

**IN THE MATTER OF
the Building Code Act, 1992, S.O. 1992, c. 23.**

Between

The Corporation of the City of Mississauga

prosecutor

and

Peel Standard Condominium Corporation #833

defendant

**Ontario Court of Justice
Mississauga, Ontario**

Quon J. P.

Reasons for Judgment

**Trial held: June 20, 2012, July 26, 2013, and
August 23, 2013**

Judgment rendered: November 1, 2013

**Charges: "Building not in accordance with approved plans", contrary to s.
36(1)(c) of *Building Code Act, 1992*, S.O. 1992, c. 23 (2 counts).**

**"Failing to comply with an order issued on February 25, 2010",
contrary to s. 36(1)(b) of *Building Code Act, 1992*, S.O. 1992, c. 23 (2
counts).**

Counsel:

C. Mariuz, prosecutor for the City of Mississauga

W. Pazzula, counsel for the defendant

Cases Considered or Referred To:

Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec Inc., [2006] S.C.J. No. 12 (QL) (S.C.C.).

Maitland Valley Conservation Authority v. Cranbrook Swine Inc. (2003), 64 O.R. (3d) 417 (O.C.A.), per Abella, Macpherson, and Simmons JJ.A.

R. v. Allard, [2001] 155 C.C.C. (3d) 206 (Q.C.A.).

R. v. Bourgault, [1999] S.J. No. 707 (QL) (Sask. Q.B)

R. v. Cancoil Thermal Corp. (1986), 27 C.C.C. (3d) 295, [1986] O.J. No. 290 (QL) (O.C.A.), per Martin, Lacourciere and Goodman JJ.A.

R. v. Bucci Hair Boutique Inc., [2009] O.J. No. 5770 (QL), 2009 ONCJ 647 (O.C.J.), per Bonas J.P.

R. v. Jorgensen, [1995] 4 S.C.R. 55 (S.C.C.).

R. v. Keough, [2006] N.J. No. 261(QL) (N.L.S.C.).

R. v. Sault Ste. Marie (1978), 85 D.L.R. (3d) 161, 40 C.C.C. (2d) 353 (S.C.C.).

R. v. Shell Canada Ltd., [1999] A.J. No. 1297 (QL) (Alta. Prov. Ct.).

R. v. Starosielski, [2001] A.J. No. 1453 (QL) (Alta. Prov. Ct.).

R. v. Walker, [1989] N.S.J. No. 132 (QL) (N.S.Co.Ct.)

R. v. Vastis, [2006] O.J. No. 1698 (QL), [2006] ONCJ 151 (O.C.J.), per Woloschuk J.P.

Riverside Developments Bobcaygeon Ltd. v. Bobcaygeon (Village), [2004] O.J. No. 151 (QL) (S.C.J.O), per Glass J.

Riverside Developments Bobcaygeon Ltd. v. Bobcaygeon (Village), [2005] O.J. No. 3326 (QL) (O.C.A.), per Feldman, Gillese and LaForme JJ.A.

Thunder Bay (City) v. Bodnar, [2007] O.J. No. 5426 (QL), 2007 ONCJ 686 (O.C.J.), per Leaman J.P.

Toronto (City) v. Barrasso, [2006] O.J. No. 4829 (QL), 2006 ONCJ 463 (O.C.J.), per Quon J.P.

Wood v. Hungerford (Township), [2004] O.J. No. 4472 (QL) (S.C.J.O), per Hackland J.

Statutes, Regulations and Rules Cited:

Building Code Act, 1992, S.O. 1992, c. 23, ss. 1.1(6), 1.1(7), 8(12), 8(13), 8(14), 10.2(1), 11, 12(2), 36(1)(a), 36(1)(b), 36(4), 36(8).

Building Code (Building Code Act, 1992), O. Reg. 350/06, ss. 1.1(3), 1.3.5.1, 1.3.5.1(2), 1.4.1.2(1)(b).

Condominium Act, 1998, S.O. 1998, c.19, ss. 2(3)(c), 42(1), 43(1), 44(1), 44(2), 44(4), 44(8), 44(9)(b), 44(10).

Exhibits entered:

- Exhibit "1" - Document Brief Book (volumes 1 and 2) compiled and submitted by the defendant's counsel. Volume 1 is comprised of 26 separate documents found in Tabs 1 to 26. Most of these 26 documents in Volume 1 were also individually entered as separate exhibits. Volume 2 is comprised of 16 documents found in Tabs 27 to 42.
- Exhibit "1A" - copy of the Application for a Permit to Construct or Demolish 3 townhouse units to be built at municipal addresses 2635, 2637 and 2639 Rogers Road, Mississauga (Building "B") that is numbered 06-726 and submitted to the City of Mississauga on April 7, 2006. The Application also indicates that the Builder is Bob Bray of Real-T-Building Inc., 6850 Millcreek Drive, Mississauga and the Owner is Real-T-Building Inc., 6850 Millcreek Drive, Mississauga. It also indicates the purpose of the application is new construction, the proposed use of the building is to be residential, and the description of proposed work is new residential development Block "B"/BLDG B, and that the proposed construction is for a new home as defined in the Ontario New Home Warranties Plan Act and that registration is required under the Ontario New Home Warranties Plan Act with the registration number being 36470 – Real-T-Building Inc. The application was also signed by an authorized agent of the owner named Raj Mangat of RSM Architecture Inc. of #45, 6625 Kitimat Road, Mississauga, and dated April 6, 2006. (1 page).
- Exhibit "1B" - copy of the Application for a Permit to Construct or Demolish 7 townhouse units to be built at municipal addresses 4009, 4011, 4013, 4015, 4017, 4019, and 4021 Glen Erin Drive, Mississauga (Building "A") that is numbered "06-" [this is the same application for a permit document numbered 06-726 contained in Tab 6 of the Document Brief entered as Exhibit "1"] and submitted to the City of Mississauga on April 7, 2006. The Application also indicates that the Builder is Bob Bray of Real-T-Building Inc., 6850 Millcreek Drive, Mississauga and the Owner is Real-T-Building Inc., 6850 Millcreek Drive, Mississauga. It also indicates the purpose of the application is new construction, the proposed use of the building is to be residential, and the description of proposed work is new residential development Block "A"/BLDG A, and that the proposed construction is for a new home as defined in the Ontario New Home Warranties Plan Act and that registration is required under the Ontario New Home Warranties Plan Act with the registration number being 36470 – Real-T-Building Inc. The application was also signed by an authorized agent of the owner named Raj Mangat of RSM Architecture Inc. of #45, 6625 Kitimat Road, Mississauga, and dated April 6, 2006. (1 page).
- Exhibit "2" - a set of construction drawings and plans that were submitted for residential development by Real-T-Building Inc. with the two Building Permit Applications for the 3 townhouse units that were built at Rogers Road, Mississauga and for the 7 townhouse units that were built at Glen Erin Drive, Mississauga, which were approved by the City of Mississauga that includes site plans, building A/A-1 foundation plan, building A/A-1 basement plan, unit 1 – Building A Ground, 2nd, 3rd floor plans, unit 2&4 –Building A floor plans, unit 3 – Building A floor plans, unit 5 – Building A floor plans, unit 6 – Building A floor plans, unit 7 – Building A-1 ground & second floor plans, building A/A-1 roof plan, Building A east and west elevations, Building A/A-1 north and south elevations, Building A building section, building B foundation plan, building B ground floor plan, building B second floor plan, building B third floor plan, building B roof plan, building B elevations, building section through unit 10 Building B, section details, details, basement and ground floor plans H.V.A.C., second floor plan H.V.A.C., basement and ground floor plans Building B H.V.A.C., second and third floor plans building B H.V.A.C., mechanical schedules and notes, and framing and truss plans (136 pages).

- Exhibit "3A" – copy of Building Permit Notice #BP06726 issued on October 20, 2006, by the City of Mississauga Planning and Building Department for 2635 Rogers Road, Mississauga for the three-townhouse condominium row development (Block B) to owner/contractor/builder: Real-T-Building Inc., 6850 Millcreek Drive, Mississauga, "as per drawings" (1 page).
- Exhibit "3B" – Copy of Building Permit Notice #BP06727 issued on October 20, 2006, by City of Mississauga Planning and Building Department for 4009 Glen Erin Drive, Mississauga for the seven-townhouse condominium row development (Block A) to owner/contractor/builder: Real-T-Building Inc., 6850 Millcreek Drive, Mississauga, "as per drawings" (1 page).
- Exhibit "4" - Copy of Declaration and Description document made pursuant to the Condominium Act, 1998, (registered as PR1504172), for the ten-unit low-rise townhouse buildings with a Certificate of Receipt by the Land Registrar for Peel (43) Brampton) that had been date stamped on July 29, 2008, at 14:23. The declarant for Peel Standard Condominium Plan No. 833 had been Real-T-Building Inc.. The declaration created a freehold condominium corporation that constituted a standard condominium corporation municipally located at 2353 Rogers Road, Mississauga. Greg Gilmour as the President of Real-T-Building Inc. executed the declaration on behalf of the corporate declarant, Real-T-Building Inc. on June 17, 2008. (28 pages).
- Exhibit "5A" - Copy of the Parcel Registration Abstract (19833-001) and copy of Transfer Deed registered on August 14, 2008, with Land Registry Office #43 showing Real-T-Building Inc.'s transfer of the townhouse unit to the new owners for 4021 Glen Erin Drive, Mississauga (Unit #1) obtained from Service Ontario on June 24, 2011, at 11:01:01 (4 pages).
- Exhibit "5B" - Copy of the Parcel Registration Abstract (19833-002) and copy of Transfer Deed registered on August 14, 2008, with Land Registry Office #43 showing Real-T-Building Inc.'s transfer of the townhouse unit to the new owners for 4019 Glen Erin Drive, Mississauga (Unit #2) obtained from Service Ontario on June 24, 2011, at 10:57:49 (4 pages).
- Exhibit "5C" - Copy of the Parcel Registration Abstract (19833-003) and copy of Transfer Deed registered on August 14, 2008, with Land Registry Office #43 showing Real-T-Building Inc.'s transfer of the townhouse unit to the new owners for 4017 Glen Erin Drive, Mississauga (Unit #3) obtained from Service Ontario on June 24, 2011, at 10:54:03 (4 pages).
- Exhibit "5D" - Copy of the Parcel Registration Abstract (19833-004) and copy of Transfer Deed registered on August 14, 2008, with Land Registry Office #43 showing Real-T-Building Inc.'s transfer of the townhouse unit to the new owners for 4015 Glen Erin Drive, Mississauga (Unit #4) obtained from Service Ontario on June 24, 2011, at 10:49:24 (4 pages).
- Exhibit "5E" - Copy of the Parcel Registration Abstract (19833-005) and copy of Transfer Deed registered on August 14, 2008, with Land Registry Office #43 showing Real-T-Building Inc.'s transfer of the townhouse unit to the new owners for 4013 Glen Erin Drive, Mississauga (Unit #5) obtained from Service Ontario on June 24, 2011, at 10:45:31 (4 pages). (4 pages).
- Exhibit "5F" - Copy of the Parcel Registration Abstract (19833-006) and copy of Transfer Deed registered on August 14, 2008, with Land Registry Office #43 showing Real-T-Building Inc.'s transfer of the townhouse unit to the new owners for 4011 Glen Erin Drive, Mississauga (Unit #6) obtained from Service Ontario on June 24, 2011, at 11:15:52 (4 pages). (4 pages).
- Exhibit "5G" - Copy of the Parcel Registration Abstract (19833-007) and copy of Transfer Deed registered on August 14, 2008, with Land Registry Office #43 showing Real-T-Building Inc.'s transfer of the townhouse unit to the new owners for 4009 Glen Erin Drive, Mississauga (Unit #7) obtained from Service Ontario on June 24, 2011, at 10:21:42 (4 pages). (4 pages).

- Exhibit "5H" - Copy of the Parcel Registration Abstract (19833-008) and copy of Transfer Deed registered on August 14, 2008, with Land Registry Office #43 showing Real-T-Building Inc.'s transfer of the townhouse unit to the new owners for 2639 Rogers Road, Mississauga (Unit #8) obtained from Service Ontario on June 24, 2011, at 11:12:35 (4 pages).
- Exhibit "5I" - Copy of the Parcel Registration Abstract (19833-009) and copy of Transfer Deed registered on August 14, 2008, with Land Registry Office #43 showing Real-T-Building Inc.'s transfer of the townhouse unit to the new owners for 2637 Rogers Road, Mississauga (Unit #9) obtained from Service Ontario on June 24, 2011, at 11:07:59 (4 pages).
- Exhibit "5J" - Copy of the Parcel Registration Abstract (19833-010) and copy of Transfer Deed registered on August 14, 2008, with Land Registry Office #43 showing Real-T-Building Inc.'s transfer of the townhouse unit to the new owners for 2635 Rogers Road, Mississauga (Unit #109) obtained from Service Ontario on June 24, 2011, at 11:04:45 (4 pages).
- Exhibit "6A" - Copy of Order to Comply #119194 that had been issued on February 25, 2010, by Stasys Obelienius, building inspector for City of Mississauga, in regards to units 1, 2, 3, 4, 5, 6, and 7 for the seven Glen Erin Drive townhouses pursuant to s. 12(2) of the Building Code Act, 1992, and indicating that the order was being sent to the address of Real-T Building Inc., at 6850 Millcreek Drive, Mississauga and also to Peel Standard Condominium Corporation 833 located at 7-4009 Glen Erin Drive, Mississauga. The Order to Comply also contained the description and the location of deficiencies and the action that was required to comply with the Order and the compliance date of May 25, 2010. The description and location of the deficiency in the Order were in respect to the alterations that had been made to the front entrance elevation and the deck design and construction details at units 1, 2, 3, 4, 5, 6, and 7 that caused the construction not to be within the scope of the approved set of building plans under building permit BP9NEW06-727. The Order to Comply also indicated that the required action and compliance date were the following: (1) Comply with Act and Code Before 2010-05-25 (2) Obtain a Revision to the Building Permit or Revise Construction or construct within the scope of the approved set of building plans (1 page).
- Exhibit "6B" - Copy of Order to Comply #119193 that had been issued on February 25, 2010, by Stasys Obelienius, building inspector for City of Mississauga, in regards to units 8, 9, and 10 for the three Rogers Road townhouses pursuant to s. 12(2) of the Building Code Act, 1992, and indicating that the order was being sent to the address of Real-T Building Inc., at 6850 Millcreek Drive, Mississauga and also to Peel Standard Condominium Corporation 833 located at 7-4009 Glen Erin Drive, Mississauga. The Order to Comply also contained the description and the location of deficiencies and the action that was required to comply with the Order and the compliance date of May 25, 2010. The description and location of the deficiency in the Order were in respect to the alterations that had been made to the deck connections at units 8, 9, and 10, that had caused the construction not to be within the scope of the approved set of building plans under building permit BP9NEW06-726. The Order also indicated that the required action and compliance date were to (1) Comply with Act and Code Before 2010-05-25 (2) Obtain a Revision to the Building Permit or Revise Construction or construct within the scope of the approved set of building plans (1 page).
- Exhibit "7" - copy of a letter sent by A. Robeznieks, P.Eng, Director, Building Division of Planning and Building Department of the City of Mississauga, dated November 23, 2010, to Real-T Building Inc., 6850 Millcreek Drive, Mississauga, regarding 4009 Glen Erin Drive (units 1, 2, 3, 4, 5, 6, 7) informing the builder that failure to comply with the Inspector's Order may lead to legal action being started without further notice. Letter also indicates that the same letter was "cc'ed" to PSCP 833 at 7-4009 Glen Erin Drive, Mississauga (1 page).
- Exhibit "8" - copy of Decision and Order dated December 21, 2012, issued by Ken Selby, Presiding Member of the Licence Appeal Tribunal in respect of the appeal by P.S.C.C. #833 of

Ontario New Home Warranties Plan Act claim that had been disallowed by the Tarion Warranty Corporation (15 pages).

- Exhibit "8A" - copy of photograph taken by Thomas Schmaus in the Fall of 2007 (October or November) showing living room and looking east with view of the unfinished deck through sliding glass doors with the wife of Thomas Schmaus in the foreground (1 page).
- Exhibit "8B" - copy of photograph taken by Thomas Schmaus in the Fall of 2007 (October or November) taken from second floor looking down and showing an unfinished deck and a ravine in the background (1 page).
- Exhibit "8C" - copy of photograph taken by Thomas Schmaus in the Fall of 2007 (October or November) of the ensuite bathroom with the wife of Thomas Schmaus in the foreground and also showing the unfinished deck and the finished deck of Unit 10 of Building A, which can be seen through a window (1 page).
- Exhibit "9" - copy of a follow up review letter dated January 4, 2010, that had been authored by Bruce Pichler, P.Eng., of Pichler Engineering, Grafton Ontario, and addressed to John Gersus, Property Manager, of Regal Property Management Ltd. and re: PSCP 833, setting out the outstanding incomplete or partially completed items for PSCP 833 as had been referenced and listed in PSCP 833's Performance Audit dated June 25, 2009. The author also indicates the letter is undertaken on behalf of the Board of Directors for Peel Standard Condominium Plan 833 and that their concern is that based on the original drawings that Pichler had received that Pichler suspects the documentation for alternative solutions were not provided to the City Building Department. Pichler also comments that if the alternative solutions had been provided to the City then Pichler would have been provided with the actual "AS-built" (= as constructed) drawings at the time of the Performance Audit (8 pages).
- Exhibit "10" - copy of a letter dated July 5, 2010, authored by Bruce Pichler, P.Eng., of Pichler Engineering, Grafton Ontario, and addressed to Leo Cusumano, Manager, Inspection Services of the Building Division for the City of Mississauga Planning and Building Department re: PSCP 833, Orders to Comply 119193 and 119194, indicating that a review of the "as built" drawings received by the Board of PSCP 833 as part of the "Supplementary Information to Application for a Permit to Construct or Demolish" dated March 5, 2010 are inaccurate with respect to what has been constructed and only two of the seven drawings were noted to be "as built" and that these two "as-built" drawings (D-02 and D-03) also have inaccuracies. The author further writes that he has advised the Board of Directors of PSCP 833 not to accept the "as built" drawings received (3 pages).

1. INTRODUCTION

- [1] It would not be unreasonable for most people who have purchased a new home in Ontario, to rightfully assume that their new home would have been constructed properly and according to the minimum standards set out in Ontario's *Building Code*, O. Reg. 350/06; that their new home would have been fully and properly inspected by municipal building officials; and that it would have indeed passed municipal inspection and met those standards set out in the *Building Code*, before they were permitted to occupy and take ownership of that new home. And, if there were to be any defects in workmanship or materials, unauthorized substitution of materials, or *Building Code* violations in the construction of their new home, which the purchasers happen to discover within one year after the date when the purchasers obtain the legal ownership and possession of their new home from the builder, then they could still make a warranty claim to the Tarion Warranty Corporation ("Tarion"), who administers the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31, to have those defects or problems repaired or fixed.
- [2] Unfortunately, this is not what had happened to the purchasers of the ten townhouses in a condominium development located at the northeast corner of Glen Erin Drive and Rogers Road in the City of Mississauga, which had been built and developed by an Ontario company named Real-T-Building Inc. ("builder-developer"). Instead of being able to quietly enjoy residing in their new townhouses, the purchasers, who had obtained legal title to their respective townhouses on August 14, 2008, have had to undergo immeasurable stress, turmoil, and frustration in their lives, since discovering that the builder-developer of their townhouse complex did not construct certain elements of their complex in accordance with the original construction drawings or architectural plans that had been approved by the City of Mississauga Planning and Building Department, and upon which two separate building permits had been based on and issued for the construction of those ten townhouses.
- [3] Moreover, the purchasers have had to also collectively outlay substantial amounts of their time and money for legal and engineering consulting fees in taking on three legal battles related to the builder-developer's unauthorized alterations. First of all, the purchasers have had to retain legal representation for their legal dispute with the builder-developer, who had not obtained municipal approval for those alterations before proceeding with constructing those elements that were not in accord with the approved plans, and who had also refused or were unable to change or fix those altered elements, so that the townhouse complex would comply with the approved plans. For their second legal engagement, the purchasers have had to collectively defend against four Building Code Act, 1992 charges in respect to those unauthorized alterations made by the builder-developer that were laid by the City of Mississauga against Peel Standard Condominium Corporation #833 ("P.S.C.C.

#833"), which legally is responsible for maintaining the buildings and common areas of their townhouse complex, and to which the purchasers are individual members of that condominium corporation. - And, for their third legal battle, which also included an appeal to the Licence Appeal Tribunal, the purchasers have had to endure a long legal fight with Tarion, who had denied their claim under the statutory warranty program provided for new homes under the Ontario New Home Warranties Plan Act to have Tarion fix those unapproved and unpermitted alterations made by the builder-developer in the construction of the townhouse project.

- [4] Furthermore, the purchasers of those ten townhouses had been also allowed to occupy and take legal ownership of their respective townhouses before the City of Mississauga Planning and Building Department had done a final exterior inspection of the townhouse development because the builder-developer of those townhouses had never made such a request to the Building Department to conduct that final exterior inspection. Those unauthorized alterations made by the builder-developer were eventually noticed by a City of Mississauga building inspector, but only after the purchasers had complained to and informed the City of Mississauga about those unauthorized alterations, which would have likely been discovered during a final exterior inspection. Moreover, as of August 23, 2013, which had been the last day of the trial in regards to those four charges, the final exterior inspection had still not been done or undertaken by the City of Mississauga, despite the ten purchasers of those townhouses having physically occupied and living in their respective townhouses since the years 2007 and 2008, when they were permitted by the builder-developer to occupy their respective townhouses as tenants-at-will while waiting for the townhouse development to be legally created and registered as a condominium corporation under the Condominium Act, 1998, S.O. 1998, c. 19. More important, this final exterior inspection had not been done by the City of Mississauga before the purchasers had become the actual owners of their respective townhouses on August 14, 2008, which is the date that legal title to their respective townhouse units had been registered and transferred to them by the builder-developer.
- [5] Also, from the date the purchasers had been first allowed to live in and occupy their respective townhouses in 2007 and 2008 to the last day of the trial on August 23, 2013, the builder-developer has failed to provide certified "as-built" drawings from an architect or professional engineer to either the City of Mississauga or to the purchasers, which accurately reflects what had been actually constructed by the builder-developer in respect to that townhouse development.
- [6] In addition, when the purchasers became collectively aware of the unauthorized alterations made by the builder-developer in the construction of certain elements of their townhouse complex, one of the purchasers made a complaint to the City of Mississauga on September 1, 2009, about those

unauthorized alterations. A City of Mississauga building inspector then attended at their townhouse complex on September 10, 2009, and had personally observed the alterations that had been made by the builder-developer that were not in accord with the approved building plans. Specifically, the inspector had observed that the builder-developer had altered or made material changes to the guardrail and deck covering for the exterior deck attached to the seven townhouses in the complex referred to as Building "A" that is on Glen Erin Drive; a material change to the method of attachment of the exterior deck for Building "A" and to the method of attachment of the exterior deck to the three townhouses in the complex referred to as Building "B" that is on Rogers Road; and a material change to the design of the front entrance canopies for the seven townhouses in Building "A", before it had obtained authorization from the City of Mississauga Planning and Building Department to make those material changes or before it had obtained or been able to obtain a revision to the building permits for those changes.

