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Class Actions in the Construction Industry in Canada

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The purpose of this paper is to outline the factual scenarios of class actions in the construction industry in Canada.[1] A feature that distinguishes construction industry class actions from many other types of class actions is that they quickly become multi-party. Plaintiffs bring in many defendants, including from each level of government.[2,3] No one is immune from being added as a defendant — architects, lawyers, accountants, real estate agents, investment advisors, bankers. Defendants often bring others into the litigation in third party proceedings and some counter-sue the plaintiff.

The involvement of multiple parties results in complexity and that can make it difficult for plaintiffs to satisfy the threshold criteria that they have to prove before a court permits a class action to proceed.[4] As stated by Martin J. in *Condominium Plan No. 0020701 v. Investplan Properties Inc.* (2006), 25 C.P.C. (6th) 327 (Alta. Q.B.):

> [83] When common issues are stated in terms of "defendants", it can be easy to lose sight of how the complexity of proceedings may increase when multiple defendants are involved. Certain of the stated common issues do not apply to each Defendant, either at all or in the same way.

At the same time, the complexity of multi-party construction scenarios makes them suitable for resolution as class actions. In *Western Canadian Shopping Centres Inc. v. Dutton* (2001), 8 C.P.C. (5th) 1 (S.C.C.), McLachlin C.J.C. stated that in "complicated cases implicating the interests of many people, the class action may provide the best means of fair and efficient resolution." Class actions legislation offers case management tools to help manage complexity where many parties are involved. Courts may stay third party proceedings[5] and counterclaims[6] until primary claims are resolved.

The following summarizes situations where the construction industry has been brought into a class action in Canada. Although there is overlap, they may be categorized as those relating to: (a) bidding; (b) marketing; (c) financing; (d) deficiencies; (e) business interruption; (f) incomplete condominiums; and (g) toxic exposure.

A. — Bidding

In *Controltech Engineering Inc. v. Ontario Hydro*,[7] Controltech Engineering Inc. sued Ontario Hydro and its directors and officers[8] for damages, restitution, and exemplary, aggravated, and punitive[9] damages for fraudulent and negligent misrepresentation, misuse of confidential information, breach of contract, inducing breach of contract, unjust enrichment, and intentionally causing economic harm through unlawful means. Ontario Hydro issued a request for proposals ("*RFP*") from bidders to provide it with electricity from renewable energy technology in 75 projects. Applicants were narrowed down in a three step bidding process. Detailed second-stage bids were submitted for 36 projects. Final bids were submitted for 17 projects, from which ten projects were to be selected. On January 19th, 1997, after bidders went through considerable expense to prepare applications, Ontario Hydro terminated the program without awarding any contracts. The plaintiff sued on behalf of 51 parties who responded to the RFP and had submitted bids for the 75 projects. Certification was refused as Sharpe J. characterized the claim "at its core" as resting on the assertion that the defendant "misrepresented important facts to those who participated in the RFP process" and there was no single misrepresentation.[10]

B. — Marketing

This category of case involves misrepresentations in marketing materials that were distributed before construction of a project or, in the case of multi-unit dwellings, before conversion from rented apartments to owned condominiums.

In *Abdool v. Anaheim Management Ltd.*,[11] on behalf of 325-350 condominium unit purchasers in the Mississauga Anaheim

Towers project, 150 named plaintiffs sought $100 million from the project owner-developers,[12] their lawyers[13] and accountants,[14] the assignees of debt instruments,[15] and the real estate brokers.[16] Central Guaranty Trust Company financed unit purchases through mortgage financing and unsecured "Equity Line" promissory notes. After Central wound up, the TD Bank and the Adelaide Capital Corporation got the notes, which the plaintiffs sought to rescind. The plaintiffs complained that the units were not sufficiently luxurious to obtain the rents forecasted to them, and that the rents were insufficient to cover their mortgage and financing charges. They named the accountants who reviewed the forecasts. Montgomery J. denied certification because of the presence of individual issues, including detrimental reliance.

In *Bosworth v. Jurock*,[17] on behalf of those who acquired ownership in Strata Corporation BCS 2210 by purchase from Roosevelt Apartments and who received a transfer of that unit either from Roosevelt Apartments Ltd. or Seal Cove Properties Ltd., Gregory Bosworth sued Oswald Jurock, David Barnes, Ralph Case, Standard Apartments Ltd., Proper Tee Investments Ltd., and Greenwich Holdings Ltd. for misrepresentation pursuant to the *Real Estate Development and Marketing Act*, S.B.C. 2004, c. 41 ("*REDMA*") and for negligent and fraudulent misrepresentation. Shannon Stange, Frank Lonardelli, and Arlington Street Investments Inc. were added as third parties. In 2006-07, the defendants marketed the units of the proposed stratified apartments to class members. The REDMA required them to provide prospective purchasers with a disclosure statement. Their Disclosure Statement said the Roosevelt buildings were "free from material defect", but did not refer to a June 2005 field review which indicated a need for chimney flashings, siding repainting, replacement of window panes, and other repairs, estimated at $35,109 per unit. The deficiencies related to common property of Strata Corporation BCS 2210, and there were no deficiencies in individual strata lots.

In *Haddad v. Kaitlin Group Ltd.*,[18] on behalf of 250-300 purchasers of lots in a subdivision in Newcastle, Ontario, Jean-Marc Haddad sued the marketers of the lots[19] for damages or restitution in misrepresentation and waiver of tort. The marketers represented that a golf course would be built within the subdivision and that class members would get free lifetime memberships. Each of the purchasers signed a standard form Agreement of Purchase and Sale. The golf course was not constructed. The clubhouse was built, but free lifetime memberships were not given to class members.[20] The plaintiff sought the revenues earned from the sale of the golf course lands and the expenses saved by not building the course.

In *Lee v. Georgia Properties Partnership*,[21] on behalf of purchasers of development units in the Private Residences at Hotel Georgia (the "*Development*"), C.H. Lee sued Georgia Properties Partnership, 0729909 B.C. Ltd., Georgia Trust (2005), and Hotel Georgia Management Ltd. From September 2007, the defendants marketed strata lots in the Development. The units varied in asking price from $605,000 to $18,000,000. As the Development was unfinished by December 2011, the completion date set out in the original disclosure statement, the plaintiff asserted that the disclosure statement contained a misrepresentation under the REDMA, *supra*, which the defendants failed to correct until May 22nd, 2012. She sought to represent those who purchased a unit before that date.

In *Lewis v. Cantertrot Investments Ltd.*,[22] on behalf of 120 purchasers of residential condominium units in "The Residence of Beauclaire" in Thornhill, Ontario, Solly Lewis and Hersl Kalif sued the vendors of the units and the listing agent,[23] the officers and directors of the condominium corporation, and the drafter of the documents that contained the misrepresentations[24] for damages in negligence, negligent misrepresentation, breach of the *Condominium Act*, fraud, oppression,[25] and breach of fiduciary duty. In the disclosure statement, budget, and flyer, the defendants said that monthly assessments and maintenance fees[26] that would be payable by purchasers of units in the project would be $0.32 per square foot. They were ultimately 62.24% more. The action settled for $400,000.

In *Peppiatt v. Nicol*,[27] on behalf of 169 purchasers of equity memberships in a golf club near Ottawa,[28] Paul Peppiatt, George Nichols, and Peter Wyslouzil sued the Royal Bank of Canada ("Bank") the "Nicol"[29] group, and the Eagle Creek Golf Club. The Bank brought the law firm of Soloway, Wright, Victor as a third party for breach of contract and professional negligence, but those claims were ultimately dismissed. The plaintiffs sought general, special, and punitive damages of more than $19,750,000 for negligence, misrepresentation, and breaches of contract, trust, and fiduciary duty. In the early 1980s, the Nicol Group built an 18-hole professional golf course. Nicol promoted the sale of equity ownership units in the club to the public. Class members purchased memberships in the club in reliance on written representations in four different Membership Information Packages ("*MIP's*"). The MIP's contained various misrepresentations, including that the Club would be built for $6,500,000 within 3 years but only if 260 memberships were pre-sold. If 260 memberships were not sold, the construction was not to proceed and all subscription proceeds were to be returned to subscribers. Nicol was unable to sell the required 260 memberships, but began to build the course anyway. The Royal Bank provided Nicol with the funds to purchase the remaining 92 memberships, using the club's land for security. When Nichol could not meet its financial commitment to the bank, the

Royal Bank took over the club. After a trial, the Court found the Bank and Nicol liable for $3,400,000 (value of the equity membership units) plus $2,917,218.82 in compounded pre-judgment interest. The Court also found Nicol liable for $845,000[30] in punitive damages.

In *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*,[31] on behalf of approximately 200 owners of 215 strata units in the Airport Hilton, Sharbern Holding Inc. sued Vancouver Airport Centre Ltd. ("*VAC*"), its affiliate and subcontractor, Larco Hospitality Management Inc. ("*HMS*"),[32] and MM&R Valuation Services, Inc.,[33] in breach of trust and fiduciary duty (VAC and HMS) and in misrepresentation (VAC and MM&R) for rescission, damages, and an accounting. Class members purchased strata units in the Airport Hilton in Richmond pursuant to VAC's 1998 offering memorandum which, based on MM&R's projected occupancy rates and average daily room rates, projected an average annual cash return of 16.6% over the first five years. Unit owners ultimately incurred losses instead of obtaining the 16.6% returns. The offering memorandum also represented that there was no conflict of interest that could reasonably be expected to materially affect a purchaser's investment decision. However, the parent of VAC and HMS, Larco Investments Ltd., had also developed another hotel, the Airport Marriot, that was connected to the Hilton by a retail concourse and parkade. VAC and HMS operated and managed both the Hilton and Marriott hotels as well as a third hotel on adjacent property, the Best Western Richmond Inn. In the hotel asset management agreements, there were additional performance based incentives for VAC and HMS respecting management of the Marriott, and Marriott unit owners were guaranteed a 12% return for the first five years of operation, whereas a 16.6% return was merely projected for the Hilton units. As a result, it was alleged that VAC and HMS would benefit by diverting hotel guests to the Marriott instead of the Hilton, and had an incentive to allocate common management expenses to the Hilton rather than to the Marriott. The plaintiff asserted that it was a breach of fiduciary duty not to disclose those material differences in the offering memorandum. The case ultimately reached the Supreme Court of Canada on the merits of the common issues.

