

SELLER PROPERTY INFORMATION STATEMENT :

All the Ontario cases 1997-2010

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I. Background

In the 2007 case of *Kauffman v. Gibson*², Justice Gordon P. Killeen wrote in his decision, "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." His comments frame the discussion in this paper.

In December of 2003, my colleague Lawrence Bremner, then practising at Gowlings in Hamilton, prepared a paper for the Hamilton Law Association entitled Seller's Property Disclosure Statement (SPIS) - the OREA Form.

The paper, he wrote, could also be named "The Ontario Law of Vendor Disclosure Statements" because it referred to all of the Ontario Court decisions dealing with property seller information statements to the date of the paper. There were only eight reported decisions at the time.

In updating Bremner's paper in January, 2011, I found that that number has mushroomed from eight to 45 in seven years. Three of those cases have gone back to court a second time over court costs, and one has been to court twice on separate motions for summary judgment. The total number of reported Ontario court decisions on the Seller Property Information Statement at the date of this writing is therefore 49.

Casting a broader net, an electronic search reveals a further 153 cases from the rest of Canada relating to the same form, but under various names, including the most common, the Property Condition Disclosure Statement.

In less than 18 years, the SPIS has given rise to or been the central feature in more than 200 Canadian court cases. This paper deals with the 49 reported Ontario SPIS cases since the first one was decided in 1997.

¹ of Aaron & Aaron, Toronto. With sincere thanks to Jeffrey W. Lem, of DAVIES WARD PHILLIPS & VINEBERG LLP, for presenting the paper orally at the live OBA Institute seminar.

² [2007] O.J. No. 2711, 59 R.P.R. (4th) 293, 158 A.C.W.S. (3d) 1016, 2007 CarswellOnt 4560, 2007 CanLII 26609

II. The SPIS Form - 220, 221, 222

Samples of the 2011 version 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.

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 rely on or ignore these disclaimers at will. In light of the varying treatments given by the courts to these three paragraphs, determining the purpose of including them in the document is somewhat uncertain.

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 of any non-compliance with zoning regulations?
9.	Are you aware of 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 from 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	<input type="checkbox"/> Owned <input type="checkbox"/> Exclusive use <input type="checkbox"/> Leased or License
11. Locker:	<input type="checkbox"/> Owned <input type="checkbox"/> Exclusive Use
12. (a)	Amenities: <input type="checkbox"/> Pool <input type="checkbox"/> Sauna <input type="checkbox"/> Exercise Room <input type="checkbox"/> Meeting/Party Room <input type="checkbox"/> Boat Docking <input type="checkbox"/> Guest Parking <input type="checkbox"/> 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? <input type="checkbox"/> Municipal <input type="checkbox"/> Drilled <input type="checkbox"/> Bored <input type="checkbox"/> Dug <input type="checkbox"/> Cistem <input type="checkbox"/> Lake <input type="checkbox"/> Community <input type="checkbox"/> Shared <input type="checkbox"/> 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? <input type="checkbox"/> Yes <input type="checkbox"/> 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? <input type="checkbox"/> Municipal <input type="checkbox"/> Septic tank with tile bed <input type="checkbox"/> Holding tank <input type="checkbox"/> 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? <input type="checkbox"/> Use Permit <input type="checkbox"/> Location Sketch <input type="checkbox"/> Maintenance Records <input type="checkbox"/> Inspection Certificate <input type="checkbox"/> 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; <input type="checkbox"/> Open all year <input type="checkbox"/> Seasonally open
(b)	Is property serviced by private road? Cost \$ per year
2.	If your access is across private property, access is <input type="checkbox"/> Right of way <input type="checkbox"/> Deeded <input type="checkbox"/> Other Cost \$ per year.
3. (a)	If water access only, access is <input type="checkbox"/> Deeded <input type="checkbox"/> Leased <input type="checkbox"/> 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 danger 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. I remain critical of the form because it is overly complex, dangerously ambiguous, misleading and technical.

Not only does the SPIS represent a risk of litigation to buyers and sellers, but its use has repeatedly resulted in a number of Ontario real estate agents getting disciplined by their regulatory body, the Real Estate Council of Ontario (RECO).

A search of the RECO website (www.reco.on.ca) in early 2011 revealed a dozen reported discipline decisions in which the agent involved was censured over the use of the SPIS, among other issues.

The most recent was in September, 2010. The agent involved published a listing for a property indicating that an SPIS form was available, when in fact it wasn't until after it was too late. The penalty imposed for this and other transgressions was \$7,000.

In September of 2007, an agent was brought before a discipline panel regarding the sale of a property which contained urea formaldehyde foam insulation (UFFI). She failed to get the buyers to acknowledge receipt of the SPIS form which disclosed the existence of UFFI. Penalty: \$7,500.

Another agent faced a discipline hearing in June, 2007. The SPIS indicated that the water supply was a well with a backup cistern. A question about year-round water supply was left blank. In fact the well was dry and the cistern had to be refilled by truck every two weeks. The agent was fined \$10,000 for failing to review and correct the incomplete SPIS form.

Earlier, the brokerage had been fined \$5,000 for failing to adequately supervise the activities of its salespersons to prevent harm to consumers.

Three agents and their employer came before a discipline hearing in late 2003. They were involved with the sale of a property in Caledon which was zoned rural and hazard land. The listing only showed the property as rural, but the SPIS disclosed it was hazard land which could not be used for any further construction. The selling agent failed to show the SPIS to the buyers before they signed the offer.

For their lack of disclosure, the three agents were fined \$5,500 each and their employer got hit with a penalty of \$2,000.

Earlier in 2003, an agent was fined \$3,000 for failing to disclose on the MLS listing or the SPIS that the “private” driveway to the house was actually on land owned by the province of Ontario.

Two agents back in 2001 listed a home on one acre of land in Caledon which was about to be designated as being within a High Potential Mineral Aggregate Resource Area. The listing noted that an SPIS was available but this turned out to be false. For their lack of disclosure, one agent was fined \$1,000 and the other \$3,000.

In another 2001 case, the SPIS stated that there was wood under the carpeting in a listed home. The agent assisted in preparing the form and failed to verify the statement, which was only partially true. Fine: \$750.

Based on these reported discipline cases, the SPIS forms can present a significant danger to the real estate agents who use them. They also have a tendency to get buyers and sellers involved in nasty litigation.

Since the use of SPIS forms is so clearly risky to all parties in a transaction, it continues to puzzle me why some agents - and the Ontario Real Estate Association - still promote them.

V. The problem

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 *Arsenault v. Pederson*, [1996] B.C.J. No. 1026, 63 A.C.W.S. (3d) 166, the 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”.

In his 2003 paper, Bremner came out in support of the SPIS forms for three reasons:

- (a) nobody knows the property (and especially the latent defects) better than the owner/vendor;
- (b) owners/vendors often hide latent defects from their agents; and
- (c) if the roof leaks or the well goes dry the broker and the agent often get sued along with the vendors.

In 2009, I asked the Ontario Real Estate Association for a meeting with its then-president to discuss the SPIS forms. She was too busy “chairing meetings” to meet with me, but OREA

did issue this statement defending its position:

"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."

To me, this makes no sense at all. 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 failed miserably.
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 Ontario Case Law

As of January, 2011, I believe these are all of the reported decisions on the Seller Property Information Statement:

1. *Rampersad v. Rose*, [1997] O. J. No. 2012 (Ontario Small Claims Court)

This appears to be the first reported decision in the law of Seller Property Information Statements, or as it was known at the time, Vendor Property Information Statement.

Rampersad v. Rose is a leaking basement case - the new owners claimed that the vendors had concealed water stains by hiding them with furniture and boxes.

To make the vendor liable for a latent defect, the purchaser must satisfy the Court that the

vendor had knowledge of the latent defect and has concealed it, or alternatively that the vendor is guilty of a reckless disregard of the truth or falsity of the representations. The vendors in this case had signed a Property Information Statement in which they stated that they were not aware of any moisture problems in the basement. The court found that the answers to the questions were representations. The purchasers were aware of the contents of the Disclosure Statement but it was not attached to the Agreement of Purchase and Sale. The purchasers were awarded minor damages.

Deputy Judge Searle held that the exclusionary clause (“This Agreement...shall constitute the entire agreement” – which was paragraph 25 of the OREA form of Agreement of Purchase and Sale) excluded the representations made in the Disclosure Statement. This position has since been overturned by higher courts.

The law of latent and patent defects figures into this case. Searle, D.J., wrote (at paragraph 5,)

“I understand the law in Ontario to be that a vendor of a residence may be held liable to a purchaser for a latent defect about which the vendor knows and which renders the premises unfit for habitation. To make the vendor liable the purchaser must satisfy the Court that the vendor had knowledge of the latent defect or has concealed a defect or is guilty of a reckless disregard of the truth or falsity of any representations made by the vendor. *McGrath v. MacLean et al* (1979), 22 O.R. (2d) 784 (O.C.A.).

“The majority reasons in that case were written by Dubin, J.A. who drew heavily on a 1960 lecture by then professor Bora Laskin in which Professor Laskin at pp. 403-4 said of caveat emptor that "absent fraud, mistake or misrepresentation, a purchaser takes existing property as he finds it." Later in that article Professor Laskin said:

"A latent defect of quality going to fitness for habitation and which is either unknown to the vendor or such as not to make him chargeable with concealment or reckless disregard of its truth or falsity would not support any claim of redress by the purchaser. He must find his protection in warranty."

The judge also noted:

“12 I turn now to the Vendor Property Information Statement hereinafter referred to as the statement It is a form adopted by the local real estate board about 1993 and is a form of disclosure ostensibly used to provide potential purchasers with information about the property. The questions posed to the vendor in the statement are those which a knowledgeable, diligent and serious potential purchaser would normally ask. It appears to have reduced to writing those questions which have been found to traditionally be asked orally.

“13 The form provides four possible answers in the form of boxes to be checked

by the vendor. Those possible answers are yes, no, unknown or not applicable. The form is designed to be signed and dated by the vendor.

“14 The form contains a number of explanatory and qualifying statements. One of those is that the answers are to be complete and accurate and flow from the vendor to the broker/sales representative who is exonerated from responsibility for the accuracy of the information. There is an admonition that purchasers must still make their own enquiries. The information is stated by the vendors to be true as of the date of signing and any important changes, to the information known to the vendors are to be disclosed by the vendors prior to closing. The vendors agree that a copy of the statement may be given by the listing agent to prospective purchasers. ...

“16 The answers to the questions in the statement are representations. The Agreement of Purchase and Sale executed July 21, 1995 is a standard form agreement and reads in part at clause 22:

"This Agreement including any Schedules attached hereto shall constitute the entire Agreement between the Purchaser and Vendor. There is no representation, warranty, collateral agreement or condition, whether direct or collateral or express or implied, which induced any party hereto to enter into this Agreement or on which reliance is placed by any such party, or which affects this Agreement or the property or supported hereby, other than as expressed herein."

“17 The Agreement of Purchase and Sale contains warranties of three of the several dozen items covered by the Vendor Property Information Statement but not the rest. I find that clause 22 of the Agreement excludes from the Agreement between the parties all representations made in the statement except those which were made warranties in the Agreement.

2. *McQueen v. Kelly*, [1999] O. J. No. 2481 (Ont. S.C.J.)

This is another leaky basement case in which the vendors completed a Disclosure Statement confirming that they were not aware of any water or moisture problems. In fact, the vendors had stored boxes in the basement in order to conceal evidence of water damage which the court found to be fraudulent misrepresentation.

The court called the purchasers foolish for not exercising the home inspection condition which was in the Agreement, but held that the vendors' representations, coupled with the intentional concealment of the water stains, permitted the purchasers to rely upon the representations and absolved them from having to have the house inspected.

The Court overruled the *Rampersad* case and said that the exclusionary clause did not exclude the Vendor Disclosure Statement because “to do so would nullify the legal effect of

the disclosures and warranties expressly set out in the information statement. The provision in the Disclosure Statement, requiring the vendors to disclose any important changes right up to closing, indicates an intention to perpetuate the warranties in the information statement beyond the time the contract for the sale of property was signed. This protects the warranty from being terminated by provisions such as the exclusionary clause”.

3. *Morlani v. McCormack*, [1999] O.J. No. 1697 (Ont. S.C.J.)

Two RCMP Officers purchased a property in 1992 and undertook numerous renovations especially to the bathroom and basement. They sold the property in 1995. The purchasers did not have a professional home inspection done.

Some time after closing, the purchasers noticed moisture problems and eventually tore up part of the floor of the bathroom which disclosed poor workmanship, substantial leaking and rotting lumber. It turned out that the vendors had installed a plastic sheet underneath the bathroom floor which had helped to contain moisture seeping downward into the basement which had contributed to the rotting of the floor joists. The purchasers claimed that this was evidence that the vendors had actively concealed the moisture problem by installing the plastic sheet thereby preventing the leakage from appearing in the ceiling of the basement.

Nevertheless, the Court held that the vendors would not have installed the plastic sheet in 1992 in order to conceal a defect when, at that time, they had no intention of selling the house. In 1992 the vendors had noticed that the northeast corner of the basement was damp to the touch but they testified that they had applied some sealant to the wall after which they could feel no more dampness.

In 1993 the vendors encountered another leak in the basement but they applied more sealant and then drywalled the wall. The Court was satisfied that the vendors had not undertaken those renovations in order to conceal evidence of water seepage.

In 1992 the vendors testified they had questioned their agent about the issue of basement leakage because they knew there had been dampness in 1992 and 1993. Her advice was to answer the question in the negative because they had no problems with basement dampness at the time they listed their house for sale in 1995. The Court concluded that the vendors honestly believed that there was no basement dampness at the time they completed the question in the Disclosure Statement and, accordingly, they were not liable for the damages suffered by the purchasers.

4. *Swayze v. Robertson*, [2001] O.J. No. 968 (Ont. S.C.J.)

A year before the sale of their property, the vendors experienced leaking in the basement but had taken steps to correct the problem. On the sale of the property, they signed a Disclosure Statement confirming that they were not currently experiencing water problems. They also

stated that there was no history of cracks or water in the basement.

The purchasers had a home inspection done and, even though the report stated that repairs would be required to the foundation to stop water leakage, they did not do any further investigations and completed their purchase.

The court held that the vendors had made a false statement knowing it to be untrue or at least indifferent to its truth with the intention to mislead. The court could have found that because the purchasers had retained a home inspector, they were not relying upon the representations of the vendors, but the court did not find that they were so estopped. The court seems influenced by the fact that the inspection report was qualified and based upon only a visual inspection of the home.

The court also rejected the vendors' argument that the exclusionary clause nullified the legal effect of the warranties set out in the Disclosure Statement (following the McQueen case). At paragraph 64 of the judgment the court states:

“The defendants cannot rely on paragraph 24 of the Purchase and Sale Agreement that essentially provides that the Agreement is the "entire agreement" to the exclusion of all other representations and warranties. To allow them do so would be to nullify the legal effect of those disclosures and warranties expressly set out by them in the Vendor's Listing Information.