- [7] Furthermore, after the City of Mississauga had become specifically aware that the builder-developer had constructed elements that were not authorized or in compliance with the approved plans, the Building Department then informed the builder-developer about those unauthorized alterations and the need to rectify them. The builder-developer then informed the City of Mississauga that it was working on resolving those unauthorized alterations and had indeed attempted to submit an application to revise the building permits on December 1, 2009. However, the builder-developer's application had not been accepted by the City of Mississauga Planning and Building Department, as the builder-developer was no longer the legal owner of the townhouse development and had been required to obtain authorization from the purchasers, who were the legal owners of the ten townhouses after August 14, 2008 (and who were acting collectively through P.S.C.C. #833), to have the application submitted on their behalf. However, the purchasers did not provide that required authorization to the builder-developer because they had been advised by the engineer that conducted a performance audit inspection of the townhouse complex that they should not authorize or give consent to the builder-developer to submit on their behalf any "as-built" drawings or to apply for a revision to the two building permits because the unauthorized alterations that were made by the builder-developer were not in accord with the approved plans or the Ontario *Building Code* and that the purchasers would be ultimately liable for the cost of fixing the altered elements or incur increased maintenance costs during the life of those altered elements or be held liable for any harm caused by the unauthorized alterations.

- [8] Then, after approximately five months had passed and there had been no changes made to the exterior decks or front entrance canopies to make them comply with the approved plans or that an application to revise the building permits had been submitted on behalf of and authorized by the purchasers, so that if the unauthorized alterations were found to comply with the *Building*

Code and approved of by the City of Mississauga, then a revision to the approved plans would be authorized for the two building permits that had been issued for the construction of the ten townhouses, which consequently would make those altered elements legally acceptable. As a consequence of there being no changes made to the exterior decks or front entrance canopies or a revision application submitted by or on behalf of the purchasers, a City of Mississauga building inspector then decided to issue Orders to Comply on February 25, 2010, pursuant to s. 12(2) of the Building Code Act, 1992, to both the builder-developer and to P.S.C.C. #833, directing them to either (1) Comply with the Building Code Act, 1992 or the *Building Code* before May 25, 2010, or (2) Obtain a Revision to the Building Permits or Revise Construction or construct within the scope of the approved set of building plans, in respect to the "front entrance elevation and the deck design and construction details have been altered causing construction not to be within the scope of the approved set of building plans" under the two building permits (see Ex. 6A and Ex. 6B).

- [9] After the Orders to Comply had been issued, the City of Mississauga granted extensions of time to comply with the Orders to Comply in respect to separate requests made by the builder-developer and by the defendant. However, because nothing had been done or changed with the construction or to the status of the exterior decks or canopies during the 11 months that had followed the issuance of the two Orders, the building inspector who had issued those orders, then decided to lay charges on February 1, 2011, against both the builder-developer and P.S.C.C. #833 for committing offences under the Building Code Act, 1992.
- [10] With respect to the charges laid against the builder-developer, it had been charged with committing two counts of "building not in accordance with approved plans", contrary to s. 36(1)(c) of the Building Code Act, 1992. Consequently, on June 20, 2012, the builder-developer entered guilty pleas to those two charges and convictions were then registered against the builder-developer.
- [11] On the other hand, despite it being the purchasers who had been the ones who had initiated the complaint about the unauthorized alterations made by the builder-developer with the City of Mississauga Planning and Building Department and who made the municipality aware of those alterations, the City of Mississauga still laid four charges under the Building Code Act, 1992 against P.S.C.C. #833 [also referred to as "Peel Standard Condominium Plan 833" or "P.S.C.P. 833" in many documents entered as exhibits]. These four charges were set out on two separate informations that were sworn on February 1, 2011. Specifically, P.S.C.C. #833 ("the defendant"), had been charged with committing the following four Part 3 regulatory offences that were set out in two separate informations:

(a) In respect to Information #000521:

PEEL STANDARD CONDOMINIUM CORP. 833
7-4009 Glen Erin Drive,
Mississauga., ON L5L 0A5

Count #1

On or about 18th day of February 2010, at 2635 Rogers Road, Units 8, 9, 10, Mississauga, Ontario did commit the offence of building not in accordance with approved plans on the basis of which Building Permit No. 06-726 was issued by the Chief Building Official contrary to subsection 8(13) of the Building Code Act, S.O. 1992, c. 23 and thereby committed an offence under Section 36(1)(c) of the said Building Code Act, S.O. 1992, c. 23.

Count #2

AND FURTHER THAT PEEL STANDARD CONDOMINIUM CORP. 833, between the period commencing on or about May 25th, 2010 and ending on or about January 13th, 2011 at 2635 Rogers Road, Units 8, 9, 10, Mississauga, Ontario did commit the offence of failing to comply with an Order to Comply issued on February 25th, 2010 pursuant to subsection 12(2) of the Building Code Act, S.O. 1992, c. 23 and thereby committed an offence under Section 36(1)(b) of the said Building Code Act, S.O. 1992, c. 23.

(b) In respect to Information #000522:

PEEL STANDARD CONDOMINIUM CORP. 833
7-4009 Glen Erin Drive,
Mississauga., ON L5L 0A5

Count #1

On or about 18th day of February 2010, at 4009 Glen Erin Drive, Units 1, 2, 3, 4, 5, 6, 7, Mississauga, Ontario did commit the offence of building not in accordance with approved plans on the basis of which Building Permit No. 06-726 was issued by the Chief Building Official contrary to subsection 8(13) of the Building Code Act, S.O. 1992, c. 23 and thereby committed an offence under Section 36(1)(c) of the said Building Code Act, S.O. 1992, c. 23.

Count #2

AND FURTHER THAT PEEL STANDARD CONDOMINIUM CORP. 833, between the period commencing on or about May 25th, 2010 and ending on or about January 13th, 2011 at 4009 Glen Erin Drive, Units 1, 2, 3, 4, 5, 6, 7, Mississauga, Ontario did commit the offence of failing to comply with an Order to Comply issued on February 25th, 2010 pursuant to subsection 12(2) of the Building Code Act, S.O. 1992, c. 23 and thereby committed an offence under Section 36(1)(b) of the said Building Code Act, S.O. 1992, c. 23.

- [12] However, on the third day of the trial, which was on August 23, 2013, the prosecution invited the court to dismiss the two charges of "building not in accordance with approved plans" against the defendant, P.S.C.C. #833, because of the evidence that had come out on the second day of the trial, which had revealed that those two charges had been laid outside the one-year limitation period, and as such, were statute-barred. Accordingly, the two charges laid against the defendant under s. 36(1)(c) of the Building Code Act, 1992 for "building not in accordance with approved plans" were endorsed as dismissed.
- [13] As for the two remaining charges of "failing to comply with an order issued on February 25, 2010", the prosecution contends that it has proven the actus reus of the two offences beyond a reasonable doubt and that the defendant has not made out the defence of due diligence on a balance of probabilities to avoid being convicted of committing the two offences.
- [14] Moreover, the prosecution submits that the defendant did not take all reasonable steps in the circumstances to comply with the two Orders to Comply, and that it could have complied with the Orders to Comply in three ways. In particular, the prosecution submits that the defendant could have:
 - (1) removed and rebuilt the exterior deck for Building "A" according to the approved construction drawings;
 - (2) authorize and consent to having the builder-developer submit "as-built" drawings to the City of Mississauga Planning and Building Department and having the builder-developer apply for a revision to the two building permits that had been issued by the City of Mississauga to build the two blocks of townhouses; or
 - (3) have "as-built" drawings prepared at P.S.C.C. #833's cost and having the "as-built" drawings submitted to the City of Mississauga Planning Building Department and then personally apply for a revision to the two building permits that had been

issued by the City of Mississauga to build the two blocks of townhouses.

- [15] On the other hand, the defendant contends that it had taken all reasonable steps to comply with the Orders to Comply and in complying with its statutory obligations under the Condominium Act, 1998, and in taking steps to comply with the two Orders the defendant has expended a substantial amount of money for several engineering reports and legal fees in their fight to have the unauthorized alterations fixed or repaired by the builder-developer or by Tarion and that the defendant had also proceeded immediately, diligently, and conscientiously with approaching the City Mississauga to inform them about the unauthorized alterations and in pursuing its warranty claim with Tarion and then in their appeal at the Licence Appeal Tribunal of Tarion's disallowance of their warranty claim, and as such, the defendant submits that an acquittal should be entered for the remaining two charges against the defendant.
- [16] Ergo, the principal issue to resolve in deciding whether the defendant should be acquitted or convicted of the two charges of "failing to comply with an order issued on February 25, 2010", is whether the defendant has taken all reasonable steps in the circumstances to comply with the two Orders to Comply.
- [17] After submissions and arguments were completed on August 23, 2013, judgment was reserved by the court and adjourned to November 1, 2013, for the court's decision to be rendered. These are therefore my written reasons for judgment:

2. BACKGROUND

(a) Appearances And Dates For The Proceeding In Respect Of The Four Charges Laid Against The Defendant

- [18] The two informations containing the four charges laid against the defendant were both sworn on February 1, 2011. Summonses were then issued by the court on the same day that required the defendant to attend on May 26, 2011, to answer to the four charges. On May 26th, the defendant appeared by agent in respect to the summonses and the matter was then adjourned to be spoken to on July 28, 2011. On July 28th, the matter was once again adjourned to be spoken to on October 6, 2011. On October 6th, the matter was further adjourned to be spoken to on December 1, 2011. On December 1st, counsel for the defendant made his first appearance on the matter and the matter was then adjourned to February 7, 2012, so that a judicial pre-trial conference could be held. After the judicial pre-trial conference was completed, the matter was then adjourned to March 8, 2012, so that trial dates for a two-day trial could be found and scheduled. On March 8, trial dates were obtained and were confirmed for June 20 and 21, 2012.

- [19] On June 20, 2012, the trial of the defendant's four charges commenced. However, it was discovered during the testimony of the prosecution's first witness that certain documents that the witness had been referring to had not actually reached or been received by the defendant's counsel, although those particular documents had been sent out by the prosecution as part of their disclosure obligation. The documents were then provided to the defendant's counsel by the prosecution so that they could be reviewed during the lunch break, but the amount of documents was too many for the defendant's counsel to properly review. This necessitated an adjournment to allow the defendant's counsel sufficient time to properly review those particular documents before the trial could continue. The trial was then adjourned to resume on November 29 and December 6, 2012.
- [20] However, on November 29, 2012, an adjournment was then sought by the prosecution as its primary witness had been hospitalized and put on short-term leave for a health issue. In addition, the prosecution further explained during the adjournment application that the defendant was still pursuing its appeal at the Licence Appeal Tribunal of Tarion's disallowance of the defendant's warranty claim and that the decision on the appeal would be coming out before the end of December 2012 [in fact, the appeal decision came out on December 21, 2012]. The adjournment was granted and the matter was set over to be spoken to on January 30, 2013. On January 30th, the court was informed that the defendant had been vindicated in its appeal in respect to the defendant's warranty claim with Tarion and once again the trial was adjourned to March 13, 2013, to allow time for the defendant to resolve the warranty claim with Tarion and for Tarion to comply with the decision of the Licence Appeal Tribunal to fix or repair the unauthorized alterations made by the builder-developer. However, on March 13th, the defendant had still not resolved the remediation of the unauthorized alterations with Tarion, and as consequence, it was decided that the trial would have to proceed and two days were then found for the trial to continue on July 26, 2013 and August 23, 2013.
- [21] On July 26, 2013, the trial continued. Then, on August 23, 2013, on the third day of the trial, the prosecution invited the court to dismiss the two charges against P.S.C.C. #833 of "building not in accordance with approved plans" because of the evidence that had come out on the second day of the trial, which had revealed that those two charges had been laid outside the one-year limitation period, and as such, were statute-barred. Accordingly, the two charges laid under s. 36(1)(c) of the Building Code Act, 1992 for "building not in accordance with approved plans" were dismissed against the defendant.
- [22] The trial was then completed on August 23, 2013, for the remaining two charges laid under s. 36(1)(b) of "failing to comply with an Order to Comply".

- [23] In addition, four witnesses had testified during the trial. One witness testified for the prosecution and three witnesses testified for the defendant. The prosecution's lone witness was Stasys Obelienius, the building inspector who had observed the unauthorized alterations and who had issued the two Orders to Comply on February 25, 2010. For the defendant, the three witnesses who testified were: (1) Ken Beard, the President of the Board of Directors for P.S.C.C. #833; (2) Thomas Max Schmaus, the Treasurer of the Board of Directors for P.S.C.C. #833; and (3) Costas Nikiforos, the manager of Building Inspections for the westside of the City of Mississauga and for the district in which the ten townhouses were located.
- [24] After submissions were heard, judgment was reserved, and the matter was adjourned to November 1, 2013, for the judgment to be rendered.

(b) The Ten Townhouses Built At Glen Erin Drive And Rogers Road In The City Of Mississauga

- [25] The townhouse development at Glen Erin Drive and Rogers Road was built as an "L-shaped" set of two-storey townhouses that are in two distinct townhouse blocks. Ten townhouses were built in this residential development. Seven of the ten units are contained in one block of townhouses known as building "A" while the remaining three townhouses are contained in a separate block known as Building "B". The seven-unit block of townhouses fronts onto Glen Erin Drive while the three-unit block of townhouses fronts onto Rogers Road. In addition, the three units in Building "B" were completed and occupied first in 2007. The remaining seven units in Building "A" were substantially completed and occupied in the early part of 2008. However, the rear exterior deck for Building "A" had not been completed before the purchasers had moved into their respective townhouses in Building "A".
- [26] The seven townhouse units in Building "A" are numbered as units #1, #2, #3, #4, #5, #6, and #7 on the approved drawings (Ex. 2), and are respectively addressed as 4021 Glen Erin Drive, 4019 Glen Erin Drive, 4017 Glen Erin Drive, 4015 Glen Erin Drive, 4013 Glen Erin Drive, 4011 Glen Erin Drive, and 4009 Glen Erin Drive. On the other hand, the three townhouse units in Building "B" are numbered as units #8, #9, and #10 on the approved drawings (Ex. 2), and are respectively addressed as 2639 Rogers Road, 2637 Rogers Road, and 2635 Rogers Road.

(c) The Builder And Developer Of The Ten-Unit Townhouse Development Located At Glen Erin Drive And Rogers Road

- [27] The builder-developer of those ten townhouses located at the northeast corner of Glen Erin Drive and Rogers Road is an Ontario corporation known as "Real-T-Building Inc." The President of Real-T-Building Inc. is Greg Gilmour. The builder-developer's address is 6850 Millcreek Drive, Mississauga. In respect

to the unauthorized alterations in the construction of certain elements of the townhouse complex, the builder-developer had been charged on February 1, 2011, with two counts of "building not in accordance with approved plans", contrary to s. 36(1)(c) of the Building Code Act, 1992. For those two charges, the builder-developer had entered guilty pleas on June 20, 2012, and convictions were subsequently registered against the builder-developer.

- [28] In addition, Bob Bray was the site supervisor for the builder-developer in regards to the construction of the ten townhouses, and had contact and discussions at the townhouse complex with Stasys Obelienius, the building inspector for the City of Mississauga, who had been involved in conducting building inspections of the ten townhouses constructed at Glen Erin Drive and Rogers Road.
- [29] Also, the architect who had designed and prepared the drawings for the construction of the ten townhouses that were submitted on behalf of the builder-developer and that had been approved of by the City of Mississauga Planning and Building Department was Raj Singh Mangat, who operated under the corporate name of RSM Architecture Inc.
- [30] Furthermore, the duty and role of builders who construct a building in Ontario is set out in s. 1.1(3) of the Building Code Act, 1992, and includes ensuring that construction does not proceed unless a permit required under the Building Code Act, 1992 has been issued by the chief building official and to construct the building in accordance with the permit and to use appropriate building techniques to achieve compliance with the Building Code Act, 1992 and the Ontario *Building Code* [emphasis is mine below]:

Role of various persons

1.1(1) It is the role of every person who causes a building to be constructed,

(a) to cause the building to be constructed in accordance with this Act and the building code and with any permit issued under this Act for the building;

(b) to ensure that construction does not proceed unless any permit required under this Act has been issued by the chief building official; and

(c) to ensure that construction is carried out only by persons with the qualifications and insurance, if any, required by this Act and the building code.

...

Role of builders

1.1(3) *It is the role of a builder,*

- (a) *to ensure that construction does not proceed unless any permit required under this Act has been issued by the chief building official;*
- (b) *to construct the building in accordance with the permit;*
- (c) *to use appropriate building techniques to achieve compliance with this Act and the building code; and*
- (d) *when site conditions affect compliance with the building code, to notify the designer and an inspector or the registered code agency, as appropriate.*

...

Limitation

1.1(8) *Nothing in this section relieves any person from the duty to comply with any part of this Act or the building code or affects the rights or duties of a person not mentioned in this section in respect of the construction of a building.*

(d) The City Of Mississauga Issued Two Building Permits For The Construction Of The Ten Townhouses Located At Glen Erin Drive And Rogers Road

[31] Raj Mangat, the architect retained by the builder-developer, prepared a set of architectural and construction plans (Ex. 2) of what was going to be constructed by the builder-developer on the property located at the northeast corner of Glen Erin Drive and Rogers Road in the City of Mississauga and submitted them with two applications (Ex. 1A and 1B) for two separate building permits. Those plans also detailed what materials were to be used and the size and construction method for different elements of the townhouse development.

[32] The City of Mississauga Planning and Building Department approved those plans submitted on behalf of the builder-developer and issued two building permits to the builder-developer on October 20, 2006, based on those plans, respectively, for the construction of two separate blocks of townhouses. Building Permit #BP06726 was issued to Real-T-Building Inc., the owner and builder-developer of the property, for the construction of Building "A" comprising of townhouse units #1, #2, #3, #4, #5, #6, and #7, which are on Glen Erin Drive while Building Permit #BP06727 was issued also to Real-T-Building Inc. for constructing Building "B" comprising of townhouse units #8, #9, and #10, which are on Rogers Road.

- [33] Moreover, s. 8(13) of the Building Code Act, 1992, prohibits anyone from constructing a building or causing a building to be constructed except in accordance with the plans, specifications, documents, and any other information on the basis of which a permit was issued or in accordance with any changes or revisions to them that has been authorized by the chief building official [*emphasis is mine below*]:

Prohibition

8(13) No person shall construct or demolish a building or cause a building to be constructed or demolished except in accordance with the plans, specifications, documents and any other information on the basis of which a permit was issued or any changes to them authorized by the chief building official.

- [34] In addition, Stasys Obelienius, the building inspector who issued the two Orders to Comply to the defendant, had testified that the builder-developer had been responsible for both of the building permits that had been issued to it for the construction of those ten townhouses.
- [35] Furthermore, the building permit system and the inspections outlined in the Ontario *Building Code* that the Ministry of Municipal Affairs and Housing have deemed mandatory, generally ensures that for any building constructed in Ontario the construction would meet the minimum building standards set out in the *Building Code* that would safeguard the life, health and safety of the building's occupants, as well as ensuring that local zoning by-laws, structural safety standards and other applicable laws are also met in the construction of that building. Moreover, the City of Mississauga Planning and Building Department would also review the submitted plans for the construction of a new building to ensure that they comply with appropriate *Building Code* standards.
- [36] However, it is the owner of the land or building where the new construction is being undertaken pursuant to a building permit that would be ultimately responsible for ensuring that the construction complies with the issued permit and all regulations and by-laws that govern the construction.
- [37] Ergo, until legal ownership of the ten townhouses had been transferred to the purchasers, the builder-developer, who had owned the townhouse complex and who had been issued the building permits had the obligation and responsibility for ensuring that the construction of the townhouse complex would be in compliance with the issued permits, the *Building Code*, the Building Code Act, 1992, and all other applicable regulations and by-laws.

(e) When Did The Purchasers Start Occupying The Townhouse Units As Renters?

- [38] As to when the units were first occupied, Ken Beard, the President of the Condominium Board, testified he had signed a purchase agreement to purchase one of the 10 townhouse units in June of 2007 and that he had moved into his unit as a tenant-at-will in May of 2008. In other words, Beard was paying monthly rent to the builder-developer while he occupied his townhouse as a tenant-at-will and did not become the legal owner of his townhouse until the Declaration and Description document creating the condominium corporation had been registered and the builder-developer had legally transferred the ownership of the townhouse to Beard on August 14, 2008.
- [39] Furthermore, Beard said that his unit had been the last of the ten units to be occupied by a purchaser. He also said that the purchasers of townhouse units #8, #9 and #10 in Building "B" were the first to move in and occupy their units and that the first of the ten units had been occupied in November of 2007.
- [40] In addition, Thomas Schmaus, the Treasurer of the Condominium Board, testified that he had put in an offer to purchase one of the townhouse units in June of 2007 and that he had moved into his unit as a tenant-at-will in February of 2008. He also said that Building "B", which is comprised of townhouse units #8, #9 and #10, were completed first and that those units were occupied as of the end of the summer of 2007. He also said that those three townhouse units were for the most part completed in the mid to late summer of 2007.

(f) When Was The Exterior Deck For Building "A" Completed By The Builder-Developer?