Stachniak v. Jurock[34] involved defendants that overlapped with *Bosworth v. Jurock*, *supra*. In Stachniak, on behalf of approximately 82 persons who acquired units in Crestwood Estates, a group of strata titled buildings in Williams Lake, from July 2007 to March 2008, Brian Stachniak sued the developer,[35] vendor,[36] and marketers[37] of the project and their principals[38] for damages and "other relief" in misrepresentation and waiver of tort and for breach of statutory duties under the REDMA, *supra*, the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 and the *Competition Act*, R.S.C., 1985, c. C-34. Units in the building were being rented at below market rates, and as described in marketing materials, class members were to purchase units at less than their appraised values that the defendants would then upgrade and rent to new tenants at current market rates. Class members were to receive profit distributions from their participation in a managed rental pool arrangement. After the sale, the plaintiffs learned that there were numerous deficiencies in the Crestwood Estates buildings that were not described in the disclosure statement provided to them pursuant to the REDMA, that their unit had not been upgraded, and that there in fact was no appraisal to indicate that the purchase price was less than the appraised value. On behalf of the class, the plaintiff sought the profits obtained from marketing and selling the units, the difference between the purchase price paid and the fair market value of the units as of closing, the amount of the assessments required for deficiency repairs (approximately $16,000 per unit), and the cost to upgrade the units to a determined standard.

C. — Financing

The typical situation in this category is where investors put up money for an inadequately secured project or where their funds are misappropriated (or both).

In *Collette v. Great Pacific Management Co.*,[39] on behalf of 1,000-1,500 purchasers of investment units in the Multimetro Mortgage, mortgage units relating to commercial developments in Nanaimo (a hotel) and Parksville (luxury condos), Guy J. Collette sued the seller[40] and listing agent[41] of the units for breach of contract, negligence, and negligent misrepresentation. The defendants brought in Multimetro Mortgage Corporation and Ken Megale as third parties ("*Multimetro*"). The borrowers did not make any payments of principal and interest on the loans, and the proceeds of realization of the security was insufficient to repay investors.

In *Cooper v. Hobart*,[42] on behalf of 3,350 investors, Mary Francis Cooper sued Robert J. Hobart and the province for damages in negligence. The province brought in third parties.[43] Between January 1996 and July 1997, the plaintiff invested money through Eron Mortgage Corporation ("*Eron*"). Eron acted as a mortgage broker for large syndicated loans. It arranged for investors to pool funds to make loans to developers of commercial real estate. The loans were made in the name of Eron or its related companies, who held the security in trust for the investors. Eron misappropriated the funds for unauthorized purposes, such as paying interest on other non-performing mortgages and paying for personal items of its principals. Only $40 million of

the $222 million outstanding to investors was able to be realized from the security taken for the loans. On October 3rd, 1997, Hobart suspended Eron's mortgage broker's license. The plaintiff said he should have done so by August 26th, 1996, when it knew that Eron violated the *Mortgage Brokers Act*. The courts found no cause of action against the government essentially because the *Mortgage Brokers Act* imposed duties to the public as a whole, not to any individual investor.

In *Elms v. Laurentian Bank of Canada*,[44] on behalf of 201 investors, Peter Elms and Doyle Schmaus sued the Laurentian Bank of Canada and the Laurentian Trust of Canada Inc. (*"Bank"*), Oliver Drabik Carruthers & Chalcraft (*"Oliver"*), Taylor Ventures Ltd., Ralph Dennis Taylor, Floyd Taylor, and 413975 B.C. Ltd. (*"TVL"*) (land developers) for damages in negligence, breach of trust, and breach of fiduciary duty. TVL bought 5 pieces of land and registered mortgages against it in the name of 413975 B.C. Ltd. The plaintiffs deposited funds with the Bank into RRSPs. The bank sent the money to Oliver, and Oliver sent assignments to the Bank. After the assignments were registered, Oliver advanced the money to TVL. Class members received fractional interests in the mortgages. Oliver drafted the conveyance documents for the land purchases and mortgage and assignment documents. The land was worth less than what the investors had advanced. TVL went bankrupt. The plaintiffs asserted that the bank and law firm breached a duty to inform them that their investment far exceeded the value of the land.

In *Gary Jackson Holdings Ltd. v. Eden*,[45] on behalf of 15-16 investors who contributed to a fund of $1,970,000 for use in *"The Elyse"*, the plaintiff sued the developer Eden[46] and Bancorp[47] in breach of trust and for knowing assistance in the breach. Bancorp lent $3,005,000 to Eden to use in The Sophia, one of Eden's projects. Eden pledged another of its projects, The Elyse, as security for the loan. When The Elyse was sold, there were insufficient funds to pay class members and Bancorp. The plaintiff sought beneficial ownership in The Elyse and distribution of the available sales proceeds.

In *Gillespie v. Gessert*,[48] on behalf of investors, in negligent misrepresentation, negligence, breach of contract, and breach of fiduciary duty, Rita Joyce Gillespie sued a mortgagor, original mortgagee, their principals, three known trust companies who held the RRSPs, two lawyers who effected the transfer of the RRSP monies and/or registration of a fractional transfer of one of the mortgages, and some known and unknown persons who marketed and sold the investment throughout British Columbia, Alberta, Saskatchewan, and Ontario. Class members invested in the mortgages using their self directed RRSP accounts. On February 1st, 2001, Creative[49] bought 8.48 acres of land in northern Alberta from the Government of Alberta. On February 14th, 2001 and July 17th, 2001, though the land had a market value of only $15,000, Creative mortgaged the land to Windrose[50] for $7,000,000. Windrose indirectly transferred interests in the mortgages to class members in exchange for money from their RRSP accounts. In late 2000 or early 2001, the plaintiff opened two RRSP accounts with CWT[51] for $172,000, whom she instructed to forward the funds to Klaus Gessert, who in turn transferred a fraction of the mortgage from Windrose to CWT as trustee for Ms. Gillespie. The money was ultimately transferred to Creative. Ms. Gillespie did not have any dealings with Concentra,[52] Olympia,[53] or Knight[54] who acted in a similar capacity to CWT with respect to other class members. Because she did not deal with some of the defendants, Horner J. refused to allow the class action to proceed with respect to any of the defendants on that basis alone. He was influenced by the fact that the plaintiff believed that she was involved in a tax fraud scheme when making her investment.[55] Some of the defendants sued third parties, many of whom the plaintiff had added as defendants.[56] Some of the defendants were noted in default.[57]

In *Jin v. Canada Everich Real Estate Group Inc.*,[58] on behalf of everyone who subscribed for units pursuant to a 2007 offering memorandum, Hong Jin and Xia Lei sued Canada Everich Real Estate Group Inc. ("*Everich*"), Chestermere East Inc., 1465907 Alberta Ltd., and solicitors for Everich[59] in breach of trust for a return of subscription funds, damages, and interest. Everich offered units, which class members purchased by providing money to one of the lawyers in trust. Pursuant to the offering memorandum, money was to be returned to investors if Everich did not receive $9 million of subscriptions by August 30th, 2007. It failed to achieve the minimum but bought the 160 acres of land near Chestermere anyway after the one law firm transferred the trust monies to another law firm to close the purchase. The investment failed.

In *McDougall v. Collinson*,[60] on behalf of 160 RRSP / RRIF investors who each invested an average of $39,000 in four syndicated mortgage funds, involving six real estate projects in the interior of British Columbia,[61] Marilyn McDougall sued the promoters,[62] the umbrella company[63] and its four companies,[64] and several others[65] in negligence, breach of trust and fiduciary duty, and breach of contract. The four companies raised at least $6,148,069 from class members through offering memoranda. Financing, construction, and management of the projects was undertaken pursuant to a complex arrangement of interrelated agreements.[66] To get investment units, investors signed a subscription agreement, a mortgage, and an agreement of nominee ownership. The nominees[67] advanced the funds to the four companies, issued mortgage unit certificates to investors, and held the mortgage security. Third party proceedings were initiated,[68] and the IMF Group and DDAI counter-sued Ms. McDougall. Based on unparticularized pleadings of any wrongdoing and a lack of evidence to support the generalized allegations, the Court

had difficulty establishing which acts were alleged to constitute the causes of action that were pled, and was therefore unable to identify the claims. The Court referenced the plaintiffs' "general unhappiness over their losses" and their "suspicions of misconduct".[69] Certification was denied on the basis that there were no common issues and that a class action was not preferable:

(a) There were settlement agreements that contained a compulsory arbitration clause that went to the court's jurisdiction.

(b) There were individual issues respecting investor contributory negligence.

(c) There were conflicts of interest between investor groups.

(d) The nominee agreement required investors to request the nominee to file an action on their behalf.

(e) Foreclosure proceedings potentially provided the accounting sought.

The Court was also influenced by the fact that a class action could financially destroy many of the defendants.

In *Metera v. Financial Planning Group*,[70] on behalf of representatives of 85 Alberta residents who invested in Barclay Las Vegas Limited Partnership,[71] four investors[72] sued The Financial Planning Group[73] and the Assante Corporation[74] for breaches of statutory, contractual, and fiduciary duties. The Height of Excellence Management Ltd. sold limited partnership units in Barclay Las Vegas LLP through 13 mutual fund salesmen. Most investors invested over $100,000 for the units ($40,000 cash, $60,000 by promissory note). The plan was for Barclay to buy an apartment complex in Las Vegas and then later resell it at a profit. In the summer of 1999, Barclay Las Vegas LLP became the subject of Chapter 11 proceedings in the U.S. By March of 2000, the property had been foreclosed upon. The plaintiffs asserted that the defendants:

(a) failed to adequately investigate and assess the Barclay Las Vegas LLP units before selling them to class members;

(b) received secret commissions from the project's promoters against the best interests of their client class members;

(c) gave investors negligent advice by

- failing to warn class members that the investment was at risk and
- not properly explaining the risks as required by securities laws; and

(d) failed to monitor the management of the LLP after class members invested.

In *Nash v. CIBC Trust Corp.*,[75] on behalf of RRSP and non-RRSP investors in Maters Management Ltd. ("*Maters*") as of January 19th, 1990 in which Morgan Trust acted as their trustee, Dr. Lawrence Nash and seven others[76] sued the CIBC Trust Corporation for damages in breach of contract, negligence, and breach of trust. Class members invested in mortgages on various residential and commercial properties owned by Maters and related companies. After the Director of Consumer Protection froze Maters' assets and forbid them from raising further funds from investors, the defendant, previously named Morgan Trust Company of Canada ("*Morgan Trust*"), the mortgagee in trust for investors in Maters' projects, and the trustee of the RRSP Investors' RRSPs, applied to the court and obtained an order appointing a receiver.[77] The plaintiffs said there was no authorization to do that and that Morgan Trust did not act reasonably in so doing.

