

Citation: ☀

Date: ☀  
File No: 16271  
Registry: Kitimat

**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA**

BETWEEN:

**Raghubansh Rai Sharda**

CLAIMANT

AND:

**District of Kitimat**

DEFENDANT

**REASONS FOR JUDGMENT  
OF THE  
HONOURABLE JUDGE BIRNIE**

Counsel for the Claimant: self-represented

Counsel for the Defendant: L. Woo

Counsel for :

Place of Hearing: Kitimat, B.C.

Date of Hearing: October 14, 15, 2010, July 22, 2011, January 17, 18, 19, 2012

Date of Judgment: March 16, 2012

**Introduction:**

[1] This is Mr. Sharda's claim against the District of Kitimat. He claims that David Anthony, a building inspector for the District, negligently misrepresented to him in the course of a building inspection that the drywall screws he was using to attach new siding to his building were appropriate fasteners and then changed his mind a few days later. He claims damages for the cost of reinstalling the siding, loss of rental income for the building and emotional pain and suffering.

[2] While I will go into the evidence in more detail and set out my findings of fact and credibility, the background in brief is as follows. In April 2008 Mr. Sharda applied to the District of Kitimat for a building permit as he intended to make some changes to the windows and siding of a building he owned at 70 – 76 Wedeen St. in Kitimat. I will refer to this building from now on as "the Property".

[3] He was granted the permit (Tab 4 of Exhibit # 10), and commenced work. Eventually he called the District office and asked for a building inspection which was scheduled for 10:00 a.m. on June 9<sup>th</sup>. David Anthony was, (and continues to be), one of two building inspectors who works for the District of Kitimat. He attended at the Property on the morning of June 9<sup>th</sup> and met with Mr. Sharda.

[4] He examined the work and had some conversation with Mr. Sharda in the course of which he learned that Mr. Sharda was using drywall screws to attach the siding to the building. He had some doubts about these screws as he had no experience with their use as fasteners for siding. He mentioned this to Mr. Sharda. Before he left he gave Mr. Sharda an inspection report, (Exhibit #1/1A - hereinafter referred to as "the Inspection

Report”), directing him to correct the window flashing and noting that he would verify the setbacks of a shed on the property. The nature of the discussion between Mr. Anthony and Mr. Sharda and the legal interpretation of the Inspection Report is at the heart of this proceeding.

[5] Over the next couple of days Mr. Anthony researched the use of the drywall screws. He returned on June 11<sup>th</sup> to examine the screws and advised Mr. Sharda that they were not an appropriate fastener. He called the next morning and confirmed this conclusion over the phone and then later on that same date by letter. In that letter he directed Mr. Sharda to remove the screws he had used and to replace them with appropriate fasteners. Mr. Sharda did not do this. As a result the Council of the District of Kitimat made a decision later in the summer of 2008 to place a Notice to Title on the Property to ensure that any future purchaser or owner would be aware of the building code violation with regard to the siding.

**Issues:**

[6] The issues which must be determined are whether Mr. Anthony negligently misrepresented to Mr. Sharda that the drywall screws he was using to attach the siding were appropriate fasteners when he conducted his inspection on June 9<sup>th</sup> and whether the inspection report he issued on that date was an approval regarding the use of drywall screws as of that date.

**Positions of the Parties:**

[7] Mr. Sharda's position is that because Mr. Anthony had looked at the drywall screws he was using to attach the siding on June 9<sup>th</sup>, before he completed the Inspection Report, and did not tell him to stop using those screws nor make any reference to any problems with or doubts about the screws on the Inspection Report he had effectively approved the use of those screws. The Inspection Report should be seen as an approval of the work he had done to date except for the concerns noted about the window flashing and the shed setbacks. Mr. Anthony in his capacity as a building inspector owed him as an owner/builder a duty of care and he had breached that duty by not writing any concerns about the screws on the Inspection Report and thereby misrepresenting to Mr. Sharda on June 9<sup>th</sup> that the drywall screws were approved and then reversing this approval on June 12<sup>th</sup>.

[8] He argued that Mr. Anthony was not a credible witness because of inconsistencies between his evidence and the evidence of another witness, Larry Hyson, about the events that took place on June 9<sup>th</sup>.