“ (65) The intention of the information given in the Vendor's Listing Information document is to perpetuate the warranties provided therein beyond the date of any contract for the purchase and sale of the premises. Such a document protects the warranties made therein from being terminated by provisions such as paragraph 24 unless expressly referred to in the Purchase and Sale Agreement.”

5. *Swayze v. Robertson* [2002] O. J. No. 785 (Ont. S.C.J. – Divisional Court)

The vendors appealed to the Divisional Court but the appeal was dismissed. The Court held that “Although the purchasers obtained an Inspection Report, the trial judge was satisfied that the Report was of limited value to them and ... they were unaware of the full nature of the defects, and the Report was insufficient to alert and inform them of the real problems”.

6. *Moore v. Page* [2002] O.J. No. 2256 (Ont. S.C.J.)

This is a structural defect and water leakage case involving a house that was constructed by an engineer/vendor. The vendor signed and delivered a Disclosure Statement indicating no problems.

The court held that the representations in the Disclosure Statement amounted to warranties of fitness and awarded the purchasers \$20,053. The purchasers relied on those representations

and warranties. The “entire agreement” clause in the printed form did not disentitle the purchasers from insisting on the duty of the vendors to disclose latent defects.

The court was not critical of the purchasers for amending their Purchase Agreement by deleting their condition (i.e. conditional upon their obtaining a satisfactory building inspection) and relying, instead, on the “representations or warranties” contained in the written Disclosure Statement.

7. *Gallagher v. Pettinger* [2003] O.J. 409, [2003] O.J. No. 409, [2003] O.T.C. 103, 8 R.P.R. (4th) 168, 2003 CanLII 21844, 120 A.C.W.S. (3d) 327 (Ont. S.C.J.). Costs ruling [2003] O.J. No. 1280, [2003] O.T.C. 103, 121 A.C.W.S. (3d) 1017 .

Boxes, which had allegedly hidden evidence of moisture, had been stored in the basement for several years. A professional home inspection was completed and the report, based on a visual inspection only, noted evidence of moisture penetration. On the Disclosure Statement the vendors indicated that the lot had flooded twice in 1987 and 1991. They also disclosed that the basement was “damp” but they otherwise indicated that they were not aware of any moisture or water problems in the basement. Eleven months after the purchase was completed, and after heavy rains, the basement flooded and the purchaser sued.

The action was dismissed. The defect was held to be latent as it was not readily observable during a routine inspection. Once the purchasers obtained a home inspection report, the liability for damages shifted to the home inspector. The vendors would not have stored valuable items in cardboard boxes on the basement floor if they knew there was a water problem. They did not take any action to conceal any known problem.

The representations made by the sellers were not negligently or recklessly made. The purchasers could have requested that the boxes be moved to inspect the rear wall but did not and chose not to make any further inquiry.

8. *Hunt v. 981577 Ontario Ltd. (c.o.b. Eagle Auto Glass)* [2003] O.J. No. 2051, [2003] O.T.C. 461, 123 A.C.W.S. (3d) 390 (Small Claims Court)

The Disclosure Statement was attached to the Agreement of Purchase and Sale. The vendor made a true statement that the vendor was not aware of any defects in any appliances. Prior to closing, the dishwasher stopped operating and required substantial repairs. The Court held that the vendors had an ongoing obligation to disclose damages and changes which occurred after the statements had been given. The purchasers were awarded \$600 plus \$240 costs.

9. *Valiquette v. Cosman* [2003] O.J. No. 5425 (Small Claims Court)

This was an action by the purchasers for damages arising from defects in the home which

were discovered after closing. The purchasers claimed the vendors withheld knowledge of the defects, but the vendor was never asked for a Seller Property Information or a building inspection. The action was dismissed.

10. *Germain v. Schaffler* [2003] O.J. No. 4514, 37 R.P.R. (4th) 116, 2005 CarswellOnt 6782 (Small Claims Court)

The purchaser sued for damages arising from latent defects in his purchase of a home. In response to a question about water stains in the basement, the vendor said that water had leaked into the basement on three occasions; when an outside tap froze, when a hot water tank leaked, and when a drain pipe on a washing machine failed. The purchaser did not have the basement inspected prior to purchase.

On the Seller Information Statement, the seller said that the lot was not subject to flooding and that she was not aware of any moisture or water problems in the basement. After closing the purchaser experienced flooding and discovered a crack in the foundation.

The action was allowed. The defect was latent, as it could not be detected by ordinary diligence. The vendor acted with a reckless disregard concerning the latent defect by stating that there was no water problem without adequately investigating the issue. She was responsible to pay the repair costs.

11. *Cyr v. Stewart*, [2003] O.J. No. 5879 (Ont. S.C.J.)

The purchaser bought a rural property from the vendor. On the property information statement, the vendor said he was not aware of any problem regarding the quantity of water. On the offer to purchase, however, the vendor represented and warranted that the well supplied an adequate supply of water and had never run dry during his occupancy. This representation survived closing in a written warranty.

After closing, there was a water shortage and the purchaser found that the flow rate was far below normal requirements for household use. The court ruled in favor of the purchaser and allowed damages of \$16,800 for a new well. The vendor's representation that the water supply was adequate was knowingly misleading, intended to induce reliance, and the purchaser did rely on it to his disadvantage.

12. *Blais v. Cook* [2005] O.J. No. 2643 (Ont. S.C.J.)

The purchasers submitted an offer to buy a rural property near Kingston. The offer was a satisfactory water test result to ensure the quality and quantity of the water. Their real estate agent had the water tested for bacteria and the test came back negative, but the agent never discussed with the purchasers the significance of the high salt content in the water.

The purchasers waived the conditions after the agent advised them that the water tests

revealed the water was “okay.” The vendor's property information stated that the water was salty and that there was a cistern on the property to provide drinkable water which was trucked to the property. The purchasers stated that they were never informed of the water problem and of the fact that there was salt water in the well. The salt water had damaged plumbing, pipes and fixtures.

The purchasers were awarded damages of \$27,152 against the real estate agent. It was not clear that the purchasers ever saw the VPIS and the agent did not advise the purchasers of the poor water quality.

This case, in my view, stands for the proposition that an agent is required to show the purchasers the VPIS and advise on the significance of the disclosures in it. The purchasers were awarded the \$27,150 cost of drilling a replacement well.

13. *Whaley v. Dennis* [2005] O.J. No. 3174, [2005] O.T.C. 662, 37 R.P.R. (4th) 127, 141 A.C.W.S. (3d) 139 (Ont. S.C.J.)

Justice Joseph W. Quinn waxed poetic at the beginning of his judgment in this case:

“Had the spring of 2003 been bluebell time in the Niagara Peninsula, the plaintiffs would have neither noticed nor cared. You see, the air was filled with the smell of sewage: the septic system in their recently purchased house was malfunctioning. To add to their woes, the basement was flooded.”

Before buying the vendors’ home, the purchasers conducted an inspection of the septic system. Several months after closing, a serious malfunction of the septic system caused raw sewage to seep into the basement of the home which subsequently flooded.

The vendors signed a Seller Property Information Statement. One question asked: "Are you aware of any problems with the septic system?" There was a choice of three answers: "Yes"; "No"; and "Unknown." They checked off the last answer. Another question asked was: "Are you aware of any moisture and/or water problems in the basement or crawl space?" The answer given was "No." The court was satisfied that the vendors knew these answers to be false. At paragraph 18 of the decision, the judge wrote:

“The Seller Property Information Statement is a crucial form of disclosure by a vendor, as it alerts a purchaser to possible areas of concern necessitating further inquiry or investigation.”

The court allowed the action allowed against the vendors for damages related to the septic system and the basement. The evidence established that the vendors were aware of the problems. The problems were latent defects which were actively concealed from the plaintiffs by the vendors. the vendors were not absolved of liability even though the purchasers had commissioned an independent septic inspection.

14. *Miersma v. Pembridge Insurance Co.*, [2005] O.J. No. 4628 (Ont. S.C.J.)

Three years after the applicants in this case sold their property, the purchaser sued them based on negligent misrepresentation in the Seller Property Information Statement and in the Agreement of Purchase and Sale. While they owned the property, the applicants had a comprehensive insurance policy with Pembridge.

The court held that the true nature and substance of the claims by the plaintiff/purchaser, as pleaded in the Statement of Claim, were in negligence against the former owners (the insured) and therefore the insurer had a duty to defend.

15. *Bird v. Ireland* [2005] O.J. No. 5125, 205 O.A.C. 1, 144 A.C.W.S. (3d) 6 (Ont. Divisional Court)

This was an appeal from a Small Claims Court decision. The appellant/vendor retained a real estate agent to sell her home. She declined to accept an offer for the full asking price, based on the warranties in the offer which she was not willing to sign.

The offer contained a warranty that the water on the property was potable and available in sufficient quantity for normal household purposes and the septic system was free from problems. There is no evidence that the appellant ever agreed to these conditions. Respondent's counsel asserts, however, that such evidence is not necessary in order to hold the appellant accountable for commission on the basis of her refusal to honour her agreement to sell at the stipulated price.

The agent successfully sued for payment of her commission and the vendor appealed.

At paragraph 9 of the judgment:

“It is clear that the (agent) simply assumed that, because the appellant (vendor) indicated in the Seller Property Information Statement that she was not aware of certain problems, she was prepared to warrant that such problems did not exist. This he was not entitled to do. There is no evidence that the (vendor) ever agreed to such conditions. It is one thing to state that one is not aware of any problem with the water and quite another thing to warrant as a positive fact that there is no problem. The former case presupposes merely a state of ignorance on the part of the vendor, from which a potential purchaser may, perhaps, take some limited comfort. Absent fraud or willful blindness, however, no liability attaches to stating the simple fact that one is not aware of any problem. In the latter case, however, one is stating positively the existence of a particular state of affairs and, by so doing, exposing oneself to liability if it should prove otherwise. Therefore, the mere fact that the vendor had indicated that she was unaware of any problems with the water or sewage systems is not to say that she was content to warrant that there were no such problems.”

“... I have concluded that the offer was not presented as required by law and for that reason the respondent is not entitled to now claim his commission.

The language of the commission agreement term was not sufficiently clear and unequivocal as to permit the agent to rely upon it. An offer containing warranties of this type was not “unconditional” in the sense that the agent was entitled to her commission if the full-price offer was declined.

16. *R. v. Repaci*, [2006] O.J. No. 5573 (OCJ)

A builder was charged with acting as a vendor of a new home in Kanata without being registered as a vendor, contrary to Section 22(1)(b) of the Ontario New Home Warranties Plan Act. He was also charged with failing to notify and pay the prescribed fees, contrary to the same section of the Act.

Under the Act, a vendor is defined as a person who sells on his, her or its own behalf a home not previously occupied to an owner. The issue is whether the above residence was previously occupied within the meaning and intent of the Act.

The builder signed an OREA residential property information statement in which he described the residence as "new". This document satisfied the Court that the accused intended to sell the residence as a new residence. The listing agent testified that he regarded the residence as new and the agent for the buyers testified likewise.

The builder was found guilty on both counts, the SPIS having been the critical factor in his conviction.

17. *King v. Barker* [2006] O.J. 2766 (Ont. S.C.J.)

This was an action for damages to remedy moisture damage and mould in the basement of a recently purchased house. The purchasers waived a home inspection and relied on the oral representations by the defendants and the Vendor Property Information Statement, which was attached as a schedule to the purchase agreement. The vendors answered no to the question “Are you aware of any moisture and/or water problems in the basement or crawl-space?”

The purchasers claimed that the defendants knowingly misrepresented the state of the property and induced them to purchase to their detriment. The court found that the defendants did not knowingly make false representations and did not make any statements with reckless disregard for the truth. The buyers had ample opportunity to inspect the condition of the property prior to purchase.

18. *Royt v. Goldenberg* [2006] O.J. No. 3489 (Ont. S.C.J.)

In March of 2006, Alexander and Tamar Royt made an offer to purchase a home on Vesta

Dr., in the Forest Hill area of Toronto. They made two deposits totalling \$150,000 on account of the total purchase price of \$1,470,000.

The seller was Hilary J. Goldenberg. Her listing with MLS included a Seller Property Information Statement (SPIS) saying that there were no encroachments. Attached to the agreement of purchase and sale was a 1940 survey that did not show any encroachments on adjoining lands.

Several months prior to closing, Alexander Royt obtained a survey that showed concrete steps, a concrete landing and stone retaining walls that encroach on the municipal road allowance. (The house is perched on a rise significantly higher than street level.)

Royt continued to prepare site plans for construction on the property but became concerned about the encroachments onto that part of the front yard owned by the city, between the sidewalk and the front lot line. Almost three months after the deadline for searching the title had passed, the buyers asked to cancel the contract and have their deposit money refunded.

The seller then suggested three options to encourage a smooth closing of the transaction. She offered to obtain an encroachment agreement from the city to allow the improvements to remain in place. She also offered to buy title insurance and/or reduce the price by \$14,000 to cover the cost of removing the steps, landing and retaining walls.

The buyers refused these options and brought an application before the Superior Court of Justice under the Vendors and Purchasers Act. This legislation allows the parties to a purchase agreement to apply relatively quickly to a court in order to determine whether any particular issue is or is not a fatal title defect, and if appropriate, to bring the contract to an end.

The buyers told the judge they relied on the SPIS and if the encroachments had been disclosed, they would not have bought the house. The three options offered by the seller, they said, were inadequate. The seller, on the other hand, argued that the improvements are not encroachments, and were built with city permission.

At the trial, expert real estate appraiser Barry Lebow testified that in his opinion the matters in dispute were "minor" and if disclosed to the buyers, "would not have any bearing on market value or marketability."

In her decision, Justice Susan Himel agreed with Lebow that the structures complained of were "so trivial and commonplace" that they would have little or no impact upon the use and enjoyment of the property by the purchasers. She also agreed that the three options suggested by the seller, including title insurance, were satisfactory answers to the buyers' objections. They were reasonable and would allow the buyers to receive substantially what they contracted for under the agreement.

"In my view," she wrote, "the (buyers) took an unreasonable position by rejecting the proposals offered." Justice Himel ruled that the improvements to the front yard do not affect the use or enjoyment of the property and any deficiency is not material nor would it affect marketability. "If the structures are encroachments," she wrote, "they are a trivial risk and are commonplace."

She added that the statements about encroachments made on the SPIS were not misrepresentations, nor were they material inducements to entering the purchase agreement.

The buyers' application to terminate the agreement and get a refund of their deposit was dismissed and the seller was awarded a total of \$50,708 in court costs, on top of the purchase price. The transaction closed on the scheduled closing date without a price abatement and without the offered title insurance policy.

The judgment reads, in part:

16 I now turn to the issue of whether the purchasers were entitled to rescind the agreement on the basis that the vendor made misrepresentations by checking off "no encroachments" on the Seller Property Information Statement. In *Rampersad v. Rose*, [1997] O.J. No. 2012, Deputy Judge Searle of the Small Claims Court discussed the use of the SPIS in real estate transactions:

It is a form adopted by the local real estate board about 1993 and is a form of disclosure ostensibly used to provide potential purchasers with information about the property ... The form contains a number of explanatory and qualifying statements.

