

Citation: *R. v. K-Tech Building Systems Inc.*, 2012 ONCJ 219

**IN THE MATTER OF
the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A.
and
Ontario Regulation 17/05.**

Between

**Her Majesty The Queen In Right Of Ontario
As Represented By
The Ministry Of Consumer Services**

prosecutor

and

**K-Tech Building Systems Inc.
and
Stanley Kondrotas**

defendants

**Ontario Court of Justice
Brampton, Ontario**

Quon J.P.

Reasons for Judgment

- Charges:** (1) engaged in unfair practice by making a false, misleading or deceptive representation to a consumer, contrary to s. 17(1) and s.116(1)(b)(ii);
(2) engaged in unfair practice by making a false, misleading or deceptive representation to a consumer, contrary to s. 17(1) and s.116(1)(b)(ii);
(3) engaged in unfair practice by making an unconscionable representation to a consumer, contrary to s. 17(1) and s.116(1)(b)(ii);
(4) failed to provide a contract to a consumer prescribed by regulation, contrary to 22 and s. 116(2); and
(5) failed to provide a refund payment to a consumer within 15 days of being given notice of cancellation of the consumer agreement, contrary to s. 96(1) and s. 116(1)(b)(viii).

Trial held: March 9 and 10, 2011, and
November 23 and 24, 2011.

Judgment released: April 13, 2012.

Counsel:

C. Glaister, counsel for the Ministry of Consumer Services.

J. Forget, counsel for the defendants.

Cases Considered or Referred To:

Bonnie Engel v. K-Tech Building Systems Inc. and Stan R. Kondrotas, court file No. CV-07-3542-00, (Ont. S.C.J.) per Herold J., February 15, 2008.

Country Cottage Living Inc. v. Heath, [2009] O.J. No. 4994 (QL) (Ont. S.C.J.), per Mulligan J.

Ontario (Ministry of Labour) v. Enbridge Gas Distribution Inc., 2010 ONSC 2013 (Ont. S.C.J.), per Bellamy J.

Ontario (Ministry of Labour) v. Enbridge Gas Distribution Inc., 2011 ONCA 13 (O.C.A.), per Watt J.A.

R. v. Cotton Felts Ltd. (1982), 2 C.C.C. (3d) 287, [1982] O.J. No. 178 (QL) (O.C.A.), per Martin, Zuber and Blair JJ.A.

R. v. Castro, 2010 ONCA 718 (O.C.A.), per Weiler, MacPherson and Armstrong JJ.A.

R. v. Devgan, [1999] O.J. No. 1825 (QL) (O.C.A.), per Labrosse, Charron and Feldman JJ.A.

R. v. Elm Tree Nursing Home Inc., [1987] O.J. No. 491 (QL) (O.C.A.), per Goodman, Cory and Finlayson JJ.A.

R. v. Hundal, [1993] S.C.J. No. 29 (QL) (S.C.C.).

R. v. Kienapple, [1975] 1 S.C.R. 729 (S.C.C.).

R. v. Logeman (1978), 5 C.R. (3d) 219 (B.C.C.A.).

R. v. McCague, 2006 ONCJ 208 (O.C.J.), per Trotter J.

R. v. Prince, [1986] 2 S.C.R. 480, [1986] S.C.J. No. 63 (QL) (S.C.C.).

R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353 (S.C.C.).

R. v. Wigglesworth, [1987] S.C.J. No. 71 (QL), [1987] 2 S.C.R. 541 (S.C.C.).

Tamarack North Holdings Ltd. (c.o.b. Tamarack North Ltd.) v. Hallisey, [2007] O.J. No. 66 (QL) (Ont. S.C.J.), per Wood J.

Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64 (QL), 2003 SCC 63 (S.C.C.).

Statutes, Regulations and Rules Cited:

Collection Agencies Act, R.S.O. 1990, c. C.14.

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A., ss. 1, 2, 2(1), 2(2), 2(2)(f), 2(3), 3, 4, 14, 14(2)(8), 14(2)(9), 15(1), 15(2), 15(2)(c), 16, 21, 22, 23, 24, 24(2), 24(3), 24(6), 24(12), 25, 26, 26(2), 26(3), 2694), 52, 79(1), 94, 95, 96(1), 96(6), 109(2), 116(1), 116(1)(b)(ii), 116(1)(b)(viii), 116(2), 116(3), 116(5), and 117.

Motor Vehicle Dealers Act, 2002, S.O. 2002, c. 30, Sched. B.

Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31. ss. 1, 14(2).

Ontario Regulation 17/05 (Consumer Protection Act, 2002), General, ss. 24, 24(2), 24(3), 24(6), 24(9), 24(12), 79(1).

Ontario Regulation 350/06 (Building Code Act, 1992, S.O. 1992, c. 23), Building Code, s. 9.1.1.9 of Part 9.

Provincial Offences Act, R.S.O. 1990, c. P.33, s. 81.

Payday Loans Act, 2008, S.O. 2008, c. 9.

Real Estate and Business Brokers Act, 2002, S.O. 2002, c. 30, Sched. C.

Travel Industry Act, 2002, S.O. 2002, c. 30, Sched. D.

Authorities Considered or Referred To:

Dukelow, Daphne A. The Dictionary of Canadian Law, 3ed. (Scarborough, Ontario: Thomson Carswell, 2004).