- [41] The rear exterior deck for Building "A" had not been constructed by the builder-developer in accordance with the approved plans. This particular unauthorized alteration made by the builder-developer is the main item in dispute between the builder-developer and the defendant, as well as being the principal subject matter of the defendant's warranty claim with Tarion.
- [42] In addition, Stasys Obelienius, the City of Mississauga building inspector, had testified that he is not aware of the date on which the rear exterior deck for Building "A" was completed. However, Ken Beard, the President of the Condominium Board, said the exterior deck had been completely done by June of 2008. Beard also said the builder-developer, in order to save costs, had eliminated a 200-foot I-beam that had been detailed in the approved drawings and that was supposed to have been installed down the center of the deck. Furthermore, Beard said the exterior deck had not been constructed in accordance with the approved plans, but had been had been altered by the builder-developer. Instead of covering the deck joists with 2 x 6 deck boards with gaps for the water to run through, as detailed in the approved plans, the

builder developer decided to replace the 2 x 6 deck boards with plywood boards that were also covered with a modified bitumen membrane, which was then overlain with wood decking. However, Beard said the waterproof membrane unfortunately held water because of the lack of a sufficient slope for the water to run off the deck, and since the deck had been improperly constructed and sealed, it also allowed water to leak into the plywood boards under the membrane. Furthermore, Beard said that because water would not run off the deck properly, the decking planks that were laid onto the membrane had become severely warped so that deck screws were being pulled out. He also said the exterior deck had become a total mess in a very short time.

[43] In addition, Thomas Schmaus, the Treasurer on the Condominium Board, said the exterior deck in question is 20 feet in depth and spans the entire length of the seven townhouses of Building "A". Schmaus also said the modified bitumen covering had been added to the exterior deck in the winter, which he believes had been sometime after February of 2008. He also said the deck had been finished before the title to the respective townhouses had been transferred from the builder-developer to the purchasers, which he said had been sometime between March and May of 2008.

[44] Furthermore, Schmaus took photographs (see Exs. 8A, 8B, 8C) which show the state of the exterior decks in the Fall of 2007, which he said had been taken either in October or November of 2007, that clearly shows that the exterior deck for Building "A" had been erected and that there had been a plywood covering on the surface of the deck, but no guardrails had been erected for the exterior deck at the time he took those photographs. In addition, Schmaus noted that the exterior deck for Building "B" could also be visible in one of the photographs and that it also showed a picket-style guard rail had been installed for that particular deck.

(g) The Ministry Of Municipal Affairs And Housing Requires A Municipality To Conduct 11 Mandatory Inspections In Respect To New Homes

[45] Concerning inspections of new homes, Stasys Obelienius, the City of Mississauga building inspector, said he is responsible for conducting certain inspections for new construction, including conducting the inspections for the ten townhouses at Glen Erin Drive and Rogers Road. He also testified that the final exterior inspection of those ten townhouses had not been done yet because the builder-developer had not made a request to the City of Mississauga to conduct that particular inspection. Obelienius also explained that the onus is legally on the builder-developer to call the City of Mississauga when a particular inspection is required or needed to be done.

[46] This legal requirement on the builder-developer to notify and request one of the mandatory inspections from the City of Mississauga is contained in s. 10.2(1) of the Building Code Act, 1992 [emphasis is mine below]:

Notice of readiness for inspection

10.2(1) At each stage of construction specified in the building code, the prescribed person shall notify the chief building official or the registered code agency, if any, that the construction is ready to be inspected.

Inspection

(2) After the notice is received, an inspector or the registered code agency, as the case may be, shall carry out the inspection required by the building code within the prescribed period.

[47] Moreover, article 1.3.5.1 of the Ontario *Building Code*, O. Reg. 350/06, also legally requires the builder or the building permit holder at each critical stage of construction to notify the Chief Building Official when the builder or permit holder is ready for an inspection [*emphasis is mine below*]:

1.3.5. NOTICES AND INSPECTIONS

1.3.5.1. Prescribed Notices

(1) This Article sets out the notices that are required under section 10.2 of the Act.

(2) The person to whom a permit under section 8 of the Act is issued shall notify the chief building official or, where a registered code agency is appointed under the Act in respect of the construction to which the notice relates, the registered code agency of,

[48] Furthermore, Obelienius also said the Ministry of Public Affairs and Housing requires municipalities to conduct 11 mandatory inspections in respect to new construction. These 11 mandatory inspections may be found within the list of inspections outlined in s. 1.3.5.1(2) of the Ontario *Building Code* [*emphasis is mine below*]:

1.3.5.1(2) The person to whom a permit under section 8 of the Act is issued shall notify the chief building official or, where a registered code agency is appointed under the Act in respect of the construction to which the notice relates, the registered code agency of,

- (a) *readiness to construct footings,*
- (b) *substantial completion of footings and foundations prior to commencement of backfilling,*

- (c) *substantial completion of structural framing and ductwork and piping for heating and air-conditioning systems, if the building is within the scope of Part 9 of Division B,*
- (d) *substantial completion of structural framing and roughing-in of heating, ventilation, air-conditioning and air-contaminant extraction equipment, if the building is not a building to which Clause (c) applies,*
- (e) *substantial completion of insulation and vapour barriers,*
- (e.1) *substantial completion of air barrier systems,*
- (f) *substantial completion of all required fire separations and closures and all fire protection systems including standpipe, sprinkler, fire alarm and emergency lighting systems,*
- (g) *substantial completion of fire access routes,*
- (h) *readiness for inspection and testing of,*
 - (i) *building sewers and building drains,*
 - (ii) *water service pipes,*
 - (iii) *fire service mains,*
 - (iv) *drainage systems and venting systems,*
 - (v) *the water distribution system, and*
 - (vi) *plumbing fixtures and plumbing appliances,*
- (i) *readiness for inspection of suction and gravity outlets, covers and suction piping serving outlets of an outdoor pool described in Clause 1.3.1.1.(1)(j) of Division A, a public pool or a public spa,*
- (j) *substantial completion of the circulation / recirculation system of an outdoor pool described in Clause 1.3.1.1.(1)(j) of Division A, a public pool or public spa and substantial completion of the pool before it is first filled with water,*
- (k) *readiness to construct the sewage system,*
- (l) *substantial completion of the installation of the sewage system before the commencement of backfilling,*
- (m) *substantial completion of installation of plumbing not located in a structure, before the commencement of backfilling,*
- (n) *completion of construction and installation of components required to permit the issue of an occupancy permit under Sentence 1.3.3.1.(2) or to permit occupancy under Sentence 1.3.3.2.(1), if the*

building or part of the building to be occupied is not fully completed, and

- (o) *completion of construction and installation of components required to permit the issue of an occupancy permit under Sentence 1.3.3.4.(5).*

[49] In addition, the role and duties of a chief building official and of building inspectors are outlined in ss. 1.1(6) and 1.1(7) of the Building Code Act, 1992. In particular, a building inspector's role includes exercising powers and performing duties provided under the Building Code Act, 1992 and the Ontario *Building Code* in connection with reviewing plans, inspecting construction, conducting maintenance inspections and issuing orders in accordance with the Building Code Act, 1992 and the *Building Code* [*emphasis is mine below*]:

Role of chief building officials

1.1(6) *It is the role of a chief building official,*

- (a) *to establish operational policies for the enforcement of this Act and the building code within the applicable jurisdiction;*
- (b) *to co-ordinate and oversee the enforcement of this Act and the building code within the applicable jurisdiction;*
- (c) *to exercise powers and perform the other duties assigned to him or her under this Act and the building code; and*
- (d) *to exercise powers and perform duties in accordance with the standards established by the applicable code of conduct.*

Role of inspectors

1.1(7) *It is the role of an inspector,*

- (a) *to exercise powers and perform duties under this Act and the building code in connection with reviewing plans, inspecting construction, conducting maintenance inspections and issuing orders in accordance with this Act and the building code;*
- (b) *to exercise powers and perform duties in respect of only those matters for which he or she has the qualifications required by this Act and the building code; and*
- (c) *to exercise powers and perform duties in accordance with the standards established by the applicable code of conduct.*

(h) Registration Inspection Requested By The Builder-Developer For The Registration Of The Declaration And Description Document For The Townhouse Development At Glen Erin Drive And Rogers Road

- [50] Stasys Obelienius, the City of Mississauga building inspector, testified that when the townhouse complex was substantially complete, the builder-developer had requested a registration inspection to be done. Accordingly, before the Declaration and Description document that would create the condominium corporation could be registered; the townhouse complex transferred and turned over to the Board of Directors of the condominium corporation to manage; and title to the individual townhouses could be transferred to the purchasers so that they would no longer have to pay rent to the builder-developer, but make mortgage payments instead, the City of Mississauga Planning and Building Department needed to attend the property to conduct a registration inspection of the townhouse complex. Obelienius also that if the townhouse complex was ready then he would grant the approval for registration.
- [51] In addition, Obelienius said he had attended the townhouse complex on June 25, 2008, to conduct only the registration inspection. He also said he had not been there to conduct the final exterior inspection, as the builder had not yet requested that particular inspection to be done. Obelienius further said he had inspected five of the townhouse units, namely, units #2, #4, #5, #6, and # 7. Furthermore, he said all those units were finished inside and occupied. However, he also said that four of the units were not occupied. In addition, he said the builder-developer had been doing outside clean-up at that time.
- [52] Obelienius also said that for the registration inspection of the townhouse complex, he had been concerned primarily with looking for safety issues, such as whether there is proper lighting, whether there are guardrails installed where required, whether the site had been cleaned up, whether stairs have been installed between floors, whether there were unprotected openings in the floor, and whether the townhouse complex had been substantially complete. Moreover, Obelienius said the registration inspection is not part of the required inspections that have to be done in regards to the two building permits that had been issued for the construction of the ten townhouses.
- [53] Furthermore, on the day of the registration inspection Obelienius said the exterior deck for Building "A" had not been completed or finished, as there were no guardrails installed for the exterior deck. As a consequence, he had to put blocks on the patio doors for all those units that opened onto the exterior deck so that the doors would not open more than four inches in order to prevent the occupants of those seven townhouses from being able go onto the unfinished deck area.

[54] In addition, Obelienius said that during the registration inspection, Bob Bray, the site supervisor, had asked Obelienius what would be required for the builder-developer to install a glass-panelled guardrail on the exterior deck for Building "A", instead of installing a picket-styled guardrail. To Bray's query, Obelienius said he responded to Bray by telling Bray that a professional engineer's certificate would be required for the glass-panelled guardrail. However, Obelienius said the builder-developer had not asked Obelienius about altering the design of the exterior decks or about covering the exterior deck for Building "A" with a waterproof membrane instead of using the 2 x 6 deck boards with gaps that had been detailed on the approved plans.

[55] Obelienius also said that after he had completed the registration inspection, he granted the approval for the builder-developer to register the Declaration and Description document to create the condominium corporation.

(i) **The Creation Of Peel Standard Condominium Corporation #833 ("P.S.C.C. #833")**

[56] The Condominium Act, 1998, S.O. 1998, c. 19, governs the creation and duties of the condominium corporation, which when created is responsible for the condominium property, finances, official records, reserve fund study, and agreements. This statute also governs the rights and responsibilities of the condominium developer; owners of the individual units in the condominium; the condominium corporation and its boards of directors; proportionate common expense contributions; corporate and owner maintenance obligations; and conditions or restrictions on the use of the units and the common elements.

[57] In addition, a condominium corporation, its common elements, and the individual units are created by a Declaration and Description document that is prepared by the builder-developer under s. 2(3)(c) of the Condominium Act, 1998, and which is registered by the builder-developer at the proper land registry office [*emphasis is mine below*]:

2(1) Subject to the regulations made under this Act and subsection (2), a declaration and description may be registered by or on behalf of the person who owns the freehold or leasehold estate in the land described in the description.

Restriction

(2) A declaration and description for a freehold condominium corporation shall not be registered by or on behalf of a person who does not own the freehold estate in the land described in the description.

Effect of registration

(3) Upon registration of a declaration and description,

(a) *this Act governs the land and the interests appurtenant to the land, as the land and the interests are described in the description;*

(b) *the land described in the description is divided into units and common elements in accordance with the description; and*

(c) *a condominium corporation is created.*

...

Objects

17(1) *The objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners.*

Duties

(2) *The corporation has a duty to control, manage and administer the common elements and the assets of the corporation.*

[58] Real-T-Building Inc., the builder-developer of the ten townhouses, was the declarant for the Declaration and Description document. On June 17, 2008, Greg Gilmour, the President of Real-T-Building Inc., signed the Declaration and Description document that created the condominium corporation named P.S.C.C. #833. The Declaration and Description document was then registered on July 29, 2008, at the Land Registry Office for the Regional Municipality of Peel that is located in the City of Brampton (see Ex. 4). As such, the defendant, P.S.C.C. #833, came into existence on July 29, 2008, by virtue of the registration of that Declaration and Description document.

[59] Furthermore, the Declaration and Description document sets out how the Condominium Corporation is owned. It also defines the units, the common elements, sets out the percentage of ownership each unit has in the property, and shows how much each owner must pay for common expense fees. In addition, a legal condominium, such as the one that comprises the ten townhouses located at Glen Erin Drive and Rogers Road, is run collectively by the condominium unit owners, all of whom are members of the Condominium Corporation known as P.S.C.C. #833. In addition, the owners of the individual units in the condominium elect a Board of Directors to oversee the operations of the Condominium Corporation. Furthermore, the Board of Directors may also hire a property manager to take care of the day-to-day repairs and maintenance of the building or buildings and the common property of the condominium.

(j) Transfer Of Ownership Of The Townhouse Units By The Builder-Developer To The Respective Purchasers

[60] Legal ownership of the ten townhouses had been transferred from the builder-developer to the respective purchasers and these transfer deeds had been registered at the Land Titles Office on August 14, 2008 (see Exs. 5A, 5B, 5C, 5D, 5E, 5F, 5G, 5H, 5I, and 5J). Hence, the builder-developer was no longer the owner of the townhouse development as of August 14, 2008.

[61] However, the builder-developer would still have control of the Board of Directors for P.S.C.C. #833 and could keep control of the Condominium Board until the “turn-over meeting” where the purchasers would elect directors to serve on the Condominium Board of P.S.C.C. #833.

(k) The Board Of Directors For P.S.C.C. #833 (“Condominium Board”)

[62] Under s. 42(1) of the Condominium Act, 1998, the first Board of Directors for P.S.C.C. #833 would be comprised of directors appointed by the builder-developer, but these directors would only hold office until a new board comprised of purchasers had been elected at the turn-over meeting held under s. 43 of the Act [*emphasis is mine below*]:

Board of directors

27(1) A board of directors shall manage the affairs of the corporation.

...

First board of directors

42(1) Within 10 days after the registration of the declaration and description, the declarant shall appoint the first board of a corporation.

...

Term

(3) The first board shall hold office until a new board is elected at a turn-over meeting held under section 43.

...

Owners’ meeting

(6) Subject to subsection (7), the first board shall call and hold a meeting of owners by the later of,

- (a) the 30th day after the day by which the declarant has transferred 20 per cent of the units in the corporation; and*
- (b) the 90th day after the declarant transfers the first unit in the corporation.*

Exception

(7) *The first board is not required to call or hold the meeting mentioned in subsection (6) if, by the day set for the meeting, the declarant no longer owns a majority of the units and advises the first board in writing of that fact.*

Election of directors

(8) *At the meeting mentioned in subsection (6), the owners, other than the declarant, may elect two directors to the first board.*

Quorum

(9) *Despite subsection 50(1), at the meeting mentioned in subsection (6), the quorum for the election of directors under subsection (8) is those owners who own 25 per cent of the units in the corporation not owned by the declarant.*

Determination of quorum

(10) *To count towards the quorum, an owner must have been entitled to receive notice of the meeting, must be entitled to vote at a meeting and shall be present at the meeting or represented by proxy.*

...

[63] Furthermore, Thomas Schmaus, the Treasurer of the Condominium Board for P.S.C.C. #833, testified that after the Declaration and Description document had been registered on July 29, 2008, the builder-developer took over on an interim basis as the property manager for the condominium property until the Spring of 2009. He also said the builder-developer had formed the first Board of Directors for P.S.C.C. #833, as required under the Condominium Act, 1998, but that there had been no directors on the first Board of Directors that were from the purchasers. As such, Schmaus said the builder-developer had control of the Condominium Board and control of the decisions to be made in respect of the townhouse complex until the purchasers took over the Condominium Board from the builder-developer.

[64] In addition, the first Board of Directors for P.S.C.C. #833 would be eventually replaced by directors comprised of the purchasers of the ten townhouses at the "turn-over meeting", as required under s. 43(1) of the Condominium Act, 1998. The builder-developer is also legally required to turn over specific documents and plans, including "as-built" drawings, to the new Condominium Board that is comprised of the purchasers [*emphasis is mine below*]:

Turn-over meeting

43(1) The board elected or appointed at a time when the declarant owns a majority of the units shall, not more than 21 days after the declarant ceases to be the registered owner of the majority of the units, call a meeting of owners to elect a new board.

Who may call meeting

(2) If the board does not call the meeting within the required time, an owner or a mortgagee having the right to vote under section 48 may call the meeting.

Time of meeting

(3) The board shall hold the meeting within 21 days after it is called.

Things to turn over

(4) At the meeting, the declarant shall deliver to the board elected at the meeting,

- (a) the seal of the corporation;
- (b) the minute book for the corporation including a copy of the registered declaration, registered by-laws, current rules and minutes of owners' meetings and board meetings;
- (c) copies of all agreements entered into by the corporation or the declarant or the declarant's representatives on behalf of the corporation, including management contracts, deeds, leases, licences and easements;
- (d) copies of all policies of insurance and the related certificates or memoranda of insurance and all insurance trust agreements;
- (e) bills of sale or transfers for all items that are assets of the corporation but not part of the property;
- (f) the records maintained under subsection 47 (2) and subsection 83 (3); and
- (g) all records that it has related to the units or to employees of the corporation.

Same, after meeting

(5) The declarant shall deliver to the board within 30 days after the meeting,

- (a) the existing warranties and guarantees for all the equipment, fixtures and chattels included in the sale of either the units or

common elements that are not protected by warranties and guarantees given directly to a unit purchaser;

- (b) the as-built architectural, structural, engineering, mechanical, electrical and plumbing plans;
- (c) the as-built specifications, indicating all substantive changes, if any, from the original specifications;
- (d) all existing plans for underground site services, site grading, drainage and landscaping, and television, radio or other communications services;
- (e) all other existing plans and information not mentioned in clause (b), (c) or (d) that are relevant to the repair or maintenance of the property;
- (f) if the property of the corporation is subject to the Ontario New Home Warranties Plan Act,
- (i) proof, in the form, if any, prescribed by the Minister, that the units and common elements have been enrolled in the Plan within the meaning of that Act in accordance with the regulations made under that Act, and
- (ii) a copy of all final reports on inspections that the Corporation within the meaning of that Act requires be carried out on the common elements;
- (g) a table setting out the responsibilities for repair after damage and maintenance and indicating whether the corporation or the owners are responsible;
- (h) a schedule setting out what constitutes a standard unit for each class of unit that the declarant specifies for the purpose of determining the responsibility for repairing improvements after damage and insuring them;
- (i) all financial records of the corporation and of the declarant relating to the operation of the corporation from the date of registration of the declaration and the description;
- (j) if the meeting is held after nine months following the registration of the declaration and description, the reserve fund study that is required within the year following the registration of the declaration and description;
- (k) all reserve fund studies that have been completed or are required to have been completed at the time the meeting is held, other than the reserve fund study that is required within

the year following the registration of the declaration and description;

(l) a copy of the most current disclosure statement delivered to a purchaser of a unit in the corporation under section 72 before the meeting; and

(m) all other material that the regulations made under this Act require to be given to the board.

Cost

(6) The items mentioned in subsections (4) and (5) shall be prepared at the declarant's expense, except for the items mentioned in clauses (5) (j) and (k) which shall be prepared at the expense of the corporation.

Audited financial statements

(7) The declarant shall deliver to the board within 60 days after the meeting audited financial statements of the corporation prepared by the auditor, on behalf of the owners and at the expense of the corporation, as of the last day of the month in which the meeting is held.

...

[65] On April 30, 2009, the "turn-over meeting" required under s. 43(1) was held, at which time the first Board of Directors that had been appointed by the builder-developer were replaced by directors who were elected by the purchasers of the ten townhouses. Ergo, the Board of Directors that were comprised of the purchasers of the ten townhouses were not responsible for the common areas of the townhouse complex until April 30, 2009.

[66] Furthermore, the builder-developer had control of the Condominium Board until the builder-developer turned over control of the Board to the purchasers at the turn-over meeting held on April 30, 2009. Thomas Schmaus also testified that the new Board then was comprised of directors who were purchasers of the ten townhouses. Schmaus also said the new Condominium Board then requested documents, building plans, and warranties from the builder-developer, but very little had been turned over by the builder-developer to them.

(l) When Did The Purchasers Become Collectively Responsible And Liable For Repairing Any Deficiencies In The Townhouse Complex?

[67] Under s. 43(1) of the Condominium Act, 1998, a Condominium Board comprised of the purchasers would not become legally responsible for the ten townhouses and the common property until a turn-over meeting was held and

directors were elected from the purchasers to serve on the Condominium Board.

- [68] When the condominium corporation came into existence, representatives of the builder-developer were the first directors of P.S.C.C. #833. And, because the builder-developer controlled the board of directors for P.S.C.C. #833, the builder-developer, through his control of the Condominium Board for the townhouse development, would be responsible for the common areas of the townhouse development, including the exterior decks, which would be part of the common area of that condominium corporation. The builder-developer then would be responsible for the common areas until the Condominium Board is turned over to the directors from and elected by the purchasers.
- [69] In addition, Ken Beard, one of the purchasers and the President of the Condominium Board, testified that on April 30, 2009, control of the Board of Directors was turned over to the purchasers' directors and as such, the builder-developer had been responsible for the common areas up to April 30, 2009, when the Condominium Board was turned over to the purchasers.
- [70] In addition, Beard testified that the purchasers were not involved in the construction of the townhouse development or project. Beard also said the purchasers were not collectively responsible for managing the townhouse complex until April 30, 2009.

