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## Court ruling rattles home inspectors

The home inspection industry in Canada may never be the same again following the decision of the British Columbia Supreme Court last week in the case of *Salgado v. Toth*\*.

Back in September 2006, Manuel Salgado and Nora Calcaneo signed an agreement to buy a house in North Vancouver for \$1,095,000. The contract was conditional on financing and a home inspection.

At the recommendation of their real estate agent, the buyers hired Imre Toth and his company HomePro Inspections to prepare a home inspection report for the property. Toth inspected the interior of the house, then spent another 30 minutes examining the roof and the rest of the exterior.

The contract Toth signed with the buyers stated that the inspection and report could not be used as a warranty of the condition of the house, and in the event the inspector was found liable for negligence or breach of contract, his liability would be limited to the \$450 cost of the report.

After the inspection, Toth provided both a written and verbal report to Salgado and Calcaneo. He noted a number of structural deficiencies and told his clients that repair costs would be in the neighbourhood of \$15,000 to \$20,000. On that assurance, the buyers closed the deal.

After closing, the new owners discovered serious problems with the wooden structural beams of the house due to rot and moisture. As well, it turned out that the south part of the house was sitting on fill that had not been properly compacted and the structure itself was settling and unstable.

The buyers sued Toth, the sellers and the real estate agents. The case against the former owners was settled before trial and the claim against the agents was discontinued. The only defendants remaining at trial were Toth and his company.

After a five-day trial, Justice Grant Burnyeat awarded the buyers \$192,920, representing the restoration costs of \$212,920, minus Toth's original \$20,000 estimate.

The judge ruled that Toth was negligent in not inspecting all of the structural beams and in failing to draw to the buyers' attention that the rot was much more widespread than he indicated to them.

The judge found that Salgado and Calcaneo would not have bought the house and would not have suffered damages had they known the full extent of the rot on the east and west side beams of the house. The judge also ruled that Toth was negligent in failing to advise the buyers to retain a geotechnical engineer before waiving the inspection condition in the offer. They relied on Toth's advice regarding the stability of the house and suffered damages as a result of that reliance.

Toth's repair estimate, said the judge, was "woefully inadequate." The judge decided that the repair estimate Toth provided led the buyers to believe that the structural expenditures would not be excessive and that the problems were not significant.

He awarded them the actual cost of the necessary structural changes, including engineering costs. With respect to the exclusion of liability in Toth's inspection contract, the evidence showed that the buyers never read the contract before signing it. The court decided that it was incumbent on Toth to draw to Salgado's attention the exclusion and waiver clauses in the contract and ensure that he understood them.

Since that didn't happen, the judge ruled the exclusion of liability paragraph didn't apply.

An award approaching \$200,000 in a home inspection case is virtually unheard of in Canada. My guess is that the case will result in an end to "quickie" home inspections.

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### \*Salgado v. Toth, 2009 BCSC 1515 (CanLII)

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Date: 2009-11-09

Docket: S073646

URL: <http://www.canlii.org/en/bc/bcsc/doc/2009/2009bcsc1515/2009bcsc1515.html>

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#### Decisions cited

- [Bauer v. Bank of Montreal](#),  reflex 110 D.L.R. (3d) 424
- [Fraser Jewellers \(1982\) Ltd. v. Dominion Electric Protection Co.](#), 1997 CanLII 4452 (ON C.A.) 34 O.R. (3d) 1 148 D.L.R. (4th) 496 32 B.L.R. (2d) 1 101 O.A.C. 56
- [Karoll v. Silver Star Mountain Resorts](#), 1988 CanLII 3094 (BC S.C.) 33 B.C.L.R. (2d) 160
- [Queen v. Cognos Inc.](#), 1993 CanLII 146 (S.C.C.) [1993] 1 S.C.R. 87 99 D.L.R. (4th) 626 45 C.C.E.L. 153 60 O.A.C. 1

## IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:	<i>Salgado v. Toth</i> ,
	2009 BCSC 1515

Between:

Manuel Ignacio Salgado and Nora Gabriela Calcaneo

Plaintiffs

And

Imre Toth and 659279 B.C. Ltd. doing business as HomePro Inspections, Grahame Harold Shannon, Shirley Yap Shannon, The District of North Vancouver and Cesar Parayno

Defendants

Before: The Honourable Mr. Justice Burnyeat

## Reasons for Judgment

Counsel for Plaintiffs:	F.R. Eadie
Counsel for Defendants Imre Toth and 659279 B.C. Ltd., dba HomePro Inspections:	G.S. Miller and C. Tham
Place and Date of Trial:	Vancouver, B.C. May 25-29, 2009
Place and Date of Judgment:	Vancouver, B.C. November 9, 2009

[1] The Plaintiffs purchased a property in North Vancouver having a building lot that had a steep slope along the southern perimeter of the lot ( Property ) and a house consisting of an **Alframe structure built during the early 1960s and an addition that was constructed in the late 1980s ( House )**.

[2] The former owners listed the Property for sale during the summer of 2006 at a listing price of \$1,195,000.00. By a September 15, 2006 contract of purchase and sale ( Agreement ), the Plaintiffs agreed to pay \$1,095,000.00 for the Property with the purchase to complete on October 27, 2006. The Agreement was subject to an inspection report and bank approval to the Buyers satisfaction on or before 5 week days after acceptance .

[3] At the recommendation of their real estate agent, the Plaintiffs retained the Defendants, Imre Toth and 659279 B.C. Ltd. doing business as HomePro Inspections ( Mr. Toth ) to prepare an inspection report for the Property. Mr. Toth came to the Property, inspected the House, and provided both a written and a verbal report to the Plaintiffs. Mr. Toth received \$450.50 for his services.

[4] The Plaintiffs allege that Mr. Toth made certain statements about the cost of repairing the Property and that those representations constitute negligent misrepresentations that were relied upon by the Plaintiffs. At the same time, the Plaintiffs allege that Mr. Toth conducted the inspection of the Property in a negligent manner and failed to identify and warn the Plaintiffs of a number of material defects. Mr. Toth denies those allegations, and, in any event, relies on his contract with the Plaintiffs to limit any liability that he might have.

[5] The Plaintiffs have settled with the Defendants, Grahame Harold Shannon and Shirley Yap Shannon, who were the former owners, have discontinued their action against Alfredo Lavaggi and Sussex Realty Corporation, carrying on business as Prudential Sussex Realty and the said Sussex Realty Corporation, and have discontinued their action against the District of North Vancouver and Cesar Parayno, an engineer. Accordingly, the Plaintiffs do not seek from the Defendants any damages or other relief for any portion of the loss, damage or expense alleged which may be attributed to the fault of those Defendants and expressly waive any right in this Action to recover from the Defendants, Imre Toth and 659279 B.C. Ltd., any amount which the other Defendants would be liable to indemnify Imre Toth and 659279 B.C. Ltd. in third party proceedings.

[6] By agreement, the parties accept that the cost of remedial work to remedy certain problems with the House totals \$192,920.45, made up as follows: (a) A Frame Beams west side of the House (\$35,000.00); (b) A Frame Beams east side of the House (\$18,800.00); (c) Stabilization of House (\$56,800.00); (d) Engineering (\$26,269.00, comprised of costs incurred to date of \$16,269.00, and estimated future costs of \$10,000.00); (e) West side deck removal (\$9,360.00); (f) replacement of the west deck (\$24,100.00); and (g) a shoring up of the east deck (\$11,500.00).

[7] With G.S.T. of \$9,091.45, and a contingency of \$22,000.00, the total cost of the required remedial work is \$212,920.45. From that amount, the Plaintiffs subtract the \$20,000.00 that Mr. Toth estimated the remedial work would cost and claim \$192,920.45, as well as pre-judgment interest and Scale B costs.

### **BACKGROUND**

[8] Alfredo Lavaggi was a realtor who was contacted by the Plaintiffs. Mr. Lavaggi introduced the Property to the Plaintiffs and acted as their agent with respect to the purchase of the Property.

[9] At the recommendation of Mr. Lavaggi, Mr. Toth was requested to prepare a home inspection report. Mr. Toth inspected the Property and House on September 21, 2006. In accordance with his testimony at Trial, I find that Mr. Toth took about 30 minutes to inspect the roof and the rest of the exterior of the House . I make no conclusions about how long Mr. Toth spent to inspect the interior of the House.