Tarion Warranty Corporation website, online: Tarion: Protecting Ontario's New Home Buyers <<http://services.tarion.com/New-Home-Builders/Pages/Other-Dwellings-Not-Covered-or-Special-Considerations.aspx>>

Exhibits entered:

- Exhibit "1" - Corporate Profile Report and Certificate of Status produced October 21, 2009, of K-Tech Building Systems Inc., indicating it was incorporated on April 4, 2006, and that on April 4, 2006, Stanley R. Kondrotas was the Director, President, Secretary and Treasurer of the corporation and the registered office of the corporation was 1169 Lorimar Drive, Mississauga, Ontario (4 pages).
- Exhibit "2" - Certificate of Status from Ministry of Government Services dated October 21, 2009, of K-Tech Building Systems Inc., indicating the corporation was incorporated on April 4, 2006 and has not been dissolved (1 page).
- Exhibit "3" - copy of letter dated November 2, 2009, from the Township of South Algonquin containing a copy of building permit issued to Bonnie Engel for the construction of a cottage (2 pages). [Admitted on consent by both parties as a business record without having to call a witness to prove the document.]
- Exhibit "4" - copy of letter dated December 16, 2009, from the Township of South Algonquin regarding the building permit activity for the permit issued to Bonnie Engel for the construction of a cottage, indicating that Mike Paplinskie Contracting made the building permit application on April 2, 2007, and on June 2, 2007, Paplinskie had delivered a revision of the structural plans and engineered slab, and that on June 13, 2007, a building permit was delivered to Paplinskie at Bonnie Engel's property, and that on June 27, 2007, there was a preparation for the cement pour of ICF walls (3 pages). [Admitted on consent by both parties as a business record without having to call a witness to prove the document.]
- Exhibit "5" - copy of the Purchase Agreement dated October 4, 2006, between K-Tech Building Systems Inc. and Bonnie Engel, for the purchase and erection of a pre-fabricated building (6 pages).

- Exhibit "6" - copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #102 for \$16,695.00 (first instalment payment) dated October 4, 2006, issued by Bonnie Engel regarding deposit paid to K-Tech Building Systems Inc. (1 page).
- Exhibit "7" - copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #153 for \$2,290.00 dated December 21, 2006, issued by Bonnie Engel regarding payment for blueprints (\$170) and 2nd instalment of \$2120 paid to "KTech" (1 page).
- Exhibit "8" - copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #155 for \$2,819.86 dated January 30, 2007, issued by Bonnie Engel regarding payment for extras regarding porch, gable windows, and windows in foundation paid to K-Tech Building Systems Inc., (1 page).
- Exhibit "9" - copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #158 for \$1,969.84 dated February 28, 2007, issued by Bonnie Engel regarding payment for extras regarding porch, gable windows, and windows in foundation paid to "KTech" (1 page).
- Exhibit "10" - copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #157 for \$1,211.00 dated February 28, 2007, issued by Bonnie Engel regarding payment for extras regarding porch, gable windows, and windows in foundation paid to "KTech" (1 page).
- Exhibit "11" - copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #614 for \$10,000.00 dated February 28, 2007, issued by David Boomer regarding cottage instalment payment paid to "KTech" (1 page).
- Exhibit "12" - copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #105 for \$270.00 dated April 2, 2007, issued by Bonnie Engel regarding payment of fees to Township of South Algonquin for processing building permit application (1 page).
- Exhibit "13" - copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #108 for \$4399.18 dated April 30, 2007, issued by Bonnie Engel regarding payment to "KTech" for extras regarding porch, gable windows, and windows in foundation (1 page).
- Exhibit "14" - copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #617 for \$10,000.00 dated April 30, 2007, issued by David Boomer regarding cottage payment to "KTech" (1 page).
- Exhibit "15" - copy of a package of emails between Bonnie Engel and Stanley Kondrotas from May 1, 2007 to October 8, 2007 (41 pages).
- Exhibit "16" - copy of invoice for \$742.00 from Buelow Engineering Ltd. dated June 2, 2007, for review of design of cottage framing and design and drawing of reinforced concrete slab on grade package for Bonnie Engel (1 page).
- Exhibit "17" - copy of drawings of concrete slab and footings by Buelow Engineering Ltd. for Bonnie Engel's cottage (2 pages).
- Exhibit "18" - copy of elevations and floor plans for Bonnie Engel's cottage (2 pages).
- Exhibit "19" - copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #091 for \$5,700.00 dated July 13, 2007, issued by Bonnie Engel regarding payment paid to "KTech" (1 page).
- Exhibit "20" - copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #092 for \$1,109.30 dated July 20, 2007, issued by Bonnie Engel regarding payment paid to "KTech" (1 page).
- Exhibit "21" - copy of photograph taken by David Boomer between the end of September to the beginning of October 2007 of prefabricated wall units or panels with name "Engel" written on panels stacked on a trailer at the back of K-Tech Building Systems Inc. building located at 1169 Lorimar Drive, Mississauga (1 page).
- Exhibit "22" - copy of spreadsheet of payments made by Bonnie Engel to K-Tech Building Systems Inc. in accordance with payment schedule in agreement and for extra costs (2 pages).