(m) Performance Audit Report

- [71] Thomas Schmaus, the Treasurer for the Condominium Board, explained that under the provisions of the Condominium Act, 1998, the Condominium Board was obligated to perform a list of statutory requirements, including doing a reserve fund study under s. 94 and retaining a profession engineer or architect to do a Performance Audit of the common elements described in the Declaration and Description document for P.S.C.C. #833 under s. 44(1) and to prepare a report as required under s. 44(8) detailing any deficiencies in the workmanship or construction in respect to the common areas.
- [72] Under s. 44(2), the Performance Audit is required to be done no earlier than six months following the registration of the Declaration and Description document that created the Condominium Corporation, but no later than 10 months after the registration of that document. Since the document creating P.S.C.C. #833 was registered on July 29, 2008, then the Performance Audit had to be completed before May 29, 2009. In addition, s. 44(8) requires a Performance Audit Report to be prepared by the profession engineer or architect and under s. 44(9)(b) the Report had to be filed with Tarion within 11 months of the Declaration and Description document being registered, which means the Performance Audit Report had to be filed with Tarion before June 29, 2009. *[emphasis is mine below]*:

Performance audit

- 44(1) *If the property of the corporation includes one or more units for residential purposes or if the corporation is a common elements condominium corporation, the board shall retain a person who holds a certificate of authorization within the meaning of the Professional Engineers Act or a certificate of practice within the meaning of the Architects Act to conduct a performance audit of the common elements described in the description on behalf of the corporation.*

Time for audit

- (2) *A performance audit shall be conducted no earlier than six months, and no later than 10 months, following the registration of the declaration and description.*

Cost

- (3) *The corporation shall pay the cost of the performance audit and it shall form part of the corporation's budget for the year following the registration of the declaration and description.*

Purpose

- (4) *The person who conducts the performance audit shall determine whether there are any deficiencies in the performance of the common elements described in the description after construction has been completed on them that,*
- (a) *may give rise to a claim for payment out of the guarantee fund under section 14 of the Ontario New Home Warranties Plan Act to the corporation; or*
- (b) *subject to the regulations made under this Act, would give rise to a claim described in clause (a) if the property of the corporation were subject to that Act.*

Duties

- (5) *In making the determination, the person who conducts the performance audit shall,*
- (a) *inspect the major components of the buildings on the property which, subject to the regulations made under this Act, include the foundation, parking garage, wall construction, air and vapour barriers, windows, doors, elevators, roofing, mechanical system, electrical system, fire protection system and all other components that are prescribed;*
- (b) *subject to the regulations made under this Act, inspect the landscaped areas of the property;*

- (c) review all final reports on inspections that the Corporation within the meaning of the Ontario New Home Warranties Plan Act requires be carried out on the common elements; and
- (d) conduct a survey of the owners of the corporation as to what evidence, if any, they have seen of,
 - (i) damage to the units that may have been caused by defects in the common elements, and
 - (ii) defects in the common elements that may cause damage to the units.

Powers for audit

- (6) The person who conducts a performance audit may, for the purpose of the audit,
 - (a) enter onto the property at any reasonable time either alone or accompanied with any expert that the person considers necessary for the audit;
 - (b) require any person to produce any drawings, specifications or information that may on reasonable grounds be relevant to the audit;
 - (c) make all examinations, tests or inquiries that may on reasonable grounds be relevant to the audit; and
 - (d) call upon any expert for the assistance that the person considers necessary in conducting the audit.

No obstruction

- (7) No person shall obstruct a person who is exercising powers under this section or provide false information or refuse to provide information to the person.

Contents

- (8) The person who conducts a performance audit shall prepare a written report that includes,
 - (a) a copy of the person's certificate of authorization within the meaning of the Professional Engineers Act or certificate of practice within the meaning of the Architects Act, as the case may be;

- (b) details of the inspection and findings made by the person in the course of conducting the audit;
- (c) a statement that the person has reviewed all final reports described in clause (5) (c);
- (d) a copy of the survey described in clause (5) (d) and a summary of the results of it;
- (e) the determination that subsection (4) requires the person to make; and
- (f) all other material that the regulations made under this Act require.

Submission of report

- (9) Before the end of the 11th month following the registration of the declaration and description, the person who conducts a performance audit shall,
 - (a) submit the report to the board; and
 - (b) file the report with the Corporation within the meaning of the Ontario New Home Warranties Plan Act if the property is subject to that Act.

Claim under other Act

- (10) The filing of the report with the Corporation within the meaning of the Ontario New Home Warranties Plan Act shall be deemed to constitute a notice of claim that the corporation gives to the Corporation within the meaning of that Act under the regulations made under that Act for the deficiencies disclosed in the report.

[73] Moreover, s. 44(4) of the Condominium Act, 1998 requires the engineer or architect doing the performance audit to determine whether there are any deficiencies in the performance of the common elements described in the Description after construction had been completed on them that may give rise to a claim for payment to the condominium corporation out of the guarantee fund under s. 14 of the Ontario New Home Warranties Plan Act. In addition, s. 44(10) of the Condominium Act, 1998 provides that the filing of the Performance Audit Report with Tarion is deemed to be notice of a warranty claim for the deficiencies disclosed in the report.

[74] Furthermore, Ken Beard, the President of the Condominium Board, testified that the purchasers' limitation period to make certain warranty claims under the Ontario New Home Warranties Plan Act would be expire on August 14, 2009, which is one year after the builder-developer had transferred legal ownership

of the townhouses and common areas to the purchasers and to P.S.C.C. #833, respectively.

- [75] Therefore, it had been very crucial for the Board of Directors of P.S.C.C. #833 to retain a professional engineer to prepare the Performance Audit Report and file that report with Tarion, as filing the report with Tarion is deemed notice to Tarion of any warranty claim that the purchasers would collectively have under the Ontario New Home Warranties Plan Act.
- [76] The Performance Audit Report (see Ex. 1, Defendant's Document Brief Book #1, Tab 25) had been prepared by Bruce Pichler of Pichler Engineering (the "Pichler Report") and was dated June 25, 2009, and was also submitted to the Board of Directors of P.S.C.C. #833 on June 25, 2009.
- [77] In addition, Thomas Schmaus, the Treasurer of the Condominium Board, testified the builder-developer did not provide the purchasers with a set of certified "as-built" plans, but did provide them with an original set of permit plans. Furthermore, Schmaus said that Bruce Pichler, the professional engineer who had prepared the Performance Audit Report had also informed Schmaus that the plans that had been given to them by the builder-developer were different from what had been actually constructed by the builder-developer. Schmaus also said the Performance Audit Report had been provided to the builder-developer, Tarion, the Condominium Board, the City of Mississauga, and to the property manager that the Condominium Board had hired to manage the townhouse complex.

(n) The Discovery of the Unauthorized Alterations by the Purchasers

- [78] The purchasers of the ten townhouses were not aware of the alterations that the builder-developer had made to elements of the townhouse complex or that they were not in accord with the approved building plans or drawings, until they had been made aware by the Performance Audit Report provided to them on June 25, 2009. The 22-page report had identified approximately 33 deficiencies or *Building Code* violations, including that the exterior decks and the front entrance canopies for the seven townhouses in Building "A" were not built according to the approved drawings (see Ex. 1, Defendant's Brief Book, volume 1, Tab 25).
- [79] The Report was also derived from Bruce Pichler's inspection of the townhouse complex and a review of the building permit drawings and plans approved by the City of Mississauga, which had been provided by the builder-developer.
- [80] Furthermore, Ken Beard, the President of the Condominium Board, had said the builder-developer had provided the Condominium Board with five sets of drawings as "as-built" drawings, but that they were only iterations of the approved permit drawings with modifications. In addition, Beard said he had

been advised by Bruce Pichler, the professional engineer who had prepared the Performance Audit Report, that these iterations of the permit drawings were not accurate, as they did not properly show what had been actually built. Furthermore, Beard said that these iterations did not contain any details of the changes or alterations that had been constructed by the builder-developer.

[81] In addition, Beard said the builder-developer had been upset with the Performance Audit Report, which revealed *Building Code* violations and other deficiencies, because the builder-developer had contended and believed the purchasers and Pichler had used the wrong drawings.

[82] Beard also said the builder-developer had only made a few cosmetic repairs, but would not address the major deficiencies revealed in the Performance Audit Report. In particular, Beard said the builder-developer would not touch the exterior deck for Building "A", even though the boards on the deck were floating. Beard further said that the expected life of that exterior deck was supposed to have been for 20 years, but the deck had to be replaced immediately.

(o) The Nature Of The Unauthorized Alterations Made By The Builder-Developer That Were Not In Accord With The Approved Plans Or Drawings

[83] Two major elements of the townhouse complex at Glen Erin Drive and Rogers Road were not built according to the approved plans. These unauthorized alterations were in respect to the exterior decks for both Building "A" and Building "B" and in respect to the front entrance canopies for the seven townhouses of Building "A". Both exterior decks had been built so that cars could be driven underneath the decks in order to go into the garage for each townhouse. The exterior decks were also attached to the rear masonry walls of the two buildings.

[84] The approved plans had specified the floor of the exterior deck for Building "A" was to be constructed as an open joist floor and that the guardrails for the deck were to be a picket-style guardrail, which would have been the same guardrail system that had already been constructed for the exterior deck for Building "B". However, the builder-developer had decided to alter the flooring for the exterior deck for Building "A" by constructing or covering the deck with plywood and a waterproof membrane. It had also altered the guardrail by installing a tempered glass panelled guardrail instead of installing pickets as detailed in the approved drawings. In addition, both exterior decks were not attached as had been designed in the approved drawings. Instead of attaching the exterior decks to the inside of the masonry walls, the builder-developer attached the exterior deck to a header board that was attached to the masonry wall. However, Stasys Obelienius, the City of Mississauga building inspector, testified that this method of attachment of the exterior decks to the masonry

wall that had been utilized by the builder-developer was not a method that was disapproved of by the Ontario *Building Code*. Nevertheless, Obelienius said that these specific alterations were not in accord with the approved plans, even though the method of attachment used by the builder-developer for the exterior decks had been a safe and acceptable method under the *Building Code*.

- [85] On the other hand, Obelienius said that the tempered glass panels installed as a guardrail for the exterior deck for Building "A" was not specifically approved of in the *Building Code* and would require a professional engineer to design and certify the glass-panelled guardrail system, before they could be installed as guardrails.
- [86] Furthermore, Obelienius testified that he met with Bob Bray, the site supervisor, on June 25, 2008, at the townhouse complex, at which time Bray had asked Obelienius what had to be done if the builder-developer wanted to install glass panels for the guardrails on the exterior deck for Building "A". Obelienius had told the site supervisor that an engineer had to design and certify the glass guardrail system and then apply for a revision to the building permit that had been issued for Building "A".
- [87] In addition, Ken Beard, the President of the Condominium Board, said that problems with the exterior deck for Building "A" had started about 3 months after it was completed. Beard further said the deck boards were twisted badly and deck screws were being pulled out. Furthermore, he said the flooring on the exterior deck had warped significantly as well. Beard also said the builder-developer had omitted a steel beam that would have been used in the construction of the exterior deck for Building "A" that would have ran the entire length of the exterior deck.
- [88] As for the unauthorized alterations to the front entrance canopies for the seven townhouses in Building "A", Obelienius testified that the builder-developer had constructed a flat roof for the canopies instead of a gable or peaked roof as had been detailed in the approved drawings.
- [89] Moreover, Ken Beard said that the builder-developer had made these wholesale structural changes without an architect and a steel structural engineer being involved.
- [90] Beard also said that unit #7 and unit #10 had leaked like a sieve for five years, and that walls for those units had to be taken down.
- [91] In addition, s. 8(12) of the Building Code Act, 1992 prohibited the builder-developer from making any material change to a plan on the basis of which a building permit had been issued without notifying, filing details with, and obtaining the authorization of the City of Mississauga Planning and Building Department [*emphasis is mine below*]:

Notice of change

8(12) No person shall make a material change or cause a material change to be made to a plan, specification, document or other information on the basis of which a permit was issued without notifying, filing details with and obtaining the authorization of the chief building official.

(p) Complaints By The Board Of Directors Of P.S.C.C. #833 To The Builder-Developer

[92] After the Performance Audit Report had been submitted to the Board Of Directors of P.S.C.C. #833, the Condominium Board contacted the builder-developer about their concerns over the alterations or deviations from the approved design plans. However, Ken Beard, the President of the Condominium Board, testified that Greg Gilmour, the President of Real-T-Building Inc., had informed Beard that they would be in court for many years if the purchasers wanted the builder-developer to do anything with the exterior decks. Beard later informed the Condominium Board of the builder-developer's response to the Condominium Board's complaint about having the exterior decks fixed so that they would comply with the approved plans.

[93] Furthermore, Thomas Schmaus, the Treasurer of the Condominium Board, said that after the builder-developer had received the Performance Audit Report things had become heated between the Condominium Board and the builder-developer. Schmaus also said the builder-developer then began making excuses and had wanted to supply them with other plans. Schmaus also said the Condominium Board then approached the City of Mississauga once they realized the plans that they had received from the builder-developer did not match what had actually been built.

(q) Has The City Of Mississauga Completed A Final Exterior Inspection Of The Townhouse Complex?

[94] Stasys Obelienius, the City of Mississauga building inspector, testified that there are 11 mandatory inspections listed by the Ministry of Municipal Affairs and Housing that has to be done in regards to the statutory inspections required to be done on a new building under the Building Code Act, 1992, such as inspections for the foundation, plumbing, and electrical. However, Obelienius said that the City of Mississauga will not go out to do one of those inspections, unless it is formally requested to do one of those particular inspections by the builder. In other words, the City of Mississauga will not perform one of those mandated inspections on its own schedule unless it is asked to do so by the builder.

- [95] For the present case, Obelienius said the builder-developer of the 10 townhouses at Glen Erin Drive and Rogers Road had not at any time made a request for the City of Mississauga to attend the townhouse development to conduct a final exterior inspection. He also said the construction of the exterior deck and the front entrance canopies would have fallen under that final exterior inspection. In addition, Obelienius said that from his check of his department's computer records there had been no "as-built" plans or drawings submitted to the City of Mississauga that would reflect what had actually been built at the townhouse development.
- [96] Furthermore, the builder-developer, who is the holder of the building permits issued to construct the ten townhouses, is required by the Ontario *Building Code* to notify the City of Mississauga Planning and Building Department to arrange for inspections at certain stages of construction. In addition, the building permit documents and the approved plans that are stamped and signed by the City of Mississauga are also required to be kept on site at all times and be available when particular inspections are being conducted.
- [97] In addition, Obelienius said the Building Code Act, 1992 dictates when a project must be started by, but that there is no time set out in the Act when the project must be completed by. Furthermore, Obelienius said the obligation is on the builder-developer, who holds the two building permits issued to construct the ten townhouses, to notify or call the City of Mississauga when it is ready for a particular inspection. This obligation on the permit holder to notify the City of Mississauga of their readiness for a particular inspection, such as a final inspection, is proscribed by s. 10.2(1) of the Building Code Act, 1992 [*emphasis is mine below*]:

Notice of readiness for inspection

10.2(1) At each stage of construction specified in the building code, the prescribed person shall notify the chief building official or the registered code agency, if any, that the construction is ready to be inspected.

Inspection

(2) After the notice is received, an inspector or the registered code agency, as the case may be, shall carry out the inspection required by the building code within the prescribed period.

- [98] Furthermore, Obelienius explained that the City of Mississauga would not have been able to do a final exterior inspection in any event, since the Planning and Building Department would not have had any "as-built" plans or anything else to base its inspection on, especially when certain elements of the townhouse development had not been built according to the approved plans. In other words, there were no "as-built" plans that would have shown what had actually

been built at the townhouse development, which had been submitted and accepted by the City of Mississauga, for which a final exterior inspection could be done on.

- [99] Obelienius also said that in a final inspection, he would be looking at caulking and at the lights and also inspect the framing of the exterior deck to see if the proper materials had been used.
- [100] Furthermore, Obelienius said there are still two outstanding inspections that have to be conducted on the townhouse project at Glen Erin Drive and Rogers Road. Moreover, he is not aware if the defendant had tried to apply or had applied for a revision to the building permits. However, he reiterated that there is nothing in the City of Mississauga computer system that indicates the defendant had applied for a revision to the two permits issued for the construction of the ten townhouses.
- [101] In addition, Obelienius said that up to the last date of the trial, the City of Mississauga has not been requested by the builder-developer or the defendant to attend the townhouse project to do a final exterior inspection. He also said that it is still an outstanding inspection that has to be completed.
- [102] Furthermore, Ken Beard, the President of the Condominium Board, testified that he had not been aware that the City of Mississauga had not conducted a final inspection and had been extremely surprised that the purchasers had been allowed to occupy the new townhouses without a final inspection being done. Beard also said that a final Hydro inspection has not been done on the townhouse complex, nor had any of the purchasers been made aware of it not being conducted.

(r) Building Inspector Stasys Obelienius' Attendances At The Townhouse Development

- [103] Stasys Obelienius said he had first attended at the townhouse complex on November 28, 2006, to conduct an inspection of the forms for the footings before they were poured. In addition, Obelienius said he does not do inspections for sewers or mains, since that is not his field. However, he said he is there for structural inspections.
- [104] Obelienius said he then attended the townhouse development on February 5, 2008, but the builder-developer had not been ready for the inspection that Obelienius had been called out to do, so Obelienius said he had to re-attend on February 14, 2008, to do that particular inspection.
- [105] For his next attendance at the townhouse development, Obelienius said he had attended on June 25, 2008, to conduct a "registration inspection" for the purpose of registering the Declaration and Description document that would

create the condominium corporation. Obelienius also said the "registration inspection" was not an inspection required to be done in regards to the two building permits. He also said the exterior deck for Building "A" at that time had not been constructed and that only the steel frame of the deck had been erected.

- [106] Furthermore, Obelienius said he next attended the townhouse complex on September 4, 2009, as a result of a complaint made on September 1, 2009, by Mrs. Furlong, one of the purchasers of the ten townhouses. However, when Obelienius attended at the purchaser's unit he said the purchaser was not there. He then arranged to meet Mrs. Furlong on September 10, 2009.
- [107] On September 10, 2009, Obelienius re-attended the townhouse complex to deal with the Furlong complaint and met with Ken Beard, Thomas Schmaus, and Mike Furlong, who were member of the Condominium Board. Obelienius said he was provided with the Performance Audit Report that outlined deficiencies for the townhouse complex that had been prepared by Bruce Pichler. He also did an inspection of the townhouse complex and observed the unauthorized alterations made by the builder-developer.
- [108] Then on September 14, 2009, Obelienius said he met with Bob Bray, the site supervisor for the builder-developer, at the townhouse complex. Obelienius said he had made Bray aware that the builder-developer would need to address the unauthorized alterations and obtain a revision for the building permits for those alterations. Obelienius then said Bray had informed Obelienius that they would supply a professional engineer's report and certificate for the glass-panelled guardrails and that they had engineers working on the other items.
- [109] For his next attendance, Obelienius said he had attended the complex on February 18, 2010. On that occasion, Obelienius said he had noticed that there were still deficiencies and that the exterior decks were still constructed the same. Obelienius also said he met with Bob Bray again and was informed by Bray that the builder-developer was still working on the plans. In addition, Obelienius said he had observed the exterior deck had been still constructed with the glass-panelled guardrails and the membrane floor, that the front entrance canopies were still constructed with flat roofs, and that no application for a revision to the permits had been submitted. However, he did note that some bracing had been done to the exterior deck for units #8, #9, and #10 of Building "B", but otherwise he said that deck was still the same and that he could still see the deck joists hanging on the ledger boards. Therefore, he said the town house complex was still not in compliance.
- [110] In addition, Obelienius said he had attended at the townhouse complex on July 19, 2013, and had observed that the construction was still the same as when he had observed the complex in 2009, namely that the ledger board was still

visible, that there was still a flat roof for the front entrance canopies, that there was still the glass-panelled guardrail for the exterior deck, and that there was still a membrane covering the exterior deck. He also said he had checked the City of Mississauga computer system on July 19th and noted that no revision application had been filed yet.

[111] Obelienius also said he has not yet been requested to do a final exterior inspection of the townhouse complex.

(s) Complaints By P.S.C.C. #833 To A City Of Mississauga Councillor And To The Planning and Building Department About The Builder's Unauthorized Alterations

[112] On June 25, 2009, the Condominium Board for P.S.C.C. #833 was given the Performance Audit Report prepared by Bruce Pichler that detailed the unauthorized alterations and other deficiencies made by the builder-developer to the common areas. After the Condominium Board became aware of the unauthorized alterations, Thomas Schmaus, the Treasurer of the Condominium Board, testified that the property manager that had been retained by the Condominium Board had contacted the City of Mississauga about the unauthorized alterations made by the builder-developer.

[113] In addition, Mrs. Furlong, who was one of the purchasers of the ten townhouses, had also made complaints to Katie Mahoney, a city councillor for the City of Mississauga and to the Planning and Building Department of the City of Mississauga on September 1, 2009, about the unauthorized alterations made by the builder-developer.

[114] Furthermore, Bruce Pichler had also contacted the City of Mississauga on behalf of the Condominium Board to inform the City of Mississauga about the unauthorized alterations.

[115] After these complaints were made to the City of Mississauga, Stasys Obelienius, a building inspector, was then directed by his manager to attend at the townhouse development to investigate the complaint. On September 10, 2009, Obelienius met with the directors of the Condominium Board to look into the complaint.

[116] In addition, Costas Nikiforos, the supervisor of the building inspection staff for the west side of Mississauga, testified that a meeting had been held at the municipality's office with himself, his manager, Stasys Obelienius, Ken Beard, and Greg Gilmour, to decide what to do about the unauthorized alterations made by the builder-developer. Nikiforos said he had informed the builder-developer and the Condominium Board members that a revision permit would be required that would have to include the glass-panelled guardrails installed on the exterior deck, the front entrance canopies, and the membrane covering

the exterior deck, since the original plans had called for deck planking instead of the plywood and decking surface that had been actually constructed, picket guardrails instead of the glass panels that were actually installed, and a pitched roof instead of the flat canopies that were actually constructed. In addition, Nikiforos, said that the builder-developer had been instructed by Nikiforos to revise the plans and then make an application to revise the building permits and that the City of Mississauga's plan examiners would check to see whether the plans met the *Building Code*. In addition, Nikiforos said that if the plans submitted with the revision application did not comply with the *Building Code* then the plans examiner would not approve the application.

[117] Furthermore, Nikiforos said that it had been the builder-developer's obligation to inform the City of Mississauga when the builder had made modifications to the approved plans, as well as the builder-developer's obligation to call the City of Mississauga for an inspection.

