

Citation: *Larouche v. Radwanski*, 2011 YKSM 3

Date: 20110527
Docket: 10-S0086
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON

Before: His Honour Chief Judge Cozens

CHELSEA LAROUCHE

Plaintiff

v.

JOE RADWANSKI
(doing business as
SHERLOCK HOMES INSPECTIONS)

Defendant

Appearances:
Tess Lawrence
Joe Radwanski

Counsel for the Plaintiff
Appearing on his own behalf

REASONS FOR JUDGMENT

Overview

[1] In the Spring of 2010, the Plaintiff, Ms. Larouche, was considering the purchase of her first home (the "Home"). The Defendant, Mr. Radwanski operating as Sherlock Holmes Inspections, conducted a home inspection at her request (the "Inspection"). A Home Inspection Contract prepared by Mr. Radwanski was signed by him and Ms. Larouche on March 18, 2010 (the "Contract"), the same day as the Inspection. Ms. Larouche was provided the Contract for review at the beginning of the Inspection and signed it prior to the conclusion of the Inspection. The Inspection took approximately 1½ hours to complete. This was the first home inspection that Ms. Larouche had been involved with.

[2] Mr. Radwanski completed the Home Inspection Report (the “Report”) and met with Ms. Larouche at a coffee shop the next day to discuss it. Ms. Larouche paid Mr. Radwanski \$367.50 for the Inspection and the preparation of the Report.

[3] After receiving the Report, Ms. Larouche completed her purchase of the Home. Shortly afterwards she was informed by a tenant and contractors she had hired that there were certain deficiencies with respect to the Home, in particular:

- a) defective electrical baseboard heaters;
- b) a structurally deficient roof and chimney; and
- c) a structurally deficient rear deck.

[4] Ms. Larouche has incurred expenses related to the repairs of the roof and chimney and the purchase of new baseboard heaters, for which she is seeking compensation in full from Mr. Radwanski. Ms. Larouche also claims damages for the cost of installing a new deck, but this work has not yet been undertaken.

[5] The Contract includes a clause that purports to limit the liability of Mr. Radwanski to the amount of the fee paid for the Inspection.

[6] The trial commenced on February 7, 2011 and continued on February 22, 2011. Ms. Larouche testified in support of her claim. Contractors Riel Sydney and Mark Vigneault also testified for Ms. Larouche. Mr. Radwanski was the only witness to testify in defense of Ms. Larouche’s Claim.

Preliminary Issue – The Arbitration Clause

[7] Clause 1(h) of the Contract stipulates that “all disputes arising in relation to the inspection and Inspection Report shall be referred to and resolved by binding arbitration pursuant to the *Arbitration Act* (Yukon).” The parties have not, strictly speaking, made attempts to comply with this condition of the Contract. At best, Ms. Larouche’s position was that attempts had been made to address the dispute between the parties without court proceedings but these attempts were

unsuccessful. Regardless, both Ms. Larouche and Mr. Radwanski took the position at trial that they did not wish to pursue arbitration under Clause 1(h) and were content to have the matter resolved by way of trial.

Issues

- A. Did Mr. Radwanski breach his Contract with Ms. Larouche?
- B. Was Mr. Radwanski negligent?
- C. Is the liability of Mr. Radwanski limited to the amount paid for the inspection?
- D. If the liability of Mr. Radwanski is not limited, what are the damages?

Evidence and Analysis

[8] Ms. Larouche was 24 years old at the time that the Contract was signed. This was her first home purchase. She is employed by the Government of Yukon as an administrative assistant in the Department of Finance. In this capacity she has some experience with contracts, in particular with respect to assuming a clerical role in making changes to contracts as directed by her supervisor. I do not accept the submission of Mr. Radwanski that Ms. Larouche had experience in the composition and drafting of contracts, such that she should therefore be viewed as having special or enhanced knowledge with respect to understanding the terms and conditions of a contract.

[9] Mr. Radwanski has 15 years experience as a journeyman carpenter. He has conducted home inspections as Sherlock Holmes Inspections for approximately 9 years, and he testified that he has inspected approximately 3000 homes in his capacity as an inspector. I find it somewhat difficult to believe that he has inspected an average of approximately 333 homes a year, but nonetheless accept that he has considerable experience in this area.

[10] The Contract was filed as Exhibit 14 at trial. I note that it is comprised of the following:

- a covering page entitled “Sherlock Homes Inspection Report”, followed by a single page entitled “Property/Client Information”;
- a two-page Home Inspection Contract signed by Ms. Larouche and Mr. Radwanski;
- a four-page document entitled “Schedule A : CAHPI (BC) Standards of Practice” (“CAHPI (BC) Standards”), (“CAHPI” is the acronym for the “Canadian Association of Home and Property Inspectors”)
- 19 pages of information referencing and rating the following components for the main residence (pp. 2 – 20):
 - o Roof
 - o Attic
 - o Foundation
 - o Electrical Service – Panel
 - o Plumbing
 - o Laundry Room
 - o Heating – Cooling – Ventilation
 - o Secondary Heat Sources
 - o Living Room
 - o Dining Room
 - o Kitchen
 - o Appliances
 - o Foyer – Halls – Stairways
 - o Family/Recreation Room
 - o Main Bathroom
 - o Additional Bathroom
 - o Master Bedroom
 - o Bedroom (x 2)
 - o Bedroom – Basement
 - o Exterior
 - o Property & Exterior Additions
 - o Garage
 - o Shed /Greenhouse
 - o List of Repairs; and
- four pages referencing the following components for the suite (pp. 1 – 4):
 - o Living & Dining Rooms
 - o Foyer – Halls – Stairway
 - o Kitchen
 - o Appliances
 - o Master Bedroom
 - o Storage Room
 - o Bathroom

- two pages of a three-page Property Disclosure Statement dated March 8, 2010;
- a single page entitled “62 Tamarack Information Sheet”;
- a two-page City of Whitehorse Building File Information Report dated March 8, 2010; and
- a single page Plan of Lot 1104 Porter Creek Subdivision.

