Usenik v. Sidorowicz* (2008 ONSC 11373, 2008-02-25, ¶ 14), *Lunney v. Kuntova* (2009 ONSC 7173, 2009-02-24, ¶ 13).

<sup>162</sup> *Bond v. Richardson* (2007 NBQB 264, 2007-08-07, ¶ 35).

<sup>163</sup> *Hanslo v. Barry* (2011 BCSC 1624, 2011-11-29, ¶ 34), *Boreland v. Gilmore* (2006 NBQB 34, 2006-01-30, ¶ 9),

<sup>164</sup> *Neilson v. Lam* (2010 BCSC 1702, 2010-12-01, ¶ 51), *McIntosh v. Papoutsis* (2009 BCSC 174, 2009-02-13, ¶ 9),

<sup>165</sup> *Brown v. Douglas* (2010 BCSC 1059, 2010-07-27, ¶ 60), *Turgeon c. Boutin* (2011 QCCS 2574, 2011-05-10, ¶ 67-69),

<sup>166</sup> *Krawchuk v. Scherbak* (2011 ONCA 352, 2011-05-06, ¶ 164-165), *Riley v. Langfield* (2008 ONSC 23957, 2008-05-13, ¶ 133-135), *McIntosh v. Papoutsis* (2009 BCSC 174, 2009-02-13, ¶ 38-39, 59).

<sup>167</sup> *Skinner v. Crowe* (2010 NSSM 66, 2010-11-16, ¶ 23-24), *Snider v. Karpinski* (2009 SKQB 394, 2009-10-06, ¶ 147-148).

addition, brokers who ask sellers to complete the PDS should provide them with information on the way to complete it<sup>168</sup> and on the document's legal implications.<sup>169</sup>

In many cases, the brokers' advice is the source of litigation, by recommending that sellers not indicate a past problem, even a serious one, if repairs have been made and appear satisfactory.<sup>170</sup> However, sellers may at times minimize problems while disclosing them.

Finally, if the broker represents the buyer, the courts consider that the broker's duty of care includes emphasizing to his client the potential problems mentioned in the PDS and investigating them.<sup>171</sup>

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<sup>168</sup> *Swift v. Kung and Kung et al* (2006 BCSC 1123, 2006-07-24, ¶ 48), *Neilson v. Lam* (2010 BCSC 1702, 2010-12-01, ¶ 52-54), *Boreland v. Gilmore*, (2006 NBQB 34, 2006-01-30, ¶ 9).

<sup>169</sup> *Lyle et al v. Burdess et al* (2008 YKSM 5, 2008-12-18, ¶ 98-100).

<sup>170</sup> *Hanslo v. Barry* (2011 BCSC 1624, 2011-11-29, ¶ 34-36), *Lang v Knickle* (2006 NSSC 177, 2006-07-21, ¶ 27), *Moffatt v. Finlay* (2007 NSSM 64, 2007-10-30, ¶ 15), *Skinner v. Crowe* (2010 NSSM 66, 2010-11-16, ¶ 24), *Kaufmann v. Gibson* (2007 ONSC 26609, 2007-07-10, ¶ 21), *Usenik v. Sidorowicz* (2008 ONSC 11373, 2008-02-25, ¶ 47), *Lyle et al v. Burdess et al* (2008 YKSM 5, 2008-12-18, ¶ 43, 46).

<sup>171</sup> *Agius v. Anderson et al* (2008 MBQB 189, 2008-06-27, ¶ 104-106, 110-112), *Cotton v. Monahan et al* (2010 ONSC 1644, 2010-04-30, ¶ 15), *Snider v. Karpinski* (2009 SKQB 394, 2009-10-06, ¶ 142).



## 8. COMPARISON OF PROPERTY DISCLOSURE STATEMENT FORMS

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Nothing prevents an association, home inspector, notary or lawyer from drafting his own Property Disclosure Statement (PDS) form, because the latter is not legally mandatory. However, the present study is limited to PDS forms used by real estate brokers. Seven PDS forms for residential properties were obtained following an Internet search or an information request to organizations administering the PDS. The forms studied are presented in Annex 10.

We did not receive or find PDS copies from Prince Edward Island, Newfoundland and Labrador and the territories; and the Alberta industry stopped using the PDS around 2004. Finally, some provinces' peculiarities favouring use of the PDS were noted:

- Manitoba: the PDS is attached to the offer to purchase form. Clause 7 of the offer to purchase provides standard clauses if the parties want to attach the PDS to the offer.
- Nova Scotia: the offer to purchase form contains a standard clause to request a copy of the PDS (clause 3). This clause specifies that when received by the buyer, the PDS will be part of the offer to purchase contract.
- Quebec: the PDS form is mandatory since July 2012. Brokers must have it completed by the seller at the signing of the brokerage contract.<sup>172</sup>

### 8.1 Information for the Seller and Buyer About the PDS

According to the form, the number of pages varies between two (Saskatchewan) and six (Quebec), and the number of questions between 19 (Manitoba) and 63 (Quebec). An entire page of explanations precedes the questions in the forms of British Columbia and Saskatchewan. All the forms provide a minimum of information to buyers and sellers about use of the PDS or the way to complete it. All the forms mention the seller's responsibility to ensure that the information provided is accurate, to the best of his knowledge. Several forms advise choosing the answer "Don't know" when in doubt.

Only two forms explain the PDS's purpose:

- British Columbia, p. 1: "The property disclosure statement is designed, in part, to protect the seller by establishing that all relevant information concerning the premises has been provided to the buyer."
- Ontario, p. 1: "This statement is designed in part to protect Sellers by establishing that correct information concerning the property is being provided to buyers."

Some forms mention that the PDS will be part of the offer to purchase if the parties so decide and put it in writing in the contract. There is also information about the legal implications, a reminder that the buyer is responsible for conducting his own investigations, a suggestion that the buyer have a home inspection done by a home inspector, a reminder that the seller should provide additional information or documents if necessary, as well as a description of the real estate broker's liability.

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<sup>172</sup> OACIQ. *Contexte d'utilisation du formulaire obligatoire Déclarations du vendeur sur l'immeuble, op.cit.*

## 8.2 Signatures

All the forms require the seller's and buyer's signatures. Some also require a witness, the date, time and place of signing. Others require the seller and at times the buyer to initialize all the pages. Signatures may be required to attest that the parties have read and understood the instructions regarding the PDS, to allow the real estate broker to provide an eventual buyer with a copy of the form, or to free him from any liability regarding the information provided in the form. In all cases, the buyer's signature is required upon receipt of the form.

## 8.3 Choice of Answers and Formulation of Questions

Similar questions allow for a different choice of answers depending on the province. Thus, to the question "Are you aware of any damage due to wind, fire, water, wood rot, pests, rodents or insects," Nova Scotia owners (10.c) can answer "Yes, No or Does not apply," whereas Ontario owners (IS9.c) can also choose "Unknown." This question is also an instance of a catch-all question, where one can easily forget details when answering.

The choice of answers allowed for certain questions can also leave us wondering about the circumstances that might justify such a choice. Thus, to the question "To the best of your knowledge, are the exterior walls insulated?" British Columbia (3.A) and Saskatchewan (2.c) owners can answer "Yes, No, Don't know or Not Applicable." An exterior wall may in fact be insulated or not, and the owner may not know if it is. But we may wonder about the circumstances in which the question of exterior wall insulation would not apply.

Very different strategies were observed for the information gathering. Several aspects of the building may be grouped into a single question, as in the Manitoba form (13): "Are you aware of any existing defect or deficiency in the heating, electrical or plumbing equipment or associated systems?" whereas other questions are more specific, as in the New Brunswick form (3.D): "Are there any problems with the electrical system?" Catch-all questions are also used, such as "Are you aware of any existing defect or deficiency associated with any of the following: sauna, hot tub, satellite dish and related equipment, garage door including automatic openers and equipment, carburetor, appliances (refrigerator, stove, freezer, washer, dryer), hot water tank, water softener, lawn sprinkler system, air-conditioning, burglar alarm, central vacuum, central humidifier, air purification system, intercom or any other chattel or fixture?" in the Manitoba form (14).

## 8.4 Condominiums and Rural Properties

Some forms contain a section dedicated to condominium units or rural properties, as described in Table 11.