- Exhibit "23" - copy of letter from Bonnie Engel's lawyer, Leon Offman, dated October 11, 2007, addressed to Stanley Kondrotas of K-Tech Building Systems Inc. regarding breach of contract for delay of performance of contract and a request for return of monies paid by Bonnie Engel to K-Tech Building Systems Inc. (2 pages).
- Exhibit "24" - copy of letter from Stanley Kondrotas of K-Tech Building Systems Inc. dated October 18, 2007, addressed to Bonnie Engel's lawyer, Offman Raby, disputing the breach of contract (2 pages).
- Exhibit "25" - copy of Statement of Claim of Bonnie Engel (unsigned and undated) made against Stan R. Kondrotas and K-Tech Building Systems Inc. for damages and interest prepared by Bonnie Engel's lawyer, Offman Raby (6 pages).
- Exhibit "26" - copy of default Judgment order from Justice Herold of the Ontario Superior Court of Justice dated February 15, 2008, against Stan R. Kondrotas and K-Tech Building Systems Inc., with an order to pay Bonnie Engel the sum of \$60,965.86 and \$1,979 for the costs of the action (6 pages).
- Exhibit "27" - copy of E-Complaint on Complaint Form submitted electronically on March 10, 2009, to the Ministry of Small Business and Consumer Services by Bonnie Engel against K-Tech Building Systems Inc., and Stan Kondrotas, President, complaining about the company delaying building her cottage with excuses and that she had a civil judgment against the company and Kondrotas (3 pages).
- Exhibit "28" - copy of drawing and description of slab and grade and Logix Wall alternate drawn by Michael J. Paplinskie (1 page).
- Exhibit "29" - copy of estimate for \$22,639 and \$390 GST and contract from Paplinskie Contracting Ltd. dated June 9, 2007, for erecting slab on grade and eight foot ICF block walls (Logix) (1 page).
- Exhibit "30" - copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #085 for \$12,614.50 dated June 9, 2007, issued by Bonnie Engel as deposit for constructing cottage foundation paid to Paplinskie Contracting Ltd., (1 page).
- Exhibit "31" - copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #090 for \$11,514.50 dated July 10, 2007, issued by Bonnie Engel as a further payment for constructing cottage foundation paid to Paplinskie Contracting Ltd., (1 page).
- Exhibit "32" - copy of invoice from Paplinskie Contracting Ltd., to Bonnie Engel dated November 12, 2007, for supplying and installing subfloor for cottage indicating that \$2500 had been paid and that \$3,091.50 was still owing (1 page).
- Exhibit "33" - copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #096 for \$2500.00 dated October 16, 2007, issued by Bonnie Engel and paid to Mike Paplinskie as payment for constructing subfloor (1 page).
- Exhibit "34" - copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #043 for \$3091.50 dated November 18, 2007, issued by Bonnie Engel and paid to Mike Paplinskie as another payment for constructing subfloor (1 page).
- Exhibit "35" - copy of 18 photographs of Bonnie Engel's cottage being built and erected (2 pages).
- Exhibit "36" - copy of 11 photographs of Bonnie Engel's cottage being built and erected (6 pages).
- Exhibit "37" - copy of invoices from Barry Bay's Home Building Centre to Paplinskie Contracting Ltd., regarding Bonnie Engel's cottage for plywood (dated September 16, 2008 for \$1423.01); for shingles (dated September 12, 2008 for \$3476.78); for galvanized materials, roof nails and roof repair cement (dated September 18, 2008 for \$115.23); and for engineered trusses (dated September 18, 2008 for \$4803.63) (four pages).

- Exhibit "38" - copy of statement from Barry Bay's Home Building Centre to Paplinskie Contracting Ltd., regarding Bonnie Engel's cottage for various invoices (dated September 17, 2008 for total of \$13,786.54) (2 pages).
- Exhibit "39" - copy of invoices and sales history from Barry Bay's Custom Woodworking to Paplinskie Contracting Ltd. dated September 2, 2008, to September 16, 2008, regarding materials for Bonnie Engel's cottage (4 pages).
- Exhibit "40" - copy of invoice from Vincent Peplinskie to David and Bonnie Engel for installing and providing windows and doors for \$3765.58; copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #081 for \$3765.58 payable to Vincent Peplinskie and copy of [NAME OF BANK REMOVED FOR PRIVACY] cheque #188 dated November 5, 2007, issued by Bonnie Engel for \$1380.00 and paid to Vincent Peplinskie for windows, doors, and locks (1 page).
- Exhibit "41" - copy of invoice from Buelow Engineering Ltd. dated September 2, 2008, for review of design of cottage porch framing and design and drawing of reinforced concrete slab on grade for Bonnie Engel for \$210.00 and a copy of schedule 1 of a Designer information form dated September 2, 2008 (2 pages).
- Exhibit "42" - two invoices from Vincent Peplinskie to David and Bonnie Engel dated September 10, 2008, for \$7,455.00 for installing and providing windows (\$2000 deposit) and dated September 11, 2008, for \$1,246.87 for stairs; and [NAME OF BANK REMOVED FOR PRIVACY] cheque #095 for \$6701.87 dated November 11, 2008, payable to Vincent Peplinskie, issued by Bonnie Engel (3 original documents).
- Exhibit "43" - invoice from Vincent Peplinskie to David and Bonnie Engel dated October 16, 2008, for \$4923.64 for installing and providing doors (\$750 deposit) and [NAME OF BANK REMOVED FOR PRIVACY] cheque #002 for \$4173.64 dated October 17, 2008, payable to Vincent Peplinskie, issued by Bonnie Engel (2 original documents).
- Exhibit "44" - invoice from Vincent Peplinskie to David and Bonnie Engel dated November 17, 2008, for \$6796.03 for installing and providing vertical siding and windows (\$1030 deposit) and [NAME OF BANK REMOVED FOR PRIVACY] cheque #022 for \$6105.83 dated December 1, 2008, payable to Vincent Peplinskie, issued by Bonnie Engel (2 original documents).
- Exhibit "45" - purchase order from Vincent Peplinskie to David and Bonnie Engel dated June 1, 2009, for \$2152.50 for manufacturing and installing seven large screens for the porch and [NAME OF BANK REMOVED FOR PRIVACY] cheque #038 for \$2152.50 dated June 4, 2009, payable to Vincent Peplinskie, issued by Bonnie Engel (2 original documents).
- Exhibit "46" - letter from Michael J. Paplinskie dated April 1, 2009, indicating payments received from Bonnie Engel for \$50,430 for construction of home and [NAME OF BANK REMOVED FOR PRIVACY] payment order dated November 26, 2008 for \$4,465 and three [NAME OF BANK REMOVED FOR PRIVACY] cheques: #094 for \$15,000.00 dated September 4, 2008, #001 for \$22,000 dated September 20, 2008, #096 for \$9,000 dated September 29, 2008, payable to Michael Paplinskie, issued by Bonnie Engel (5 original documents).
- Exhibit "47" - copy of internet complaint form completed by David Boomer dated 2007/11/22 18:44 that had been received by the Consumer Protection Branch regarding complaints against K-Tech Ltd. and Stan R. Kondrotas (2 page document).
- Exhibit "48" - colour copies of 49 photographs taken by Sylvester Lewis when acting as bailiff at the beginning of December 2007 (possibly December 7, 2007) for inventory purposes of exterior and interior of K-Tech Building Systems Inc. building located at 1169 Lorimar Drive, Mississauga (49 pages).
- Exhibit "49" - colour copies of 11 photographs taken by Sylvester Lewis as bailiff in April 2008 of exterior of premises for inventory purposes of K-Tech Building Systems Inc. building located at 1169 Lorimar Drive, Mississauga (11 pages).
- Exhibit "50" - copies of emails for September 29, 2006 and October 2, 2006 (2 pages) between K-Tech Building Systems Inc. and Bonnie Engel and original handwritten note from Stan Kondrotas

to Bonnie Engel giving directions to view windows on a building being erected on Doe Lake (1 page).