In *Tampa Hall Ltd. v. Canadian Imperial Bank of Commerce*,[78] on behalf of unpaid creditors who supplied materials or services to Cadillac Lumber Limited ("*Cadillac*") which were incorporated into improvements as defined by the *Construction Lien Act* and which materials or services were paid for by the recipient to the Canadian Imperial Bank of Commerce ("*CIBC*") directly or through its agents, Tampa Hall Limited sued CIBC and Ernst & Young Inc. (Trustees in Bankruptcy for Cadillac) in negligence (not inquiring as to *Construction Lien Act* trust beneficiaries) and for knowing receipt of funds in breach of trust. Cadillac was a manufacturer, wholesaler, supplier, and retailer of lumber related products. It made general lumber, plywood, particle board, etc. and also custom made stairs, trusses, trim etc. which were installed in improvements and relating to which it acted as a subcontractor. It purchased materials for its construction from suppliers who went unpaid and filed a class action after Cadillac went into bankruptcy. CIBC, Cadillac's bank, appointed KPMG as a receiver. KPMG collected unpaid accounts from Cadillac's debtors, but did not pay any of those funds to class members. The plaintiff asserted that KPMG collected those

sums as a trustee under the *Construction Lien Act* and that the funds should have gone to class members. Because Cadillac did not keep records of which suppliers' products went to which customers, it could not trace the supply of commodities and services from class members to particular projects. Since there were only five potential class members who had traceable claims and since the claims totaled $793,300.95, Haines J. found a class action to not be preferable as they could pursue claims in another way.[79]

Western Canadian Shopping Centres Inc. v. Dutton[80] involved investments in land in northern Saskatchewan through Canada's Business Immigration Program of Employment and Immigration. On behalf of holders of 231 Class "A", "E" and "F" Debentures issued by Western Canadian Shopping Centres Inc. ("*WCSC*"), whose sole shareholder was Joseph Dutton, WCSC, Muh-Min Lin, and Hoi-Wah Wu sued 22 defendants,[81] including directors, lawyers, and accountants for breach of fiduciary duty. Third party proceedings were also initiated.[82] Pursuant to various offering memoranda distributed in different locations by different agents, Investors deposited their funds with The Royal Trust Company. Claude Resources Inc. ("*Claude*") was involved in gold exploration in northern Saskatchewan. Pursuant to a May 1990 Purchase and Development Agreement, for $5.55 million, Claude sold rights to a Crown surface lease to WCSC on land adjacent to Claude's "Seabee" gold deposits. WCSC agreed to commit $16.5 million for surface improvements and for the construction of a gold mill. WCSC raised the $22.05 million by issuing Class "A" debentures to 142 of the investors. Other investors later contributed funds in exchange for Series "E" and "F" debentures, which were pooled with the Series "A" debentures in terms of priority to the underlying security for the investments. Claude leased back the land and mill for rental payments that matched the amounts that WCSC was to semi-annually pay as interest to investors. It was to make lease payments in amounts equal to the interest payments due under the debentures. Claude's failure to make the lease payments due in December of 1991 triggered the class action. The plaintiffs alleged that funds were mismanaged and misdirected and that the investment was improperly secured.

D. — Deficiencies

This category can be split between cases involving defective construction methods[83] and cases involving installations of defective goods.

(a) — methods

In *Bunn v. Ribcor Holdings Inc.*,[84] on behalf of 110 homeowners (direct and indirect purchasers), Dianne Bunn sued Ribcor Holdings Inc. ("Ribcor") and the Corporation of the Township of Scugog ("Scugog") in breach of contract, breach of statutory duty, negligence, and misrepresentation for compensatory damages of $5 million, punitive and exemplary damages of $1 million, interest, and costs. Ribcor built 95 homes in a subdivision of Port Perry. The houses were developed and sold in two stages, five years apart. In promotional materials, Ribcor said the homes would be of high quality, modern, and energy efficient. The plaintiff said the homes were not built according to the Ontario *Building Code*, and were not of a workmanlike manner, free from defects, or fit for habitation. Scugog was alleged to have not properly detected or prevented Ribcor's defective construction. Ribcor counterclaimed for slander and libel.

In *Condominium Plan No. 0020701 v. Investplan Properties Inc.*,[85] on behalf of condominium purchasers, Condominium Corporation No. 0020701 sued developers and their directors,[86] sales agents,[87] and an engineer[88] for damages[89] in fraudulent and negligent misrepresentation,[90] breach of statutory and common law duty to warn,[91] breach of fiduciary duty,[92] and negligence (against Manticore).[93] "The Residence" condominium project in Edmonton had 100 suites. Between February 24th, 1998 and March 9th, 2000, The Residence was converted from an apartment building to a condominium project. The defendants were involved in the conversion of the building and sale of the units between March 9th, 2000 and March 1st, 2003. There were construction deficiencies relating to the conversion. As Martin J. described:

> [6] . . . By way of overview, it is alleged that after control of the Corporation was turned over to the unit owners, the Board of the Corporation became aware of serious problems and deficiencies in respect of the common property. Extensive work was required to repair severe deterioration of the parkade, post-tension cables, the building envelope (including mechanical lines), parkade service de-laminations, climate control issues and fire code deficiencies.

In *Kimpton v. Canada (Attorney General)*,[94] on behalf of those who purchased or owned a building, suite, or dwelling unit in British Columbia made with frame construction between 1985 and 2000 in accordance with either the *National Building Code* ("NBC")[95] or the B.C. *Building Code* ("*BCBC*") that the province enacted as law and that developed or may develop problems resulting from the accumulation or condensation of water or vapour in exterior walls, Mary Louise Kimpton sued the provincial and federal governments and the Canada Mortgage and Housing Corporation for negligence, negligent misrepresentation, and

failure to warn. In 1990 "The Willows" condominium complex was constructed in Saanich. It suffered building envelope failure because it was constructed in compliance with the NBC's requirement that exterior walls be sealed by two vapour barriers. That requirement was unsuitable for the moist environment in British Columbia because moisture that became trapped between the barriers caused structural damage with ensuing health risks. The plaintiff said the federal government, through the National Research Council, was negligent in drafting the NBC, and that the province was negligent for adopting it by regulation and for drafting and adopting the BCBC.

(a) The B.C.C.A. held that the BCBC was "an act of lawmaking" that a Court could not review to impose civil liability:

> [63] The legislative policy decision that led to the enactment of the BCBC was intended to benefit the public. It was an act of governing. To the extent that the Province negligently governs, the voting public may impose a political consequence at an election. As stated in *A.O. Farms*, however, "Government when it legislates, even wrongly, incompetently, stupidly or misguidedly is not liable in damages."

(b) Respecting the federal government, the National Research Council was not found to be in sufficient proximity to the plaintiff.

(c) Respecting CMHC, the B.C.S.C. held that it would be against public policy to impose a warranty on the CMHC respecting the fitness of buildings that borrowers mortgaged to lenders:

> [90] Mortgage insurers like CMHC should not be subject to thousands of claims from plaintiffs who illogically rely upon the insurer's construction requirements for such an unintended purpose. The commercial ramifications of such a finding would reverberate throughout the industry to the eventual disadvantage of purchasers like Ms. Kimpton who need mortgage loan insurance in order to purchase property with a lower down payment.

In *Mackie v. Toronto (City)*,[96] on behalf of tenants who lived with mental health or cognitive disability and who formally complained of a problem concerning disrepair of their rental unit and whose complaint was not resolved within two weeks, Josephine Grey Mackie, Jean McCarthy, and Cornelia Harrison sued the city and the Toronto Community Housing Corporation ("*TCHC*") for an order requiring the defendants to repair their buildings in accordance with regulatory standards, an order under s. 24 of the *Charter*, $500 general damages for each class member, and punitive, aggravated, and exemplary damages in negligence and for breaches of the *Human Rights Code* and ss. 7 and 15 of the *Charter*. The plaintiffs tried for a decade to get TCHC to repair their buildings. Perell J. struck the action as the Landlord and Tenant Board under the *Residential Tenancies Act, 2006* had exclusive jurisdiction over the failure to repair claims and the Human Rights Commission had exclusive jurisdiction over the *Human Rights Code* and *Charter* claims.

In *McKinnon v. Martin & Moosomin (Rural Municipalities)*,[97] after $60 million had already been expended on a wind turbine project, David McKinnon sued the municipalities of Martin and Moosomin, the Red Lily Wind Energy Corp., and 7314507 Canada Inc. in nuisance and negligence for an injunction seeking to halt all construction and operation of wind turbine generators within 2000 metres of occupied homes. The plaintiff alleged that when constructed that close, wind turbine generators are associated with sleep disturbance and deprivation and resulting health risks including cardiovascular disease, increased stress, weight changes, headaches, depression, and anxiety.

In *McMillan v. Canada Mortgage & Housing Corp.*,[98] on behalf of purchasers of a "residential occupancy, unit or interest in a multiple-family, building located on the West Coast of Canada" which utilized a Face-Sealed[99] or Concealed-Barrier[100] wall assembly, incorporating Stucco Cladding,[101] a Wood Frame[102] and Air Barrier[103] and who were required or assessed to pay costs associated with repairing any such wall assembly as a result of water or moisture ingress into the wall assembly, Alan McMillan and Linda Hepner sued the Canada Mortgage and Housing Corporation ("*CMHC*") for damages in negligence, including for breach of duty to warn. After buying a condo in the Villa Positana complex in White Rock, the plaintiffs learned that there could be a problem with water leaks and moisture-related damage to the complex. They were assessed a share of repairs made by a contractor ($61,795.10). A *Report of the Commission of Inquiry into the Quality of Condominium Construction in British Columbia* by Dave Barrett, Commissioner (Victoria: Minister of Municipal Affairs, June 1998) looked into the leaky condo problem in British Columbia. CMHC investigated housing problems in Canada and learned of design and construction flaws in residential dwellings in the West Coast. Through its investigations, the CMHC knew that a sealed exterior face of the walls with an energy efficient interior design would result in the trapping of moisture inside buildings, the build-up of mold and fungi, and structural deterioration. The plaintiffs alleged that CMHC was under a duty to

(a) warn owners and prospective purchasers of that design defect and to

(b) pass on the knowledge they gained, and

(c) take reasonable steps to ensure that design was not used in the construction of west coast residences.