[118] Nikiforos also said the City of Mississauga did a registration inspection, but not a final exterior inspection of the townhouse complex, and that the exterior deck would have been an integral part of that final inspection. As such, Nikiforos said the City of Mississauga has not yet signed off on the deck. Moreover, Nikiforos said that it would be premature for the builder-developer to call for a final exterior inspection when the revisions are still outstanding.

[119] Moreover, Nikiforos said that it had been the City of Mississauga's view that the unauthorized alterations made by the builder-developer had been workmanship related and not related to *Building Code* deficiencies and that the purchasers should be seeking redress at Tarion and that the City would not be responsible for the builder-developer's unauthorized alterations, since they were not *Building Code* related.

[120] Nikiforos also said that he was not certain about the safety of the exterior deck, but did acknowledge that the exterior deck did not appear to have any safety issues or that there had been any urgency to bring the deck up to compliance in order to comply with the Orders to Comply.

[121] In addition, Thomas Schmaus, the Treasurer of the Condominium Board, had testified that the City of Mississauga had also advised the purchasers to revise the plans and get the items fixed.

(t) The Confirmation Of The Unauthorized Alterations On September 10, 2009, by City of Mississauga Building Inspector Stasys Obelienius

[122] Stasys Obelienius, the building inspector responsible for that particular townhouse development, attended at the complex on September 10, 2009, and met with Mike Furlong, Ken Beard, and Thomas Schmaus of the Condominium Board. The Board members then presented Obelienius with the

Performance Audit Report that contained a list of deficiencies. Obelienius then walked around and inspected all ten units of the townhouse complex. Obelienius also said the list of deficiencies that was set out in the Performance Audit Report had contained items that were covered by the Ontario *Building Code* and ones that were not.

- [123] In his inspection of the ten units on September 10, 2009, Obelienius testified he had observed that the exterior deck and front entrance canopies for the seven townhouses in Building "A" had not been constructed according to the approved plans.
- [124] In particular, Obelienius said he had looked at the exterior decks and had observed a covering on the exterior deck for townhouse units #1 to #7 that had been a substitute to the original plans. Obelienius also said drawing A9-1, item #5 in the approved plans (Ex. 2) had detailed the use of 2 x 6 decking boards with gaps between the planks, but Obelienius had observed the exterior deck had been instead covered with a plywood skin, which was then covered with a waterproof membrane that had not been shown in the approved drawings. Moreover, Obelienius said that with the plywood and membrane covering, he could not see through it, and as such, a waterproof barrier and a solid floor for the deck had been created. Furthermore, he said that for Building "B" the exterior deck had been built with 2 x 6 deck boards, as the approved exterior deck plan had detailed.
- [125] Obelienius also said he noted in particular that the method of connection for the exterior deck for units #1 to #7 of Building "A" and the method of connection for the exterior deck for units #8 to #10 of Building "B" had not been constructed according to the approved plans on which the two building permits had been issued. In particular, Obelienius said the method of connection, as set out in drawing A9-1, detail #8 of the approved plans (Ex. 2), shows that the deck joists for both exterior decks were to sit in a pocket that had been constructed in the masonry or stone. However, Obelienius said he noticed that the deck joists for both decks had been connected instead to the two buildings by the use of hangers and not sitting in a pocket that had been constructed in the masonry or stone. In addition, he said there were ledger boards to the units and carriage bolts were used, but it was out of the masonry and the joists hung over the side of the ledger boards. On the other hand, Obelienius said the method of attachment that he did observe was acceptable under the *Building Code*, although it had not been in accord with the approved plans, and the builder-developer would, therefore, need a revision to the building permits.
- [126] In addition, Obelienius said he also specifically observed the installation of a glass guardrail on the exterior deck for Building "A" instead of the installation of a picket-styled guardrail that had been called for in the approved plans. He also said that because the *Building Code* does not provide standards or specifications for the use of glass panels as guardrails on exterior decks, the

builder-developer would need to obtain a revision to the building permit and to also have an engineer design plans for the glass-panelled guardrails. He then referred to drawing A9-2, item EDI of the approved plans (ex. 2), which showed the exterior deck for units #1 to #7 with pickets for the guardrail. In addition, Obelienius said that pickets for guardrails were in the *Building Code*, and since the picket system for guardrails had been pre-tested then specifications for the picket guardrail could be picked out of the *Building Code*.

- [127] Furthermore, Obelienius said the City of Mississauga did not get a request to conduct an inspection of the exterior deck for Building "A".
- [128] Obelienius further said he had observed that the builder had constructed a flat roof assembly for the front of each of the townhouses in Building "A" instead of constructing them as a peaked roof, which had been set out in the approved plans, and which had been actually built for the front entrances of the townhouses in Building "B".
- [129] In addition, Obelienius said these alterations made by the builder-developer were not minor changes, but actual changes to the construction that was not in accord with the approved plans. However, Obelienius did say there were minor items as well that needed to be fixed.
- [130] Obelienius also said he probably would not have been aware of the unauthorized alterations or deficiencies, if Mrs. Furlong had not complained to the City of Mississauga and he had not been given the Performance Audit Report that outlined a number of deficiencies. Obelienius also said the builder-developer had not notified him that it would be constructing elements for the townhouse complex that would not have been in compliance with the approved plans.

(u) The Builder-Developer's Efforts to Rectify the Unauthorized Alterations

- [131] After observing the unauthorized alterations on September 10, 2009, Obelienius said he then met with Bob Bray, the site supervisor for the builder-developer, on September 14, 2009, at the townhouse complex. Obelienius said he made Bray aware of the unauthorized alterations and what alterations would need a revision to the building permits. Obelienius then said that Bray had informed Obelienius that the builder-developer would supply a professional engineer's report and certificate for the glass-panelled guardrails and that they also had engineers working on the deficient items.
- [132] The builder-developer had also informed the City of Mississauga that they were working on resolving the problem, as well as preparing "as-built" drawings to reflect what was actually constructed, and that it would then apply for a revision to the building permits.

- [133] On the other hand, the builder-developer informed the purchasers that the builder-developer would not change the exterior deck and front entrance canopies, since it believed that the alterations and deviations were reasonable and within their mandate and that the agreement between the purchasers and the builder-developer had also permitted the developer to alter, substitute, or make deviations in the construction of the townhouses.
- [134] Obelienius also said that on December 1, 2009, the builder-developer then attempted to file an application for a revision to the two building permits, but Kristy Webb, from the City of Mississauga Planning and Building Department would not accept the revision application from the builder-developer because the builder-developer was no longer the legal owner of the ten townhouses and that consent or permission would have to be obtained from or given by the purchasers that now make up the Board of Directors of P.S.C.C. #833, who were now the legal owners of the townhouses and common property before the revision application would be accepted and considered by the City of Mississauga. However, the purchasers, had been advised by Bruce Pichler, the professional engineer who had prepared the Performance Audit Report, not to provide that consent to the builder-developer. As such, the purchasers had refused to give their consent to the builder-developer to file the revision application for the building permits on their behalf.
- [135] Moreover, Ken Beard, the President of the Condominium Board, testified he had been advised not to acquiesce and give the builder-developer permission to apply for a revision to the building permits, since the purchasers could be saddled with the liability and the cost of repairing any deficiencies that were caused by the builder-developer and that the Tarion Warranty Corporation would be off the hook and no longer be legally obligated to fix the defective exterior decks or other unauthorized alterations. In addition, Beard said the Condominium Board did not want to allow the revision application to be submitted by the builder-developer, as the builder-developer had not provided them with any accurate and certified "as-built" drawings, and that allowing the application to be filed would infer that the purchasers had accepted the changes and the status of what had actually been built by the builder-developer.
- [136] Obelienius also said that the builder-developer's revision application was never processed by the City of Mississauga because the builder-developer was no longer the legal owner of the ten townhouses and their respective common areas, and that the City of Mississauga would not accept the application without the consent of the legal owners, which would have been the Condominium Corporation, which had been comprised of the purchasers of the ten town townhouses.
- [137] Furthermore, Thomas Schmaus, the Treasurer of the Condominium Board, said that on January 4, 2010, Bruce Pichler had prepared another assessment

of the townhouse property and had reported to the Condominium Board that the exterior deck was still not in compliance with the *Building Code* and that the "as-built" drawings that the builder-developer had been trying to submit to the City of Mississauga was not accurate and did not reflect what had been actually built. In addition, Schmaus said that Pichler had also recommended that the Condominium Board not accept those uncertified and inaccurate "as-built" drawings.

[138] Next, Obelienius said he met with Bob Bray, the site supervisor, on February 18, 2010, at the townhouse complex, but Obelienius said he observed there were still the deficiencies and that the exterior decks were still the same and constructed with the glass-panelled guardrails and a membrane floor, that the front entrance canopies were still constructed with flat roofs, and that no revision application to the permits had been submitted. However, he did note that that some bracing had been done to the exterior deck for units #8, #9, and #10 of Building "B", but otherwise the deck was still the same and that he could still see the deck joists hanging on the ledger boards. He also said the townhouse complex was still not in compliance at that time.

[139] Furthermore, Thomas Schmaus said that Bruce Pichler, on behalf of the Condominium Board, had sent a letter on July 5, 2010, to Leo Cusumano, the Manager of Inspection Services for the City of Mississauga Planning and Building Department, stating that the builder-developer's "as-built" drawings were not accurate.

[140] In addition, Schmaus said the City of Mississauga did not do much in resolving the issue of the unauthorized alterations, except to issue the two Orders to Comply.

(v) "As-Built" Plans Or Drawings

[141] "As-built" drawings, or more properly referred to by the term "as constructed plans", is defined under s. 1.4.1.2(1)(b) of the Ontario *Building Code* and means "construction plans and specifications that show the building and the location of the building on the property as the building has been constructed" [*emphasis is mine below*]:

1.4.1.2. Defined Terms

(1) *Each of the words and terms in italics in this Code has,*

(a) *the same meaning as in subsection 1 (1) of the Act, if not defined in clause (b), or*

(b) *the following meaning for the purposes of this Code and, where indicated, for the purposes of the Act:*

...

As constructed plans means, for the purposes of the Act and this Code, construction plans and specifications that show the building and the location of the building on the property as the building has been constructed.

[142] In respect to receiving “as-built” drawings from the builder-developer, Ken Beard of the Condominium Board testified the builder-developer had promised the purchasers in 2009 that it would provide them with “as-built” drawings, but has yet to fulfill that promise. However, Beard did acknowledge that the builder-developer has provided them with five versions or iterations of the original permit drawings, but that these iterations were not accurate or certified by a professional architect or engineer. Furthermore, Beard said that without those “as-built” drawings the City of Mississauga cannot do a final inspection. Beard also said that RSM Architect Inc. did not want to do the “as-built” drawings because the unauthorized alterations constructed by the builder-developer does not meet the *Building Code*, and therefore, does not want to take on any potential liability for those unauthorized alterations by preparing the “as-built” drawings.

[143] In addition, Beard said that the builder-developer had also prepared hand-drawn sketches as “as-built” drawings and had attempted to submit them as drawings with an application for a revision to the building permits, but they had not been accepted by the City of Mississauga because the builder-developer was no longer the owner of the townhouse complex. Moreover, Beard said that Bruce Pichler had advised the Condominium Board not to allow the builder-developer to submit those hand-drawn sketches as “as-built” drawings to the City of Mississauga on behalf of the Board and for the Board to keep away from those drawings, especially when the unauthorized alterations had not been constructed according to the *Building Code* and the Board could incur liability for authorizing those drawings to be submitted. Beard also said those hand-drawn sketches, which he had first observed in February of 2011, had been full of errors, had not been certified, did not reflect what was there, and did not meet the *Building Code*. Moreover, Beard said the Condominium Board had wanted the builder-developer to provide them with certified and accurate “as-built” drawings from an approved source.

(w) The Issuance Of The Orders To Comply On February 25, 2010, To Both The Builder-Developer And To P.S.C.C. #833

[144] Stasys Obelienius’ authority to issue the two Orders to Comply on February 25, 2010, is set out in s. 12(2) of the Building Code Act, 1992 [*emphasis is mine below*]:

Inspection of building site

- 12(1) *An inspector may enter upon land and into buildings at any reasonable time without a warrant for the purpose of inspecting the building or site in respect of which a permit is issued or an application for a permit is made.*

Order

- (2) *An inspector who finds a contravention of this Act or the building code may make an order directing compliance with this Act or the building code and may require the order to be carried out immediately or within such time as is specified in the order.*

[145] After attending the townhouse complex on February 18, 2010, and not observing any changes to the construction of the exterior decks or other deficiencies that Obelienius had made Bob Bray, the site supervisor, aware of on September 14, 2009, Obelienius decided to issue two Orders on February 25, 2010. One order was for Building "A" and one order was for Building "B". Obelienius also said he issued those two orders to both the builder-developer and to P.S.C.C. #833. The two Orders required both of them to comply with the Building Code Act, 1992 and the Ontario *Building Code* before May 25, 2010, by either obtaining a Revision to the two Building Permits issued for the townhouse development, or by revising construction or to construct within the scope of the approved set of building plans.

[146] In particular, the defendant's Orders to Comply referred to the deficiencies regarding the construction of the front entrance canopies for Building "A" and the exterior deck designs for Building "A" and Building "B" (see Ex. 6A and Ex. 6B). The two Orders also required the defendant to either:

- (1) *Comply with Building Code Act, 1992 and the Ontario Building Code before May 25, 2010*
- (2) *Obtain a Revision to the two Building Permits issued for the townhouse development or Revise Construction or construct within the scope of the approved set of building plans.*

[147] Furthermore, Ken Beard, the President of the Condominium Board, has acknowledged that Condominium Board did have the responsibility to comply with the two Orders to Comply that had been issued on February 25, 2010.

[148] In addition, both the builder-developer and P.S.C.C. #833 made separate requests to Obelienius to extend the May 25, 2010, deadline for compliance. Obelienius said he had received an e-mail from Greg Gilmour, the President of Real-T-Building Inc., stating that they were still working on revising the plans and an e-mail from Ken Beard, the President of the Condominium Board, indicating that they were also working on the revision required by the City of Mississauga. Obelienius said he then granted them both extensions of time to

comply with the Orders. He also said he did not attend at the townhouse complex on May 25, 2010, which was the original date of the deadline.

- [149] However, on July 25, 2010, Obelienius said he checked the City of Mississauga computer system to see if a revision application had been submitted, but observed that no application had yet been submitted. He also said that he attended on July 25, 2010, at the townhouse location and observed that the status of the deficiencies had not been corrected or that there were any changes.
- [150] Then, on September 17, 2010, Obelienius said he checked the City of Mississauga computer system once more to see if a revision application had been submitted, but again observed that no application had yet been submitted.
- [151] Consequently, as a result of the inaction, Obelienius said he then issued a legal letter on November 23, 2010, to both the builder-developer and to P.S.C.C. #833 that was sent out by registered mail, informing them that possible legal action would be commenced if the Orders to Comply were not complied with or acted upon and that he would be following up with them in four weeks (see Ex. 7).
- [152] Then for his follow up on December 16, 2010, Obelienius said he received an e-mail from Greg Gilmour, the President of the builder-developer, asking for an extension of four more weeks to allow more time for the Tarion appeal to be heard and for Gilmour to obtain a legal opinion. Obelienius said he then granted them four more weeks.
- [153] Obelienius then said he once again checked the City of Mississauga computer system on January 13, 2011, and observed that there had been no revision application submitted to the City of Mississauga.
- [154] In addition, Obelienius said he received correspondence by e-mail from Ken Beard, the President of the Condominium Board, informing Obelienius that Beard had received a revised drawing from Bob Bray, that it had been the first time that Beard had seen any revised drawings from the builder-developer, and that it would take time for the Board to review those revised drawings and for them to consider if they would support the revision application.
- [155] However, Obelienius' response to Beard's request for more time to comply was that legal action would be commenced because Obelienius had been concerned with the statutory limitation period for laying charges under the Building Code Act, 1992.

- [156] Consequently, Obelienius swore out charges under the Building Code Act, 1992 on February 1, 2011, against both the builder-developer and P.S.C.C. #833.
- [157] Ken Beard also said the Condominium Board had considered having “as-built” drawings prepared at their expense if the Condominium Board was not satisfied with the builder-developer’s “as-built” drawings, but the Condominium Board had been wary of the liability that could incur to the Board for accepting what had been constructed by the builder-developer, since it had been constructed with *Building Code* violations. Beard also said the City of Mississauga had told the Condominium Board that the City of Mississauga was not responsible for *Building Code* violations, but that Tarion would be responsible for them. Because of their concern about incurring liability for the unauthorized alterations, Beard said the “as-built” drawings would not be provided to the City of Mississauga by P.S.C.C. #833. In addition, Beard said the City of Mississauga had warned the Condominium Board that any drawings submitted on behalf of P.S.C.C. #833 would close the City of Mississauga file.
- [158] Furthermore, Beard said Bruce Pichler had submitted letters to the City of Mississauga outlining the issues in respect to the unauthorized alterations and that Pichler had advised the Condominium Board not to submit any “as-built” drawings or to allow the builder-developer to submit “as-built” drawings on the Board’s behalf. Beard also said the Condominium Board wanted P.S.C.C. #833 to be indemnified if they allowed “as-built” drawings to be submitted to the City of Mississauga while there were still *Building Code* violations.
- [159] In addition, Beard said the Condominium Board had tried to get certified “as-built” drawings from the builder-developer, but the architect for the builder-developer, Raj Mangat, said he had been too busy to prepare the “as-built” drawings.
- [160] Furthermore, Beard said the Condominium Board did not want to accept the responsibility for any catastrophic events resulting from the unauthorized alterations and the *Building Code* violations, so the Condominium Board did not want anything to do with preparing the “as-built” drawings or allowing the builder-developer to submit its “as-built” drawings before the *Building Code* violations were corrected. In other words, Beard said that if accurate “as-built” drawings were allowed by the Condominium Board to be submitted to the City of Mississauga then it would mean that the Board had accepted the unauthorized construction by the builder-developer. In addition, Beard said that Tim Gallagher of the City of Mississauga forewarned the Condominium Board not to do this because the City of Mississauga was not responsible for *Building Code* violations and warranty defects.
- [161] Beard also said the Condominium Board had thought about the option to comply with the Order by revising construction and giving the builder-developer

permission to come and knock down the exterior deck and rebuild it according to the approved plans, but the Board had been concerned about who would pick up the cost and who would pay for this to be done. In addition, Beard said the Condominium Board did not feel they should be responsible for rebuilding the deck. More important though, Beard said the Condominium Board did not have sufficient funds or money to rebuild the deck according to the approved plans.

- [162] Furthermore, Beard said the purchasers only wanted what they paid for when they purchased their respective townhouses. In addition, Beard said the City of Mississauga had imposed a tremendous cost on the purchasers because the City of Mississauga had let the builder-developer walk away from its responsibility. As a consequence, Beard said the Condominium Board had pursued their warranty claim with Tarion and had been waiting for Tarion to rebuild the exterior decks and remediate the other deficiencies in the townhouse complex.
- [163] In addition, Beard said that the builder-developer had been responsible for making the unauthorized alterations, before the Condominium Board (of purchaser directors) had even discovered the deficiencies and unauthorized alterations.
- [164] Moreover, Beard said the Condominium Board comprised of the purchasers had been only been responsible for the common elements of the townhouse complex after the Declaration and Description document creating P.S.C.C. #833 had been registered. Beard also emphasized that the final exterior inspection had never been done by the City of Mississauga on the lands or common elements of the townhouse complex.
- [165] In addition, Beard said that nothing has changed to the exterior decks, glass-panelled guardrails, and the front-entrance canopies, except for some remedial work to the glass partitions.
- [166] In addition, Beard said there is no statutory requirement in the Condominium Act, 1998 for the Condominium Board to file any "as-built" drawings with the City of Mississauga. However, he did emphasize that that any drawings to be submitted must be certified by an architect or professional engineer. He also opined that no professional architect or engineer wanted to sign off on those "as-built" drawings for the builder-developer and take on the liability that could incur to the architect or engineer, since the construction had not been in accordance with the approved plans and because of the existing *Building Code* violations.
- [167] Beard also commented that the Condominium Act, 1998 should have protected new home owners from this type of abuse that the purchasers of these ten

townhouses had experienced and that had been caused by the builder-developer's unauthorized alterations.

(x) **Building Inspector Obelienius Charges Both The Builder-Developer And P.S.C.C. #833 On February 1, 2011, For Committing Offences Under The Building Code Act, 1992.**

[168] As the Orders to Comply were not complied with by either the builder-developer or by P.S.C.C. #833 within the allotted time, Obelienius on February 1, 2011, then charged both the builder-developer and P.S.C.C. #833 with two charges each for "building not in accordance with approved plans" under s. 36(1)(c) of the Building Code Act, 1992, as well as charging P.S.C.C. #833 with two charges for "failing to comply with the February 25, 2010, Orders to Comply" under s. 36(1)(b) of the Building Code Act, 1992.

[169] On June 2, 2012, the builder-developer entered guilty pleas to the two offences of "building not in accordance with approved plans" and was convicted and fined for committing those two offences under the Building Code Act, 1992.

(y) **Warranty Claim By P.S.C.C. #833 To Tarion, Who Administers The Ontario New Home Warranties Plan Act**

[170] Tarion is responsible for ensuring that builders repair or resolve items that are covered by the statutory warranty. Moreover, the Ontario New Home Warranties Plan Act recognizes the condominium corporation as the 'owner' of the common elements.

[171] In addition, the statutory warranty provided to new home purchasers by a builder is set out in s. 13(1) of the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31, and includes the builder's warranty for one year that the new home is constructed in a workmanlike manner and is free from defects in material, is fit for habitation, and is constructed in accordance with the Ontario Building Code [*emphasis is mine below*]:

Warranties

13(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

- (b) that the home is free of major structural defects as defined by the regulations; and
- (c) such other warranties as are prescribed by the regulations.

Exclusions

13(2) A warranty under subsection (1) does not apply in respect of,

- (a) defects in materials, design and work supplied by the owner;
- (b) secondary damage caused by defects, such as property damage and personal injury;
- (c) normal wear and tear;
- (d) normal shrinkage of materials caused by drying after construction;
- (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
- (f) damage resulting from improper maintenance;
- (g) alterations, deletions or additions made by the owner;
- (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
- (i) damage resulting from an act of God;
- (j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
- (k) damage caused by municipal services or other utilities;
- (l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.

