

# **DON'T RELY ON MY ADVICE!:**

## **A PRACTICAL GUIDE TO DISCLAIMERS\***

**Are disclaimers worth the paper they're written on, assuming they are written at all?**

### **Introduction**

One definition of a professional is that they are someone who is paid to give advice. Years of schooling, mountains of experience and natural insight are the necessary ingredients required to render a valuable opinion. Every masterpiece however must have an imperfection; a hallmark of its human creator. It has been my experience that an imperfection gets magnified in reverse proportion to its size; in other words, the smaller the imperfection, the greater its impact when the opinion comes into play. This rule may be because obvious and large imperfections in an opinion are often quickly noticed when the opinion is immediately acted upon, which affords the professional time to re-evaluate and issue a fresh opinion. The minor imperfections such as the failure to take an accurate measurement can often be overlooked in the delivery of a report but can have a great effect upon completion of the project.

Therefore since no opinion is perfect, it is imperfect practice not to issue a disclaimer with your opinion. Disclaimers are ethical, appropriate, acceptable, and all too often constitute overlooked boilerplate. Having a stale-dated disclaimer is sometimes worse than having no disclaimer at all. As will be discussed below contractual provisions that are ambiguous will be read against the party who drafted it.

In this presentation I will discuss the purpose of disclaimers and the overarching principle of disclaimer interpretation *contra proferentum*. I will then provide a "how to" for drafting an enforceable disclaimer clause and will provide examples of how certain disclaimer clauses have been interpreted by various courts.

### **The Purpose of Disclaimers**

A disclaimer is meant to delineate the scope of rights and obligations stemming from an opinion such as rendered in a report. The question of what to disclaim varies depending on the purpose of the report, but the most common disclaimer is to limit the scope of the report to the site conditions on the day of the inspection, and make no guarantees as to the future condition of what is inspected. For litigation reports the most common disclaimer is to limit the use of the report to counsel and/or the party who has retained the expert for court use only, not to be relied upon for a future project or other party in the litigation or the public at large.

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### ***Contra Proferentum***

Whether the court will uphold a disclaimer is just as much a question of construction and conduct as what is being disclaimed. The doctrine of *contra proferentum* is applied in the case of disclaimers. In *Bauer v. Bank of Montreal* (1980), McIntyre J., on behalf of the Supreme Court of Canada, 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 ex-emption 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.<sup>1</sup>

### **How to Draft an Enforceable Disclaimer Clause**

#### **1. The onus is on the professional to bring the disclaimer(s) to the attention of the signing party.**

The applicability of an exclusion or limitation clause can be challenged on the ground that the party seeking its protection did not bring its existence and inclusion in the contract sufficiently to the notice of the other party at the time of, or prior to the making of the contract, with the result that the latter cannot be taken to have assented to the clause. If this is so, then the clause will not be effectuated ...<sup>2</sup>

In *Trigg v. MI Movers International Transport Services Ltd.*, the Ontario Court of Appeal held that the onus on the party seeking to enforce the limitation clause, is greater where a standard form contract is used.<sup>3</sup>

In various sample service agreements and inspection agreements, many disclaimer clauses have disclaimers in caps and others not. This may cause confusion, leading a client to assume that all the disclaimers are in caps. Given the way in which *contra proferentum* is applied in these cases, a court may find that these disclaimers hidden within the agreement and not in caps should not be upheld. However, in *Salgado v. Toth*, many of the provisions of the contract containing disclaimers were upheld while not in caps, while the provision in caps and bolded was upheld, but its scope was narrowed significantly (see “What to Disclaim - An Example: *Salgado v. Toth*” below).<sup>4</sup>

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<sup>1</sup> *Bauer v. Bank of Montreal*, [1980] S.C.J. No. 46.

<sup>2</sup> G.H.L. Fridman, *Law of Contracts in Canada*, 2nd ed. (Toronto: Carswell, 1986) at para. 537.

<sup>3</sup> *Trigg v. MI Movers International Transport Services Ltd.*, [1991] O.J. No. 1548 (C.A.).

<sup>4</sup> *Salgado v. Toth*, 2009 Carswell BC 3020 [*Salgado*].

