CASE LAW ON

SELLER PROPERTY INFORMATION STATEMENT:

UPDATE 2011 - 2013

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I. Background

In the 2007 decision in *Kauffman v. Gibson* Fo , Justice Gordon P. Killeen wrote, “It seems that, in the past 10 years or so, ... voluntary disclosure statements ... have been adopted by real estate boards across Canada. Almost inevitably, they have given rise to litigation over their meaning and reach.”

In the 2012 decision in *Nylander v. Martin* Fo , Koke, J., referring to the Property Condition Statement, wrote:

“Based on the experience of those provinces that have employed the PCS, it seems to present a ripe ground for litigation. Doubtless this is due in no small measure to the problems inherent in an informal "fill in the blank" form which can have such serious legal consequences when problems subsequently develop in a real estate transaction.The wisdom of maintaining in use a form fraught with such inherent difficulties, exacerbated by the conflicting statements within the form concerning its purpose and effect, should be addressed by lawyers and real estate agents alike.”

The critical comments of these two judges, and others, frame the discussion in this paper.

In February, 2011, I presented a paper to the Ontario Bar Association Institute entitled “Seller Property Information Statement: All the Ontario cases 1997 - 2010" in which I analyzed 49 Ontario decisions which had been reported to the end of 2010.

That paper is available from the OBA in the 2011 Institute binder, and online at *http://aaron.ca/columns/seller%20property%20information%20statement.htm.*

By January, 2011, the number of reported Ontario SPIS cases had reached 49 (including three cases which had gone to court twice), and a further 26 are discussed in this paper (counting motions and appeals), bringing the total to 75. Across Canada the total number of SPIS cases at present is about 240 — and new ones are appearing at the rate of about one every week or two.

It is difficult to think of any other single form — except perhaps the marriage certificate — which has spawned so much litigation and has produced so much money for litigation lawyers.

This paper deals with all reported Ontario SPIS cases from 2011 to 2013.

II. The SPIS Form - 220, 221, 222

Samples of the 2013 versions of the OREA forms are appended to this paper. The SPIS itself is form 220. The condominium schedule is form 221, and the rural property schedule is form 222. The copyright forms are printed with permission of the Ontario Real Estate Association.

Form 220 is preceded by these cautions:

ANSWERS MUST BE COMPLETE AND ACCURATE This statement is designed in part to protect Sellers by establishing that correct information concerning the property is being provided to buyers. All of the information contained herein is provided by the Sellers to the brokerage/broker/salesperson. Any person who is in receipt of and utilizes this Statement acknowledges and agrees that the information is being provided for information purposes only and is not a warranty as to the matters recited hereinafter even if attached to an Agreement of Purchase and Sale. The brokerage/broker/salesperson shall not be held responsible for the accuracy of any information contained herein.

BUYERS MUST STILL MAKE THEIR OWN ENQUIRIES Buyers must still make their own enquiries notwithstanding the information contained on this statement. Each question and answer must be considered and where necessary, keeping in mind that the Sellers' knowledge of the property may be incomplete, additional information can be requested from the Sellers or from an independent source such as the municipality. Buyers can hire an independent inspector to examine the property to determine whether defects exist and to provide an estimate of the cost of repairing problems that have been identified.

This statement does not provide information on psychological stigmas that may be associated with a property.

Above the sellers' signature is this disclaimer:

THE SELLERS STATE THAT THE ABOVE INFORMATION IS TRUE, BASED ON THEIR CURRENT ACTUAL KNOWLEDGE AS OF THE DATE BELOW. ANY IMPORTANT CHANGES TO THIS INFORMATION KNOWN TO THE SELLERS WILL BE DISCLOSED BY THE SELLERS PRIOR TO CLOSING. SELLERS ARE RESPONSIBLE FOR THE ACCURACY OF ALL ANSWERS. SELLERS FURTHER AGREE TO INDEMNIFY AND HOLD THE BROKERAGE/BROKER/SALESPERSON HARMLESS FROM ANY LIABILITY INCURRED AS A RESULT OF ANY BUYER RELYING ON THIS INFORMATION. THE SELLERS HEREBY AUTHORIZE THE BROKERAGE TO POST A COPY OF THIS SELLER PROPERTY INFORMATION STATEMENT INTO THE DATABASE(S) OF THE APPROPRIATE MLS®SYSTEM AND THAT A COPY OF THIS SELLER PROPERTY INFORMATION STATEMENT BE DELIVERED BY THEIR AGENT OR REPRESENTATIVE TO PROSPECTIVE BUYERS OR THEIR AGENTS OR REPRESENTATIVES. THE SELLERS HEREBY ACKNOWLEDGE RECEIPT OF A TRUE COPY OF THIS STATEMENT.

As will be seen in the case discussions below, the courts typically ignore these disclaimers. Exactly why the wording appears on the forms is, to me, wishful thinking.

III. The Forms Themselves

One of the main criticisms of the forms is that they are too complex. The questions require a considerable amount of legal, accounting, technical or structural expertise, and neither agents nor lay vendors can possibly understand all of the questions.

Consider the difficulty of answering these questions on Form 220:

GENERAL:		
1.	I have owned the property from _____.	
2.	Does any other party have an ownership or spousal interest in the property?	
3.	Is the property a condominium or a freehold property that includes an interest in a common elements condominium? (If yes, Schedule 221 to be completed.)	
4.	Is the property subject to first right of refusal, option, lease, rental agreement or other listing?	
5.	Are there any encroachments, registered easements, or rights-of way?	
6.	Is there a plan of Survey? Date of Survey _____.	
7.	Are there any disputes concerning the boundaries of the property?	
8.	Are you aware or any non-compliance with zoning regulations?	
9.	Are you aware or any pending developments, projects or rezoning application in the neighbourhood?	
10.	Are there any public projects planned for the neighbourhood? eg. road widening, new highways, expropriations etc.	
11.	Are there any restrictive covenants that run with the land?	
12.	Are there any drainage restrictions?	
13.	Are there any local levies or unusual taxes being charged at the present time or contemplated? If so, at what cost? _____.	
14.	Have you received any notice, claim, work order or deficiency notice affecting the property from any person or any public body?	
15. (a)	Is the property connected to municipal water? (If not, Schedule 222 to be completed.)	
(b)	Is the property connected to municipal sewer? (If not, Schedule 222 to be completed.)	
16.	Are there any current or pending Heritage restrictions for the property or the area?	

17.	Are there any conditional sales contracts, leases, or service contracts? eg: furnace, alarm system, hot water tank, propane tank, etc. Specify _____ Are they assignable or will they be discharged? _____.
18.	Are there any defects in any appliances or equipment included with the property?
19.	Do you know the approximate age of the building(s)? Age _____ Any Additions: Age _____.
20.	Are you aware of any past or pending claims under the Tarion Warranty Corporation (formerly ONHWP)? Tarion Warranty Corporation /ONHWP Registration No. _____
21.	Will the sale of this property be subject to HST?

... or these questions in the condominium schedule, Form 221

CONDOMINIUM CORPORATION: (Provide applicable ADDITIONAL COMMENTS)					
1.	(a)	Condominium fees? $			
	(b)	Condominium fees includes:			
	(c)	Cost for amenities not included in fee $ Details $			
2.	Are there any special assessments approved or contemplated?				
3.	Have you received any written notice of lawsuit(s) pending?				
4.	Have you been informed of any notices, claims, work orders or deficiency notice affecting the common elements received form any person or any public body?				
5.	(a)	Has a reserve fund study been completed? Date of Study			
	(b)	Approximate amount of reserve fund as of last notification $			
6.	(a)	Are there any restrictions on pets?			
	(b)	Are there any restrictions on renting the property?			
	(c)	Are there any restrictions on the use of the property?			
7.	(a)	If any renovations, additions or improvements were made to the unit and/or common elements, was approval of the condominium Corporation obtained?			
	(b)	Is approval of any prospective buyer required by the Condominium Corporation?			
	(c)	Are any other approvals required by the Condominium Corporation or Property Manager? If yes, specify:			
	(d)	Name of Property Management Company?			
8.	Are there any pending rule or by-law amendments which may alter or restrict the uses of the property?				
9.	Is the Condominium registered?				
10.	Parking: Number of Spaces		☐ Owned	☐ Exclusive use	☐ Leased or License
11.	Locker:		☐ Owned	☐ Exclusive Use	
12.	(a)	Amenities: ☐ Pool ☐ Sauna ☐ Exercise Room ☐ Meeting/Party Room ☐ Boat Docking ☐ Guest Parking ☐ Other			

or these questions in the rural/recreational schedule, form 222:

WATER SUPPLY AND WASTE DISPOSAL: (Provide applicable ADDITIONAL COMMENTS)	
1. (a)	What is your water source? ☐ Municipal ☐ Drilled ☐ Bored ☐ Dug ☐ Cistern ☐ Lake ☐ Community ☐ Shared ☐ Other
(b)	If your water source is Community/Shared, is there a transferable written agreement?
(c)	Are you aware of any problem re: quantity of water? (If yes, explain below)
(d)	Are you aware of any problems re: quality of water? (If yes, explain below)
(e)	Do you have a water treatment device?
(f)	Is your water system operable year round? Heated lines? ☐ Yes ☐ No
(g)	Date and result of most recent water test
(h)	Are any documents available for the well? If yes, specify?
(i)	Does the property have any abandoned well(s)?
2. (a)	What kind of sewage disposal system services the property? ☐ Municipal ☐ Septic tank with tile bed ☐ Holding tank ☐ Other (Explain below)
(b)	Are you aware of any problems with the septic system? Date septic tank/holding tank last pumped? Age of the system
(c)	What documentation for the sewage system is available? ☐ Use Permit ☐ Location Sketch ☐ Maintenance Records ☐ Inspection Certificate ☐ Other
3.	Are the well(s), water line(s) and waste disposal system(s) within the boundaries of the subject property?

ACCESS, SHORELINE, UTILITIES: (Provide applicable ADDITIONAL COMMENTS)	
1.	(a) Is property access by municipal road? If, yes; ☐ Open all year ☐ Seasonally open
	(b) Is property serviced by private road? Cost $ per year
2.	If your access is across private property, access is ☐ Right of way ☐ Deeded ☐ Other Cost $ per year.
3.	(a) If water access only, access is ☐ Deeded ☐ Leased ☐ Other (Explain below)
	(b) Water access cost of: Parking $ Dock $ per year
4.	(a) Is the original Shore Road Allowance owned?
	(b) Are there any pending applications for shoreline improvement?
	(c) Are there any disputes concerning the shoreline or improvements on the shoreline?
	(d) Are there any structures or docks on the original Shore Road Allowance?
	(e) Is the original Road Allowance included in the lot size?
5.	Does the boundary of the property extend beyond the water line? If yes, explain below.
6.	(a) Is hydro available to the property?
	(b) Is the owner responsible for the installation, replacement / maintenance of any utility poles / equipment?

IV. The risk to agents using the form

Use of the SPIS remains a controversial issue in the real estate community. Some listing agents encourage sellers to complete the form and provide it to buyers to disclose various issues about a house being offered for sale. Some local real estate associations make it mandatory. Others avoid it. Many stakeholders find it overly complex, ambiguous, misleading and technical.

The use by agents of the SPIS has resulted in a number of Ontario real estate agents getting disciplined by their regulatory body, the Real Estate Council of Ontario (RECO). Details are published on the RECO website (www.reco.on.ca), and some are detailed in my 2011 paper referred to above.

As well, many agents and brokerages have been dragged into litigation in reported decisions since 1997. In the Ontario Court of Appeal decision in *Krawchuk v. Scherbak*, discussed below, Epstein, J.A., hit the real estate agent (Weddell) with a judgment for damages exceeding $110,000:

> Even without being in a position to identify the precise parameters of the standard of care that the real estate respondents owed Ms. Krawchuk, the following considerations support a finding that they did not meet their obligations to their client:
>
> 1. The trial judge found that Ms. Weddell was aware of settling problems. The evidence of this was, in fact, manifest; 2. There was reason for Ms. Weddell to be on her inquiry as to the veracity of the Scherbaks' representations;
>
> 3. Ms. Weddell made no inquiry at all of the Scherbaks as to what precisely they knew about the settlement problems, including how they believed them to have been fixed;
>
> 4. Ms. Krawchuk asked for reassurance specifically with respect to the issue of settlement problems; and,
>
> Ms. Weddell, on her own admission, had no expertise in addressing the evidence of settlement.
>
> As a consequence of the real estate respondents' failure to meet their obligations to Ms. Krawchuk in this respect, she purchased defective property and suffered a loss.
>
> I would therefore allow Ms. Krawchuk's appeal from the dismissal of her claims against the real estate respondents and award judgment against them in the amount of $110,742.32.

At least one judge believes that the purpose of the SPIS is NOT to protect agents. In *Riley v. Langfield* [2008] O.J. No. 2028 (Ont. S.C.J.) - Trial; Costs [2008] O.J. No. 2816

The most interesting part of the decision of Justice D.J. Gordon is his criticism of the realtors for each of the parties, for their lack of "any due-diligence inquiry" and especially their failure to take action with respect to the possibility of water problems.

> 131 I pause at this point to consider the involvement of the two real estate representatives in this transaction. They are not defendants and, hence, no evidence was tendered as to the standard of care they were required to perform.
>
> 132 The realtors are said to be professional. They received a commission in some unknown amount on closing of the transaction. There can be no doubt they owed a duty of care. Mr. Korchensky and Mr. Rhodes made reference to the importance of checking for water problems, particularly in older homes. Nevertheless, on the evidence presented it appears neither realtor conducted any due diligence inquiry.
>
> 133 Mr. Rhodes said he conducted a "cursory inspection" of the property when preparing the listing agreement. He met with the Langfields to complete the SPIS. Despite the stated disclosure in this document, Mr. Rhodes made no further inquiry.
>
> 134 Mr. Korchensky saw the water or moisture disclosure in the SPIS. Despite his stated concern with this reference, he was content to rely on Mr. Langfield's limited comments. Mr. Korchensky, it appears, did not recommend a second viewing nor did he suggest a professional home inspection.
>
> **135 Realtors are expected to provide advice and direction to their clients. They are paid to act as professionals. They are not simply tour guides walking through a residence. The cavalier attitude of both realtors with respect to the SPIS is troubling. *The purpose of the SPIS is not to protect realtors from liability.* They have a due diligence obligation.**
>
> (emphasis added)

V. The purpose of the form and the resulting problems

In *Ward v.Smith*, (2001) 45 R.P.R. (3d) 154, the B.C. Supreme Court adopted the following descriptions of Disclosure Statements:

(a) "The purpose of the disclosure statement is to raise questions and concerns rather than give detailed answers to the disclosures made."

(b) "Although the property condition disclosure statement forms part of the agreement for a purchase and sale, it is not necessarily a warranty. Its main purpose is to put purchasers on notice with respect to known problems. The disclosure statement … merely indicates that the statements therein are true according to the seller's current actual knowledge."

(c) "The disclosure statement does not call upon a vendor to warrant a certain state of affairs. It requires the vendor to say no more than that he or she is or is not aware of problems."

In the earlier decision in *Arsenault v. Pederson*, [1996] B.C.J. No. 1026, 63 A.C.W.S. (3d) 166, the same British Columbia Supreme Court stated:

(a) "I have no idea who drafted these questions (in the disclosure statement) but they clearly are drawn in a manner offering more protection for a vendor than to a purchaser and in a manner to provide a salesperson or vendor with an air of rectitude which might not…be deserved".

(b) "The title to the document (the Property Information Statement) is…a misnomer. It does not directly disclose the actual condition of the property. It requires the vendor to say no more than that he or she is not aware of problems."

One of the questions which the courts have been wrestling with is whether the statements contained in the Disclosure Statements are representations or warranties. The third sentence in the first paragraph of the OREA form states that "The information is being provided for information purposes only and is not a warranty".

The OREA Real Estate Encyclopedia states that: "It is important to note that recommended warranty clauses usually state that the party represents and warrants. The two terms should be clearly differentiated".

"A warranty is a statement or covenant that is subsidiary or collateral to the contract. Breach of a warranty entitles the purchaser to damages only and does not permit the purchaser to rescind the contract. A representation is a statement made by one party to the other, before or at the time of contracting, regarding some existing fact, or some past event, which is one of the causes that induces a contract."