...

Term of warranty under subs.(1)

13(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

...

Application of warranties

13(6) *The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.*

...

Same, breach of warranty

14(3) *Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,*

(a) *the person became the owner of the home through receiving a transfer of title to it or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and*

(b) *the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.*

Same, major structural defect

14(4) *Subject to the regulations, an owner who suffers damage because of a major structural defect mentioned in clause 13 (1) (b) is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct the major structural defect if the owner makes a claim within four years after the warranty expires or such longer time under such conditions as are prescribed.*

...

Other recovery

14(6) *In assessing the amount for which a person is entitled to receive payment out of the guarantee fund under this section, the Corporation shall take into consideration any benefit, compensation, indemnity payable, or the value of work and materials furnished to the person from any source.*

Performance

14(7) *The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under this section.*

Condominiums

15. *For the purposes of sections 13 and 14,*

(a) *a condominium corporation shall be deemed to be the owner of the common elements of the corporation;*

- (b) *subject to clauses (c) and (d), if dwelling units are included in the property of a condominium corporation, the warranties on the common elements of the corporation take effect on the date of the registration of the declaration and description;*
- (c) *no warranties shall take effect on the common elements of a common elements condominium corporation or a vacant land condominium corporation;*
- (d) *the warranties on common elements of a phased condominium corporation, that are added to the corporation after the registration of the declaration and description take effect on the date of the registration of the amendments to the declaration and description that created them; and*
- (e) *the amalgamation of two or more condominium corporations does not affect or extend the warranties on the common elements of the amalgamating corporations.*

[172] Furthermore, the Performance Audit Report prepared by Pichler Engineering and dated June 25, 2009, which listed and noted a number of deficiencies, *Building Code* violations, and unauthorized alterations, had been filed with Tarion on July 7, 2009. Pursuant to s. 44(10) of the Condominium Act, 1998, once the Performance Audit Report is filed with Tarion, it is deemed to be notice to Tarion of a warranty claim made by P.S.C.C. #833 under the Ontario New Home Warranties Plan Act [*emphasis is mine below*]:

Submission of report

44(9) Before the end of the 11th month following the registration of the declaration and description, the person who conducts a performance audit shall,

- (a) *submit the report to the board; and*
- (b) file the report with the Corporation within the meaning of the Ontario New Home Warranties Plan Act if the property is subject to that Act.

Claim under other Act

44(10) The filing of the report with the Corporation within the meaning of the Ontario New Home Warranties Plan Act shall be deemed to constitute a notice of claim that the corporation gives to the Corporation within the meaning of that Act under the regulations made under that Act for the deficiencies disclosed in the report.

[173] In addition, Ken Beard, the President of the Condominium Board, said the purchasers were not getting any cooperation from the builder-developer and that the builder-developer had refused to touch any of the major deficiencies cited by the Performance Audit Report, especially the exterior deck for Building "A". Beard also said the builder-developer had threatened to tear the building down. Furthermore, Beard explained that there would be a tremendous cost to the purchasers of the ten townhouses of approximately \$200,000 to \$250,000 to fix the exterior deck in order to make it comply with the approved plans. Therefore, Beard said this necessitated the Condominium Board, sometime in July of 2009, filing for conciliation under s. 17(1) of the Ontario New Home Warranties Plan Act with Tarion. Beard also said an inspector from Tarion then came and walked around the townhouse complex and then prepared a report for Tarion. In addition, Beard said the conciliation inspection by a Tarion inspector had been conducted on September 7, 2010.

[174] However, on November 1, 2009, Tarion issued a formal decision letter which disallowed P.S.C.C. #833's warranty claim under the Ontario New Home Warranties Plan Act and concluded that the unauthorized alterations made by the builder-developer were substitutions that were legally permissible and that the builder-developer had the right to make those substitutions because the right of the builder-developer to make those substitutions had been contained in the purchase agreement between the purchasers and the builder-developer. Tarion's decision also made reference to P.S.C.C. #833's warranty claim in regards to the exterior deck construction and the addition of a modified bitumen membrane to the exterior deck, in which Tarion concluded it to be an allowable substitution and to be of equal or better quality than the item referred to in the purchase agreement (see Defendant's Brief Book, volume 2, Tab 35):

This is an allowable substitution of an item referred to in the purchase agreement and does not amount to a breach of the Substitution Warranty – Specified Item. The substituted item is of equal or better quality than the item referred to in the purchase agreement.

[175] However, the defendant did not agree with Tarion's decision in disallowing their warranty claim that had been based on the right of the builder-developer to make substitutions and appealed Tarion's decision to the Licence Appeal Tribunal on November 12, 2010. Beard also commented that substitutions should only be allowed for items such lights, bulbs, faucets, and other similar items, but not for structural changes made without certified drawings and without structural engineers approving of the alterations to the approved plans.

[176] Beard also said the Condominium Board had advised and made the City of Mississauga aware that they were trying to resolve the Building Code Act, 1992 issues with the City of Mississauga through its warranty claim with Tarion, so that Tarion would fix or repair the exterior deck and other deficiencies in the construction of the townhouse complex.

(z) The Defendant's Appeal at The Licence Appeal Tribunal Of Tarion's Disallowance Of Warranty Claim To Fix or Repair The Builder-Developer's Unauthorized Alterations

- [177] The defendant's appeal of Tarion's disallowance of the defendant's warranty claim was filed on November 12, 2010, with the Licence Appeal Tribunal. The builder-developer was an added party to the appeal proceeding.
- [178] Furthermore, Ken Beard, the President of the Condominium Board, said a pre-hearing was then held at the Licence Appeal Tribunal in 2011. He further said the builder-developer then introduced many process delays in the appeal proceeding. For example, Beard said the builder-developer challenged the Pichler Engineering Report as being biased in regards to the exterior deck, and the defendant had to hire another engineer to prepare a report, which added to the delay in the appeal being heard and completed.
- [179] In addition, Thomas Schmaus, the Treasurer of the Condominium Board, said there were approximately ten days of hearing on the appeal, which had taken over a year and a half to complete, and had been the most drawn out process imaginable that had started with an attendance on January 9, 2011, and ended with an attendance on November 26, 2012. Moreover, there were 11 actual dates for the hearing of the appeal: January 9 and 10, March 1, September 24, 27, and 28, and November 1, 2, 5, 6, and 26. Schmaus also said the decision on the appeal was given on December 21, 2012. Furthermore, Schmaus said the License Appeal Tribunal's decision had ordered Tarion to arrange for all the deficiencies to be addressed and corrected and to have all the parties involved to expedite the preparation of the "as-built" drawings.
- [180] However, Schmaus said that very little has been done to date by Tarion to address the deficiencies, especially in regards to remediating the exterior deck. Although Schmaus did note that Tarion had retained an engineer to assess the work that has to be done in order to comply with the Licence Appeal Tribunal decision. In addition, Schmaus said the engineer's report has been done and that Tarion has to now put the work out for tender and the deadline for contractors to submit quotes was to be on August 30, 2013. In addition, Schmaus said that Tarion would inform the Condominium Board in September of 2013 about the progress and the contract and that the "as-built" drawings would also be done. He also said there would be a lot of major work to be done on the exterior deck to comply with the Licence Appeal Tribunal decision, including the I-beam construction with joists and a plywood slope for the bitumen covering. Schmaus also said the estimate to fix the deck using the most economical solution would cost in excess of \$120,000, and would involve keeping the current design and put a slope in, instead of building the original design. He also said the maintenance costs of replacing the deck would also have to be increased since the life of the deck has been shortened by the unauthorized alterations made by the builder-developer. He further said the

unauthorized alterations would also affect the resale value of the ten townhouses.

- [181] Furthermore, Schmaus said his involvement in the fight with the builder-developer, with the City of Mississauga Planning and Building Department, and with Tarion has been a four-year battle and is almost a second job for Schmaus.
- [182] Schmaus also said there had been no concern about safety issues with not fixing the exterior deck immediately in order to bring the deck into compliance with the Order to Comply. Additionally, he said it was not a safety issue that needed immediate correction, but a performance and appearance issue. He also said the Condominium Board could not comply with the Orders to Comply simply for the sake of complying, since that would have jeopardize their Tarion warranty claim. He further said that if “as-built” plans had been submitted on behalf of the Condominium Board, then it would be deemed that the Condominium Board had accepted the unauthorized alterations.
- [183] Furthermore, Schmaus said there had been at least five engineering reports prepared for the Licence Appeal Tribunal, which included Bruce Pichler’s Report, two reports by Halsall, and two reports by Morrison Hershfield.
- [184] In addition, Schmaus said the Morrison Hershfield Reports had also identified deficiencies or defects in the construction of the townhouse complex.
- [185] Moreover, in the appeal decision released on December 21, 2012, Ken Selby, the Presiding Member, had ruled in favour of the defendant and had ordered Tarion to fix the exterior deck to comply with the *Building Code* and had found that the substituted design for the exterior deck was not similar or equal and had fell below an acceptable standard (see Ex. 8).
- [186] Ken Beard also commented that Presiding Member Selby in his 16-page decision also vilified the builder-developer and vindicated the defendant’s position. In addition, Beard said the Licence Appeal Tribunal awarded costs against Tarion and the builder-developer.
- [187] In regards to whether the builder-developer’s unauthorized alteration to the exterior deck for Building “A” met the Ontario *Building Code* requirements, Presiding Member Selby, at p. 8 of his decision, held that the alteration was a material change and that since a revised permit was not obtained from the City of Mississauga before making this material change that was not in accord with the approved plans, then it was a failure of the builder-developer to comply with the Ontario *Building Code* [*emphasis is mine below*]:

1. Meets Ontario Building Code Requirements (1997)

The Building Code Act, [1992], S.O. 1992, c. 23, as amended by S.O. 1997, c. 24 and S.O. 1997, c. 30, schedule B provides as follows.

(12) Notice of Change. No person shall make a material change or cause a material change to be made to a plan, specification, document or other information on the basis of which a permit was issued without notifying, filing details with and obtaining the authorization of the chief building official.

Clearly, on the evidence, this project involved a material change. These decks were constructed without a revised permit and the City of Mississauga has noted this failure to follow the OBC [Ontario Building Code] in the Order to Comply. ... Construction of these decks without a permit contravenes the 1997 OBC. ...

- [188] Furthermore, at p. 5 of his decision, Presiding Member Selby considered the argument of whether the builder-developer had constructed an exterior deck that had been “equal or better” than the exterior deck originally indicated in the approved plans and held that there is evidence that the deck is “not equal or better” than the originally designed deck [*emphasis is mine below*]:

Several photographs show leave and organic materials in the small space under the deck boards ... These are difficult to remove and these materials tend to retain moisture. This strongly suggests that the as-built deck is not equal or better than the open deck which was designed in the permit drawings.

- [189] Moreover, at p. 5 of his decision, Selby commented on the waterproof membrane used in the construction of the exterior deck for Building “A” and found the slope of the deck to be too small and had caused water to return to the underside of the membrane:

Extensive leaking of the membrane is occurring ... Photo 3 shows that the slope is small enough that it becomes negative in spots thus the water appears to be returning on the underside of the membrane, onto the plywood and bypassing the drip edge. This is inconsistent with the proper application of a two-ply membrane application as the water must pass over the drip edge. Any moisture on this nearby plywood is a significant concern regarding the life of this structure.

- [190] In addition, Selby ordered, at p. 15 of his decision, that Tarion had to correct items #24, #26, and #29 of the Performance Audit Report in respect to the concern about the exposed pressure treated decking material. Items #24, #26 and #29 of the Performance Audit Report were listed as the following:

24	<p>Location: Building "A" – decks</p> <p>Component: Deck planking</p> <p>Deficiency: Substitute and poor installation</p> <p>Reference:</p> <ul style="list-style-type: none"> - Drawings A3-1 to A3-6 and A6-2 (Floor Plans) <p>Comment: Deck and privacy fences (Ref No. 25) not constructed as per drawings, 2x6" planking was specified, 5/4x6" installed and poorly fastened resulting in lifting butt edges.</p>
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...

26	<p>Location: Building "A" – deck</p> <p>Component: Installation</p> <p>Deficiency: Substitute and poor installation</p> <p>Reference:</p> <ul style="list-style-type: none"> - Drawings A3-1 to A3-6 (Floor Plans) <p>Comment: Sleepers for deck planking installation above modified bitumen membrane will be constantly wet or damp and provides inadequate depth for deck plank screw fasteners.</p>
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...

29	<p>Location: Building "A" and "B" – decks</p> <p>Component: Pressure treated wood</p> <p>Deficiency: Improper finish</p> <p>Reference:</p> <ul style="list-style-type: none"> - Wood Manufacturers Guidelines - Standard Building Practices <p>Comment: End cuts of pressure treated wood not finished/protected as per manufacturer's recommendations. Cut ends are to be painted with a wood preservative.</p>
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[191] Selby also held at p. 15 of his decision that Tarion had to repair the bitumen membrane and other specific items listed in the Performance Audit. He also

said at p. 15 that the "parties shall cooperate in expediting "as-built" drawings to the City of Mississauga for building permit purposes.

(aa) Tarion's Efforts To Fix Or Remediate The Unauthorized Alterations After The Licence Appeal Tribunal Overturned Tarion's Disallowance Of The Defendant's Warrant Claim

- [192] After the Licence Appeal Tribunal ruled that the exterior deck was not built properly and that Tarion was obligated to fix it, Ken Beard testified that there is still negotiations going on between the defendant and Tarion on how to comply with the order of the Licence Appeal Tribunal and how to rectify the exterior deck problem at a reasonable cost without completely tearing down the existing structure and putting in a completely new exterior deck.
- [193] Beard also said that the Condominium Board is trying to work with Tarion and put Tarion in a reasonable position to remediate the exterior deck. He further said that Tarion has met with contractors at the townhouse complex. Moreover, Beard said that Tarion has to meet the order from the Licence Appeal Tribunal and believes there is no other way for Tarion to comply except by building the original deck approved of in the plans from which the building permits were issued. Beard also said the purchasers are waiting for a final position from Tarion and that Tarion is heading toward a settlement. He also said that Tarion has to also fix the ledger plates, bring the front entrance canopies up to specification, and rebuild the exterior deck for Building "B".
- [194] In addition, Beard said the Licence Appeal Tribunal had determined that the hand-drawn sketches submitted and prepared by the builder-developer as "as-built" drawings were not correct and did not accurately reflect the status of what had been actually built. Beard also said the "as-built" drawings were hand-drawn and not done by a professional.
- [195] Beard also said that if the exterior deck for Building "A" were to be rebuilt according to the original approved plans with the 200-foot, 18 inch I-beam, then it would cost approximately \$250,000. However, Beard said that if the remediation of the deck were to only go back to the joists, then it would cost approximately \$200,000.
- [196] In addition, several engineering consultants were retained by the different parties involved in the dispute among the purchasers, the builder-developer and the Tarion Warranty Corporation, in which various estimates were made by them for the cost of removing and replacing the exterior deck so as to accord with the original approved plans or for making the exterior deck comply with the Order of the Licence Appeal Tribunal issued on December 21, 2012, that were in the range of \$120,000 to \$250,000.

[197] And, as of July 19, 2013, Stasys Obelienius, the City of Mississauga building inspector, said he has observed that the construction of the unauthorized alterations at the townhouse complex is still the same as it had been in 2009. He also said he had checked the City of Mississauga computer system on July 19, 2013, and noted that there had been no revision application filed yet.

(bb) The Defendant’s Intention In Obtaining “As-built” Drawings And Submitting An Application For Revisions To The Building Permits

[198] Thomas Schmaus, the Treasurer of the Condominium Board, testified that submitting “as-built” drawings before Tarion had rectified the exterior deck problem would have been a useless endeavor, since the exterior deck, in any event, would have to be changed or altered in order to satisfy the Order of the Licence Appeal Tribunal, and that a final exterior inspection would be still premature until the “as-built” drawings could be prepared based on what the exterior deck would actually look like after Tarion’s remediation.

[199] Therefore, Schmaus said that once the exterior deck is fixed and complies with the *Building Code* then the Condominium Board would arrange to have “as - built” drawings prepared and submitted to the City of Mississauga, along with an application to revise the building permits.

3. APPLICABLE LAW

[200] The defendant condominium corporation, P.S.C.C. #833, has been charged with contravening s. 36(1)(b) of the Building Code Act, 1992, S.O. 1992, c. 23, for not complying with two Orders to Comply issued on February 25, 2010. The defendant had also been charged with two counts of contravening 36(1)(c) for “building not in accordance with approved plans”, contrary to s.36(1)(c), but the court dismissed those two charges on the final day of the trial [*emphasis is mine below*]:

Offences

36(1) A person is guilty of an offence if the person,

...

(b) fails to comply with an order, direction or other requirement made under this Act; or

(c) contravenes this Act, the regulations or a by-law passed under section 7.

...

[201] If the defendant condominium corporation is convicted of contravening s. 36(1)(b) of the Building Code Act, 1992, S.O. 1992, c. 23, for not complying

with the February 25, 2010, Orders to Comply, then the maximum penalty that could be imposed on the defendant condominium corporation for each conviction under s. 36(4) is \$100,000 for a first offence [*emphasis is mine below*]:

Penalties

36(3) *A person who is convicted of an offence is liable to a fine of not more than \$50,000 for a first offence and to a fine of not more than \$100,000 for a subsequent offence.*

Corporations

(4) *If a corporation is convicted of an offence, the maximum penalty that may be imposed upon the corporation is \$100,000 for a first offence and \$200,000 for a subsequent offence and not as provided in subsection (3).*

Subsequent offence

(5) *For the purposes of subsections (3) and (4), an offence is a subsequent offence if there has been a previous conviction under this Act.*

Continuing offence

(6) *Every person who fails to comply with an order made by a chief building official under subsection 14(1) or clause 15.9(6)(a) is guilty of an offence and on conviction, in addition to the penalties mentioned in subsections (3) and (4), is liable to a fine of not more than \$10,000 per day for every day the offence continues after the time given for complying with the order has expired.*

Power to restrain

(7) *If this Act or the regulations are contravened and a conviction is entered, in addition to any other remedy and to any penalty imposed by this Act, the court in which the conviction is entered, and any court of competent jurisdiction thereafter, may make an order prohibiting the continuation or repetition of the offence by the person convicted.*

[202] As for the two charges laid under s. 36(1)(c) of the Building Code Act, 1992, S.O. 1992, c. 23, against the defendant, for "building not in accordance with approved plans", the two charges had been statute-barred because of the application of the one-year limitation period provided in s. 36(8) [*emphasis is mine below*]:

Limitation period

36(8) No proceeding under this section shall be commenced more than one year after the facts on which the proceeding is based first came to the knowledge of,

(a) *an officer, where the proceeding is in respect of the enforcement of by-laws passed under section 15.1; or*

(b) the chief building official, in any other case.

Same

(8.1) *Subsection (8), as it read immediately before the day subsection 2(9) of Schedule 21 to the Good Government Act, 2009 comes into force, continues to apply where the subject-matter of the proceeding arose more than one year before that day.*

4. ISSUES

[203] The principal issue to be resolved in deciding whether the defendant should be acquitted or convicted of committing the two offences of “failing to comply with an Order to Comply”, contrary to s. 36(1)(b) of the Building Code Act, 1992, is the following:

(a) Did the defendant condominium corporation, P.S.C.C. #833, take all reasonable steps in the circumstances to comply with the two Orders to Comply issued by a City of Mississauga building inspector on February 25, 2010?

5. ANALYSIS

[204] The prosecution submits it has proven beyond a reasonable doubt that between the period of May 25, 2010 and January 13, 2011, the defendant condominium corporation, P.S.C.C. #833, has committed the actus reus for the two offences of “failing to comply with an Order to Comply”, issued by City of Mississauga building inspector Stasys Obelienius on February 25, 2010. Moreover, the prosecution contends the defendant has not made out the defence of due diligence on a balance of probabilities to avoid being convicted of committing those two offences.

[205] In particular, the prosecution contends the defendant had not taken all reasonable steps for the circumstances to comply with the two Orders to Comply, especially when the defendant could have complied with those two Orders in three ways. For the first means to comply with the Orders, the

prosecution contends the defendant could have removed the exterior decks and rebuilt them so the decks would comply with the approved plans. Or, as a second alternative, the prosecution suggests the defendant could have authorized or given their approval to the builder-developer to submit "as-built" drawings and an application for a revision to the building permits on behalf of the defendant. Finally, for its third option, the prosecution contends the defendant at its own expense could have hired someone else, because of its difficulty with the builder-developer, to prepare certified "as-built" drawings and itself submit an application to the City of Mississauga for a revision to the building permits.

- [206] On the other hand, the prosecution also recognized and understood the difficulty and reluctance the defendant would have had in choosing the first two options for complying with the two Orders to Comply. However, the prosecution argues that the same concern about costs and liability does not necessarily apply to the defendant's third option for complying with the two Orders, since it would have been fairly simple for it to have certified "as-built" drawings prepared by an architect or professional engineer at its own expense and then submitting those "as-built" drawings along with an application for a revision to the building permits, considering that those unauthorized alterations made by the builder-developer may not in any event have passed a final exterior inspection by the City of Mississauga, especially when the building permits were still open and had been issued to the builder-developer, which places the responsibility on the builder-developer to fix the unauthorized alterations if the alterations did not comply with the *Building Code*.
- [207] In response, the defendant does not agree with the prosecution's contention that it did not take all reasonable steps to comply with the two Orders to Comply when it did not choose any of the three available options that would have been acceptable to the City of Mississauga. On the contrary, the defendant contends that it did take all reasonable steps in the circumstances to comply with those Orders by deciding to conscientiously and persistently pursue another route that had been more favourable to the defendant, in opting to proceed with its warranty claim with Tarion, which has also required the defendant to pay a substantial amount of money for legal fees and engineering reports in the pursuit of that warranty claim. In addition, the defendant submits that if Tarion were to allow its warranty claim then it would be Tarion and not the defendant who would be saddled with the sins of the builder-developer and the cost of fixing or repairing the builder-developer's mistakes.
- [208] Furthermore, the defendant argues that to properly decide whether the steps taken by the defendant were reasonable for the circumstances, the "reasonableness" standard should be considered in the context of the three statutes governing the circumstances, namely, the Building Code Act, 1992, the Condominium Act, 1998, and the Ontario New Home Warranties Plan Act

and by taking into account that the defendant did not have anything to do with building the townhouse complex or a hand in constructing the unauthorized alterations; that it is only a defendant as the result of the operation of the Condominium Act, 1998; that the responsibility alone for complying with the Orders to Comply should have been on the builder-developer who made those unauthorized alterations; that it would be grossly unfair for the defendant to incur the huge cost of fixing the unauthorized alterations or being saddled with any liability for any harm or increased maintenance or repair costs caused by the builder-developer's unauthorized alterations; that the alterations made by the builder were not minor, cosmetic, or inexpensive ones, but major ones that were not easily fixed; that there had been no immediate danger to the safety of the purchasers or to the public if the defendant did not immediately fix or repair the unauthorized alterations or apply for a revision to the building permits; and that the City of Mississauga Planning and Building Department should have been more diligent in enforcing the *Building Code* and in inspecting the builder-developer's construction of the townhouse complex.

