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Does One Have To Be a Lie-Detector in Real Estate?

by
GREG BLANCHARD

This section features the court case of *Krawchuk v. Scherbak*,[1] and will also cover:

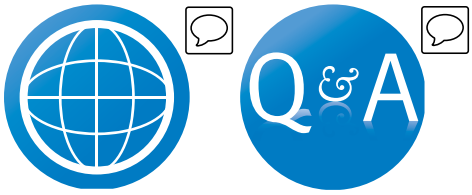
- negligent misrepresentation on the Seller Property Information Statement (Ontario version of PDS); and
- agency – how to advise the client as a buyer's agent, a seller's agent, and as a limited dual agent.

Introduction

Disclosure of Material Latent Defects

At common law, a seller, and a seller's agent, must disclose all known material latent defects. A seller's agent has the professional obligation to disclose all material latent defects within the meaning of the Council Rules. A latent defect is one that is not visible upon ordinary inspection, but which materially affects the property's use or value. "*Every imperfection or deficiency which a careful inspection and inquiry will not reveal cannot amount to a latent defect of the kind capable of displacing the doctrine of* caveat emptor. *In order to qualify as such, the defect must carry with it a consequence of substance, that is, it must be of such a nature as to render the house uninhabitable or dangerous.*"[2] On the other hand, a patent defect is one that is readily visible and/or obvious upon ordinary inspection. A patent defect may also materially affect the property's use or value.

Section 5-13 of the Council Rules requires a separate written disclosure of any known material latent defects to all parties to that trade.



[1] *Krawchuk v. Scherbak*, [2011] O.J. No. 2064.
[2] *Cardwell et al. v. Perthen et al.*, 2006 B.C.S.C. 333 at para. 128.

Greg Blanchard's practice focuses on professional liability errors and omissions defence, information technology and e-commerce issues in litigation, directors and officers litigation, and general insurance litigation.

Greg has experience at all levels of the court system in British Columbia. He participates regularly in arbitrations and mediations, and has appeared before administrative tribunals and professional regulatory bodies.

Greg is regularly involved in advising professional associations and their insurers in areas of risk management, loss prevention, and coverage.

The term *material latent defect* means the following:[3]

SEC. 5-13 **"material latent defect" means a material defect that cannot be discerned through a reasonable inspection of the property, including any of the following:**

(a) a defect that renders the real estate

(i) dangerous or potentially dangerous to the occupants,

(ii) unfit for habitation, or

(iii) unfit for the purpose for which a party is acquiring it, if

(A) the party has made this purpose known to the licensee, or

(B) the licensee has otherwise become aware of this purpose;

(b) a defect that would involve great expense to remedy;

(c) a circumstance that affects the real estate in respect of which a local government or other local authority has given a notice to the client or the licensee, indicating that the circumstance must or should be remedied;

(d) a lack of appropriate municipal building and other permits respecting the real estate.

Section 5-8 of the Council Rules requires that disclosures be in writing. They should also be separate from any service agreement under which real estate services are provided, and separate from any agreement giving effect to a trade in real estate. A licensee is not required to disclose a known material latent defect to a buyer, if the seller has already disclosed all known material latent defects, in writing, to the buyer. For example, disclosing the material latent defect on the Property Disclosure Statement (PDS) may now satisfy the requirement of the Council Rules.

Timing of the disclosure is critical. Written disclosure of all known material latent defects must be provided to the buyer before there is an accepted offer. A licensee acting for the seller must ensure that the written disclosure of the material latent defect was provided to the buyer prior to the acceptance of the offer by the seller. Licensees should include the following clause in the Contract of Purchase and Sale whenever a material latent defect is disclosed.

Disclosure of Material Latent Defect Clause[4]

The buyer acknowledges having received separate written disclosure of a material latent defect relating to (general reference to issue).

[3] Council Rules 5-13.