In *Ward v. Smith* (*supra*), the court continued "Representations are non-contractual. If they are not true the appropriate remedy is not an action for breach of contract, but the avoidance or rescission of a contract entered into in consequence of the representation, and, possibly, a tort action for damages. Thus…. a misrepresentation, may:

(1) entitle the representee to avoid the contract, if the representation was fraudulently made;

(2) entitle the representee to rescind the contract, if the representation was innocently made or;

(3) entitle the representee to sue, in tort, for damages if the representation was negligently made".

OREA's official position on the forms was expressed to me in a 2009 written statement:

> "We take great pride in this form because it has demonstrated its ability to inform buyers and protect sellers over its many years of use in Ontario. The SPIS form protects sellers from a claim by the buyer that the seller did not reveal the condition of their home. Numerous court cases have cited the SPIS as evidence that a seller did, indeed, disclose a condition such as a wet basement so they were found not to be responsible for a claim by a purchaser.
>
> "We also know anecdotally that many potential claims by purchasers against sellers never even make it to court because those purchasers are reminded of the SPIS as evidence that they had, indeed, been informed of the condition of the house they bought.

"The Seller Property Information Statement also has proven to be an excellent tool to inform buyers of the condition of a property they are considering. Through the use of a SPIS, a buyer has pertinent information about a property that will assist them (sic) in their decision making process.

"The key to the successful use of the SPIS is the key to any successful transaction: honesty. If a seller knowingly hides pertinent information about their property, that is simply dishonest."

On the other side of the discussion, I remain opposed to the forms for a number of reasons. These include:

1. They require technical, legal, construction, environmental or accounting expertise far beyond the capacity of most individuals, and indeed, most agents.

2. The disclaimers of responsibility are ignored or invoked by the courts without any apparent consistency.

3. They give rise to an inordinate amount of litigation, often in Small Claims Courts, without any predictability of results.

4. Agents get into trouble with their regulators for misuse or abuse of the forms.

5. Many of the questions are ambiguous and capable of misunderstanding.

6. Many of the questions are unclear as to whether they require answers referring to the present or the past tense.

7. Some of the questions ask about events which occurred prior to the ownership of the vendor, and would be completely beyond his or her knowledge (for example, “Has the use of the property **ever** been for the growth or manufacture of illegal substances?)

8. Some of the questions are beyond the ability of the vendor to answer without huge expenditures of money (for example, the question asking about whether there is an underground fuel oil tank on the property.)

9. Individual vendors cannot be expected to have tax expertise or to know whether a sale is subject to HST.

10. Sellers are not clairvoyants. They cannot know whether an appliance or a hot tub or a furnace has any defects at the time of closing which - inevitably - show up the day after the deed is registered.

11. Sellers are not lawyers who would easily be able to determine whether there are encroachments, easements, restrictive covenants, drainage restrictions, local levies, heritage designations or other parties with ownership interests. And typically, agents do not ask their clients to consult professionals before completing and signing the forms.

12. The form fails to state that its completion is optional.

13. The form appears to be intended to protect agents from failing to disclose details about the property to purchasers, but if that is its purpose, it has not been successful in many cases.

14. Sellers are not told of the increased risk of litigation if they sign the form.

15. The forms encourage sellers to disclose far more than they are legally required to do with respect to disclosure of dangerous latent defects.

VI. The new Form 225 - Making matters worse. Much worse.

In the wake of the flood of court cases involving the Seller Property Information Statement (SPIS) and its counterparts across Canada, the Ontario Real Estate Association introduced a strange new form in 2013 designed to warn sellers about signing the SPIS.

Rather than place or add to the warnings about signing the SPIS form in big bold letters right on the form itself, the new form 225, entitled “Important Information for Sellers,” contains a caution for anyone about to sign the disclosure form.

In a huge understatement, the warning form states “care must be taken when the form is completed.”

"If there is some question as to whether a particular item should be mentioned on the form," the warning notes, "it is better to err on the side of caution and provide the information along with an explanation, e.g. a defect that has been repaired."

In my view, erring on the side of caution would require that no SPIS form be used at all.

The text continues: "With the high volume of property transactions that take place, there will inevitably be disputes between seller and buyers, whether or not an SPIS has been completed. The SPIS, when completed, may become an issue in such a dispute.

"There have been cases where a court has determined the sellers completed the SPIS accurately, honestly and to the best of their ability and the evidence provided by the SPIS is favourable to the sellers. There have been other cases where a court has determined that a seller has not been forthcoming with important information on the SPIS or has provided misleading information to the buyers."

The warning form makes no mention of the frequent criticisms that have been levelled at the SPIS by the courts, in the media, and elsewhere. Filling it out completely requires technical, legal, construction, environmental, tax and accounting expertise far beyond the capacity of most individuals, and indeed, most agents. Many of its questions are ambiguous or unclear at best. Some of the questions ask about events which occurred prior to the ownership of the seller, and would be completely beyond his or her knowledge. Sellers signing the form are asked impossible technical questions about encroachments, easements, restrictive covenants, drainage restrictions, local levies and heritage designations.

In my view, neither Form 225 nor any other form will ever resolve these issues.

But the biggest zinger on the new warning form is that it fails to correctly state the law on a seller's disclosure requirements. It says, "Whether or not the seller completes an SPIS, the law requires a seller to disclose hidden material defects to a property." If the form was correct it would state that the law requires a seller to disclose any hidden defect which renders the property uninhabitable or dangerous. Telling a lay person to disclose "material" defects without defining the term is both unhelpful and misleading.

I can't think of any other document in any area of law that exists solely to warn consumers about the dangers of signing a different form altogether. To me, the concept of a separate warning form is simply bizarre. It makes me wonder whether the real purpose of the form is an attempt to shield the agent from getting sued for asking the seller to sign the SPIS.

In a blog about the SPIS, lawyer Simon Parham wrote, "Buyers love them. Lawyers hate them. Sellers should be wary of them." He could also have added that litigation lawyers really love them.

In its attempt to dig itself out of a hole created by a very bad disclosure form, OREA's new warning form has only succeeded in making the hole that much deeper.

VII- The Ontario Case Law 2011 - 2013

As mentioned earlier, my 2011 paper summarizes all the Ontario cases up to the end of 2010. What follows below are my comments on all the Ontario SPIS decisions from 2011 to date.

Scott v. Moir [2011] O.J. No. 985, 3 R.P.R. (5th) 296, 2011 CarswellOnt 1393 - March 1, 2011

This was a Small Claims Court action brought by the purchaser of a house in Springdale, Ont., against the vendor, claiming the costs of installing a new chimney, the decomissioning of two dug wells, and the removal and replacement of some contaminated soil. Prior to entering into the agreement, the purchaser had a home inspector inspect the property.

The Seller Property Information Statement, which formed part of the Agreement of Purchase and Sale, was accepted by the court as evidence that the vendor disclosed the existence of a well that was filled.

In dismissing the buyer's claim, the deputy judge wrote, "Reliance by a purchaser on a home inspector to complete the transaction relieves the vendor absent fraud."

Despite the fact that the answers to some of the questions in the SPIS were technically incorrect or misleading the judge noted:

> "... the seller property information statement is not a warranty and the defendant is warned in the statement to make her own enquiries. In other words, the defendant should have conducted a reasonable inspection personally or through her home inspector."

The claim of the buyer was dismissed.

Ryan v. Kaukab [2011] O.J. No. 5151, 2011 ONSC 6826, 6 C.L.R. (4th) 247, 209 A.C.W.S. (3d) 715, 2011 CarswellOnt 12853, 13 R.P.R. (5th) 28 - Nov 17 2011

This action was brought by the purchasers against the vendors claiming equitable damages in lieu of specific performance, damages for fraudulent misrepresentation, damages for unjust enrichment, and a purchaser's lien for improvements made to the property. The vendors' real estate agent reviewed and completed a Vendor Property Disclosure Statement with one of the vendors but in a very complex fact situation the document does not seem to have figured in the eventual outcome.

Krawchuk v. Scherbak - *2009 TRIAL DECISION* [2009] O.J. No. 3254, 2009 CanLII 40556, 85 R.P.R. (4th) 262, 82 C.L.R. (3d) 87, 2009 CarswellOnt 4578, 67 C.C.L.T. (3d) 267, 179 A.C.W.S. (3d) 958 (Ont. S.C.J.) - July 30, 2009. This pre-2011 decision is discussed here as context for the commentary on the appeal, which follows.