17 The term encroachment refers to an "unauthorized" or "illegal" or "unlawful" intrusion onto another's land: see *Black's Law Dictionary, Eighth Edition*, (West Publishing Co.: St. Paul, 2000); *Concise Oxford Dictionary, Eleventh Edition* (Oxford University Press: New York, 2004). In this case, the stairs, landing and retaining walls extend over the front lot line onto City owned property but were constructed with permission of the City and, certainly, without objection. The survey report obtained by the purchaser did not characterize the structures as encroachments. The Seller Property Information Statement (SPIS) had notations on it that the information is provided for information purposes only and is not a warranty even if attached to an agreement of purchase and sale. The form also stated "Buyers must still make their own enquiries". While the vendor's husband agrees that if he was now asked about encroachments (after seeing the recent survey), he would answer the question differently, he has provided an explanation for completing the SPIS the way he did. I do not consider the statements made on the form to be misrepresentations.

18 Furthermore, there is no evidence adduced by the purchasers that the statements regarding alleged encroachments were *material* to the making or were inducements to entering the purchase agreement. The applicants make an assertion that had they known of the encroachments, they would not have entered into the agreement; however, there is no other evidence supporting that contention and the evidence that is available suggests that the purchasers had plans to redevelop the property and remove the stairs and retaining walls.

19 Misrepresentations involve a misstatement of a fact which is *material* to the making or inducement of a contract: see Fridman, G.H.L. *The Law of Contract, Third Edition* (Carswell:Toronto), 293. It cannot be said that the representation was of an existing fact and that it induced the purchaser to enter into the contract.

20 I apply the policy approach outlined by Grange J.A. in *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 at 7 where he said:

I think the purchaser's reliance upon this clause can be described as "capricious or arbitrary" where the vendors had removed the curb and replaced it within the lot line so that it did not encroach on the adjacent lot, and I cannot find her action to be "reasonable and in good faith". If we were to give the clause the meaning and force ascribed to it by the trial judge, there would be very few contracts for the sale of urban land that could survive. It would be a rare case where a careful survey would not disclose some minor discrepancy. Vendors and purchasers owe a duty to each other honestly to perform a contract honestly made. As Middleton J. put it in *Hurley v. Roy* (1921), 50 O.L.R. 281 at p. 285, 64 D.L.R. 375 at p. 377: "The policy of the Court ought to be in favour of the enforcement of honest bargains ..."

21 In conclusion, I find that the purchasers' objections to title were trivial. The three alternatives presented by the vendor in response were reasonable and would have allowed the transaction to close with the purchasers receiving substantially what they had contracted for under the agreement.

22 Furthermore, rescission based upon alleged misrepresentations in the SPIS form was not available. Rescission is an appropriate remedy where the representation would result in receiving something substantially different from what was bargained for and what would be received: see Fridman, G.H.L., *The Law of Contract, Third Edition*, (Carswell: Toronto), at p. 305.

19. *Barron v. Bettencourt* [2007] O.J. 3489 (Ont. S.C.J.)

This case is an interesting example of what will not be considered an attempt to conceal defects with regard to a statement made in the SPIS.

The home in this case was a 1 ½- storey 86-year-old single family home with an unfinished basement crawl space. Approximately one month after closing the purchasers discovered water was leaking into the basement. Upon further investigation they discovered mould, rotting wood under the staircase, and efflorescence on the block walls.

The purchasers sued, claiming the vendors knew they had a water problem in the basement and deliberately concealed it, thereby preventing a full inspection by the purchasers' building inspector or the purchasers themselves.

The buyers also alleged fraudulent misrepresentation based on statements made by the vendors the day before closing and based on the information provided in the Seller Property Information Statement dated November 3rd, 2005. That Statement represented that the vendors were unaware of any moisture or water problems in the basement. The Seller Property Information Statement, in bold print in paragraph 1, stated: "(this) 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 purchasers had obtained a home inspection. Under the clause "Water Seepage/Penetration" the report stated "where accessible the finished perimeter walls of the foundation were audited with an ultrasound moisture meter. Dampness behind the walls was not found". It further provided that "due to the unpredictable and latent nature of basement

leaks no assurance or warranty can be provided that your basement will not leak in the future".

The court's decision notes the failure of the agent to insert an appropriate warranty in the agreement of purchase and sale, and relies heavily on the "entire agreement" clause in the offer. It reads, in part:

23 After weighing all the evidence I have come to the conclusion that Bettencourt and Paddley did not experience any leakage or other water problems during their ownership of the property. They inspected this home prior to the purchase of it and retained a home inspector. They saw no evidence of prior leakage and purchased the subject property. Their intention was to remain there for sometime. They expended considerable funds in improving and upgrading the property. Had there been a problem with the basement these funds could have been applied to remedying that problem as opposed to being put into the development of a rose garden. The very fact that the Defendants spent so much time and effort on the garden in and of itself suggests that they were there for the long term.

...

25 The Plaintiffs are a young couple and this was their first home They relied, to their detriment, on a realtor who did not choose to include any representation or warranty with respect to the state of the basement. However, given the 2 home inspection reports that showed no evidence of water or dampness perhaps it was not reasonable to expect the realtor to include such a condition. The evidence was inclusive as to how long it would take after leakage for efflorescence, mold and darkened wood to develop in the basement.

26 Ms. King, however, was quite certain there was no mold when she inspected the property. Ms. Barron herself testified the basement was not musty nor did it smell of mold or mildew when she inspected the basement.

...

30 I note that the Plaintiffs' home inspector, in his report, noted cracks. Surely it was incumbent on him to do an extensive inspection to ensure the cracks had not lead to leakage or were not likely to lead to leakage. If the Plaintiffs were attempting to conceal the defect the Plaintiffs allege it is unlikely they would have provided (in the Agreement of Purchase and Sale) the opportunity for the Plaintiff Barron to inspect the property twice before closing. Indeed they allowed the Plaintiffs access to the property and gave them keys the day before closing. If in fact Robin Paddley did make an oral representation as to the condition of the basement, which representation she denies, it was made on the eve of closing and therefore could not be a representation the Plaintiffs relied on to purchase the property. The Agreement is clear that there are no representations or warranties beyond which are contained in that Agreement and there are none. The Vendor Property Information Statement clearly states that is not to be incorporated into the Agreement of Purchase and Sale even if attached thereto and it clearly was not attached.

31 The Plaintiff is quite right that the clause in the Agreement of Purchase and Sale that provides it is the entire Agreement, to the exclusions of all other representations and warranties, does not apply in the presence of fraud or a calculated attempt at concealment. I find no evidence of such concealment and accordingly, the Agreement stands. While I congratulate the Plaintiffs on the skilful presentation of their Claim and while I sympathize tremendously with them, given that they have a basement which is currently unlivable, neither my admiration nor my sympathy entitles them to succeed against the Defendants.

32 Accordingly, for the reasons cited herein the Plaintiffs' Claim is dismissed with costs.

20. *Morrill v. Bourgeois* [2007] O.J. No. 1851 (Ont. S.C.J.)

When Matthew Morrill bought his house in Thunder Bay in October 2005, he did everything "by the book." He visited the house three times, viewing every room on all three visits. Twice he was accompanied by the real estate agent, and once he brought a professional home inspector. Before he signed the agreement of purchase and sale, he carefully reviewed the Seller Property Information Statement (SPIS), which was signed by the vendors and delivered to him by the agent.

Unfortunately, nobody noticed prior to closing that there were serious structural and moisture problems in the finished basement. On moving into the house, Morrill discovered for the first time a smell of mildew in the basement that was not there before closing. On removing some of the panelling, he discovered mould and mildew behind the walls, and cracks as much as 2.5 centimetres thick between some of the concrete foundation blocks.

Eventually, Morrill removed all of the panelling and insulation in the basement. There was no vapour barrier installed between the walls and the panelling, and there was mould on the strapping to which the panels were nailed. The whole south wall was cracked, and one of the foundation blocks could be removed by hand. As well, the wall was buckled in toward the interior by 7 to 10 centimetres. Ice was building up on the inside of the wall, and water was leaking in.

A structural engineer gave the owner an opinion that the only way to repair the problem would be to excavate around the entire house and install a weeping tile system connected to an interior sump pump.

When Morrill found out that total repair costs were in the neighbourhood of \$30,000 – a third of the \$90,000 price tag of the whole house – he sued the sellers, Jennifer and Spencer Bourgeois, for misrepresentation and failing to disclose the problems with the basement.

The claim was based on the SPIS signed by the sellers. Under the heading "improvements and structural," they indicated that they were not aware of any moisture or water problems, and they were not aware of any damage due to water or wood rot, among other things.

When the case went to trial, Justice Douglas Shaw noted that the information in the SPIS is not a warranty and is provided "for information purposes only." In general, sellers have an obligation to disclose hidden or "latent" defects that render the property unfit for habitation, or defects that render the property dangerous or likely to be dangerous. They are not liable, however, if they have no knowledge of the hidden defect.

Based on the evidence heard at trial, Justice Shaw ruled that there was, in fact, a latent defect in the basement. It was not apparent to the purchaser, the vendors, the agents or the home

inspector. The judge believed the evidence of the sellers that they really did not know about the water or structural problems since their master bedroom was in the basement room with the problems.

The purchaser in this case failed to prove that the sellers were guilty of fraudulent misrepresentation concerning the problems with the basement, and the action was dismissed.

It's tempting to wonder whether the buyer would have sued at all if the vendors had not signed the SPIS. It's also worth wondering whether an agent is negligent if he or she invites a seller to sign one of these statements, and the seller winds up getting sued as a result.

21. *Powers-Healy v. Little* [2007] O.J. No. 2100 (Ont. S.C.J. - Small Claims Court)

This was a motion for summary judgment in Small Claims Court. It was dismissed and the matter referred to the trial judge for a decision based on the evidence.

The case is interesting for the deputy judge's comments on the "entire agreement" clause, and whether there is a shift of responsibility from the vendors who signed an SPIS to the home inspector who makes a subsequent inspection and report.

16 Accepting that there are some circumstances when a seller might be liable for a defect, I return to the proposition put forward by the Defendants' counsel, namely, that any such liability is extinguished by a buyer's retaining a property inspector, and that the responsibility for finding and pointing out any defects rests with such inspector. Defendants' counsel refers to a frequently cited case, Hoy v. Lozanovski (1987), [1987] O.J. No. 1986, 43 R.P.R. 296 (Ont. Dist. Ct.) wherein Conant, D.C.J., states:

"However, if the purchaser chooses to not rely on the vendor and requests inspections, including professional inspectors (e.g. Home Inspection Service), then reliance for completion of the deal (the waiver in this case, is shifted to the inspector whom the purchaser has chosen. The purchaser has relied on the inspector's report, not the vendor's silence, to formulate his decision whether or not to complete the deal. In that case, responsibility of the vendor is released and assumed by the purchaser or transferred to his agent, the Home Inspector, at the time of the raking of the deal (which, in this case, was the signing of the waiver at which time the deal became firm)."

17 Similarly, in Antorisa Investments Ltd. v. 172965 Canada Ltd., supra, J.L. Lax, J., concludes at para. 65, "The law is clear that where a purchaser of real estate hires professional inspectors, the purchaser relies on its inspector's report and not on the vendor. In these circumstances, a professed reliance on a vendor is unreasonable".

18 In Belzil v. Bain, supra, the purchaser discovered, after closing, that there was a bulge in a basement wall which had been concealed by an interior wall erected so as to conceal the bulge. The Court noted at para. 57 that, "Even though the defect itself, namely the bulge, may not have been visible at the time of the sale of the House, there were ample 'clues' which would have prompted concern for further inquiry", and went on to state at para. 67, "Even if Mr. and Mrs. Belzil could prove that the defect was present at the time the wall was built and that this wall fully concealed the otherwise patent defect, their claim would fail on the basis that Mr. and Mrs. Belzil did not rely on this active concealment when deciding to purchase the House. Rather, they relied upon the inspection of Mr.

Quinn."

19 While clearly there is a shift of responsibility from a vendor to a home inspector, is that shift of responsibility absolute? Are there any circumstances when a purchaser who has hired a home inspector might still have recourse to the vendor? If the answer is no, then indeed the Defendants' motion for summary judgment must succeed as there is no way the Plaintiff could succeed in this action. I do not answer this question in the negative, however.

20 In Hoy v. Lozanovski, supra, it was noted that "... if the vendor made representations to the purchaser or the purchaser's inspectors that were fraudulent, then the responsibility for disclosing the latent defect would remain with the vendor".

21 I note that in Belzil v. Bain, supra, the presence of "clues" was sufficient to allow responsibility to detect the defect to pass to the home inspector. Fraser v. Knox, [1998] O.J. No. 4379, also talked about "clues" available to a home inspector. While these cases do not discuss where responsibility would lay if there were no clues, it seems reasonable to me to conclude that in a case where there are no "clues" and no reasonable means of testing for defects (such as soil testing, which was the issue in Antorisa Investments Ltd. v. 172965 Canada Ltd., supra) that liability for actively concealing defects, whether patent or latent, actively not disclosing latent defects, or fraudulently misrepresenting facts relating to latent defects, remains with the seller, subject to the requirement with respect to active concealment or active non-disclosure that the same constitute a fraud on the purchaser the same as a fraudulent misrepresentation would. See 688350 Ontario Ltd. v. Piron, [1994] O.J. No. 2844, supra, at paras. 125 to 129.

22 Home inspectors and other professionals hired by purchasers ought to know what they are doing and ought to do the job properly. They have knowledge, expertise, and experience well beyond the average purchaser; that is what they are paid for. They cannot, however, be expected to be guarantors of the condition of every aspect of a property. There are some things they cannot determine, even with a thorough inspection of the property and appropriate testing, given that some features of the property simply cannot realistically be accessed for inspection or testing. These are the aspects of the property which, I find, may give rise to liability on behalf of the seller, should the conditions reviewed above come into play.

23 In Swayze v. Robertson, supra, the Court imposed liability on the sellers, recognizing the limitations of the home inspection report provided to the plaintiffs.

22. *Weinman v. Brinkman* [2007] O.J. No. 2295 (Ont. S.C.J. Small Claims Court)

When listing the house for sale, the vendor completed a Seller Property Information Statement ("SPIS.") In response to the question, "Is the property subject to flooding?" the vendor indicated "No." In response to the question, "Are you aware of any moisture/water problems?" the vendor "Yes," and added "Some moisture in basement."

For unexplained reasons, possibly because it was a multiple offer scenario, the agent did not provide the buyers with a copy of the SPIS and it was not attached as a schedule to the agreement of purchase and sale. The buyers did not ask for it, even though its existence was specifically referred to in the Toronto Real Estate Board listing that had been provided to the plaintiffs.

After discussing the merits of including a condition as to an inspection in the offer, the

plaintiffs waived their rights and submitted an unconditional offer that, after some further negotiation, was accepted. At the time they bound themselves to the Agreement of Purchase and Sale the plaintiffs had not reviewed the SPIS that disclosed a basement water problem; they had waived the right to have an independent inspection that may well have revealed the problem. There was no evidence that they ever asked for the production of any existing inspection report, or that it was refused or concealed.