[4] Real Estate Council of British Columbia, "Disclosure of Material Latent Defects," *Professional Standards Manual*, 2010, 7th Edition, online at http://www.recbc.ca/licensee/psm.htm

Licensees must keep in mind that trading services include offering real estate for rent or lease. As a result, the written disclosure of a material latent defect is required regardless of whether the real estate is offered for sale, for rent, or for lease.

The Case

Krawchuk v. Scherbak[5]

The recent Ontario Court of Appeal decision of *Krawchuk v. Scherbak*[6] has generated much discussion in the real estate and legal communities. Some commentators have suggested that the decision significantly expands the duty of licensees acting as a seller's agent, to verify information provided by the seller about the property. This Ontario decision is not, strictly speaking, binding on the British Columbia courts. However, the British Columbia courts often refer to decisions from other provinces. Therefore, the *Krawchuk* case may be influential in future British Columbia cases. Consequently, the *Krawchuk* decision deserves close examination to determine the principles it establishes.

FACTS OF THE CASE

Zoriana Krawchuk was the buyer of a house in Sudbury, Ontario. Timothy and Cherese Scherbak were the sellers of the property. Wendy Weddell and Re/Max Sudbury Inc. acted as limited dual agents for the buyer and the sellers.

Shortly after moving in, Ms. Krawchuk discovered serious structural and plumbing problems in the home. The City of Sudbury ordered that these problems be repaired at a cost to Ms. Krawchuk in excess of $110,000.

As part of the listing process, the Scherbaks completed a document known as a Seller Property Information Sheet ("SPIS") with respect to the property. This is a standard form document prepared by the Ontario Real Estate Association, to protect sellers, by establishing that the correct information concerning the property is provided to prospective buyers.

This SPIS contained the following instructions:

> **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. 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**

[5] *Krawchuk v. Scherbak,* O.N.C.A. 352.
[6] *Krawchuk v. Scherbak,* O.N.C.A. 352.

The majority of buyers' lawsuits allege that the licensee misrepresented property information.

The Property Disclosure Statement (PDS) gives sellers a way to confirm what they know about their property. Sellers know the property best. Therefore, they are the logical party to provide the kind of information that buyers usually want to know. Sellers are responsible for the statements they make on the PDS.

If the sellers don't understand the question, do not fill out the form for them. If they don't know an answer to a question, they shouldn't answer it. The PDS gives buyers a starting place to make their own due-diligence investigation of the property. Article 4 of the *REALTOR® Code* requires licensees to, "discover facts pertaining to a property which a prudent REALTOR® would discover in order to avoid error or misrepresentation." Buyers often expect their licensees to know, "everything about a property."

continued . . .

> **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. [Emphasis in original.]**[7]

The SPIS also stated:

> **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 broker harmless from any liability incurred as a result of any buyer relying on this information. The sellers hereby authorize 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 the statement.**[8]

The Scherbaks answered the questions about the property in the SPIS.

With respect to the question: "Are you aware of any structural problems?," the Scherbaks answered, "NW corner settled. See additional comments."

In the section "additional comments" the Scherbaks added, "to the best of our knowledge the house has settled. No further problems in 17 years." With respect to the plumbing, the question was: "Are you aware of any problems with the plumbing system?" The Scherbaks' response was "No."

Ms. Krawchuk toured the house with Ms. Weddell. She noticed a number of visible defects in the home, including sloped floors, a foam-filled crack in the northwest corner of the crawl space, and sloping brick and block work at the exterior of the northwest corner of the house. Ms. Krawchuk was told by Ms. Weddell that the Scherbaks had informed her that the house had settled, been repaired, and that there had been no further problems in 17 years.

When Ms. Weddell originally prepared the offer on behalf of Ms. Krawchuk it contained a clause making the offer conditional on receiving a satisfactory home inspection. Ultimately, Ms. Krawchuk decided to remove the inspection condition to give her offer a better chance of being accepted.

After Ms. Krawchuk moved into the property and discovered the structural and plumbing problems, the investigation of these problems revealed that the entire north foundation wall, and the northern portion of the east and west foundation walls had settled, and were continuing to settle. This settlement caused significant weakness in the floor joists which compromised the stability of the house. The investigation of the foundation also disclosed plumbing problems.