[11] It seems odd to me that the last four items would have formed a part of the Contract, however, no explanation was offered to me and this group of documents was filed without objection as the Contract.

[12] I also note from a review of the file that a copy of the Contract was filed in the Small Claims Court Registry on January 21, 2011. This cirlox package included an additional page entitled “INFORMATION ABOUT THE PROPERTY DISCLOSURE STATEMENT”, as well as a four-page Canada Mortgage and Housing Corporation document entitled ABOUT YOUR HOUSE - HOME MAINTENANCE SCHEDULE. Also included is a letter from Summit Waterproofing Ltd. dated August 21, 2009 and marked as Exhibit 3 in the trial (the “Summit Letter”). The significance of the Summit Letter, which states that the roof was in “fine” condition when inspected in August 2009, will be discussed later in this decision. It is clear on the evidence that Mr. Radwanski was in possession of the Summit Letter at the time he conducted the Inspection and prepared the Report.

[13] I also note that the original two-page Home Inspection Contract was attached to the Reply filed by Mr. Radwanski.

[14] In the end, however, this judgment is not affected by the differences between Exhibit 14 and the cirlox package filed January 21, 2011 or the Home Inspection Contract attached to the Reply.

CAHPI (BC) Standards

[15] At the start of the CAHPI (BC) Standards portion of the Contract, it is noted that:

Sherlock Holmes Inspections is making no claim to membership in the Canadian Association of Home and Property Inspectors (BC). Joe Radwanski is a candidate for membership in CAHPI (BC) and has chosen to follow their standards of practice while preparing for certification.

[16] On the evidence, it was clear that Mr. Radwanski has, for some time, not been actively preparing for certification. While this statement has the potential to be misleading, I find that there is no evidence that Ms. Larouche was actually misled by the above reference. Therefore, this issue has no impact upon my decision.

[17] The CAHPI (BC) Standards detail a number of steps a home inspector shall take in conducting a home inspection, as well as a number of actions that the home inspector is not required to undertake. I do not propose to list all of these. The CAHPI (BC) Standards clearly set out, in a general way, what the home inspector is expected to do and what is beyond the scope of a standard home inspection.

[18] The CAHPI (BC) Standards state, in part, the following under the heading **'Purpose and Scope'**

2.1 The purpose of these Standards of Practice is:

- A. to establish a minimum and uniform standard for private, fee-paid home *Inspectors* who are members of the Canadian Association of Home and Property Inspectors British Columbia. *Home inspections* performed to these Standards of Practice are intended to provide the client with information regarding the condition of the *systems* and *components* of the home as inspected at the time of the *home inspection*.

2.2 Inspectors shall:

A. inspect:

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

B. report:

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

[19] Under the heading: '**4. EXTERIOR**', it states in part:

4.1 The *inspector* shall:A. *inspect*:

3. attached decks, balconies, stoops, steps, porches and their associated railings.

[20] Under the heading: '**5. ROOF SYSTEM**', it states in part:

5.1 The *Inspector* shall:A. *inspect*:

1. the roof covering.
4. the skylights, chimneys, and roof penetrations.

B. *describe* the roof covering and *report* the methods used to inspect the roof.

[21] Under the heading: '**8. HEATING SYSTEM**', it states, in part:

8.1 The *inspector* shall:

- A. *inspect*:
1. the installed heating equipment.

[22] Under the heading: '**13. GENERAL LIMITATIONS AND EXCLUSIONS**', it states, in part:

13.2 General Exclusions:

- B. *inspectors* are NOT required to determine:
1. the condition of *systems* or *components* which are not readily accessible.
- G. *Inspectors* are NOT required to:
1. perform any procedure or operation which will, in the opinion of the *inspector*, likely be dangerous to the *inspector* or other persons or damage the property or it's [sic] *systems* or *components*.
 2. move suspended ceiling tiles, personal property, furniture, equipment, plants, soil, snow, ice, or debris.

The Report

[23] The Report provides for 6 different ratings of condition that can be assigned to the component sub-categories of the different areas of the Home as follows:

- 5 = acceptable
- 4= needs maintenance
- 3= monitor/safety concern
- 2= defective/safety hazard
- 1= threat to habitability
- X= not inspected

Baseboard Heaters

Those portions of the Report dealing with 'Secondary Heat Sources' contain no reference to baseboard heaters. Other portions of the Report referring to specific locations within the Home, while noting the presence of baseboard heaters in some locations, do not ascribe any condition to them or make any additional comments.

Roof

The portion of the Report that deals with the 'Roof' notes in all but one category that the condition of the roof components was "acceptable". This includes an "acceptable" rating for the chimney and cap. In the component category regarding the soffits, the notation is that the soffits "need[s] maintenance".

Deck

The portion of the Report that deals with the 'Property & Exterior Additions' notes that the deck/patio, stairs and the railing condition fell within the "needs maintenance" categorization. The maintenance is particularized for each as "needs repainting".

