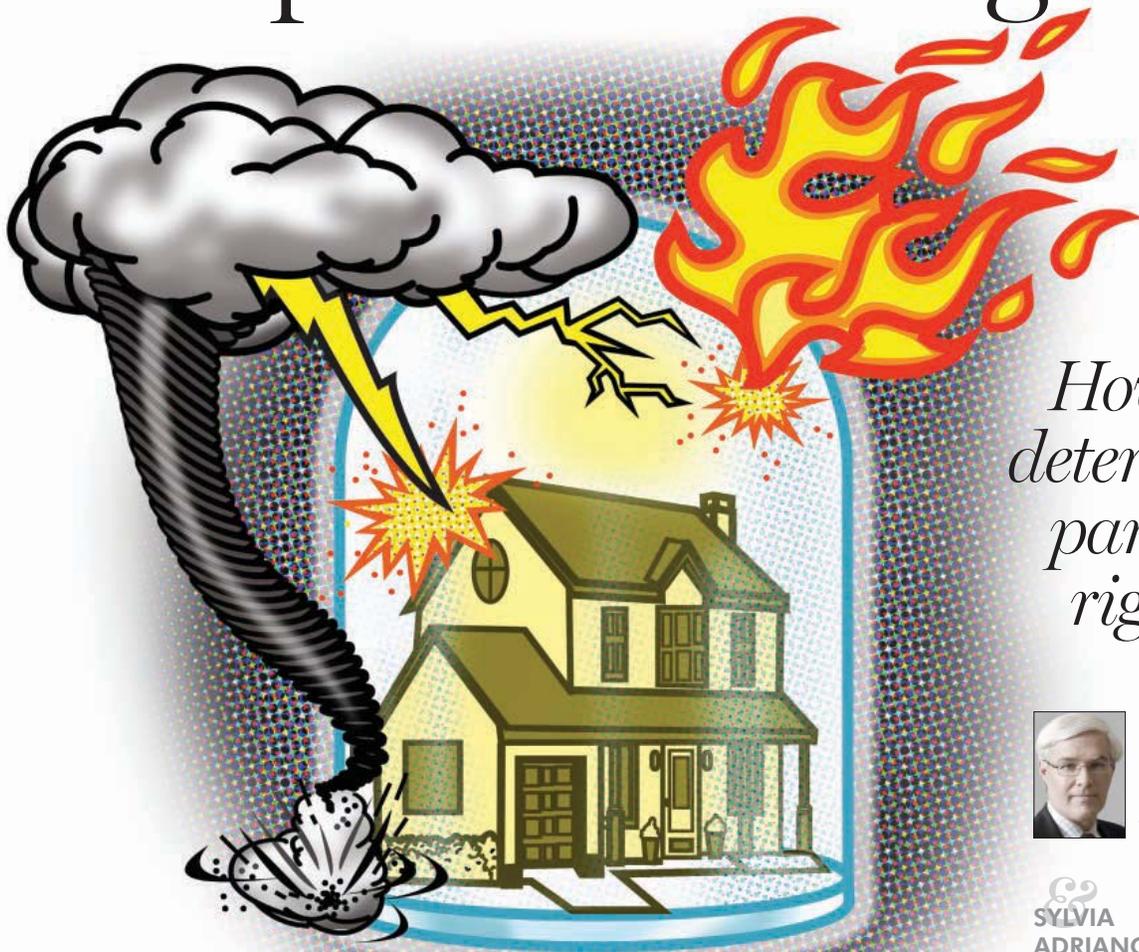


# FOCUS

ON

## Real Property

# Damage to property prior to closing



*How to determine parties' rights*



**BRAD  
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Purchasers and vendors face difficult decisions when something unexpected happens to the property between the time the agreement of purchase and sale is signed and the transaction closes. Events such as a fire, water damage or the discovery of environmental contamination on or under the property can have costly consequences. Purchasers and vendors need to understand what their rights and obligations are.

The standard risk and insurance clause in agreements of purchase and sale says that the property remains at the risk of the vendor until closing. If there is "substantial" damage to the property prior to closing, the purchaser has the right to either terminate the agreement and have deposit moneys returned or take the proceeds of the insurance policy and complete the purchase. Whether damage in a particular transaction is "substantial" will

depend on the circumstances of the transaction.

In *Wile v. Cook*, [1986] S.C.J. No. 48, the property burned down the day before closing. The purchaser and vendor agreed to extend the closing date for two weeks so the purchaser could contact the vendor's insurer. Although the purchaser was able to satisfy itself that the vendor had sufficient insurance coverage to allow the purchaser to take the insurance proceeds and close the transaction, there was a

possibility that the insurer might deny coverage because the fire may have been deliberately set.

The Supreme Court of Canada held that the purchaser, in such circumstances, was entitled to a reasonable period of time to assess its position and obtain information about the amount of the vendor's insurance coverage. However, the standard insurance clause did not give the purchaser the right to wait and see if the insurer would pay out

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Real Property

# Vendors must reveal discovery of radioactivity prior to closing

### Damage

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under the insurance policy. If the purchaser was concerned that the insurer might not pay the insurance proceeds, the appropriate action for the purchaser could be to terminate the agreement.

Water damage can also substantially affect the value of the property. Where there is water damage prior to closing, there should be an assessment of the extent of the water damage and

cost to clean up and repair the damage caused by the water. It is critical that the vendor advise its insurer immediately about the water damage and the purchaser make the necessary inquiries of the vendor and its insurer, so the purchaser can make an informed decision whether to close the transaction with the insurance proceeds or terminate the agreement.

A further event that can have a significant impact on the parties is the discovery prior to closing of environmental contamination on

or under the property. In *Sevidal v. Chopra*, [1987] O.J. No. 732, the vendors discovered, after the purchase agreement had been signed and before closing, that there was radioactive material on the property being sold. They did not disclose this information to the purchaser prior to closing. The court held that there was an obligation on the vendors to disclose to the purchaser the existence of the radioactive material when the vendors learned about this in the interval between the signing of

the purchase agreement and closing of the transaction.

The standard risk and insurance clause in purchase agreements sets out the rights of the parties and *Wile* provides helpful guidance to the parties about the operation of the clause. Purchasers and vendors, and their lawyers, need to be aware of the standard clause and the case law dealing with the clause and the disclosure of certain latent defects that are discovered prior to closing.

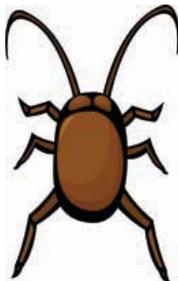
When damage occurs prior to

closing, there is often not much time for the parties to assess their positions. They will need to move quickly to determine whether the transaction should still be completed and who is responsible for the cost of the damage to the property or the cleanup of the contamination. ■

*Brad McLellan and Sylvia Adriano are partners at Weir-Foulds LLP in Toronto and members of the firm's Commercial Real Estate Group.*

## Lawddities

An oddity in Real Property Law



### Spending scandal exposed at social housing agency

An auditor general's report recently revealed lavish spending at a Toronto social housing agency—while low-income tenants wait for much-needed repairs to their apartments.

The city's auditor general released a report showing the Toronto Community Housing Corporation spent thousands of dollars on pricey chocolates, massages and lavish parties, as well as accepting untendered contracts. At the same time, many of the agency's cash-strapped tenants await badly needed repairs to their units while battling cockroaches and other pest infestations, according to Citytv.com.

Now we know where our tax dollars have been going.

—Natalie Fraser



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