**2. Bring the disclaimer(s) to the attention of the signor before the inspection is done.**

The time when the notice is alleged to have been given is of great importance. No excluding or limiting term will avail the party seeking its protection unless it has been brought adequately to the attention of the other party before the contract is made. A belated notice is valueless.<sup>5</sup>

In *Fraser v. Knox*, an inspection report was given to the homeowner after the inspection was complete, though the report stated “I hereby authorize the inspection of the Property having read and understood this [Inspection Agreement contained within the Report].”<sup>6</sup> The inspection agreement contained a limitation of liability clause. The court held that the clause is unenforceable since the homeowner should have had the opportunity to negotiate in regards to the term or have the option of retaining an inspector who would not have such a clause in their contract.

**3. Be careful in drafting the disclaimer as it will be strictly construed.**

**IN *QUEEN V. COGNOS INC.*, IACOBUCCI J. STATES:**

It is trite law that, in determining whether or not a limitation (or exclusion) of liability clause protects a defendant in a particular situation, the first step is to interpret the clause to see if it applies to the tort or breach of contract complained of. If the clause is wide enough to cover, for example, the defendant's negligence, then it may operate to limit effectively the defendant's liability for the breach of a common law duty of care, subject to any overriding considerations.<sup>7</sup>

**4. Be precise, complete and comprehensive and read the case of *SALGADO V. TOTH*<sup>8</sup>**

*Salgado* is instructive on how Courts will interpret contract disclaimers that are not comprehensive or complete. The following contractual provisions were **not upheld** by the British Columbia Supreme Court:

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.

The BC Supreme Court held that paragraph 1 of the contract did not contain wording which would limit liability and while the inspector may not have intended the inspection to constitute a

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<sup>5</sup> Fifoot and Furmston *The Law of Contract*, 11th ed. by M.P. Furmston (London: Butterworths, 1986) at 152.

<sup>6</sup> *Fraser v. Knox*, [1998] O.J. No. 4379 at paras. 44-47.

<sup>7</sup> *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.) at para. 91.

<sup>8</sup> *Salgado*, *supra* note 4 at para. 13.

recommendation as to the advisability of the purchase, the owner was entitled to rely on such recommendations if made.

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.

The court applied the doctrine of *contra proferentum* and held that the disclaimer is not broad enough to include guarantees or warranties regarding the present adequacy of the inspected structure.

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.

In the contract, “Inspector” was defined as the inspection company and not the inspector personally. Therefore, the court held that this paragraph did not exclude liability for the inspector.

##### **5. Beware of oral statements made during the inspection.**

In *Whighton v. Integrity Inspections Inc.*, the Inspection Order Agreement contained a limitation of liability clause preventing the client from claiming damages over \$10,000:

3. LIABILITY. The inspection should not be considered a technically exhaustive inspection or an insurance policy against unexpected house repair/replacement needs. The Client acknowledges that there is risk involved in purchasing a property and that the purpose of the Inspection and the Guarantee is to reduce that risk but not eliminate it. Furthermore, the Client agrees that the performance of the Inspection does not transfer that risk to the Company beyond the Guarantee limits.

.....

**The Company's liability for any Client claims, beyond the Guarantee, is limited to a maximum of the home inspection fee paid. The limitations in liability herein apply to all claims, whatsoever their nature and whether arising from negligence or other tort, in contract or from any other source or cause.<sup>9</sup>**

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<sup>9</sup> *Whighton v. Integrity Inspections Inc.*, 2007 CarswellAlta 376 at para. 47.

The issue in this case was whether the clause is broad enough to include gratuitous oral statements, including statements that the home was a “great house” in “good shape” and that necessary repairs would be \$6,000.<sup>10</sup> The Alberta Court of Queen’s Bench held that as the statements were made outside the terms of contract, the statements were not protected by the limitation of liability clause:

The clause in this case purports to exclude liability beyond the Guarantee for all claims “whatsoever their nature and whether arising from negligence or other tort, in contract or from any other source or cause.” Strictly construed against Housemaster, this clause should be read narrowly to exclude liability for a breach of contract or negligence in relation to the performance of that contract. Without clearer construction, the clause cannot exclude Housemaster from any negligence under any circumstances. Therefore, the clause cannot protect Housemaster from liability for negligence in relation to actions performed outside the terms of the contract.<sup>11</sup>

The contract did not provide for assessments of repair costs and it was not in the inspector’s practice to provide the assessment, so such a representation was made outside the terms of the contract.