- [209] The defendant also argues that in regards to the charges laid against it under the Building Code Act, 1992, it is an involuntary defendant and that the defendant had only become accused of the committing the four offences when it was created as a condominium corporation by the operation of the Condominium Act, 1998 and the purchasers had become the legal owners of the ten townhouses on April 14, 2008. However, the defendant argues that according to Costas Nikiforos, the district manager of Building Inspections for the City of Mississauga for where the ten townhouses were located, that it had been the builder-developer, which had been the entity that had dealt with the City of Mississauga Planning and Building Department and the entity that had been issued the two building permits to construct the ten townhouses, that should be the party that has to ultimately comply with the Orders to Comply.
- [210] In addition, the defendant contends that the City of Mississauga is not completely without blame for what had happened with the builder-developer making those unauthorized alterations, since the municipality had failed to fulfill its statutory obligation under s. 11 of the Building Code Act, 1992 to diligently enforce the provisions of the *Building Code* and police the townhouse project at Glen Erin Drive and Rogers Road. Moreover, the defendant supports this contention with two lines of argument. First, the defendant by analogy relies on the "officially induced error" line of cases to argue that the purchasers of the townhouses had reasonably and detrimentally relied on municipal officials to fulfill their statutory duty and properly inspect the townhouse project; and secondly, the defendant relies on the failure of the City of Mississauga to fulfill their duty and statutory obligation to police the townhouse project and enforce s. 11 of the Building Code Act, 1992, by allowing the purchasers to occupy their respective townhouses or take title to their respective townhouses before the final exterior inspection had been completed.

[211] Furthermore, the defendant submits that two pieces of legislation were engaged in respect to the unauthorized alterations made by the builder-developer, but one should not take precedence over the other. In other words, the defendant argues that for the circumstances the Building Code Act, 1992 should not necessarily have priority over the Ontario New Home Warranties Plan Act, especially when the defendant had been pursuing the warranty claim with Tarion conscientiously and diligently, even though the pursuance of the warranty claim and the appeal of Tarion's disallowance of the defendant's warranty claim had unavoidably taken so long to resolve. However, the defendant argues that since the safety of the purchasers of the ten townhouses and the public were not at immediate risk, then there had been no need to ensure that the unauthorized alterations or other deficiencies listed in the Orders to Comply had been rectified without delay. And, in regards to their contention that the defendant did not have to immediately comply with the Orders to Comply if there had been no safety concerns, the defendant relies on this court's decision in Toronto (City) v. Barrasso, [2006] O.J. No. 4829 (QL), 2006 ONCJ 463 (O.C.J.), to support the defendant's contention that it had taken all reasonable steps for the circumstances, despite the great amount of time that has transpired for the defendant to finally resolve the warranty claim with Tarion to fix or repair the unauthorized alterations.

[212] In short, the defendant contends that it had taken all reasonable steps to comply with the two Orders and has already expended a substantial amount of money for several engineering reports and legal fees in their fight to have the unauthorized alterations fixed by the builder-developer or by Tarion, and that the defendant had proceeded immediately, diligently, and conscientiously in approaching the City Mississauga to inform them about the unauthorized alterations and in proceeding with its warranty claim with Tarion and then in their appeal at the Licence Appeal Tribunal of Tarion's disallowance of their warranty claim, and as such, submits that acquittals should be entered for the remaining two charges against the defendant.

(A) HAS THE PROSECUTION PROVEN THAT P.S.C.C. #833 HAS COMMITTED THE ACTUS REUS OF THE TWO OFFENCES OF FAILING TO COMPLY WITH THE FEBRUARY 25, 2010, ORDERS TO COMPLY BEYOND A REASONABLE DOUBT?

[213] For the first stage of the inquiry for these two strict liability offences, the prosecution has met its burden and has proven beyond a reasonable doubt that the defendant at the time in question had committed the actus reus of the two offences of "failing to comply with the Orders to Comply", contrary to s. 36(1)(b) of the Building Code Act, 1992, S.O. 1992, c.23.

[214] The two Orders to Comply were issued on February 25, 2010, in respect to alterations made to the front entrance elevation for Building "A" and the deck design for both Building "A" and Building "B", and that construction details have

been altered causing construction not to be within the scope of the approved set of building plans under the two building permits (see Ex. 6A and Ex. 6B).

[215] The two Orders also required the defendant to either:

(1) *Comply with Building Code Act, 1992 and the Ontario Building Code before May 25, 2010, or*

(2) *Obtain a Revision to the two Building Permits issued for the townhouse development or Revise Construction or construct within the scope of the approved set of building plans.*

[216] Although the defendant had been given several extensions of time by Stasys Obelienius to comply with the two Orders to Comply, the defendant had between the period of May 25, 2010 and January 13, 2011, failed to comply with the Building Code Act, 1992 and the Ontario *Building Code* or obtain a revision to the two building permits issued for the townhouse development or revise construction or construct within the scope of the approved set of building plans. Obelienius has also testified that he had not observed any changes to the construction of the exterior decks for either Building "A" or Building "B" or to the front entrance canopies of Building "A", nor did he see that a revision application for the two building permits had been submitted on behalf of the defendant when he had checked the City of Mississauga computer system on January 13, 2011.

[217] Ergo, the prosecution has proven beyond a reasonable doubt that the defendant has committed the actus reus for the two offences of "failing to comply with the Orders to Comply issued on February 25, 2010".

(B) HAS P.S.C.C. #833 ON A BALANCE OF PROBABILITIES TAKEN ALL REASONABLE STEPS IN THE CIRCUMSTANCES TO COMPLY WITH THE TWO FEBRUARY 25, 2010, ORDERS TO COMPLY?

[218] However, in the second stage of the inquiry for these two strict liability offences, despite the prosecution proving beyond a reasonable doubt that the defendant has committed the actus reus of the two offences, the defendant may still avoid conviction if it meets its burden of proving on a balance of probabilities that it had taken all reasonable steps for the circumstances to avoid committing the two offences or that it had a reasonable but a mistaken belief in a set of facts, if true, would render its actions innocent and excuse the defendant from being convicted of committing the prohibited act or omission that comprises the two offences: R. v. Sault Ste. Marie (1978), 85 D.L.R. (3d) 161, 40 C.C.C. (2d) 353 (S.C.C.).

[219] Furthermore, as part of their due diligence defence, the defendant submits the City of Mississauga Planning and Building Department is also not completely

without fault, as it has failed to fulfill its statutory obligation under s. 11 of the Building Code Act, 1992 to properly police the townhouse project and in enforcing the Ontario *Building Code* in regards to the construction of the ten townhouses.

(1) Contention That The City Of Mississauga Had Failed To Do Its Statutory Duty To Properly Enforce The Building Code

[220] For this contention, the defendant argues the City of Mississauga is not completely without blame for what has happened with the builder-developer's unauthorized alterations, especially when the municipality had failed to diligently enforce the provisions of the *Building Code* and the Building Code Act, 1992, and supports this contention on two lines of argument. First, the defendant relies on the "officially induced error" line of cases, in that the purchasers of the townhouses had reasonably relied on municipal officials to fulfill their duty and properly inspect the townhouse project, and secondly, the defendant relies on the failure of the City of Mississauga to fulfill their duty and statutory obligation to police the townhouse project and enforce s. 11 of the Building Code Act, 1992, before the purchasers were allowed to occupy their respective townhouses before the final exterior inspection had been completed.

[221] The defendant further contends that the City of Mississauga had failed in their duty to do the final exterior inspection of the townhouse complex, despite not being formally requested to do so by the builder-developer to do such an inspection, considering that the purchasers were permitted to move in and occupy their respective townhouses as tenants-at-will, before the townhouses were legally transferred to the purchasers and before the condominium corporation was actually created and registered at the Land Registry office.

[222] To support this argument that in certain circumstances the municipality should be held accountable for the builder-developer constructing elements not in accordance with approved plans or in contravention of the *Building Code* or Building Code Act, 1992, the defendant relies on two particular lines of legal argument:

- (1) first, the defendant relies on a line of civil cases in which municipalities were held liable when it failed to properly enforce the Ontario *Building Code* and in situations where the municipality had missed *Building Code* violations, and
- (2) second, by analogy the defendant relies on cases involving the defence of officially induced error in which the purchasers of the new townhouses had assumed to their detriment that the City of Mississauga had done what it is required to do to ensure that the builder-developer in the construction of the ten townhouses

had complied with bylaws and regulations and the *Building Code* and had built the townhouse complex according to the approved plans.

[223] Furthermore, s. 11 of the Building Code Act, 1992 provides that a person shall not occupy a building that is newly erected until the builder-developer has notified the City of Mississauga of the date of completion of the building or part of a building and until either the building or part of the building has been inspected by the City of Mississauga or 10 days has elapsed after the City of Mississauga had been notified of the completion date of the building or part of the building [emphasis is mine below]:

Occupancy or use after completion

11(1) Except as authorized by the building code, a person shall not occupy or use a building or part of a building that is newly erected or installed or permit it to be occupied or used until the requirements set out in this section are met.

Notice of date of completion

(2) Notice of the date of completion of the building or part must be given to the chief building official or the registered code agency, if any.

Final certificate

(3) *If a registered code agency has been appointed for the building or part of the building by a principal authority to perform the functions described in clause 4.1 (4) (b) or (c) or has been appointed under section 4.2, a final certificate that contains the prescribed information must be issued.*

Inspection, etc.

(4) *If subsection (3) does not apply,*

(a) either the building or part must be inspected or 10 days must elapse after notice of the date of completion is served on the chief building official; and

(b) *any order made under section 12 must be complied with.*

[224] In addition, the defendant submits the courts have recognized that a municipality has a statutory obligation to apply the Building Code Act, 1992 and to enforce the *Building Code* or it could be found civilly liable for not doing so. Moreover, the defendant submits that the purchasers of the ten townhouses have to their detriment relied on the City of Mississauga Planning And Building officials to properly do their statutory duty. And, if the municipal

officials do provide inaccurate information or do not discharge their statutory obligation then the municipality could be held civilly liable. However, for the present case the defendant does not claim that the City of Mississauga should be held civilly liable, but that the defendants had acted reasonably in relying on the City of Mississauga to ensure that the townhouse complex had been properly inspected and that the builder-developer had constructed the elements shown on the approved plans correctly and according to the Building Code.

(a) The City Of Mississauga Would Be Civilly Liable For Not Conducting Building Inspections Properly Or For Negligently Applying Or Enforcing The Building Code

[225] In making their argument that the purchasers had relied detrimentally on the City of Mississauga doing their statutory duty to ensure that the townhouse complex had been properly inspected and that the builder-developer had constructed the townhouse complex according to the approved plans and the *Building Code*, the defendant contends that the City of Mississauga had not acted reasonably in fulfilling their statutory duty and relies on Wood v. Hungerford (Township), [2004] O.J. No. 4472 (QL) (S.C.J.O) and Riverside Developments Bobcaygeon Ltd. v. Bobcaygeon (Village), [2004] O.J. No. 151 (QL) (S.C.J.O), in which the municipalities in those two cases were found to have a duty of care toward current and prospective owners and were found to be civilly liable for not conducting building inspections properly or in reasonably applying or enforcing the *Building Code*.

[226] In Wood v. Hungerford (Township), [2004] O.J. No. 4472 (QL) (S.C.J.O), at paras. 43, 44, 54 and 55, Hackland J. confirmed that a municipality, which operates a program of building inspections under the Ontario *Building Code*, owes a duty of care to current and subsequent home owners to carry out inspections of new home construction with a reasonable standard of care. The court then found the municipality liable to the plaintiff for failing to have in place a proper system for ensuring compliance with the Ontario *Building Code* and for the negligent inspection of the original construction of the house [*emphasis is mine below*]:

It is now well established law that a municipality which operates a program of building inspection under the Ontario Building Code owes a duty of care to current and subsequent home owners to carry out inspections of new home construction with a reasonable standard of care. In particular they must, through their inspectors, ensure compliance with the standards of construction mandated by the Building Code. An authoritative discussion of the applicable principles is found in the judgment of the Supreme Court of Canada in Ingles v. Tutkaluk Construction Ltd. [2000] 1 S.C.R. 298. This is a decision on very similar facts to the present case, in which a municipality was held liable (together with the builder), for failure to inspect the footings of a house which resulted in major foundation damage.

In the Ingles case, supra, Bastarache, J., speaking for a unanimous Court, held that once a government agency makes a policy decision to inspect or where inspection is provided for by statute such as the Ontario Building Code, it owes a duty of care to all those who may be injured by the negligent implementation of the policy and in particular to those injured by negligence in carrying out the system of inspection. The learned justice stated:

"20 Once it is determined that an inspection has occurred at the operational level, and thus that the public actor owes a duty of care to all who might be injured by a negligent inspection, a traditional negligence analysis will be applied. To avoid liability, the government agency must exercise the standard of care in its inspection that would be expected of an ordinary, reasonable and prudent person in the same circumstances. Recently, in *Ryan v. Victoria*, [1999] 1 S.C.R. 201, supra, at para. 28, Major J. reaffirmed that the measure of what is reasonable in the circumstances will depend on a variety of factors, including the likelihood of a known or foreseeable harm, the gravity of that harm and the burden or cost which would be incurred to prevent the injury. The same standard of care applies to a municipality which conducts an inspection of a construction project. While the municipal inspector will not be expected to discover every latent defect in a project, or every derogation from the building code standards, it will be liable for those defects that it could reasonably be expected to have detected and to have ordered remedied; see, for example, *Rothfield v. Manolakos*, supra, at pp. 1268-69."

Bastarache, J. went on to say:

"23 The legislative scheme is designed to ensure that uniform standards of construction safety are imposed and enforced by the municipalities."

...

"The purpose of the building inspection scheme is clear from these provisions: to protect the health and safety of the public by enforcing safety standards for all construction projects. The province has made the policy decision that the municipalities appoint inspectors who will inspect construction projects and enforce the provisions of the Act. Therefore, municipalities owe a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of their inspection powers."

...

... both experts agreed that on this scenario the cause of the problem was clearly faulty construction. The experts were also able to agree that there were multiple contraventions of the requirements of the Building Code in relation to the building materials used (poor grade lumber) and the inadequate construction of the floor joists and load bearing walls. Finally, both experts agreed that constructing a house that was out of level and out of plumb contravenes the requirements of the Building Code. On all of this evidence, I find as a fact that a competent building inspector carrying out appropriate inspections with reasonable care would have identified the multiple and serious Building Code violations in this house and would have required the builder to rectify them. Finally, I-note that Mr. Delen pointed to

a number of actions taken by Ms. Wood and Mr. Phair or Ms. Wood's tenants which may have contributed to the foundation damage to the house. My view is that while some of these activities may have exacerbated or accelerated the deterioration of the foundations, they were not the cause or the effective cause of this deterioration and were only harmful because unbeknownst to Ms. Wood, the house was vulnerable due to a compromised foundation, shoddy building materials and negligent construction of the structural elements of the house.

For the reasons noted, I find the defendant, The Township of Hungerford liable to the plaintiff for failing to have in place a proper system for ensuring compliance with the Ontario Building Code and for the negligent inspection of the original construction of the house. No finding will be made against Mr. Varty because he is immune from liability in this action pursuant to s. 20(2) of the Building Code Act, S.O. 1974, c.47 which provides that no action lies against an inspector for an action or omission done in good faith in the execution of his duties under the Act or the regulations.

(b) The “Officially Induced Error Defence” Analogy

[227] Furthermore, the defendant is also attempting by analogy to rely on the line of cases dealing with the defence of “officially induced error”, by arguing that the purchasers of the ten townhouses had to their detriment assumed that the City of Mississauga Planning and Building Department had done their statutory duty and properly policed the townhouse development by conducting building inspections and in enforcing the *Building Code* and the Building Code Act, 1992 to ensure that the builder-developer had constructed the townhouse complex according to the approved plans and according to the standards of the *Building Code* before the purchasers were allowed to take ownership of and occupy their respective townhouses.

[228] To make their analogy, that to their detriment the purchasers had presumed that the City of Mississauga had done their statutory duty under the Building Code Act, 1992 in enforcing the *Building Code*, the defendant relies on Maitland Valley Conservation Authority v. Cranbrook Swine Inc. (2003), 64 O.R. (3d) 417 (O.C.A.) and on R. v. Cancoil Thermal Corp. et al (1986), 27 C.C.C. (3d) 295, [1986] O.J. No. 290 (QL) (O.C.A.).

[229] In R. v. Cancoil Thermal Corp. et al (1986), 27 C.C.C. (3d) 295, Lacourciere J., at page 304, stated that an officially induced error of law may in some circumstances constitute a valid defence, but it will depend on whether the opinion of the official was reasonable in the circumstances and whether it was reasonable for the accused to rely on it [*emphasis is mine below*]:

"Ordinarily, mistake of law cannot be successfully raised as a defence to a criminal or quasi criminal charge or regulatory offence, but an officially induced error of law may, in some circumstances, constitute a valid defence. This will, of course, depend on whether the opinion of the official

was reasonable in the circumstances and whether it was reasonable for the accused to rely on it."

[230] However, the defence of "officially induced error" is only available as a defence where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law in question. Moreover, in order for the accused to successfully raise the defence of "officially induced error", the accused must show that they relied on the erroneous legal opinion of the official and that their reliance was reasonable. The reasonableness of their reliance will depend upon several factors including the efforts the accused made to ascertain the proper law, the complexity, or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness, and reasonableness of the advice given.

[231] Furthermore, the Supreme Court of Canada in Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec Inc., [2006] S.C.J. No. 12 (QL), has confirmed that the "officially induced error" defence is available for regulatory offences and has adopted the R. v. Jorgensen, [1995] 4 S.C.R. 55 (S.C.C.) requirements for proving that defence.

[232] In addition, Lamer J., writing for the Supreme Court of Canada in R. v. Jorgensen, [1995] 4 S.C.R. 55, at para. 22, explained that the defence of due diligence is separate from officially induced error, since due diligence is a full defence while officially induced error does not negative culpability, and as such, reasonable inquiries of an official and reasonable reliance on erroneous advice from an official does not convert officially induced error into due diligence [*emphasis is mine below*]:

As the Ontario Court of Appeal in Cancoil Thermal noted, the defence of due diligence is separate from officially induced error. While due diligence in ascertaining the law does not excuse, reasonable reliance on official advice which is erroneous will excuse an accused but will not, in my view, negative culpability. There are two important distinctions between these related provisions. First, due diligence, in appropriate circumstances, is a full defence. If successfully raised, the elements of the offence are not completed. Officially induced error, on the other hand, does not negative culpability. Rather it functions like entrapment, as an excuse for an accused whom the Crown has proven to have committed an offence. Second, diligence may be necessary to obtain the advice which grounds an officially induced error. This is so because an accused who seeks to rely on this excuse must have weighed the potential illegality of her actions and made reasonable inquiries. This standard, however, does not convert officially induced error into due diligence.

[233] Moreover, the R. v. Jorgensen requirements were summarized in Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec Inc., at para. 26, as the following:

- (1) *that an error of law or of mixed law and fact was made;*
- (2) *that the person who committed the act considered the legal consequences of his or her actions;*
- (3) *that the advice obtained came from an appropriate official;*
- (4) *that the advice was reasonable;*
- (5) *that the advice was erroneous; and*
- (6) *that the person relied on the advice in committing the act.*

[234] Furthermore, the “officially induced error” defence is akin to being a cousin of having a reasonable mistake of fact. In other words, in contending that there had been an officially induced error, the accused would be contending that they had committed the offence because they misunderstood the law, although ignorance of the law is not a defence. However, when the mistake of law is the result of relying on advice from a government official, it may be a defence, since government officials are presumed to understand the law, so that when they give an accused advice and the accused reasonably acted on the advice, it would not be fair to hold the accused liable for committing an offence that resulted from that erroneous advice.

[235] However, in the present case there is no evidence that the defendant had received advice from an appropriate City of Mississauga Planning and Building Department official, which resulted in the defendant committing the offence in question. Although Ken Beard, the President of the Condominium Board, had testified about being forewarned by Tim Gallagher of the City of Mississauga not to allow “as-built” drawings be submitted to the City of Mississauga because the City of Mississauga was not responsible for *Building Code* violations and warranty defects, it is not clear if the advice relied on by Beard had been erroneous or that it had been crucial advice that had been relied upon and led to the defendant to commit the prohibited act or omission. However, even if the defendant had been relying simply on the defence of officially induced error, Beard never testified to what Gallagher’s position had been with the City of Mississauga and whether Gallagher is an appropriate official who had been responsible for the administration or enforcement of the particular law in question.

[236] Furthermore, in R. v. Shell Canada Ltd., [1999] A.J. No. 1297 (QL) (Alta. Prov. Ct.), the accused company had raised the defence of officially induced error by arguing that the accused company had filed numerous monthly and yearly

water quality reports with the Alberta Environment Department that had contained data relating to the fish bioassay tests and that the manner in which the test results were conveyed to the government officials should have rightly alerted them to the fact that only a single concentration test was being done instead of the required multi-concentration testing, but the court ruled, at paras. 43 and 44, that the government's silence didn't excuse or justify the accused's failure to conduct all necessary tests and that the government regulators failure to recognize the accused's error cannot be the basis for an officially induced error defence [*emphasis is mine below*]:

While I agree with the submission that silence can, in some circumstances, be a representation, such can hardly be the case where the party purporting to rely on that representation is entirely unaware that an issue even exists.