They claimed that CMHC breached its duties and statutory obligations and that the plaintiffs suffered damage as a result. Both the B.C.S.C. and the B.C.C.A. dismissed the claim because of no duty of care. The duties alleged were not analogous to previously recognized duties and the *CMHC Act* and *Housing Act* did not indicate that a duty of care was owed to specific homeowners, but rather to the general public.

In *Spencer v. Regina (City)*,[104] on behalf of direct and indirect purchasers of a Norlawn home[105] that was built by Carma Developers Ltd. (*"Carma"*)[106] and inspected by the city, Douglas and Judy Spencer sued the city and Carma in negligence for damages, including the cost of repairing the homes and for their loss of value. Between 1971 and 1974, Carma designed and constructed 40-50 "Norlawn" homes that the City inspected, approved, and permitted construction of. In 1985, the plaintiffs bought 10 Bird Bay and had to do major repairs to the basement walls and foundation.[107] The plaintiffs alleged that the design of the homes was deficient. Zarzeczny J. refused to certify the class action because of individual issues applicable to each class member and each home.

(b) — installations

Some of these are brought solely against manufacturers of goods that are installed, but it is not inconceivable that similar actions could be brought against builders who select the product for use in their projects. Builders may also become plaintiffs or class members, for example, by purchasing products whose price was impacted by illegal price fixing.

In *Campbell v. Flexwatt Corp.*,[108] on behalf of over 2,000 consumers living in British Columbia who installed Aztech-Flexel, Thermaflex or Flexwatt radiant ceiling heating panels ("*RCHP's*") in their homes which were subsequently ordered disconnected by the Chief Electrical Inspector for the province, Jim Campbell and Michelle Ann-Marie Isherwood sued the Flexwatt Corporation, Wintertherm Corporation, Thermaflex Limited, Aztech International Ltd., Flexel International Ltd., Adair Industries Ltd., Canadian Standards Association ("*CSA*"), the province, and ten municipalities[109] for damages in negligence and misrepresentation. CSA filed third party proceedings against 103 municipalities.[110] Some defendants manufactured and distributed RCHP's.[111] Between 1991 and 1996, there were several incidents of overheating RCHP's in the province. On November 2nd, 1993, the province's Chief Electrical Inspector issued a disconnect order for some models, on September 26th, 1994 for other models, and on November 18th and 25th, 1994 for other models. Consumers had to acquire alternate heating sources. CSA developed electrical standards which equipment had to meet before being used in B.C.

In *Chace v. Crane Canada Inc.*,[112] on behalf of persons who suffered damage from a cracked tank manufactured at Crane Canada Inc.'s B.C. Pottery Plant between specific dates, John and Ethel Chace and Yvette Houle sued Crane Canada Inc. for negligent manufacture of toilet tanks for water damage done to their homes. Crane observed a significantly higher than normal rate of cracks and fractures in toilet tanks manufactured during an eight year period until the plant was shut down and the kiln rebuilt. After the plant was reopened, the failure rate dropped to normal levels. Crane said it took reasonable steps to try to find the cause once the problem came to its attention. There was no evidence of problems with tanks after the kiln was rebuilt in late 1990.

In *Chadha v. Bayer Inc.*,[113] Avinder Chadha and Renu Chadha sued Bayer Inc. and Bayer Corporation under the *Competition Act*, R.S.C. 1985, c. C-34, in civil conspiracy, and for infliction of economic injury by unlawful means. The amount of damages sought was about $70-112 on a $150,000 home. The plaintiff asserted that the defendants conspired to fix the price of iron oxide pigment or black pigment that was used to colour various construction materials.

In *Crawford v. London*,[114] on behalf of current and former owners of approximately 999 condominium units through six condominium corporations, Thelma Crawford sued the City of London for special damages for the cost of converting fireplaces from wood to gas and general damages for fear and anxiety, loss of use of wood burning fireplaces, loss of time and opportunity, and diminution of property value. The City then brought the project architects and engineers[115] into the litigation. The plaintiff claimed that the City approved the building plans, but after the condos were constructed, determined that the wood burning fireplaces in each unit as installed were a fire hazard. They were subsequently replaced by gas insert fireplaces that cost $4,000 each. Gillese J. allowed the action to be brought as a class action, and rejected the notion that it had to be brought as a

representative action by the condominium corporations for unit owners.

In *Denis v. Bertrand & Frere Construction Co.*,[116] on behalf of 176 class members, which included 69 "Category 1" claimants,[117] whose homes had serious foundation problems caused by defective concrete foundations that deteriorated because it contained "fly ash" instead of cement powder, in two actions, Jean Marie Denis and seven other homeowners sued Bertrand & Frere Construction Company Limited ("*Bertrand*"), Lafarge Canada Inc. ("*Lafarge*"), The Bank of Nova Scotia and Scotia Mortgage Corporation, Charlebois & Dubuc Associés Ltée ("*Charlebois*"),[118] and R. & G. Lapensée Formwork Vankleek Hill Inc. in one action and Bertrand, Raymond Bertrand, Lafarge, and Charlebois in another action for damages. Bertrand manufactured defective ready mix concrete that caused foundations in homes to deteriorate. Lafarge marketed the concrete. The homeowners sued in May of 1999 although the homes were built from 1986 to 1988 between Rockland and Hawkesbury, Ontario. Leading to trial, the Court ordered that the defendants pay the plaintiffs $855,000 in interim disbursements. After a trial of Category 1 test cases, the plaintiffs successfully recovered approximately $250,000 per home as the cost to repair foundations and to add brick, engineering fees, moving and relocation expenses, accommodation for two months while the repairs were made, contingency,[119] hardship and inconvenience,[120] and pre-judgment interest.[121] Since this class action went to trial, it has set a standard respecting the type and quantum of loss that class members may recover for.

In *Ducharme v. Solarium de Paris Inc.*,[122] on behalf of Ontario residents who purchased a solarium designed and manufactured by the defendant and sold in Ontario through the defendant's franchisees, Doris Ducharme sued Solarium de Paris inc. in negligence, and for unfair trade practices under the *Business Practices Act*, R.S.O. 1990 c. B18 and its successor the *Consumer Protection Act*, S.O. 2002 c. 30. The plaintiff purchased a solarium model 1221 and in August of 2005, installed it in her home. The plaintiff did not apply for a building permit. The Town of Renfrew later refused to grant a permit because the solarium did not meet the structural requirements of the Ontario *Building Code*. The solarium was not designed to withstand the weight of snow. The City ordered the plaintiff to redesign or remove the solarium, which she did for $17,949.23.

In *Gariepy v. Shell Oil Co.*,[123] on behalf of owners of 700,000 homes that had polybutylene plumbing systems, five individuals sued three manufacturers for damages caused by negligent manufacture and supply of acetal or polybutylene resin pellets that were in turn used by others to make polybutylene plumbing pipes and acetal insert fittings. Because of the resin, plumbing pipes cracked and leaked.

In *Hughes v. Sunbeam Corp. (Canada) Ltd.*,[124] on behalf of those who purchased various brands and models of ionization smoke alarms, Trevor Hughes sued manufacturers and testers for the cost of the alarms (approx. $20) and the cost to install a replacement. A component used in the ionization alarms could not detect smoke from smouldering fires. He asserted that the smoke alarms were negligently designed, researched, constructed, developed, and tested.

In *Olsen v. Behr Process Corp.*,[125] Leonard Olsen, Paul Dennis, and Linda Dennis sued Behr Process Corporation and Behr Process Canada Ltd. for damages in negligence, breach of warranty, and breaches of the *Trade Practice Act*, R.S.B.C. 1996, c. 457 and the *Competition Act*, *supra*. The defendants manufactured liquid chemical wood coatings that they sold as "Natural Seal Plus" and "Super Liquid Raw Hide". The products did not protect wood surfaces to which they were applied, and they promoted mildew, growth, discoloration, and degradation of wood fibre. The products caused irreparable harm to the plaintiffs' homes and it was not financially feasible to either replace or repair the damaged wood.

In *Toronto Community Housing Corporation v. Thyssenkrupp Elevator (Canada)*,[126] on behalf of owners of traction elevators in Ontario who were required to replace sheave jammers following the issuance of a 2006 order from the Ontario Technical Standards and Safety Authority, the Toronto Community Housing Corporation and Housing Services Incorporated sued Thyssenkrupp Elevator[127] for the cost of replacing "sheave jammers" (about $12,000 per jammer).

E. — Business Interruption

This category involves large scale construction that causes commercial disruption.

In *Curactive Organic Skin Care Ltd. v. Ontario*,[128] on behalf of businesses located on St. Clair Avenue West[129] in Toronto, Curactive Organic Skin Care Ltd. sued the province, the city, and the Toronto Transit Commission for damages in negligence, gross negligence, nuisance,[130] and abuse of power. The city and the TTC began to replace the subway with a light rail transit system, and in the process, also undertook construction of an enhanced streetscape, the upgrading of water and natural gas mains, and the burial of hydro wires along St. Clair West. However, the project initially stalled because there was public resistance to the project and because public consultation was poor. The provincial Ministry of the Environment insisted on

further consultation with the public. The TTC and the City prematurely and carelessly recommenced construction as public debate about the project continued. The project was not properly supervised, and it was mismanaged and uncoordinated. The contracting and subcontracting process was badly mishandled. There was confusion and there were cost overruns and substantial delays and ongoing disruptions of access to and from the affected community. More than 200 businesses failed during the delayed construction. Notwithstanding the various categories of loss claimed,[131] the court dismissed the action as it was a claim for "injurious affection", which had to be brought under the *Expropriations Act*.

In *Gautam v. Canada Line Rapid Transit Inc.*,[132] on behalf of 62 persons who owned property in Cambie Village, and 215 persons who operated a business from leased premises therein, Gary Gautam, 557856 B.C. Ltd., and George and Jane King sued the Canada Line Rapid Transit Inc., Intransit BC Limited Partnership, Intransit British Columbia G.P. Ltd., and SNC-Lavalin Inc. in nuisance and waiver of tort, and for injurious affection. The defendants were involved in building the Canada Line rapid transit system that connected Vancouver with Richmond and the Vancouver International Airport. At issue was whether the defendants were wrong to use the "cut and cover" rather than the "bored tunnel" method of construction. "Cut and cover" construction involved digging a trench, installing a tunnel in the trench, backfilling the trench, and restoring the street surface. It caused disruption of vehicle and pedestrian traffic in a way that the "bored tunnel" method would not have.