- Exhibit "51" - copy of K-Tech brochure regarding cottages and recreational houses (3 pages).
- Exhibit "52" - binder of K-Tech photographs of cottages and buildings and floorplans.
- Exhibit "53" - copies of emails for December 20, 2006, January 16, 2007, January 17, 2007, January 18, 2007 and January 24, 2007 between Stan R. Kondrotas, President of K-Tech Building Systems Inc. and Bonnie Engel (8 pages).
- Exhibit "54" - copy of a fax of quotes for building materials from Bel Air Lumber Inc. dated September 18, 2007 to Stan of K-Tech regarding a project location of Whitney (4 pages).
- Exhibit "55" - original hand drawn map and directions to Bonnie Engel's property that had been in file in Stanley Kondrotas' possession (1 page).
- Exhibit "56" - colour copies of 6 photographs of (1) trailer and wall panels dated 2007/01/05 at Bobcaygeon location; (2) cottage being erected dated 2007/04/19 at Huntsville location; (3) cottage being erected dated 2006/12/15 at French River location; (4) cottage being erected dated 2007/06/07; (5) cottage being erected 2007/01/05; (6) cottage being erected dated 2007/06/30 (6 pages).

1. INTRODUCTION

- [1] This is the story of Bonnie Engle and her dream to have a cottage built on her property located by the Madawaska River in the Township of South Algonquin in Ontario. Her dream had begun when she and her husband, David Boomer, had purchased that property about 22 years earlier. It had also taken them some 20 years to pay off the purchase price of that property and to be free of any bank liens. They also saved and put money aside so that some day Bonnie Engel could build her dream cottage. During the years, they had also attended cottage shows and had talked to or made inquiries of various companies about the type and cost of building a cottage on their property. Engle had wanted her cottage to be steel-framed and built from a floor plan that she had drawn up herself using a special computer software program. Finally, in 2006 Engel and her husband had reached the point when they were ready to proceed and had decided to use one company that they believed were reputable and knowledgeable to build or erect that cottage.
- [2] After deciding on that company, Bonnie Engel entered into and signed a written purchase agreement on October 4, 2006, with the corporate defendant, K-Tech Building Systems Inc. ("K-Tech"), whose office and factory were located at 1169 Lorimar Drive in the City of Mississauga. The agreement required K-Tech to build or erect a cottage on Engel's property according to the Ontario Building Code and the specifications set out in the agreement, in which the exterior walls for the cottage would be prefabricated in K-Tech's factory. However, before signing the agreement to build the cottage, Engel had discussions with Stanley Kondrotas, who was the President and director of K-Tech, about what type of cottage would be built, what would be provided by K-Tech, how long it would take, when it could be built, and what the cottage would cost. Furthermore, the terms in the agreement made it Engel's responsibility for obtaining a building permit; for having a concrete foundation constructed on her property with another contractor that she had to pay for separately; and to make six payments or installments totaling \$47,770 to K-Tech by specific dates, with \$42,993.00 of that total purchase price being paid upfront before K-Tech would commence construction of the cottage on Engel's property. And in consideration of receiving that amount of money, K-Tech, for their end of the bargain, would manufacture or fabricate the engineered wall panels for the cottage in their factory in Mississauga; would order windows, doors, roof shingles, lumber, roof trusses, and other building materials to complete the cottage; would transport or have delivered the pre-built wall panels and the other materials to Engel's property; and would build or erect the cottage as specified in the agreement onto a concrete foundation that Engel would arrange to be built separately. Engel also wanted upgrades of materials and other items not specified in the October 4, 2006 agreement and agreed to pay K-Tech separately for those upgrades or custom-ordered items either upfront or on a payment plan. Moreover, Engel did give K-Tech separate payments upfront for those extra or upgraded items. It had also been envisioned that the cottage would take two weeks to erect and be completed sometime in August of 2007. Although the intention had been to have the cottage

- started and completed in August of 2007, an actual date for completion of the cottage had not been set out or specifically spelled out in the agreement.
- [3] Furthermore, Engel had obtained her building permit on June 13, 2007, arranged to have the concrete foundation poured on June 27, 2007, and had paid all the required installment payments to K-Tech on time, and was ready by the last week of July 2007 to have the cottage built on her property. Engel then pressed Stanley Kondrotas for a date when K-Tech would actually start erecting and assembling the cottage on the concrete foundation. As Engel had wanted a firm commitment from K-Tech to start construction of the cottage on her property on a specific date, Stanley Kondrotas on July 5, 2007 informed Engel that because they had so many jobs lined up that if she paid the fifth installment under the agreement early then Engel's job would receive priority over other customers. Believing that she would receive such priority in the queue of jobs to be done by K-Tech if she paid the fifth installment early, Engel made a \$5700 payment to K-Tech on July 13, 2007. This \$5700 payment also included a further payment for those extra items or upgrades of materials that had been requested by Engel in addition to that fifth installment payment of \$4178 which had not been actually due until the building components for Engel's cottage were ready to be shipped to the Engel property.
- [4] Also, as of July 20, 2007, Engel had paid to K-Tech upfront the sum of \$56,194.18 (which is the total of the amounts of the cheques from Exhibits #6, #7, #8, #9, #10, #11, #13, #14, #19, and #20 that Engel and her husband had paid to K-Tech). However, Engel did not pay to K-Tech the last installment of \$4,777.00 that was due when the cottage was completed. Consequently, of the \$56,194.18 that had been paid by Engel and her husband upfront to K-Tech, \$13,201.18 of that amount was for the extras and upgraded materials requested by Engel, while the remaining \$42,993 was paid towards the purchase price of \$47,770 set out in the agreement.
- [5] Alas, this story did not have a happy ending. Instead, Bonnie Engel's dream turned into a nightmare when K-Tech continually delayed the start date for the erection of Engel's cottage that had been originally envisioned to be started and completed in August of 2007. When it appeared that K-Tech would not fulfill their end of the agreement in transporting the manufactured wall panels and other building materials to Engel's property and in commencing to build the cottage because of the numerous delays or excuses given by Stanley Kondrotas to Engel from the last week of July 2007 to the first week of October 2007 of why K-Tech could not start Engel's cottage or why K-Tech would not even allow Engel to pick up her wall panels and the other building materials from K-Tech and transport it herself to her property, Engel and her husband decided to hire a lawyer to help them terminate the agreement and get the return of the \$56,194.18 they had paid upfront to K-Tech. On Engel's direction, Engel's lawyer sent a letter dated October 11, 2007, to K-Tech to inform and notify the company that Engel was cancelling the agreement and treating the delays in erecting the cottage as a breach by K-Tech of the October 4, 2006 agreement, that Engel no longer wanted the cottage to be built or erected by K-Tech, and demanded K-Tech refund fully all the money Engel and her husband