[7] *Krawchuk v. Scherbak*, O.N.C.A. 352, para. 13.
[8] *Krawchuk v. Scherbak*, O.N.C.A. 352, para. 14.

As a result of these problems, Ms. Krawchuk commenced a lawsuit against the sellers, the licensee and others.

TRIAL DECISION[9]

At trial, Ms. Krawchuk claimed that the Scherbaks were liable to her and in breach of contract. She also claimed that the Scherbaks were liable for fraudulent or negligent misrepresentation in the Seller Property Information Statement. Ms. Krawchuk also alleged that Ms. Weddell was liable for fraudulent or negligent misrepresentation, in respect to the condition of the house and, in negligence, for failing to properly advise her about the importance of a satisfactory home inspection.

The trial judge dismissed Ms. Krawchuk's claim against the sellers for breach of contract. He found that, in the absence of any warranties or guarantees as to the fitness of the house, the principle of *caveat emptor* applied. He said that there was no evidence that the Scherbaks had concealed the problems with the house, nor did the Scherbaks know that the property was potentially uninhabitable or dangerous.

The trial judge did, however, find that the Scherbaks were liable for negligent misrepresentations contained in the SPIS. He stated that the information provided about the foundation was false because it was incomplete. He concluded that the Scherbaks knew that the structural problems were not restricted to the northwest corner of the home, and were much more serious than they had disclosed. He also found that the sellers' answer in the SPIS concerning the plumbing was false. He stated the following:[10]

> *Although I accept that the representation was not made to mislead Ms. Krawchuk, certainly it was not full, frank, and accurate disclosure of the structural problems of the house. In my view, a reasonably prudent person in similar circumstances would have disclosed the following: (l) that there had been significant settlement of the entire north wall of the foundation and the northern portion of both the east and west walls of the foundation prior to their becoming owners of the property; (2) that although there had not been further settlement noted during their 17 years of ownership, they are unaware of what repair work was done to address the settlement before they became owners; (3) that in observing the northern portion of the east wall of the foundation, there was reason to believe that the foundation may not have been properly repaired; and (4) buyers should satisfy themselves that the foundation is sound. Obviously, the Scherbaks' representation with respect to the structure fell far short. Negligence is established. It is also my view that the Scherbaks were negligent in indicating that there were no problems with the plumbing. Reasonably prudent persons in their circumstances would have disclosed that once or twice per year they experienced a sewer line blockage that prevented water and sewage from discharging into the municipal system.*[11]

continued . . .

This is, perhaps, an unrealistic expectation when one considers that a buyer's agent may never have been to the property before. Therefore, buyers' agents should be careful to advise buyers only what they actually know and/or have verified about a property and they should urge their buyers to have the property inspected by a property inspector.

[9] *Krawchuk v. Scherbak* (2009), 85 R.P.R. (4th) 262.
[10] *Krawchuk v. Scherbak* (2009), 85 R.P.R. (4th) 262, at para 61.
[11] *Krawchuk v. Scherbak* (2009), 85 R.P.R. (4th) 262, at para. 61.

The trial judge dismissed the action against Ms. Weddell and the brokerage. He found that Ms. Weddell had simply relayed to Ms. Krawchuk the information provided by the sellers, and that she had no reason to doubt the information. He also concluded that Ms. Weddell was not negligent in failing to recommend to Ms. Krawchuk that she obtain a home inspection. He said that Ms. Krawchuk knew the value of having an inspection of the property but she made a decision to submit a subject free offer.

The Court of Appeal Decision

The Scherbaks appealed the finding of liability made against them in favour of Ms. Krawchuk. Ms. Krawchuk appealed the dismissal of her action against Ms. Weddell and the brokerage.