The buyers' claim was dismissed:

20 The defendants made no effort to conceal any water problems in their basement. The problem had been disclosed in the SPIS that the plaintiffs failed to review. It had been open to the plaintiffs to make their offer conditional on an inspection and they waived the right to do so. The inspection report of James Hammond makes it plain that water damage was visible, as does the quotation provided by JAGG Enterprizes. There were no representations made by the defendants as to the condition of the basement.

21 While the defendants knew there was a water leak the ignorance of the plaintiffs can be directly related to their own lack of inquiry.

22 The problem was a patent defect not a latent defect. The entry of water into the basement was detectable on ordinary inspection. There was no attempt on the part of the defendants to mislead the plaintiffs by concealing the damage or by inducing the plaintiffs to limit their inquiries. Indeed, the repairs have never been made, the actual cause of the leaks remains open to speculation and it is impossible to conclude that the defendants were in any better position to know about the source of the problem than would have been the plaintiffs had they even known about the dampness or moisture.

23 The plaintiffs are entirely incorrect in their assertion that in the circumstances there was any duty whatsoever on the part of the defendants to bring the water problem to their attention.

24 It is impossible to see any basis on which the defendants could be held liable to the plaintiffs.

25 The action has to be dismissed.

23. *Tarion Warranty Corp. v. Oppedisano* [2007] O.J. No. 5427 (OCJ)

This is another case where a builder was charged with selling a new home without registering under the Ontario New Home Warranties Plan Act.

The builder provided a Vendor Property Information Statement which indicated, among other things, that the building was one year old and that the sale was not subject to GST. In the area on the form relating to the Ontario New Home Warranty Program, the defendant checked the 'not applicable' box beside the words "Are you aware of any past or pending claims under the [program]?" The space beside the "ONHWP Registration Number" is blank. The form states, on page two, that the roof is "brand new."

On the facts of the case, the court found that the builder had lived in the home for three months, "albeit Spartanly," and the charges were dismissed.

24. *Kaufmann v. Gibson* [2007] O.J. No. 2711 (Ont. S.C.J.)

John and Suzanne Kaufmann are both retired medical doctors in their 80s, living in London, Ont. In early 2004, they discovered signs of water penetration and damage in two large bay windows in their living room, in the floor of the master bedroom, and in the closet of an adjacent bedroom. More damage was evident in a crawl space and small basement room below the master bedroom.

The home insurers were notified and a restoration company came to do drying, cleanup and repair work to the tune of about \$12,500. An insurance estimator attributed the cause to ice damming, resulting from heavy winter conditions in London in the winter of 2003-04.

Ice damming is caused when snow and ice buildups occur on roofs, followed by melting. After the melt, water finds its way into the house under the eaves, and causes serious internal damage.

The estimator recommended installation of additional baffles on the roof and ventilation holes beside the bay windows, and this was done by the Kaufmanns at their own expense.

Later that year, the Kaufmanns decided to sell the house and listed it with a local real estate agent for \$495,000. As part of the listing arrangement, the owners signed a Seller Property Information Statement (SPIS). These documents are apparently routinely provided by London Real Estate Board agents, although they are not mandatory.

Three questions on the form asked: "Are you aware of ..." any moisture or water problems, water damage or roof leakage? Although John was inclined to disclose the water damage from earlier that year, his real estate agent persuaded him to answer "no" on the basis that the questions were in the present tense, and there was no water problem at the time of signing the statement. It turns out that the advice was wrong.

Within a few days, the Kaufmanns had accepted an offer to purchase the house for \$485,000 from Michael Gibson and Nancy Pettigrew. The SPIS was attached to the agreement. At the top of the form is a caution that the questions were answered for information purposes only and that the SPIS is not a warranty. Buyers are encouraged by the form to make their own inquiries.

Prior to closing, the purchasers discovered that water damage had occurred earlier in 2004, and were "flabbergasted" by the extent of the repairs done. The purchasers were told by the restoration company that there was no guarantee that the water penetration would not recur.

In light of the new information, the purchasers terminated the transaction. The Kaufmanns eventually re-sold the property to other buyers for \$380,000 – a reduction of \$105,000 from the earlier price.

It wasn't long before the Kaufmanns sued Gibson and Pettigrew for their losses, and the would-be buyers counterclaimed for return of their \$5,000 deposit. The matter was heard in a three-day trial in London in 2007 before Justice Gordon Killeen. In his ruling released in July, the judge dismissed the Kaufmanns' action, and declared that the purchase agreement had been rescinded.

"Since the SPIS form was incorporated in the agreement," Killeen wrote, "the non-disclosure was tantamount to false representations as to the condition of the home and justifies rescission."

On the plain wording of the questions, the judge said that the answers could not be restricted to the present-tense basis, but full disclosure of the past repairs was required.

Justice Gordon P. Killeen undertook a careful and detailed analysis of SPIS case law as of 2007:

99 The spirit and general purpose of the SPIS form is well stated in two introductory paragraphs of the form reading as follows:

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 Seller to the Broker/Sales Representative. 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 Broker/Sales Representative 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 Seller's 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.

For the purpose of this Seller Property Information Statement, a "Seller" includes a landlord and a "buyer" includes a tenant, or a prospective tenant.

100 As can be seen in the opening words of para. 1, "ANSWERS MUST BE COMPLETE AND ACCURATE". While this paragraph goes on to say that the answers do not constitute warranties, there cannot be any doubt that they can have legal consequences as representations, especially if they were read by the purchasers before submitting their offer, as here, and were then incorporated into the terms and conditions of the agreement. One finds the following clause in Schedule A to the agreement confirming incorporation:

The Buyer acknowledges that the Buyer has received a completed Seller Property Information Statement from the Seller, attached hereto as Schedule B and forming part of this Agreement of Purchase and Sale and has had an opportunity to read the information provided by the Seller on the Seller Property Information Statement prior to submitting this offer.

101 There is nothing within the preliminary two paragraphs of the SPIS suggesting that the various questions should be given any special or narrow reading and since paragraph 1 leads off with an admonition to vendors that their answers should be "complete and accurate" it is not unreasonable to infer that the questions should be given a plain, common-sense reading rather than a narrow or tortured one.

102 The 16 questions in the key "Structural" section of the form are all open and plain questions which, as it seems to me, call for open and plain answers.

103 Many of the questions start with the broad phrase "are you aware of" and then go on to mention "problems" of a variety of kinds.

104 For example, question 1 asks "Are you aware of any structural problems?" This is broad language and cannot be realistically limited to structural problems on the day the form was signed.

105 The three questions in issue - questions 7 to 9 - are similarly framed and cannot, in their plain terms, be said to only call for answers on a current or so-called present-tense basis.

106 Question 7 asks about awareness of moisture or water problems; question 8 about damage due to water or other things; question 9 about roof leakage or unrepaired damage.

In other words, there are no suggestions in any of these questions about exact current conditions alone and they all speak of concerns about water problems in one way or another.

107 To me it is patently impossible to give the narrow reading to these questions which the plaintiffs' argument presents.

108 What if the plaintiffs had had a flood in their basement through a cracked basement wall one month before July 8 and had had the entire basement repaired and cleaned up so that the damage problem was corrected? On the plaintiffs' approach, disclosure would not be needed. The mere asking of such a question, or a similar one, shows how wrong-headed the interpretive approach of the plaintiffs is.

109 It seems that, in the past 10 years or so, similar voluntary disclosure statements to the one employed here have been adopted by real estate boards across Canada. Almost inevitably, they have given rise to litigation over their meaning and reach.

110 One of the leading cases is *Alevizos v. Nirula*, [2003] M.J. No. 433, 2003 MBCA 148 (Man. C.A.), a decision of the Manitoba Court of Appeal written by Chief Justice Scott.

111 In *Alevizo*, the purchasers had noticed a gap in a window while going through the house during the negotiation stage of offers and had concerns about possible water problems such that they asked for a seller's property condition statement (PCS), which was Manitoba's equivalent of the SPIS form in this case.

112 The vendors signed the PCS and emphatically denied that there had been any leakage at the windows. The purchaser bought the property and later sued for damages involved in later

repairing the windows. The trial judge concluded that the male vendor's PCS denial of prior water damage was false because it did not contain complete information about leakage at the windows.

113 Chief Justice Scott upheld the trial judge and, in the course of his judgment, laid down five useful rules for consideration in cases where such voluntary disclosure statements are used [para. 36]:

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 any 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.H. 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.

114 Chief Justice Scott went on, at para. 38, to make this additional comment about the omissions in the PCS answer:

In the end, I have concluded that the trial judge's decision that fraud had been demonstrated should be sustained. The vendors were found to have deliberately omitted to provide the purchasers with a full and honest answer respecting "flooding and leakage" in the home. Their response was not merely a "half truth" it was a positive falsehood. Once the vendors voluntarily undertook to complete the PCS, they were obliged - indeed they were under a duty in the circumstances - to do so honestly and completely. This they did not do. [Emphasis added.]

115 It is important to emphasize that, unlike the situation in *Alevizos* case, the defendant purchasers in this case took the trouble to incorporate the SPIS document directly into the terms and conditions of the agreement.

116 In my view, this greatly strengthens the position of the defendants because they were relying on the SPIS, not as an outside document containing representations, but, rather, as a specific contractual commitment within the four corners of the agreement itself.

117 I find as a fact that the SPIS answers in this case were clearly untrue on Mr. Kaufmann's part and he knew them to be untrue when he answered "No" to all three questions and declined even to add some comments in the "Additional Comments" lines below the questions.

118 With respect, Mr. Kaufmann cannot hide behind the back of his agent, Ms. Siskind, and evade legal responsibility by saying that he answered the questions as he did because of her advice. He must be answerable, in short, for his calculated non-answers.

Gibson and Pettigrew were awarded costs of \$48,000 plus GST to be applied against their total legal bill of \$75,010. The plaintiffs, in turn, received a very expensive lesson in English grammar.

Even though Kaufmann answered the SPIS questions as he did on the advice of his agent, the court found that he could not “hide behind the back of his agent... and evade legal responsibility by saying that he answered the questions as he did because of her advice. He must be answerable, in short, for his calculated non-answers.”

119 I agree with Mr. Corbett's point that, once a vendor "breaks his silence" by signing the SPIS, the doctrine of caveat emptor falls away as a defence mechanism and the vendor must speak truthfully and completely about the matters raised in the unambiguous questions at issue here. In this case, the called-for truthful answers were an integral part of the contractual terms and the failure to provide truthful answers fully justified the defendants in refusing to close and asking for rescission of the agreement.

...

131 In sum, I conclude that the plaintiffs deliberately withheld information from the purchasers in the answers to questions 7 to 9 of the SPIS, information that was strongly relevant to the purchasers

in deciding whether to sign the agreement. Since the SPIS form was incorporated in the agreement, the non-disclosure was tantamount to false representations as to the condition of the home and justifies rescission.

The judge was clearly not an admirer of the SPIS forms. His critical comments, cited above, are worth repeating: "It seems that, in the past 10 years or so, similar voluntary disclosure statements to the one employed here have been adopted by real estate boards across Canada. Almost inevitably, they have given rise to litigation over their meaning and reach." It would be interesting to speculate on the result had the Kaufmanns sued their real estate agent based on the defective advice.

25. *Dryden v. McLean* [2007] O.J. No. 5668 (Ont. S.C.J. Small Claims Court)

The issue in this case was whether the vendors, before the closing of the sale of their house to the purchasers, negligently misrepresented to the purchasers the actual condition of the hot tub.

On page two of the SPIS, paragraph 13, under the heading, "IMPROVEMENTS AND STRUCTURAL," the question is stated as follows:

13. Are you aware of any problems with the swimming pool, sauna, hot tub or jet bathtub?

The form allows a person to answer in only one of four ways: "Yes", "No", "Unknown", or "Not Applicable." The vendor answered "No."

Repairs to the hot tub cost the new owners \$3,015.62 to make it operable and they sued for that amount, founding their claim in negligent misrepresentation.

The court took note of the warning paragraphs at the top of the form:

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.**

(Underling, capitalization and emphasis are those contained in the document itself)

26. *Doz v. Joslin* [2008] O.J. No. 5550 (Ont. S.C.J. Small Claims Court)

The purchasers bought a Toronto house from the vendor. Before the agreement was signed, the vendor delivered an SPIS to the purchasers. Question #9 on page 15b under "Improvements And Structural" asked: "Are you [the Seller] aware of any roof leakage or unrepaired damage?" A month prior to closing, the vendor had a leaking roof and skylight repaired, so she answered in the negative.

The question for the judge was whether or not she misled or misrepresented the condition of the roof and, in particular, the condition of the skylight. The judge found that she answered truthfully, and dismissed the claim against her. The judge noted that the roof had been repaired, and there was no evidence that established that this skylight was leaking water. There was no negligent misrepresentation.

27. *Usenik v. Sidorowicz* [2008] O.J. No. 1049 (Ont. S.C.J.)

The purchaser wanted to buy a house in Thunder Bay, back in May 2004. When she found one she liked, she read the SPIS form that the vendors had prepared at the request of their real estate agent. In answer to the question, "Is the property subject to flooding," the sellers answered "no." They also answered no to the question, "Are you aware of any moisture and/or water problems?"

Pre-sale inspections of the house by the purchaser, her own agent, her boyfriend and her home inspector, failed to disclose any water problems. But shortly after she took possession, the new owner became aware of water leaking into the basement. The drywall began to blister, and mould was discovered growing behind the baseboard.

The SPIS stated:

"any person who is in receipt of and utilizes this statement acknowledges and agrees that the information is being provided for informational purposes only and is not a warranty as to the matters recited hereinafter even if attached to an agreement of purchase and sale. ... buyers must still make their own inquiries notwithstanding the information contained on this statement."

The agreement of purchase and sale contained the typical "entire agreement clause:"

"... This Agreement including any schedule attached hereto, shall constitute the entire Agreement between Buyer and Seller. There is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein.

The buyers obtained quotes totalling \$47,040 for repairs and sued for these costs, as well as other damages for loss of rental income from the basement tenant, and loss in value of the house due to the leaky basement. The lawsuit was framed as a case of damages resulting from the sellers' misrepresentation or deceit.

At trial, the evidence revealed that the vendors told their real estate agent that there had been some water in the basement a number of years previously, but that they had fixed the problem. They said that the agent advised them that since the problem had been fixed, there was no need to mention it.

The judge decided that one or more of the disputed SPIS statements was false.

47. The questions asked caused the vendors some uncertainty. They consulted with their real estate agent. The questions were phrased in the present tense: "Is the property subject to flooding?". They interpreted this to mean "Is the property NOW subject to flooding?". But the truth of the matter was that while it may not now be flooding it was *subject* to flooding, i.e., it was "liable or exposed or prone to" [Concise Oxford Dictionary] flooding unless one took the simple precaution of ensuring that roof water was not allowed to fall at the northwest corner of the basement wall. A misrepresentation can consist of a failure to divulge needed information. (*Spinks v. R.* (1996) 134 D.L.R. (4th) 223 (Fed Ct.))