General

Within the 'List of Repairs' section of the Report, there is no mention of roof repairs, other than a need for the front gable end to have soffits installed at the eaves. The only repair issue noted for the deck, stairs and railings was a need for repainting. There is no reference to baseboard heaters.

The Actual State of Repair

Baseboard Heaters

[24] Ms. Larouche discovered after she moved into the Home that several of the baseboard heaters were not working.

[25] Mr. Radwanski testified that he did not check any of the baseboard heaters in the Home. He acknowledged in cross-examination that he could have indicated on the Report that the baseboard heaters were not inspected but did not do so.

[26] Mr. Radwanski testified that, in practice, he generally does not assign a condition to baseboard heaters, although he sometimes chooses to examine random ones. In his mind, the heating system in the home was the oil monitor system.

[27] I accept the uncontroverted evidence of Ms. Larouche and find that there were several inoperable baseboard heaters in the Home that required repair and/or replacement.

The Roof

[28] Shortly after purchasing the Home, Ms. Larouche hired Midnight Sun Sheet Metal & Heating (“Midnight Sun”) to install a propane fireplace. She testified that they advised her that there was a problem with the chimney that could not be fixed without replacing the roof. In the quote from Midnight Sun, marked as Exhibit 4, it is noted that “...the fireplace chimney was leaning quite heavily” and that it was “...split at the connection of the chimney and the offset”. The author of the quote noted that, in his opinion, “If the fireplace had been used a fire would have had direct access to combustibile materials in the attic therefore causing a fire”.

[29] Mr. Radwanski testified that he was unable to inspect the roof because there was snow on it and it would have been unsafe for him to attempt to go onto it. Instead, he relied upon the Summit Letter in drawing his conclusions for the Report. He testified that he took the Summit Letter at “face value”.

[30] In full, the Summit Letter reads as follows:

To: Mrs. Janet Lecamp

Re: Roofing, 62 Tamarack Cr., Whitehorse, Yukon

Dear Madame,

Further to our conversation I have inspected the roof at 62 Tamarack Cr., in Whitehorse. You will be happy to hear that your roof is fine and you can expect another five to ten years of trouble free service from this roof. This roof is composed of well hewed cedar shakes that are on average two to three centimeters thick. There is no evidence of cracking, shrinking, loose fastening or missed shingles. A good quality cedar roof will last a long time in

the Yukon as it is not prone to moss build up (which retains moisture and eventually rots the roof) or even pollution, things that happen in southern climates.

To replace this roof with an alike product at today's price would be \$18,000.00 to \$20,000.00 dollars. A high quality asphalt shingle would be considerably less. I hope this information is helpful, should you have any questions do not hesitate to contact me.

[31] Ms. Janet Lecamp was the previous owner of the Home and, as I understand it, this letter was attached to the Residential Property Disclosure Statement provided by Ms. Lecamp's realtor to Ms. Larouche's realtor. Ms. Larouche testified that she did not provide this letter to Mr. Radwanski but that her realtor likely did. Mr. Radwanski stated that Ms. Larouche provided him this letter at the time of the inspection. Regardless of the means, I accept that Mr. Radwanski was in possession of the Summit Letter at the time he conducted the Inspection and prepared the Report.

[32] Ms. Larouche testified that she wanted the roof inspected by Mr. Radwanski in order to receive his opinion. She testified that she was aware that Mr. Radwanski had looked at the roof from the ground. She stated, however, that she was not aware that this was all he had done and assumed that he had done more than this to inspect the roof.

[33] In the Report, the roof condition, with the exception of the soffits, is noted to be "acceptable". However, Mr. Radwanski testified that he and Ms. Larouche had a lengthy discussion while standing on the deck, during which he advised her that he would not be able to inspect the roof due to it being covered with snow. Mr. Radwanski testified that he told Ms. Larouche that the roof was good for 1 – 5 years but that he couldn't make a full evaluation. Ms. Larouche denied that this discussion occurred, and said that at no time did Mr. Radwanski tell her that he would not be able to inspect the roof due to safety concerns.

[34] Mr. Radwanski testified that the Home Inspection Report contracted for was comprised of both a written component, being the Report, and a verbal component, this being any discussion he had with Ms. Larouche while the Inspection was conducted. There are no written notes or other documentation setting out the content of any such discussions.

[35] Mr. Radwanski agreed in cross-examination that it was his obligation to inspect the roof and not simply rely on the opinion of someone else. He explained that the CAHPI (BC) Standards allowed him to not inspect the roof and provide a reason for not doing so. He testified that he was satisfied that Ms. Larouche was fully aware of the extent to which he inspected the roof. He agreed that he did not inspect the chimney at all, yet rated it as “acceptable” as well.

[36] Riel Sidney is a journeyman carpenter and a contractor with approximately 15 years experience. He testified that he has replaced approximately 60 roofs. He first attended at the Home shortly after Ms. Larouche had purchased it. Mr. Sidney stated that he could see from the ground that the roof shakes were in poor condition, and once on the roof, he noted that it was breaking up and falling apart. He stated that the chimney was a fire hazard.

[37] Mr. Sidney testified that there were several points on the roof where there was improper sealing or patching that would allow water to penetrate, and that there were problems with the flashing. He testified that the roof would not have lasted another season. Mr. Sidney testified that the deterioration in the roof could not have happened in a short period of time, such as 10 months, since the date of the Summit Letter, but likely occurred over 10 – 20 years.

[38] Marc Vigneault is a journeyman carpenter with approximately 30 years experience. He stated that he has built approximately 60 – 70 homes and

installed approximately 100 roofs. At the time of trial he was employed as a safety officer with the Worker's Compensation Board.