Note that the court’s finding was assisted by a clause in the agreement related to oral representations, stating that the written report constituted the inspection results and that oral representations would not alter the interpretation of the inspection results..

**6. Incorporate all documents into the Contract or Agreement containing the disclaimer(s).**

In *Salgado v. Toth*, clause 16(b) stated “[B]y signing the Property Inspection Contract, the CLIENT acknowledges, covenants and agrees that: b) The INSPECTOR has not made any representations or warranties other than those contained in the Contract.” Clause 16(b) was not enforced by the court as the Inspection Report was a separate document and the representations and warranties were contained in that report, not the contract. The Contract did not incorporate the subsequent reporting pages on which the representations and warranties were contained. The court held that

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

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<sup>10</sup> *Ibid.* at para. 30.

<sup>11</sup> *Ibid.* at para. 51.

enter into the Contract or which were contained in the oral or written report subsequently provided by Mr. Toth.<sup>12</sup>

### **Other Examples of Disclaimers**

The following contractual provisions were **upheld** by the British Columbia Supreme Court in *Salgado v. Toth*:

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.
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;<sup>13</sup>

### **Conclusion**

Disclaimer clauses are a professionals' shield to defend themselves against the client's sword. Disclaimers have become a necessary part of doing business in the litigation environment. They are ethical and mandatory. Your disclaimer should be read and updated and not casually inserted as part of the boilerplate. Your disclaimer may be negotiated, limited or expanded depending on the circumstances but it should always be considered as your safeguard to ensure that your professional opinion is not inappropriately used...but don't rely on my advice!

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<sup>12</sup> *Salgado*, *supra* note 4 at 77.

<sup>13</sup> *Ibid.* at 13.

**Appendix A**  
***Salgado v Toth***

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Citation: ***Salgado v. Toth,***  
2009 BCSC 1515

Date: 20091109  
Docket: S073646  
Registry: Vancouver

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 A-frame 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 21st 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 them 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'm asking 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 HOUSE SPACE**” 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 HOUSE SPACE**” — “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 HNIAC 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 A-frame 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 A-frame 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 A-frame 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:

#### A-frame 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 A-frame 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 A-frame 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 ail 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 I erosion" at the S, SW which require repair & upgrading and that "solitary foundation movements at the S side dee, SW (?)" need repair, and that "floor sag SW living rm (bsmt) 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 “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.”

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 not 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. Cognos Inc., [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 A-frame 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] CARPI 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-frame 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 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's not opening. It appeared not to opening, and that's what I expect, and that's what I – 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's 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-frames]", 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'd 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 A-frames.

[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 – you found two that are rotten, wouldn't you –you be on sort of a high alert to make sure that the rest are – 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 A-frame 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 A-frame 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 A 4 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 "thigh 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’s 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 A-frame 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 A-frame 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 a 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 A-frame 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. 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 A-frame has a slope to it which you observed, correct, without measuring the slope?

A. The A-frame 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. 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. 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) 148 D.L.R. (4th) 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 *Karol v. Silver Star Mountain Resorts Ltd.* (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* (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] 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.

“Burnyeat J”

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The Honourable Mr. Justice Burnyeat

**Exhibit B**  
**Sample Disclaimers**

# **STATEMENT OF GENERAL CONDITIONS**

## **1. STANDARD OF CARE**

This study and Report have been prepared in accordance with generally accepted engineering or environmental consulting practices in this area. No other warranty, expressed or implied, is made.

## **2. COMPLETE REPORT**

All documents, records, data and files, whether electronic or otherwise, generated as part of this assignment are a part of the Report which is of a summary nature and is not intended to stand alone without reference to the instructions given to us by the Client, communications between us and the Client, and to any other reports, writings, proposals or documents prepared by us for the Client relative to the specific site described herein, all of which constitute the Report.