had paid upfront to K-Tech. However, K-Tech or Stanley Kondrotas did not refund the money.

- [6] Unfortunately, because of financial difficulties it was having in the latter half of 2007, K-Tech was locked out of its premises located at 1169 Lorimar by its landlady in the first week of December 2007 for being in arrears of paying their rent. K-Tech eventually went bankrupt and its assets were purchased by others at fire sale prices, with the money from the sale going to pay off creditors. As such, K-Tech is no longer in business or operating as a viable business. Sadly, Bonnie Engel did not get her dream cottage built, a refund, or anything from K-Tech that she and her husband had paid for.
- [7] Furthermore, an investigation was begun by the Ministry of Consumer Services into the transaction between Bonnie Engel and K-Tech after it had received complaints from David Boomer and Bonnie Engel. Boomer and Engel had filed separate online complaints to the Ministry on November 22, 2007, and March 10, 2009, respectively, against K-Tech and Stanley Kondrotas. After these complaints were investigated, the Ministry decided to charge K-Tech Building Systems Inc. and Stanley Kondrotas, the President and director of K-Tech Building Systems Inc., on November 17, 2009, with jointly committing in 2006 and 2007 five offences under the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A. The five charges are namely:
- (1) *for engaging in an unfair practice by making a false, misleading or deceptive representations to a consumer on or about October 4, 2006, contrary to s. 117 and 116(1)(b)(ii);*
 - (2) *for engaging in an unfair practice by making a false, misleading or deceptive representations to a consumer on or about July 5, 2007, contrary to s. 117 and 116(1)(b)(ii);*
 - (3) *for engaging in an unfair practice by making by making an unconscionable representation to a consumer on or about October 4, 2006, contrary to s. 117 and 116(1)(b)(ii);*
 - (4) *for failing to deliver to a consumer on October 4, 2006, a future performance agreement containing the information required by s. 24 of Ontario Regulation 17/05, contrary to s. 22 and s. 116(2); and*
 - (5) *for failing to provide a refund payment to a consumer within 15 days of being given notice of cancellation of the consumer agreement by the consumer on or about October 30, 2007, in accordance with s. 96(1) of the Act, and s. 79(1) of Ont. Reg. 17/05, thereby committing an offence under s. 116(1)(b)(viii).*

[8] In defending against these five charges, the defendants have made three distinct arguments for why they should not be found guilty or be convicted of committing these five offences. For their first argument, they contend the prosecution has charged them under the wrong statute. Specifically, the defendants contend that the Ministry of Consumer Services should have actually charged them under the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31 and not under the Consumer Protection Act, 2002, as the agreement or transaction in question involves constructing a year-round home to the standards set out in the Ontario Building Code, which they submit meets the definition of a "home" specifically covered by the Ontario New Home Warranties Plan Act, but does not meet the definition of "goods" or "services" under the Consumer Protection Act, 2002.

[9] For their second argument, the defendants submit that if the Consumer Protection Act, 2002 is ultimately determined to apply to the transaction in question, then the defendants contend, in the alternative, that they have acted with due diligence nevertheless and were always ready and willing to complete the cottage according to the terms set out in their agreement with Bonnie Engel, but that it had been Engel who had caused the delays in commencing the cottage by not obtaining the building permit earlier, which then caused the pouring of the concrete foundation to be delayed; by running out of money and asking for the start date to be delayed until the Fall of 2007 or later, which prompted Stanley Kondrotas to cancel orders he had with suppliers for custom items, especially the order for the roof trusses to be manufactured; by not providing proper directions to the defendants on how to find her property so they could deliver the wall panels and other materials to Engel's property; and also by Engel hiring a lawyer to terminate the agreement. In addition, the defendants contend there were also problems that arose which were unforeseen or beyond the defendants' control which had added to the delay and their inability to erect or commence Engel's cottage or to deliver the pre-built wall panels or materials to the Engel property, such as bad weather; having to wait 28 days for the concrete foundation to cure; the workers who erect the buildings having to finish or complete buildings they were already working on before they could move to the Engel property to start the Engle cottage; Stanley Kondrotas' father being hospitalized during the period in question, which required both Stanley Kondrotas and his brother, Terry Kondrotas, being at the hospital on a full-time basis, which also prevented them from being involved full-time in the business; and Terry Kondrotas, who is the person who actually builds the cottages for K-Tech, not being available because of having to be at the hospital and for having to remain in town in order to sell his own home and resolve personal relationship issues; and the landlady of their premises locking them out of their factory and office for arrears in rent, which prevented the defendants' having access to Engel's wall panels and other materials ordered for the cottage.

[10] Furthermore, despite the question of which of the two consumer protection statutes properly applies to the transaction in question, the defendants for their

third argument contend there has been an abuse of the court's process, since these proceedings are effectively being used to collect a debt, since Engle has already obtained a civil judgment against the defendants for \$60,965.86 and \$1,979 for costs of that action.