**Table 11: Existence of specific PDS forms for condominiums and rural properties**

Province	Observations
British Columbia	Distinct forms for condominiums and rural properties.
Manitoba	Distinct form for making an offer to purchase a condominium unit, but no distinct PDS. No distinct forms (offer to purchase or seller property information statement) for rural properties.
New Brunswick	No distinct form or questions for condominium units or rural properties.
Nova Scotia	No distinct form or questions for condominium units or rural properties.
Ontario	Question 3 of the general part refer to a form (Schedule 221) containing 12 questions specific to condominiums. There is also a distinct form (Schedule 222) for sellers of a property not serviced by municipal sewer or aqueduct systems, and of a property with limited access or bordering a body of water.
Quebec	No distinct form or questions for condominium units or rural properties.
Saskatchewan	The PDS contains a question specific to condominium sales.

## 8.5 Elements Covered

The forms are lists of questions about a property's elements or systems, at times grouped by theme. The selling owner answers by checking the appropriate answer. The choices allowed are usually: Yes, No, Don't know, Not Applicable. Some questions have a narrower range of answers. For example, to the Manitoba form's question 5 "Are you aware if the property has been used as a marijuana growing operation or to manufacture illegal drugs?" the only possible choices are Yes or No.

The questions of the forms studied were grouped into 25 different themes. For the questions' exact wording as well as the possible answers to them, see Annex 10.

### 1. Acquisition and occupation of the building

As shown in Table 12, the forms of British Columbia, Nova Scotia and Ontario do not contain a question involving the building's date of acquisition. Those of Quebec and Ontario contain a question on the construction date.

**Table 12: Acquisition and occupation of the building**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Building's date of acquisition	D2.1		1	p. 1			7
Selling owner's occupation of the building	D2.2		1			G1	
Building's construction date	D2.5					G19	
Third party interests in the building (e.g. spouse, loan, rental)	D2.6					G2, G4	
Rental building – details	D2.3 D2.4						

## 2. Latent defects

Only the British Columbia (4.B) and Manitoba (18) forms require disclosing known latent defects from the selling owner. The Quebec form does not mention latent defects, but “factors relating to the immovable and not mentioned in these declarations that are liable to significantly reduce the value or restrict the use thereof, reduce the income generated thereby or increase the expenses relating thereto” (D13.9).

## 3. Psychological stigmas

Only the Quebec form mentions a stigma not related to the vicinity or to criminal activities. Question D13.8 inquires about a “suicide or violent death in the building.”

## 4. Permits and warranties

As shown in Table 13, all the forms contain a question on work done without a permit. Four of the forms contain questions on work inspection and on obtaining a permit of occupation. Only the British Columbia form contains a question on recent (less than 60 days prior) modifications, possibly to take into account cosmetic work done as part of home staging activities, a growing trend since the 2000s and the slow down in real estate sales.

Although all the provinces have a warranty plan for new homes,<sup>173</sup> only three PDS forms request information on this subject. The New Brunswick and Nova Scotia forms request more general information about warranties still valid and transferable to the buyer.

**Table 13: Permits and warranties**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Work done without a permit	D 13.3	3.I	3	8.C	8.C	IS 2.b	3.n
Work inspection and occupation permit		3.C		8.D	8.D	IS 2.c	
Pool installation permit					8.E		
Owner builder construction permit		3.S					
Unauthorized accommodation on the property		3.Q					
Non-observance of the fire code						IS 5.a	
Property improvements or renovations made by the seller	D 13.2 D14					IS 2.a	
Existence of plans and specifications for the work	D 13.4						
Modifications in the last 60 days		3.H					
New home warranty	D2.9	3.I				G20	
Existence of valid/transferable warranties				10.F	10.D		

<sup>173</sup> CBC News. *Warranty Info Across Canada*, January 9, 2009, Marketplace, [http://www.cbc.ca/marketplace/2009/new\\_home\\_nightmares/warranty.html](http://www.cbc.ca/marketplace/2009/new_home_nightmares/warranty.html), April 15, 2013.

## 5. Home inspection and other reports

Three forms ask whether reports exist on specific tests, but as shown in Table 14, the Quebec PDS is the only one asking whether previous home inspection reports exist. In addition, the OACIQ requires that real estate brokers disclose the existence of previous home inspection reports.<sup>174</sup> Finally, British Columbia has established an energy-efficiency program with EnerGuide for new home builders,<sup>175</sup> and the form includes a question on this topic.

**Table 14: Previous home inspection and other reports**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Existence of reports on specific tests	D 12.2 D 12.3				9.D		3.p
Existence of previous home inspection reports	D 12.1						
Existence of an EnerGuide report		3.U					

## 6. Notice of non-compliance and criminal activities

Most of the forms contain a question on notices of non-compliance and claims related to the property, as shown in Table 15.

Five forms request information on criminal uses that might have physically affected the premises. Indeed, marijuana growing operations often affect building healthiness by favouring mould development, and their electric hookups, often illegal, can be risky. Synthesizing drugs can involve the use of hazardous products that may still be present in the building if it has not been decontaminated.<sup>176</sup>

**Table 15: Notice of non-compliance, criminal activities and insurance cancellation**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Non-compliance with by-laws, zoning or others			2	8.A	8.A	G8	3.a
Notice or claim from any person or public organization (individual, insurer, municipality, etc.)	D2.7	1.E		10.H		G14	3.c
Criminal activities that may have affected the property's condition	D 13.7	4.A	5			E9	3.o
Legal non-conforming use				8.B	8.B		
Property insurance policy cancellation or non-renewal	D 13.5		19				
Rejected insurance claim	D 13.6						

<sup>174</sup> OACIQ. *Le respect des règles de l'inspection en bâtiments : ça vous concerne de près*, September 13, 2011, article 119995 <http://www.oaciq.com/articles/respect-regles-inspection-en-batiments-vous-concerne-pres>, April 15, 2013.

<sup>175</sup> BC Hydro. *Power Smart New Home Program*, [http://www.bchydro.com/powersmart/builders\\_developers/new\\_home\\_program.html](http://www.bchydro.com/powersmart/builders_developers/new_home_program.html), April 15, 2013.

<sup>176</sup> Edmiston, 2010, *op.cit.*, p. 295-6.

## 7. Land

Questions about the land's use or quality pertain to the following subjects: easements and other usage limitations, location (heritage area or other zoning restriction), projects for the vicinity, environmental protection, soil quality or contamination, and possible tax increases. Those questions are presented in Table 16.

Manitoba's form is the only one that contains no question about easements or other usage limitations. Given that the latter must normally be disclosed at least in the deed of land, this type of question appears mainly to notify the buyer earlier in the process. The other most frequent questions pertain to the property's location in a heritage zone, knowledge of future projects affecting the vicinity, contaminations, or the seller's knowledge of imminent tax increases.

The forms of Quebec and Ontario contain more questions on the land than those of other provinces; Quebec's form is the only one that includes questions about iron ochre.

**Table 16: Land taxes, uses and quality**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
<b>Taxes</b>							
Knowledge of possible tax increases		1.D	4			G13	3.b
Sale subject to HST						G21	
<b>Usage Limitations</b>							
Easements and other usage limitations	D2.6	1.A		10.A 9.C	10.A 10.B	G5 G11 E5 G12	3.d
Heritage area	D 2.6b			8.E	8.F	G17	
Future projects in the vicinity <sup>a</sup>	D 13.9			10.G	10.E	G9 G10 E3	
Availability of a survey certificate		1.C				G6	
Disputed property limits						G7	
<b>Environment</b>							
Contamination: fuel oil, oil, or buried oil tank	D4.3			9.B 9.D	9.C 9.D	E1	
Other contaminations: lead, mercury, gasoline	D4.3			9.B	9.D	E1	
Soil quality: instability, drainage	D4.1 D4.2					E6	
Work on the land: backfill, pool filling, retaining wall	D4.4					E7	
Existence of dumps, landfill sites or others in the vicinity	D 13.9					E2	
Storage of hazardous materials					9.B		
Presence of iron ochre	D4.5 D4.6 D4.7						
Compliance with environmental protection laws and regulations	D2.8						

- a. The list of projects varies according to the forms, but may include: real estate development, public projects (widening streets, highways, expropriations), zoning change, wind farm.

## 8. Water infiltrations

All the forms contain at least one question about water infiltrations, as shown in Table 17. Those questions may be specific to the basement or roof. There are also more general questions on damages from several causes, including infiltrations. Finally, there are questions on repairs made to correct problems due to water or moisture.