The vendors and, apparently, their agent, interpreted the SPIS question to mean "Is the property NOW subject to flooding?" But the truth of the matter, the judge reasoned, was the while it may not "now" be subject to flooding, it was *subject* to flooding? In other words, "it was liable or exposed or prone to flooding."

The judge also held that the statements were made negligently but not fraudulently, that the purchaser relied on the misrepresentation, and that but for the misrepresentation, the purchaser would not have bought the house.

“(T)he false statements were made negligently. In the words of the General Confession of the Book of Common Prayer they did "that which they ought not to have done and failed to do that which they ought to have done. ..." Having embarked upon answering the questions asked the vendors should have followed their instincts and disclosed the previous problems, explained the solution to the problem and explained what would happen if the downspouts were not handled properly. Their failure to elaborate in this matter has brought them to grief.

Damages of \$33,874.33, plus GST on part of that amount, were assessed against the vendors. Included in the award was the sum of \$2,000 for aggravation.

28. *Macdonald v. Robson* [2008] O.J. No. 1730 (Ont. S.C.J.)

This case was an application by a would-be purchaser for a declaration that he was entitled to rescind the agreement of purchase and sale due to the respondent's failure to show good title and for return of his deposit.

The property was a two-acre rural property. Applicant wanted to build several structures on the property. The real estate listing for the property did not refer to any easements.

In the Seller Property Information Statement signed by the vendor, in response to a question inquiring whether there were any easements, the answer given was "unknown, on survey". In another question asking if the survey showed the location of all easements, the

response was "yes, written location of sunroom". A survey was produced on or about March 14, but it made no reference to any easements.

The buyer's lawyer discovered that there was a large easement on the property comprising about 25 per cent of the area. The easement granted the town rights to enter onto the property to deal with the storm sewer systems. The Easement Agreement required the property owner to keep the area comprised by the easement free of all obstructions, including buildings or structures. Respondent argued that the existence of the easement did not materially affect the applicant's use of the property because there were other areas on the property where applicant would be permitted to build his drive shed and other structures.

The court found that the existence of the large easement significantly compromised the use the purchaser wished to make of the property now and in the future. The easement materially affected the present use of the property as applicant had specific plans to build structures in the area where the easement was located.

The judge found that the easement materially affected the present use of the property. The application of the purchaser for a declaration that the requisition was valid and that he was entitled to rescind the agreement was granted. The decision is a little sparse on reasoning with respect to the role the SPIS played in the outcome.

29. *Riley v. Langfield* [2008] O.J. No. 2028 (Ont. S.C.J.) - Trial; Costs [2008] O.J. No. 2816

This decision serves as a potent reminder of the dangers of using a Seller Property Information Statement (SPIS) when selling real estate. In December 2003, Paul and Judith Riley signed an agreement to buy a home in Tavistock from John and Kimberley Langfield.

Prior to signing the offer, the sellers completed and delivered to the buyers an SPIS on a standard real estate board form. The form, in wide use throughout parts of Ontario, asks questions about the condition of the home. It states that the answers are being provided for information purposes only and are not warranties. It also warns that sellers are responsible for the accuracy of all answers.

In the Tavistock transaction, the sellers stated in the SPIS that there were no defects in any included appliances or equipment, that the fireplace was in working order, and that the sellers were not aware of any problems with the swimming pool or any moisture or water problems in the basement.

After the closing in April 2004, the purchasers discovered a "flood" in the basement, and some of their possessions were destroyed or damaged by the water. They also found that the swimming pool filter and pump were not working.

That summer, a public health inspector visiting a house under construction next door discovered a pipe coming from the Riley property containing raw sewage. He also discovered an abandoned well. The inspector ordered the Rileys to install a new septic system and fill in the abandoned well. Fortunately, the Rileys' title insurance policy paid for those costs.

When the extent of their other losses became clear, the Rileys sued the Langfields for damages of \$145,650 for fraudulent misrepresentations, and punitive damages of \$97,500, claiming misrepresentation and breach of contract.

After hearing all the evidence, the judge dismissed the claim for damages to the basement and awarded the Rileys only \$2,100 for the costs of repairing the pool and the gas line to the fireplace.

The most interesting part of the judge's decision 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 for the purpose of this paper)

If part of the intended purpose of the SPIS forms is to protect agents, they clearly fail miserably in that regard. They are litigious, as they ask simple questions that require complex answers and ask questions that many lay people don't understand. They ask sellers to disclose more than they are required to do.

If the seller gets sued, then the agent and the broker may well be joined in the action for their role in using the forms - as the next case illustrates. Based on the flood of new cases involving the use of the SPIS, chances are increasingly good that the parties will wind up in court.

At a subsequent hearing in the Riley case, costs of \$25,000 awarded to defendant Langfield even though the plaintiff Riley had been partially successful. The plaintiffs had alleged fraudulent misrepresentation during the proceedings. When such a charge was alleged and not proven, substantial indemnity costs to the defendant had to be considered. The significant difference between the amount claimed by the plaintiffs and the amount recovered, particularly in view of the previous offers to settle, supported a consideration of substantial indemnity costs. The plaintiffs' expectation had been to recover substantial indemnity costs had they been successful, and it was appropriate to conclude that the plaintiffs would have to pay costs on the same level. An award of substantial indemnity costs to Langfield was appropriate.

This case contains a clear statement that the purpose of the SPIS is not to protect agents from liability. Nevertheless, many of the agents I have spoken to have told me they believe that is the exact purpose of the forms. In fact, one of them even put it in writing.

In his column in the August, 2007, issue of REM (Real Estate Magazine), broker Stan Albert forcefully disagreed with some of my critical comments on the SPIS which had been published in The Toronto Star. In his REM column, Albert asked the question, "What protects us as (agent or broker) registrants?" At the same time, he called on real estate boards across the country "to seek the assistance of the provinces to step up and make it mandatory to require the forms, to help our registrants become better and more proficient."

Albert has since changed his mind, and no longer advocates the use of the SPIS form at his brokerage.

30. *Moore v. Royal LePage Meadowtowne Realty* [2008] J. No. 3032 (Ont. S.C.J. - Small Claims Court)

The plaintiffs in this case are husband and wife. In 2004, husband was co-owner of a home inspection franchise and was an accredited home inspector. His company had been servicing the defendant, Royal LePage and its clients (potential vendors and purchasers) in providing home inspections.

In July, 2004, the defendant Barbara Crowe, a licensed agent with Royal LePage, retained Gregory Moore to conduct a prelisting inspection of a rural property in Milton.

As listing agent, Ms. Crowe was concerned that there had been previous water damage in the basement of the property, as evidenced by water marks on the walls. As a result, potential vendors were shying away from putting in offers. As she indicated, from

information received, Ms. Crowe believed that the cause of this damage was resolved and the basement had been dry for a number of months. It was important to Ms. Crowe that a potential buyer had full disclosure of the situation. As well, she wanted to ensure herself that whatever had caused the damage had been corrected. Ms. Crowe was also of the view that in "estate sales" it was preferable to get an inspection as the property may not have been up kept as best as it could. Therefore, she encouraged the vendor, Wendy Stanley to retain Mr. Moore's services to do the inspection. The "bottom line" for Ms. Crowe was that she wanted everything out in the open, so that potential buyers would be fully apprised of the condition of the property.

The defendant, Wendy Stanley, was the great-niece of the defendant Lilian Readhead, the owner of the property. At the time, she was about 94 years of age, and was living in a retirement home. Acting as Ms. Readhead's attorney, under a power of attorney, it was Ms. Stanley's job to sell the property.

In March 2004, on one of her routine checks, Ms. Stanley discovered that the basement had flooded. A company called ServiceMaster was retained to fix the problem, and Ms. Stanley was advised that the problem was solved. Indeed the problem appeared to be resolved and the home was listed for sale on May 8, 2004.

An SPIS was completed by Ms. Stanley when she listed the property on May 8, 2004. It contained these two disputed statements:

Is the lot subject to flooding? This was answered with an asterisk, directing the reader to the bottom of the form, stating: "Culvert on adjacent property blocked; caused flooding in basement due to spring run-off. We believe situation has now been resolved with installation of reverse-flow valve in drain."

Are you aware of any moisture and/or water problems in the basement or crawl space? Answer: "No."

In July, 2004, Mr. Moore attended at the property with Ms. Stanley and Ms. Crowe. The previous water problem/flooding problem was pointed out to Mr. Moore. Mr. Moore prepared his report and printed it out on spot. He notes in his report (Exhibit 1) a number of deficiencies, including, at page 6, the issue of the water damage. The report states: "*Evidence of past water penetration observed. Recommend review sellers disclosure statement or have reviewed by licensed professional for repair or replacement as necessary.*"

Eventually the Moores purchased the property without seeing a copy of the SPIS or attaching it to the offer. After a number of rainstorms in December, 2004, the Moores experienced basement flooding and sued their agent and the vendor for \$6,913 based on misrepresentation. It was only on January 12, 2005, that Mr. Moore requested and received a copy of the SPIS.

The plaintiffs' claim was dismissed. The judgment reads, in part:

19. In review of the caselaw, there does appear to be a number of reported decisions of leaking basements and where courts have wrestled with whether the statements contained in SPISs are representations or warranties. The SPIS states at the top of its first page:

*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 broker/sales representative or Buyer. **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 broker/sales representative shall not be held responsible for the accuracy of any information contained herein. (Bold added)*

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.

20. The third sentence in the first paragraph of the SPIS (quoted above) clearly states that "... the information is being provided for information purposes only and is not a warranty as to the matters recited hereinafter ...". In the face of fraud and negligent misrepresentation, a court would disregard this insertion.

The court's decision contains a detailed review of the case law from Ontario and other provinces, and includes a discussion of patent and latent defects. The findings are summarized as follows:

30 I am satisfied that there were no fraudulent misrepresentations made by any of the defendants, nor were there any concealments of defect made by them. I find that each, to the best of her ability, acted in a forthright manner in their dealing and in their disclosure to the plaintiff.

31 I am also satisfied that Ms. Stanley honestly filled out the SPIS and did not negligently or recklessly make the statements in the SPIS. The defect in question was latent, as it could not be detected by ordinary diligence on her part. The only way that the defect could be discovered would have been in retaining the services of an expert.

32 I am somewhat perplexed as to why Mr. Moore, in the dual role of home inspector and buyer, would not have been more prudent in seeking out an expert - someone who knows about basements and/or foundation problems. He states so in his report and moreover, admonishes a potential buyer to do so, yet he himself did not.

33 Interestingly, I cannot recall there being any evidence clearly citing the actual cause of this water leakage (latent defect). There was some mention of the property being on a water table, but no evidence was tendered to nail down the root cause. The only evidence appears to indicate that as of January 2005, the problem (not the cause) was resolved by installation of sump pumps.

34 I find that in fact, the defendants looked to and relied upon the plaintiff, Mr. Moore, to steer them in the right direction, as this was the very reason they felt compelled to hire him. They had no intentions of deceiving anyone, let alone the plaintiffs, regarding any possible defect. They hired Mr. Moore. He gave them advice. Mr. Moore, was not, in my opinion, an "ordinary buyer," being the author of an inspection report clearing giving direction, which he himself did not heed.

This is clearly a case of the shoemaker going without shoes. The buyer was the cause of his own problems.

31. *LeBoutillier v. Jacobs* [2008] O.J. No. 4065 (Ont. S.C.J. Small Claims Court)

This was another case of damages resulting from a basement flood. The issues were: Was the defect patent or latent? Did the sellers conceal a latent defect from the buyers. The case also involved the standard of care of a reasonably prudent home inspector.

On the Seller's Property Information Statement, the vendor "No" to the question, "Are you aware of any moisture and/or water problems?" There is an asterisk beside this line and another asterisk at the heading "Additional Comments " at the bottom of the page where she wrote, " The home was affected by the 2004 flood, not affected by the 2002 flood. Basement was redone ..."

She made an offer to purchase conditional upon a home inspection. The Agreement was signed May 4th, 2005. The inspection by Mr. Rae took place May 11th, 2005. She waived the condition and the deal was closed on June 30th, 2005.

The purchaser relied on the SPIS and a home inspection report. Inevitably, there was a flood in the basement following a substantial rainstorm.

After hearing the evidence, the judge concluded that the vendor did not know of any structural defects in the foundation that would cause any flooding. Quoting Gallagher v Pettinger (above), the judge noted, "Absent fraudulent representations or concealment, when a professional home inspector's report is obtained then reliance has shifted to the home inspector." On the facts, the action was dismissed.

32. *Barker v. Ford* [2008] O.J. No. 4475 (Ont. S.C.J.- Small Claims Court)

The buyers purchased a residence from the defendant in the city of Woodstock. Some time after they took possession they discovered water pooling in two locations in the basement. They sued the vendor for damages equivalent to the estimated cost of repairing, from the outside, two cracks in the basement wall. The case raised the issues of latent defect and patent defect (which will not be discussed here) and the role of the Seller Property Information Statement signed by the defendant.

The judge wrote in his decision that, "The role of the Seller Property Information Statement is not entirely clear. It seems not to be a warranty but has been used in past cases

to show the credibility, or lack of credibility, of the seller. In the case at bar nothing in the Seller Property Information Statement was carried into the Agreement of Purchase and Sale made Ex. No. 2 or, as far as the court is aware, the transfer documents.”

The buyers had conducted a home inspection.

On the issue of the Seller Property Information Statement, the vendor testified that he had retained a real estate agent to list and sell the property. When he met with the agent, they worked together on the Seller Property Information Statement. When they came to the question "Are you aware of any moisture and /or water problems?" they decided to deal with as it is shown on the Statement that became Ex. No. 1.

The moisture and water question is found at question #7 in the "Improvements And Structure" section of the questionnaire. It can be seen on the exhibit that Mr. Ford initialed the "NO" column but between the end of the question and his initials are the printed words "see comment". In the space for comments is printed the following:

"Laundry room had small amount of moisture in northwest corner, seller has remedied, there have been no problems since."

In his reasons for judgment, the judge found the vendor credible:

The evidence, especially with the plaintiffs' admission of a heavy winter rainfall around the time of the first-discovered leak, compels the conclusion that Mr. Ford is credible. The court accepts his evidence and finds he was truthful and forthright in completing the questionnaire. The plaintiffs were put on notice by the questionnaire. Their home inspector reported no problem with water in that area. There was a minor latent defect behind the drywall. Said in an alternate way, the defendant did disclose the defect.

33. *Lunney v. Kuntova* [2009] O.J. No. 742 (Ont. S.C.J.)

The vast majority of residential real estate transactions close as scheduled, without problems or disputes. The chances of any given real estate deal resulting in litigation involving the buyers, sellers and real estate agents increase dramatically when the agents insist that the sellers complete a disclosure document called the Seller Property Information Statement (SPIS).

The forms provide an endless source of income for litigation lawyers, and a bottomless pit of grief and expense to the parties involved in the transaction.