IN ORDER TO PROPERLY UNDERSTAND THE SUGGESTIONS, RECOMMENDATIONS AND OPINIONS EXPRESSED HEREIN, REFERENCE MUST BE MADE TO THE WHOLE OF THE REPORT. WE CANNOT BE RESPONSIBLE FOR USE BY ANY PARTY OF PORTIONS OF THE REPORT WITHOUT REFERENCE TO THE WHOLE REPORT.

## **3. BASIS OF REPORT**

The Report has been prepared for the specific site, development, design objectives and purposes that were described to us by the Client. The applicability and reliability of any of the findings, recommendations, suggestions, or opinions expressed in the document, subject to the limitations provided herein, are only valid to the extent that this Report expressly addresses proposed development, design objectives and purposes, and then only to the extent there has been no material alteration to or variation from any of the said descriptions provided to us unless we are specifically requested by the Client to review and revise the Report in light of such alteration or variation or to consider such representations, information and instructions.

## **4. USE OF THE REPORT**

The information and opinions expressed in the Report, or any document forming part of the Report, are for the sole benefit of the Client. NO OTHER PARTY MAY USE OR RELY UPON THE REPORT OR ANY PORTION THEREOF WITHOUT OUR WRITTEN CONSENT AND SUCH USE SHALL BE ON SUCH TERMS AND CONDITIONS AS WE MAY EXPRESSLY APPROVE. The contents of the Report remain our copyright property. The Client may not give, lend or, sell the Report, or otherwise make the Report, or any portion thereof, available to any person without our prior written permission. Any use which a third party makes of the Report, are the sole responsibility of such third parties. Unless expressly permitted by us, no person other than the Client is entitled to rely on this Report. We accept no responsibility whatsoever for



damages suffered by any third party resulting from use of the Report without our express written permission.

## **5. INTERPRETATION OF THE REPORT**

- a) **Nature and Exactness of Soil and Contaminant Description:** Classification and identification of soils, rocks, geological units, contaminant materials and quantities have been based on investigations performed in accordance with the standards set out in Paragraph 1. Classification and identification of these factors are judgmental in nature. Comprehensive sampling and testing programs implemented with the appropriate equipment by experienced personnel, may fail to locate some conditions. All investigations utilizing the standards of Paragraph 1 will involve an inherent risk that some conditions will not be detected and all documents or records summarizing such investigations will be based on assumptions of what exists between the actual points sampled. Actual conditions may vary significantly between the points investigated and the Client and all other persons making use of such documents or records with our express written consent should be aware of this risk and this report is delivered on the express condition that such risk is accepted by the Client and such other persons. Some conditions are subject to change over time and those making use of the Report should be aware of this possibility and understand that the Report only presents the conditions at the sampled points at the time of sampling. Where special concerns exist, or the Client has special considerations or requirements, the Client should disclose them so that additional or special investigations may be undertaken which would not otherwise be within the scope of investigations made for the purposes of the Report.
- b) **Reliance on Provided Information:** The evaluation and conclusions contained in the Report have been prepared on the basis of conditions in evidence at the time of site inspections and on the basis of information provided to us. We have relied in good faith upon representations, information and instructions provided by the Client and others concerning the site. Accordingly, we cannot accept responsibility for any deficiency, misstatement or inaccuracy contained in the Report as a result of misstatements, omissions, misrepresentations, or fraudulent acts of the Client or other persons providing information relied on by us. We are entitled to rely on such representations, information and instructions and are not required to carry out investigations to determine the truth or accuracy of such representations, information and instructions.
- c) **Design Services:** The Report may form part of the design and construction documents for information purposes even though it may have been issued prior to the final design being completed. We should be retained to review the final design, project plans and documents prior to construction to confirm that they are consistent with the intent of the Report. Any differences that may exist between the report recommendations and the final design detailed in the contract documents should be reported to us immediately so that we can address potential conflicts.
- d) **Construction Services:** During construction we must be retained to provide field reviews. Field reviews consist of performing sufficient and timely observations of encountered conditions to confirm and document that the site conditions do not materially differ from

those interpreted conditions considered in the preparation of the report. Adequate field reviews are necessary for Thurber to provide letters of assurance, in accordance with the requirements of many regulatory authorities.