[9] The District position is that while Mr. Anthony in his role as a building inspector owed a duty of care to Mr. Sharda he did not breach that duty. He did not approve the use of drywall screws on June 9<sup>th</sup>. He advised Mr. Sharda that he was unsure about their use. The Inspection Report related only to the need to correct the window flashings and to confirm the setback for a shed. That Report was not and did not purport to be an approval or rejection of the drywall screws or the siding installation. It was an interim report dealing only with the items set out on it. Anthony had no obligation to write his

doubts about the screws on that Report. He had advised Mr. Sharda of his concerns and Sharda was on notice that their appropriateness as a fastener was uncertain.

[10] Under the provisions of the *Kitimat Municipal Code* and the *British Columbia Building Code* 2006 it is the building owner's obligation to ensure that any materials used in building construction are in accordance with the requirements of the BC Building Code. Under the terms of the building permit issued to Mr. Sharda it was his obligation to request inspections of the work. Mr. Sharda did not request an inspection until the siding work was approximately 75% complete. He did not take steps to ensure the fasteners he was using complied with the Codes. He is liable for the improper use of the drywall screws as a fastener and for any damages or problems arising there from.

[11] For the reasons that follow I have concluded that Mr. Sharda has not established any negligent misrepresentation on the part of Mr. Anthony or the District of Kitimat regarding the use of drywall screws as fasteners for siding, nor has he established that the Inspection Report was in any way an approval from Mr. Anthony or the District regarding the use of drywall screws as fasteners for vinyl siding.

[12] In these reasons I will deal first with the evidence of the five witnesses called by Mr. Sharda and will set out my findings of fact and credibility. I will then deal with relevant law, with references to the case authorities cited by both parties. Finally I will set out my analysis as to how the law should be applied to the facts of this case.

**Facts and Credibility:**

[13] Mr. Sharda called five witnesses. The District of Kitimat did not call any witnesses. Mr. Sharda was permitted wide latitude in his questioning of these witnesses both in terms of the manner of his questioning and the nature of the questions asked. By this I mean that he was permitted to put leading questions to witnesses and to ask them about matters that appeared at times to be only marginally relevant to his claim for negligent misrepresentation.

[14] The persons who gave evidence were: David Anthony, Larry Hyson who assisted Mr. Sharda with some of the siding work, Trafford Hall who was the Manager for the District of Kitimat when the events of this case occurred, Peter Brock, the chief building inspector of the District of Kitimat and Timothy Gleig, the chief engineer for the District of Kitimat.

**David Anthony:**

[15] The examination and brief cross examination of Mr. Anthony occupied a full day of court time. His evidence was to the following effect.

[16] He was hired by the District of Kitimat as a Building Bylaw Inspector in June 2000. Thus he had eight years experience in this role by June 2008. On June 9, 2008 at about 10:00 a.m. he attended at the Property in response to Mr. Sharda's request for an inspection of the work he was doing. (It is common ground that this work involved replacing the siding and changing the windows as set out on the building permit issued on April 22, 2008.)

[17] When he arrived at the property he noted that siding of the building was 75% complete. The back and both sides of the building had new siding and more than one half of the front of the building had siding on it. He walked around the building and inspected each wall for tightness. He noted that the siding was tighter than usual. He thought the nails might be too tight and asked Mr. Sharda about this. Mr. Sharda assured him he had left room for movement of the siding, (which needs room to expand and contract). He then noticed that the second floor windows at the front of the building were not taped. Mr. Sharda told him he had taped the windows at the back but not those on the front and he explained to Mr. Sharda how he would like to see the tape applied. At this point he was in the midst of writing up his inspection report.

[18] At this time the subject of screws came up as fasteners for the siding. He confirmed with Mr. Sharda that he had not used nails and was surprised by this. Mr. Sharda told him he did not like the pounding of nails so had used screws instead. He asked to see the screws being used and was shown them. He told Mr. Sharda he had never heard of drywall screws being used before but that the screws he was using might be good. He could see that Mr. Sharda was worried and agitated and he did not want to give him any incorrect information. He said, "I do not know. I've never seen drywall screws used before. They may be okay."