**Table 17: Water infiltrations**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Water or moisture infiltrations in the basement or crawl space	D3.1	3.K		6.A	6.A		
Water infiltrations elsewhere than in the basement (e.g. roof, terrace, balcony, solarium, skylight, door, window, chimney or other)	D3.1						
Presence of cracks in the foundations, rot or others affecting the basement	D5			6.A	6.A		
Moisture or water infiltrations in the walls		3.K					
Moisture or water infiltrations in the structure				10.C			
Moisture or water infiltrations in the roof or walls					6.B		
Water damage or infiltrations affecting the building and coming from any source (rain, melting snow, sewer backup, etc.).			7				
Basement infiltrations, through walls, floors, roof, windows, for any building or property improvement			8				
Any moisture or water problem						IS 9.a	
Any damage due to water or wood rot		3.L		10.B	10.C	IS 9.c	
Any roof leaks or moisture or water problems or unrepaired water damage in the dwelling / improvements							3.g
Any unrepaired or incompletely repaired damage to any building or improvements on the property resulting from water or moisture			9				
Any repairs carried out to correct leakage or dampness problems in the last five years					6.C		
Any repairs to correct past or present problems related to moisture and/or water problems, roof leakage, wood rot						IS 9.d	

## 9. Floods

Flooding is the most frequent natural hazard in Canada.<sup>177</sup> It is therefore surprising that only four of the forms contain questions on the risks of flooding and related damage, as shown in Table 18. However, the forms of British Columbia, Manitoba and Nova Scotia contain general questions about water damage (see the previous heading, *Water Infiltrations*).

**Table 18: Floods**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Property subject to flooding				10.E		E.4	3.h
Flood damage	D 13.1					IS 9.c	
Qualification for a flood protection program							4.a
Periodic water accumulation on the property	D4.5						

## 10. Roof

Water infiltrations through the roof are difficult to detect under normal conditions. As shown in Table 19, it is therefore reasonable for all the forms to require reporting such infiltrations. Another very frequent question pertains to unrepaired damage to the roof.

**Table 19: Roof**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Leak or moisture from the roof	D3.1	3.M	17	6.B	6.B	IS 9.b	3.g
Unrepaired damage to the roof		3.M	17	6.B	6.B	IS 9.b	3.g
Age of the roof	D7.1	3.M				IS 9.b	
Roof repairs since the property was acquired				6.B		IS 9.d	
Ice at the edge of the roof in winter	D7.3						
Documents supporting roof recovering	D7.2						

<sup>177</sup> Government du Canada. *Get Prepared – Floods*, April 10, 2013, <http://www.getprepared.gc.ca/cnt/hzd/flds-eng.aspx>, April 15, 2013.



## 11. Structure

Some structural problems can be difficult to detect in a visual inspection. All the forms address these problems, either with a general question about the building or a more specific one about the roof, walls, or foundations, as shown in Table 20. Quebec's form contains questions on foundations' stability, but none on the roof or wall structure. The only question that might cover this aspect of a building is question D13.9, about "any other factors relating to the immovable and not mentioned in these declarations that are liable to significantly reduce the value or restrict the use thereof, reduce the income generated thereby or increase the expenses relating thereto."

**Table 20: Structure**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Building structure problem		3.G	6			IS1	3.I
Roof structure problem				6.B	6.B		
Problem of structure, unrepaired damage or infiltration to the walls				6.B	6.B		
Problem of structure, unrepaired damage or infiltration to the foundation				6.A	6.A		
Repair or stabilization of the foundation	D4.2			6.A			
Cracks in the foundation	D5.2						
Wall repairs since the acquisition				6.B			
Liquid spills or other problem in the basement	D5.1 D5.2						

## 12. Insulation

As shown in Table 21, four forms include questions about insulation and two ask what type of insulation is used. However, several questionnaires contain questions about the presence of asbestos or urea formaldehyde products (see the heading *Indoor Air Quality*).

**Table 21: Insulation**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Ceiling or attic insulation		3.B		6.D	6.E		2.b
Type of ceiling or attic insulation				6.D	6.E		
Exterior wall insulation		3.A		6.C	6.D		2.c
Type of exterior wall insulation				6.C	6.D		
Basement wall insulation				6.E			2.d
Type of basement wall insulation				6.E			

### 13. Electrical system

All the forms contain at least one question on electrical system problems, and three forms also have questions on the electrical panel and type of wires (Table 22).

**Table 22: Electric system**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Electrical system problems	D9.3	3.N	13	3.D	3.B	IS 10.a	3.e
Electrical panel (amperage, type)				3.B 3.C	3.A	IS 10.a	
Type of wires <sup>a</sup>			15	3.A		IS 10.b	
Repairs or modifications to the electrical system				3.E	3.C		
Presence of a generator and related problems	D9.7 D9.8						
Connection to the electric power utility	D9.1 D9.2						

- a. This question aims at determining if aluminum wires are present in the building. This type of wire was used in the sixties and seventies, when the price of copper rose. Increased fire hazards are related to those wires, and some insurers may refuse to cover the risk.<sup>178</sup>

### 14. Telecommunications

The Quebec form is the only one that asks the names of the telecommunications companies servicing the building (D2.10 and D2.11).

### 15. Plumbing

All the forms ask about plumbing problems (Table 23). Five forms ask about the existence of a water softening system, and three contain questions on the type of pipes (particularly lead pipes) and on modifications to the plumbing system.

**Table 23: Plumbing**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Problems with the plumbing system	D8.1	3.O	13	4.B	4.A	IS11	3.e
Water softener and details	D8.5		14	1.C	1.C		3.f
Type of pipes			15	4.A		IS12	
Modification to the plumbing system, including drains and agricultural drain	D8.3			4.C	4.B		
Water heater's age or related problems	D8.4		14				
Sump or drainage well with or without a discharge pump	D8.2						

<sup>178</sup> Gromicko, Nick *et al.* *Aluminum Wiring*, InterNACHI, <http://www.nachi.org/aluminum-wiring.htm>, April 15, 2013.

## 16. Drinking water supply

All the forms ask about the drinking water source (municipal aqueduct or private source) and problems of quality or quantity, as shown in Table 24.

**Table 24: Drinking water supply**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Supply from the municipal aqueduct system or a private system <sup>a</sup>	D8.6	2.A	12	1.A	1.A	G 15.a	1.d 1.e
Water quality or quantity problems, pressure	D 8.6e	2.B	12	1.B	1.B		1.f
Availability of drinking water analysis results		2.C		1.B 1.D	1.D		
The well's drinking water flow		2.C					1.f

- a. The Ontario form requests that a separate document (Schedule 222) be completed by sellers of a property not supplied with drinking water from a municipal aqueduct system. That document contains questions on water quantity and quality, available analysis results, and water treatment systems.

## 17. Wastewater disposal

As shown in Table 25, all the forms ask if the building is connected to the municipal sewer system or to a private system (e.g. septic tank) and if there are wastewater disposal problems.

**Table 25: Wastewater disposal**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Connection to a municipal sewer system or use of a private system <sup>a</sup>	D8.7	2.D	11	2.A	2.A	G 15.b	1.a 1.b
Problems with the wastewater disposal system	D8.7	2.E	11	2.Bi	2.B		1.c
Details of the septic tank or other private system	D8.7	2.G		2.A 2.B	2.D 2.C		
More recent date the septic tank was emptied	D8.7			2.A	2.A		

- a. The Ontario form requests that a separate document (Schedule 222) be completed by sellers of a property not connected to a municipal sewer system. That document contains questions about problems, details of the system used (type, age), documentation, and the more recent date the system was emptied.

## 18. Natural gas

Table 23 shows that only two forms (Quebec and British Columbia) contain questions on the use of natural gas.

**Table 26: Natural gas**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Natural gas problems	D9.6	3.N					
Connection to natural gas services	D9.4 D9.5						

## 19. Heating, air conditioning, ventilation and other systems

As shown in Table 27, all the forms ask about problems with the heating system. However, the Manitoba and Saskatchewan forms contain no question requiring details of it. The age of fuel oil tanks, and the possibility of an underground tank, are asked about in four forms. The questions' style varies according to the forms. Some forms cover all systems other than heating within a single general question. At the other extreme, the Quebec form asks specific questions about each system.

