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Long-suffering homeowners need cement case resolution

The Great Eastern Ontario Cement Case is alive and well and thriving in Ottawa. In fact, after wending its way through the Ontario court system for more than 16 years, it may be the country's longest ongoing litigation.

It all began between 1986 and 1988, when a number of houses in eastern Ontario, between Rockland and Hawkesbury, were built with ready-mix concrete foundations containing fly ash, a by-product of coal-powered electrical generation.

Lafarge Canada Inc., a large multinational, supplied cement powder and the fly ash formulation. They were used in the preparation of the concrete by Bertrand & Fr re Construction. Unfortunately, the fly ash was defective and within months of construction, the foundations began to deteriorate.

A total of 28 owners filed timely warranty claims with the predecessor of the Tarion Warranty Corporation and all had their foundations completely replaced.

In 1992, 137 other owners who failed to file their warranty claims in time sued Bertrand, Lafarge and others, and they in turn sued 30 different insurance companies.

When the trial started in September 1997, 50 lawyers were present. The proceedings took 150 days over a period of 16 months, and involved 110 witnesses, 15 experts, and 600 exhibits consisting of tons of paper.

"There was an overload of evidence," wrote Justice Albert Roy, who tried the case. "Throughout the proceedings, often forgotten were the innocent plaintiffs," the judge commented.

Justice Roy handed down his decision in April 2000, awarding the plaintiffs some \$15 million in damages, plus another \$5 million in interest, at the rate of about \$140,000 per house.

A subsequent ruling ordered the defendants to pay another \$20 million in court costs. The Court of Appeal later upheld the bulk of the rulings by the trial judge.

But the story doesn't end there.

In 1999, while the first case was wending its way through the courts, 170 plaintiffs who own 69 other properties not involved in the initial case, started a class action against Bertrand and Lafarge claiming replacement of the defective foundations in their homes. In some cases, the cost of replacing the foundations exceeded the homes' fair market value.

Eventually, the parties in the class action agreed that they would abide by the findings of liability by Justice Roy in the first action, and all that was necessary would be to determine the damages suffered by each owner.

A 10-day trial took place in Ottawa in February 2008. The court heard evidence from three representative homeowners whose basement foundations required replacement, and the parties agreed that the court's findings on damages for those three owners would serve as a guideline for resolving the claims of the others in similar circumstances.

In March, Justice Charles T. Hackland handed down his ruling on the damages for the three homeowners.

In a 21-page decision, the judge awarded each of the owners between \$225,000 and \$279,000, including engineering fees, moving expenses, relocation costs and \$23,925 for hardship and inconvenience. Court costs will be determined at a later date.

Another group of owners participating in the class action have homes where the foundations can be repaired instead of being replaced, and the trial of their claims will take place later in 2008 if they cannot be resolved earlier.

The real tragedy is that dozens of Ontario homeowners have had to cope with problem basements for 10 to 20 years, and have been put through protracted litigation.

They couldn't enjoy their homes fully. They couldn't sell, couldn't rent and couldn't finance to repair.

Hopefully, with the resolution of the class action, their problems will soon be over.

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See also:

<http://www.aaron.ca/columns/2001-07-14.htm>

<http://www.aaron.ca/columns/2003-03-22.htm>

<http://www.aaron.ca/columns/2001-02-17.htm>

<http://www.aaron.ca/columns/2003-10-11.htm>

<http://www.canlii.org/en/on/onsc/doc/2006/2006canlii40225/2006canlii40225.html> decision on interim disbursements

<http://www.canlii.org/en/on/onsc/doc/2008/2008canlii14537/2008canlii14537.html> for the decision cited above

<http://www.canlii.org/en/on/onca/doc/2002/2002canlii31835/2002canlii31835.html> Ontario Court of Appeal 2002

<http://www.canlii.org/en/on/onca/doc/2003/2003canlii41258/2003canlii41258.html> Ontario Court of Appeal 2003

Trial decision of Justice Albert Roy is not reported on Canlii but available to subscribers of Quicklaw as [2000] O.J. No. 1360.