[19] He said he told Mr. Sharda he would have to look into this but also said he doesn't know for sure if he told Mr. Sharda he would check on the screws. However he knew he would do this. He and Mr. Sharda had a lengthy discussion about what needed to be done with the window flashing. Mr. Sharda also had some questions about building a shed. He noted both the window flashing issue and the questions about the

shed on his inspection report and gave a copy of that report to Mr. Sharda telling him that he needed to fix the window flashing on the front of the building. He gave him this report after he had looked at the drywall screws. He did not write anything down about the use of drywall screws because he didn't have enough information.

[20] He knew Mr. Sharda would have to remove the siding on the front of the building in order to fix the window flashing for the first floor windows and that this would give him the time to make his inquiries about the use of drywall screws as fasteners for siding.

[21] Later that day after conducting some other business he went back to his office and discussed the matter with Peter Brock the chief building inspector for the District. He needed to check the Building Code and talk to the manufacturer of the siding. The BC Building Code was silent on the issue of drywall screws to attach vinyl siding. He was able to speak to the siding manufacturer on June 11<sup>th</sup> and learned that screws could be used as long as they had a head diameter of at least 3/8 " and were corrosion resistant.

[22] He then went back to see Mr. Sharda, (on June 11<sup>th</sup>) and have a closer look at the screws. He noted that some of the siding had been removed to do the work on the window flashings. The drywall screws being used by Mr. Sharda had a head diameter of less than 3/8 " and did not meet the corrosion resistant standard as they had never been tested. There was no information about corrosion resistance on the boxes of drywall screws. He told Mr. Sharda that he did not have enough information to support the approval of the screws and he should not be using them. Mr. Sharda asked him to reconsider as it would be a burden to him to have to redo the siding and could he go

back and see if there was another solution. He agreed to talk to the manufacturer again and told Mr. Sharda not to do any further work as the office of the siding manufacturer in Ontario was now closed and he would get back to him in the morning.

[23] At 10:00 a.m. on June 12<sup>th</sup> he called Mr. Sharda. He was presented with a transcript of that telephone conversation, (Exhibit "B") and agreed that this was the gist of the June 12<sup>th</sup> conversation but did not believe it was a complete transcript. While that transcript was not entered as a numbered Exhibit in the trial I accept that it does represent the essence of what was said between Mr. Anthony and Mr Sharda that morning.

[24] In the course of this conversation Mr. Anthony advised Mr. Sharda that he had spoken to the manufacturer and while there were some screws that could be used for siding this did not include drywall screws as they would rust and could break off causing the siding to come off in a high wind. He told him the Building Code was silent on the use of screws and that it required him to check the manufacturer's instructions.

[25] After further discussion about the kind of screws that could be used Mr. Sharda told Mr. Anthony that as he had not told him to stop using the screws until the previous day on June 11<sup>th</sup>, that it was only fair that he be able to leave the siding that was already on the building and use a different fastener to complete the job. He said Anthony had told him on the 9<sup>th</sup>, regarding the use of screws, "It's not the end of the world", and that now he was effectively telling him it was the end of the world. At this point Anthony told him he had to change all the screws and he would send him a letter to that effect.

[26] Mr. Anthony did send Mr. Sharda a letter to this effect, (Exhibit #3) and subsequently was asked by his superiors to provide an account of what had taken place between June 9<sup>th</sup> and June 11<sup>th</sup>. He wrote a memo dated July 8, 2008, (Exhibit #2), setting out his recollection of events.

[27] There was a good deal of examination of Mr. Anthony in relation to the amount of siding on the front of the Property on June 9<sup>th</sup> when he first attended for the inspection and the amount of siding on June 11<sup>th</sup> when he returned for a further examination of and discussion about the screws. He initially stated that on June 9<sup>th</sup> when he first attended the siding was above the first floor windows. (It was this siding which was going to have to be removed in order to correct the window flashing). When he attended on June 11<sup>th</sup> he took a photo of the building (Ex #4), and some of the siding had been removed relative to what he had seen on June 9<sup>th</sup>. He was sure that there was no further progress made on the siding since he saw it on the 9<sup>th</sup>.

