# Must Seller of Land Disclose Environmental Contamination to Buyer?



**Scenario:** A company buys land it thinks is environmentally fit for a certain business use. Only after the sale closes does it discover that the land is contaminated and can’t be used for the intended purpose. The buyer also discovers that the seller knew about the contamination but never said anything about it.

**Question:** Is the seller’s failure to disclose the contamination grounds for money damages or rescinding the sale?

**Basic Rule:** If contamination constitutes a “patent defect” that a buyer could and should have discovered for itself, the seller doesn’t have to disclose it. But sellers do have to disclose contamination that’s considered a “latent defect” that a reasonable buyer wouldn’t be expected to uncover. Here are two cases showing how these venerable principles of contract law play out in actual land sales.

## Seller Must Disclose Latent Defect Contamination

Here’s a case where a court ruled that contamination was a latent defect that the seller had to disclose.

## Situation

A real estate developer hires a firm to test the subsoil of a lot on which it intends to build a home. Testing reveals uncompacted landfill several feet deep. According to the engineering report, the condition threatens the integrity of the proposed building and will cost a lot of money to remedy. So, the developer scraps the construction. A year later, it sells the lot to a construction company that it knows intends to build a house on the land without disclosing the contamination. When the buyer discovers the subsoil problem it sues the developer.

## Ruling

The British Columbia Supreme Court orders the developer to pay the buyer damages for failure to disclose.

## Reasoning

The normal rule of *caveat emptor*—Latin for let the buyer beware—doesn't apply to land sales involving "latent defects that are actively concealed by the seller." The developer knew perfectly well that the land was unsuitable for building a home unless the soil was excavated and replaced and that the buyer didn't have the money for such measures. Moreover, the defect wasn't one the buyer could have reasonably been expected to discover. "There was no hint or clue of anything untoward" about the land that would suggest the need for testing, said the court. Houses had been built on other lots in the same subdivision, and the city had already issued a building permit for the lot. The contract also said that the seller was delivering a "fully serviced building lot."

*Hartnett v. Wailea Construction Ltd.*, [1989] B.C.J. No. 497

# Seller Need Not Disclose Patent Defect Contamination

Here’s a case where contamination was determined to be a patent defect that the seller didn’t have to disclose.

## Situation

The owner of a metal stamps plant uses varsol, a substance that Ontario environmental law classifies as a hazardous waste, to clean machinery and then dumps the chemical on the back of its property. An environmental consultant’s report also warns the owner of the high risk that dirty varsol has migrated onto neighbouring properties. Less than two years later, the owner sells the land to a developer who intends to get the property re-zoned and build a condominium complex. The seller doesn’t disclose the contamination. The buyer learns of the problem two months after closing and sues to rescind the sale.

## Ruling

The Ontario Court of Appeal says the seller didn’t have to disclose the contamination and denies rescission.

## Reasoning

At most, the contamination was a patent defect that the buyer could easily have discovered before the sale. It knew the property was zoned for industrial use and that a factory had been operating on it for years. But it chose not to conduct any physical inspection, environmental site assessment, or standard soil testing before buying the land. And unlike the seller in *Hartnett*, the factory owner didn’t know that the buyer intended to use the land for residential purposes. Also unlike in the BC case, the contract didn’t make any representations about the property’s environmental condition.

*Tony's Broadloom & Floor Covering Ltd. (Trustee of) v. NMC Canada Inc*., 1996 CanLII 680 (ON CA)