In respect to the sellers, the Court of Appeal stated that once a seller agrees to complete a disclosure statement, such as the SPIS, the seller is obligated to provide, ". . . to the extent possible, accurate and complete information."[12] The court also said that a buyer, in the position of Ms. Krawchuk, is not required to investigate the completeness or accuracy of the sellers' statement on the disclosure statement. The court commented:

> *Finally, I note that while the SPIS highlights that the purchaser may wish to make further enquiries considering that the "[s]ellers' knowledge of the property may be incomplete"; this is not what happened here. The Scherbaks have not been found liable because their knowledge of the condition of the property was incomplete, but because they failed to disclose their full knowledge of the condition of the house. They knew that there were serious structural problems all along the north wall and in the northwest and northeast corners of the house and that there were ongoing sewer problems. They did not disclose these facts.*[13]

The Court of Appeal overturned the dismissal of the action against the licensee and the brokerage. The court found that the trial judge erred in concluding that Ms. Weddell had no reason to question the information provided by the Scherbaks about the foundation of the house.

The court stated:

> *In my view, Ms. Weddell had plenty of reasons to question the veracity of the Scherbaks' assurances that the settlement problems had long since been resolved. She was a real estate agent with 33 years experience specializing in residential houses. She knew that the house had a history of settlement problems and accordingly was underpriced. As well, her visual inspection of the property disclosed settlement problems, the manifestation of which was sufficiently significant that it prompted her to further question the Scherbaks. Against this background and Ms. Weddell's admission that she was*

[12] *Krawchuk v. Scherbak,* O.N.C.A. 352, at para. 79.
[13] *Krawchuk v. Scherbak,* O.N.C.A. 352, at para. 92.

> *"no home inspector," it seems to me that she had good reason to look behind the Scherbaks' representations.*
>
> *In my opinion therefore, the trial judge's conclusion that Ms. Weddell had no reason to doubt the Scherbaks' representations, was "clearly wrong." The only available inference is to the contrary. The circumstances were such that Ms. Weddell should have verified the accuracy of the Scherbaks' representations about the house and she did not.*[14]

The court referred to a number of cases which supported the position that a buyer's agent has a duty to verify the accuracy of a seller's statement about the property. Generally when there are circumstances which should cause the licensee to doubt the accuracy of the information. The court stated:

> *In my opinion, in the circumstances of this case, given the requirements set out in the Code and the fact that Ms. Weddell had reason to doubt the veracity of the Scherbaks' representations about the house, the authorities that indicate that a real estate agent's duty to his or her client includes a duty to investigate material information about the property, are applicable.*
>
> *Whatever the standard of care, given the obvious defects in this house, Ms. Weddell had to either further verify the assurances herself or recommend, in the strongest terms, that Ms. Krawchuk get an independent inspection either before submitting an offer or by making the offer conditional on a satisfactory inspection. The failure to do either was an egregious lapse.*[15]

Principles To Be Taken From This Case

The Ontario Court of Appeal decision does not expand the seller's obligations in completing a disclosure statement about the seller's property. The court confirmed that in completing a disclosure statement a seller is obligated to provide accurate and complete information to the best of the seller's knowledge. This is consistent with existing case law.

This decision does not expand the duty of a real estate agent, acting for a buyer, to verify the information provided by a seller about the property.

The court found that a buyer's agent has a duty to verify the information provided by a seller where there is reason to doubt the seller's information. Again this finding is consistent with existing case law, both in British Columbia and other provinces.

This decision does, however, serve as an important reminder to licensees that they must not blindly accept information provided by the seller about the seller's property; especially where there are circumstances which would cause the licensee to question the accuracy of the information. Licensees should always exercise a degree of healthy scepticism about the information from a seller. This is particularly so where the property has had a history of problems.