[39] Mr. Vigneault first attended at the Home at the end of August, 2010 in response to an advertisement placed by Ms. Larouche seeking someone to complete roof repairs. He testified that he could see from the driveway that the roof was in very poor condition, with split and rotted shingles. When he was on the roof he noted the inadequate patch jobs and other significant deficiencies. He testified that any professionally-trained carpenter would have known that the roof needed to be replaced and, in his opinion, there is no way that the Home should have been sold without the roof being replaced. In cross-examination, Mr. Vigneault stated that the only way to properly assess the roof would be to get up and see it. He stated that he would not accept the opinion of another contractor in making an assessment that he was responsible for.

[40] In a letter from Lloyd Cole, owner/operator of SkyHigh Roofing (Exhibit 6) he noted that on May 25, 2010 he inspected the roof and stated the following:

I recommend the roof to be resheeted & resingled as soon as possible. The existing shingles are severely deteriorated. I recommend this be done before the winter months are upon us.

[41] A City of Whitehorse Inspection Report dated June 6, 2010, filed as Exhibit 8 in the trial (the "June Report"), indicates that the "Original shake roof shows signs of rot".

[42] I find that at the time that the Inspection was conducted, the roof was in such a state of disrepair that it needed to be replaced. I prefer the evidence of Ms. Larouche over that of Mr. Radwanski with respect to the existence of and/or content of any discussions that took place between her and Mr. Radwanski in regard to the inspection of the roof. I accept the evidence of Ms. Larouche that

she was unaware that Mr. Radwanski had not conducted an inspection of the roof.

[43] While I find that Ms. Larouche was, or should have been aware, that Mr. Radwanski did not go onto the roof, this does not mean that she knew that the roof had not been inspected. This is not an area in which Ms. Larouche has or could be presumed to have any experience or expertise. Mr. Radwanski had the experience and expertise. I find that Ms. Larouche was entitled to rely upon the Report and its notation that the roof was in “acceptable” condition.

[44] Further, I do not accept that the evidence and submission of Mr. Radwanski that the Inspection and subsequent “Report” was comprised of both written and oral content. While there likely was discussion between Ms. Larouche and Mr. Radwanski during the course of the Inspection, I find that these discussions did not result in an oral “Report” that formed part of the final Report. I find that Ms. Larouche was entitled to rely upon the written Report as setting out the entirety of Mr. Radwanski’s findings regarding the condition of the Home’s components.

[45] The Report enabled Mr. Radwanski to not only provide a prescribed rating, but to also make comments and recommendations for each item, both as part of the rating and on the separate List of Repairs page. For some components, Mr. Radwanski did make comments and recommendations and list necessary repairs. He cannot, in these circumstances, now assert that the plain meaning of the Report should be supplanted or enhanced by oral information provided to Ms. Larouche outside of the Report about necessary repairs, in particular with regard to the deck and the roof.

The Deck

[46] Ms. Larouche testified that Mr. Radwanski inspected the rear deck by looking through the patio doors and that he did not go outside to conduct an inspection. She stated that she pointed out visible holes in the deck and asked Mr. Radwanski whether, as a result, replacement of the deck would be required, and that he replied “No”. She said that although there was snow on the deck surface, she could see these holes. She testified that Mr. Radwanski did not go under the deck, although access could have been easily gained. The deck, as is apparent from the photos collectively filed as Exhibit 2, is several feet above the ground and provides easy access. Ms. Larouche testified that Mr. Radwanski told her that doing anything more than replacing a couple of boards and repainting the deck would be a waste of money.

[47] In cross-examination, Ms. Larouche denied being outside on the deck with Mr. Radwanski at the time of the Inspection and discussing the deck and roof condition with him. She stated that any such discussion took place after she had purchased the Home and asked Mr. Radwanski to return to look at the problems pointed out by the other contractors. Ms. Larouche testified that Mr. Radwanski attended at the Home a second time in late May or June at her request, and that he indicated on that occasion that he would not have passed the deck.

[48] Mr. Radwanski testified that he went onto the deck and pointed out a broken board on the deck and a loose railing. He stated that he was unable to examine underneath the deck because snow shoveled from the deck had rendered the underside inaccessible. He stated that the snow was 3' to 4' deep and surrounded the deck.

[49] Mr. Sidney testified that the deck was not safe and needed to be replaced. He said that the boards were rotten and could be stepped through. He also noted that the stairs were not built to building code standards, as they lacked a third stringer, and that the railings were ready to come off the stairs. He testified

that the joists had been “scabbed” together and were not up to standard. He stated that these deficiencies were readily visible.

[50] Mr. Vigneault testified that when he went onto the deck in order to access the roof, he put his foot through the deck. He advised Ms. Larouche to cordon off the deck to prevent access due to safety concerns.

[51] The June Report indicates that the rear attached deck “shows signs or serious rot in the joists and decking” and the “front beam support pads all all [sic] guard [?] ballustrade spacing does not meet the N.B.C. [National Building Code] min. requirements”.

[52] The Property Disclosure Statement indicated that the rear deck needs some TLC (i.e. “tender loving care”). Mr. Radwanski stated that, in preparing the Report, he relied on the Property Disclosure Statement as he ‘likes to think that people are basically honest’. He testified that, in his opinion the previous owner of the Home did not properly complete the Property Disclosure Statement.

[53] Again, I prefer the evidence of Ms. Larouche over that of Mr. Radwanski. Surely had Mr. Radwanski noted the loose railing he would have, or at least should have, noted this on the Report. He had opportunity to do so but did not.