[28] Later, in cross examination by District counsel he said that it was possible that the siding on June 9<sup>th</sup> was a piece or two lower than what he observed and photographed on June 11<sup>th</sup>.

[29] Mr. Anthony was a straight forward witness. Despite the often confrontational style of Mr. Sharda's direct examination, which at times smacked of accusations that he was lying, Anthony was very patient and non argumentative. While he resiled slightly from his initial testimony about how much siding was on the front of the building on June 12<sup>th</sup> relative to what he had seen on June 9<sup>th</sup> his evidence was otherwise consistent. He did not demonstrate any bias to Mr. Sharda and in fact he appeared to be making an

effort to be helpful to him in terms of understanding and responding to his questions – which at times were somewhat convoluted and needed to be reframed

[30] The only other evidence as to what occurred at the Property from June 9<sup>th</sup> – 12<sup>th</sup> is that of Larry Hyson.

**Larry Hyson:**

[31] Mr. Hyson testified that on June 9<sup>th</sup> he came over to the Property to help establish a plumb line on the front of the building. He arrived at 9:00 a.m. and at the time there was no siding on the front of the building that he could recall. The front of the building was just black. He began by running a plumb line at the top of the door and then measuring down to where the starter strips would go. He established some of the starter strips but not all of them. He then left and came back later that day.

[32] At one point in his direct evidence he appeared to be saying that he came to put the starter strips on the building after Mr. Anthony had left. [Transcript of July 22, 2012, p. 23 l. 42 – 47]. Mr. Sharda relied heavily on this part of his evidence in his argument that Mr. Hyson's evidence should be preferred to that of Mr. Anthony. However, it is clear from his answers on re-examination that he had no personal knowledge as to when Anthony was at the Property, [Transcript of July 22, 2012, l.3 – 25]. It is also clear from the whole of his evidence that he was saying that he went to the Property, established the starter strips, left and came back later in the day when he was told by Mr. Sharda that the building inspector had been to the Property.

[33] When he came back later in the day he saw that the windows had been taped and he testified at different points in the direct and cross examination that on his return:

- 1) Ex # 6, a photo which shows one end of the building at 70 – 76 Wedeen St. with black paper, no siding and the first floor windows taped shows what he saw,
- 2) that the siding was up just below the doors,
- 3) The siding was somewhere between the top of the windows and the top of the doors, and
- 4) The siding may have been just above the doors.

[34] He was not present when Mr. Anthony was there. There is a good chance he left the property around lunch time. (I note that in his argument Mr. Sharda characterized Hyson as having said that he did not install the starter strips on the front of the building until noon. This is not what he said.) He was not able to say when in the afternoon he had returned. When he came back Mr. Sharda told him Mr. Anthony had been there and then showed him the work he had done. Apart from doing the work with the starter strips on June 9<sup>th</sup> he did not get involved again until later, after July, when he finished the rest of the siding.

[35] Exhibit #5, (the photograph taken by Mr. Anthony on June 11<sup>th</sup>), shows what the siding looked like on June 11<sup>th</sup>. From the end of the day on June 9<sup>th</sup> to June 11<sup>th</sup> the siding had progressed a little bit further.

[36] He had no personal knowledge as to whether Ex #1, the Inspection Report was a final inspection report. His interpretation of it was that it was a go ahead to finish the job.

[37] While I have no doubt that Mr. Hyson was making every effort to recall accurately what he saw and did on June 9<sup>th</sup>, I found parts of his evidence to be somewhat confusing. His evidence as to the siding he observed on the front of the Wedeen St. building when he returned on the afternoon of June 9<sup>th</sup> was, on the one hand, that the building looked like the photo Ex. #6 which shows at least one half of the front of the building with no siding at all. On the other hand he said that the siding on the front of the building was somewhere between the top of the windows and just above the doors. This strikes me as a fairly obvious contradiction. He was uncertain, at best, as to when he left the property after doing the work on the starter strips.