Back in the spring of 2004, Timothy and Cherese Scherbak signed a listing agreement to sell their property on Boland Ave. in Sudbury, using the services of Wendy Weddell and Re/Max Sudbury Inc. The Seller Property Information Statement (SPIS), which they signed at the same time, resulted in years of litigation, hundreds of thousands of dollars in legal fees, and damages amounting to twice the value of the house.

Following an open house, Zoriana Krawchuk signed an agreement to purchase the house from the Scherbaks. The offer was not conditional on financing or home inspection, and came in at $10,100 over the $100,000 asking price.

Shortly after closing, Krawchuk discovered that the entire north foundation wall and the northern portions of the east and west foundation walls had settled and were continuing to sink into the ground below. The settling resulted in the failure of proper support for the floor joists and building above. The city of Sudbury issued a work order requiring the problems to be rectified.

Correcting the foundation problem required lifting the home from its foundations, followed by excavation, removal and replacement of the cement basement floor, foundations and subsoil, and placing the house back on the new foundations.

Moving the home caused significant cracking of the interior finish in many areas, requiring further repairs. Fortunately, Krawchuk had purchased title insurance on the closing of her property, and the title insurer reimbursed her more than $105,000.

Krawchuk was still in the red on the deal. She estimated her total damages to be $191,414.94 and sued the sellers, the agent and Re/Max. In the lawsuit, she claimed that the sellers were liable to her for breach of contract and misrepresentation. She argued that the problems with the foundation were hidden defects, which made the house uninhabitable, and that the Scherbaks had deliberately camouflaged them by attempting to level out the living and dining room floors back in 1995.

A significant component of the Krawchuk claim was based on the SPIS completed by the sellers. On the SPIS form, the question "Are you aware of any structural problems?" was answered: "NW corner settled – to the best of our knowledge the house has settled. No further problems in 17 years."

After an unusually long 12-day trial in June, 2009, Justice Robbie Gordon found that this statement was intended to inform prospective purchasers, not to mislead them. Nevertheless, he accepted that Krawchuk relied on the truth and accuracy of the Scherbaks' statement in the SPIS, and that she would not have made the offer if she had known of the structural problems which existed. In so doing, the judge wrote that Krawchuk suffered damages by relying on the SPIS, and that the Scherbaks were responsible for negligent misrepresentation.

Krawchuk's claims against Weddell and Re/Max were dismissed.

When it came to assessing damages, the judge was critical of Krawchuk for incurring damages of more than $190,000 on a house that she bought for $110,100. The judge ruled that she should have sold the house for fair market value and sued for the difference.

Despite this, and even though Krawchuk had recovered more than $105,000 from her title insurer, on July 30, he awarded her additional damages of more than $110,700 against the Scherbaks, plus 4 ½ years of interest on that sum, and court costs.

In a case commentary written at the time the decision was released, I wrote that this case was only the latest in a series resulting from the use of the Seller Property Information Statement. The form is badly drafted, difficult to interpret, and impossible to fill out properly without legal or professional advice. Too often it results in very expensive court proceedings. It is a gold mine for litigation lawyers. Sellers who sign the form, and agents who recommend it, are asking for trouble.

Krawchuk v. Scherbak - APPEAL DECISION: [2011] O.J. No. 2064, 2011 ONCA 352, 279 O.A.C. 109, 82 C.C.L.T. (3d) 179, 332 D.L.R. (4th) 310, 106 O.R. (3d) 598, 5 R.P.R. (5th) 173, 4 C.L.R. (4th) 1, 2011 CarswellOnt 3015, 201 A.C.W.S. (3d) 848 — December 8 2011

If there ever was any doubt about the risks to sellers and real estate agents of using the Seller Property Information Statement (SPIS), this decision of the Ontario Court of Appeal would seem to have put them to rest once and for all.

The Court of Appeal reversed the trial decision in the Krawchuk case summarized above, and held the real estate agent and her employer equally liable with the sellers for negligent misstatement in filling out the form.

As noted above, Krawchuk sued the sellers, the agent and Re/Max Sudbury for misrepresentation in failing to disclose the hidden defects. A significant component of the Krawchuk claim was based on the SPIS form completed by the sellers.

The trial judge found the Scherbaks liable for negligent misrepresentation and awarded Krawchuk damages of $110,000 in addition to the $105,000 she had recovered from her title insurer. He dismissed her claims against the real estate agent and broker.

The Scherbaks appealed the judgment against them, and Krawchuk cross-appealed the dismissal of her claim against the real estate agent.

A three-judge panel of the court of appeal noted that the “issue of primary importance” in the case was “the duty of a real estate agent to verify information provided by the vendor about the property.”

Writing for the appeal court, Justice Gloria Epstein upheld the judgment against the sellers, but also made the real estate agent equally liable for “egregious lapses” during her representation of both purchaser and vendors.

The court wrote that the agent ought to have inquired further into the sellers’ incomplete disclosure that the foundation issues had been resolved years earlier. Failing that, she should have urged the buyer to hire a home inspector or make the offer conditional on an inspection.

Having failed to protect the buyer made the real estate agent equally liable with the sellers for damages.

The court awarded half of the $110,000 in damages against the sellers and half against the real estate agent. In addition, the buyer was awarded $25,000 in costs of the appeal against the sellers and a further $25,000 in costs against the real estate agent.

The costs of the 12-day trial have not been made public, but could easily range into the hundreds of thousands of dollars for all parties involved.

Although the outcome of this case may be viewed as being restricted to its particular facts, and it did not create any new duties of real estate agents, it does emphasize how easily an experienced real estate agent can be held responsible in damages for failing to verify a seller’s statements on the SPIS form.

In her written decision, Justice Epstein endorsed comments in earlier cases about the SPIS form, including one that said use of the form "seems to present a ground ripe for litigation," and another which said that the case should be taken as a warning about the routine use of the form.

Clearly, agents and sellers who continue to use the SPIS do so at their own peril.

Sherbak v. Krawchuk - APPLICATION FOR LEAVE TO APPEAL TO SUPREME COURT OF CANADA: [2011] S.C.C.A. No. 319, [2011] C.S.C.R. no 319

An application for leave to appeal the Ontario Court of Appeal decision to the Supreme Court of Canada was dismissed on December 8, 2011, without reasons.

Moore c. Beaudin [2011] O.J. No. 2975 - May 10, 2011

Before the purchaser bought a single family residence, the vendors produced a Seller Property Information Statement in which they said "no" to a question about whether they were aware of problems with the quality of the well water. Following the purchase of the property, the purchaser found that the water quality in the house was salty, and the salt level exceeded acceptable levels provided by the Province of Ontario.

The purchaser had to install a water treatment system in order to reduce the amount of salt in the water from his well.

The purchaser claimed $25,000.00 from the vendor, her real estate agent and the brokerage, arguing that the vendor made a false representation, and that the agent and the brokerage were negligent not to have recommended, in addition to bacteriological water analysis, an analysis to determine water quality . The purchaser settled with the agent and brokerage for $5,000, reducing her claim to $20,000.

The trial judge found that the vendors' agent knew there was a high content of salt in the water of the single family residence. The vendors, were advised by their real estate agent to respond in the negative to the SPIS question about any problems with the water quality. completing the Seller Property Information Statement with their agent, were entitled to rely on the advice of the real estate agent .

The judge found that the vendors could not rely solely on the advice of the agent, but also bore their share of responsibility.

The judge held the purchaser's agent and brokerage jointly and severally responsible for one-third of the plaintiff's damages. The vendors were held responsible for two-thirds of the damages. In addition , the vendors' agent and brokerage were held jointly and severally liable to pay the 50% of the damages awarded to by the purchaser against the vendors.

Damages were set in the amount of $ 15,000.00, and judgment in favor of the purchaser in the sum of $10,000.

Cartwright v. Benke [2011] O.J. No. 2511, 2011 ONSC 2011 - May 11 2011

Justice Mark Edwards began his ruling in this case with the words, "The joy of buying one's home can in some cases turn into a nightmare for the buyer. This is one of those cases."

In the SPIS signed by the seller prior to the signing of the purchase agreement, the seller indicated he was not aware of any moisture and/or water problems.