This 2009 Ontario Superior Court decision is yet another example of how dangerous these forms are and why OREA and some of its member boards should bear the blame for promoting them.

Back in 2002, Maria Lunney purchased a 90-year old Ottawa duplex for \$180,000 from Jana Kuntova. The listing agent was Masoud Badre, an employee of Re/Max Metro City. The house was described in the sale listing as having a "stone, stucco" exterior with a "stone" foundation.

This type of foundation, with parging on the interior sides, was in common use until about 70 years ago, and is also known as a rubble foundation.

At the time of the listing, Kuntova – with the assistance of her agent, Badre – completed a Seller Property Information Statement on the OREA form. In it she stated that she was not aware of any structural problems in the basement.

Prior to the sale to Lunney, however, Kuntova had accepted an offer to purchase the property from Marque Laflamme. That purchaser had obtained a home inspection report, which indicated advanced crumbling of the rubble foundation under the rear extension of the house. Laflamme backed out of the transaction, although the seller was not told the reason for the cancellation.

At the time of her purchase in 2002, Lunney also commissioned a home inspection, but it did not reveal any defects in the foundation as the interior basement walls had been covered with drywall since the previous inspection.

A subsequent inspection undertaken for Lunney in 2005 revealed that there were serious foundation deficiencies behind the drywall, and that the property would either have to be demolished or raised to permit the construction of a new foundation under it.

The following year, Lunney sued Kuntova, Badre and Re/Max Metro-City for \$300,000 in damages for misrepresentation. The co-defendants also sued each other.

The trial took place in 2008 over the course of five days. As a general guideline, the three lawyers involved probably spent at least another five days each in pre-trial discoveries and in preparation for trial. That comes to a total of a minimum of 30 lawyer-days, and points to a combined legal bill for everyone of something north of \$100,000.

In the end, the judge found no evidence that the defendants were aware that the foundation was useless. The case was dismissed. Following the trial, Lunney paid court costs to the defendants, but the amounts have not been made public. As well, the losing plaintiff was responsible for her own legal bills and the foundation is still at the end of its useful life.

But for the existence of the SPIS this case may never have gone to court. The form is an invitation to litigation, and in my view agents who promote it are doing themselves and their clients a huge disservice by exposing everyone to needless litigation.

34. *Ohler v. Pyle* [2009] O.J. No. 3434 (Ont. S.C.J. Small Claims Court); *Costs* [2009] O.J. No. 3435

Even though this is a Small Claims Court case, the decision of Deputy Judge Kenneth Koprowski is an incredible 234 paragraphs long, and consists of more than 20,000 words.

This is yet another leaky basement case based on negligent misrepresentation and breach of contract. The claim arose out of the plaintiffs' purchase from the defendants in December, 2006, of a house in London.

The parties signed an agreement of purchase and sale dated September 12, 2006. Prior to submitting the offer to the defendants, the plaintiffs obtained a Seller Property Information Statement ("SPIS"), dated September 5, 2006, and signed by the defendants. The representation in the SPIS which gave rise to the litigation was contained in the "Additional Comments" section on page two of the SPIS, a portion of which stated: "In the event of an extreme downpour, minor basement leakage may occur." This statement was handwritten and not part of the pre-printed portion of the SPIS. The SPIS was attached to and made part of the purchase agreement.

Three weeks after the plaintiffs completed the purchase of the property on December 15, 2006, and after they had moved in their belongings, they experienced a large amount of water in the basement during a rainfall. They considered the flooding to be much more than the amount that was disclosed in the SPIS. The plaintiffs claimed that they suffered significant damage and expense to repair the problem. The problem included a non-functioning weeping tile system.

The issue for the court to decide was whether the statement that the defendants made in the Seller Property Information Statement was a misrepresentation of the water leakage situation in the basement of the property so as to amount to a negligent misrepresentation? After a three-day trial the court held that the defendants made a negligent misrepresentation of the water leakage problem in the basement of the property. The court noted that the leakage experienced by the purchasers was "anything but minor." Clearly, the use of that one word - minor - was the focus of the litigation, and the main reason for holding the sellers liable.

Damages of \$9,000 were awarded, plus costs of \$2,464.65.

35. *Stone v. Stewart* [2009] O.J. No. 1674 (Ont. S.C.J. Small Claims Court)

Stone v. Stewart is yet another in the flood (sorry) of leaky basement cases. The case was a claim by plaintiff purchasers of a residence for the anticipated cost to remedy water problems unexpectedly encountered in the basement and damage to personalty caused by the entry of water, as well as their labour and costs to remove the water and clean the house. The decision is based more on the patent/latent defect issue than the law relating to

SPIS, but is included here for the sake of completeness.

The defendant vendor claimed she was not aware of problems with water, moisture or structural problems at the time of the 2007 sale. She denied any warranty, guarantee or certification and denied deliberately or recklessly concealing any such problems.

The plaintiff was awarded \$8,096 in damages plus costs. There was a serious water problem in the basement and it was more extensive than the defendants had admitted. The SPIS answer that proclaimed no awareness of any water or moisture problem in the basement was, at best, less than forthright, according to the court. The defendant was wilfully blind in that she seemed to have made no serious enquiries about the condition of the basement but affixed her signature to a document she could not answer seriously in truth. She had delegated the furnishing of information to Mr. Stewart and could not now hide behind the purported absence of knowledge and the delegation.

The court referred to the case of *Rampersad v. Rose*³:

5 In that case what was then known and titled as a Vendor Property Information Statement was involved. It was a creation of the Ontario Real Estate Association. Such documents were relatively new and no prior case on the effect of such documents was found. I held the answers to the questions in the Vendor Information Property Statement were representations, as distinct from warranties, three of the topics covered by the VPIS were made warranties in the agreement of purchase and sale and the "complete agreement" clause in the agreement excluded the rest of the representations from consideration. The VPIS has since been re-named Seller Property Information Statement (SPIS) and the wording has been changed in an apparent attempt to reduce or eliminate responsibility on the seller.

The court did not believe the defendant's denial of being aware of a water or moisture problem in the basement. The defect was a patent one, but the painting of the basement floor shortly before the property was listed for sale amounted to a concealment of a patent defect, thus converting it to a latent defect.

The judge reviews some of the previous SPIS cases and disagrees with the conclusions in *Morrill v. Bourgeois*, above, with respect to the law of patent and latent defect.

6 A recent canvas of the law of latent defect, patent defect and patent defect concealed is found in *Morrill v. Bourgeois* [2007] O.J. No. 1851, 56 R.P.R. (4th) 298, 157 A.C.W.S. (3d) 664, 2007 CarswellOnt 3023 (Ont. S.C.J.). D.C. Shaw J.'s findings of the state of the law appear to be the same as mine in 1997 but he noted the continuing softening of "habitability" from a condition that prevents habitation to a condition that adversely and substantially or significantly impairs habitation. He also opined the information in the SPIS is not a warranty because, at least by then, it was stated on the form as "not a warranty", even if attached to an agreement of purchase and sale.

7 With some trepidation I disagree with the statement of Shaw J. near the bottom of page 6 of his reasons. Immediately after finding the statements in the SPIS are not warranties he said: "To succeed

³ [1997] O.J. No. 2012, 71 A.C.W.S. (3d) 584. See case number 1 in this paper.

in this action, Mr. Morrill must therefore prove misrepresentation."

8 In my view this statement is wrong because it forecloses the long-established law that a seller of a residence with a latent defect or concealed patent defect can be held liable if the defect adversely affects the habitability of the residence, the seller had a duty to disclose it, the seller was aware of it and did not disclose it, i.e. remained silent. There is not necessarily a requirement of a misrepresentation although that is another way by which a seller can render himself liable. In McGrath *supra* Dubin J.A. said, at page 791, it is incumbent on the purchaser to establish the latent defect was known to the vendor "or" show the circumstances were such that it could be said the vendor was guilty of concealment "or" the vendor was guilty of concealment "or" had a reckless disregard of the truth or falsity of any representations made. In my opinion this confirms my view that there are alternatives to misrepresentation.

9 To summarize the law, it appears to be as follows. A seller of a residence may be held liable to a buyer for an undisclosed latent defect (including a patent defect concealed) about which the seller knows and which substantially or significantly and adversely impacts the habitability of the residence. A seller may also be held liable for a misrepresentation. A seller may also be held liable if there is a warranty. Any concealment of a defect that would otherwise be patent is treated as fraudulent. A trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. Caveat emptor applies to patent defects. A latent defect is one that would not be readily apparent to an ordinary purchaser during a routine inspection. Some cases have referred to a "diligent" buyer.

36. *Krawchuk v. Scherbak* [2009] O.J. No. 3254 (Ont. S.C.J.)

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, which required 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. The SPIS is a controversial form in widespread use throughout Ontario for residential transactions. Its stated purpose is to protect sellers by disclosing correct information about the property to buyers.

On the SPIS form signed by the Scherbaks, 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, 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 to be agreed upon, or decided later by the judge.

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.

37. *Leberg v. Francis* [2009] O.J. No. 4162 (Ont. S.C.J. Small Claims Court)

The buyers sued for two alleged misrepresentations in the Seller Property Information Statement: the defendant vendors said of their awareness of any moisture/water problems in the basement "moisture in corner" and "minimal water corner". As to awareness of any damage to wind, fire, water, insects, termites, rodents, pets or wood rot the initials "JF" appear in the "No" column. The buyer alleged fraudulent misrepresentation.

5 The plaintiff complains that immediately after the closing a renovator discovered animal nests in the walls of one room and in another room during subsequent renovations. The plaintiff also complains that leaks appeared in the ceilings of two bedrooms of the top floor on the north side of the house and attributes those to the condition of the roof on the north side. Those leaks first appeared in the fall of 2008, a year after the purchase.

The decision includes a thorough and worthwhile review of the case law to the time of the decision. Based on the evidence, the claim was dismissed and the defendant was allowed costs of \$1,756.71.

38. *Poplawski v. McGrimmon* [2010] O.J. No. 33 (Ont. S.C.J.)

The main action in this litigation was a claim for damages of \$675,000 arising from the construction by the Defendants McGrimmon and Sholea of a new home and their sale of it to the Plaintiffs for \$340,000. The Plaintiffs' claim, sounding in misrepresentation, non-disclosure and negligence, was settled pursuant to undated Minutes of Settlement by which the Plaintiffs accepted the sum of \$275,000 in full satisfaction of their claims.

The sum of \$10,000 was paid by the McGrimmon and Sholea; \$15,000 by the Defendant Kevin Kelly, (carrying on business as Homepro Inspections and Cornerstone Home Inspections); \$20,000 by the Defendants John W. Roberts and Remax Metro-City Realty Ltd.; \$120,000 by the Defendant City of Ottawa; \$55,000 by the Third Party Grenville Mutual Insurance Company and \$55,000 by The Personal Insurance Company of Canada.

Only the Third Party claim remained outstanding.

This decision is the result of a motion dealing only with the issue whether The Personal Insurance Company owes a duty to defend McGrimmon and Sholea. This motion was brought pursuant to Rule 21 of the *Ontario Rules of Civil Procedure* for the determination of a question of law before a trial. The fact that Personal contributed to the settlement of the main action is irrelevant to the merits of this motion.

4 The facts giving rise to the main claim are that on February 14, 2004, the Defendants McGrimmon and Sholea entered into an Agreement of Purchase and Sale with the Plaintiffs. The sale closed on April 30, 2004 when the Plaintiffs took possession of the property. The basis of the Plaintiffs' claims is that after the closing date they discovered numerous defects and deficiencies with the house and the property. The overview paragraph of the Statement of Claim states:

The Plaintiffs bring the within action with respect to the purchase and sale of the property; the faulty design and poor construction of the property; the negligent inspection of the property; the poor supervision of the design of the property; the inadequate repair and negligent regulation of the property; misrepresentations on the part of the defendant; the failure to disclose the condition of the property on the part of the defendants; and the breach of the defendants contractual duty of care, legislative, regulatory, fiduciary and other duties to the plaintiffs.

[emphasis added]

5 The heading in the Statement of Claim under which the Plaintiffs describe the causes of action against the Defendants reads: "Liability of McGrimmon and Sholea for misrepresentations, non-disclosure and negligence."

6 The Plaintiffs state that they relied on the Seller Property Information Statement which was delivered to them before entering into the Agreement of Purchase and Sale. The Plaintiffs allege that the Seller Property Information Statement contained numerous representations about the condition of the subject property, which they claim were warranties under the agreement and were "false in many respects." They allege misrepresentation with respect to the water quality, the septic system, inspections by the City, compliance with the Building and Fire Codes, water problems, roof leakage problems and the electrical and plumbing systems. The claim lists a multitude of negligent acts on the part of McGrimmon and Sholea in the construction of their home, including the failure to properly have their plans approved by the municipality, a failure to properly construct the home, a failure to ensure that their contractors, employees or agents were properly qualified to undertake the work in the construction of the home, that they ought to have known of serious deficiencies in the construction of the home, that they listed the home for sale when they ought to have known that the home was subject to deficiencies and failed to ensure that the deficiencies were rectified.

7 In the Amended Statement of Claim, issued May 5, 2006, all the amendments particularize further negligence in the construction and sale of the home. In addition the Plaintiffs allege that McGrimmon and Sholea were aware that their representations to the Plaintiffs were false or otherwise reckless whether they were true or false.

The court ruled that the third party liability coverage is broad and portable and found that the claim gave rise to the duty to defend. In essence, the action was one of negligence, and the negligence was not subsumed by the assertion of a breach of contract. It was found to be disparate, based on a fair reading of the claim. In the result, even if the court was wrong that a claim for breach of contract was insured, the judge found that the claim for negligence is insured. The Personal Insurance Company was obligated to defend McGrimmon and Sholea in the main action.

39. *Heddle v. Blake* [2010] O.J. No. 983 (Ont. S.C.J. Small Claims Court)

By an Agreement of Purchase and Sale dated June 16, 2008, the defendants agreed to sell and the plaintiff agreed to purchase a property in Kitchener. The purchaser had inspected the property twice herself. She noticed possible water problems in the laundry room, but was not sure about their nature or extent.

The plaintiff requested and the defendants completed a Seller Property Information Statement ("SPIS"), which they signed on June 16, 2008. Their signatures appear following a paragraph which states in material part:

The Sellers state that the above information is true, based on their current actual knowledge as of the date below.

The purchaser also signed the SPIS, on June 23, 2008, immediately after the following sentence:

I acknowledge that the information provided herein is not warranted ...

The SPIS contained three entries which the plaintiff relied on in support of her claim of fraudulent misrepresentation. On page 1, the defendants answered "unknown" in response to the question "Are there any drainage restrictions?" On page 2, the defendants answered "No" to the question "Is the property subject to flooding?" On page three they answered "No" to the question "Are you aware of any moisture and/or water problems?"

The buyers had a thorough home inspection done on June 23, 2008. The report noted certain flaws, and the inspector commented, under Significant Items, "Further evaluation and potential repair to control basement leakage".

Following significant basement leakage, the purchaser suspected a crack in the foundation.

The purchaser's claim was dismissed.