[10] After completing his inspection, Mr. Toth met with the Plaintiffs, discussed what was in the written part of his report, discussed other matters about the Property and the House with the Plaintiffs, and received payment from the Plaintiffs for providing his services. Sometime during that meeting, a contract with the Defendant, 659279 BC Ltd. doing business as HomePro Inspections, was signed by Mr. Salgado ( Contract ). Ms. Calcaneo did not sign the Contract. While the Contract defines 659279 BC Ltd. dba HomePro Inspections as the Inspector , the Contract is signed by Mr. Toth in a space above the words: INSPECTOR IMRE TOTH 659279 BC LTD. HOMEPRO INSPECTIONS .

[11] After receiving the written and verbal report of Mr. Toth, Mr. Salgado phoned Mr. Lavaggi to discuss what he had been told. At his March 12, 2008 Examination for Discovery, Mr. Lavaggi was asked the following questions and gave the following answers:

Q. But he [Mr. Salgado] might have said there s a reference here to a structural problem?

A. He did mention, as I said to you before, that he was told there was structural and foundation problems.

Q. Did he indicate to you what the extent of those problems were? Other than

A. He talked about it and that they were major, that they were significant.

Q. Did he say what the dollar value of the problem was?

A. I don't recall.

[12] The Plaintiffs removed the subject clauses on the Agreement, the purchase in the name of both Plaintiffs completed on schedule, and the Plaintiffs took possession of the Property.

### THE CONTRACT

[13] The Contract signed by Mr. Salgado on September 21, 2006 contained a number of provisions, including the following (capitalization and bold print as set out in the Contract):

1. The INSPECTOR will perform a VISUAL INSPECTION of the readily accessible and visible areas of the major systems and components of the Primary Residence on the Property and certain built-in equipment and improvements. The inspection and report are not intended to reflect on the market value of the Property nor to make any recommendation as to the advisability of purchase.

2. The condition of certain systems, components and equipment will be randomly sampled by the inspector. Examples of such systems, components and equipment are window/door operation and hardware, electrical receptacles, switches and lights, cabinet/countertop mounts and functions, insulation depth, mortar, masonry, paint and caulking integrity and roof covering materials. Furniture, rugs, appliances, stored items, etc. will not be moved for the inspection.

3. The INSPECTOR will give a professional opinion on whether those items inspected are performing their intended function at the time of the inspection or are in need of immediate repair. The inspection and report are based upon observations of conditions that exist at the time the inspection was performed.

4. Cost estimates, if provided, are ballpark estimates only and are not intended to be relied upon by any person for accuracy. The CLIENT should obtain written bids from qualified licensed contractors in order to determine the possible cost of repairs.

5. This inspection is performed in accordance with the **Code of Ethics and Standards of Practice of the Canadian Association of Home and Property Inspectors (CAHPI), a copy of which is attached to this report.**

6. The Client is encouraged to participate in the visual inspection process and accepts responsibility for the consequences of electing not to do so, i.e. incomplete information being available to the Inspector. This Client's participation shall be at the Client's own risk for injuries, falls, property damage, etc;

**9. THE INSPECTION AND REPORT ARE NOT INTENDED NOR ARE TO BE USED AS A GUARANTEE OR WARRANTY, EXPRESSED OR IMPLIED, REGARDING THE FUTURE ADEQUACY, PERFORMANCE OR CONDITION OF ANY INSPECTED STRUCTURE, ITEM OR SYSTEM. THE INSPECTOR IS NOT AN INSURER OF ANY INSPECTED CONDITIONS.**

13. It is understood and agreed that should the INSPECTOR be found liable for any loss or damages resulting from a failure to perform any obligations, including but not limited to negligence, breach of contract, or otherwise, then the liability of the INSPECTOR shall be limited to a sum equal to the amount of the fee paid by the CLIENT for the Inspection and Report.

15. In the event that the CLIENT claims damages against the INSPECTOR and does not prove those damages, the CLIENT shall pay all legal fees, arbitrator/mediator fees, legal expenses and costs by the INSPECTOR in defence of the claim.

16. By signing the Property Inspection Contract, the CLIENT acknowledges, covenants and agrees that:

- a) The CLIENT understands and agrees to be bound by each and every provision of this contract;
- b) The INSPECTOR has not made any representations or warranties other than those contained in the Contract;
- c) The TOTAL fee payable at the time of the visual inspection of the Subject Property shall be \$450.50.
- d) The CLIENT shall pay the fees described above to the inspector without set-off or deduction.

[14] At Trial, Mr. Toth stated that he understood that the Plaintiffs would be available at 12:00 noon on the 21<sup>st</sup> so that he could provide them with his presentation regarding the inspection. The Plaintiffs did not arrive as Mr. Toth anticipated:

I cannot recall exactly the time when they arrived. And I believe I expressed my frustration, because we agreed upon a time, and I felt ignored and disrespectfully treated, so I was having quite a [frustrating] time. I expressed that I have other things to do than waiting for people, and I scheduled this, as I told, my presentation between 12:00 and 1:00, and I have other things to do. And that was what I said, and then I started discussing the report.

[15] At his December 26, 2008, Examination for Discovery, Mr. Salgado stated that he arrived at the Property at about 12:30. I conclude that the presentation of Mr. Toth took between 30 and 45 minutes, and, in addition to the written and verbal report provided by Mr. Toth, Mr. Toth and the Plaintiffs visited some of the areas within the House during that time. At Trial, Mr. Toth was asked how long he spent after the presentation of the written and verbal report going through the House with the Plaintiffs and he stated: 15, 20 or more minutes after the structural presentation.

[16] At Trial, Mr. Toth stated that his contract would usually be signed by both parties at the beginning of the inspection if all parties were present but, if not present, then at the time before the inspection was discussed. At Trial, Mr. Toth stated that it was his usual practice that approximately 99% of his written report was fully blank until the presentation with my client starts, but that, if the client was not present, then for time management and killing the empty time, he would fill in most if not all of the written portion of his report prior to the client being present. Mr. Toth stated that the Contract was signed before any kind of presentation on September 21, 2006. I find that the Contract was signed after virtually all of the written portion of the report was added to the report.

[17] At his October 17, 2007 Examination for Discovery, Mr. Toth stated that he completed the report, invited the Plaintiffs to sit down, and then introduced this inspection report system. At Trial, Mr. Toth stated that, after Mr. Salgado filled in his name and address on the Contract, he then said to Mr. Salgado:

This is the property inspection contract. Opening the book, showing the contract, I told, in Canada, every home inspection conducted by a member of the national association has to have this written agreement signed. I did my part. I masked him to review it and fill the top part and sign it at the bottom. He reviewed it and then signed it, filled it and signed it.

Since I'm not sure my clients how much they understanding or reading from my contract, this is my standard practice, to briefly point out three major elements. I'm calling them three major elements. Is the number 1 is inspection this regarding to the scope of inspection, sentences 1 to 4. I briefly summarizing those section as the nature of my inspection is visual inspection. ...

And then second cornerstone or significant information is I'm following the standard of practice and code of ethics ... and that was the 5 and 6. And I called the so-called sentence number 9 printed in bold capital lettering, I named it as a third major information, it telling inspection is not an insurance policy, not a warranty or assuring or one of the any conditions. This is a standard no matter how much time my clients spending reading or not reading, I'm pointing always out these three areas.

### WRITTEN REPORT

[18] The written report prepared by Mr. Toth started with a THE BIG PICTURE/SUMMARY page. The form of report was prepared by Mr. Toth after consulting with a lawyer and after incorporating the recommended contract form of the Canadian Association of Home and Property Inspectors of B.C. ( CAHPI (BC) ). The Big Picture/Summary page set out eight separate areas of the inspection, rating each of the eight sections as average, above average or below average, as well as setting out major points of concern , setting out significant qualities , and setting out whether major/minor repairs were recommended .