[54] Further, from the photographs of the underside of the deck, I note that there is more than one access point, as well as a large window from which the underside of the deck could have been viewed from inside the residence. Mr. Radwanski’s evidence in this regard does not have the ring of truth to it. I find that Ms. Larouche’s version of events is credible and consistent with the extrinsic evidence.

[55] Therefore, I accept the evidence of Ms. Larouche regarding the deck. Had Mr. Radwanski actually gone outside and inspected the rear deck, which I

find he could have done, or at least looked at the underside from inside the Home, I expect that he would have observed some of the clearly visible deficiencies that were present.

[56] I have reviewed the photographs and it is apparent that the deck is in extremely poor condition. The joists underneath are twisted in some places and supported by short pieces of strapping in others. The wood is clearly in a state of advanced deterioration.

[57] I accept the evidence that the deck needs to be replaced in its entirety and that this would, or should have, been apparent to Mr. Radwanski at the time he conducted the Inspection.

Law

[58] The purpose of a home inspection and the responsibility of home inspectors is stated in **Brownjohn v. Ramsay**, 2003 BCPC 2 at para. 17 to be as follows:

[17] The broad purpose of securing a residential home inspection is to provide to a lay purchaser expert advice about any substantial deficiencies in the property which can be discerned upon a visual inspection, and which are of a type or magnitude that reasonably can be expected to have some bearing upon the purchaser's decision-making regarding whether they wish to purchase the property at all, or whether there is some basis upon which they should negotiate a variation in price. Broadly speaking, it is a risk-assessment tool.

[59] The judge in **Brownjohn** goes on to state in paras. 20 and 21 that:

[20] While I suggest that there are obvious limitations to what one can expect from home inspections of the type undertaken in this case, one also needs to be mindful of the responsibility which is taken on by the home inspector. Persons who hold themselves out to the community as professionals prepared to provide advice for a fee – accountants, lawyers, engineers, architects, physicians, and other professionals immediately come to mind – must know that in marketing and providing their services,

they invite reliance upon their advice and, in doing so, they create a risk that their client will suffer harm if the professional falls short of the standard of care which reasonable may be expected of that category of professional in the particular circumstances, and their advice is wrong.

[21] The home inspector in the context of the average residential home inspection is involved in an inherently risky business. The inspector invites reliance. If prospective home purchasers did not believe they could secure meaningful and reliable advice about the home they are considering purchasing, there would be no reason for them to retain the inspector. The matters about which the inspector is asked to opine – for example, roofs, foundations, and other basic home systems – are of interest to the purchaser precisely because they are the aspects of the home which would give rise to the greatest financial exposure were they to be discovered to be defective after completion of the purchase.

Breach of Contract

[60] I find that there was a contract entered into between Ms. Larouche and Mr. Radwanski. Ms. Larouche paid Mr. Radwanski the sum of \$367.50 in exchange for his inspection of the Home and for preparing and providing a report advising Ms. Larouche of the condition of the components of the Home where he could inspect these components, or alternatively advising her of those components that he was unable to inspect.

[61] I also find that Mr. Radwanski was, or should have been, aware that Ms. Larouche intended to rely upon the inspection report that he prepared, in making decisions with respect to her purchase of the Home. I further find that Ms. Larouche did, in fact, rely upon the Report when making her decision to purchase the Home for a certain sum of money.

[62] In my view, there was an implied term in the Contract that Mr. Radwanski would inspect the Home according to normally accepted standards of a home inspector and would identify to Ms. Larouche any major or significant defects that a reasonably prudent home inspector would observe through a careful inspection consistent with CAHPI (BC) Standards. (See ***Schiltroth v. RDS Enterprises***

(c.o.b.) Home-Alyze 2010 SKPC 47 at para. 24; **Fraser v. Knox**, [1998] O.J. No. 4379 (Ont. S.C.J.) at para. 36).

[63] Expert evidence is not necessarily required to establish the breach of a contract for professional work. In this case the Contract sets out the requisite standards. (See **Schiltroth** at para. 25).

[64] When a homeowner or home-buyer contracts for a home inspection, their reasonable expectation is that the person conducting the inspection will provide an opinion regarding the condition of certain prescribed components of the home, and that the opinion will be reasonably accurate, within the prescribed limitations of the contract.

[65] In **Whighton v. Integrity Inspections**, 2007 ABQB 175 at para. 28, the trial judge stated the following:

The provision of a reasonable opinion is the very essence of an inspection contract between a home buyer and a home inspector. The benefit of such a contract is that the home buyer is provided with a reasonable opinion on subject matter falling outside the knowledge of the ordinary person. The Defendant failed to provide the Plaintiffs with an opinion that in anyway [sic] approached any standard of reasonableness. Therefore, Housemaster failed to perform all of its obligations under the contract, and that failure deprived the Plaintiffs of substantially the whole benefit of the contract.

[66] Under the CAHPI (BC) Standards Mr. Radwanski was contractually obliged to inspect the baseboard heaters, the deck, the roof and the chimney, subject to specified limitations that could prevent him from doing so.

Baseboard Heaters

[67] Mr. Radwanski acknowledged that he did not inspect any of the baseboard heaters.

[68] There is no specific mention within the CAHPI (BC) Standards of baseboard heaters.

[69] However, section 8.1(A)(1) requires that all installed heating equipment be inspected. There is mention within the 'Electrical System' section 7.1(A)(8) that the inspector shall inspect "a *representative number* of installed lighting fixtures, switches, and receptacles".