**Table 27: Heating, air conditioning, ventilation and other systems**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
<b>Heating System</b>							
Problems with the heating system	D 10.1	3.J	13	5.C	5.B	IS8	3.e
Age of the fuel oil tank	D 10.1			5.B	5.A	E8	
Existence of an underground fuel oil tank	D 10.1	1.B			9.C 9.D	E8	
Type of heating system	D 10.1			5.A 5.B	5.A		
Fuel oil leaks from the tank or pipes	D5			5.B	5.D		
Heating system repairs or upgrades				5.D	5.C		
Meeting of applicable requirements for the fuel oil tank						E8	
Existence of rooms more difficult to heat	D 10.1						
Radiating film heating	D 10.1						
Installation year of the furnace or heating system components	D 10.1						
Date of the latest chimney-sweeping for the heating system	D 10.1						
<b>Air Conditioning System</b>							
Air conditioning system problems	D 10.3	3.J	14	7.A	7.A	IS7	3.e
Installation year of the air conditioning system	D 10.3						
<b>Ventilation System</b>							
Ventilation system problems (e.g. air exchanger)	D 10.4			7.A			3.e
Installation year of the ventilation system (e.g. air exchanger)	D 10.4						
<b>Other Systems</b>							
Problems with the air humidifying or purifying system			14	7.A	7.A		3.e
Problems with the heat pump or geothermal system	D 10.2 D 10.5						
Installation year of the heat pump and/or geothermal system	D 10.2 D 10.5						

## 20. Stoves, fireplaces and chimneys

All the forms contain at least one question about backup heating appliances (stoves, fireplaces and chimneys). As shown in Table 28, eight forms ask about problems with the latter, four if they have been inspected, and one if they were installed by qualified persons.

**Table 28: Stoves, fireplaces and chimneys**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Backup heating problems, including insurance problems	D 10.6		16	5.E		IS 6.a	3.m
WETT inspection or other approval by the authorities regarding wood heating		3.E	16	5.E		IS 6.b	
Wood heating installation by qualified persons					5.E		
Existence of backup heating (stove, fireplace, chimney), frequency of use	D 10.6		16				
Installation year, documentation	D 10.6						
Frequency of chimney-sweeping and date of the latest chimney-sweeping	D 10.6						

## 21. Miscellaneous equipment

Various pieces of equipment are not part of a building's main systems. As shown in Table 29, we find questions on pools, whirlpool baths, hot tubs, saunas, sprinkler systems, alarm systems, etc.

**Table 29: Miscellaneous equipment**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Problems with the pool or whirlpool bath		3.P	14	7.A		IS13	3.f
Problems with the sauna, hot tub, sprinkler system			14			IS13	3.f
Problems with the dish antenna, garage door, garburator, household appliances, alarm system, central vacuum cleaner, intercom, or other			14	7.A	7.A	G18	3.f
Operational smoke and carbon monoxide detectors						IS 5.b	

## 22. Maintenance contracts and leased equipment

Four forms contain questions about leased equipment and three about ongoing maintenance contracts, as shown in Table 30.

**Table 30: Maintenance contracts and leased equipment**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Existence of leased equipment		3.R		7.B	7.B	G16	
Details of leased equipment				7.B	7.C	G16	
Existence of conditional sales contracts						G16	
Existence of ongoing maintenance contracts						G16	
Existence of a service contract for the septic tank or other private system		2.F					
Existence of maintenance contracts for a heating system, air conditioning, heat pump, geothermal system	D 10.1 to D 10.3, D 10.5						

## 23. Indoor air quality

Only the New Brunswick form asks no question on the presence of products containing asbestos. As shown in Table 31, five forms ask about traces of mould or the presence of radon, and three forms ask about the presence of urea formaldehyde.

**Table 31: Indoor air quality**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Products containing asbestos (e.g. vermiculite, Zonolite)	D6	3.C	15		9.D	IS4	2.a
Traces of mould or rot	D6		15	10.D	9.D		3.q
Presence of radon	D 12.2 D 13.9		15	9.A	9.A	E1	
Presence of urea formaldehyde	D 12.2					IS3	2.a
Odours: sewer, moisture, gas, fuel oil, etc.	D6						

- a. The Ontario and British Columbia forms contain no specific question on the presence of mould, but do contain a more general question on water and moisture damage.

## 24. Insects and pests

Six forms ask about damage caused by vermin or pets; some of those forms specify that the question pertains to unrepaired damage. The latter is frequently unknown to the owner, because it is located inside the walls or roof. The Quebec and Manitoba forms ask instead if vermin are or have been present, as shown in Table 32.

**Table 32: Insects and pests**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Damage caused by insects, rodents, pests or pets		3.F	9	10.B	10.C	IS9.c	3.k
Presence of insects or pests (e.g.: carpenter ants, bats, rodents)	D 11.1		10				
Using the services of a professional exterminator	D 11.2						

## 25. Damage due to wind and fire

All the forms contain a general question on damage due to wind or fire, as shown in Table 33. But the formulation can vary: a) has the building ever sustained damage; b) are you aware of damage; c) are you aware of unrepaired or incompletely repaired damage.

**Table 33: Damage due to wind or fire**

Question Themes	Question Numbers						
	QC	BC	MN	NB	NS	ON	SK
Damage due to ice storm, wind, fire	D 13.1	3.L	9	10.B	10.C	IS 9.c	3.k
Repairs to correct damage due to wind or fire						IS 9.d	

## 9. RESULTS AND DISCUSSION

### 9.1 Summary of the Situation of the PDS in Canada

British Columbia appears to be the first Canadian province to have used the PDS following its introduction by the BCREA in 1991. Copies of the form currently in effect were obtained from seven provinces (British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec and Saskatchewan). Alberta's real estate sector used the form for some time but stopped doing so around 2004. The PDS also appears to be used in Prince Edward Island,<sup>179</sup> Newfoundland and Labrador,<sup>180</sup> and Yukon.<sup>181</sup>

As opposed to the rest of Canada, the ACQC viewed PDS usage in Quebec more as a measure to protect consumers than real estate brokers. The ACQC had prepared a questionnaire in collaboration with the OTPQ, and suggested that sellers complete it to limit their liability regarding latent defects.<sup>182</sup> The OTPQ supported this approach and recommended that its members use the PDS for home inspection. A few years afterward, the OACIQ published its own form, intended for real estate brokers. So it is common for Quebec home inspectors to have the PDS completed, as opposed to inspectors in other provinces, who consider this a real estate broker's action.<sup>183</sup>

It is difficult to estimate the frequency of PDS usage in each province, and real estate brokers' associations do not publish any data on this subject. But it may be assumed that the PDS is more widely used in Manitoba, Nova Scotia and Quebec, because in these provinces all sellers working with a real estate broker are informed of the PDS's existence and are asked to complete it. NBREA states that the PDS is used in around 75% of normal real estate transactions.<sup>184</sup> The PDS also appears to be commonly used in British Columbia and Ontario, since its use is among BCREA and OREA best practices.

There is a seller's warranty in the common law provinces and in Quebec. In both cases, that warranty does not cover patent defects, and the courts determine whether or not a defect is latent. Under the CCQ, the defect engages the legal warranty if it is latent, major, existed prior to the sale and was unknown to the buyer. The seller thus has an interest in disclosing all of his property's major defects to make them known to the buyer, and the PDS gives him the means to do so. The seller is also liable for defects unknown to him. Under the common law, the buyer may win a latent defect case if he succeeds in demonstrating that the defect is major or that it makes the property unfit for his intended use as stated by him and known to the seller. The seller is therefore not liable if he was not aware of the defect. Still, the PDS remains an interesting way to disclose major defects known to the seller. However, using the PDS may allow the buyer to initiate legal action for misrepresentations if the information provided is inaccurate.

<sup>179</sup> Some listings of real estate brokers in Prince Edward Island include a line to indicate the PDS's availability.

<sup>180</sup> Can LII. *Donald Murray and Kara Murray v. Donna Tilley and Owen Grimes Realty (2000) Inc.*, *op. cit.*, ¶ 39-40.

<sup>181</sup> Can LII. *Lyle et al v. Burdess et al*, 2008 YKSM 5, 2008-12-18, ¶ 11, <http://www.canlii.org/en/yk/yksm/doc/2008/2008yksm5/2008yksm5.html>, April 15, 2013.