[19] The rating for **STRUCTURE** was half-way between average and below , and all of the words Major/Minor Repairs Recommended were underlined. The **ELECTRIC**, **PLUMBING**, **KITCHEN** and **EXTERIOR** are all rated as Average . The **HEATING/VENTILATION/AC** and the **INTERIOR** were rated as between average and above average. The **UNDER HOUSESPACE** was also rated as between above average and average. Minor repairs were recommended for the **ELECTRIC** and minor repairs and maintenance were Recommended for the **PLUMBING** and **ELECTRIC** components. Maintenance was recommended for the **HEATING/VENTILATION/AC COMPONENT**. The **SIGNIFICANT QUALITIES** were noted as being 200 A service , Newer furnace , and Well maintained clean interior . The **MAJOR POINTS OF CONCERN** for the **STRUCTURE** were described as follows: To fix-up structural deficiencies . The comments under the headings **MAJOR POINTS OF CONCERN** and **SIGNIFICANT QUALITIES** were handwritten onto the report form. The next part of the written report dealt with each of the eight components and comprised two pages for each of the eight components.

[20] On the first page for the component **STRUCTURE**, the following was noted:

SETTLEMENT NOTED:  Slight  Moderate  Ongoing?

SOIL EROSION NOTED:  No  Yes South SW

[21] The only marks or words that were not on the printed form were the question mark after the word ongoing and the words South SW after the word Yes . There was a check mark beside the printed words: CHECK WITH PROFESSIONAL ENGINEERING/PEST CONTROL CONTRACTOR OR \_\_\_\_\_ FOR COMPLETE INFORMATION .

[22] The printed heading on the next page dealing with **STRUCTURE**, was: **SIGNIFICANT STRUCTURAL DEFICIENCIES** . On this page, there were number of printed Descriptions . There was a column where a tick mark could be placed to indicate that a particular description applied, a second column to write in the Location where the description applied, and two columns to allow tick marks to be added to indicate whether Repair or Upgrade or both were suggested. The following printed descriptions had tick marks beside them, with the Location, Repair and/or Upgrade columns as noted:

- (a) Unstable soil conditions/erosions (location being S, SW , and repairs and upgrade ticked);
- (b) Solitary foundation movements (location being S side, deck, SW (?), and repairs ticked);
- (c) Floor sag (location being SW living rm (bsmt) settled to South , but without repair or upgrade ticked); and
- (d) Wood deck unstable, lateral support missing (with both repair and upgrade ticked).

[23] In addition to those descriptions that were printed on the form, the following additional comments were handwritten in by Mr. Toth:

- (a) Wood decks 6x6 posts have no bracing in any directions, new braces must be added. N side framing (posts and beam) moved, doesn t support the deck any more. Raise the top of beam to support joists.
- (b) SW deck structure solitary foundations have major settlements, post base soil connection structure has no proper connection to house. To lift-up, and reinforce foundation & posts.
- (c) Two West side timber rafters near foundations are decayed, water damaged.
- (d) SE corner of garage conc. structure cracked.

For each of (a), (b) and (c), the repair column was ticked but the upgrade column was not.

[24] The other seven areas of inspection contained somewhat unimportant notations on the two printed pages for each of the seven separate areas of the inspection:

- (a) **UNDER HOUSESPACE** mouse droppings in furnace rm (with the **SIGNIFICANT UNDER HOUSE DEFICIENCIES** being noted as Occasional seepage possible, to drain backyard! and Property grading pooling water against house N. side (backyard) , with both noting a suggested Upgrade );
- (b) **ELECTRICAL** with the **SIGNIFICANT ELECTRICAL DEFICIENCIES** notations Wires / boxes uncovered / loose Furnace rm, Exterior E and Tree branches / vines interfering with cable , with both noted as requiring Repair ;
- (c) **PLUMBING** a number of repairs were recommended, but nothing of a particularly significant nature;
- (d) **HEATING/VENTILATION/AIR CONDITIONING** (with the only **SIGNIFICANT H/V/AC DEFICIENCIES** being Fireplace damper warped, not closing Family rm);
- (e) **KITCHEN** had two matters noted: Refrigerator handle loose and Countertops have swollen joints ;
- (f) **INTERIOR** was a notation Mouse droppings in furnace room . There were a number of **SIGNIFICANT INTERIOR DEFICIENCIES** noted but none that bear on the questions between the parties involving this litigation;
- (g) **EXTERIOR** , the **SIGNIFICANT EXTERIOR DEFICIENCIES** were noted as: Retaining wall has no weep holes, add new, drill drains in conc. wall along stair , Finished grading high, lowering 6 below siding required NE, E, Yard has no proper drainage pooling rain water N patio area , Debris to remove from E side , and 50% of garage roof, 100% of N overhang roof, 90% of walkway roof, ponding water, new drainage recommended at low points . Upgrades were recommended for all those deficiencies .

[25] After the first significant rainfall, the Plaintiffs noted leakage from the roof above the area that had been established as a family room. As a result, repairs were made to the roof. The Plaintiffs had discussions with a contractor who provided them with estimates of what it would cost to undertake the repairs of the areas in the report of Mr. Toth that required attention. The Plaintiffs also had William E. Clayton undertake an inspection of the Property

#### REPORT OF WILLIAM E. CLAYTON

[26] Mr. Clayton went to the Property in mid-December 2006 and undertook a cursory inspection. That involved taking no notes but taking photographs which are in evidence. The photographs taken in December 2006 clearly show well-established rot in a number of the **Alframe members**. While the written report of Mr. Toth had indicated: Two West side timber rafters near foundation are decayed, water damaged and while Mr. Toth did not inspect the structural members on the east side of the **Alframe** part of the House as he did not attempt to access a room which housed the east side structural members, Mr. Clayton found substantial problems with almost all of the **Alframe beams**.

[27] At Trial, Mr. Clayton was qualified to provide an expert opinion regarding home inspections and the responsibility of home inspectors. His May 13, 2009 opinion was in evidence. In that opinion, he was asked the following questions and provided the following answers:

#### Alframe Beams

Q1. Please advise if there is any material difference in the state of the structure since your inspection of the structure in November or December of 2006.

A1. Since my inspection on 17 December 2006, the rot conditions in all visible portions of the **Alframe members** appear to have progressed and are more extensive. At the time of my 2006 inspection, the rot appeared to be well established.

Q2. Please examine the balance of the exposed **Alframe rafters** on the west side of the house and advise whether or not they are also in need of repair.

- A2. I examined all the exposed A-frame members on the west side of the house May 5th and advise that, in my opinion, all of the members, except the first one at the northwest corner, need extensive repairs and replacement of the majority of the exposed exterior portions.
- Q3. Please examine that portion of the structure [the horizontal beam at the south end of the A-frame structure] and advise as whether or not it is need of repair.
- A3. I inspected the southernmost beam in the crawlspace. It is in an advanced state of rot. My knife easily penetrated 3 into the members. Water was weeping out of the wood. There were numerous fungal organisms growing on the wood members. In my opinion, these members will need to be replaced as they cannot be repaired.
- Q4. Please describe the state of the A-frame rafter on the East side and advise whether or not they are in need of repair.
- A4. Examination of the east side, southernmost A-frame reveals extensive rot immediately above the deck. It appears that an attempt has been made in the past to cover-up the condition or hide the condition possibly before the last time the house was painted. In my opinion, repairs are required.
- Q5(a). Once the house inspector determined that two of the rafters were rotten, what steps should the house inspector have taken, what should the house inspector have reported to the client and what recommendations should the house inspector have made to the client.
- A5(a) In my opinion, a prudent inspector in this market place at that time, would have checked the condition of all of the similar structural members and reported the condition in writing and in discussion with the client and would most likely have physically shown the client the condition. A prudent inspector would have recommended that a (structural) engineer, experienced in heavy timber construction be engaged to review the condition and make further recommendations with respect to repair and costs for repairs.
- Q5(b) In order to be consistent with the standards in the industry, what steps would a house inspector take with respect to the inspection of the A-frame rafters on the East side of the A-frame structure, particularly given the fact that he had identified two of the rafters on the West side of the structure as being rotten.
- A5(b) The standards used by Mr. Toth and referred to in his Property Inspection Contract are the Canadian Association of Home and Property Inspectors (CAHPI) Standards of Practice. Those Standards only require that the inspector inspect and probe ... a representative number of structural components where deterioration is suspected or where clear indications of possible deterioration exist.
- In spite of the conditions imposed by the Standards, and as explained in A5(a) above, I believe that a prudent inspector would have inspected and reported on all of the A-frame members, not just some of them as required by the Standards.