F. — Incomplete Condominiums

In *Cheung v. Kings Land Developments Inc.*,[133] on behalf of 273 purchasers of 251 condominium units in the "The World Centre" in Richmond Hill, which was never built, Bernard K. Cheung and Ben Wing Pun Mok sued the Kings Land defendants,[134] the law firm that held the deposits in trust,[135] real estate agents,[136] and Living Realty Inc. for return of deposits, punitive damages, and general damages. The law firm, real estate agency, and Kings used the $10,894,104 to pay their fees and costs. Cumming J. certified common issues including whether Kings breached the agreements of purchase and sale and whether the deposits were contractually required to be repaid to the class members. The Kings Land defendants consented to certification, but a plaintiff in an individual action opposed it.

Lau v. Bayview Landmark Inc.[137] was a similar class action involving the same defendants and similar agreements and a condominium complex in Richmond Hill. Charmaine Siu Man Lau and Peter Kong sued a developer and its principals,[138] a lawyer and his firm,[139] and the real estate firm[140] that marketed the development for recovery of deposits and damages in tort and for breach of trust and participation in breach of trust.[141] The developer presold units pursuant to a standard form Agreement of Purchase and Sale under which deposits were to be returned if the project was not completed. Class members paid deposits to a law firm in trust. The law firm released the monies to the developer. The developer used some of the funds to buy the land on which the project was to be built and "dissipated" the remaining funds to pay "the costs of sales, marketing and legal fees".

In *Holmes v. Jastek Master Builder*,[142] on behalf of approximately 37 purchasers of unbuilt condominium units at 103 Wellman Crescent in Saskatoon, Michael Holmes and Joseph Bichel sued a developer ("*Jastek*") and its principal,[143] and the principal's brother and his development company ("*GDP*")[144] in breach of contract,[145] inducing breach of contract, negligent misrepresentation, conspiracy,[146] and breach of fiduciary duty. Class members purchased units from Jastek. After Jastek submitted its building permit application to the city, Saskatoon property prices dramatically rose. Jastek informed class members that it would not proceed with construction. Shortly thereafter, GDP filed building permit applications with the city on the same land.

G. — Toxic Exposure

This category of case bridges environmental class actions with construction class actions. Examples involving construction activities are included here.

In *DeFazio v. Ontario (Ministry of Labor)*,[147] on behalf of everyone who accessed the Sheppard Station or were exposed to others who did, Frank and Assunta Defazio and Mike Cramarossa sued the province, the Toronto Transit Commission, and Pinchin Environmental Consultants Ltd. for damages for lost income, stress and anxiety, fear of disease, physical illness, and for exemplary and punitive damages. The plaintiffs claimed they were exposed to asbestos during construction of the Sheppard-Yonge subway station.

In *MacDonald v. Dufferin-Peel Catholic District School Board*,[148] on behalf of 22,000 students, Paula MacDonald, on her own behalf and as litigation guardian of her daughter, and Philip MacDonald sued the Dufferin-Peel Catholic District School Board in negligence and nuisance. The school board initiated third party proceedings against suppliers, contractors and an architect.[149]

The plaintiff alleged that the defendant's 1,000 portable classrooms became contaminated by mold which made students ill, and that the school board constructed facilities that allowed amplification of mold and that prolonged the students' exposure to mold. The plaintiffs said that the defendant knew about the presence of mold but failed to remove it, test for it, and provide proper ventilation. The school board brought in third parties on the basis that, if amplified mold was present in any of its schools, it was caused by their negligence.

H. — Remarks

Many in business believe that class actions — bringing multiple plaintiffs together in a conjoined attack on a defendant — are a misdirected concept that inappropriately hurts enterprise. Regardless of one's philosophical outlook, the reality is that class actions have upped the stakes in construction litigation. Class actions, by making cases that were previously uneconomical as individual actions financially viable for plaintiffs and their lawyers, have changed the legal landscape for business in general and the construction industry in particular.

The foregoing cases demonstrate the types of risks to those in the construction industry by the very nature of the litigation. Conceivably, everyone who wears a hard hat, carries a clipboard, or even drives by a construction site could be brought into a multi-party class action. Participants in the construction industry would be well advised to keep records, be insured, and to price the potential costs of litigation into bidding.

Footnotes

* *E.F. Anthony Merchant, Q.C.* (J.D., U. Sask., 1967), is a founding and current partner of Merchant Law Group LLP. He is a member of The Law Societies of Saskatchewan, Alberta, and British Columbia and the State Bar of Arizona. *Casey R. Churko* (J.D., U. Sask., 2004), is an associate at Merchant Law Group LLP. He is a member of the Law Society of Saskatchewan.

1 This paper excludes cases from Quebec, which has a civil law not common law tradition.

2 Governments are regularly brought in, though they are often struck owing to the existence of other statutory procedures and remedies that take away a civil court's jurisdiction to entertain a class action involving matters that should be pursued pursuant to the administrative schemes before regulatory boards.

3 At para. 82 of *McDougall v. Collinson*, 2000 BCSC 398 (B.C. S.C.), Smith J. described the defendants' argument that "the numerous defendants in this action reflects a 'deep pockets' approach to litigation that may force settlements because of the very substantial legal costs that will be incurred by them."

4 The certification criteria include: (a) a cause of action; (b) an identifiable class; (c) common issues; (d) preferable procedure; (e) adequacy of representation.

5 *Cooper v. Hobart* (1999), 68 B.C.L.R. (3d) 293 (B.C. S.C.): ("[55] It is my opinion that the third party proceedings should be stayed until the conclusion of the trial of the common issues").

6 *Bunn v. Ribcor Holdings Inc.* (1998), 38 C.L.R. (2d) 291 (Ont. Gen. Div.), ¶48.

7 *Controltech Engineering Inc. v. Ontario Hydro* (1998), 72 O.T.C. 351 (Ont. Gen. Div.) (certification dismissed); (2000), 130 O.A.C. 367 (Ont. Div. Ct.) (appeal of certification denial dismissed).

8 William Farlinger, O. Allan Kupcis, John Fox, J. Roderick, and John Doe et al.

9 A defendant may be liable for punitive damages for conduct that is harsh, vindictive, reprehensible or malicious: *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085.

10 He cited para. 12 from the statement of claim: ("12. . . . Through misrepresentations and other inducements by Hydro, the Plaintiffs were convinced to spend substantial sums of money, and to forego other business opportunities, to compete for contracts to supply such renewable electricity. Through 1995 and 1996 Hydro continued to use misrepresentations and inducements to cause the Plaintiffs to continue in the RETs Competition at considerable incremental and ongoing cost and loss. . . . ").

11 *Abdool v. Anaheim Management Ltd.* (1993), 15 O.R. (3d) 39 (Ont. Gen. Div.) (certification dismissed); (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.) (appeal of certification denial dismissed).

12 Anaheim Management Ltd. and Anaheim Properties (Ontario) Limited.

13 Goldman Sloan, Nash & Haber (solicitors for Anaheim).

14 Deloitte & Touche (reviewed financial forecasts for project prepared by Anaheim).

15 Toronto Dominion Bank (assignees of debt instruments) and Adelaide Capital Corporation (assignees of debt instruments).

16 Martin Capital Group Inc. and RLM Investments Incorporated.

17 *Bosworth v. Jurock*, 2011 BCSC 1583 (B.C. S.C.); 2013 BCCA 4 (B.C. C.A.) (certification upheld).

18 *Haddad v. Kaitlin Group Ltd.*, 2008 CarswellOnt 7627 (Ont. S.C.J.) (conditional certification); *Haddad v. Kaitlin Group Ltd.*, 2012 ONSC 4515 (Ont. S.C.J.) (limitation period).

19 The Kaitlin Group Ltd. (sold the lands), 1138337 Ontario Inc. (owned the lands), and CCCC Durham West Ltd. (purchased the lands from 1138337 and resold them).

20 Class members had to pay $20 a month for access to the clubhouse.

21 *Lee v. Georgia Properties Partnership*, 2012 BCSC 1484 (B.C. S.C.).

22 *Lewis v. Cantertrot Investments Ltd.* (2005), 24 C.P.C. (6th) 40 (Ont. S.C.J.) (certification); (2006), 24 C.P.C. (6th) 49 (Ont. S.C.J.) (litigation plan approved); 2006 CarswellOnt 2737 (Ont. S.C.J.) (certification); (2006), 29 C.P.C. (6th) 352 (Ont. S.C.J.) ($30,000 fees + $16,506.51 disbursements to P); 2006 CarswellOnt 8009 (Ont. Div. Ct.); 2007 CarswellOnt 9033 (Ont. Master); 2007 CarswellOnt 7330 (Ont. S.C.J.) (implied undertaking re examination transcripts published to P counsel's website); 2008 CarswellOnt 1202 (Ont. Master); 2010 CarswellOnt 7811 (Ont. S.C.J.); 2011 CarswellOnt 2919 (Ont. S.C.J.).

23 Cantertrot Investments Limited. The plaintiff also named Sandor Hofstedter, Mark Samuel Mandelbaum, George Hofstedter, Larry Froom, and Alex Lewin who were officers or directors or both of Cantertrot.

24 H&R Property Management Inc. and Stanley Cappe (employee and general manager of H&R).

25 The oppression was based on the fact that the defendants had deliberately divested Cantertrot of its assets with knowledge of its potential liability to make it judgment proof.

26 The monthly assessments and maintenance fees included security, electricity, and natural gas.

27 *Peppiatt v. Nicol* (1993), 20 C.P.C. (3d) 272 (Ont. Gen. Div.); (1996), 44 C.P.C. (3d) 8 (Ont. Gen. Div.) (for decertification); 1997 CarswellOnt 5087 (Ont. Gen. Div.) (various motions); (1998), 71 O.T.C. 321 (Ont. Gen. Div.) (common issues trial - class won); (2001), 148 O.A.C. 105 (Ont. C.A.); (2001), 20 C.P.C. (5th) 290 (Ont. S.C.J.) (distribution of judgment proceeds).

28 The memberships cost $20,000, $25,000, and $28,000 at different times.

29 R.J. Nicol, Robert John Nicol in trust, Coopers & Lybrand Limited Trustee of the Estate of R.J. Nicol Homes Limited a bankrupt, R.J. Nicol Management Limited.

30 Punitive damages were given for $5,000 for each of 169 investors.

31 *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2005 BCSC 232 (B.C. S.C.) (certification granted); 2005 BCSC 681 (B.C. S.C.) (terms of certification); 2005 BCSC 896 (B.C. S.C.) (additional certification discussion); 2006 BCCA 96 (B.C. C.A.) (certification upheld); 2007 BCSC 1262 (B.C. S.C.) (common issues trial - class won); 2008 BCSC 245 (B.C. S.C.) (common issues order terms); 2008 BCSC 442 (B.C. S.C.) (to certify remedial common issues / document production); 2008 BCCA 387 (B.C. C.A. [In Chambers]) and 2008 BCCA 250 (B.C. C.A.) (to strike factum); (2009), 57 B.L.R. (4th) 1 (B.C. C.A.) and [2011] 2 S.C.R. 175 (common issues appeal - class lost).