<sup>182</sup> ACQC. *Guide d'inspection de maisons usagées – Comprendre l'inspection préachat*, 2002, p. 25.

<sup>183</sup> Featherston, Sharry. Personal communication, e-mail of June 27, 2012, CAHPI.

<sup>184</sup> Ryan, Jamie. Personal correspondence, letter of July 20, 2012, NBREA.



The study of some hundred recent cases involving a PDS revealed that the document is at the basis of legal action in the majority of the cases studied. The judges estimated that sellers had not answered honestly in 21% of Quebec cases and 50% of cases under the common law, which probably reflects the advantage of making as full a disclosure as possible under civil law to avoid law suits for violating the seller's warranty of quality. As opposed to civil law courts, common law courts' written decisions provide an abundance of case law to determine the PDS's legal status (21% vs. 55% of cases). Indeed, in Quebec the form is frequently only one of the items of evidence in a case for latent defects, whereas common law judges must begin by determining what value they attach to the form if the case for misrepresentations is based on the latter.

## 9.2 Usefulness of the Seller Property Information Statement

### 9.2.1 Protection for real estate brokers

Real estate broker associations introduced PDS forms in the US to protect their members from legal proceedings launched by dissatisfied buyers. Those associations have succeeded in making it legally mandatory to use the PDS in approximately two thirds of American states,<sup>185</sup> thus transferring to sellers the obligation to provide buyers with accurate information. In Canada, those forms were also introduced by the real estate broker associations and the organizations overseeing them. However, the forms are not legally mandatory in any province or territory. It should also be noted that real estate brokerage laws impose a duty of disclosure on brokers and that obtaining the PDS enables them to carry out that duty.

### 9.2.2 Protection for sellers

The PDS is also useful in protecting the seller by retaining a trace of information provided and lessening his liability by demonstrating that all necessary information was provided to the buyer. In Quebec, this advantage is even more pronounced, because the seller usually must provide a legal warranty against latent defects, and disclosing the property's defects lessens the seller's liability. The PDS also helps to circumscribe the information that must be provided to the buyer.

### 9.2.3 Protection for buyers

Obtaining the PDS establishes some balance between the seller's and the buyer's knowledge of the property. Retaining the information thus provided is also useful to buyers in the event of legal action for misrepresentations.

In addition to providing a basis for comparing similar properties, that disclosure would reduce the number of "surprises" further to the purchase and would help reduce the amount of litigation. Another advantage is that by asking questions that an informed buyer might formulate, the PDS may provide the buyer with information that may guide the home inspection or that would be difficult to obtain even with a rigorous home inspection. In a ruling for the Nova Scotia Small Claims Court, the adjudicator Eric K. Slone stated that the PDS's main usefulness is to disclose latent defects known to the seller.<sup>186</sup>

<sup>185</sup> Nanda, July 2006, *op.cit.*, p. 3.

<sup>186</sup> CanLII. *Moffatt v. Finlay*, 2007-10-30, 2007 NSSM 64, ¶ 29-30, <http://www.canlii.org/en/ns/nssm/doc/2007/2007nssm64/2007nssm64.html>, April 15, 2013.

Some defects are not material (e.g. properties stigmatized by violent death) or are not limited to the property (e.g. development projects in the vicinity), but some buyers might be interested in knowing them.

### 9.3 Points to Be Considered for Improving the PDS

As pointed out by the experts interviewed by Miller *et al*, the issue is to draft a PDS that (1) provides useful information in a simple, readable and understandable way; (2) balances the seller's and buyer's needs; and (3) clarifies and simplifies the role of real estate industry professionals in the disclosure process.<sup>187</sup>

#### 9.3.1 Taking behaviour biases into account

The literature review highlighted that consumers behaviour of in a buying situation is not always that of the "rational consumer" referred to by classical economists. Rather, in some circumstances the consumer reportedly acts according to certain behaviour biases that can lead him to poor decision-making. Some of those costly biases should be taken into account when PDS forms are drafted:

- Information overload: according to the classical economic model, increasing the quantity of information is always beneficial. This assumption is not supported by the results of market studies, which rather suggest that beyond a certain level of information, the consumer decides not to buy or even chooses at random;
- Bias due to formulation and presentation: consumers are influenced not only by the objective information provided, but also by the "frame" of that information. For example, a "92% fat-free" allegation triggers a different response than does "8% fat."<sup>188</sup>

Several other biases inherent to the questionnaire's very form are known:

- Bias for saying yes: the respondent gives positive answers to please or to avoid having to justify himself;
- Bias for self-esteem: the respondent prefers answers that present him in a good light;
- Halo effect: the respondent tends to give the same answer to all questions where a scale is used;
- Contamination effect: the answer given to the first question has an impact on the following questions.<sup>189</sup>

Moreover, governments may favour PDS usage otherwise than through legislation, by relying on the fact that in a complex situation, consumers tend to adopt the default proposal.<sup>190</sup> This possibility was raised in the Neufeld report.<sup>191</sup> The MSC choose to annex the PDS to the offer to purchase form and to include the PDS by default in the

<sup>187</sup> Miller *et al*, 2006, *op.cit.*, p. 7-10.

<sup>188</sup> McAuley, Ian. *Roundtable on Economics for Consumer Policy - Summary Report*, July 26, 2007, OECD, p. 11-12, <http://www.oecd.org/internet/consumerpolicy/39015963.pdf>, April 15, 2013.

<sup>189</sup> Gruszka, Nathanael. *Comment rédiger un questionnaire?* August 22, 2012, Gruszka Etudes Marketing, <http://marketingpharmaceutique.blogsmarketing.adetem.org/archive/2007/11/27/comment-rediger-un-questionnaire.html>, April 15, 2013.

<sup>190</sup> McAuley, 2007, *op.cit.*, p. 12.

<sup>191</sup> Neufeld, 2009, *op.cit.*, p. 31-32, 42.

contract. The NSREC also includes the PDS by default in the offer to purchase. In both cases, the parties may cross out the inclusion clause if they oppose it, since the PDS is not legally mandatory.

### 9.3.2 Determining which aspects must be disclosed

There is no consensus on the range and nature of the elements subject to disclosure. Some American authors question both the use of the property line as a disclosure limit, and the way in which stigmatized properties should be treated.<sup>192,193</sup> Australian researchers recommend simplifying forms that seem more complex than those used in the US and Canada. Moreover, a comparison of aspects subject to disclosure by legislation in Australia, and of the reasons for some of the country's legal actions, demonstrate that mandatory forms do not necessarily cover all the aspects important to buyers.<sup>194,195</sup> Our study of Canadian case law confirms this by demonstrating that in at least nine of the cases studied, the form's questions did not cover the problem encountered by the buyer after acquiring the property.

A fervent opponent of the PDS, lawyer and Toronto columnist Bob Aaron, wrote when the form was introduced in Manitoba that he preferred it to the Ontario form for the simple reason that the Manitoba form's questions were simpler and less numerous:

The major difference between the disclosure form created by the Manitoba Real Estate Association and the Ontario Real Estate Association version is their length and complexity. The Manitoba form has 19 questions, the basic Ontario form has 48.

I am a devout opponent of these forms, but given a choice, I would take the Manitoba form any day.<sup>196</sup>

Following our comparison of seven PDS forms, the questions were classified into 25 categories, covering a variety of subjects: building acquisition and occupation dates; latent defects; psychological stigmas; permits and warranties; home inspection and other reports; notice of non-compliance and criminal activities; land; water infiltrations; floods; roof; structure; insulation; electrical system; telecommunications; plumbing; drinking water supply; wastewater disposal; natural gas; heating, air conditioning, ventilation and other systems; stoves, fireplaces and chimneys; miscellaneous equipment; maintenance contracts and leased equipment; indoor air quality; insects and pests; damage due to wind and fire.

It seems only logical that the aspects that are useful to the buyer in making his decision and that should be subject to disclosure differ whether the property is located in the city or the countryside, and whether it is a single house or a condominium. And yet, only British Columbia has distinct forms for condominiums and rural properties. The Ontario PDS refers the reader to an additional form containing 12 questions reserved for condominiums (Schedule 221). There is also an additional form for properties not serviced by municipal sewer or aqueduct systems, as well as properties with limited

<sup>192</sup> Roberts, 2006, *op.cit.*, p. 957-993.