Stability of House

- Q2. Given those observations, in order to be consistent with the standards in the industry, what steps would a house inspector take and what would be reported to the client and recommended to the client? In this regard, please make whatever comments you deem appropriate with respect to the reference in the house inspection report prepared by Mr. Toth to settlement and advise whether or not you believe those comments are consistent with the standards in the industry give the conditions observed.
- A2. The CAHPI Standards of Practice require that an inspector report on those systems and components inspected which, in the professional opinion of the inspector, are significantly deficient or are near the end of their service life.

In my opinion, the condition of the A-frame members were significantly deficient at the time of the inspection and should have been reported as such. Also in my opinion, the location of the foundations very close to the juncture between the house construction site and the steep slope, regardless of their condition, should have caused a prudent inspector to recommend that his clients consult a geotechnical engineer prior to completing their purchase decision.

In his report Mr. Toth indicates on The Big Picture / Summary page that the structure is below average, and that the MAJOR POINTS OF CONCERN: are To fix-up structural deficiencies

Further in the report in the Structure page, Mr. Toth notes 1) Moderate settlement and suggests that it may be ongoing 2) soil erosion a [sic] the south SW and 3) a check mark beside Check with professional Engineer/pest control contractor but does not specifically indicate the exact concern.

On the Significant Structural Deficiencies page, Mr. Toth indicates that there are Unstable soil conditions / erosion at the S, SW which require repair & upgrading and that solitary foundation movements at the S side dec, SW (?) need repair, and that floor sag SW living rm (bsnt) settled to South without any recommendation;

and that wood deck unstable, lateral supports missing and in need of repair and upgrading;

and that wood deck s 6x6 posts have no bracing in any directions, new braces must be added. N side framing (posts and beam) moved, doesn t support the deck any more. Raise the top of the beam to support joists. Repair needed;

and that SW deck structure, solitary foundations have major settlements, post bases have soil connections, structure has no proper connection to house. To lift-up and reinforce foundations & posts Repairs needed;

and that two West side timber rafters near foundations are decayed, water damaged. Repairs needed.

Mr. Toth has reported many of the structural deficiencies and recommended that his client should check with professional engineer . In this respect, the report appears to meet the intentions of the Standards of Practice. but, in my opinion, Mr. Toth s report is deficient in as much as it does not make any recommendation to have a geotechnical review of the Property and that the report does not clearly present the significance of the problems observed.

- Q3. Assuming that Mr. Toth verbally advised that the slope stability Issue or settlement issue related to the supports for the decks on the south side of the A-frame portion of the structure and that the cost of repair would be in the order of \$15,000, was Mr. Toth s advice consistent with the standards of the industry. If not, why not?
- A3. The Standards of Practice are silent on the provision of repair estimates.

Mr. Toth s contract states that 4. Cost estimates, if provided are ball-park estimates only and are not intended to be relied upon by any person for accuracy. The CLIENT should obtain written bids from qualified licensed contractors in order to determine the possible cost of repairs.

There are no repair costs provided in Mr. Toth s written report, therefore any cost estimates provided must have been verbal. Some inspectors provide order-of-magnitude estimates verbally to their clients, and in this respect, Mr. Toth appears to be consistent with industry practices although the provision of such estimates are beyond the requirements of the Standards of Practice.

If Mr. Toth did provide a repair estimate of \$15,000, it would appear to be insufficient, based on the significance of the deteriorated condition of the structure and decks that were evident at the time of his inspection. Given the limited time that Mr. Toth spent on site and the time required to adequately inspect and report on this somewhat complex structure, there was little time available for Mr. Toth to consider and provide a ball-park estimate that would be a reasonable reflection of the conditions noted in the house.

[28] Mr. Clayton summarized his findings regarding the beams of the House as follows:

Grid	A-Frame	Beam	Comments
West			
A1	No rot evident	No beam visible	
A2	Rot north & south	Rot north & south	Bent & beam repaired, not original.

			Rot in both original and repaired beams.
A3	Rot north & south	Rot north & south	Bent & beam repaired, not original. Beam rot in new/repaired portion only
A4	Rot north & south	Rot south	Bent & beam repaired, not original. Rot in original beams only.
A5	Rot north & south	No rot visible.	
A6	No rot visible	Rot north	Rot in both original and repaired beams.
East			
G5	Rot south	Rot north & south	Original bent without splices.
G6	Rot north & south	Rot north & south	Original bent without splices. Rot in bent above deck & in crawlspace.

## DISCUSSION AND CASE AUTHORITIES

[29] In order for negligence to be established, the Plaintiffs must establish on a balance of probabilities that the Defendants owed the Plaintiffs a duty of care, the standard of care required of a home inspector, that the Defendants breached the duty of care owed to the Plaintiffs by failing to meet the requisite standard of care, and that the breach of the duty of care caused the Plaintiffs to suffer damages.

[30] In order to establish the tort of negligent misrepresentation, it is necessary to prove that there was a duty of care based on a special relationship between the parties, a representation was made by one party to the other, that representation was false, inaccurate or misleading, that misrepresentation was made negligently, the person to whom the representation was made must have reasonably relied on the representation, and the reliance must have been detrimental to that person with the consequence of the person suffering damages: *Queen v. Cogan Inc.*, 1993 CanLII 146 (S.C.C.), [1993] 1 S.C.R. 87.

[31] The Plaintiffs allege that the Defendants breached their duty of care by failing to inspect all of the **Alframe beams for rot and moisture**, by failing to fully advise the Plaintiffs regarding the extent of the structural problems relating to the House, by failing to advise the Plaintiffs that a structural engineer should be retained by them, and that Mr. Toth made various statements regarding the cost of correcting the problems that he found, and that the statements amounted to negligent misrepresentation.

[32] It is not disputed by the Defendants that the Defendants owed the Plaintiffs a duty to conduct the home inspection and prepare the report in a competent manner. The Defendants submit that this duty was subject to the terms of the Contract which specified that the standard against which their competence would be measured would be the Standards of Practice set out by the Canadian Association of Property and Home Inspectors.

[33] CAHPI publishes a Code of Ethics and Standards of Practice (Standards) for its members. Mr. Toth is a member of CAHPI. Mr. Toth is also a member of the British Columbia Association. The Standards of the national organization includes the following statement: The Standards are a set of guidelines for home inspectors to following the performance of their inspections. They are the most widely-accepted home inspection guidelines in use, and include all the home's major systems and components.

[34] The Standards provide in part:

### 2. PURPOSE AND SCOPE

2.1 The purpose of these Standards of Practice is to establish a minimum and uniform standard for private, fee-paid home inspectors who are members of one of the provincial/regional organizations of CAHPI. Home inspections performed to these Standards of Practice are intended to provide the client with information regarding the condition of the systems and components of the home as inspected at the time of the Home Inspection.

2.2 The Inspector shall:

#### A. Inspect:

1. readily accessible systems and components of homes listed in these Standards of Practice.
2. installed systems and components of homes listed in these Standards of Practice.

#### B. report:

1. on those systems and components inspected which, in the professional opinion of the inspector, are significantly deficient or are near the end of their service lives.
2. a reason why, if not self-evident, the system or component is significantly deficient or near the end of its service life.
3. the inspector's recommendations to correct or monitor the reported deficiency.
4. on any systems and components designated for inspection in these Standards of Practice which were present at the time of the Home Inspection but were not inspected and a reason they were not inspected.

### 3. STRUCTURAL SYSTEM

3.1 The inspector shall:

#### A. Inspect:

1. the structural components including foundation and framing.
2. by probing a representative number of structural components where deterioration is suspected or where clear indications of possible deterioration exist. Probing is NOT required when probing would damage any finished surface or where no deterioration is visible.

#### B. describe:

1. the foundation and report the methods used to inspect the under-floor crawl space.
2. the floor structure.
3. the wall structure.
4. the ceiling structure.
5. the roof structure and report the methods used to inspect the attic.