32 Formerly known as HMS Hospitality Management Services Ltd. ("HMS").

33 MM&R did business as HVS International-Canada, whom the plaintiff also named as a defendant. MM&R issued a third party notice

against HMS, VAC, and Larco Enterprises Inc.

34 *Stachniak v. Jurock*, 2012 BCSC 601 (B.C. S.C.).

35 Standard Apartments Ltd., Proper Tee Investments Ltd., and Greenwich Holdings Ltd.

36 Carson Street Developments Ltd. (marketing directly or through Parkview Ventures Ltd.).

37 AMG Investments Ltd. and Worldwide Referrals Realty Inc.

38 Oswald Jurock, David Barnes, and Ralph Case.

39 *Collette v. Great Pacific Management Co.* (2001), 86 B.C.L.R. (3d) 92 (B.C. S.C. [In Chambers]) (certification dismissed); 2002 BCCA 195 (B.C. C.A.) (certification remanded); 2003 BCSC 332 (B.C. S.C.) (certification dismissed); 2004 BCCA 110 (B.C. C.A.) (certification allowed); (2004), 333 N.R. 393 (note) (S.C.C.) (leave to appeal certification denied); (2005), 11 C.P.C. (6th) 293 (B.C. S.C. [In Chambers]) (for trial without jury); 2005 BCSC 1749 (B.C. S.C.) (decertification denied); 2006 BCSC 820 (B.C. S.C.) (directions re admissibility of evidence).

40 Great Pacific Management Co. Ltd. (*"Great Pacific"*) and Sector Financial Services Ltd. and Sector Securities Inc. (*"Sector"*). 621 Great Pacific clients bought Parksville units. 96 Sector clients bought Parksville units.

41 Norman Hill Realty Inc. The plaintiff also named Helen Gorender, an employee of Norman Hill.

42 *Cooper v. Hobart*, 1998 CarswellBC 3251 (B.C. Master) (document production); 1998 CarswellBC 3208 (B.C. S.C. [In Chambers]) (document production); 1999 CarswellBC 857 (B.C. C.A. [In Chambers]) (document production); (1999), 68 B.C.L.R. (3d) 274 (B.C. S.C.) (certification dismissed); 1999 CarswellBC 807 (B.C. S.C.) (third party kept in); (1999), 68 B.C.L.R. (3d) 293 (B.C. S.C.) (certification granted / third party proceedings stayed); 75 B.C.L.R. (3d) 54 (B.C. C.A.) (no duty of care); (2000), 261 N.R. 391 (note) (S.C.C.); [2001] 3 S.C.R. 537 (no duty of care).

43 Brian William Slobogian, Onalee Robin Slobogian, Frank Biller, Michelle Marie Biller, Eron Mortgage Corporation, Eron Financial Services, Eron Investment Corporation, Eron Investment (#2) Corporation, 543219 B.C. Ltd., 509994 B.C. Ltd., 509097 B.C. Ltd., 496622 B.C. Ltd., 534170 B.C. Ltd., Rocke Wightman, Alan Samuel McLean, Curtis William Lehner, Kevin Robert Brown, Young Robert Lee, Trevor Slobogian, Lance Lindsay Coulson, Kerry Kristopher Wade Nagy, Ken Robert Jenkins, Debra Lyn Gallie, Gordon Douglas Carter, Garry Robert Dukelow, Renate Morell, Russell Jennings, Douglas Frederick Jackie (Eron's lawyer), David Nairne, Ian Wragge.

44 *Elms v. Laurentian Bank of Canada* (2000), 73 B.C.L.R. (3d) 366 (B.C. S.C. [In Chambers]); 2000 BCSC 796 (B.C. S.C.) (no claim for punitive damages); (2001), 5 C.P.C. (5th) 201 (B.C. C.A.); (2002), 97 B.C.L.R. (3d) 146 (B.C. S.C.) (bankruptcy order. law firm wanted to issue third party notices despite stay of proceedings); 2002 BCSC 1726 (B.C. S.C.); (2004), 35 B.C.L.R. (4th) 373 (B.C. S.C.) (a common issues trial on the merits against law firm); (2006), 51 B.C.L.R. (4th) 1 (B.C. C.A.) (no success against law firm).

45 *Gary Jackson Holdings Ltd. v. Eden* (2009), 84 C.P.C. (6th) 162 (B.C. S.C.) (preservation order); 2010 BCSC 273 (B.S. S.C.) (certification dismissed).

46 William J. Eden, 0740783 B.C. Ltd., 0722051 B.C. Ltd., W.J.E. Consultants Ltd., W.J.E. Management Corporation, 1029809 Alberta Ltd., 1039289 Alberta Ltd., 1143694 Alberta Ltd., 0755637 B.C. Ltd., 1263925 Alberta Ltd., 0791404 B.C. Ltd., 1305686 Alberta Ltd., 1188716 Alberta Ltd.

47 Bancorp Financial Services Inc. and Bancorp Growth Mortgage Fund Ltd.

48 *Gillespie v. Gessert* (2006), 32 C.P.C. (6th) 319 (Alta. Q.B. [In Chambers]) (certification dismissed).

49 Creative Timber Log Homes Inc ("*Creative*").

50 Windrose Mortgage Corporation.

51 Canadian Western Trust Company ("*CWT*").

52 Concentra Financial Services Association, formerly the Co-Operative Trust Company of Canada.

53 Olympia Trust Company.

54 David D. Knight.

55 In *Gillespie v. Gessert*, see note 48, *supra*. ("[11] Ms. Gillespie appears to have understood from the beginning of her investment that the first mortgage granted to Windrose was not intended to be conventional security, but rather was a vehicle to be used to take money from her R.R.S.P. and send it offshore to be invested away from the prying eyes of Canada Customs and Revenue Agency, hereinafter referred to as 'R.A.' There is sufficient evidence . . . to raise serious issues about Gillespie's knowing participation in a scheme to get access to her R.R.S.P. funds for investment in non-qualifying investments, all the while making it appear that the funds were invested in qualifying arm's-length Canadian mortgages. "[49] . . . Liability, in this case, needs to be analysed on an investor-by-investor basis due to the uncontradicted evidence of Gillespie arising out of her cross-examination that something more than a straight-forward mortgage investment was being made.").

56 Brian Stoutenburg, Herb DeMars, Orest Rusnak, and Academy Financial Planners and Consultants Inc. also marketed and sold the investment.

57 Creative, Windrose, Frank Dieter Posselt, Julia Chaulifoux, and Craig Knapp.

58 *Jin v. Canada Everich Real Estate Group Inc.*, 2011 ABQB 524 (A.B. Q.B.) (certification granted).

59 Jang Cheung Lee Chu Law Corporation and C.H. William Cheung

60 *McDougall v. Collinson*, 2000 BCSC 398 (B.C. S.C.) (certification denied).

61 Six projects at Vernon, Kelowna, and Castlegar: Imperial Ridge (44 condo building); Heritage Hill (30 walk-up condos); Erinmoore (21 luxury townhouses); Westbank (66 condo building).

62 William Edward Collinson and Kenneth Umbarger (*"Promoters"*). The Promoters controlled the IMF Group. Umbarger acted as a mortgage broker as a principal of Dominion. Collinson co-owned Metro.

63 Imperial Capital Corporation (*"ICC"*).

64 Imperial Mortgage Fund Inc.; R 218 Enterprises Ltd.; Imperial Mortgage Fund (3) Inc.; Imperial Mortgage Fund (4). (*"IMF Group"*)

65 Dominion Mortgage Corporation (*"Dominion"*); Metro-Sunlake Projects Ltd. (*"Metro"*) — construction and management contractor for Vernon and Kelowna projects; Kenway Industries Ltd. (*"Kenway"*) — general contractor for Castlegar, related to Umbarger; Woodway Holdings Ltd. (*"Woodway"*); El Rancho Vista Farms Ltd. (*"El Ranco"*) — related to Collinson, sold its interest in the Westbank lands to IMF3 Co.; Sunlake Industries Ltd. — co-owned Metro with Collinson; Rancher Investments Corp.; Vancorp Development Ltd. (*"Vancorp"*) — co-partner with ICC in the Heritage Hill and Erinmoore projects; John Stringer; and Messer, Stringer & Company.

66 The agreements included: offering memoranda; subscription agreement; mortgage and agreement of nominee ownership; security agreement; nominee agreement; interest agreement; service agreement; construction agreement with the promoters' related companies.

67 Dominion Depository Agency Inc. (*"DDAI"*) acted as nominee for three of the mortgages. Valley First Credit Union was nominee for the fourth, but was later replaced by DDAI.

68 Against Valley First Credit Union (the original fourth nominee) and against Gus Faller, Linda Piddocke, John Huber, Chris Jaegli, Hugh Jensen, and Sheila Golley (*"McDougall Group"*).

69 The analysis was made one year before the Supreme Court of Canada decided in *Hollick v Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 that evidence need not be introduced on the cause of action analysis and that there were to be no assessments of the merits of the claim.

70 *Metera v. Financial Planning Group* (2002), 29 C.P.C. (5th) 153 (Alta. Q.B.) (service); (2003), 36 C.P.C. (5th) 284 (Alta. Q.B.) (certification allowed); 2003 ABQB 884 (Alta. Q.B.) (for stay pending appeal).

71 The plan was to purchase an apartment complex in Las Vegas and resell it at a profit.

72 Edmund Metera, Uldis Delveris, Sam Rigakis, and Harold Dunads.

73 The Financial Planning Group was a trade name.

74 The Assante Corporation was the parent of other defendants including Assante Capital Management Ltd. and Assante Financial Management Ltd., who acquired the business of DPM Securities Inc. and The Height of Excellence Management Ltd., who were involved in the initial sale of the units.

75 *Nash v. CIBC Trust Corp.*, 1996 CarswellOnt 72 (Ont. C.A.); (1996), 7 C.P.C. (4th) 263 (Ont. Gen. Div.) (post-certification issues); (1996), 206 N.R. 72 (note) (S.C.C.); (1996), 7 C.P.C. (4th) 260 (Ont. Gen. Div.) (summary judgment for D); (1997), 69 A.C.W.S. (3d) 1102 (Ont. C.A.) (appeal of summary judgment dismissed); (1997), 109 O.A.C. 200 (note) (S.C.C.); 1999 CarswellOnt 553 (Ont. C.A.) (*res judicata* appeal dismissal).