<sup>193</sup> Edmiston, 2010, *op.cit.*, p. 281-320.

<sup>194</sup> Miller *et al*, 2006, *op.cit.*

<sup>195</sup> Christensen *et al*, 2007, *op.cit.*, p. 149.

<sup>196</sup> Aaron, Bob. *Manitoba Simplifies Seller Disclosure Form*, November 11, 2011, thestar.com, <http://www.thestar.com/living/realestate/article/1084308--aaron-manitoba-simplifies-seller-disclose-form>, April 15, 2013.

access or bordering a body of water (Schedule 222). The Saskatchewan PDS contains a question specific to condominium sales. The other PDSs do not specifically address these subjects.

### 9.3.3 Formulating questions for target publics

Drafting a PDS form involves several challenges. As opposed to questionnaires used in marketing research or satisfaction surveys, the completed form will not be compiled by researchers, but will have to be clear and understandable to the average seller and buyer while leaving no room for legal interpretation. Nevertheless, several recommendations useful in drafting marketing research questionnaires apply:<sup>197</sup>

- Determine the questionnaire's objective;
- List the data to be collected;
- Don't try to know everything: information overload can be a problem;
- Sequence the questionnaire in a coherent progression;
- Write the questions with precise terms;
- Adapt the questionnaire to the data collection method (with or without a real estate broker's help);
- Take care in writing the introduction, by clarifying the questionnaire's goals, legal implications, data confidentiality protection;
- Vary question formats to prevent the respondent from becoming weary;
- Pre-test the questionnaire to check its understandability, question sequencing, completion time;
- Make respondents interested in the subjects covered.

It is also necessary to ensure that the buyer reads the form. A form presented as a list with a space under each item to describe the nature and scope of defects is more likely to be read than one that simply refers to a series of annexed studies or certificates. An American study (2000) of forms used for disclosure in real estate transactions revealed that only 3% of respondents found list-type forms too complex.<sup>198</sup> Christensen *et al* (2009) summarize the aspects that should be taken into account before implementing a mandatory PDS form:

- When the information is given to the purchaser;
- Whether the information is relevant to the transaction;
- Whether the information is helpful and useful and would assist a purchaser in making an informed decision about entering into the transaction;
- Whether the information is in plain English and able to be processed and understood by the purchaser; and
- Whether the layout of the document assists the purchaser in reading.<sup>199</sup>

In comparing the forms, we observed certain amateurism in the questions formulation. For example, similar questions may allow for a different choice of answers depending on the province. And in some cases, the choice of answers allowed is inconsistent with the question asked.

<sup>197</sup> Bertin, Olivier. *10 bonnes pratiques pour réussir votre questionnaire*, May 9, 2011, <http://www.marketing-strategie.fr/2011/05/09/10-bonnes-pratiques-pour-reussir-votre-questionnaire/>, April 15, 2013.

<sup>198</sup> Moore GS and Smolen G, 2000. Article quoted in Christensen et al, 2009, *op.cit.*, p. 24.

<sup>199</sup> Christensen et al, 2009, *op.cit.*, p. 28-29.

Several judges made comments about the form and content of PDS questions as found in our case law study. Thus, a PDS's imprecise questions make it difficult for a buyer to win in litigation based on a misrepresentation. Justice Romilly of the Provincial Court of Alberta expresses his frustration in this regard:

I find that I must reiterate what I have stated in several other judgments that Property Disclosure Statements that qualify the representation being made by a Vendor with terms such as: "To the best of your knowledge" and "Are you aware of a particular fact", are fraught with difficulties, except in very obvious cases of deception, for the purchaser trying to establish that a Vendor had knowledge or was aware of a particular defect in the condition of the property that is being purchased. It strikes me that unless there is some obligation on a Vendor to make due inquiry into the particular representation sought, the process becomes, in my opinion, meaningless, and the duty shifts on the Purchaser to make such due inquiry before, not after, purchase, or the maxim of "*caveat emptor*" or "buyer beware" applies.<sup>200</sup>

Excessively vague questions can lead the seller to believe they do not apply in his case. In the *Payette c. Dumont* case<sup>201</sup> on iron ochre, the sellers answered in the negative the question "Are there other defects, abnormalities or other problems known to you and not mentioned in this questionnaire?"<sup>202</sup> in the form used in 2007. However, the sellers provided buyers with documentation and instructions related to the iron ochre problem about maintaining the drains and pump of the catch basin in the basement. The 2012 version of the OACIQ's PDS contains specific questions on iron ochre.

The choice of verb tenses leads to uncertainties and at times divergent interpretations. The problem arises when a restrictive interpretation of the present tense induces the seller not to disclose, for example, serious basement infiltrations in the recent past because he has made repairs before the property was put up for sale. This interpretation is shared by Justice Smith of the Nova Scotia Supreme Court, who considers that questions beginning with "Are you aware" should reflect the seller's knowledge of the property's condition at the time of completing the form.<sup>203</sup> Justice Wright of the Court of Queen's Bench for Saskatchewan disagrees and finds this present tense interpretation too restrictive, particularly when major repairs have been made.<sup>204</sup> In addition to these two cases, we identified six others where this issue was addressed, thus demonstrating the problem raised.<sup>205</sup> The adjudicator Slone, of the Nova Scotia Small Claims Court,

<sup>200</sup> CanLII. *Smith & Viitanen v. Chen & New World Realty Ltd.*, 2008-02-21, 2008 BCPC 372, ¶ 16, <http://www.canlii.org/en/bc/bcpc/doc/2008/2008bcpc372/2008bcpc372.html>, April 15, 2013.

<sup>201</sup> CanLII. *Payette c. Dumont*, 2010-03-26, 2010 QCCS 1631, ¶26, 62, <http://www.canlii.org/fr/qc/qccs/doc/2010/2010qccs1631/2010qccs1631.html>, April 15, 2013.

<sup>202</sup> Our translation of: "Existe-t-il d'autres défauts, anomalies ou autres problèmes que vous connaissez et qui n'ont pas été mentionnés dans ce questionnaire?"

<sup>203</sup> CanLII. *Gesner v. Ernst*, 2007-05-18, 2007 NSSC 146, ¶ 58, <http://www.canlii.org/en/ns/nssc/doc/2007/2007nssc146/2007nssc146.html>, April 15, 2013.

<sup>204</sup> CanLII. *Snider v. Karpinski*, 2009-10-06, 2009 SKQB 394, ¶ 133-135, <http://www.canlii.org/en/sk/skqb/doc/2009/2009skqb394/2009skqb394.html>, April 15, 2013.

<sup>205</sup> *Swift v. Kung and Kung et al* (2006 BCSC 1123, 2006-07-24, ¶ 6), *Libby and Peng v. Godbout and St. Amand* (2010 BCPC 153, 2010-07-15, ¶ 59-62), *Allen v. Thorne* (2007 NSSM 31, 2007-07-14, p. 11-12), *Kaufmann v. Gibson* (2007 ONSC 26609, 2007-07-10, ¶ 79, 101-108), *Usenik v. Sidorowicz* (2008 ONSC 11373, 2008-02-25, ¶ 47), *Skinner v. Crowe* (2010 NSSM 66, 2010-11-16, ¶ 9).

suggests reformulating certain questions to make them more useful and remove uncertainty about the period concerned.<sup>206</sup>

Justice Brown of the Supreme Court of British Columbia raises a point regarding the presentation and readability of questions about a building structure. Indeed, we may wonder if what constitutes a house's structure is clear to all buyers and sellers, and why alterations made in the last 60 days would be limited to those made to the structure.<sup>207</sup>

The building's acquisition date, and whether the owner was also its occupant, may be important in determining whether the property was acquired for speculation or by a renovation expert for a home flip. A British Columbia court noted in 2009 that the PDS questionnaire did not ask any question about this. Had such a question been asked, buyers would have had less trust in a PDS completed by sellers involved in such an operation.<sup>208</sup>

### 9.3.4 Determining when to hand the PDS to a potential buyer

It has been demonstrated that when consumers make initial investments, they tend to continue investing despite information favouring withdrawal. Consumer education in irrecoverable costs does not appear to diminish this tendency to persist in the initial line of conduct. This effect is observable in the real estate field, where buyers are observed not to be inclined to renegotiate a property's price when defects are discovered once the offer to purchase is made.<sup>209</sup>

The cognitive psychology studies referred to previously show that when information is provided late in the process – for example, after the offer to purchase is signed – the consumer tends to persist in the transaction once the commitment has been made, particularly with the signing of the offer to purchase. It appears that the potential buyer takes into account the information received, but gives it less relative weight than the initial information on the property and its price.<sup>210</sup> These findings support the recommendation that the PDS be provided to the potential buyer during his initial research or at the very least before he makes an offer to purchase.