Before the completion of the offer of purchase and sale, the purchaser engaged the services of the defendant home inspector. The inspector provided both a verbal and a written report. The written report noted with respect to the foundations of the house:

> Moisture has penetrated exterior wall in basement, probably due to eaves troughs discharging water directly to foundation. Basement bathroom has signs of moisture damage to subfloor and backs of bathroom wall board. All corners of house show signs of punkiness, probably due to either previous roof leaks or condensation due to electric baseboard heaters. Any of these areas could contain mould which should be checked by a certified expert.

The purchaser claimed that the home inspector negligently misrepresented the true state of the condition of the house when he orally represented to him that there was nothing that he knew of that would prevent him from purchasing the house. The purchaser also claimed that the vendor fraudulently misrepresented the condition of the house when he failed to disclose the existence of mould.

The judge found no evidence of fraudulent representation or concealment on the part of the vendor. The judge noted that the purchaser had read the inspector's report and did not follow the advice of retaining a certified mould expert. The judge rejected the purchaser's evidence that the inspector orally represented to him that there was no reason why he should not close the transaction.

Damages were assessed at $24,000, but the action against the inspector and vendor was dismissed. In suggesting that the defendants not pursue costs, the judge wrote:

> "The defendants are entitled to their costs. In considering their position with respect to costs, the defendant's may wish to consider the potential impact of such costs demands given the unfortunate set of circumstances that ultimately befell Cartwright and his family. While there is an old saying, "you live by the sword and die by the sword", compounding Cartwright's unfortunate situation with costs demands, may not ultimately seem to be appropriate by the defendants under the circumstances."

Aitken v. Unifund Assurance Co. [2011] O.J. No. 5083, 2011 ONSC 1809, 108 O.R. (3d) 147, 5 C.C.L.I. (5th) 78, 209 A.C.W.S. (3d) 677, 2011 CarswellOnt 12486 [TRIAL DECISION] - September 29, 2011

The novel issue in this case and the subsequent appeal was whether a homeowner insurer has an obligation to defend a vendor on a claim under an SPIS.

Unifund insured James and Carole Aitken under a homeowners policy for their house in Thunder Bay. When the house was sold, the insurance policy was cancelled.

Subsequently, the purchaser of the house brought an action against the vendors alleging misrepresentations were made in the Seller Property Information Statement. The purchaser initially alleged that the Aitkens had intentionally misled them in the SPIS as to problems with the house, that they had taken steps to hide the problems, and intentionally misrepresented that they had undertaken renovations on the house with building permits.

A statement of defence was filed by the vendors [the Aitkens] but they chose not to advise their insurer of the claim as the allegations in the statement of claim were framed as intentional acts, which the policy does not cover. The purchaser later amended the claim deleting references to wilful or deliberate conduct by the Aitkens and replacing them with allegations of carelessness or negligence. The insurer Unifund was then notified of the claim by the Aitkens.

The insurer took the position that the policy coverage did not require it to indemnify or defend the applicants. The Aitkens applied for a declaration that Unifund was obligated to defend the action under their homeowner policy.

Justice Bonnie Warkentin held that the application should be granted in part. Once the claim was amended such that it would fall within the policy, then in the absence of any exclusions, Unifund was notified of the claim in a timely fashion, and had a duty to defend the Aitkens in the main action. The Aitkens were awarded costs of the motion, and costs to continue the litigation from the date the insurer was notified.

The issue of whether or not there was a duty to indemnify was left to the trial judge after hearing all of the evidence.

Aitken v. Unifund Assurance Co. [2012] O.J. No. 4450, 2012 ONCA 641, 298 O.A.C. 139, 112 O.R. (3d) 391, 13 C.C.L.I. (5th) 1, 355 D.L.R. (4th) 50, 220 A.C.W.S. (3d) 615, 2012 CarswellOnt 11769 [APPEAL DECISION] - September 25, 2012

This was the appeal from the *Aitken v. Unifund Assurance Co.* decision (above). The Court of Appeal dismissed the appeal. It held that the claim for negligent misrepresentation clearly fell within the terms of the homeowner's policy. There was no exclusion of coverage based on the fact that the Aitkens no longer owned the house. Nor was there a breach of the policy by failing to provide timely notice of the claim to Unifund. The Aitkens were entitled to a defence from Unifund at no cost to them. Full indemnity costs of $25,000 were awarded against Unifund.

Ricchio v. Rota [2011] O.J. No. 4655, 2011 ONSC 6192, 8 C.L.R. (4th) 149, 12 R.P.R. (5th) 310, 2011 CarswellOnt 11043 - October 20, 2011

The issue of the Seller Property Information Statement only figures to a small extent in this case. The purchaser sued the vendors for damages for their failure to disclose latent defects in the home before its sale. The purchaser bought the home subject to a home inspection. The only recommendation that resulted from the home inspection was that the window well covers be replaced and a leak at the base of the furnace be fixed.

The vendors completed a Seller Property Information Statement and their listing agent had it but it was never requested by the purchaser, nor was it attached to the Agreement of Purchase and Sale.

Following closing, the purchaser began renovations to the home, replacing windows and eavestroughs. The location of downsprouts was changed within days of completion of the sale, and this resulted in water spilling close to the home's foundation, instead of being diverted to the back of the yard as the vendors had designed it.

At trial, the purchaser's action was dismissed. The judge noted that the purchaser had failed to communicate to the home inspector the fact of the home renovations. The water the purchaser found in the basement after closing was caused by the renovations, and specifically the relocation of the downsprouts.

"I am satisfied," the judge wrote, "that there was no latent defect which was actively concealed by the Rotas. The purchasers could have reviewed the Seller's Property Information Statement, could have contracted for a more thorough and extensive home inspection, or could have included more extensive representations and warranties in the agreement. The purchaser chose not to do so."

Soboczynski v. Beauchamp [2011] O.J. No. 5120, 2011 ONSC 6791 [TRIAL DECISION] - November 17, 2011

The issue in this decision and in the appeal which follows below was whether the vendors who had signed an SPIS were obligated to inform the purchasers of a flood in the property after the agreement of purchase and sale was signed but before closing. The purchasers sued the defendant vendors for damages for negligent misrepresentation in an agreement of purchase and sale.

Don and Louise Beauchamp decided to sell their property on Gardenvale Cr., in London, back in 2007. After inspecting the property, Adam and Olga Soboczynski submitted an offer which was prepared by an agent who was a friend of the Beauchamps — the sellers of the home. The offer was accepted with a price of $290,000.

Before the offer conditions were waived, the sellers delivered to the buyers a Seller Property Information Statement (SPIS) which was provided to them by the agent.

In the SPIS, the Beauchamps stated the property was not subject to flooding and they were not aware of any moisture or water problems. At the bottom, the form states that the sellers will disclose any "important changes" to the buyers before closing.

After receiving a favourable home inspection report, the buyers waived the conditions making the offer firm and binding. Nine days before closing in January, 2008, water entered the basement. The Beauchamps dried out the wet rug and replaced the underpad.

The transaction closed as scheduled without disclosure of the flood to the buyers. Three weeks later, the basement flooded again and the buyers cleaned up at their own expense. Later in 2008, the new owners learned of the January flood. They felt that the sellers had misrepresented the water issues and started a lawsuit.

At trial, deputy judge Anthony Little found that the Beauchamps did not disclose the January flood because they honestly believed it was a one-off occurrence. He ruled

that the SPIS was a separate document alien to the Agreement of Purchase and Sale, and the representations in it could not be relied upon because of the entire agreement clause in the Agreement of Purchase and Sale. The subsequent flood, he concluded, was a "one off" event and did not amount to an important change in the minds of the vendors at that time requiring notice to the purchasers in any event. As well, there was no prior problem with ponding or flooding on the property that was proven on a balance of probabilities.

Soboczynski v. Beauchamp, 2013 ONSC 2631 [APPEAL] (apparently unpublished - see http://www.aaron.ca/columns/SOBOCZYNSKI%20v%20BEAUCHAMP%20DIV%20CT.pdf) - May 28 2013

In April, 2013, the Soboczynskis appealed to a three-judge Divisional Court panel. Writing for the court in May, Justice Thea Herman referred to a half dozen previous decisions on the SPIS, and ruled that the trial judge was in error on the issue of pre-closing disclosure of the flood.

Based on the wording of the SPIS, the court held that the sellers should have advised the buyers of the pre-closing flood. The flood was an "important change" to the information provided in the SPIS. The Beauchamps were ordered to pay $25,000 to the buyers as compensation for negligent misrepresentation.