76 Ashak Rustom, Dennis Proudlove, Dr. John Kwak, Robert Bond, Joe Pacsuta, Dr. Donald R. Johnson, and Margaret Johnson.

77 As Ground J. explained in (1996), 7 C.P.C. (4th) 260 (Ont. Gen. Div.): (”[31] . . . an action founded on the commencement of, or success in, a legal proceeding will not be allowed and that the only exception to such principle is where the original proceeding has been resolved in favour of the plaintiff, the original proceeding was commenced without reasonable and probable cause and was motivated by fraud, malice or bad faith and the plaintiff has suffered damage which the law will recognize from the initiation of the earlier proceeding or a judgment obtained in the earlier proceeding which has subsequently been set aside as fraudulently obtained.”).

78 *Tampa Hall Ltd. v. Canadian Imperial Bank of Commerce* (1998), 37 C.L.R. (2d) 274 (Ont. Gen. Div.) (certification dismissed).

79 He applied the standard of whether a class action was necessary rather than preferable, and that is likely an approach that is wrong at law.

80 *Western Canadian Shopping Centres Inc. v. Dutton* (1996), 41 Alta. L.R. (3d) 412 (Alta. Q.B.) (”certification” allowed); (1998), 30 C.P.C. (4th) 1 (Alta. C.A.); (1999), 252 N.R. 195 (note) (S.C.C.) (”certification” upheld); 2000 CarswellAlta 1384 (S.C.C.) (”certification” upheld); [2001] 2 S.C.R. 534 (”certification” upheld); (2003), 338 A.R. 124 (Alta. Q.B.) (security for costs).

81 Joseph Dutton, Bennett Jones Verchere, J.M.D. Management Ltd., Garnet Schulhauser, Arthur Anderson & Co., E.A. Schiller and Associates Ltd., Cominco Engineering Services Ltd., A.C.A. Howe International Limited, Ernst & Young, Alan Lundell, The Royal Trust Company (escrow agent), William Wiese, Claude Resources Inc., William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billingsley, John A. Keily, Peter K. Gummer, James B. Engdahl, Donald O. MacKenzie, and Jon R. MacNeill.

82 Joseph Dutton, Bennett Jones Verchere, J.M.D. Management Ltd., Garnet Schulhauser, Arthur Anderson & Co., E.A. Schiller and Associates Ltd., Cominco Engineering Services Ltd., A.C.A. Howe International Limited, Ernst & Young, Alan Lundell, The Royal Trust Company, William Wiese, Claude Resources Inc., William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billingsley, John A. Keily, Peter K. Gummer, James B. Engdahl, Ronald O. MacKenzie, Jon R. MacNeill, Western Canadian Shopping Centres Inc.

83 Generally, either construction or installation was *not according to code* or was *according to code* but the code itself was bad.

84 *Bunn v. Ribcor Holdings Inc.* (1998), 20 C.P.C. (4th) 145 (Ont. Gen. Div.) (venue); (1998), 38 C.L.R. (2d) 291 (Ont. Gen. Div.) (certification granted).

85 *Condominium Plan No. 0020701 v. Investplan Properties Inc.* (2006), 25 C.P.C. (6th) 327 (Alta. Q.B.) (certification granted); 2007 ABQB 774 (Alta. Q.B.) (document production); 2009 CarswellAlta 2332 (Alta. Q.B.) (third party claim); and 2010 ABCA 267 (Alta. C.A.) (third party claim).

86 Investplan Properties Inc., 852167 Alberta Ltd., 759826 Alberta Ltd., Michael Nugent, Michael Whitehead, Gary W. Grab, Gary Hartwell, Kari Thompson, Brian Lester, and John Doe 1 to 5.

87 Butler Cabin Capital Corporation and John Doe 6 to 12.

88 Manticore Engineering Ltd. (A third party claim against other engineers was dismissed by summary judgment).

89 For the costs of repair and replacements, including for hidden defects and undeclared deficiencies, and enough to properly fund the reserve fund and to cover unpaid condominium fees and other costs to the Corporation.

90 In respect of the following alleged statements: that each suite had been extensively renovated; that the exterior and common area of the building had undergone a complete renovation; that the returns from investing in The Residence would be 17%; that comprehensive engineering, reserve fund and environmental studies had been conducted to ensure the integrity of the project; and that the cash flow projections accurately and completely assessed the needs of The Residence in the future.

91 Failure to warn purchasers of problems with The Residence, including repairs to the post-tension system.

92 Failure to hold in trust monies needed to effect repairs and restorations to the common property.

93 Manticore completed the reserve fund study as if the repairs and restorations were complete, in breach of proper engineering standards and practices and it failed to advise in the post tension review of the severe deterioration of the post-tension system.

94 *Kimpton v. Canada (Attorney General)* (2002), 14 C.P.C. (5th) 168 (B.C. S.C.); (2002), 9 B.C.L.R. (th) 139 (B.C. S.C.) (no duty of care); (2004), 23 B.C.L.R. (th) 249 (B.C. C.A.) (no duty of care).

95 In *Kimpton v. Canada (Attorney General)* (2002), 9 B.C.L.R. (4th) 139 (B.C. S.C.): (”[67] . . . The NBC, sometimes referred to as the Model Code, is not a legislative enactment and, in fact, has no legal status unless adopted or adapted by a jurisdiction having authority, such as the Province. The National Research Council (the “Council”) is the body responsible for the development of the NBC. . . . “).

96 *Mackie v. Toronto (City)*, 2010 ONSC 3801 (Ont. S.C.J.) (subject matter jurisdiction).

97 *McKinnon v. Martin & Moosomin (Rural Municipalities)*, 2010 SKQB 374 (Sask. Q.B.) (interlocutory injunction denied); 2011 SKQB 313 (Sask. Q.B.) (costs against P of $4,500); *McKinnon v. Martin & Moosomin (Rural Municipalities)* (2012), 2012 SKQB 58 (Sask. Q.B.) (*ex parte* injunction damages).

98 *McMillan v. Canada Mortgage & Housing Corp.* (2007), 75 B.C.L.R. (4th) 359 (B.C. S.C.) (certification denied because no duty of care.); 86 B.C.L.R. (4th) 273 (B.C. C.A.) (upholding duty of care analysis.); 2009 CarswellBC 1126 (S.C.C.) (refuse leave to appeal duty of care analysis).

99 ”Face-Sealed” refers to a design strategy for rain penetration control that relies on the exterior layer (the wall cladding) of the building envelope assembly to resist all rain penetration.

100 ”Concealed-Barrier” refers to a design strategy for rain penetration control where a sheathing membrane located on the interior of the exterior surface of the wall cladding provides a barrier to resist the penetration of rain water further into the assembly.

101 ”Stucco Cladding” refers to a layer or layers of stucco and related materials or components of a building envelope assembly that constitute the outermost surface of the wall assembly such that it is fully exposed to the exterior environment.

102 ”Wood Frame” refers to a wall, the structural components of which are comprised mainly of wood.

103 ”Air Barrier” refers to one or more layers of materials and components that together control the flow of air across layers of a wall assembly for the purpose of limiting the potential for heat loss / gain, and interstitial water vapour transfer and condensation, due to air movement.

104 *Spencer v. Regina (City)* (2003), 31 C.P.C. (5th) 293 (Sask. Q.B.) (certification denied); 2003 SKQB 109a (Sask. Q.B.) (costs).

105 Evidence filed at the hearing indicated that Carma built 40-50 Norlawn homes in Saskatchewan between 1971-74.

106 Formerly Cairns Homes Limited and related companies.

107 If there was a common complaint or harm amongst class members, it was not made clear in the written reasons.

108 *Campbell v. Flexwatt Corp.* (1996), 50 C.P.C. (3d) 290 (B.C. S.C.) (certification granted); (1996) (B.C. S.C.) (third parties); (1997), 35 B.C.L.R. (3d) 404 (B.C. S.C.) (documentary disclosure); (1997), 15 C.P.C. (4th) 1 (B.C. C.A.) (certification upheld); (1998), [1998] B.C.J. No. 418 (B.C. C.A.) (costs); (1998) (S.C.C.) (leave to appeal certification denied); (1998), 62 B.C.L.R. (3d) 11 (B.C. S.C.) (extend class member registration).

109 City of Vancouver, Municipality of West Vancouver, City of Victoria, City of North Vancouver, District of North Vancouver, City

of Burnaby, Corporation of the City of New Westminster, District of Maple Ridge, City of Surrey, and the Corporation of Delta.

110 The third party proceedings were stayed until the common issues involving the manufacturers and CSA were determined.

111 Flexwatt Corporation made panels in Massachuesetts and distributed them in B.C. through various companies including Wintertherm Corporation. Aztech-Flexel made Thermaflex panels in Scotland and distributed them in B.C. through Aztech International and Adair Industries Ltd.

112 *Chace v. Crane Canada Inc.* (1996), 26 B.C.L.R. (3d) 339 (B.C. S.C.) (certification allowed); (1997), 44 B.C.L.R. (3d) 264 (B.C. C.A.) (certification upheld).

113 *Chadha v. Bayer Inc.* (1998), 82 C.P.R. (3d) 202 (Ont. S.C.J.) (pleadings); (1999), 36 C.P.C. (4th) 188 (Ont. S.C.J.) (certification granted); (1999), 43 C.P.C. (4th) 91 (Ont. S.C.J.) (certification notice); (1999), 45 O.R. (3d) 478 (Ont. S.C.J.) (leave to appeal certification allowed); (2001), 8 C.P.C. (5th) 138 (Ont. Div. Ct.) (certification overturned); (2003), 23 C.L.R. (3d) 1 (Ont. C.A.) (appeal of certification denial dismissed); (2003), 170 O.A.C. 126 (Ont. C.A.); (2003), 320 N.R. 399 (note) (S.C.C.) (leave to appeal certification denial dismissed).

114 *Crawford v. London (City)*, 2000 CarswellOnt 2561 (Ont. S.C.J.) (applicability of *CPA*); (2000), 47 O.R. (3d) 784 (Ont. S.C.J.) (applicability of *CPA*).