The guidelines given to real estate brokers on the timing to provide buyers with the PDS are variable, but providing of the PDS before the offer to purchase is submitted does not appear to be a widespread practice. Guidelines on the timing for handing the PDS to the buyer were found in four provinces. In British Columbia, the broker representing the seller must ensure that written disclosure of latent defects known to the seller is made to the buyer before the offer to purchase is accepted, which implies that the PDS is handed between the submission and the acceptance of the offer to purchase.<sup>211</sup> Moreover, it is

<sup>206</sup> CanLII. *Moffatt v. Finlay*, *op.cit.*, ¶ 31.

<sup>207</sup> CanLII. *Neilson v. Lam*, 2010-12-01, 2010 BCSC 1702, ¶ 82-85, <http://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc1702/2010bcsc1702.html>, April 15, 2013.

<sup>208</sup> CanLII. *Manghat v. Tchilinguirian*, 2009-09-17, 2009 BCSC 1809, ¶ 7, <http://www.canlii.org/en/bc/bcsc/doc/2009/2009bcsc1809/2009bcsc1809.html>, April 15, 2013.

<sup>209</sup> Christensen *et al*, 2009, *op.cit.*, p. 26-27.

<sup>210</sup> Stern, 2005, *op.cit.*, p. 57-91.

<sup>211</sup> RECBC. *Professional Standards Manual*, Section II Trading Services, 2 - Acting for Sellers, (I) Disclosure of Material Latent Defects, p. 64, [http://www.recbc.ca/pdf/Professional\\_Standards\\_Manual.pdf](http://www.recbc.ca/pdf/Professional_Standards_Manual.pdf), April 15, 2013.

also suggested that the seller's broker have PDS copies on site during visits of the property.<sup>212</sup>

In Nova Scotia, it is recommended that the broker distribute PDS copies only with the seller's agreement, because it is a confidential document that must be treated as such, and that the PDS not be used as a leaflet on open house days or to solicit buyers. The PDS is usually provided to the buyer only after the offer to purchase is submitted.<sup>213,214</sup>

In Ontario, the broker must inform any buyer interested in the property about the existence of a PDS or its equivalent. The broker must also provide a copy of the PDS as soon as possible to a buyer who requests it.<sup>215</sup>

In Quebec, since June 2012 the PDS has been mandatory during real estate transactions with a broker. The form must be prepared during the signing of the brokerage contract and is thus available before the offer to purchase is submitted.<sup>216</sup>

### 9.3.5 Providing cautions

Better consumer protection depends on better information. So it seems necessary to better inform sellers and buyers about their obligations regarding the real estate transaction, but also about the PDS's legal implications.

## 9.4 Lessons From Case Law

As a result of our case law study, we find that under the common law regime, a substantial area of the law has developed around the PDS. We observed that the majority of legal actions based on the PDS invoke misrepresentation. To win a legal action for misrepresentation, the buyer must demonstrate that he relied on the PDS to make his decision to purchase. However, if the seller has answered the questions honestly, the *caveat emptor* rule applies, even if the PDS contains errors because, for example, a latent defect was unknown to him. On the other hand, the seller's liability is not engaged by a misrepresentation regarding patent defects or by their non-disclosure if the buyer does not prove that this misrepresentation induced him to buy the property.

Quebec is the only Canadian province with a civil law regime. The court rulings are less concerned by the legal scope of the PDS, since the cases involving a PDS are usually latent defect ones, and the document is only one item of evidence among others. To win a case for latent defects, the buyer must begin by demonstrating the defect in the legal sense, for the seller's warranty to apply. The seller's liability is not engaged if he

<sup>212</sup> RECBC. *Professional Standards Manual*, Section II Trading Services, 4 - General Information, (a) Contract Clauses, xxii Disclosure Issues, (3) Property Disclosure Statements (PDS) and xxiii Property Disclosure Statement Clause, p.100,

[http://www.recbc.ca/pdf/Professional\\_Standards\\_Manual.pdf](http://www.recbc.ca/pdf/Professional_Standards_Manual.pdf), April 15, 2013.

<sup>213</sup> NSREC. *PCDS Forms*, February 20, 2012, Commission News Bulletin 159,

<http://www.nsrec.ns.ca/documents/Bulletin159.pdf>, April 15, 2013.

<sup>214</sup> NSREC. *PCDS Forms*, May 6, 2012, Commission News Bulletin 137,

<http://www.nsrec.ns.ca/media36ec.pdf?mid=472>, April 15, 2013.

<sup>215</sup> RECO. *Seller Property Information Statements*, winter 2012, For the Record, p. 3,

<http://www.reco.on.ca/UserFiles/Winter%202010%20Final.pdf>, April 15, 2013.

<sup>216</sup> OACIQ. *Contexte d'utilisation du formulaire obligatoire Déclarations du vendeur sur l'immeuble, op.cit.*

successfully demonstrates that the buyer did not fulfil his duty of care and diligence, or that the problem is related to the property's age. Indeed, the courts do not consider obsolescence to be a latent defect.

Under both legal systems, including the PDS in the offer to purchase contract demonstrates the importance attached to the PDS by the buyer and facilitates its use in litigation. The PDS is useful as proof of the seller's erroneous answers or to retain a trace of disclosures made. In many cases, it is reported that the PDS has induced a false sense of security, that half-truths hid a patent defect, or that the questions' formulation left room for interpretation. However, the buyer is responsible for demonstrating that the seller was aware of an undisclosed latent defect.

There are limits to the PDS's usefulness. For example, a seller cannot disclose a defect unknown to him, he may make involuntary mistakes while completing the form, or he may lack knowledge if he has not resided in the home. The formulation of PDS questions or the real estate broker's advice may also mislead the seller. In addition, at times the PDS's questions simply do not cover the buyer's problem.

We have also found that in some circumstances the buyer is at fault by not following up on a problem disclosed by the seller, by not fulfilling his duty to investigate, by not reading the PDS carefully before concluding the sale, by not taking the PDS information into account in his decision-making, or simply by not requesting an PDS.

## 9.5 Role of Real Estate Brokers

In most provinces, the responsibilities under provincial real estate brokerage laws are shared between a government organization or one that a government authority charges with applying the law, and a CREA-affiliated association mainly occupied with defending the interests of real estate brokers. An overlapping of responsibilities between those organizations was observed, particularly with regard to training, and at times to compliance with the code of ethics. Administering the PDS form is the government organization's responsibility in three provinces: Manitoba, Nova Scotia and Quebec. Elsewhere, CREA-affiliated associations are responsible.

The websites of the organizations overseeing the work of real estate brokers were studied to learn what type of training was dispensed to brokers regarding the PDS. This question was also asked directly of the organizations. Information from nine organizations representing six provinces was found about PDS training provided to real estate brokers. The guidelines stated by William Foster in a 2003 report<sup>217</sup> were compared with the information we found. The sources consulted do not make it possible to conclude that Foster's recommendations have been applied regarding information that should be provided to buyers and sellers about the PDS. Some guidelines are more widely applied:

- The buyer's real estate broker must remind the buyer that even after obtaining a PDS the buyer has a duty to investigate: a home inspection or a more specialized one, along with asking the seller more specific questions;
- The seller's real estate broker should remind the seller of the importance of providing accurate and complete information when choosing to fill out a PDS;

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<sup>217</sup> Foster, January 2003, *op. cit.*, p. 34-37.



- The real estate broker has the obligation to verify some of the more problematic information in the PDS in order to fulfil his duty of care.

Although the examination of the role of real estate brokers was not included in the goals of the case law study, the latter allowed us to identify 22 rulings for which a broker explains how he advised his client and how he uses the PDS in his work. Their examination confirms the results of our study of the websites of organizations overseeing the work of real estate brokers, i.e., that there is room for improvement in their PDS training. Indeed, in many cases, the advice of brokers is at the origin of litigation, by recommending that sellers not indicate a past problem, even a serious one, if repairs have been made and appear satisfactory. In addition, if the broker represents the seller, the courts consider that the broker's duty of care includes emphasising to his client the potential problems identified in the PDS and investigating them.