14 I find that the plaintiff's allegations of misrepresentations against Mr. and Mrs. Blake to be entirely without merit. There is no evidence at all to suggest that the defendants knew about the crack which was discovered in April 2009 only after the external foundation was professionally excavated, either when they signed the SPIS, or at any relevant time. I accept Mr. Blake's evidence that there was a minor water problem which he addressed by caulking and which he believed to have been fixed when he signed the SPIS.

15 The plaintiff places an interpretation on the three above-mentioned entries in the SPIS which they simply cannot bear. The question of drainage restrictions appears to have nothing to do with what occurred here. There is no evidence of flooding at any time during the defendants' 19-year ownership of the property. Since they had fixed the only water/moisture problem they knew about, their negative answer to that question was factually correct and honestly given.

16 The applicable law is stated by Justice D.J. Gordon in *Riley v. Langfield*, [2008] O.J. No. 2028 (S.C.J.). I have also consulted *Kaufmann v. Gibson* (2007), 59 R.P.R. (4th) 293 (Ont. S.C.J.), and *Leberg v. Francis*, [2009] O.J. No. 4162 (Sm. Cl. Ct.).

17 The only *caveat* to Justice Gordon's statements of law in *Riley*, *supra*, relates to his comments on the standard proof, at paragraphs 85 & 111, which I believe have been overtaken by *F.H. v. MacDougall*, [2008] 3 S.C.R. 41, released about five months after *Riley*. But the distinction between proof on a balance of probabilities and the former concept of proof commensurate with the occasion makes no difference to the outcome in this case.

18 There is no evidence of concealment by these defendants. The defects in question were patent defects. Ms. Heddle in fact observed evidence of them prior to closing, and was expressly advised by her professional home inspector that basement foundation repairs were recommended to address leaking, at a cost estimated at a range \$500 to \$2,500. She was in fact aware of the problem and she elected to close anyway.

19 What Ms. Heddle was not aware of was that the apparent extent of the problem would significantly increase in February 2009 due to unusually heavy rain coupled with frozen ground. There is no basis in the evidence to suggest that the defendants at any relevant time were or ought to have been any more aware of that eventuality than she was. There is no basis in law to displace the *caveat emptor* rule.

20 The SPIS is not a warranty. Its main purpose is to put purchasers on notice with respect to known problems. If the SPIS is completed honestly and without intention to mislead, liability will not follow even if the representation turns out to be incorrect: see *Riley, supra*, at para. 98.

21 Quite simply, the court finds no evidence of misrepresentation in this case and there is no evidence that Ms. Heddle relied on any such misrepresentation as she may believe to have occurred because she closed the transaction with her eyes open. The principal repair cost she incurred was specifically forecast by her home inspector.

22 It is regrettable if Ms. Heddle feels wronged by the defendants. However I have no hesitation in finding that her claim has no merit and must be dismissed.

40. *Hebert-Eve v. Xuereb* [2010] O.J. No. 1180 (Ont. S.C.J. Small Claims Court)

Jennifer Hebert-Eve purchased a residence in Peterborough from Felix Xuereb in February of 2008. Prior to signing the agreement of purchase and sale, Hebert-Eve was provided with a Seller Property Information Statement (SPIS). In the SPIS, Xuereb stated that the type of wiring in the house was copper by placing a check mark in the box next to the word "copper". The other options were "aluminum", "knob-and-tube" and "other". "Copper" refers to modern electrical cables that consist of bundles of wires separated by layers of flexible plastic. "Knob-and-tube" refers to an older style of wiring in which the conductors were single wires covered in a cloth-based sheath.

Hebert-Eve was particularly concerned with the type of wiring in the home because she had had previous difficulties obtaining insurance on a home that had knob-and-tube wiring. She relied upon the SPIS and because of her previous experience, she would not buy a home if she knew it was wired with knob-and-tube.

While inspecting the home, Hebert-Eve's family and friends saw knob-and-tube wiring, but concluded that the knob-and-tube was not in use and that the wiring of the home had been updated to copper. About two weeks after closing, Hebert-Eve discovered that while the wiring at the electrical panel in the basement was copper, knob and tube wiring was still in use and concealed above ceilings and behind walls throughout the house.

Hebert-Eve had represented to her insurance company that the wiring of the home was "copper" and she undertook to have the knob-and-tube wiring replaced. The cost to her of

doing so was \$6,345 for electrical work, \$3,400 for repair and repainting of walls that were damaged as a necessary result of the electrical work and a storage charge of \$46.20.

In his decision, deputy judge Stephen Bale wrote:

15 Given that (the vendor) knew enough to choose "copper" over "knob-and-tube" in the SPIS, that he had removed evidence of knob-and-tube wiring in the utility room because it might deter prospective purchasers and that the wiring of the three fixtures that he replaced would have looked old and very different from the updated wiring at the electrical panel, I am unable to accept Xuereb's statement that, not being an electrician, he didn't notice the old wiring when he changed the fixtures or that the issue never crossed his mind.

16 On their own, statements contained in an SPIS are not contractual terms but rather, representations made as to the seller's knowledge of the condition of the property. However, such statements may become contractual terms, if they are incorporated into the agreement of purchase and sale. The agreement of purchase and sale in this case contained the following provision:

The Buyer acknowledges that the Buyer has received a completed Seller Property Information Statement from the Seller and has had an opportunity to read the information provided by the seller on the Seller Property Information Statement prior to submitting this offer.

17 While the apparent purpose of this provision is to fix the purchaser with knowledge of the contents of the SPIS, by including the provision in the agreement of purchase and sale, the parties incorporated the SPIS into the agreement. Although the information contained in the SPIS is stated to be true based upon the seller's "current actual knowledge" as of the date it is signed, the SPIS also contains the following provision:

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.

18 The SPIS having been incorporated into the agreement of purchase and sale, Xuereb became contractually bound to disclose to Hebert-Eve any changes to the information contained in the statement of which he became aware prior to closing. Having not done so, he is liable to compensate her for the costs incurred in updating the wiring from knob-and-tube to copper.

19 Even if the provision of the agreement of purchase and sale referred to above was not sufficient to incorporate the terms of the SPIS into the agreement, the result would be the same. Having made the representation in the SPIS, when it became apparent prior to closing that at least some of the wiring in the home had not been updated, Xuereb had a duty to so inform Hebert-Eve and his silence amounted to a misrepresentation.

The buyer secured judgment against the seller for the full \$10,000 monetary jurisdiction of the court at the time.

41. *Cotton v. Monahan* [2010] O.J. No. 1786; Costs: [2010] O.J. No. 2653

Back in April, 2006, Walter and Shelley Cotton signed an agreement to buy their dream home in Brantford. After closing, the house turned out to be the worst nightmare they could have imagined, requiring them to spend more than \$85,000 to bring it up to building code.

Before the Cottons signed the offer to purchase, they reviewed the Seller Property Information Statement (SPIS) provided by the sellers, Gary, Laurie and Carey Monahan.

The Cottons and their agent went over each question and answer thoroughly. The form disclosed that extensive renovations had been done to the house by the sellers without any building permit.

Finding themselves in the midst of a “hot” real estate market, the Cottons instructed their real estate agent to submit an unconditional offer without a home inspection clause — despite the agent’s advice to the contrary. It was only after the transaction closed that the buyers conducted a home inspection and an electrical safety inspection, both of which revealed numerous problems.

Eventually, the Cottons had to gut a significant portion of the house so repairs could be done. The house, they said, was “in chaos” for the next six months.

The Cottons then sued the Monahans for the cost of the repairs, alleging that the Monahans actively concealed the many hidden defects in the house. The defence was that the Monahans did not actively conceal anything that they knew to be a defect, that they honestly answered the questions in the SPIS, and that the buyers failed to exercise due diligence by conducting a home inspection before committing themselves to the purchase.

The trial of the case took 10 days. Combined legal fees for both parties could easily have been in excess of \$100,000.

Justice Harrison Arrell released his 19-page decision in April, 2010. He began his analysis with the often-quoted words of the late professor (and subsequently Chief Justice) Bora Laskin in a 1960 Law Society lecture, when he said, “Absent fraud, mistake or misrepresentation, a purchaser takes existing property as he finds it . . . unless he protects himself by contract terms.”

Arrell conducted an extensive discussion of the law of latent and patent defects, and quoted a 1979 decision of the Ontario Court of Appeal which stated that a seller who is aware of a hidden (or latent) defect in a resale house has an obligation to disclose it to the purchaser only if it makes the house dangerous or unfit for habitation. Otherwise, a seller is not obligated to disclose either hidden or obvious defects in a house.

To be successful in a lawsuit, purchasers like the Cottons have to prove that there are hidden defects in a property making it dangerous or unliveable, and that the defects were known to the sellers who purposely concealed them — or that the sellers recklessly disregarded the truth or falseness of any representations made about known defects.

The judge dismissed the Cottons’ claim. He ruled that the defects in the house were not known to the sellers and that there was no evidence that the Monahans purposely or

knowingly concealed any defects. He also decided that the sellers accurately and truthfully filled out the questions in the SPIS form.

51 The plaintiffs have established, through their experts, that there were defects to this property including structural, electric and plumbing. These defects were clearly latent.

52 There is no evidence that the vendors were aware that these were indeed defects, were contrary to the Building Code or might be a safety issue. In fact the evidence of the vendor, which I accept, is to the contrary. He was a handyman, a do it yourselfer, and self taught. He fixed up this house to the best of his ability shortly after purchasing it. He changed virtually none of the wiring and boxes that were already in the walls because he assumed there was nothing wrong with that set up since he had had no problems. He did not think he was doing anything wrong structurally or with the plumbing. Everything worked fine after his renovations and he thought nothing more of them. He and his family lived in the home for 4 years after he finished his renovations, without problems. There is no evidence to the contrary. I accept his evidence as true that he would not have allowed his family, especially his disabled son, to live in the home if he thought for a moment they were in any danger or there were any safety issues.

53 The plaintiff fails on all three criteria to ground liability:

(a) The defects, I find as a fact, were not known to the vendors to be defects;

(b) I find as a fact that there is no evidence to establish that the vendors purposely or knowingly concealed any defects;

(c) I find as a fact that there was no conduct by the vendors of reckless disregard of the truth of any representations made. The vendors were not home during the initial inspection of the home. The vendors were asked no questions about the home. The vendors filled out accurately and truthfully the SPIS statement indicating no permits or inspections were done regarding any of the renovations. The agent for the vendors stated clearly and truthfully that as far as she knew there were no problems with the house. The vendors would have answered a similar question the same way. There was never any direct communication between the plaintiffs or their agent and the vendors.

54 The purchasers were fully aware that renovations had been done by the vendor, they were fully aware those renovations were not inspected nor was a permit obtained; they were fully aware the house was 50 years old; they were at liberty to have the home professionally inspected, they made a conscious decision not to; they could have insisted on moving appliances or anything else if they wished a better inspection; they could have insisted on further inspections by electricians, plumbers or engineers if they wished to make those inspections conditional on their offer and through Mr. Cotton's father they had easy access to individuals with such expertise. They elected not to do so because Mr. Cotton had significant experience in renovations and felt confident in what he could see. Moreover, both Mr. and Mrs. Cotton wanted this home and did not want to miss the opportunity of purchasing it because of a conditional offer. They made a decision to forego their due diligence. There was nothing done by the vendors to entice them into making an offer nor did they do anything to purposely or otherwise to conceal problems with the home nor give any misleading representations about their home. In any event I find as a fact, that the purchasers did not rely on any representations made in the SPIS or by the vendors' agent.

55 It is significant that the home was professionally inspected shortly after closing which then led to the electrical safety inspection and the notation of 17 defects. This of course could have occurred prior to closing as a condition of the offer and as recommended by their agent, however, the plaintiffs made a conscious decision to not proceed on that basis.

56 For the reasons given I do not feel that the plaintiffs' have proven their case on a balance of probabilities and it must be dismissed.

This case is just the latest in a long string of recent cases which would never have gone to court but for the existence of the SPIS form. As I see it, the SPIS form is the single most frequent cause of Ontario real estate litigation. It poses huge, unjustified risks to buyers and sellers of real estate.

Two lessons, in my opinion, emerge from the Cotton v. Monahan case:

First, unless the parties enjoy expensive court battles, vendor should never sign a Seller Property Information Statement. Agents who encourage their use may not be protecting the best interests of their clients. This paper proves that the form represents a huge litigation risk.

And second, buying a house without conducting a professional home inspection is a very risky business indeed.

Two months after the decision was released, the parties were in court again. The plaintiffs were ordered to pay the defendants costs of \$33,743.21. It was a sobering reminder of the costs and risks of litigation attributed mainly to the SPIS form. As an interesting side note, the claim against the defendants' broker was dismissed on consent one week before the commencement of the trial. A *Mary Carter* agreement was entered into between the plaintiffs and the broker for \$8,000.00.

42. *Smith v. Campanella* [2010] O.J. No. 2383 (Ont. S.C.J. -Small Claims Court)

In this case, David and Brenda Smith sued Salvatore and Maria Mamone Campanella, for damages in the amount of \$9,256.25, arising from the Smiths' purchase of the Campanella house in Hamilton. The Smiths claimed in court that they wanted to purchase a house that had copper wiring and that this was very important to them, to the point that they would not purchase a house that did not have copper wiring.

5 ... the plaintiffs allege that the defendants, by a document referred to as an SPIS, and by verbal representations to the plaintiffs' real estate agent made both by the defendants themselves and by the defendants' real estate agent, represented that the defendants' house was wired with all copper wiring, as a result of which they purchased it. The plaintiffs claim that after the purchase transaction had closed, they discovered that the house had aluminum wiring in it, as well as copper wiring. The plaintiffs claim that the defendants knew this and misled them, and that had they known that there was aluminum wiring, then they would not have purchased the home. The plaintiffs seek damages which represent the cost to redo, with copper wiring, that part of the house that has aluminum wiring, and then to repair and repaint the walls that get damaged by that rewiring.

6 The defendants claim that they thought the house had copper wiring, that they did not intentionally mislead the plaintiffs, that the plaintiffs had a responsibility to check the wiring out, and that there was no warranty that the house had copper wiring. They plead and rely on the doctrine of caveat emptor. They also claim that aluminum wiring is safe and that the plaintiffs have suffered no loss.

7 The document referred to by the plaintiffs as that upon which they relied is an SPIS which stands for Seller Property Information Statement. It is a document that was completed by the defendants containing information about the house, one part of which makes reference to the wiring and indicates that the electrical wiring is copper. The document is not mandatory. It is completed for information purposes by a vendor for a purchaser.

...

62 The SPIS form has 4 columns on the relevant page where wiring is referred to. These are headed "YES", "NO", "UNKNOWN", and "NOT APPLICABLE". There are 18 items, or questions, on that page ranging from "structural problems" to whether there was a home inspection report available, and if so, the date of the report. The answer to the question, or item, dealing with insulation was responded to by initialling in the column headed "UNKNOWN". The answer to the question asking what was under the carpeting was answered by writing in the blank area provided "UNKNOWN". Accordingly, Mr. Campanella had completed two of the 18 items on that page by marking them as 'unknown', but not so the question on type of wiring where he had checked off "copper".