3.2 The inspector is NOT required to:

- A. provide any engineering service or architectural service.

B. offer an opinion as to the adequacy of any *structural system or component*.

#### 4. EXTERIOR

4.1 The *inspector* shall:

A. *Inspect*:

1. the exterior wall covering, flashing and trim.
2. all exterior doors.
3. attached decks, balconies, stoops, steps, porches, and their associated railings.
4. the eaves, soffits, and fascias where accessible from the ground level.
5. the vegetation, grading, surface drainage, and retaining walls on the property when any of these are likely to adversely affect the building.
6. walkways, patios, and driveways leading to dwelling entrances.

B. *describe* the exterior wall covering.

[35] While paragraph 5 of the Contract states that the CAHPI Code of Ethics and Standards of Practice are attached to the Contract, there is nothing in evidence which would allow me to conclude that this was the case. Accordingly, I cannot conclude that it was agreed between the parties that the inspection would be performed in accordance with the CAHPI Code of Ethics and Standards of Practice. Even if I am wrong in this regard and, in any event, I am satisfied that the Standards are only guidelines, and that a determination that the inspection had been undertaken in accordance with the Standards would not preclude a finding that the inspection was carried out negligently. In this regard, Mr. Toth at Trial stated:

Standard of Practice sets minimum expectations for the home inspectors, what they have to render during and after the inspection. I believe this is the standard, like the Bible, of every home inspector as a minimum requirement. Some inspectors try to exceed it. Some others never target to exceed it. I feel myself whatever time circumstances exist, I try to go even beyond that.

#### CLAIM OF THE PLAINTIFFS RELATING TO THE STRUCTURAL MEMBERS

[36] The first part of the claim of the Plaintiffs relates to rotten **A**beam structural members. The older **A**lframe portion of the House is supported by horizontal and vertical beams. The Plaintiffs submit that the ends of most of those beams were rotten at the time of the inspection by Mr. Toth. Mr. Toth did not identify all of the rotten horizontal and vertical beams, Mr. Toth did not advise them that he had not inspected all of the horizontal and vertical beams, and Mr. Toth underestimated the cost of repair of the two beams that he did identify as rotten when stating that the cost of repair would be in the neighbourhood of \$4,000.00. It is now apparent that the estimated cost of replacing all of the rotten beams is in the neighbourhood of \$90,000.00, and that the cost of repairing the two beams that he did identify as rotten is in the neighbourhood of \$35,000.00.

(a) Beams on the East Side of the House

[37] I find that Mr. Toth made no inspection of the vertical beams on the east side of the House. I find that an inspection of two of those beams would have been easily accessible through an unlocked door off the lower balcony. This door led into a room that was otherwise inaccessible from inside the House. I find that even a cursory examination of the two beams in this area would have revealed to Mr. Toth that they were rotten.

[38] At his October 17, 2007 Examination for Discovery, Mr. Toth could only state that he could not recall if: ... that room was or was not available for inspection. At Trial, Mr. Toth was asked whether he had tested any of the beams on the east side of the house, and stated: Unfortunately not I cannot exactly recall why ever since, it is kind of a mystery for myself. I have no proper explanation why. I just simply don't remember. I accept the evidence that the door to the room could not be locked from the outside so that there was no impediment to Mr. Toth entering the area and discovering that there was considerable rot in two of the east side beams.

[39] Under cross-examination, Mr. Toth described the area as a crawl space but I find that is not accurate. From the photographs in evidence, it is clear it is just a room off the exterior of the House. As to why he did not attempt to go through the door, Mr. Toth stated under cross-examination:

I make effort to open every solid door, but I cannot easily identify where they lead to, and then I supposed to open that door. I cannot recall which way I find it, closed, which way I find it even stuck to the frame or for any way it is not opening. It appeared not to opening, and that's what I expect, and that's what my statement about. ...

That was a typical door of a house, and that was not marked as a crawl space door, and once I cannot or I appeared couldn't go through, I legitimately expected to be access the same room from the inside, which unfortunately never happened.

If the door is not opening, it is not readily accessible.

... because I don't remember what kind of way I used to push the door, bang the door or tried to gently open. One way or the other, the door didn't open and I didn't go in. It was not readily accessible. ...

If I would be aware that room has no interior connection and that has no other access way, then I would ask I would try to make effort.

[40] Mr. Toth stated that it was his usual practice to go clockwise when inspecting a house and, regarding any doors that he finds, he would attempt to enter the door:

... I find the doorway which is not clear where it goes, I try to go through or clarify the door, where it goes.

So in our case, we have a solid door on that so-called crawl space, exactly the same looking and full-size door than the door beside of it, or other doors. So I assume, but I cannot hundred percent recall it, that information. I may find it locked or not opening at some point, for any reason not opening, and then I assume there will be another inside room, another room, but I will approach from the inside of the building. Which unfortunately never happened.

[41] Even if Mr. Toth concluded that he could not have outside access to what was behind the door, he should have come back to that space when he determined in his later inspection of interior adjacent space that the space could not be accessed from inside the House. At Trial, Mr. Toth confirmed that he did not ask anyone to gain access to this room.

[42] I find it was necessary for Mr. Toth to inspect this room and the two east side beams in order to perform his inspection appropriately. Mr. Toth is liable either in negligence or in breach of contract because he did not perform the inspection in accordance with paragraph 1 of the Contract because he did not perform a VISUAL INSPECTION of the readily accessible and visible areas of the House. At the same time, the Standards relied upon by Mr. Toth also include a requirement that such an inspection take place. If I am wrong in coming to those conclusions, I also find that Mr. Toth was negligent in not drawing to the attention of the Plaintiffs that he had not had an opportunity to inspect the two east side beams because he could not or did not access the space. Pursuant to the agreement reached between the parties, I find that the cost of repairing or replacing east side frame beams is \$18,800.00.

(b) Beams on the West Side of the House

[43] Regarding the horizontal and vertical beams on the west side of the House, Mr. Toth stated at his October 17, 2007 Examination for Discovery that two members were ... showing not very extensive but visible damages and wood rot, that he ... inspected with a probe all of those [all of the **A**lframes], and that The rest had no wood rot. At his Examination for Discovery, Mr. Toth repeated that he had advised the Plaintiffs that he had inspected all of the beams on the west side of the House when he was asked the following questions and gave the following answers:

Q And did you tell them that you inspected the other ones on the west side and they appeared to be fine? Did you say that to them?

A Yes.

[44] I find this testimony inconsistent with other testimony of Mr. Toth. At his Examination for Discovery and at Trial, Mr. Toth stated that he inspected all of the beams and found only two to have rot. At Trial, Mr. Toth stated it was only his obligation to provide the Plaintiffs with a representative number of deficiencies. In this regard, Mr. Toth stated:

Which means my duty is to give a representative number of deficiencies and explain them, and I believe I did it, even if that could be my best, despite of my best effort, I still missed one or two small location somewhere.

When I inspected it in September 2006, I find I detected wood rot on the two structure piece, and I believed that was sufficient representation of the west side Alframes.

[45] At Trial, Mr. Toth stated that he only examined two of the west side beams, as that was the representative sample that was required of him. He was also asked the following question and gave the following answer:

Q Once you found the two beams to be rotten, didn't you think that you were going to have to go and take extra steps, unusual steps to make sure that the rest of the beams were sound? Isn't that just common sense, now that you found two that are rotten, wouldn't you be on sort of a high alert to make sure that the rest are sound?

A It was high alert enough and referring to engineering services, that will take care of the rest.

[46] According to the opinion of Mr. Clayton who was called as a witness for the Plaintiffs and who was qualified as an expert to provide an opinion regarding house inspection standards, the Standards set out by CAHPI only require a home inspector to inspect and probe: ... a representative number of structural components where deterioration is suspected, or where clear indications of possible deterioration exist. However, Mr. Clayton also provided the opinion that, despite the standards set by CAHPI, a prudent inspector would have inspected and reported on all of the Alframe members and not just some of them as required by the Standards. I agree. To fail to do so was negligent after Mr. Toth found what he did with the two beams he said he did examine.