## **6. RISK LIMITATION**

Geotechnical engineering and environmental consulting projects often have the potential to encounter pollutants or hazardous substances and the potential to cause an accidental release of those substances. In consideration of the provision of the services by us, which are for the Client's benefit, the Client agrees to hold harmless and to indemnify and defend us and our directors, officers, servants, agents, employees, workmen and contractors (hereinafter referred to as the "Company") from and against any and all claims, losses, damages, demands, disputes, liability and legal investigative costs of defence, whether for personal injury including death, or any other loss whatsoever, regardless of any action or omission on the part of the Company, that result from an accidental release of pollutants or hazardous substances occurring as a result of carrying out this Project. This indemnification shall extend to all Claims brought or threatened against the Company under any federal or provincial statute as a result of conducting work on this Project. In addition to the above indemnification, the Client further agrees not to bring any claims against the Company in connection with any of the aforementioned causes.

## **7. SERVICES OF SUB CONSULTANTS AND CONTRACTORS**

The conduct of engineering and environmental studies frequently requires hiring the services of individuals and companies with special expertise and/or services which we do not provide. We may arrange the hiring of these services as a convenience to our Clients. As these services are for the Client's benefit, the Client agrees to hold the Company harmless and to indemnify and defend us from and against all claims arising through such hirings to the extent that the Client would incur had he hired those services directly. This includes responsibility for payment for services rendered and pursuit of damages for errors, omissions or negligence by those parties in carrying out their work. In particular, these conditions apply to the use of drilling, excavation and laboratory testing services.

## **8. CONTROL OF WORK AND JOBSITE SAFETY**

We are responsible only for the activities of our employees on the jobsite. The presence of our personnel on the site shall not be construed in any way to relieve the Client or any contractors on site from their responsibilities for site safety. The Client acknowledges that he, his representatives, contractors or others retain control of the site and that we never occupy a position of control of the site. The Client undertakes to inform us of all hazardous conditions, or other relevant conditions of which the Client is aware. The Client also recognizes that our activities may uncover previously unknown hazardous conditions or materials and that such a discovery may result in the necessity to undertake emergency procedures to protect our employees as well as the public at large and the environment in general. Those procedures may well involve additional costs outside of any budgets previously agreed to. The Client agrees to pay us for any expenses incurred as the result of such discoveries and to compensate us through payment of additional fees and expenses for time spent by us to deal with the consequences of such discoveries. The Client also acknowledges that in some cases the discovery of hazardous

conditions and materials will require that certain regulatory bodies be informed and the Client agrees that notification to such bodies by us will not be a cause of action or dispute.

## **9. INDEPENDENT JUDGEMENTS OF CLIENT**

The information, interpretations and conclusions in the Report are based on our interpretation of conditions revealed through limited investigation conducted within a defined scope of services. We cannot accept responsibility for independent conclusions, interpretations, interpolations and/or decisions of the Client, or others who may come into possession of the Report, or any part thereof, which may be based on information contained in the Report. This restriction of liability includes but is not limited to decisions made to develop, purchase or sell land.

## STATEMENT OF QUALIFICATIONS AND LIMITATIONS

The attached Report (the “Report”) has been prepared by ● for the benefit of ● (“Client”) in accordance with the agreement between ● and Client (the “Agreement”).

The information, data, recommendations and conclusions contained in the Report:

- are subject to the budgetary, time and other constraints and limitations in the Agreement and the qualifications contained in the Report (the “Limitations”)
- represent ●’s professional judgement in light of the Limitations and industry standards for the preparation of similar reports
- may be based on information provided to ● which has not been independently verified
- have not been updated
- must be read as a whole and sections thereof should not be read out of such context
- were prepared for the specific purposes described in the Report and the Agreement and must not be used for any other purpose whatsoever

Unless expressly stated to the contrary in the Report or the Agreement, ●:

- shall not be responsible for any events or circumstances that may have occurred since the date on which the Report was prepared or for any inaccuracies contained in information that was provided to ●
- makes no guarantees or warranties whatsoever, whether express or implied, with respect to the Report or any part thereof, other than that the Report represents ●’s professional judgement as described above
- shall not be deemed to have represented that the Report or any part thereof is exhaustive or applicable to any specific use other than that described in the Report and the Agreement

Except as described above, ● denies any liability in respect of the Report or parts thereof and shall not be responsible for any damages arising from use of the Report or parts thereof.

