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October 11 2003

ONHWP's \$100,000 limit should be raised

Faulty cement reveals flaws in warranty plan

Time and dollar limits too low, judge suggests

The Supreme Court of Canada has refused to hear the final appeal in the infamous eastern Ontario cement case, clearing the way for 137 homeowners and their lawyers to receive the remainder of more than \$40 million in damages and costs owing, after one of Ontario's longest and most expensive civil trials.

It all began with the construction of 137 homes and one condominium in eastern Ontario between Hawkesbury and Rockland in 1986 and 1987. Several years later, the owners began to experience problems with their foundations. The concrete walls started to grow white powder (efflorescence) and black mould, and began to deteriorate significantly. As well, water was constantly leaking through the walls into the basements.

Attempts were made to repair the problems with latex, epoxy and dehumidifiers, but they all failed.

Most of the homeowners failed to make a claim under their Ontario New Home Warranty Program coverage within what was then a five-year time limit. Fortunately, 29 of them did file during the warranty period and ONHWP became heavily involved in the problem.

It retained experts who determined that the concrete in each of the foundations was structurally unsound, having been manufactured with a defective fly ash formula.

Fly ash is a byproduct of coal-powered electrical generation, but the particular mixture supplied by Lafarge Canada during that period made the concrete unsuitable for house foundations.

The mega-trial of the case began in September, 1997 with 137 plaintiffs, three principal defendants, 30 insurance company defendants, 50 lawyers, 110 witnesses, 600 exhibits and tons of paper all of it in both official languages. The trial took 16 months and involved 150 court days.

When it was all over in the spring of 2000, Superior Court Justice Albert Roy awarded the plaintiffs close to \$20 million in damages and interest, and another \$20 million in legal costs. The first \$20 million was paid in July, 2001, but the remaining \$20 million was held up by a series of appeals to the Ontario Court of Appeal and the Supreme Court of Canada.

In a surprise move on Aug. 28, the Supreme Court dismissed the applications of several insurance companies for leave to appeal. The court's two-line decision did not give any reasons for its ruling.

Thousands of Ontario homeowners who were not directly involved in the case have benefited from it in one major way. In his original ruling, Roy wrote that the case underscored a "serious flaw in the Ontario New Home Warranties Act."

The Act, he said, was intended as a consumer protection plan for the benefit of people buying new homes.

"Unfortunately, it benefited only 29 of the 137 or so plaintiffs," he said. "Why? Because the five-year limitation period is too rigid and inflexible. An owner who has a serious problem has to make a claim within five years of the date that the home was completed and ready for possession."

"The Ontario government, which has responsibility for this legislation, should give serious consideration to making the limitation period in the Act more consumer friendly," the judge said.

"This case clearly illustrates how an inflexible, fixed period has denied the majority of the plaintiffs, who have a legitimate claim, the benefits of the Act."

Following his very public criticism, the warranty period was extended from five to seven years for structural deficiencies.

But the government has ignored another of Roy's criticisms.

Under the ONHWP legislation, there is a statutory limit of \$100,000 on claims made to the program. That limit was set 12 years ago, in 1991.

Several of the cement claims exceeded the limit, but the program paid the excess and recovered it from the defendants in the lawsuit.

Roy wrote: "I have already discussed the purpose of the legislation, that is the protection of the consumer. Clearly, regulation 118/91, setting the \$100,000 limit, needs to be updated to correspond with today's new housing prices."

That was two years ago. House prices and construction costs are even higher today.

The new Liberal government under Dalton McGuinty should make consumer protection a top priority and raise the ceiling for ONHWP claims. Statistically, there may be very few claims exceeding \$100,000, but for the unlucky homeowners who get hit with a warranty claim over that amount, the fallout can be devastating.