[47] Mr. Toth gave various excuses as to why it was not possible to examine all of the west side beams. Regarding the horizontal beams, Mr. Toth stated at Trial they were in quite high. When asked whether or not he had gone up to probe the horizontal beams, Mr. Toth stated: I just don't remember what part, but that was obvious without probing the wood ... the wood rot. He said that the wood rot on the A6 beam was visible. From the photographs taken by Mr. Clayton, it is clear that the horizontal beams on the two Alframe beams found by Mr. Toth to have rot are quite high off the ground but that the other beams are not. I reject the testimony of Mr. Toth that all of the horizontal beams were high and could not be easily inspected.

[48] Mr. Toth stated at Trial that he was not in a position to inspect all of the west side horizontal and vertical beams as some of them were covered with grass so as to make them inaccessible. As to why he did not clear away the grass to make sure that he could thoroughly check the A4 beam, Mr. Toth stated: I am not clearing grass. That's not part of my job. Mr. Toth appears to have forgotten that the Standards provide that an inspector is to inspect the vegetation ... on the Property when any of these are likely to adversely affect the building.

[49] A photograph taken in December 2006 regarding beam A4 indicates a tiny clump of grass at the bottom of the beam. At Trial, Mr. Toth was asked whether the grass was high at the time he made the inspection, and he stated: That's my recollection, that's correct. He also stated: In between that was a clear-out of the whole area. However, the possibility that there had been a clearing of the vegetation in the whole area between the time when Mr. Toth conducted his inspection and December 2006 was not put to the Plaintiffs under cross-examination. Mr. Toth makes no mention of there being high grass in his written report even though the report does note in the EXTERIOR section, that: Debris to remove from E side. As well, it was drawn to the attention of Mr. Toth that his report form contained a provision that he had to draw to the attention of the parties what was not inspected and the reason it was not inspected. Mr. Toth confirmed that he did not do that and did not report to the Plaintiffs that something had not been inspected.

[50] Regarding the photographs taken by Mr. Clayton, Mr. Toth testified at Trial that it is possible that the rot had occurred between September, 2006 when he inspected that beam and December, 2006 when the photograph was taken: It's obviously that deteriorated from September to December. At Trial, Mr. Toth stated that the rot which was evident had occurred in the two and a half years since he inspected the Property and, at the time of his inspection, the rot wasn't there. I have no hesitation in rejecting this testimony. It is inconceivable that the rot that is shown in the photographs taken by Mr. Clayton in December 2006 could have occurred between September and December 2006. Mr. Toth was also incorrect in stating that all of Mr. Clayton's photographs were taken 2-1/2 years after his inspection of the Property. This is simply not the case.

[51] I accept the evidence of Mr. Clayton. From the photographs that he took in December 2006 and from his May 13, 2009 opinion, I find that rot was well established on four of the Alframe beams and four of the horizontal beams at the time of the inspection by Mr. Toth. I conclude that the photographs which were taken by Mr. Clayton in December 2006 fairly represent the conditions that would have been found by Mr. Toth on September 21, 2006. In particular, the December 17, 2006 photograph taken by Mr. Clayton does not show any vegetation which would make it impossible for a full inspection of at least four of the horizontal and vertical beams to take place. Mr. Toth owed the plaintiffs a duty to inspect all west side beams after he ascertained that there was rot in two of the beams. I conclude that he did not do so.

[52] I also find that Mr. Toth was negligent in not drawing to the attention of the Plaintiffs the extent of the rot in the beams. If he had actually examined all of the beams on the west side of the House, he could not have come to the conclusion that only two of the beams were rotten. If, on the other hand, he only examined two of the beams, he was negligent in not drawing to the attention of the Plaintiffs that he had only examined two of the beams and had not examined the others. I find that the examination of only two of the beams was not in accordance with the obligations that Mr. Toth owed to the Plaintiffs. Mr. Toth was also negligent when he described the MAJOR POINTS OF CONCERN for the STRUCTURE as being to fix-up structural deficiencies. This is hardly a sufficient description of what needed to be done to correct the deficiencies. I find that the use of the word fix-up lulled the Plaintiffs into assuming that minor or cosmetic changes could be made in order to meet the MAJOR POINTS OF CONCERN.

[53] I also find Mr. Toth negligent in his failure to advise the Plaintiffs that they should have structural engineers examine the beams. Mr. Toth was asked whether he told the Plaintiffs that they needed engineers to go and probe the rest of the beams and he answered: no. I accept the opinion of Mr. Clayton that: A prudent inspector would have recommended that a (structural) engineering, experienced in heavy timber construction, be engaged to review the condition and make further recommendations with respect to repair and costs of repairs. The failure of Mr. Toth to provide this advice to the Plaintiffs amounts to negligence.

[54] Regarding the costs of repairing the two rotten west side beams, I accept the evidence of the Plaintiffs that they were provided with a repair estimate in the neighbourhood of \$4,000.00 by Mr. Toth. By agreement between the parties, the actual cost of replacing the west side beams is \$35,000.00.

[55] Despite paragraph 4 of the Contract which provides that, if cost estimates are provided, they are ballpark estimates only, Mr. Toth was adamant that he would generally never provide such estimates. At Trial, Mr. Toth stated that he gave them a ballpark rough estimate but that I asked him to obtain quotes from contractor, and he should expect somewhere around this ballpark figure for that particular carpentry job. [to repair the two Alframe members]. Mr. Toth stated that he was not expected to give any ballpark figures but, because Mr. Salgado insisted, he did give them a ballpark estimate: My best honest guess. When asked whether it was normal and a standard practice to provide estimates to clients, Mr. Toth stated: No, as it was not the home inspector's job to do. We don't have enough information for current market conditions.

[56] Paragraph 4 of his standard form of contract contemplated that ballpark estimates might be provided. Accordingly, I cannot accept his evidence that it was not his normal and standard practice to provide such estimates to clients who requested his advice. I find that the repair estimate of \$4,000 relating to the west side beams was provided to the Plaintiffs by Mr. Toth. I find that this estimate of \$4,000 was woefully inaccurate. While I cannot conclude that the Plaintiffs relied upon this estimate provided by Mr. Toth, I do find that the estimate of \$4,000.00 lulled the Plaintiffs into assuming that the rot was of no particular importance, and that it could be inexpensively corrected.

[57] I find that Mr. Toth was negligent in his inspection of the horizontal and vertical beams on both sides of the House. Mr. Toth was negligent in not inspecting the east side beams, and was negligent in his inspection of the west side beams by either inspecting only two and not advising the Plaintiffs that he had only done so or by not drawing to their attention that the rot was much more widespread than he indicated to them. His breaches of duty of care caused the Plaintiffs to suffer damages. But for the negligent act and/or the omission, the damages would not have occurred as the purchase of the Property would not have occurred. I find that the Plaintiffs would not have purchased the Property if the full extent of the rot on the east and west side beams of the House had been known and brought to their attention. In the circumstances, the Plaintiffs are entitled to damages of \$35,000.00 plus \$18,800.00 less the \$4,000.00 estimate provided by Mr. Toth.

#### CLAIM OF THE PLAINTIFFS RELATING TO THE STABILITY OF THE HOUSE

[58] The second part of the claim of the Plaintiffs relates to the stability of the House. The south portion of the House sits on fill that was not properly compacted at the time of

construction, the House is being undermined, this settlement results in stress on the structural members of the House, and, in order to stabilize the structure, the geotechnical and structural engineers who have been retained by the Plaintiffs have recommended that extensive remedial work be undertaken. The Plaintiffs submit that Mr. Toth failed to properly warn them of the extent of the problem and that he stated to them that the problem could be dealt with by way of remedial work costing less than \$16,000.00, whereas the estimated cost is now in excess of \$75,000.00.

[59] In his written report, Mr. Toth indicated that the settlement was Moderate and that it might be Ongoing as he had a question mark beside that word on the printed form for the component **STRUCTURE**. He also indicated that the rating for **STRUCTURE** was half way between average and below .