115 Ruebsam Engineers Inc. and Stevens Kroetsch Architects Inc.

116 *Denis v. Bertrand & Frere Construction Co.*, 2000 CarswellOnt 4027 (Ont. S.C.J.); [2000] O.J. No. 5783 (Ont. S.C.J.) (limitation period); [2001] O.J. No. 1583 (Ont. S.C.J.) (approval of litigation plan); 2002 CarswellOnt 2916 (Ont. S.C.J.) (add class members); (2006), 38 C.P.C. (6th) 360 (Ont. S.C.J.) (interim disbursements); 2007 CarswellOnt 6603 (Ont. S.C.J.) (trial issues set); (2008), 58 C.P.C. (6th) 177 (Ont. S.C.J.) (test cases to set quantum to settle other cases).

117 Category 1 claimants required replacement of their foundation. Category 2 claimants did not require their foundations to be replaced.

118 Charlebois and Dubuc Associes Ltee were removed from the class action, and the action against them stayed until the class action concluded, and the Court ordered that the plaintiffs would not proceed against Charlebois if the class action against Bertrand and Lafarge succeeded.

119 In *Denis v. Bertrand & Frere Construction Co.* (2008), 71 C.L.R. (3d) 246 (Ont. S.C.J.): (”[24] . . . (5) . . . I accept the plaintiffs’ submission that a contingency allowance is required in order to reduce the chances of homeowners encountering one or more unusual expenses that are special to them and which are not otherwise adequately provided for. Examples would include unforeseen costs of the repair work such as the need to re-pour the footings, extra accommodation expenses due to particular family circumstances, special security or storage concerns and many other out of pocket costs that would not have occurred in the absence of this major construction project which these homeowners will be compelled to endure. . . . “).

120 Of hardship and inconvenience, the Court said: (”[26] There is no medical evidence before the Court. Nevertheless, I have no hesitation in accepting that these foundation problems have been an ongoing source of worry and stress to the plaintiffs. The knowledge that the foundations of one’s house are crumbling and that the property is virtually unsaleable, are matters that are beyond disconcerting. This situation has understandably been the source of marital stress and other family pressures to some of the plaintiffs. Some of the plaintiffs have made minimal use of their basements because they are damp, mildewy and unpleasant. Others, such as the Youngs and Mrs. McLaughlin’s late husband have used the basement and simply put up with dampness and odours. The plaintiffs have refrained from improving their property in some cases because the major construction associated with the foundation replacement has been sensibly considered to be a project that has to be taken care of first. In short, these homeowners have been partially deprived of the enjoyment of their homes and of the peace of mind that most homeowners derive from the occupation of what is likely their principal asset.”).

121 The Court ordered a trial of damages for three properties, as selected by the plaintiffs, to enable settlement of other “Category One” properties, whereby it heard competing evidence as to the cost of replacing foundations and held that the 3 test plaintiffs were respectively entitled to damages of $225,524, $279,032, and $273,988.

122 *Ducharme v. Solarium De Paris Inc.* (2007), 48 C.P.C. (6th) 194 (Ont. S.C.J.) (certification dismissed); [2008] O.J. No. 1558 (Ont. Div. Ct.); (2010), 98 C.P.C. (6th) 386 (Ont. S.C.) (certification allowed).

123 *Gariepy v. Shell Oil Co.* (2000), 1 C.P.C. (5th) 120 (Ont. S.C.J.) (jurisdiction); 2001 CarswellOnt 1361 (Ont. Div. Ct.) (jurisdiction); (2002), 23 C.P.C. (5th) 360 (Ont. S.C.J.) (certification dismissed); (2002), 23 C.P.C. (5th) 393 (Ont. S.C.J.) (costs $80,000 +

$95,000); (2002), 26 C.P.C. (5th) 358 (Ont. S.C.J.) (settlement); 2002 CarswellOnt 6186 (Ont. S.C.J.) (settlement approval); (2003), 29 C.P.C. (5th) 305 (Ont. S.C.J.) (timing of summary judgment); (2003), 48 C.P.C. (5th) 340 (Ont. S.C.J.) (fee approval); [2003] O.J. No. 5820 (S.C.J.) (settlement approval); 2004 CarswellOnt 6301 (Ont. S.C.J.) (settlement approval); 2004 CarswellOnt 8813 (Ont. Div. Ct.) (appeal of certification refusal dismissed); [2005] O.J. No. 505 (Ont. Div. Ct.) ($15,000 against P).

124 *Hughes v Sunbeam Corp. (Canada) Ltd.* (2000), 2 C.P.C. (5th) 335 (Ont. S.C.J.); [2001] O.J. No. 5879 (Ont. S.C.J.) (D's get party-party costs); (2002), 61 O.R. (3d) 433 (Ont. C.A.); (2003), 320 N.R. 193 (note) (S.C.C.).

125 *Olsen v. Behr Process Corp.*, 2003 BCSC 429 (B.C. S.C.) (to strike claim); 2003 BCSC 1252 (B.C. S.C. [In Chambers]) (certification granted).

126 *Toronto Community Housing Corporation v. Thyssenkrupp Elevator (Canada)* (2011), 19 C.P.C. (7th) 280 (Ont. S.C.) (certification granted); (2011), 19 C.P.C. (7th) 352 (Ont. S.C.) (costs of $400,000 + $34,673.56 disbursements for P); (2012), 19 C.P.C. (7th) 364 (Ont. S.C.) (leave to appeal certification dismissed); 2012 ONSC 6626 (Ont. S.C.J.) (settlement and fee approval).

127 Thyssenkrupp Elevator (Canada) Limited, Thyssenkrupp Northern Elevator Corporation, and Thyssenkrupp Elevator Limited.

128 *Curactive Organic Skin Care Ltd. v. Ontario*, 2011 ONSC 2041 (Ont. S.C.J.) (subject matter jurisdiction); 2011 ONSC 3064 (Ont. S.C.J.); 2012 ONCA 81 (Ont. C.A.) (subject matter jurisdiction).

129 From Bathurst St. to Old Weston Rd.

130 A defendant is liable in nuisance where its conduct, whether intentional, negligent, or lawful, causes an unreasonable and substantial interference with the plaintiff's use of land. The interference must be intolerable to an ordinary person, considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use, and the utility of the activity. Compensation will not be awarded for trivial annoyances.

131 The loss suffered included but was not limited to the following:

- for commercial tenants: loss of customers resulting from various causes including excessive construction delays, dirt, noise, dust, unsafe walking conditions, power disruptions, water infiltration, sewage backup, structural damages to buildings, lack of adequate parking, unavailability of public transportation, lack of street parking, malicious and persistent ticketing of cars by the Toronto Parking Authority, congested single lane traffic, and a narrowing of sidewalks resulting in diminished patio use for restaurants.

- for landlords: reductions in rent, having to forgive arrears of rent, the inability to pass property tax obligations to their tenants pursuant to leases and in many cases loss of rent due to vacancies and business failures.

132 *Gautam v. Canada Line Rapid Transit Inc.* (2009), 83 C.L.R. (3d) 136 (B.C. S.C.) (to disqualify judge); (2010), 81 C.P.C. (6th) 179 (B.C. S.C.) (certification granted); (2011), 6 C.P.C. (7th) 1 (B.C. C.A.) (certification upheld).

133 *Cheung v. Kings Land Developments Inc.* (2001), 14 C.P.C. (5th) 374 (Ont. S.C.J.) (certification granted); (2002), 156 O.A.C. 73 (Ont. Div. Ct.) (leave to appeal certification denied).

134 Kings Land Developments Inc., Henry Lam, and Linda Lam.

135 Jeffrey P. Beber and Levitt, Beber.

136 Eddie Lee, Re/Max T.S. Realty Inc.

137 *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.) (certification granted); 1999 CarswellOnt 3783 (Ont. S.C.J.) (costs of $52,831); 2004 CarswellOnt 8307 (Ont. S.C.J.); (2004), 71 O.R. (3d) 487 (Ont. S.C.J.); (2006), 34 C.P.C. (6th) 138 (Ont. S.C.J.).

138 Bayview Landmark Inc., Henry Lam, and Linda Lam. Kitman Developments Inc. was also a developer.

139 Jeffrey Beber and Levitt Beber.

140 Living Realty Inc. and Living Realty (H.K.) Limited.

141 "Strangers to a trust" can be held liable for a breach of trust: (a) as a constructive trustee for a breach of trust; or (b) if they knowingly participate in a breach of trust, either by (i) being in "knowing receipt" of trust property; or (ii) knowingly assisting in a dishonest and fraudulent design on the part of the trustees. See *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787.

142 *Holmes v. Jastek Master Builder*, 2007 SKQB 242 (Sask. Q.B.) (to substitute RP's); 2007 SKQB 415 (Sask. Q.B.) (to substitute RP's); 73 R.P.R. (4th) 135 (Sask. Q.B.) (to amend statement of claim; vacate CPL); 2008 SKCA 159 (Sask. C.A.) (to strike appeal for failure to obtain leave; to lift stay of CPL vacation); 74 R.P.R. (4th) 157 (Sask. Q.B.); 2010 SKQB 156 (Sask. Q.B.); 2010 SKCA 115 (Sask. C.A. [In Chambers]).

143 Jastek Mater Builder 2004 Inc., Jastek Valencia Project Inc., 585323 Saskatchewan Ltd., and Randall Pichler.

144 GDP Construction Corp., 626040 Saskatchewan Ltd., and Glenn Pichler.

145 Breach of condominium purchase agreements — duty of good faith to use reasonable efforts to obtain a building permit to complete the contract.

146 *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.* (1983), 145 D.L.R. (3d) 385 (S.C.C.): ("Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:

> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiffs is likely to and does result.

In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.").

147 *DeFazio v. Ontario (Ministry of Labour)* (2007), 38 C.P.C. (6th) 223 (Ont. S.C.J.) (certification dismissed); 2007 CarswellOnt 3182 (Ont. S.C.J.) ($40,000 against P); 2007 CarswellOnt 8034 (Ont. Div. Ct.); (2007), 49 C.P.C. (6th) 144 (Ont. Div. Ct.) (appeal of certification denial dismissed); (2008), 53 C.P.C. (6th) 192 (Ont. Div. Ct.) (costs against P).

148 *MacDonald v. Dufferin-Peel Catholic District School Board*, [1999] O.J. No. 4231 (Ont. S.C.J.) (venue change); (2000), 20 C.P.C. (5th) 345 (Ont. S.C.J.) (certification denied).

149 ATCO Structures Inc., Canadian Portable Structures (1992) Ltd., Decloet Bayham Limited, Hamilton Modular Bulidings Inc., NRB Inc., Temspec Incorporated, Halliday Homes Ltd., American Air Filter, Continental Building Movers Ltd., Farquhar Construction Limited, and Page & Steele Architect.

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