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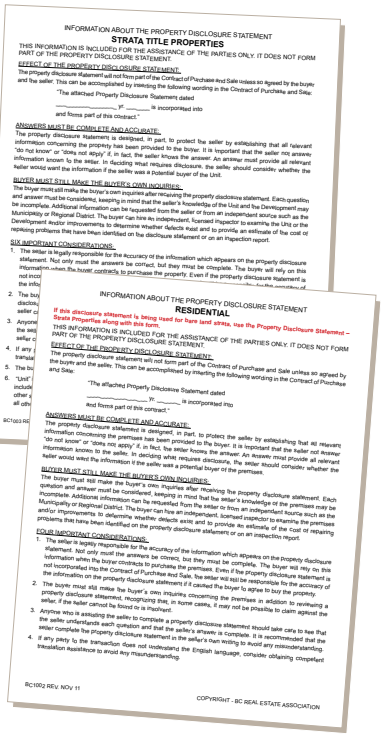
[14] *Krawchuk v. Scherbak,* O.N.C.A. 352, at paras. 143 and 144.
[15] *Krawchuk v. Scherbak,* O.N.C.A. 352, at paras. 153 and 154.

LICENSEE PERSPECTIVES

Never call the seller a liar, but go and check because the seller may not always know, remember, or understand what is being asked about the property. In the words of a local sports announcer recalling what journalism school taught him about validating information, "if your mother says she loves you, go and get a second source!"

{ STEWART HENDERSON }


INFORMATION ABOUT THE PROPERTY DISCLOSURE STATEMENT
STRATA TITLE PROPERTIES

THIS INFORMATION IS INCLUDED FOR THE ASSISTANCE OF THE PARTIES ONLY. IT DOES NOT FORM PART OF THE PROPERTY DISCLOSURE STATEMENT.

EFFECT OF THE PROPERTY DISCLOSURE STATEMENT:

The property disclosure statement will not form part of the Contract of Purchase and Sale unless so agreed by the buyer and the seller. This can be accomplished by inserting the following wording in the Contract of Purchase and Sale:

"The attached Property Disclosure Statement dated _____ yr. _____ is incorporated into and forms part of this Contract."

ANSWERS MUST BE COMPLETE AND ACCURATE:

The property disclosure statement is designed, in part, to protect the seller by establishing that all relevant information concerning the property has been provided to the buyer. It is important that the seller not answer "do not know" or "does not apply" if, in fact, the seller knows the answer. An answer must provide all relevant information known to the seller. In deciding what requires disclosure, the seller should consider whether the seller would want the information if the seller was a potential buyer of the Unit.

BUYER MUST STILL MAKE THE BUYER'S OWN INQUIRIES:

The buyer must still make the buyer's own inquiries after receiving the property disclosure statement. Each question and answer must be considered, keeping in mind that the seller's knowledge of the Unit and the Development may be incomplete. Additional information can be requested from the seller or from an independent source such as the Municipality or Regional District. The buyer can hire an independent, licensed inspector to examine the Unit or the Development and/or improvements to determine whether defects exist and to provide an estimate of the cost of repairing problems that have been identified on the disclosure statement or on an inspection report.

FOUR IMPORTANT CONSIDERATIONS:

1. The seller is legally responsible for the accuracy of the information which appears on the property disclosure statement. Not only must the answers be correct, but they must be complete. The buyer will rely on this information when the buyer contracts to purchase the property. Even if the property disclosure statement is not incorporated into the Contract of Purchase and Sale, the seller will still be responsible for the accuracy of the information on the property disclosure statement if it caused the buyer to agree to buy the property.
2. The buyer must still make the buyer's own inquiries concerning the premises in addition to reviewing a property disclosure statement, recognizing that, in some cases, it may not be possible to claim against the seller, if the seller cannot be found or is insolvent.
3. Anyone who is assisting the seller to complete a property disclosure statement should take care to see that the seller understands each question and that the seller's answer is complete. It is recommended that the seller complete the property disclosure statement in the seller's own writing to avoid any misunderstanding.
4. If any party to the transaction does not understand the English language, consider obtaining competent translation assistance to avoid any misunderstanding.

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RESIDENTIAL

If this disclosure statement is being used for bare land strata, use the Property Disclosure Statement – Strata Properties along with this form.

THIS INFORMATION IS INCLUDED FOR THE ASSISTANCE OF THE PARTIES ONLY. IT DOES NOT FORM PART OF THE PROPERTY DISCLOSURE STATEMENT.