[60] At his October 17, 2007 Examination for Discovery, Mr. Toth was asked the following questions and gave the following answers:

Q. So just so I can summarize your evidence on this point, the evidence that you saw of either settlement in the past or ongoing settlement was by looking at the cement abutments at the base of the **Alframe beams on the west side**

A. Yes.

Q. and by looking at the foundations supporting the deck, that is where the post met the cement footings, correct?

A. Yes.

Q. And then I think you mentioned earlier in your testimony in the ceiling of the deck or towards I think it s over towards where the hot tub is, some of the joists appeared to be have pulled away from the roof above?

A. Yes.

Q. So those were the three aspects of the residence that indicated to you that there was settlement or perhaps ongoing settlement; is that correct?

A. It s not containing the fourth one which we marked here, the basement floor and associated strip foundation which were noticed and reported to being settled. So that s four different kind of settlements.

Q. Well, or at least symptoms of settlement?

A. Symptoms, that s correct.

Q. So just so I understand the fourth one, I understand your point about that the floor of the basement in the **Alframe** has a slope to it which you observed, correct, without measuring the slope?

A. The **Alframe** and the basement floor has no connection.

[61] At his October 17, 2007 Examination for Discovery, Mr. Toth stated that he did not give: ... any figures as to the possible costs of remedying the perceived problem or potential problem with the settlement aspect of the matter . I find that testimony to be inconsistent with what Mr. Toth stated at Trial when he testified:

So I said I don t know. I don t know how much. And it s not simple to answer this question at all. I could tell them the carpentry work to fix up the deck and fix up the rafter, reported rafter, it would be somewhere in the neighbourhood of [\$15,000.00 to] \$20,000.00, but they should obtain a general contractor or specific contractor to obtain. This is just should be treated as a very ballpark guess. ...

I mentioned to plaintiff the engineer, based on his information, may well specify retaining walls, piling, or any other engineering solution for the problem. And I have no idea how much that would cost, that what kind of work that would be. I mentioned this this possibilities, and I gave absolutely no financial not even ballpark figure. This mention of [\$4,000.00 to] \$5,000.00, I never heard about that.

[62] At the Trial, Mr. Toth stated that he told the Plaintiffs that the unstable soil conditions/erosions ... along the whole south line from the east corner to the west corner, and specifically the southwest area turning to the west side, soil erosion and was noted. Soil erosion was noted on all foundation areas. Regarding the check mark beside the statement settlement moderate , Mr. Toth at Trial stated that he reviewed that with the Plaintiffs and, after he presented what was written in the report, he stated:

... these are those visual clues of structural movements deterioration. I cannot tell in a short visual inspection with my my limitation whether this movements are still ongoing or they not ongoing. ...

I did not see any inside or outside major visual clues to tell the sequence how this movement this movements developed.

There are no reportable clues. The only thing we can do and they can do a further geotechnical engineering evaluation, because even an engineer cannot tell on a short visual observation if that s ongoing or not ongoing. And I not only told my client, only engineering and geotechnical firm can give the answer, but I also recommended, during that discussion, I would recommend a geotechnical firm who is familiar with North Vancouver geographic area.

[63] During his cross-examination at Trial, Mr. Toth was asked whether the Plaintiffs could deduce from the question mark beside whether settlement was Ongoing , that this was a very, very important piece of advice , and that this house may settle down this slope . Mr. Toth stated that it was sufficient combined with the verbal explanation . In response to whether the written part of his report was to contain all of the salient information, Mr. Toth stated that this is why he had checked the need for an engineer and verbally explained: the geotechnical survey, geotechnical report or examination needed .

[64] However, Mr. Toth also made this statement at Trial regarding the checkmark beside check with professional engineer :

I don t remember if I pointed out the check mark itself. The discussion was not pointing on the check mark. Discussion was pointing what to do. And what to do is included the recommendation what I said. ...

My intent was to check with professional engineer for complete information. I admit I probably was better to cross the pest control word at that time.

[65] I accept the opinion of Mr. Clayton that there should have been a recommendation that the Plaintiffs consult a geotechnical engineer prior to deciding whether they would remove the subject clause in the Agreement. In dealing with **STRUCTURE**, Mr. Toth indicates that the rating was between average and below , but he does not set out whether the repairs that are recommended by him are either Major or Minor . He only describes the settlement as being Moderate , and he questions whether it is ongoing . While there is a checkmark beside the printed words CHECK WITH PROFESSIONAL ENGINEERING/PEST CONTROL CONTRACTOR OR \_\_\_\_\_ FOR COMPLETE INFORMATION , the specific concern regarding why a professional engineer should be consulted is not set out. As well, it is not clear whether this is only an indication that a pest control contractor should be consulted.

[66] While Mr. Clayton was of the opinion that the part of the report of Mr. Toth dealing with **STRUCTURE** met the Standards set out by the CAHPI, I also accept the opinion of Mr. Clayton and I find that Mr. Toth was negligent in not recommending a geotechnical review of the Property and by not clearly presenting the significance of the problems observed. I find that Mr. Toth owed the Plaintiffs a duty of care, and that this duty was not met because he did not recommend to the Plaintiffs that they should consult a geotechnical engineer prior to deciding whether to proceed with the purchase of the Property. I have no hesitation in concluding that the Plaintiffs relied upon the advice received from Mr. Toth before deciding whether they would remove the subject clauses contained within the Contract and proceed to purchase the Property. As a result of the reliance of the Plaintiffs on the advice received from Mr. Toth regarding the stability of the House, the Plaintiffs proceeded to purchase the Property and have suffered damages as a result of that purchase. But for the negligence of Mr. Toth, the damages suffered by the Plaintiffs would not have been incurred.

[67] I accept the evidence presented on behalf of the Plaintiffs that Mr. Toth gave them a repair estimate of \$15,000.00 for structural work relating to the stability of the House. That estimate was woefully inadequate. While I find that damages are not available to the Plaintiffs as a result of this negligent misrepresentation of the likely cost of the structural changes that were required in order to provide stability for the House because I cannot come to the conclusion that the Plaintiffs relied on this misrepresentation to their detriment, I find that the estimate that was provided gave considerable solace to the Plaintiffs that the structural expenditures would not be excessive and, therefore, the structural problems were not significant. I find that the Plaintiffs are entitled to the actual cost of the structural changes which are required, including engineering costs, being \$56,800.00, \$26,269.00,

\$9,360.00, \$24,100.00 and \$11,500.00, less the \$15,000.00 estimate provided by Mr. Toth.

[68] I have no hesitation in coming to the conclusion that the Plaintiffs relied upon the report received by Mr. Toth to decide whether they would purchase the Property. At his December 16, 2008 Examination for Discovery, Mr. Salgado was asked what expectations he had regarding the inspection that would be performed by Mr. Toth, and he stated: Well, that he would determine if the subject would be removed. Mr. Salgado was also asked the following questions, and gave the following answers:

Q. So you were looking to him for advice as to whether you should buy or not buy; is that fair to say?

A. I would think so, yes.

... And then I basically asked him if the house if I should go through with the deal; you know, if there was anything that he had noticed that would impede me from buying the house.

Q. Yes. And what did he say?

A. He said no. ...

Then I ask again, and then he said you can go ahead, there s no problem

Q. Okay. So a moment ago you told me that he simply said no, now you re saying that he said you can go ahead, there s no problem.

A. A moment ago I told you that I asked him about three times.

[69] I find it significant that Mr. Toth was not in a position to deny that the Plaintiffs had asked him whether or not they should proceed to purchase the House. At Trial, Mr. Toth was asked the following question and gave the following answer:

Q. Mr. Toth, did the plaintiffs ask you a question, something to the effect of whether or not they should purchase the house?

A. I cannot recall.

[70] The purpose of obtaining an inspection is to provide a lay purchaser with expert advice about any substantial deficiencies or, as is set out in the Standards, any significantly deficient problem relating to systems or components that can be discerned upon a visual inspection deficiencies of the type or magnitude that reasonably can be expected to have some bearing upon the decision-making process of a purchaser regarding whether they will purchase the property or upon which they will renegotiate the price. An inspector invites reliance by the very nature of the advice that is given. Plainly, if prospective home purchasers did not believe that they could secure meaningful and reliable advice about the home they were considering purchasing, there would be no reason for them to retain an inspector to inspect that home. In the case, reliance is obvious.