[70] I find that Mr. Radwanski was required under the Contract to inspect the baseboard heaters to determine whether they were operable, or, if unable to do so, provide an acceptable explanation as to why he could not. Even if I am found to have been wrong in determining that the baseboard heaters formed part of the "installed heating equipment", I further find that, at a minimum, Mr. Radwanski was obligated under the Contract to inspect a representative number of the baseboard heaters in the Home or, alternatively, to have marked on the Report that he did not examine these.

[71] Either way, Mr. Radwanski failed to address the baseboard heaters and I find that this is clearly a breach of his contractual obligations.

Roof

[72] In this case Mr. Radwanski had the option of advising Ms. Larouche that he could not inspect the roof due to snow cover and safety concerns. While Ms. Larouche would likely not have been pleased with this, Mr. Radwanski would have been well within his rights under the Contract to decline to inspect the roof from above.

[73] I note that Mr. Radwanski testified that he looked into the attic space during the Inspection. There was no evidence called, however, to establish that the condition of the roof would have been apparent at the time from within the

attic space, or that the roof inspection could have been conducted from within the attic space. The water damage that Ms. Larouche testified was apparent when the new propane fireplace was being installed would not have been readily visible to Mr. Radwanski at the time of the Inspection, nor would he have been required to take steps that would have allowed him to view this water damage. There is some basis to speculate that the chimney problems, and hence the immediately surrounding roof condition, would have been readily visible from within the attic space, but I decline to do so. There is no reliable evidence that would allow for such speculation.

[74] In any event, I find that Mr. Radwanski breached his contractual obligations to Ms. Larouche by providing an opinion in the Report that the relevant roof components, including the chimney, were in an “acceptable” condition, when they clearly were not. The Contractual obligations upon Mr. Radwanski to conduct the Inspection and provide the Report required him to conduct his own inspection and did not contemplate that he could choose to simply rely on the opinion of others as set out in the Summit Letter and the Property Disclosure Statement. Alternatively, Mr. Radwanski could have advised Ms. Larouche that he could not inspect the relevant roof components and marked the Report as “not inspected”, an option that he chose not to use.

Deck

[75] There is some evidence that there was a thin layer of snow on the deck. Strictly speaking, that could have allowed Mr. Radwanski to rely on the limitation in the CAPHI (BC) Standards that does not require him to remove snow to conduct his inspection of the deck surface. I find, however, that Mr. Radwanski did not advise Ms. Larouche that he could not inspect the deck due to the snow. Rather, he told Ms. Larouche verbally and noted in the Report that the deck needed ‘TLC’ in the form of repainting only.

[76] Further, I have found that Mr. Radwanski could have accessed the deck underside either physically from the outside, or visually through the interior basement window. He did neither and thus did not fulfill his obligations under the Contract.

[77] I also find that Mr. Radwanski could have inspected the deck stairs and the railing with respect to their non-compliance with current building standards, and that he failed to do so, or, to the extent that he may have inspected them he failed to do so in a reasonable and competent manner. While the stairs themselves may have been covered with snow, the lack of a stringer would have been visible from the vantage point of the basement window, at a minimum. On the evidence I find that Mr. Radwanski could have easily walked out onto the deck to check the railings.

[78] Therefore, I find that Mr. Radwanski breached his contractual obligations to Ms. Larouche with respect to the deck and related components.

Negligence and Negligent Misrepresentation

[79] In order for Mr. Radwanski to be held liable for negligence, Ms. Larouche must establish, on a balance of probabilities, that Mr. Radwanski owed Ms. Larouche a duty of care, what the standard of care required of a home inspector is, that Mr. Radwanski breached the duty of care he owed to Ms. Larouche by failing to meet the requisite standard of care, and that this breach of the duty of care caused Ms. Larouche to suffer damages.

[80] In order to establish the tort of negligent misrepresentation it must be established that there was a special relationship between Ms. Larouche and Mr. Radwanski, that Mr. Radwanski made a representation to Ms. Larouche that was false, inaccurate or misleading, that this misrepresentation was made negligently, that Ms. Larouche relied upon this misrepresentation to her detriment and that,

as a consequence, Ms. Larouche suffered damages. (See **Queen v. Cognos Inc.**, [1993] 1 S.C.R. 87; **Salgado v. Toth** 2009 BCSC 1515 at paras. 29, 30).

[81] An action for negligent misrepresentation may lie even where the parties are in a contractual relationship (see. **BG Checo International Ltd. v. British Columbia Hydro and Power Authority**, [1993] 1 S.C.R. 12).

[82] Ms. Larouche claims that Mr. Radwanski breached his duty of care to her in the following ways: he did not inspect the baseboard heaters at all, yet indicated in the Report “no rating” with respect to the heaters when he should have, at a minimum, indicated that he did not inspect them; he did not inspect the relevant roof components, relying instead on the opinion in the Summit Letter, yet he marked these roof components as being “acceptable”, when, as subsequent inspections determined, they clearly were not; he did not inspect the deck components at all, or to the extent that he may have, he assessed them as needing repainting only, when in fact these deck components were clearly not acceptable and were in need of replacement.

[83] I find that Mr. Radwanski owed Ms. Larouche a duty of care to conduct the Inspection and prepare the Report in an accurate and competent manner. This content of this duty of care is established by the terms of the Contract, which incorporated the CAHPI (BC) Standards. I find that Mr. Radwanski’s conduct of the Inspection and preparation of the Report fell far short of the standard of care required of a home inspector. I further find that Ms. Larouche relied upon the Report to her detriment and, as a result, suffered damage.