After an extensive review of the authorities, the court concluded that the entire agreement clause does not preclude the possibility of a claim for negligent misrepresentation based on a representation made in an SPIS signed after the parties entered into the agreement. The trial judge was found to have erred in law in finding that the buyers could not rely on the representation in the SPIS because of the entire agreement clause.

Justice Herman ruled that the sellers owed the buyers a duty of care, and that there was an ongoing obligation to notify the buyers of any important changes to the information provided in the SPIS. The subsequent flooding was an important change and the sellers therefore made a statement that was untrue or inaccurate.

It was reasonable for the buyers to rely on the SPIS to conclude that there were no water problems when they took possession of the home.

In my view, several lessons emerge from this case:

- Sellers are liable for misrepresentation, even if the misrepresentation is innocent.
- If there was no SPIS form in this case, the sellers would probably have not have been ruled responsible.
- Sellers who sign an SPIS have an obligation to disclose an "important change" to the information in the form which occurs before closing.
- Whether sellers have to disclose a pre-closing flood which caused no damage, in the absence of an SPIS, remains an open question.

Clearly the SPIS form causes more litigation than it prevents.

Sigrist v. McLean [2011] O.J. No. 5865, 2011 ONSC 7114, 283 O.A.C. 100, 15 R.P.R. (5th) 33, 2011 CarswellOnt 14424 - December 15 2011

This was an action by the plaintiffs for specific performance and damages with respect to a commercial and residential property. When the plaintiffs went to see the property prior to the purchase, the vendor provided them with an information package that included a Seller Property Information Statement. Ultimately, the judge ruled in favour of the plaintiffs, and the SPIS was not a relevant factor in the case.

Costa v. Wimalasekera [2012] O.J. No. 6365, 2012 CarswellOnt 13889, 24 R.P.R. (5th) 186 [TRIAL] - January 27 2012

This case involved a property that was subject to flooding every time it rained. The Agreement of Purchase and Sale was conditional upon the purchasers receiving a satisfactory Seller Property Information Statement from the vendor.

In response to the question "Is the property subject to flooding?", the seller answered "No". Prior to submitting the offer, the purchasers had viewed the property on two occasions and both times the back yard was completely dry. The purchasers waived the condition and the deal closed.

Within a month of closing, it became apparent that the yard flooded whenever it rained. The purchased sued seeking damages for the cost of rectifying the problems in the rear yard.

Deputy judge Robert Filkin followed the Court of Appeal's decision in *Krawchuk v. Scherbak*, 2011 ONCA 352 (above), in holding that the representations made in the Statement were intended to be relied on by the purchasers and were enough to establish a special relationship giving rise to a duty of care on the vendor.

The vendor knew the representations made in the Statement would be relied on by the purchasers and used by them in deciding whether to finalize the purchase. As held by the Court of Appeal in *Krawchuk*, the warnings in the Statement "do not absolve the Seller of liability for misstatements". Judgement was given in favour of the purchasers and damages assessed in the amount of $25,000.00.

Costa v. Wimalasekera, [2012] O.J. No. 5155, 2012 ONSC 6056, 299 O.A.C. 348, 24 R.P.R. (5th) 199, 2012 CarswellOnt 13808 [APPEAL] - November 2, 2012

The defendant seller appealed the above decision to the Divisional Court. The issues considered included:

> -whether the statement in the SPIS was a fraudulent misrepresentation, or whether it was a negligent misrepresentation, which would entail a finding of a duty of care;
>
> -whether the buyers reasonably relied on the misrepresentation of the seller;
>
> -whether the trial judge erred in characterizing the water problem as a latent defect;
>
> -and whether the trial judge erred in law in failing to give effect to the "entire agreement" clause in the agreement.

Ultimately, all the issues were resolved in favour of the buyer and the appeal was dismissed.

The appeal court ruled that the trial judge did not err in concluding that the water accumulation constituted flooding based on a layman's understanding of the term. Given the vendor's prior knowledge of the issue, there was no error in finding that the statements attributable to the vendor constituted a fraudulent or negligent misrepresentation relied upon by the vendors. There was no error in characterizing the water problem as a latent defect. The entire agreement provision in the purchase and sale agreement did not immunize the vendor from liability for misrepresentations in the Seller Property Information Statement, as the Statement was referred to in the Schedule, incorporated into a condition for the purchasers' benefit, and was thus intended by the parties to be given legal effect.

Coleman v. Schade (c.o.b. Pillar to Post) [2012] O.J. No. 1035 - February 14, 2012

The purchasers in this case sued the home inspector and the vendor, alleging the inspector was negligent in failing to identify rotted floor joists in the basement, and alleging the vendor misrepresented the structural condition of the home. The plaintiffs entered into an agreement of purchase and sale[1] with the defendant to purchase a property in Huntsville. Attached as a schedule to the agreement was a Seller Property Information Statement which stated that the vendor was not aware of any structural problems with the building or damage due to wood rot.

Prior to closing, a home inspection was done and the written report made no mention of wood rot or structural problems. Three months after closing, the purchasers discovered severe rot in the floor joists connected to the east wall in the basement.

The trial judge in Small Claims Court held that the statements made by the vendor in the SPIS were representations in the APS that the purchasers could and did rely on. The court cited *Krawchuk* in support of the proposition that sellers are liable for misstatements made on the SPIS. The judge also held that the home inspector fell below the standard of care because he failed to see the rotted floor joists in the basement.

Judgment was given in favour of the purchasers, with damages in the amount of $9,786.00 apportioned 50/50 between vendor and home inspector.

Wood v. Lerner [2012] O.J. No. 1017 - March 1, 2012

This was another case involving both an SPIS and a home inspector. The plaintiffs agreed to purchase a property in Newmarket from the defendant on November 9, 2008 for the sum of $331,500.00. Two days after the agreement was signed the defendant, Allan Fenton, conducted a home inspection of the property.

Eight days after the closing, on May 27, 2009, the basement of the property flooded during a rain storm. Following the flood the plaintiffs on their own and with the assistance of various inspectors and trades people, determined that there were 3 major problems with the property that affected water entry into the property. The roof was determined to be in

need of immediate replacement, there was a foundation crack, and the waste plumbing drain pipe leading from the upstairs toilet to the basement leaked. Unrelated to the water problems, the plaintiffs have also claimed that a fireplace and a kitchen light in the property were not in good working condition at the time of closing in violation of the warranty contained in the agreement of purchase and sale.

The plaintiffs claimed that the vendor misrepresented the facts on the Seller Property Information Statement signed by him by failing to indicate water problems, water damage, plumbing system problems, and a foundation crack.

The plaintiffs further claimed that the defendant home inspector negligently misrepresented the lifespan of the roofs on the property and failed to discover and report a foundation crack and leakage in the waste plumbing drain pipe. The court found that the vendor had knowledge of the crack in the foundation and of prior water damage and failed to disclose this to the purchasers on the SPIS. The judge cited the Court of Appeal decision in *Krawchuk v. Scherbak* where it determined that a vendor's duty to correctly represent the property continues even if a home inspection is done, and that the SPIS survives the closing.

The court also held the home inspector liable for negligently misrepresenting the condition of the roof to the purchasers, and for failing to report the foundation crack and damage to the drainage pipe.

The vendor was held responsible to pay half of the cost of the repair for the foundation crack, drainage pipe and all of the cost for the flood damage. The inspector was held responsible to pay $2,602.57 towards the roof repair and half of the repair cost for the foundation crack and drainage pipe.

Tedford v. TD Insurance Meloche Monnex, [2011] O.J. No. 4240, 2011 ONSC 5500, [2011] I.L.R. I-5197 [MOTION] - September 22, 2011

and

Tedford v. TD Insurance Meloche Monnex [2012] O.J. No. 2821, 2012 ONCA 429, 292 O.A.C. 374, 9 C.C.L.I. (5th) 15, 2012 CarswellOnt 7791, 216 A.C.W.S. (3d) 227, [2012] I.L.R. I-5302, 112 O.R. (3d) 144, 351 D.L.R. (4th) 239 [APPEAL] - June 22, 2012

The plaintiff was the insured under a home insurance policy issued by the defendant insurance company. The insured had sold his home and was subsequently sued for damages for allegedly making misrepresentations in the Seller Property Information Statement. The purchaser in that lawsuit pleaded that, because of the misrepresentations of the insured vendor in the SPIS, she had, in addition to paying for repairs, suffered anxiety, sleep disturbances and other physical symptoms. The insured's homeowner policy covered his liability for "property damage" and "bodily injury". The insured brought an application for a declaration that the defendant insurer was obligated to defend him in the SPIS action. The court in the application found that the health consequences of the purchaser constituted "bodily injury", and therefore the insurer was obligated to defend him in the entire action. The insurer appealed.