[38] Mr. Sharda argued quite forcefully that Mr. Anthony had lied about the amount of siding that was on the building when he attended for the inspection on June 9<sup>th</sup>. He compared Mr. Anthony's evidence to that of Mr. Hyson submitting that Mr. Hyson's evidence made it clear that as of sometime after 9:00 in the morning on June 9<sup>th</sup> there was no siding on the front of the Property and if this was accepted it was very unlikely that by 10:00 o'clock, when Mr. Anthony attended, the siding had been attached up to or just below the top of the first floor windows.

[39] This is an important point because the gist of Mr. Sharda's submission about Mr. Anthony's evidence was that he had lied about the amount of siding on the front of the building on June 9<sup>th</sup>, and since he had lied about this, none of the evidence he gave about what had occurred on June 9<sup>th</sup> was credible. What this left was the Inspection

Report which should be accepted and interpreted as a document which effectively approved the installation of the siding as observed by Anthony, (and Hyson) on June 9<sup>th</sup>.

[40] I agree that Mr. Anthony's evidence about the siding on the building when he did his inspection on June 9<sup>th</sup> and Mr. Hyson's evidence about what he observed that day are inconsistent. It does seem unlikely that they could both be correct about the timing of their arrival that day and the point at which the siding on the building had reached the to just above or below the first floor windows.

[41] My concern however is with the accuracy of Mr. Hyson's evidence rather than that of Mr. Anthony. Mr. Hyson does not appear to have had any reason to make any notes about his recollection of June 9<sup>th</sup>. He gave his evidence over three years after these events occurred so there is some concern about the natural fading and unavoidable reconstructive processes of memory. His evidence does contain one unexplained inconsistency in relation to both seeing the building later in the day with one half of it still without siding, and seeing that the siding was up to a point around the top of the first floor windows.

[42] As set out above I found Mr. Anthony's evidence to be internally consistent. He had reason to note up his recollection of the events in question, ( including the amount of siding on the building as between June 9<sup>th</sup> and 11<sup>th</sup> and the fact that some of the siding had to be removed in order to fix the window flashing), less than a month after the events occurred. His observations were made in the course of his employment as a building inspector which requires him to make observations about the state of buildings

under construction. His observation that the siding was above the windows on June 9<sup>th</sup> is consistent with his evidence that he had some time to make the necessary inquiries about the drywall screws because he knew that the siding would have to be removed to deal with the window flashing.

[43] For these reasons, where Mr. Hyson's evidence is inconsistent with Mr. Anthony's evidence I prefer the evidence of Mr. Anthony.

[44] I accept Mr. Anthony's evidence about the amount of siding which was on the front of the building on June 9<sup>th</sup> and do not accept Mr. Sharda's submission that he was lying on this point or that his evidence lacks credibility in any other respect. I also accept Mr. Anthony's evidence as a whole regarding what he saw and said and did on June 9<sup>th</sup> through June 12<sup>th</sup>.

**Trafford Hall:**

[45] Mr. Hall was the Manager of the District of Kitimat in 2008 and his job was to implement the policies of council and to give policy development advice.

[46] Mr. Sharda had complained to him that the requirement that he remove the siding on the Property and reattach it with proper fasteners was unfair. He took this issue seriously and took steps to determine if Mr. Anthony had approved the use of drywall screws. He sought and received a report through the Director of Engineering dated July 8, 2008, (Exhibit #2). His concern was to ensure the building inspector had been fair.

[47] He determined that Mr. Anthony had done his job and made the appropriate inquiries about the use of drywall screws. He was satisfied that Mr. Sharda had not been misled. He saw the Inspection Report and considered it to be a record of an inspection but not either an approval or rejection of drywall screws.

[48] By letter dated July 10, 2008 he asked Mr. Sharda to come and meet with him but Mr. Sharda refused to do so. In this letter he advised Mr. Sharda of the process for appealing a ruling by a building inspector. He was satisfied that it was appropriate to place a Notice to Title on the Property.

[49] There were no issues as to Mr. Hall's credibility and I accept his evidence.

**Peter Brock:**

[50] As of July 2008 he had worked for 24 years as a building inspector with the district of Kitimat and was the District's chief building inspector. He was not present on June 9<sup>th</sup> or 11<sup>th</sup> at the Property. Mr. Anthony spoke to him on June 9<sup>th</sup> and he advised him to carry on with his investigations as to whether the use of drywall screws was satisfactory to the manufacturer of the siding. He had no information to suggest Anthony had initially approved the use of drywall screws and then changed his mind.