- [11] Moreover, the defendants submit that the October 4, 2006 agreement had been between Bonnie Engel and K-Tech and that because Stanley Kondrotas was not a party to that agreement then Stanley Kondrotas is not ultimately responsible or liable for what K-Tech Building Systems Inc. did or omitted to do, and as such, should be acquitted of the five charges.
- [12] In reply to the defendants' arguments for an acquittal or for a stay of proceedings for an abuse of process, the prosecution contends that the Consumer Protection Act, 2002 properly applies to the transaction in question despite whether the Ontario New Home Warranties Plan Act applies or not, that the prosecution has proven all five charges against both defendants beyond a reasonable doubt, and that the defendants have failed to prove on a balance of probabilities that they were acting with all reasonable care in the circumstances in preventing or avoiding the commission of the five offences, that there has been no abuse of process in proceeding with the charges, and that Stanley Kondrotas is liable for committing the five offences as a principal or party, as an agent of the supplier, and as an officer and director of K-Tech.
- [13] In addition, the trial of the five charges was held over four days: on March 9th and 10th and on November 23rd and 24th of 2011. At the trial, six witnesses testified. Three witnesses testified for the prosecution while three witnesses testified for the defence. After submissions were heard, judgment was reserved and the matter was adjourned to April 13, 2012, to render the judgment. These, therefore, are the written reasons for judgment:

2. THE CHARGES

- [14] Both K-Tech Building Systems Inc. and Stanley Kondrotas have been charged jointly with committing the following five offences:

Stanley Kondrotas and K-Tech Building Systems Inc., 1169 Lorimar Drive, Mississauga, Ontario on or about 4th day of October 2006, at the City of Mississauga, in the Central West Region and elsewhere in the Province of Ontario did commit the offence of

- (1) *engage in an unfair practice in relation to Bonnie Engel, a consumer, by making a false, misleading or deceptive representation to said consumer that he would purchase, order or fabricate the materials and components of the building referred to in that future performance agreement entered into with Bonnie Engel, a consumer, on October 4, 2006 AND that he would load, pack, brace, and arrange delivery of the materials and components for the*

said building referred to in that future performance agreement entered into with Bonnie Engel, a consumer, on October 4, 2006 AND that he would erect and complete the building referred to in that future performance agreement entered into with Bonnie Engel, a consumer, on October 4, 2006, in a good and workmanlike order according to the Specifications referred to in said future performance agreement and in accordance with the Ontario Building Code and failed to do so, contrary to section 17(1) of the Consumer Protection Act, 2002, Chapter 30, Schedule A, as amended, and thereby, committed an offence under section 116(1)(b)(ii) of the said Act.

AND FURTHER THAT:

(2) Stanley Kondrotas and K-Tech Building Systems Inc. on or about the 5th day of July 2007, in the City of Mississauga in the Central West Region and elsewhere in the Province of Ontario did commit the offence of engage in an unfair practice in relation to Bonnie Engel, a consumer, by making a false, misleading or deceptive representation to said consumer that he would prioritize her order in consideration of an early payment and failed to do so contrary to section 17(1) of the Consumer Protection Act, 2002, Chapter 30, Schedule A, as amended, and thereby, committed an offence under section 116(1)(b)(ii) of the said Act.

AND FURTHER THAT:

(3) Stanley Kondrotas and K-Tech Building Systems Inc. on or about the 4th day of October 2006, in the City of Mississauga in the Central West Region and elsewhere in the Province of Ontario did commit the offence of engage in an unfair practice in relation to Bonnie Engel, a consumer, by making an unconscionable representation to Bonnie Engel, a consumer, that he would fulfill the obligations as required under that future performance agreement dated October 4, 2006 with the said Bonnie Engel when Stanley Kondrotas ought to have known that the said Bonnie Engel, a consumer, would be unable to receive a substantial benefit from the subject matter of his representation, said commission of an unfair practice being contrary to section 17(1) of the Consumer Protection Act, 2002, Chapter 30, Schedule A, as amended, and thereby, committed an offence under section 116(1)(b)(ii) of the said Act.

AND FURTHER THAT:

(4) Stanley Kondrotas and K-Tech Building Systems Inc. on or about the 4th day of October 2006, in the City of Mississauga, in the Central West Region, and elsewhere in the Province of Ontario, did commit the offence of fail to deliver to Bonnie Engel, a consumer, a future performance agreement containing the information required by section 24 of Ontario Regulation 17/05, as amended, of the Consumer Protection Act, 2002, Chapter 30, Schedule A, as amended, contrary to section 22 of the said Act and, thereby, committed an offence under section 116(2) of the said Act.

AND FURTHER THAT:

- (5) *Stanley Kondrotas and K-Tech Building Systems Inc. on or about the 30th day of October 2007, in the City of Mississauga in the Central West Region and elsewhere in the Province of Ontario did commit the offence of fail to refund payment to Bonnie Engel, a consumer, within fifteen days of being given notice of cancellation of the consumer agreement, to the supplier, in accordance with section 96(1) of the Consumer Protection Act, 2002, Chapter 30, Schedule A, as amended, and section 79(1) of Ontario Regulation 17/05 of the said Act and, thereby, committed an offence under section 116(1)(b)(viii) of the said Act.*