[84] In particular, Mr. Radwanski’s actions were negligent with respect to his inspection of the roof and deck and to the ratings set out in the Report for these components as they were clearly inaccurate and misleading.

[85] I find that the statement made to Ms. Larouche by Mr. Radwanski regarding the deck needing only repainting and the replacement of a couple of boards constituted a further negligent misrepresentation. Therefore I find Mr. Radwanski to be liable for negligence and negligent misrepresentation in regard to the deck and roof components.

[86] I also find Mr. Radwanski to be negligent with respect to the baseboard heaters, in that he failed to inspect them at all. He had a duty to inspect them and to rate them and was negligent in failing to comply with this duty.

Exclusion clauses

[87] The two-page Home Inspection Contract contains the following at the bottom of the first page:

*Note: Read the reverse. It forms part of this contract.

(Initials) _____

On the reverse page it reads in part as follows:

Limitations, Terms and Conditions

1.(c) The inspection and Inspection Report **do not** constitute a guarantee, warranty, or an insurance policy;

...

(k) The Inspector's total liability to the Client for negligence and breach of conflict [sic], including liability for mistakes, errors or omissions in the inspection and the Inspection Report, shall be limited to the amount of the fee paid for the inspection, and the client releases the Inspector from any liability in excess of the amount paid.

...

(Initials) _____

Neither the first page nor the reverse page are initialed.

[88] Ms. Larouche testified that the limitation clause was not pointed out to her, and that she was not aware of its existence. Mr. Radwanski testified that he assumed Ms. Larouche was aware of it. His assumption is based upon the fact that Ms. Larouche signed the Contract. Mr. Radwanski agreed that he did not explain the limitation of liability clause to Ms. Larouche.

[89] Ms. Larouche testified that she was handed the Contract at the beginning of the inspection and told to “look it over” by Mr. Radwanski. She stated that she divided her attention between trying to read the Contract and accompanying Mr. Radwanski as he conducted the Inspection on the approximately 2200 sq. ft. Home. She stated that she would have liked to have taken the Contract home to review it, but Mr. Radwanski required it to be signed before he left the Home, in order for the Inspection to be completed. Ms. Larouche further testified that when she met Mr. Radwanski at the coffee shop he took her through the Report, but he did not review the conditions of the Contract with her.

[90] The law with respect to the effect of clauses purporting to limit the liability of home inspectors is set out in a number of cases.

[91] In **Brownjohn**, the trial judge considered a clause purporting to limit the liability of the home inspector to the amount paid for the inspection. In deciding to award damages beyond the cost of the inspection, the trial judge cited case law which stood for the proposition that a distinction should be made between those cases where the participant is involved in an inherently risky sporting activity and those cases where “a commercial firm supplies to the public ordinary items of trade and from a commercial point of view dictates the terms on which consumers are to obtain those goods”. (see para. 90 referring to **Knowles v. Whistler Ski Corp**, [1991] B.C.J. No. 61 (S.C.) and **Dyck v. Manitoba Snowmobile Association** (1985), 18 D.L.R. (4th) 635 (S.C.C.)

[92] The trial judge concluded that:

[94] ...If PTP [the Defendant] wanted to achieve wholesale exclusion of liability, then at the very minimum, it needed to bring its exclusions to the express attention of Brownjohn [the Plaintiff]. I am quite satisfied on the evidence that Averill did nothing of the kind.

...

[96] But I find the purported contractual exclusion clause of liability beyond the cost of the contract, in the absence of being specifically drawn to the attention of Brownjohn and being specifically acknowledged by her, to be “sufficiently divergent from community standards of commercial morality that it should be rescinded”.

[93] In **Schiltroth**, the trial judge reiterated the three factors that were stated to be relevant in **Tercon Contractors Limited v. British Columbia**, [2010] SCC 4, in deciding whether to give effect to a limitation or exclusion clause:

1. Did the parties intend that the exclusion clause would apply in these circumstances?
2. Was the clause unconscionable at the time the contract was made?
3. Is there an overriding public policy that would preclude its enforcement?

[94] With respect to the first consideration, while it may have been the intention of Mr. Radwanski that the limitation or exclusion clause be sufficiently broad to apply in respect of breach of contract or negligence, there is no evidence to support a finding that this was Ms. Larouche’s intention. She did not have a reasonable opportunity to turn her mind to the effect of the clause purporting to limit liability. This clause was not pointed out to her or explained to her. I am satisfied that, at the time that she signed the Contract, Ms. Larouche was unaware of this clause and did not intend to agree to limit Mr. Radwanski’s liability to the \$367.50 paid for the inspection.

[95] With respect to the second consideration, the relevant portions of the Contract were prepared by Mr. Radwanski and provided to Ms. Larouche for her signature. This was Ms. Larouche's first home purchase, and she required the services of a home inspector. She was not in a position to negotiate the specific terms of the Contract with Mr. Radwanski. The parties were not in an equal bargaining position. I agree with the trial judge in **Schiltroth** when he states at para. 51 that:

In circumstances such as these, the defendant must in the clearest way bring the nature and effect of the exclusions to the attention of the plaintiffs (*Brownjohn*). This is particularly so where the clause is in a standard form contract. The defendant Sperling did not do so.

[96] With respect to the final consideration, the court in **Schiltroth** was not presented with any evidence of such an overriding public policy. Nevertheless, the trial judge stated the following at para. 54:

...However, other authorities have held that similar clauses in home inspection contracts are unenforceable on what appear to be policy grounds. This Court finds it contrary to public policy to uphold an exclusion clause whereby a home inspector can be "incompetent, or reckless, or incompetent and reckless, and express any opinion he likes regarding major structural aspects of the house, and have no responsibility to the client beyond" the cost of the inspection (*Brownjohn*, para. 92).