[51] He testified that he would not necessarily write down on an inspection report if he had doubts about an element of construction. In this situation he would have advised Mr. Sharda as to his concerns about the screws and that he would check on them

[52] Ex # 1 is not a final inspection report and is neither an approval of nor a rejection of the vinyl siding. It is a general framing inspection report. Final inspection reports used

by the District are in the form shown in exhibit # 11. This form states at the top , “FINAL INSPECTION”, and includes a specific reference to siding as an item which is accepted or rejected – which Ex # 1 does not. There was no request for a final inspection at the Property. It is the obligation of a property owner to seek a re-inspection

[53] Ex # 1 is not a specific approval of anything. It relates only to the need to tape the flashing and to check on shed setbacks. The fact that there are no rejections on Ex #1 does not make it an approval. He has used this type of inspection form for years and it is not final unless it says it is final

[54] There were no credibility concerns raised regarding Mr. Brock’s evidence and I accept his testimony.

**Timothy Gleig:**

[55] Mr. Gleig is the Director of Engineering Services for the District of Kitimat and has had this job for the last 20 years. Building inspectors are under his management. He saw the Inspection Report, exhibit #1, in late June or early July 2008 and asked Anthony for a report, ( Ex # 2) which he received on July 11<sup>th</sup>. When he asked for this report he saw the problem as the construction material used on the Property and how it had been dealt with by Mr. Anthony

[56] He does not routinely see inspection reports. In his view Ex # 1 was not a final report or an approval to use drywall screws. It dealt only with one aspect of the job. It was an interim report. The fact that Mr. Anthony did not mention the use of drywall

screws in the Inspection Report does not mean it is an approval to use those screws. Any discussions on the job site are part of the inspection process.

[57] A property owner bears the responsibility for work done and compliance with the Building Code and to book initial and subsequent inspections.

[58] There are no credibility issues regarding Mr. Gleig's evidence and I accept his evidence.

[59] I note that Mr. Hyson, Mr. Hall, Mr. Brock and Mr. Gleig were all asked, ( by Mr. Sharda), for their interpretation of the Inspection Report. None of them was qualified as an expert witness and none of them was present when the Report was prepared or given to Mr. Sharda. I consider their evidence on this point to be helpful only to the extent that they had experience in general terms with inspection reports. Mr. Brock is the only one of these witnesses who had an established history, ( 24 years as a building inspector in the District), with inspection reports. For this reason I give his evidence on this point some weight but do not consider it to be definitive as to whether or not Exhibit # 1 was or was not a final inspection or an approval to use the drywall screws. I do not consider the opinions of Mr. Hyson, Mr. Hall or Mr. Gleig to be helpful and attach no weight to them because there is no evidence as to their experience with inspection reports in the past.

**Mr. Sharda's Decision Not to Testify:**

[60] Mr. Sharda chose not to take the witness stand and give evidence himself as to his interaction with Mr. Anthony on June 9<sup>th</sup> through 12<sup>th</sup> or as to the state of the

completion of the siding on June 9<sup>th</sup> or 11<sup>th</sup>. I was somewhat concerned in the course of the trial that he understand that if he did wish to tell me about his recollection of events on the dates in question he needed to give evidence and that he could not give me his version of events in the course of his submissions or otherwise from counsel table.

[61] I pointed this out to Mr. Sharda a number of times throughout the hearing. He appeared to understand. At the beginning of the last three days of his case on January 17, 2012 I explained that as the Claimant he was required to prove his case on the balance of probabilities and explained what this meant. He indicated that he understood this.

[62] After he had called what would otherwise be his final witness, Mr. Gleig, I advised Mr. Sharda that the only version of what had taken place between he and Mr. Anthony that was in evidence was that of Mr. Anthony. If I accepted the argument I understood he was intending to make; i.e. that Mr. Anthony should not be believed, as there were contradictions between some aspects of his evidence and the evidence of Mr. Hyson, then this would leave me with no credible version of what had occurred between them on that date.