3. BACKGROUND

- [15] K-Tech Building Systems Inc. (“K-Tech”), the corporate defendant, is a company that erects affordable buildings for their customers. These buildings are constructed of prefabricated, engineered wall panels that are manufactured in the K-Tech factory located at 1169 Lorimar Drive, Mississauga, Ontario. On October 4, 2006, K-Tech entered into a “purchase agreement” with Bonnie Engel (see Exhibit #5), to construct a cottage on Engel’s property for \$47,700. As part of the agreement, K-Tech would either manufacture custom-sized wall panels or use standard-sized wall panels from their inventory; order from other manufacturers or suppliers the necessary doors, windows, roof shingles, roof trusses and other building materials to complete the cottage; transport or have delivered the wall panels and other building materials to Engel’s property; and then to erect a fully inhabitable cottage according the Ontario Building Code onto the concrete foundation that Engel had arranged to be constructed by another contractor.
- [16] The October 4, 2006 agreement had been prepared by Stanley Kondrotas, the President and director of K-Tech. Furthermore, Engle had dealt primarily with Stanley Kondrotas in regards to the cottage and in her dealings with K-Tech.
- [17] Although the agreement price for the cottage was for \$47,700, Engel and her husband, David Boomer, had actually paid K-Tech \$56,194.18 upfront for the cottage, which included the periodic installments as required by the agreement and payments for the extras and upgrades that Bonnie Engel had wanted for the cottage. However, Engel did not receive any wall panels, materials, goods, services (save for some blueprints), a completed cottage from K-Tech, or a full refund of the money that she had paid upfront to K-Tech. Because of the delays and excuses being made by K-Tech Building Systems Inc. and Stanley Kondrotas in delivering the required materials to Engel’s property and commencing the cottage, Engel and Boomer hired a lawyer in October of 2007 to terminate the agreement and to get a refund of the money they had paid to K-Tech. Moreover, Engel and Boomer also filed complaints with the Ministry of Consumer Services

about the defendants' actions in promising to build a cottage, but failed to do so, and for not refunding the money after Engel had notified the defendants on October 11, 2007, she had cancelled the agreement to purchase the cottage.

- [18] In addition, Bonnie Engel sued both of the defendants in a civil proceeding in regards to the agreement to build the cottage and the money paid upfront to K-Tech and on February 15, 2008, she received a default judgment from Justice Herold of the Ontario Superior Court of Justice in which the defendants were ordered to pay Engel the sum of \$60,965.86 and \$1,979 for the costs of the action, which also included an order that the interest rate on the judgment had been set at 6% per annum (see Exhibits #25 and #26: Bonnie Engel v. K-Tech Building Systems Inc. and Stan. R. Kondrotas, court file No. CV-07-3542-00).

(a) The Defendants

- [19] The corporate defendant, K-Tech Building Systems Inc., is a company incorporated in the Province of Ontario. It was incorporated on April 4, 2006. The company's head office and factory is located at 1169 Lorimar Drive, Mississauga, Ontario. Its business involves principally the sale of affordable homes or buildings to purchasers, which are constructed of prefabricated, engineered wall components. These prefabricated, engineered wall panels are first manufactured in its factory and then the wall components are transported to the job site where they are assembled into a building by K-Tech or by others.
- [20] The other defendant in this proceeding is Stanley Kondrotas, who is the director, President, Secretary and Treasurer of K-Tech Building Systems Inc. He has held these positions since April 4, 2006, the date of incorporation for K-Tech.
- [21] K-Tech had been formerly a family business started by Stanley Kondrotas' father about 30 years earlier, but due to his father's deteriorating health related to dementia and Alzheimer's disease, the business and assets were transferred to K-Tech. Stanley Kondrotas was also appointed as the President and director of K-Tech and formally took over running the family business on April 4, 2006. K-Tech also had a large inventory of approximately 300 pre-built wall panels, in which a sale was held to sell off these panels. The money from the sale of these panels was then taken out of the family business and given to Stanley Kondrotas' father and mother for their retirement. The family business had also gained an international reputation for their technology and method in manufacturing wall components for affordable homes and had built many of these types of homes in the Caribbean.
- [22] Furthermore, Stanley Kondrotas testified that he was the person who ran the front office of K-Tech, while his brother, Terry Kondrotas, who had been trained in the construction of buildings, was the person who would actually builds or erects the buildings for K-Tech. Stanley Kondrotas was also the person who had dealt and communicated primarily with Bonnie Engel in regards to negotiating the agreement for manufacturing and erecting a cottage on Engel's property. In addition, it was

Stanley Kondrotas, as an officer for K-Tech, who had signed the October 4, 2006 purchase agreement with Bonnie Engel on behalf of K-Tech.

- [23] In addition, K-Tech had orders to construct other buildings or cottages in 2007. It appears that K-Tech had been involved in constructing buildings or cottages at three locations in 2007, that were referred to as the project at "Bobcaygeon (Pigeon Lake)", at "Huntsville", and at "French River". Hence, there appeared to be three other building projects for K-Tech in 2007, besides the Engel cottage project. However, it does not appear that there were any other projects besides these three building projects for K-Tech in 2007, which would have been in a queue of projects at the same time with the Engel cottage waiting to start construction.
- [24] Furthermore, K-Tech was in dire financial difficulty in 2007 that required K-Tech to let go of an employee. Debra Hunter, the office secretary of K-Tech, testified that K-Tech could no longer afford to pay her and she left the company in September of 2007. In addition, K-Tech's premises were chained and padlocked by a bailiff hired by K-Tech's landlady in the first week of December 2007 to distress the premises for arrears in rent. Stanley Kondrotas also testified that the premises K-Tech rented at 1196 Lorimar Drive cost \$12,000 a month.
- [25] In addition, Michael Markham, who was employed by K-Tech to manufacture the engineered wall panels in K-Tech's factory and to assist in erecting and completing the buildings on site, testified that he had left the employ of K-Tech in the summer of 2007, but then returned to help clean up the shop or factory in August of 2007. Markham also said he had decided to leave K-Tech because he wanted to be at home and did not want to work out of town or be on the road anymore.
- [26] Moreover, Stanley Kondrotas testified that the economy had turned down in 2007 and that many projects for K-Tech that he had expected to proceed had been cancelled. Eventually, K-Tech went bankrupt and its assets were sold off at fire sale prices. K-Tech is now no longer in business or operating as a viable business. In addition, Stanley Kondrotas is now making a living teaching power skating.
- [27] As for Terry Kondrotas, the person who would have built the Engel cottage for K-Tech, he unfortunately passed away between the first two trial dates of March 9 and 10 and the last two trial dates of November 23 and 24 of 2011, before he was to testify in this trial.