[97] I concur with these comments and find that there is a significant public policy aspect to this case. Home inspections are not uncommon in real estate transactions. If a home inspector wishes to rely on a limitation of liability or exclusion clause in a home inspection contract, as a matter of public policy, the home inspector must take reasonable steps to ensure that the existence, purpose and effect of such a clause is clearly drawn to the attention of the party contracting for the home inspection. A limitation of liability or exclusion clause cannot be buried in a standard form contract and then brought to the surface to extricate the home inspector from his or her acts of negligence or contractual breach.

[98] It is clear that Mr. Radwanski did not take reasonable steps to ensure that Ms. Larouche was even aware of the existence of the limitation of liability clause in the Contract, much less ensure that she was aware of its purpose and effect. I accept the evidence of Ms. Larouche and find that she was not provided sufficient time to carefully read the Contract prior to being required to sign it.

[99] I decline to follow **Calder v. Jones**, 2010 BCPC 77, and **Rayne v. Martin and Buck**, 2006 BCPC 422; cases filed by Mr. Radwanski in which similar clauses limiting liability were found to be applicable. In **Calder** the trial judge found that there was no inequality of bargaining power and specifically did not find that the defendant failed to bring the limitation clause of the contract to the plaintiffs' attention. The trial judge also found that the contract was brought to the attention of the plaintiffs in the days leading up to the inspection. In **Rayne**, the trial judge found that the defendant was careful to afford the plaintiff the opportunity to read the contract and answer questions before signing it. None of these considerations apply to the case before me.

[100] I therefore find that the limitation of liability clause in the Contract is not enforceable in this case.

Damages

[101] Ms. Larouche testified that she would still have attempted to purchase the Home had she known about the deficiencies, but she would have offered a lower price. I find that Ms. Larouche would not have purchased the Home at the price she paid had she been aware of the condition of the roof and the deck and, to a lesser extent, the electric baseboard heaters.

[102] Therefore I find that Ms. Larouche is entitled to receive damages. As it cannot now be determined what Ms. Larouche would have paid for the Home at

the time, I award as damages the actual cost of the work required to conduct the necessary repairs.

Baseboard Heaters

[103] I award the \$425.00 Summit Electric charged to replace one bedroom baseboard heater and provide a new heater for the front entrance with new wire to replace dysfunctional wiring (Exhibit 3).

Roof

[104] I award \$9,146.36, comprised of the following:

- \$5,000.00 that Ms. Larouche paid Mr. Vigneault, operating as Contracting Construction and Handy-Man Service, as per the invoice dated September 3, 2010 (Exhibit 9).
- \$3,000.00 that Ms. Larouche paid Sidney Construction
- \$1,146.36 for roof supplies on the following invoices:
 - o Duncan's Limited \$227.85 invoice September 17, 2010 (Exhibit 10)
 - o Kilrich Industries Limited invoices October 1, 4, and 10 (Exhibit 11)

[105] I decline to reduce this amount by application of the principle of betterment. Ms. Larouche chose to replace the cedar shake roof with a metal roof. I accept the evidence that this in fact resulted in a reduction in cost, as compared to repairing the roof with cedar shakes. SkyHigh Roofing provided a quote of \$16,800.00 on May 26, 2010 to repair the roof and install new cedar shake shingles (Exhibit 7) and a quote of \$15,750.00 on September 10, 2010.

[106] I also accept the evidence of Mr. Sidney and Mr. Vigneault that they charged Ms. Larouche less than full market value for their work on the roof.

Chimney

[107] I award \$3,103.54 based upon the quote from Midnight Sun Sheet Metal & Heating dated June 16, 2010 (Exhibit 4). This work has been completed and paid for by Ms. Larouche.

Deck

[108] Ms. Larouche testified that at the time of trial she had not yet had the deck replaced due to financial constraints.

[109] Mr. Vigneault testified that the cost of replacing the deck would be between \$5,700.00 to \$6,500.00.

[110] Riel Sydney of Sidney Construction provided a quote of \$4,750.00 to repair the deck. He testified that the actual value of this job was more in the range of \$5,500 - \$6,000.00 but he quoted a lower price because he wanted to help out Ms. Larouche.

[111] I award Ms. Larouche \$6,000.00 for the anticipated cost of replacing the deck. I decline to reduce this amount by application of the principle of betterment.

Other

[112] I award Ms. Larouche the \$367.50 she paid for the Inspection. She clearly did not receive what she paid for.

[113] I decline to award the entirety of the \$94.60 paid for the City of Whitehorse Permit dated May 31, 2010 (Exhibit 5). This permit is in respect of other work unrelated to the Inspection, as well as the rear deck. I award \$47.30, which is half of the value of the permit.

[114] I award costs in the amount of \$150.00 for filing fees and a further \$150.00 for counsel fee at trial.

[115] Therefore the total amount awarded to Ms. Larouche is \$19,389.70.

[116] I further award pre-judgment interest from October 1, 2010 on the amount of \$12,674.90 (for monies expended on the roof and chimney repairs). Some of

this money was expended before this date and some after. Ms. Larouche testified that she utilized her line of credit to pay for some of this work, although I do not have any evidence as to what the interest rate was. I have chosen October 1, 2010 as a median.

[117] I award post-judgment interest pursuant to the *Judicature Act* on the total amount outstanding.

COZENS C.J.T.C.