[63] Mr. Sharda remained adamant that he did not intend to testify but would rely on discounting Mr. Anthony's credibility and then rest his case on the Inspection Report as a final inspection report and an approval of his use of drywall screws.

### **The Permit and the Inspection Report:**

[64] The building permit issued to Mr. Sharda by the District is found at Tab 4 of Exhibit 10. This permit states in part as follows:

- (1) ***You must request inspections at each stage of work call the District of Kitimat at 632-8900*** ( on the permit this is in boldface and in capital letters).

Ten work stages are then set out including “*Cladding Interior & Exterior*”

- (2) *...I further agree to confirm to all requirements of Part 13, Divisions 1 – 7, Building Regulations and all other statutes and/or requirements of the Kitimat Municipal Code*

[65] The Inspection Report ( Exhibit 1), is titled “ Framing Inspection”. Near the top of the report is the following note in boldface print:

***Note: A final inspection will require any unapproved items below to be reinspected.***

The areas of inspection to be ticked do not include siding. All of these areas have a vertical line through the boxes where an acceptance or rejection would be noted. No acceptance or rejection is noted in any of the boxes. In the comments section the following is written:

*Tape flashing to building paper- verify setbacks for shed ( in office)*

Below this comment is a final boldface sentence printed on the form:

***This inspection becomes null and void with any change in construction for this premise, or upon failure to comply with the Building Regulations of the Kitimat Municipal Code.***

**The Law:**

**A. Statutes:**

[66] The following statutory provisions are relevant in this case:

1) ***Kitimat Municipal Code, Part 13, Division 1.***

- 13.1.1. 1. *The Building Code as defined by this Subdivision of Kitimat Municipal Code is hereby adopted and by this reference is made part of the Kitimat Municipal Code and shall apply to all buildings in the District of Kitimat.*
- 13.1.2 *“Building Code” means Parts 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the current edition of the British Columbia Building Code .....as amended from time to time.*
- 13.1.5 *The Building Inspector is authorized to:*
- a) *administer this Division*
- 13.1.6 *Neither the granting of a permit nor the approval of the drawings and specifications nor inspections made by the Building Inspector shall in any way relieve the Owner of a building from full responsibility for carrying out the work or having the work carried out in accordance with the Building Code and requirements of this Division*
- 13.1.8 *The provisions of this Division are not intended to limit the appropriate use of materials, equipment or methods of construction not specifically authorized herein. A person desirous of providing an equivalent material, equipment or method of construction not authorized by the Division or the Building Code shall submit to the Building Inspector sufficient evidence to satisfy the Building Inspector that the proposed equivalent will provide the level of performance required by this Division or the Building Code.*

## 2) British Columbia Building Code 2006

### 1.1.1.

1) *This Code applies to any one or more of the following:*

(d) *an alteration of any building,*

(k) *the installation, replacement or alteration of materials or equipment regulated by this Code*

### 1.1.3

1) *Neither the granting of a permit nor the approval of the drawings and specifications nor inspections made by the authority having jurisdiction shall in any way relieve the Owner of a building from full responsibility for carrying out the work or having the work carried out in accordance with the requirements of the British Columbia Building Code.*

*Division B Part 9 of the B C Building Code deals with the attachment of Cladding, including siding to the outside of a building.*

## B. Negligent Misrepresentation

[67] The five requirements for an action in negligent misrepresentation were set out by the Supreme Court of Canada in ***Queen v. Cognos Inc.***, [1993] 1 S.C.R. 87. These requirements are:

- 1) there must be a duty of care based on a “special relationship” between the representor and the representee,
- 2) the representation in question must be untrue, inaccurate or misleading,
- 3) the representor must have acted negligently in making the representation,

- 4) the representee must have relied, in a reasonable manner, on said representation, and
- 5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[68] In a later case, ***James Ingles v. The Corporation of the City of Toronto***, [2000] 1 S.C.R. 298 the Court considered the duty of care owed by a city building inspector to an owner-builder and held that the duty owed was the standard of care expected of the ordinary, reasonable and prudent inspector in the circumstances.