#### EFFECT OF THE LIMITATION OF LIABILITY CLAUSE

[71] The Defendants submit that any liability found on the part of the Defendants will be limited by the limitation of liability clauses set out in paragraphs 1, 4, 13 and 16(b) of the Contract. I cannot reach that conclusion.

[72] Paragraph 1 of the Contract provides that: The inspection and report are not intended to reflect on the market value of the Property nor to make any recommendation as to the advisability of purchase. I am satisfied that this part of paragraph 1 does not exclude any liability on behalf of the Defendants. There are no words which attempt to limit liability and, in any event, while it may not have been intended that there be any recommendation regarding the advisability of purchase, the Plaintiffs were entitled to rely on any recommendations as to the advisability of purchase if such recommendations were made. I find that such recommendations were made and relied upon.

[73] I find that the Plaintiffs did not read the terms of the Contract prior to Mr. Salgado signing it. I accept the evidence of the Plaintiffs that they felt rushed because of the schedule of Mr. Toth. However, I also find the Plaintiffs were intelligent, university-educated people and that they had entered into contracts previously and knew that placing their signature upon a contract had legal implications. The Defendants submit that, in the absence of fraud or misrepresentations, a person is bound by an agreement signed by them whether or not the person has read its contents and that the failure to read a contract before signing it is not a legally acceptable reason for refusing to be bound by its terms: *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.*, 1997 CanLII 4452 (ON C.A.), (1997) 148 D.L.R. (4<sup>th</sup>) 496 (Ont. C.A.) at paras. 30-31.

[74] The Defendants also submit that it was not necessary for them to draw to the attention of the Plaintiffs any onerous terms or to ensure that the Plaintiffs had read and understood those terms and that the only exception is where the circumstances are such that they would realize that the Plaintiffs were not consenting to those terms. In *Karoll v. Silver Star Mountain Resorts Ltd.* 1988 CanLII 3094 (BC S.C.), (1988), 33 B.C.L.R. (2d) 160 (B.C.S.C.), McLachlin C.J.S.C., as she then was, stated:

Many factors may be relevant to whether the duty to take reasonable steps to advise of an exclusion clause or waiver arises. The effect of the exclusion clause in relation to the nature of the contract is important because if it runs contrary to the party's normal expectations it is fair to assume that he does not intend to be bound by the term. The length and format of the contract and the time available for reading and understanding it also bear on whether a reasonable person should know that the other party did not in fact intend to sign what he was signing. This list is not exhaustive. Other considerations may be important, depending on the facts of the particular case.

(at p. 166)

[75] Here, the Plaintiffs were given little time to read the Contract and understand what the Defendants intended to be the effect of the Contract. As well, the primary purpose of the meeting between Mr. Toth and the Plaintiffs was to advise them regarding the results of this inspection. I find that very little time was available for the Plaintiffs to read and understand what was in the Contract. By the very nature of the relationship, the ability to rely on what was being said was critical and, if there was any suggestion that the Plaintiffs could not rely upon what was being said by Mr. Toth and what was set out in his report, I find that Mr. Salgado would not have signed the Contract. In the circumstances, it was incumbent upon Mr. Toth to draw to the attention of Mr. Salgado the exclusion and waiver clauses and to take reasonable steps to apprise Mr. Salgado of the onerous terms and to ensure that he read and understood them.

[76] As well, exclusion clauses must be drafted with complete clarity and the principle of *contra proferentum* should be applied. In *Bauer v. Bank of Montreal* [reflex](#), (1990), 110 D.L.R. (3d) 424 (S.C.C.), McIntyre J., on behalf of the Court, stated:

In construing such a clause, the Court shall see that the clause is expressed clearly and that it is limited in its effect to the narrow meaning of the words employed and it must clearly cover the exact circumstances which have arisen in order to afford protection to the party claiming benefit. It is generally to be construed against the party benefiting from the exemption and this is particularly true where the clause is found in a standard printed form of contract, frequently termed a contract of adhesion, which is presented by one party to the other as the basis of their transaction. (at p. 428)

[77] In reviewing the Property Inspection Contract, it must be noted that the Contract is separate from the 17-page Report which starts with the heading The Big Picture/Summary. There is nothing in the Contract which incorporates the subsequent reporting pages into the Contract. Regarding paragraph 16(b) of the Contract, there are no representations or warranties in the Contract. While it may have been the intent of paragraph 16(b) to exclude representations or warranties that arose outside the Contract, it could not have been in the contemplation of the parties that a reference to a document containing no representations or warranties would exclude representations or warranties that were made to induce the Plaintiffs to enter into the Contract or which were contained in the oral or written report subsequently provided by Mr. Toth.

[78] Under the Contract, the Inspector is defined as being 659279 B.C. Ltd. dba HomePro Inspections. Accordingly, I am satisfied that the attempt to limit liability by paragraph 13 of the Contract relates only to the Inspector and not to Mr. Toth personally. It was Mr. Toth who was the inspector. It is Mr. Toth who is the member of the CAHPI (B.C.). In this regard, the cover page indicates This report prepared by: Imre Toth, B.Arch., RHI, Member of the Canadian Association of Home and Property Inspectors (B.C.). I am satisfied that the ambiguity regarding whether the provisions of paragraph 13 of the Contract were also to apply to any failure by Mr. Toth to perform any obligations should be resolved against Mr. Toth in favour of a reasonable and fair interpretation.

[79] Regarding paragraph 9 of the Contract, it is important to note that it purports to exclude any **GUARANTEE OR WARRANTY, EXPRESS OR IMPLIED RELATING TO: ... THE FUTURE ADEQUACY, PERFORMANCE OR CONDITION OF ANY INSPECTED STRUCTURE, ITEM OR SYSTEM** (bold type and capitalization in the original). I find that

paragraph 9 is not broad enough to exclude a guarantee or warranty, express or implied regarding the present adequacy, performance or condition of any inspected structure, item or system. That is the very nature of the inspection that was undertaken. Again, I am satisfied that the doctrine of *contra proferentum* applies and that any guarantee or warranty, express or implied relate to the adequacy, performance or condition of any inspected structure, item or system at the time of the inspection would not be excluded by paragraph 9. While I make no findings that Mr. Toth guaranteed or warranted anything to the Plaintiffs, I make this finding regarding this paragraph of the Contract in the context of the consistent failure to exclude liability.

[80] I find that the Defendants are not in a position to rely on paragraphs 1, 9, 13 and 16 of the Contract to exclude liability for the damages which I find were suffered by the Plaintiffs as a result of the oral and written report provided by Mr. Toth.

**SHOULD THERE BE APPORTIONMENT?**

[81] The Defendants submit that, if the Court finds liability on the part of the Defendants, this liability should be apportioned between them and the former Defendants, Mr. and Ms. Shannon. In the Statement of Claim, the Plaintiffs alleged that the Shannons made negligent representations, including that the residence was a solid house and the settlement observed by the Plaintiffs had been there forever, and was not ongoing. It is submitted by the Defendants that, if the Plaintiffs reasonably relied upon any representations, it must be that they relied upon those of Mr. and Ms. Shannon, and liability should be apportioned. The Defendants submit that, as there is no apparent means to determine the apportionment, a 50-50 apportionment between the Defendants and Mr. and Ms. Shannon is mandated by the *Negligence Act*.

[82] There is nothing before me which would allow me to conclude that the Plaintiffs relied upon any representations made by Mr. and Ms. Shannon prior to the Plaintiffs entering into the September 15, 2006 Agreement. Rather, I am satisfied that the Plaintiffs relied only on the statements made by Mr. Toth in his oral and written report. The Plaintiffs relied on what was provided by Mr. Toth and arranged for his inspection in order to have a neutral party provide them with an assessment of the Property and the House. I reject the argument that there should be an apportionment between the Defendants and Mr. and Ms. Shannon of the damages that I find payable by the Defendants.

**CONCLUSION**

[83] The Plaintiffs will be entitled to Judgment against the Defendants in the amount of \$192,920.45. As the parties advise that the provisions of Rule 37(b) of the *Rules of Court* apply, the parties will be at liberty to speak to the question of costs in due course.

\_\_\_\_\_  
Bumyeat J  
The Honourable Mr. Justice Bumyeat