63 The form has the column answers blacked out for the items dealing with the electrical system wiring, and dealing with carpeting. There is no place to check off or initial "unknown" for the type of wiring. The answer for the wiring is to be a choice made by making a selection from and checking a box for "copper", "aluminum", "knob-and-tube", or "other", and there is a space beside the word "other" where the defendants could have filled in "unknown", but instead they checked off "copper", and there is nothing filled in, in the blank area beside "other".

67 I accept that while the answer given by the defendants that the wiring was copper was thought by the defendants to be true, that is, that they did not deliberately or fraudulently mislead the plaintiffs. Nonetheless it was based upon a thin premise, an assumption, a guess, really, based upon the age of the building, as indicated below, made without doing any checking to ascertain if the answer was accurate, and this assertion amounted to a negligent misrepresentation.

...

122 There is no condition in the Agreement of Purchase and Sale, nor in the Schedule A, that the vendors warrants that the wiring in the house is copper. The only reference to copper wiring is in the Seller Property Information Statement, which had been made a part of the Agreement of Purchase and Sale by virtue of Schedule A. As I have indicated, it was not simply appended to the Agreement of Purchase and Sale. The Schedule A said that it was part of the offer.

123 Unlike many documents associated with real estate transactions, the Seller Property Information Statement, that is, the SPIS, is fairly straight forward, and not excessively wordy. The document is 3 pages long and consists of 3 paragraphs at the beginning, comprised of a total of 14 lines, followed by 49 items, questions, that deal with the property, and concluding on the third page with a final paragraph of 7 lines, above the signature lines for the vendors, and two lines (one and a quarter, really,) above the signature line of the purchasers.

124 The wording of the SPIS in the first two paragraphs is important. They are each 6 lines long. I would point out that there are several cases referred to, below, which deal with SPIS's, or their equivalent, in Ontario, and in other provinces, and that the wording below is not the same as that which is found in these others. There are small but potentially significant variations.

125 The first paragraph begins with the following words, in capitals, bolded, and underlined:

"ANSWERS MUST BE COMPLETE AND ACCURATE "

126 The paragraph continues:

"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.

127 The second paragraph begins with the following words, also in capitals and bolded and underlined:

BUYERS MUST STILL MAKE THEIR OWN ENQUIRIES"

128 The second paragraph continues:

"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 inaccurate or 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.

129 The third paragraph at the beginning, comprised of a little over a line in length makes reference to the word 'seller' including a landlord, and 'buyer' including a tenant.

130 The paragraph on the third page above the signature line for the vendors is 7 lines long. The first line refers to schedules attached to and forming part of the Statement, and is blank as to any such schedules.

131 The rest of the paragraph is 6 lines long, and states:

"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(c) 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."

132 The document is signed by the defendants and dated February 8, 2008.

133 The SPIS states in the sellers' signature paragraph that the information is true based on their "current actual knowledge", but the defendants did not have actual knowledge. They were assuming.

134 Above the signature line of the plaintiffs the following appears, in two lines:

"I acknowledge that the information provided herein is not warranted and hereby acknowledge receipt of a copy of the above information including any applicable Schedule(s)."

135 Below this are the signatures of the plaintiffs and the date February 14, 2008.

136 It is clear that the SPIS is providing warning to the buyers in this paragraph that the information is not being warranted, and may be inaccurate or incomplete.

137 The SPIS also indicates in the first paragraph that it is not a warranty even if attached to an Agreement of Purchase and Sale. It is almost an invitation to obtain a warranty if one is desired. It certainly provides information, but with reservations. In this case, the SPIS was not just "attached" to the Agreement of Purchase and Sale. By the terms of Schedule A to the Agreement of Purchase and Sale the SPIS was made a part of the Agreement.

138 As indicated above, the wording of the SPIS is that the sellers are stating that the information is true based upon their actual knowledge. There is not any suggestion of answers being based upon best information and belief. The words "actual knowledge" are used.

The 264-paragraph decision of Deputy Judge Jay State contains a thorough and detailed analysis of the law and many of the cases in this paper. This seems to be the first case in which a judge found the plaintiff purchasers contributorily negligent, since they should have conducted a more thorough investigation of the wiring issue which concerned them so much. As a result he reduced their damages by 50 per cent:

251 Absent the verbal representations, this case may have been decided otherwise. However, in this case, the defendants not only made the direct comment in the SPIS that the wiring was copper, a comment that purchasers would look at and rely upon, but there were two verbal confirmations, that is, representations, of that. What is more, as indicated above, the SPIS was added to the Agreement of Purchase and Sale and by the terms of the Schedule A, became a part of it. That is more than just being 'attached' to the Agreement of Purchase and Sale. The words used were "shall become part of this Offer of Purchase and Sale."

252 As Justice Killeen pointed out in Kaufmann, that elevated the SPIS to something more than just a representation. Just as in Kaufmann, in this case it became a specific contractual commitment within the four corners of the agreement itself.

253 In this case, it buttressed the representations of the defendants that the wiring was copper. The defendants had completed the document incorrectly, and that was due to their negligence in completing the SPIS as they did. That they did so based upon the advice of their agent, Mr. Connelly, is not an excuse. They cannot hide behind him. There was a negligent misrepresentation that was made by the defendants, and it was relied upon by the plaintiffs.

254 In the result, I find that both the plaintiffs and defendants were negligent in this matter and accordingly, that the plaintiffs are to have judgment but I assess that they are only entitled to one half of their damages due to their contributory negligence in the case.

255 As for the plaintiffs' damages, there is a question as to whether the plaintiffs did indeed suffer any damages as the evidence of the defendants is that electrical wiring is safe. Indeed, the plaintiffs repaired the wiring which they felt was unsafe. However, the plaintiffs bargained to buy a house that was all copper wiring. They got a house that had copper and aluminum wiring, but could be changed by replacing the aluminum wiring with copper wiring to make it all copper wired.

256 The evidence of the plaintiffs' and defendants' real estate agents was that a house with all copper is worth more than a house without.

257 Accordingly, as a measure of the damages, the cost to replace the aluminum wiring with copper wiring, so that the house has all copper wiring, does represent the damages incurred by the plaintiffs.

In the end, after a day of trial and a decision which is more than 28,500 words long, the plaintiff purchasers were awarded \$3,556.88 and costs.

43. *Graham v. Diamond* [2010] O.J. No. 2435 (motion for summary judgment) and [2010] O.J. No. 3632, 2010 ONSC 4973 (motion for summary judgment) (Ont. S.C.J.)

The question for the court to decide in this motion for summary judgment was when a lawyer is presented with an unconditional but obviously defective agreement of purchase and sale by a client, does he or she have an obligation to try to negotiate an improvement to its terms?

The decisions on two motions in this case were released in June and August, 2010.

In July, 2002, Patrick and Heather Graham entered into an agreement to purchase a house on Carrington Lane in Quinte West from George Diamond. The agreement was conditional until the end of the month on the Grahams arranging satisfactory financing, failing which the deal would die and the deposit money would be returned. In the agreement the Grahams also acknowledged receipt of a Vendor Property Information Statement (vendor statement) which was completed and signed by the vendor. There was no condition for either an environmental assessment or a home inspection.

After the financing condition had been waived and the deal was firm, the Grahams retained Belleville lawyer Raymond Kaufman to represent them in the transaction. Prior to closing, Kaufman confirmed with the city of Quinte West that there were no outstanding work orders on file against the property. The transaction closed August 16, 2002.

Three years later, the buyers sued the sellers, their real estate agents, their lawyer, and others claiming damages for "serious and permanent injuries" resulting from apparent contamination of either the land or the building itself.

Among other things they claimed that Kaufman failed, neglected or refused to ensure that a proper environmental site assessment was performed at the property, and that it was a customary practice to have a home inspection performed on the property before the closing of the purchase.

In response to the law suit, counsel for Kaufman brought an application in the Superior Court of Justice in Belleville in May asking the court to dismiss the action against him on the basis that there was no genuine issue for trial.

Kaufman's position in court was that he accepted the retainer from the Grahams after all the conditions in the agreement had been waived by them, that he completed all the standard title and other searches and had certified title in accordance with standard solicitor's practice.

Justice Michael Quigley dismissed the claim against Kaufman without the need to have a trial.

"There is no law," wrote the judge, "to suggest that the Grahams were entitled to either a home inspection or environmental assessment unless there was a condition in the agreement to that effect."

"Even if (Kaufman) had been alerted to such potential problems, I am not convinced that Kaufmann's retainer to close the transaction could be extended to include an obligation on his part to examine the possibility of the existence of such problems. Once Kaufmann had completed the title search and found the property free and clear of any encumbrances and/or title problems . . . the Grahams were then obligated to close."

In his decision, the judge asked, "Did Kaufmann have any obligation to negotiate a 'better' deal than the one negotiated by the Grahams themselves?"

Answering his own question, the judge wrote, "Firstly, he was never instructed to do so, and secondly, had he been so instructed, the Grahams were not entitled to a 'better' deal by virtue of their signed agreement of purchase and sale. In effect, the Grahams are asking the court to find that Mr. Kaufmann should have closed the barn door some days after the horse had bolted the stable."

On a second motion for summary judgment, the case was dismissed against the vendor, the real estate brokerage and the municipality.

44. *Reiss v. Gregoire* [2010] O.J. No. 2804, 2010 ONSC 1732 (Ont. S.C.J.)

This is another case where the law relating to the SPIS and the law of latent and patent defects overlap each other.

Randall and Catherine Reiss purchased the Gregoire home in West Lorne, Ontario pursuant to an agreement of purchase and sale made January 23, 2005. The plaintiffs viewed the property on two occasions prior to closing.

Based on what Mrs. Grigore told them about the property and the seller property information statement provided by her realtor, the plaintiffs entered into the agreement of purchase and sale. The transaction closed May 30, 2005. On the property information statement, the defendants indicated that they were not aware of any problems with the central air conditioning or heating system, not aware of any moisture and/or water

problems, and not aware of any roof leakage or unrepaired damage. Inevitably, numerous defects were discovered after closing.

After reviewing all the evidence, the court was satisfied that the Gregoires did not know about the latent defects.

80 ... They made truthful statements to the plaintiffs and they were not reckless.

81. The plaintiffs inspected the property themselves and chose not to exercise their right to have the opinion of a professional real estate Inspector. After considering all the evidence, I find that the rule of *caveat emptor* applies.”

45. *Emmott v. Edmonds* [2010] O.J. No. 3197 (Ont. S.C.J.)

Although this is essentially a dispute over a mortgage, an SPIS figures into the case tangentially.

The plaintiff real estate agent, Randi Emmott, testified that she obtained from the vendors a signed, April 19, 1999, Vendor Property Information Statement. In the "structural" section of the document, the vendors had answered that they were not aware of any moisture or water problems in the basement. The plaintiff stated that it was standard practice to obtain such an information statement from the vendors. She did not provide the purchasers with a copy of it prior to entering into the agreement of purchase and sale.

The judge’s decision concluded that the plaintiff agent did not misrepresent the condition of the property's basement to the defendants prior to closing, as alleged.

87 In any event, the evidence is clear that the defendants placed no reliance on any statement which the plaintiff may have made in that regard. The defendants relied on the AmeriSpec Report. Once they received it, they waived the home inspection condition and proceeded to close the purchase. As noted above, the AmeriSpec Report raised several red flags about possible water leakage in the basement and recommended that the purchasers make inquiries of the vendors. The defendants ignored the red flags, made no inquiries, and waived the condition. Following their occupancy of the Property, the defendants made no complaint to Ms. Emmott about the condition of the basement. In such circumstances, I conclude that the evidence discloses that the defendants placed no reliance on any statement made by the plaintiff about the condition of the basement.

VII. 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.

SCHEDULE A - All Ontario SPIS/VPIS Cases 1997-2010

1. Rampersad v. Rose [1997] O.J. No. 2012, 71 A.C.W.S. (3d) 584
2. McQueen v. Kelly [1999] O.J. No. 2481
3. Morlani v. McCormack, [1999] O.J. No. 1697, 88 A.C.W.S. (3d) 492
4. Swayze v. Robertson [2001] O.J. No. 968, [2001] O.T.C. 186, 39 R.P.R. (3d) 114, 104 A.C.W.S. (3d) 212
5. Swayze v. Robertson [2002] O.J. No. 785
6. Moore v. Page [2002] O.J. No. 2256
7. Gallagher v. Pettinger [2003] O.J. No. 409, [2003] O.J. 409, [2003] O.J. No. 409, [2003] O.T.C. 103, 8 R.P.R. (4th) 168, 2003 CanLII 21844, 120 A.C.W.S. (3d) 327 (OS CJ). Costs ruling [2003] O.J. No. 1280, [2003] O.T.C. 103, 121 A.C.W.S. (3d) 1017, 2003 CanLII 21844
8. Hunt v. 981577 Ontario Ltd. (c.o.b. Eagle Auto Glass) [2003] O.J. No. 2051, [2003] O.T.C. 461, 123 A.C.W.S. (3d) 390 (Small Claims Court), 2003 CanLII 13511
9. Valiquette v. Cosman [2003] O.J. No. 5425
10. Germain v. Schaffler [2003] O.J. No. 4514
11. Cyr v. Stewart [2003] O.J. No. 5879
12. Blais v. Cook [2005] O.J. No. 2643, [2005] O.T.C. 521, 33 R.P.R. (4th) 94, 140 A.C.W.S. (3d) 226, 2005 CanLII 22210
13. Whaley v. Dennis [2005] O.J. No. 3174, 2005 CanLII 26328
14. Miersma v. Pembridge Insurance Co. [2005] O.J. No. 4628, [2005] O.T.C. 942, 32 C.C.L.I. (4th) 159, 143 A.C.W.S. (3d) 748, 2005 CarswellOnt 5301, 2006 CanLII 12281
15. Bird v. Ireland [2005] O.J. No. 5125, 2005 CanLII 44382
16. R. v. Repaci [2006] O.J. No. 5573, 2006 ONCJ 559, 74 W.C.B. (2d) 728
17. King v. Barker [2006] O.J. No. 2766, 149 A.C.W.S. (3d) 1158, 2006 CanLII 23150
18. Royt v. Goldenberg [2006] O.J. No. 3489, 50 R.P.R. (4th) 213, 150 A.C.W.S. (3d) 953, 2006 CarswellOnt 5261, 2006 CanLII 29932
19. Barron v. Bettencourt [2007] O.J. No. 5519, 56 R.P.R. (4th) 298, 157 A.C.W.S. (3d) 664, 2007 CarswellOnt 3023
20. Morrill v. Bourgeois [2007] O.J. No. 1851, 2007 CanLII 16635, [2007] O.J. No. 1851, 56 R.P.R. (4th) 298, 157 A.C.W.S. (3d) 664, 2007 CarswellOnt 3023, 2007 CanLII 16635

21. Powers-Healy v. Little [2007] O.J. No. 2100
22. Weinman v. Brinkman [2007] O.J. No. 2295, 158 A.C.W.S. (3d) 150
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