The Ontario Court of Appeal allowed in the appeal in part. Though the application judge did not err in determining the nature of the bodily injury aspect of the action, he erred in holding that the insurer should pay for 100 per cent of the defence costs without apportionment, because the claim for bodily injury was only a small part of the total damages claimed.

The Court directed that the insurer's counsel be instructed to defend both the covered and the uncovered claims, in a manner commensurate with the aggregate amount claimed, and that the insured homeowner bear the costs of the defence, to the extent they exceed the reasonable costs associated with the defence of the covered claims. In determining the reasonable costs associated with the defence of the covered claims, it is appropriate to consider the quantum of the covered claims. It would be unfair to the insurer to fix it with defence costs that are disproportionate to the extent of its potential liability for the covered claim.

Shen v. Maiolo [2012] O.J. No. 3654 - July 24, 2012

The buyer in this case sued to recover $18,643.03 spent to rectify deficiencies in a residence purchased from the seller. Of this amount, $14,161.03 related to a basement mould problem. The balance encompassed imperfections in the swimming pool, sauna, dishwasher, door, ceiling and sewage connections.

A month before closing, the vendor signed a Seller Property Information Statement where she responded to the question "Are you aware of any moisture and/or water problems?", with "No". Though the SPIS was not formally incorporated into the Agreement of Purchase and Sale, the purchaser received it "up front" and prior to closing. The mould problem in the basement was discovered five months after closing.

The deputy judge in his reasons noted:

"I distill the following factors:-

- Generally, the principle of *caveat emptor* applies;
- However, liability can attach to a vendor who knows of a material latent defect and actively conceals same or makes a representation in reckless disregard of its truth;
- A purchaser who has commissioned an inspector's report has transferred reliance from the vendor to the inspector (*Sobocyzynski*);
- But it must be remembered that each scenario is case-specific and the present one stands on its own facts.

[The purchaser] Shen cannot avoid primary responsibility for all this. To begin with, he should have formally incorporated the SPIS into the agreement (*Soboczynski*).

Further, his own inspector's report warned of basement moisture issues, literally screaming for further inquiry. Here was an intelligent and savvy customer, forceful in securing several undertakings of repair plus a price reduction, who ought to have looked after himself better."

However, on the testimony of two witnesses, the court found that significant mould deposits had existed in the basement during the time when the vendor owned the home. The vendor had contracted one of the witnesses to address the mould issue. The vendor therefore was not honest in her answer to the moisture question on the SPIS and misled the purchaser.

The purchaser's primary reliance had to be upon the inspector's report, but the vendor's "misleading statement is hardly irrelevant. To ignore it would be to condone the reckless dissemination of untruths, a notion repugnant to the ethos of honourable dealings in contract and quite unacceptable in law. Once it was presented to the purchaser it was intended in some shape or form to comfort him."

Despite the finding that the purchaser failed to exercise due diligence, judgment was awarded against the vendor for 30% of the basement mould repair.

Elks v. Derouin [2012] O.J. No. 4838, 2012 ONSC 5844 - October 15, 2012

This is a case which involved a self-represented plaintiff, and numerous hearings including one before the Landlord and Tenant Board. As the judge noted, it had clearly "gone off the rails."

In something of an understatement, the judge wrote: "Leaky basements, as latent defects and often misrepresentation, are a rich source of real estate litigation."

The reported decision was on a motion by the defendants seeking security for costs and an extension of time to mediate the claim of the plaintiff.

The plaintiff's claim stemmed from a failed real estate transaction. She alleged that a fraudulent amendment was made by the defendants to the Seller Property Information Statement after the original was delivered to her. She sued the owners, the current tenants and the realtors for damages.

The motion was allowed. The decision of the plaintiff to re-litigate the same issues despite the decision made in the Landlord and Tenant Board, her failure to pay the outstanding cost awards, evidenced a frivolous and vexatious proceeding on her behalf. The buyer was ordered to post $25,000 as security for costs before continuing with the litigation.

Favaro v. Yaw [2012] O.J. No. 5101, 2012 ONSC 6133 - October 30, 2012

The plaintiffs purchased a house from the defendants in August, 2005. At or before closing, the purchasers received a signed Seller Property Information Statement and a Statutory Declaration from the defendants, both of which they were held entitled to rely upon. Amongst other things, these documents stated that:

i. The property was not subject to flooding;

ii. The vendors had not made any renovations, additions or improvements to the property; and

iii. The vendors were not aware of any moisture and/or water problems.

In the first spring after the purchase and every following spring as well as in the fall, the purchasers noticed water in the basement. In the first two years after occupancy, the purchasers discovered a crack in the front wall of the basement, some rot, and evidence that major structural work had been done to the basement walls prior to the sale.

In the year after closing, the purchasers noticed major structural problems with the roof and some rot. Four years following closing, the purchasers made a claim to their title insurer. The statement of claim was issued in May, 2011 - six years after closing.

Within two years of closing, the buyers were aware of sufficient information "to put them on notice that the defendant vendors were not truthful in their sale documentation. At the least it should have put them on a course of enquiry which very easily and quickly would have given them proof of the vendors' fraud."

The court held that the *Limitations Act* was an absolute defence to the purchasers' claim. The claim was discovered outside the two year limitation period.

Nylander v. Martin [2012] O.J. No. 5183, 2012 ONSC 6281 - November 5, 2012

Prior to signing an agreement of purchase and sale for a house in Sault Ste. Marie, the seller signed a Seller Property Information Statement indicating that the property was not subject to flooding and that he was unaware of any structural or moisture/water problems.

Within weeks of closing, the buyer discovered a significant amount of water in the basement. Her contractor reported that there was substantial evidence of prior leakage and water damage in the basement. The buyer also retained an engineering firm, which reported that major structural problems existed with the basement wall that had been repaired previously.

The engineer estimated $39,480 in repairs were necessary. The seller admitted signing the SPIS and that the property had water problems in 1995, the year after they purchased it, but that they had the problem remedied and that it never returned.

The seller's engineer reported the water ingress problems experienced by the buyer were the result of a record rainfall in the month after the buyer took possession as well as the buyer's negligence in allowing snow to accumulate on her driveway and sidewalk adjacent to the basement wall. The seller's engineer estimated that the needed repairs would cost no more than $5,000.

The buyer's motion for summary judgment was dismissed. The sellers were obliged to provide the buyer with some information concerning the past issues they had with water leaking into the basement. The buyer's failure to have the property inspected by a professional prior to purchasing it did not insulate the sellers from liability because the male seller had signed the statement.

The extent of the water leakage problem was a matter that required viva voce evidence. It was not clear whether or not the leakage was an ongoing problem or a one-time occurrence. It was also unclear what, if any, structural problems with the basement wall were visible at the time the buyer purchased the property. More evidence was also needed on the issue of the extent of the repairs required.

Koke, J., made some interesting comments on the effect to be given to the SPIS:

> The SPIS used in this case and documents similar to it are now in common use across Canada. There is an increasing and evolving body of case law which has held that vendors are liable in damages to purchasers in circumstances where the purchasers have relied on such a document to their detriment.