In Cancoil (supra) the accused was aware that it was taking action that could contravene regulations. They alerted the government inspector to the issue and their actions. The inspector's silence in those circumstances could well be seen as a representation, and it would not be unreasonable to rely on it. That is a far cry from the facts before this Court which establish that the accused was blissfully unaware that its conduct might in any way might offend any regulatory requirement. To then say that they relied on, or were "induced" by, any governmental action to excuse or justify their conduct would be to create a fiction. The most that can be said in this case is that government regulators failed to recognize Shell's error. That cannot found the basis for a defence of officially induced error.

[237] Accordingly, the City of Mississauga's supposed inaction of not attending the townhouse complex to do a final exterior inspection cannot be used as the basis for the defendant's claim, which is analogous to officially induced error, in that the purchasers had to their detriment relied upon or had presumed the City of Mississauga had done their statutory duty to ensure the builder-developer had complied with the *Building Code* before the City of Mississauga allowed the purchasers to take legal ownership of and occupy their respective townhouses. Moreover, the defendant's claim that the purchasers had acted or had been induced to act to their detriment cannot be based on a presumption that a government body had done its statutory duty, especially when the government body in the particular circumstances and the legal process did not require the government body attend the townhouse complex to do their statutory duty to enforce the Building Code until it had been requested to do their duty by the builder-developer.

[238] In addition, Stasys Obelienius had only conducted a registration inspection and not one related to the building permits before the builder-developer transferred the townhouses to the purchasers. Moreover, the registration inspection had been only for safety issues and not for whether the builder-developer's construction had complied with the approved plans, since the request for the

final exterior inspection had not been requested by the builder-developer. Furthermore, Obelienius explained that a final exterior inspection could not be done unless "as-built" drawings had been prepared and submitted to the City of Mississauga for review and approval, since there would be no "as-built" plans showing what had actually been built at the townhouse complex by the builder-developer for the inspection to be done on. Moreover, Obelienius said he had been aware after September 10, 2009, that the builder-developer had made unauthorized alterations and had constructed elements in the townhouse complex that were not according to the approved plans, and as such, "as-built drawings would have to be prepared to accurately reflect what actually had been built and that a revision permit would have to be obtained and the "as-built" plans would then have to be approved of by the Planning and Building Department to see if it meets the *Building Code*. Obelienius also said he could then conduct at that point a final exterior inspection, if one is requested.

[239] However, the City of Mississauga's response that a final exterior inspection could not be done without "as-built" drawings being submitted to the City of Mississauga seems to be circular reasoning, but unfortunately, that particular system of building inspections and revisions to building permits is valid and provided for under the *Building Code* and the Building Code Act, 1992, in that the builder-developer is obligated to notify the City of Mississauga when it is ready for an inspection to be conducted and that the City of Mississauga does not go out to do a particular inspection unless the builder-developer requests an inspection. However, if the City of Mississauga receives a complaint then a building inspector can inspect without being notified by the builder-developer and issue orders to rectify any *Building Code* contraventions, as provided under s. 12 of the Building Code Act, 1992.

[240] Consequently, there is no evidence that the City of Mississauga had been aware or had been made aware that the builder-developer had not been complying with the *Building Code*, the Building Code Act, 1992, or not constructing the townhouse in accordance with the approved plans, before the purchasers were allowed to legally take ownership of and occupy their respective townhouses.

[241] Therefore, the purchasers' detrimental reliance on their presumption that the City of Mississauga had done their statutory duty and had presumed that the City of Mississauga had done what it is required to do to ensure that the builder-developer in the construction of the ten townhouses had complied with applicable bylaws and regulations and the *Building Code* and had built the townhouse complex according to the approved plans, is not a factor to consider in this particular case on whether the defendant had been duly diligent in complying with the Orders to Comply.

(2) The Builder-Developer's Role And Failure To Build According To The Approved Plans

[242] The builder-developer had submitted applications for two building permits, along with building plans for approval to the City of Mississauga Planning and Building Department, to construct the two separate blocks of townhouses. The City of Mississauga approved the drawings and granted two building permits to the builder-developer to construct the ten townhouses. However, the builder-developer had changed the methods of attachment of the two exterior decks, had changed the type of guardrails and the design of the exterior deck for Building "A" and had changed the front entrance canopies from a peaked roof to a flat roof, which were not in accordance with what had been detailed in the approved plans and without notifying or without obtaining approval from the City of Mississauga to make those alterations in construction. These were not minor or cosmetic changes, but material changes that required approval from the City of Mississauga.

[243] Moreover, this is also not the situation where the defendant was already the owner of the townhouse, had been issued the building permits, and had then hired the builder-developer to construct the townhouse complex. Unfortunately, the purchasers have been left with the responsibility and obligation to clean up the builder-developer's sins in making those unauthorized alterations. In addition, those material changes had already been made by the builder-developer before the purchasers became legally responsible for those unauthorized alterations, simply because they became the collective owners of the townhouse complex. Also, the defendant had no involvement or say in the decision by the builder-developer to make those unauthorized alterations.

[244] Furthermore, the builder-developer was still in control of the Condominium Board up to the turn-over meeting held on April 30, 2009, and up to that time the builder-developer could have also obtained an engineer's certificate for the glass-panelled guardrails, have had certified "as-built" drawings prepared, and had submitted an application to revise the building permits, and then request a final exterior inspection, and did not need at that time the consent of the purchasers to submit "as-built" drawings or an application to revise the building permits.

(3) Three Options In Which The Defendant Could Have Chosen In Order To Comply With The Two Orders To Comply

[245] The prosecution also contends that the defendant had not taken all reasonable steps in complying with the two Orders to Comply, since it could have complied with the two Orders by three means:

- (i) tear down exterior decks and rebuild the decks according to the approved plans

- (ii) authorize the builder-developer to submit “as-built” drawings and an application for revisions to the two building permits on behalf of the defendant
- (iii) have “as-built” drawings prepared at defendant’s expense and submit application itself for revisions to the two building permits

(a) First option: tear down exterior decks and rebuild according to approved plans

[246] In respect to the first option, the defendant contends that choosing the option of itself tearing down the exterior decks and rebuilding the decks in order to comply with the Orders to Comply would not have only voided the warranty under the Ontario New Home Warranties Plan Act, but also lay the burden and substantial cost of fixing the unauthorized alterations on the defendant, which the defendant submits should not have been their obligation to do, since it had been the builder-developer who had constructed the townhouse complex with the unauthorized alterations and who rightfully should have the responsibility for fixing those unauthorized alterations. Moreover, choosing the first option would have also undermined the defendant’s effort to get Tarion to fix those unapproved alterations under the statutory warranty given to the defendant under the Ontario New Home Warranties Plan Act.

[247] On the other hand, the prosecution also recognized and understood the difficulty the defendant would have had in choosing the first two options. As for the first option, because of the cost of approximately \$200,000 to \$250,000 that the purchasers would have to collectively pay out to tear down and rebuild the exterior deck and the possibility that if the purchasers were the ones that did rebuild or do work on the exterior deck then their warranty claim with Tarion would be voided. And, for the second option, because of the contention by the purchasers that they could be saddled with increased maintenance or repair costs or be held responsible for any harm caused by the unauthorized alterations if they were to give their blessing to the builder-developer to submit “as-built” drawings and to apply for a revision to the building permits on its behalf as the owners of the townhouse complex, since this choice could signify that the purchasers had accepted the unauthorized alterations made by the builder-developer.

(b) Second option: authorize builder-developer to submit “as-built” drawings and submit application for revision to the two building permits on behalf of the defendant

[248] In addition, the defendant further argues that it could not have chosen the second option of authorizing or acquiescing to the builder-developer submitting on the defendant’s behalf, inaccurate and uncertified “as-built” plans to the City

of Mississauga and to also allow the builder-developer to submit an application on the defendant's behalf for a revision to the building permits for those unauthorized alterations without voiding the defendant's warranty claim with Tarion. Furthermore, the defendant had been advised by a professional engineer, which had been retained by the defendant, that allowing the builder-developer to submit uncertified "as-built" plans to the City of Mississauga would mean that the defendant had approved of the unauthorized alterations, which would then mean that Tarion would not have to fix the unauthorized alterations or that the defendant would be indemnified for the cost of fixing the unauthorized alterations. The defendant also contends that allowing the builder-developer to submit uncertified "as-built" drawings on the defendant's behalf would also mean the defendant would be saddled with the liability for a catastrophic event caused by the builder-developer's unauthorized alterations.

(c) **Third option: have "as-built" drawings prepared at defendant's expense and then itself submit application for revision to the two building permits**

[249] The defendant also does not agree with the prosecution's contention that it could have easily complied with the Orders to Comply by choosing the third option, by having certified "as-built" drawings prepared at its own expense and then itself submitting an application for a revision to the building permits for the townhouse development, since the defendant contends that it would have been a fruitless exercise, especially when the exterior decks will be changed and fixed by Tarion as ordered by the Licence Appeal Tribunal, so that certified "as-built" drawings cannot be prepared until after the exterior decks and the other unauthorized alterations are fixed by Tarion. Once Tarion completes those fixes, then the defendant submits, certified "as-built" drawings will then be prepared and submitted and an application for revisions to the building permits may then be submitted, if required, which would depend on whether Tarion fixes the unauthorized alterations to be in accord with the approved plans or to simply meet the *Building Code*.

(4) **Were The Steps Taken By Defendant To Comply With The Two Orders To Comply Reasonable For The Circumstances?**

(a) **Reasonableness In The Context Of The Circumstances**

[250] The defendant also relies on this court's decision in Toronto (City) v. Barrasso, [2006] O.J. No. 4829 (QL), 2006 ONCJ 463 (O.C.J.), to support the defendant's contention that it had taken all reasonable steps in the circumstances, despite the great amount of time that has transpired to resolve the defendant's claim with Tarion to fix the unauthorized alterations, especially when there had been no immediate danger to the purchasers or to the public from those unauthorized alterations and the extraordinary length of time it would take to comply with the Orders to Comply.

[251] Moreover, the defendant submits that in deciding whether the defendant had taken all reasonable steps in the circumstances in trying to comply with the Order to Comply that the defendant's efforts and actions have to be considered in the context of "reasonableness", as decided by this court's decision in Toronto (City) v. Barrasso, and in view of the circumstances and the operation of the Condominium Act, 1998, which made the defendant an involuntary defendant; in view of the application of the Ontario New Home Warranties Plan Act under which the defendant had sought a warranty claim from Tarion to fix the unauthorized alterations; and because there had been no immediate danger to the safety of the purchasers or to the public from the unauthorized alterations. In other words, despite the extraordinary time involved with its warranty claim with Tarion, the defendant contends that it had undertaken and made a reasonable response in the circumstances to comply with its obligation.

(b) The Defendant's Lack Of Involvement In The Construction Of The Townhouse Complex Or In The Decision To Make The Unauthorized Alterations

[252] In addition, the defendant argues that for the four charges laid against it under the Building Code Act, 1992, it is an involuntary defendant and that the defendant had only become accused of the committing the four offences when it was created as a condominium corporation by the operation of the Condominium Act, 1998 and because the purchasers had become the legal owners of the ten townhouses on April 14, 2008. Moreover, the defendant argues that according to Costas Nikiforos, the district manager of Building Inspections for the City of Mississauga, had testified that it had been the builder-developer that has to ultimately comply with the Order to Comply, especially when it had been the entity that had dealt with the City of Mississauga Planning and Building Department and the entity that had been issued the building permits to construct the ten townhouses.

(c) Inordinate Delay By Defendant In Being Able To Comply With The Orders To Comply

[253] Moreover, the defendant contends that it had taken all reasonable steps to comply with the Orders to Comply and has already expended a substantial amount of money for several engineering reports to be prepared and for legal fees in their fight to have the unauthorized alterations fixed by the builder-developer or by Tarion, and that the defendant had proceeded immediately, diligently, and conscientiously with approaching the City Mississauga to inform them about the unauthorized alterations and in proceeding with its warranty claim with Tarion and then in their appeal at the Licence Appeal Tribunal of Tarion's disallowance of their warranty claim, and as such, submits that an

acquittal should be entered for the remaining two charges against the defendant.

[254] The defendant further contends that two pieces of legislation were engaged in respect to the unauthorized alterations made by the builder-developer, and that the Building Code Act, 1992 should not have precedence over the Ontario New Home Warranties Plan Act, since the defendant had been pursuing the warranty claim with Tarion diligently, despite the warranty claim and the appeal of the disallowance of the defendant's warranty claim had taken so long to resolve and that the safety of the purchasers of the ten townhouses and the public were not at issue if the unauthorized alterations or other deficiencies required under the Orders to Comply were not immediately rectified.

(d) Defendant's Effort In Pursuing The Tarion Warranty Claim

[255] Because the defendant had been concerned about the possibility of increased maintenance and repair costs and the potential liability that could incur from any harm caused by the unauthorized alterations made by the builder-developer to the exterior deck for Building "A" and the cost of repairing and fixing the deck to comply with the approved plans, the defendant pursued their warranty claim with Tarion because it had believed that this had been their best option to pursue in order to comply with the Orders to Comply.

[256] For the circumstances, this avenue of pursuit was not unreasonable, although it will have or has taken an inordinate amount of time to accomplish.

(e) Were There Any Safety Concerns If The Defendant Did Not Immediately Comply With The Orders To Comply?

[257] The defendant submits that there was no immediate concern for the safety of the purchasers of the ten townhouses or for the public if the defendant did not immediately comply with the two Orders to Comply and relies on this court's ruling at para. 25 in Toronto (City) v. Barrasso, [2006] O.J. No. 4829 (QL), 2006 ONCJ 463 (O.C.J.), in which this court held that the defendant had not proceeded with due diligence in complying with an Order to Comply because of the immediate danger to the tenants of a high-rise apartment that had been left without the proper fire protection systems when the defendant had failed to immediately comply with the order to fix or repair the fire protection systems for the building:

Furthermore, because the corporate defendant did not make any efforts at all to rectify just one of the 20 deficiencies listed in the Notice of Violation of February 18, 2005, between February 18 to March 8, 2005, then Inspector Gaboury was justified in laying the charges against the corporate defendant, since over 500 residential apartments with tenants in the corporate defendant's building were without the proper fire protection during that period. Also, since the corporate defendant had not taken any

immediate or reasonable steps to rectify one deficiency during that time period, the corporate defendant's claim fails that it was not given a reasonable time to rectify the deficiencies before the charges were laid. Moreover, occupants of the building are put at great risk if the owner of this type of high-rise apartment building with this many tenants is permitted to proceed on its own schedule to remedy deficiencies. This dangerous situation was present in the corporate defendant's building between February 18 and March 8, when the fire alarm and sprinkler systems were down and no alternate measures were immediately implemented to protect the integrity of the building or the safety of the building's occupants.

[258] For this particular consideration, there is no evidence that there had been an immediate danger to the safety of the purchasers of the ten townhouses or to the public, if the defendant failed to immediately fix or repair the unauthorized alterations or to obtain a revision to the building permits in order to comply with the Orders to Comply. Furthermore, considering that the exterior deck had been completed by June of 2009 and that the purchasers of the ten townhouses had been occupying their respective townhouses since that time, and that the City of Mississauga had granted several extensions of time for the defendant to comply with the Orders to Comply, also indicates that there had been no safety concerns if the defendant did not comply with the orders immediately.

[259] Ergo, since there had been no immediate danger to the safety of the purchasers of the townhouses or to the public, it was not unreasonable for the defendant in these circumstances to pursue its Tarion warranty claim for Tarion to do the fixes and repairs, which is a much longer route in terms of time for the defendant to eventually comply with the two Orders to Comply.

(f) Conclusion

[260] Although the two Orders to Comply have still not been complied with by the defendant at the conclusion of the trial of these four charges, the defendant has nevertheless proven on a balance of probabilities that it has taken all reasonable steps in the circumstances in attempting to comply with the two Orders to Comply. The defendant's pursuit of its warranty claim with Tarion to fix or repair the unauthorized alterations, which are the subject matter of the two Orders to Comply issued by the City of Mississauga Planning and Building Department, had been a valid and reasonable route for it to take for these exceptional circumstances. Furthermore, in attempting to comply with the Orders the defendant and its Board of Directors have also expended a substantial amount of effort and money for several engineering reports and legal fees in their fight to have the unauthorized alterations fixed or repaired by the builder-developer or by Tarion.

[261] Moreover, it had been the defendant that had been the one who had notified and informed the City Mississauga Planning and Building Department about

the unauthorized alterations made by the builder-developer and had been proactive in trying to get the builder-developer to fix or repair those unauthorized alterations or to get the City of Mississauga to force the builder-developer to fix or repair those unauthorized alterations.

[262] Furthermore, the defendant had also proceeded immediately, diligently, and conscientiously with its pursuit of its warranty claim with Tarion to get Tarion to fix or repair the builder-developer's unauthorized alterations and then in their appeal at the Licence Appeal Tribunal of Tarion's disallowance of their warranty claim, which eventually had been granted on December 21, 2012, and had required Tarion to repair and fix the exterior deck of Building "A" and other deficiencies, so that it would comply with the Ontario *Building Code*.

[263] In addition, the defendant had not been involved in building the townhouse complex or constructing the unauthorized alterations or in the ultimate decision to make those unauthorized alterations or to deviate from the approved building plans. It was also not legally responsible for the common area of the townhouse development at the time those unauthorized alterations were constructed by the builder-developer and it only became legally responsible for the two Orders to Comply in respect of those unauthorized alterations, when it became the legal entity responsible for the condominium's common areas through the operation of the Condominium Act, 1998. Consequently, because the defendant had become the legal owner of the common areas of the townhouse complex before the Orders to Comply had been issued on February 25, 2010, the defendant had to coincidentally assume the legal responsibility for the sins of the builder-developer under the Building Code Act, 1992. On the other hand, the defendant had not been the legal owner of the townhouse complex when the unauthorized alterations were made by the builder-developer, but the builder-developer had been the legal owner and the entity who had been issued the two building permits. As such, the builder-developer is the entity at fault for making those alterations in the construction of the townhouse complex, which had not been in accord with the approved building plans, without having first obtained approval from the City of Mississauga or without first applying for a revision to the building permits for those alterations.

[264] Furthermore, the defendant's decision to pursue the warranty claim with Tarion was also not unreasonable for the circumstances, since the defendant had been apprised by a professional engineer that the cost for fixing or repairing the exterior deck for Building "A", to make the exterior deck be in accordance with the approved plans, would have been in the range of \$200,000 to \$250,000 for something that it had no say in when the builder-developer decided to make those unauthorized alterations. Furthermore, the remediation or repairs to bring the townhouse complex into compliance with the Orders to Comply were not minor, cosmetic, or inexpensive, but were major and costly endeavours. In other words, the deficiencies were not easily fixable.

- [265] Equally, it had not been unreasonable for the particular circumstances for the defendant not to have “as built” plans prepared at its own expense and apply for a revision to the building permits or to have the builder-developer submit on the defendant’s behalf “as-built” plans and a revision application, since the defendant had not received any certified “as-built” plans from the builder-developer that had accurately reflected what had actually been built by the builder-developer.
- [266] In addition, the defendant had proceeded appropriately based on the advice it had received from a professional engineer not to consent to the builder-developer submitting any “as-built” plans or a revision application to the City of Mississauga, while the unauthorized alterations had not been repaired or fixed, since the alterations had been built in contravention of the approved plans, the *Building Code* and the Building Code Act, 1992, which could have saddled the defendant with increased maintenance and repair costs in respect to those unauthorized alterations or expose it to liability for harm caused by the unauthorized alterations made by the builder-developer.
- [267] Moreover, it would have also been premature for the defendant to have “as-built” drawings prepared at its own expense and apply for a revision to the building permits while its pursuit of its warranty claim with Tarion was still alive, considering that if the defendant’s warranty claim was approved of, then Tarion would have to pay for the cost of fixing or repairing the exterior deck and other unauthorized alterations. Ergo, “as-built” drawings could not have been done until after Tarion had made those repairs or fixes to the unauthorized alterations, considering that the repairs would have to comply with the *Building Code* but not necessarily be in accordance with the approved plans.
- [268] In addition, there had been no immediate danger to the safety of the purchasers of the two townhouses or to the public, if the defendant did not immediately fix or repair the unauthorized alterations or obtain a revision to the building permits in order to comply with the Orders to Comply, especially when the exterior deck had been completed by June of 2009 and the purchasers had been occupying their respective townhouses since that time without any safety concerns, and the City of Mississauga had granted several extensions to the defendant to comply with the Orders to Comply. And, because there had been no immediate danger to the safety of the purchasers or to the public, it was not unreasonable for the defendant to choose the much longer route in terms of time to eventually comply with the Orders to Comply by pursuing its Tarion warranty claim for Tarion to do the fixes and repairs.
- [269] Lastly, although it may be surprising to most purchasers of new homes that they would be allowed to take ownership and occupy their new homes before a final exterior inspection had been done by a municipality, because the builder had not requested such an inspection, the *Building Code* and Building Code

Act, 1992, does provide for such a process and does place the obligation on the builder to notify the municipality when they are ready for a particular inspection.

[270] And, for those reasons the defendant has proven on a balance of probabilities that it had taken all reasonable steps in the circumstances to comply with the two Orders to Comply, and as such, acquittals will be entered for the defendant, P.S.C.C. #833, for the two charges of “failing to comply with an Order to Comply issued on February 25, 2010.

6. DISPOSITION

[271] The corporate defendant, Peel Standard Condominium Corporation #833, is acquitted of all four charges laid against it under the Building Code Act, 1992. Two of the charges were for “building not in accordance with approved plans” under s. 36(1)(c), while the other two charges were for “failing to comply with an order issued on February 25, 2010”, under s. 36(1)(b).

[272] Acquittals for the two charges in respect of “building not in accordance with approved plans” had been entered earlier before final submissions had been completed.

[273] And, for the two remaining charges of “failing to comply with an Order to Comply issued on February 25, 2010”, contrary to s. 36(1)(b) of the Building Code Act, 1992, the corporate defendant, Peel Standard Condominium Corporation #833, has proven on a balance of probabilities that it had taken all reasonable steps in the circumstances to comply with those Two Orders to Comply, and is therefore acquitted of those two charges.

Dated at the City of Brampton on November 1, 2013.

QUON J.P.

Ontario Court of Justice