This Disclaimer is attached to and forms part of the Report.

# STATEMENT OF QUALIFICATIONS AND LIMITATIONS

The attached Report (the “Report”) has been prepared by • (“Consultant”) for the benefit of the client (“Client”) in accordance with the agreement between Consultant and Client, including the scope of work detailed therein (the “Agreement”).

The information, data, recommendations and conclusions contained in the Report:

- are subject to the scope, schedule, and other constraints and limitations in the Agreement and the qualifications contained in the Report (the “Limitations”)
- represent Consultant’s professional judgement in light of the Limitations and industry standards for the preparation of similar reports
- may be based on information provided to Consultant which has not been independently verified
- have not been updated since the date of issuance of the Report and their accuracy is limited to the time period and circumstances in which they were collected, processed, made or issued
- must be read as a whole and sections thereof should not be read out of such context
- were prepared for the specific purposes described in the Report and the Agreement
- in the case of subsurface, environmental or geotechnical conditions, may be based on limited testing and on the assumption that such conditions are uniform and not variable either geographically or over time

Unless expressly stated to the contrary in the Report or the Agreement, Consultant:

- shall not be responsible for any events or circumstances that may have occurred since the date on which the Report was prepared or for any inaccuracies contained in information that was provided to Consultant
- agrees that the Report represents its professional judgement as described above for the specific purpose described in the Report and the Agreement, but Consultant makes no other representations with respect to the Report or any part thereof
- the case of subsurface, environmental or geotechnical conditions, is not responsible for variability in such conditions geographically or over time

The Report is to be treated as confidential and may not be used or relied upon by third parties, except:

- as agreed by Consultant and Client
- as required by-law
- for use by governmental reviewing agencies

Any use of this Report is subject to this Statement of Qualifications and Limitations. Any damages arising from improper use of the Report or parts thereof shall be borne by the party making such use.

This Statement of Qualifications and Limitations is attached to and forms part of the Report.

# PROFESSIONAL SERVICES TERMS AND CONDITIONS

The following Terms and Conditions are attached to and form part of the Proposal for Professional Services to be performed by ● and together, when the CLIENT authorizes ● to proceed with the services, constitute the AGREEMENT.

**DESCRIPTION OF WORK:** ● shall render the services described in the Proposal (hereinafter called the “SERVICES”) to the CLIENT.

**TERMS AND CONDITIONS:** No terms, conditions, understandings, or agreements purporting to modify or vary these Terms and Conditions shall be binding unless hereafter made in writing and signed by the CLIENT and ●. In the event of any conflict between the Proposal and these Terms and Conditions, these Terms and Conditions shall take precedence. This AGREEMENT supercedes all previous agreements, arrangements or understandings between the parties whether written or oral in connection with or incidental to the PROJECT

**COMPENSATION:** Payment is due to ● upon receipt of invoice. Failure to make any payment when due is a material breach of this AGREEMENT and will entitle ●, at its option, to suspend or terminate this AGREEMENT and the provision of the SERVICES. Interest will accrue on accounts overdue by 30 days at the lesser of 1.5 percent per month (18 percent per annum) or the maximum legal rate of interest. Unless otherwise noted, the fees in this agreement do not include any value added, sales, or other taxes that may be applied by Government on fees for services. Such taxes will be added to all invoices as required.

**NOTICES:** Each party shall designate a representative who is authorized to act on behalf of that party. All notices, consents, and approvals required to be given hereunder shall be in writing and shall be given to the representatives of each party.