The examination of the websites of government organizations that oversee the work of real estate brokers has demonstrated that the information provided to consumers about the PDS and its legal implications was minimal. Brochures or the equivalent intended for consumers (buyers or sellers) were found in all provinces except New foundland and Labrador and the territories. Of those nine brochures, five mention the PDS's existence but provide little information about it. In addition to the brochures, four websites provide buyers and sellers with additional information about the PDS.

## 10. CONCLUSION AND RECOMMENDATIONS

This study has examined in-depth the context in which the PDS is used in Canada. During a real estate transaction, sellers and buyers face new situations over which they have little control. Using the PDS is among those new situations. One of the ways for buyers and sellers to optimize the PDS's use in decision-making would be to prepare in advance, in order to understand the document's usefulness and legal scope. However, several pitfalls may hinder their efforts, such as a lack of consumer information on the PDS, and the fact that only the Manitoba and Quebec forms are freely available on the Internet. In addition, the real estate brokers' standards of conduct regarding the PDS are not explained on the websites of organizations overseeing brokers, which complicates the task of consumers who would have reason to complain about brokers' work in this regard.<sup>218</sup>

- Whereas to use the PDS better, the consumer (buyer or seller) should be able to prepare in advance;
- Whereas little information on the PDS is addressed to the consumer (buyer or seller) on the websites of organizations managing that form;
- Whereas PDS forms are usually not easily available to consumers;

The ACQC recommends that organizations responsible for managing the PDS form make more information easily available to consumers (brochure, leaflet, website) and give free access to the form.

The literature review, the press review, the case law study and the comparison of forms used in Canada have revealed that producing a tool such as the PDS is not simple, because many aspects, at times contradictory, must be taken into account. Working groups assigned to develop and revise PDS forms would be better placed to take into account the divergent interests of real estate brokers, buyers and sellers than the legal departments of the organizations currently managing the PDS. The mandate of those working groups would be to determine:

- The purpose of using the form;
- The type of property covered: city house, agricultural residential or country home, condominium;
- The problems covered according to provincial peculiarities: material, immaterial (stigmatized houses, future developments, special zoning, etc.);
- The PDS limits: those regarding the property and the neighbourhood, those not in the public domain, those with an impact on the property's value, those with an impact on the seller's privacy, etc.;
- The quantity of information to be provided to the potential buyer;
- The most appropriate timing for providing the PDS so that this information is considered in the decision to purchase;
- The information to provide to the buyer and seller on the PDS's legal importance.

<sup>218</sup> Tomlinson, Kathy. *Homebuyer with huge bill not told about old leak Problem was not disclosed because repair had been done*, November 7, 2011, CBC News, <http://www.cbc.ca/news/canada/british-columbia/story/2011/11/04/bc-homedefect.html>, April 15, 2013.

Given that a house's energy consumption is a major recurring expense, the forms of all provinces should contain a question on energy efficiency or consumption. In addition, standardizing the formulation of questions in order to avoid errors of interpretation should be considered. Finally, an affirmative answer should always be accompanied by a comment.

Once the form has been drafted, it is important to ensure that the target publics will interpret it correctly. The case law study has demonstrated that errors of interpretation have led to litigation thus the necessity of validating the questionnaires before they are widely used. This validation would also ensure that the document's presentation makes it reading-friendly for the buyer.

- Whereas many factors must be considered when drafting a PDS form;
- Whereas several groups have a vested interest in the PDS;
- Whereas governments are usually better placed to protect consumers than are real estate broker associations;
- Whereas the PDS should be the starting point of the home inspection;
- Whereas the interpretation of certain PDS questions, particularly regarding verb tenses, has been recognized as a problem by the courts;

The ACQC recommends that, for each province, working groups be formed to develop and revise PDS forms, and that those groups include representatives of the provincial government, real estate brokers, legal experts, home inspectors, and consumer representatives.

The ACQC recommends that those working groups report to government organizations responsible for applying real estate brokerage laws.

The ACQC recommends that the forms be periodically revised to take into account developments in case law, in construction methods and in buyers' concerns, as well as the discovery of new problems related to buildings.

The ACQC recommends that PDS questions about home inspections be grouped so as to make it easier for home inspectors to use the form.

The ACQC recommends that PDS forms be validated before their use, to ensure that the questions are clear and not subject to interpretation by the target publics: average buyers and sellers, real estate brokers, legal experts, home inspectors.

The lack of information provided to the seller about the PDS's legal implications, notably that the disclosure of defects goes beyond what is required under the common law, is often raised by opponents of its use, and has also been invoked by the AREA to stop its use.<sup>219,220</sup> So to promote PDS use, it is important to determine how the seller could be

<sup>219</sup> Aaron, Bob. *Seller Property Information Statement – All the Ontario Cases 1997-2010*, February 2011, p. 10, <http://aaron.ca/columns/seller%20property%20information%20statement.htm>, April 15, 2013.

<sup>220</sup> Pesta, Lukos K. *Seller Property Disclosure Statements*, June 20, 2011, Calgary Real Estate Review, <http://calgaryrealestatereview.com/2011/06/20/lawyers-corner-seller-property-disclosure-statements/>, April 15, 2013.

better informed of his rights and duties regarding the PDS. We have emphasized the lack of written information provided to the consumer, as well as the need to improve the information provided to the buyer and seller about the PDS's legal importance in the form itself. Another aspect to consider is the information that should be provided by the person handing the PDS form to the buyer and seller.

Currently, the home inspector profession is regulated in only two provinces (British Columbia and Alberta), so only those provinces control the training of home inspectors. It seems preferable that the PDS be handed to the seller by a real estate broker who has the necessary training and is subject to obligations for administering the PDS, in all common law provinces.

In all provinces except Quebec, home inspectors consider that handing the PDS to a property's seller is the real estate broker's responsibility. Until recently, many Quebec inspectors had the practice of asking the seller to complete a PDS, if it had not already been done, at the moment when they proceeded to conduct the home inspection. In fact, the OACIQ encouraged this practice. Since June 2012, Quebec real estate brokers are obliged, with rare exceptions, to complete the OACIQ's PDS form with the seller, during the signing of the brokerage contract. The PDS then becomes an annex to the offer to purchase. The seller may choose not to complete the PDS, but in that case the broker cannot sign a brokerage contract with him.<sup>221</sup> In the event that a real estate transaction is made without a broker's help, the home inspector may continue the practice of handing the seller a PDS form. It would then be important for information on the PDS's legal aspects to be inserted in the form itself.

The study of the websites of the organizations overseeing real estate brokers, as well as the case law study, suggest that real estate brokers' PDS training could be improved. Those regulatory organizations should ensure the existence of training in the information that brokers should provide verbally to the buyer before the PDS is completed. The case law study has highlighted cases involving real estate brokers who were poorly informed about the PDS's legal implications, gave poor advice to sellers completing the form, or did not carry out their duty of care regarding potential problems raised by a PDS. Moreover, the existence of a code of ethics for real estate brokers enables the consumer to complain if the broker does not meet his obligations.

- Whereas the training of home inspectors is controlled by legislation only in two provinces;
- Whereas the training of real estate brokers is controlled by organizations charged with administering real estate brokerage laws;
- Whereas case law has demonstrated shortcomings in the training of real estate brokers regarding the PDS, particularly in the latter's legal implications;
- Whereas buyers and sellers do not know what services to expect from real estate brokers regarding the PDS;

The ACQC recommends that it be mandatory for the real estate broker to present the PDS form to the seller in order to provide necessary explanations to complete it. The ACQC recommends that the real estate broker present the PDS to the buyer, read it

<sup>221</sup> OACIQ. Contexte d'utilisation du formulaire obligatoire Déclarations du vendeur sur l'immeuble, *op.cit.*

with him, and provide appropriate explanations. The broker's presence enables him to probe certain issues in greater depth in order to fulfil his duty of disclosure.

The ACQC recommends that real estate brokers' PDS training be improved, and include training in the information to provide verbally to the seller or buyer.

The ACQC recommends that the real estate brokerage best practices regarding the PDS be available on the websites of government organizations overseeing the work of real estate brokers. References to the code of ethics would facilitate consumer remedies and claims.

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