In the province of Manitoba the SPIS is referred to as a Property Condition Statement ("PCS") by the provincial real estate association. The effect which is to be given to such documents was discussed and summarized by the Manitoba Court of Appeal in the 2003 decision in *Alevizos v. Nirula*[2] where Scott C.J.M. stated:

> While, as we have seen, the PCS is a relatively new phenomenon in Winnipeg, at least three provinces (British Columbia, Saskatchewan and Prince Edward Island) have utilized PCS's for some time. From a review of decisions from those jurisdictions, and the one reported Manitoba decision to date (of which more later), the following general statements can be made:
>
> 1. Declarations made in a PCS are representations as opposed to terms of the contract. See Fridman's Law of Contract, ibid. (at p. 474):
>
> > A representation has been defined as "a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstances relating to it." Such statements may indeed be, or become terms of the contract, in which event they will have effect as such. However, if a representation is not and never becomes a term, its legal character and consequences are different.
> >
> > Terms are contractual and the failure to fulfil the promise contained in a term gives rise to an action for breach of contract. Representations are non-contractual. If they are not true the appropriate remedy is not an action for breach of contract, but the avoidance or rescission of a contract entered into in consequence of the representation, and, possibly, a tort action for damages.
> >
> > Damages are the remedy sought in this action.
>
> 2. Such statements do not constitute a warranty; rather the purpose of a PCS is to put purchasers on notice, to make purchasers aware of a problem if there is one. See Zaenker v. Kirk (1999), 30 R.P.R. (3d) 9 (B.C.S.C.) "its main purpose is to put purchasers on notice with respect to known problems" (at para. 19), Anderson v. Kibzey, [1996] B.C.J. No. 3008 (S.C.) at para. 13, "the purpose of the disclosure statement is to raise questions and concerns rather than give detailed answers to the disclosures made," and Ward v. Smith (2001), 45 R.P.R. (3d) 154, 2001 BCSC 1366.
>
> 3. Since the purpose of the PCS is to give the purchasers a "heads up" with respect to potential problems, liability will ordinarily be disallowed when the problem in question is obvious. See Davis v. Stinka, [1995] B.C.J. No. 1256 (S.C.). This is because purchasers in such circumstances should not have been misled by the disclosure statement. To put it another way, in such circumstances it cannot be said that the misrepresentation actually caused the person to act upon it. See Fridman's Law of Contract, ibid. at p. 309.
>
> 4. If the vendor answers the PCS honestly and does not deliberately intend to mislead, then liability will not follow even if the representation turns out to be inaccurate. Taschereau et al. v. Fuller et al. (2002), 165 Man.R. (2d) 202, 2002 MBQB 183.
>
> 5. **Based on the experience of those provinces that have employed the PCS, it seems to present a ripe ground for litigation. Doubtless this is due in no small measure to the problems inherent in an informal "fill in the blank" form which can have such serious legal consequences when problems subsequently develop in a real estate transaction. The wisdom of maintaining in use a form fraught with such inherent difficulties, exacerbated by the conflicting statements within the form concerning its purpose and effect, should be addressed by lawyers and real estate agents alike.** (Emphasis added).

Maass v. Kuehn [2013] O.J. No. 966 - January 25, 2013.

This claim arose out of the purchase of a residential property in Heidelberg, Ont. The agreement of purchase and sale contained the following:

> The Seller represents and warrants, to the best of the Seller's knowledge and belief, that, during the Seller's occupancy of the building, the sewage system has been and will be in good working

> closing. The Parties agree that this representation and warranty shall survive and not merge on completion of this transaction, but apply only to the state of the property existing at completion of this transaction.

The sellers signed a Seller Property Information Statement stating that the property was not connected to municipal sewers, that they were not aware of any environmental hazards on the property, that they remedied the only moisture problem they were aware of (in the cold room) and that they were not aware of any problems with the plumbing.

A month after closing, the buyer found a considerable amount of water on the basement floor, and large black pools of sewage on the lawn.

The issue for the judge to decide was whether the septic the system was, to the best of the defendants' knowledge and belief, in good working order on the date of closing.

After hearing all the evidence, the judge was unable to find anything false in the Seller's Property Information Statement and the claim was dismissed.

Kavanaugh v. Boomer [2013] O.J. No. 1259 - March 21, 2013

The plaintiff purchased a rural property from the defendants by agreement of purchase and sale dated March 7, 2010, and the transaction closed on May 28, 2010. Shortly after taking possession, the plaintiff discovered a problem with the septic system which required expensive repairs. She sued for damages of $10,000 based on three causes of action: breach of an express warranty, and negligent or fraudulent misrepresentation.Apart from the express warranty, the only evidence concerning any communications from the defendants to the plaintiff prior to formation of the contract concerning the state of the septic system is the contents of the Seller Property Information Statement.

The SPIS was signed by the defendants on November 12, 2009, when they listed the property with their agent. The plaintiff made her offer to purchase the property on March 7, 2010 and it was accepted on March 8, 2010 . Her evidence made it clear that she never had access to and never in fact saw the SPIS until after the contract between the parties was formed.

> A clause in the Agreement of Purchase and Sale provided as follows:
>
> The Seller agrees to provide the Buyer with a signed copy of the O.R.E.A. Seller Property Information Statement within 72 hours of acceptance of this Offer.

The SPIS was provided to the buyer through the real estate agents at some point during the 72 hours following acceptance. The judge found as a fact therefore that the SPIS was not provided to the plaintiff until after the contract was formed. As a result, the plaintiff purchaser could not have relied on any representations made in the SPIS when she entered into the contract. Since reliance is a necessary element of a claim for negligent or fraudulent misrepresentation, the deputy judge had no hesitation in dismissing that part of the plaintiff's claim.

The judge was not persuaded on a balance of probabilities that the impugned contents of the SPIS were in fact materially misleading. It was not clear that the reference to plumbing which appears under the heading "Improvements and Structural" in fact referred to the exterior septic system. In fact, the SPIS made no express reference to the septic system at all.

This agreement of purchase and sale made no attempt to incorporate the SPIS as part of its terms, nor did it contain any condition relating to the SPIS nor was it conditional on any inspection being conducted. It merely required production of the SPIS within 72 hours of acceptance. That was done.

> “There was nothing in the contract which might have entitled the plaintiff to decline to close if she was somehow dissatisfied with the contents of the SPIS, nor was there any condition for inspection which might in turn have involved reliance on the SPIS. Therefore even assuming for the sake of argument that she relied on it after the contract was already formed - and I make no such finding - any such reliance is irrelevant.”

The plaintiff's allegations based on misrepresentation were dismissed.

There was, however, a breach of a specific warranty regarding the septic system and judgment was entered in favour of the plaintiff purchaser for $6,400 plus $2,200 costs. The plaintiff won the case despite the agent's sloppy drafting and not because of it.

Dougherty v. Howell [2013] O.J. No. 2225 - May 17, 2013

As in *Kavanaugh v. Boomer* (above), this was another case where the SPIS was not provided to the purchasers until long after closing. The mutual realtor, who was admittedly hostile to such documents, did not supply a copy to the purchasers until after the offer was signed, the closing of the transaction and the appearance of moisture and other problems with the residence. It was obvious to the deputy judge that there could be no reliance by the purchasers on the representations in the document at any material time.

Per Searle, D.J.:

> **"**There was no proved reliance by the purchasers on any written or spoken representation by the vendor and so this essential element in a claim for negligent misrepresentation remains unproved."
>
> The action was dismissed.

Gauvin c. Lavoie [2013] O.J. No. 2330, 2013 ONSC 2962 [French only] - May 22, 2013

This was an appeal of a small claims court decision. The issue was whether the trial court properly interpreted the evidence of one of the witnesses with respect to reliance on the Seller Property Information Statement and subsequent changes which were made to it.

A new trial was ordered.

VIII. Conclusions

What advice can we give our clients?

1. Completion of the SPIS by the seller is voluntary and controversial. In my opinion, failure to complete it will not reflect badly on the sellers as if they are trying to hide something. Refusing to sign should not give rise to suspicions in the minds of the agent or potential purchasers.

2. Purchasers should conduct their own due diligence and never buy a house without a proper home inspection - unless the building is going to be demolished.

3. Sellers who nevertheless proceed to fill out the forms should liberally use the word "unknown" when appropriate, and seek professional advice for answers which require technical expertise. Sellers should be told that many of the questions are ambiguous - for example, do they speak in the present or past tense. Some simply cannot be answered - for example, has the property *ever* been used for ....? Some require legal expertise, such as an analysis of actual or potential claims against title. Real estate agents may not always know the full significance of the questions.

4. Purchasers should be taught the meaning of *caveat emptor,* and shown the words of then-professor Bora Laskin, written in 1960:

   > "Absent fraud, mistake or misrepresentation, a purchaser takes existing property as he finds it, whether it be dilapidated, bug infested or otherwise uninhabitable or deficient in expected amenities, unless he protects himself by contract terms".

5. Purchasers should always get a professional home inspection.

6. Agents should be advised of the pitfalls in the form and how to avoid them. □