**TERMINATION:** Either party may terminate the AGREEMENT without cause upon thirty (30) days notice in writing. If either party breaches the AGREEMENT and fails to remedy such breach within seven (7) days of notice to do so by the non-defaulting party, the non-defaulting party may immediately terminate the Agreement. Non-payment by the CLIENT of ●’s invoices within 30 days of ● rendering same is agreed to constitute a material breach and, upon written notice as prescribed above, the duties, obligations and responsibilities of ● are terminated. On termination by either party, the CLIENT shall forthwith pay ● all fees and charges for the SERVICES provided to the effective date of termination.

**ENVIRONMENTAL:** Except as specifically described in this AGREEMENT, ●’s field investigation, laboratory testing and engineering recommendations will not address or evaluate pollution of soil or pollution of groundwater.

Where the SERVICES include storm water pollution prevention (SWPP), sedimentation or erosion control plans, specifications, procedures or related construction observation or administrative field functions, CLIENT acknowledges that such SERVICES proposed or

performed by ● are not guaranteed to provide complete SWPP, sedimentation or erosion control, capture all run off or siltation, that any physical works are to be constructed and maintained by the CLIENT's contractor or others and that ● has no control over the ultimate effectiveness of any such works or procedures. Except to the extent that there were errors or omissions in the SERVICES provided by ●, CLIENT agrees to indemnify and hold ● harmless from and against all claims, costs, liabilities or damages whatsoever arising from any storm water pollution, erosion, sedimentation, or discharge of silt or other deleterious substances into any waterway, wetland or woodland and any resulting charges, fines, legal action, cleanup or related costs.

**PROFESSIONAL RESPONSIBILITY:** In performing the SERVICES, ● will provide and exercise the standard of care, skill and diligence required by customarily accepted professional practices normally provided in the performance of the SERVICES at the time and the location in which the SERVICES were performed.

**LIMITATION OF LIABILITY:** The CLIENT releases ● from any liability and agrees to defend, indemnify and hold ● harmless from any and all claims, damages, losses, and/or expenses, direct and indirect, or consequential damages, including but not limited to attorney's fees and charges and court and arbitration costs, arising out of, or claimed to arise out of, the performance of the SERVICES, excepting liability arising from the sole negligence of ●. It is further agreed that the total amount of all claims the CLIENT may have against ● under these Terms and Conditions, including but not limited to claims for negligence, negligent misrepresentation and breach of contract, shall be strictly limited to the lesser of professional fees paid to ● for the SERVICES or five hundred thousand dollars (\$500,000). No claim may be brought against ● more than two (2) years after the cause of action arose. As the CLIENT's sole and exclusive remedy under these Terms and Conditions any claim, demand or suit shall be directed and/or asserted only against ● and not against any of ●'s employees, officers or directors.

**INDEMNITY FOR MOLD CLAIMS:** It is understood by the parties that existing or constructed buildings may contain mold substances that can present health hazards and result in bodily injury, property damage and/or necessary remedial measures. If, during performance of the SERVICES, ● knowingly encounters any such substances, ● shall notify the CLIENT and, without liability for consequential or any other damages, suspend performance of services until the CLIENT retains a qualified specialist to abate and/or remove the mold substances. The CLIENT agrees to release and waive all claims, including consequential damages, against ●, its subconsultants and their officers, directors and employees arising from or in any way connected with the existence of mold on or about the project site whether during or after completion of the SERVICES. The CLIENT further agrees to indemnify and hold ● harmless from and against all claims, costs, liabilities and damages, including reasonable attorneys' fees and costs, arising in any way from the existence of mold on the project site whether during or after completion of the SERVICES, except for those claims, liabilities, costs or damages caused by the sole gross negligence and/or knowing or willful misconduct of ●. ● and the CLIENT waive all rights against each other for mold damages to the extent that such damages sustained by either party are covered by insurance.

**DOCUMENTS:** All of the documents prepared by or on behalf ● in connection with the PROJECT are instruments of service for the execution of the PROJECT. ● retains the property



and copyright in these documents, whether the PROJECT is executed or not. These documents may not be used for any other purpose without the prior written consent of ●. In the event ●'s documents are subsequently reused or modified in any material respect without the prior consent of ●, the CLIENT agrees to defend, hold harmless and indemnify ● from any claims advanced on account of said reuse or modification.