### **Analysis:**

#### **Negligent Misrepresentation:**

[69] It was Mr. Sharda's responsibility as an owner-builder to inform himself before he began his work as to the requirements of the Building Code in relation to the materials he used and to ensure he complied with these requirements. He did not do this in relation to the use of drywall screws as fasteners for the vinyl siding. He completed approximately 75% of the siding, i.e. the back, both sides and part of the front of the building before calling for an inspection.

[70] Once he called for the inspection it was reasonable for Mr. Sharda to rely on the information given to him by Mr. Anthony. As set out in the ***Ingles*** decision Mr. Anthony owed a duty of care to Mr. Sharda to conduct his inspection to the standard of an ordinary, reasonable and prudent inspector.

[71] The only evidence other than that of Mr. Anthony as to the ordinary, prudent standard of care expected of a building inspector was that of the chief building inspector Peter Brock. Brock, who has 24 years experience, stated that it is not necessary for an inspector to note any doubts about construction materials on an inspection report where those doubts have otherwise been communicated to the builder in the course of the inspection. As I have stated already I found Mr. Brock to be a credible witness and I accepted his evidence.

[72] In the course of his inspection Mr. Anthony learned that Mr. Sharda was using drywall screws to attach the siding and he looked at the screws. He advised Mr. Sharda that he had never heard of this before. He didn't know if they were okay. They might be. He may have said, "It's not the end of the world." He completed the inspection form he was using to advise Mr. Sharda that he needed to correct the flashing around the windows and signed the report. He did not write the uncertainty he had expressed to Mr. Sharda about the screws on this form. The siding on the front of the building was at a point that it would have to be removed in order for the flashing work to be done. He then left, checked on the appropriateness of the screws over the next couple of days and returned two days later to examine the screws more closely and give Mr. Sharda his opinion that they could not be approved. He confirmed this opinion after further inquires the following morning.

[73] At no point in his dealings with Mr. Sharda did Mr. Anthony represent to him that the drywall screws were approved. On the contrary, he stated to him that he did not know if they were okay. Even if he then stated, "It's not the end of the world", this does not change the fact that, at the very least he had clearly indicated to Mr. Sharda that

there was a doubt about the drywall screws. The fact that Mr. Anthony then completed the Inspection Report in relation to the window flashing and signed it was not a representation that the screws were approved.

[74] The Report does not, on its face, state anything about the screws and whether their use was approved or rejected and it does not state that it is a “Final Inspection Report”. It was signed and given to Mr. Sharda after a conversation in which a clear doubt was expressed about the use of drywall screws as fasteners. In this context it was not reasonable for Mr. Sharda to place any reliance on that report as an approval of the screws. He was in fact on notice, given his obligation to use materials approved by the Code, to get ensure he got further information from Mr. Anthony or his own investigations as to whether the screws were proper fasteners to use.

[75] Mr. Anthony did not breach his duty of care toward Mr. Sharda. His conduct was that of an ordinary, reasonable and prudent building inspector. While I find that there was no misrepresentation made by Mr Anthony and no breach of any duty of care by him, I note that even if negligence had been established Mr. Sharda would not be able to claim any damages arising from the obligation to reinstall the siding which was already attached to the building at the time Mr. Anthony attended on June 9<sup>th</sup>. His use of drywall screws to attach that siding had no relationship to his reliance on any advice or information given to him by Mr. Anthony.

#### The Inspection Report

[76] As I have already stated the fact that Mr. Anthony did not make any note on the Inspection Report regarding his doubts about the drywall screws was not a negligent

misrepresentation on his part. Nothing in the language or content of that Report states that it is an approval regarding the use of the screws or a final inspection regarding the installation of the siding. The Report is not an approval either in law or in fact of the use of the drywall screws to attach the siding to the Property.

**Conclusion:**

[77] Mr. Sharda has not established any negligence on the part of Mr. Anthony or the District of Kitimat. His claim is dismissed. Under Rule 20 of the Small Claims Rules he is required to pay to the District of Kitimat their filing and service fees in the amount of \$60.00. (These amounts are not set out on the District's Reply but are in the court file in the amount of \$60.00, ( filing fee of \$50.00 and service fee of \$10.00). ). If there are additional filing or service fees the District may bring an application to have the amount of the fees settled.