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BUYER MUST STILL MAKE THE BUYER'S OWN INQUIRIES:

The buyer must still make the buyer's own inquiries after receiving the property disclosure statement. Each question and answer must be considered, keeping in mind that the seller's knowledge of the premises may be incomplete. Additional information can be requested from the seller or from an independent source such as the Municipality or Regional District. The buyer can hire an independent, licensed inspector to examine the premises and/or improvements to determine whether defects exist and to provide an estimate of the cost of repairing problems that have been identified on the property disclosure statement or on an inspection report.

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3. Anyone who is assisting the seller to complete a property disclosure statement should take care to see that the seller understands each question and that the seller's answer is complete. It is recommended that the seller complete the property disclosure statement in the seller's own writing to avoid any misunderstanding.
4. If any party to the transaction does not understand the English language, consider obtaining competent translation assistance to avoid any misunderstanding.

In addition to acting in the best interest of the client, a licensee's obligations also include:[16]

SEC. 3-3 Duties to Clients

. . .

(d) advise the client to seek independent professional advice on matters outside of the expertise of the licensee; . . .

(h) use reasonable efforts to discover relevant facts respecting any real estate that the client is considering acquiring;

The Property Disclosure Statement and Agency

The *Krawchuk* case has been the subject of much discussion within the British Columbia real estate community. Some of that discussion has focused on the Property Disclosure Statement ("PDS") and agency.

It is fundamental that licensees appreciate who they are acting for in a transaction. A buyer and a seller have competing interests and are commercially adverse. A seller wants to obtain the highest price for their property, while a buyer will seek to acquire it at the lowest price. A seller is likely going to be reluctant to disclose negative attributes of the property, while a buyer will be keenly interested in learning about anything negative regarding the property. A buyer's agent is obligated to promote the interests of the buyer, while the seller's agent is obligated to promote the interests of the seller. Consequently, the advice that each agent gives to his or her principal about the PDS will differ.

sUMMARY

The advice that a licensee should give on the Property Disclosure Statement depends on whether the principal is the buyer or the seller. A licensee acting as a limited dual agent cannot give the buyer or the seller this recommended advice about the PDS. A prudent licensee will also document, in writing, all of the advice given about the PDS to his or her principal.

[16] Council Rules, 3-3.

The Take-Aways

As a Buyer's Agent

A buyer's agent should:

- advise the buyer to obtain and thoroughly review the PDS relating to the subject property;
- explain to the buyer the limitations of a PDS; i.e., that it is not a guarantee that the property has no defects, or only those which are noted, nor is it a guarantee or a warranty by the seller to that effect;
- advise the buyer to get an inspection of the property from a qualified home inspector irrespective of what the PDS says;
- explain the risks to the buyer of not having the property inspected by a qualified home inspector; and
- discuss with the buyer the practical implications of making the offer conditional upon the PDS being incorporated as a term of the contract.

As a Seller's Agent

The seller's agent should:

- advise the seller that the seller's agent is obligated to disclose latent defects known to the agent in writing which have not been disclosed by the seller;
- discuss with the seller the practical implications of completing the PDS even though its completion is not required by law;
- advise the seller that if the seller chooses to complete the PDS the information must be complete and accurate to the best of the seller's knowledge; and
- discuss with the seller the practical implications of the buyer possibly making an offer conditional upon the PDS being incorporated as a term of the contract.

In Dual Agency

When a licensee is a limited dual agent, the licensee is obligated by the Limited Dual Agency Agreement to be impartial to both the buyer and the seller and ensure that advice given to one is given to both. To give unilateral advice on the PDS would conflict with this duty of impartiality.

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resources

LINKS

- Property Disclosure Statement (found on REALTOR® Link, on WEB*Forms*™)
- Real Estate Council of British Columbia, "Reminder About Property Inspections," *Report from Council*, June 2011, Volume 46, No. 6. www.recbc.ca/pdf/rfc/2011/june2011.pdf