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## Cement case hard to work out

For 137 people in eastern Ontario, the purchase of their homes was the realization of a dream. For some it was their first home, and for others it was their retirement home. None of them could have foreseen the nightmare that awaited them.

All of the homes were located between Hawkesbury and Rockland, in the eastern reaches of the province, and further east into Quebec as far as Montebello. They were all brand new, and most were built and purchased in 1986 or 1987.

Within the first year after the purchase, the proud owners started experiencing problems with the foundations. The walls started growing a fluffy white powder known as efflorescence. The concrete inside and outside above grade started deteriorating and disintegrating. The foundation walls were usually wet, and water was leaking into the basements. Black mould was growing on the walls, and many began to crack. Substantial deterioration of the parging occurred on the exposed exterior surfaces.

All attempts to repair the problems by applying latex or epoxy, or the installation of dehumidifiers and air exchangers failed. For years, no-one could figure out what the problem was.

Finally, in 1992, the Ontario New Home Warranty Program got involved after receiving a large number of complaints. ONHWP hired experts to investigate and test the concrete, and they reported that the concrete in the foundation of each one of the houses was structurally unsound. The only viable solution was a complete removal and replacement the foundations in each and every house - at a cost of about \$100,000 each.

Unfortunately, most of the homeowners had not filed claims with the warranty program within what was then a five-year guarantee period. The only alternative was the court system.

And so began what Superior Court Justice Albert Roy last year called the infamous cement case. It involved 137 plaintiffs suing three main defendants, who in turn sued 30 different insurance companies.

When the trial started in a special courtroom in September, 1997, there were 50 lawyers present. The proceedings were bilingual, and everything had to be translated simultaneously. The trial took 16 months, and involved 110 witnesses, of whom 15 were experts. Some 600 exhibits, representing tons of paper, were put into evidence.

Most of the plaintiffs had been coping with their deteriorating basements for more than 10 years. They didn't have the use of the basements and couldn't enjoy their homes. With the concrete continually deteriorating, would the walls collapse before being replaced? The owners couldn't sell, couldn't rent, and couldn't finance to repair. Nor could they abandon their homes and live elsewhere.

The main defendants were Bertrand & Frere Construction Company Limited, the ready-mix operator which supplied concrete for all of the foundations, and Lafarge Canada Inc., a large multi-national which supplied cement powder and fly ash used in the batching of the concrete.

Fly ash is a by-product of coal-powered electrical generation, and although not inherently dangerous, the fly ash formula used in preparation of Bertrand's concrete clearly made it unsuitable for use in house foundations.

In his judgment last April, Justice Roy found Lafarge 80 per-cent responsible, and Bertrand 20 per-cent responsible for replacing all of the foundations. Total damages were about \$15 million plus interest. The judgment alone was more than 500 paragraphs and 50,000 words.

In December, Roy handed down his ruling on costs, penalizing Lafarge with 90 per-cent of the solicitor-client costs of the plaintiffs because its counsel needlessly lengthened the trial, and hitting Bertrand with 10 per cent.

Unfortunately, the nightmare of the deteriorating foundations is far from over for everybody involved. Not only has the trial decision been appealed, with a hearing scheduled for May, but Son of Cement Case has already been started.

At the time the original 137 homeowners started their joint action against Lafarge and Bertrand, there was no provision in law for class actions. For various reasons, a number of homeowners were prevented from joining the main court case.

They have now banded together using Hawkesbury, Ont., lawyer Robert Smith to start a class action. Smith told Law Times last month that the class action had been certified by the courts to proceed and there were already more than 45 plaintiffs on board. Smith is quoted as saying that there may be as many as 400 different homeowners in Eastern Ontario who may be experiencing defective foundations from the faulty fly ash concrete mixture.

Since the factual and liability issues are basically the same, the class action is essentially on hold until the Court of Appeal rules on the first case. But with more than \$15 million in damages and millions more in costs and interest, the case could eventually wind up in the Supreme Court of Canada.

In the meantime, real estate agents and lawyers between Ottawa and Hawkesbury are taking extra precautions when listing for sale a house with defective concrete. Even though the replacement costs might eventually be paid by court order, full disclosure of the problem must be made to any potential purchaser.

For owners of new homes in the rest of Ontario, there is a lesson to be learned from the Ottawa experience. If a structural problem is not reported to the Ontario New Home Warranty Program within the seven-year coverage period, the unfortunate homeowner may have to look forward to years of expensive and draining litigation.