● cannot guarantee the authenticity, integrity or completeness of data files supplied in electronic format ("Electronic Files"). CLIENT shall release, indemnify and hold ●, its officers, employees, consultants and agents harmless from any claims or damages arising from the use of Electronic Files. Electronic files will not contain stamps or seals, remain the property of ●, are not to be used for any purpose other than that for which they were transmitted, and are not to be retransmitted to a third party without ●'s written consent.

**FIELD SERVICES:** ● shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with work on the PROJECT, and shall not be responsible for any contractor's failure to carry out the work in accordance with the contract documents. ● shall not be responsible for the acts or omissions of any contractor, subcontractor, any of their agents or employees, or any other persons performing any of the work in connection with the PROJECT.

**GOVERNING LAW/COMPLIANCE WITH LAWS:** The AGREEMENT shall be governed, construed and enforced in accordance with the laws of the jurisdiction in which the majority of the SERVICES are performed. ● shall observe and comply with all applicable laws, continue to provide equal employment opportunity to all qualified persons, and to recruit, hire, train, promote and compensate persons in all jobs without regard to race, color, religion, sex, age, disability or national origin or any other basis prohibited by applicable laws.

**DISPUTE RESOLUTION:** If requested in writing by either the CLIENT or ●, the CLIENT and ● shall attempt to resolve any dispute between them arising out of or in connection with this AGREEMENT by entering into structured non-binding negotiations with the assistance of a mediator on a without prejudice basis. The mediator shall be appointed by agreement of the parties. If a dispute cannot be settled within a period of thirty (30) calendar days with the mediator, if mutually agreed, the dispute shall be referred to arbitration pursuant to laws of the jurisdiction in which the majority of the SERVICES are performed or elsewhere by mutual agreement.

**ASSIGNMENT:** The CLIENT and ● shall not, without the prior written consent of the other party, assign the benefit or in any way transfer the obligations under these Terms and Conditions or any part hereof.

**SEVERABILITY:** If any term, condition or covenant of the AGREEMENT is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions of the AGREEMENT shall be binding on the CLIENT and ●.

Appendix C

# Happy Fun Ball

## Happy Fun Ball

**Kid 1...Jan Hooks**

**Kid 2...Dana Carvey**

**Kid 3...Mike Myers**

[open on three kids playing with their Happy Fun Ball]

**Kid 1:** It's happy!

**Kid 2:** It's fun!

**All Three Kids:** It's Happy Fun Ball!

**Announcer:** Yes, it's Happy Fun Ball! The toy sensation that's sweeping the nation! Only \$14.95 at participating stores! Get one today!

- Warning: Pregnant women, the elderly, and children under 10 should avoid prolonged exposure to Happy Fun Ball.
- Caution: Happy Fun Ball may suddenly accelerate to dangerous speeds.
- Happy Fun Ball contains a liquid core, which, if exposed due to rupture, should not be touched, inhaled, or looked at.
- Do not use Happy Fun Ball on concrete.
- Discontinue use of Happy Fun Ball if any of the following occurs:
  - itching
  - vertigo
  - dizziness
  - tingling in extremities
  - loss of balance or coordination
  - slurred speech
  - temporary blindness
  - profuse sweating

- heart palpitations
- If Happy Fun Ball begins to smoke, get away immediately. Seek shelter and cover head.
- Happy Fun Ball may stick to certain types of skin.
- When not in use, Happy Fun Ball should be returned to its special container and kept under refrigeration. Failure to do so relieves the makers of Happy Fun Ball, Wacky Products Incorporated, and its parent company, Global Chemical Unlimited, of any and all liability.
- Ingredients of Happy Fun Ball include an unknown glowing substance which fell to Earth, presumably from outer space.
- Happy Fun Ball has been shipped to our troops in Saudi Arabia and is also being dropped by our warplanes on Iraq.
- Do not taunt Happy Fun Ball.
- Happy Fun Ball comes with a lifetime guarantee.