(b) The Consumer

- [28] Bonnie Engel is the person who had entered into a written agreement on October 4, 2006, with the corporate defendant, K-Tech Building Systems Inc., to build or erect a cottage on her property. She is employed as a business analyst for an environmental laboratory service. Her husband is David Boomer. Engel had first met Terry Kondrotas, the brother of Stanley Kondrotas, who is an officer and director of K-Tech and the individual defendant in this proceeding, at a cottage trade

show she had attended sometime in 1993 or 1994. She also said she had obtained brochures from Terry Kondrotas about his company's business and information about how to contact them. When Engel was serious about building a cottage on her property in 2006, she emailed the email address she had obtained for Baltic Homes, which was the name of the company on the business card she had received from Terry Kondrotas. However, the reply she had actually received from her email inquiry to Baltic Homes was not from that named company, but from Stanley Kondrotas of K-Tech. An appointment was then arranged and Engel attended in September or October of 2006 at the K-Tech premises located at 1169 Lorimar Drive in Mississauga.

- [29] In addition, Engel testified that she does not recall having had a tour of K-Tech's factory located at the back of the offices of K-Tech or observing any of the wall panels designated for her cottage in the K-Tech factory.
- [30] Engel also testified that she had drawn up a floor plan for the cottage that she wanted using a special computer software program, from which Stanley Kondrotas had arranged for blueprints for the proposed cottage to be prepared from her floor plan. However, there were errors on those original blueprints, such as the staircase being drawn in the wrong location, which necessitated them being sent back three times for revisions. It was then agreed between Engel and Stanley Kondrotas that they would split the cost for another set of blueprints to be prepared. As such, Engel paid an additional \$170 for the revised blueprints.
- [31] Furthermore, as a term of the agreement Engel had been responsible for applying for and obtaining a building permit from the Township of South Algonquin for the proposed cottage. Engel had initially submitted the application fee along with the blueprints provided by K-Tech on April 2, 2007, but approval for the permit was not initially given. The Township had wanted an engineer's stamp for the structural plans and engineered slab drawings for the cottage. Engel then turned to Stanley Kondrotas for assistance, but Kondrotas did not want to pay for an engineer, as he felt that an engineer was not needed to certify the drawings to obtain the permit if Engel took full responsibility for any potential liability as the owner and builder of the cottage. However, Engel took the side of caution and retained an engineer at her own expense to prepare these plans and drawings and then re-submitted these new plans on June 2, 2007, to the Township. Subsequently, Engel was issued the building permit on June 13, 2007.
- [32] Also, by the terms of the agreement Engel had been responsible for hiring and paying for another contractor to construct and pour the concrete foundation and slab for her cottage. She did fulfill that requirement in the agreement and hired a local contractor to do the concrete work and pour the foundation and slab. The concrete had been poured on June 27, 2007. In addition, the foundation contractor instructed Engel to wait 28 days for the concrete to cure before putting any weight on the foundation. As such, K-Tech would not have been able to begin construction of the cottage on the foundation until the last week of July of 2007.

- [33] Moreover, Engel had fulfilled her end of the agreement, made all the required installment payments on time, and paid for the extras and upgrades of materials separately to K-Tech. Also, at one point in the summer of 2007, she was upset about not having enough money to pay for the cottage because she was unable to sell her truck. She had asked Stanley Kondrotas not to cash one of her cheques she provided to K-Tech right away, but K-Tech did actually cash that cheque right away. Engel also testified that she had not asked Stanley Kondrotas to delay the start of her cottage. Contrarily, she said that she had been actually anxious to start the cottage as early as possible and had asked Stanley Kondrotas if the cottage could be started in July of 2007. Furthermore, Engel had constantly emailed or called Stanley Kondrotas to get a firm start date for the cottage so that either she or her husband could plan their vacation so that one of them could take time off from their work and be available to show or direct the workers from K-Tech to Engel's property and to facilitate K-Tech being able to deliver the prefabricated wall panels and other building materials and to start construction of the cottage.
- [34] Moreover, Engel had been in constant communication and contact with Stanley Kondrotas after signing the agreement with K-Tech Building Systems Inc. and had attended the K-Tech offices on many occasions, until she had been advised by her lawyer in October of 2007 not to have any more contact with him or anyone with K-Tech.

(c) The Agreement between K-Tech Building Systems Inc. and Bonnie Engel

- [35] After discussions about the price and type of cottage, Stanley Kondrotas provided Engel with a six-page typed purchase agreement for the proposed cottage in which the wall panels would be manufactured in the K-Tech factory located at 1169 Lorimar Drive, and that windows, doors, roof shingles, roof trusses and other building materials would be ordered and supplied by K-Tech, and that K-Tech would then transport the wall panels and other building materials to the Engel property where workers from K-Tech would assemble and erect a completed cottage on the foundation Engel had arranged to be constructed by another contractor.
- [36] However, Engel did not sign the agreement right away but took the purchase agreement home with her to consider the agreement.
- [37] Sometime after receiving the typed agreement from Stanley Kondrotas, Bonnie Engel and K-Tech entered into the purchase agreement (Exhibit #5) on October 4, 2006.
- [38] Stanley Kondrotas also testified that he had prepared the purchase agreement himself so that it would be simple to understand and had copied or had taken the clauses for his agreement from the best clauses of other agreements used by other cottage builders or suppliers. He also alluded to the fact that a lawyer had drafted those other agreements from which he had copied the clauses from.

- [39] The agreement included the terms for the purchase of a 900 sq. ft. cottage to be constructed or erected upon a foundation provided by Engel for the price of \$47,770, which included the GST; that Engel had to pay the purchase price over six installments, with the date or when each payment had to be paid by; that Engel was responsible for obtaining a building permit; and included what K-Tech would provide to Engle in consideration of the money paid by Engel.
- [40] The six payments that were required to be paid by Engel were set out in clause 1.2(a) to (f) of the October 4, 2006 purchase agreement:

1.2 *The Purchase Price shall be paid in partial payments as follows:*

- (a) *KTech requires a down payment of 35% of the Purchase Price
\$ 16,695.00 due at the signing of this Agreement*
- (b) *KTech requires the next payment of \$ 2,120 due and payable upon presentation of permit plans*
- (c) *KTech requires the next payment of \$ 10,000.00 to be made by February 28, 2007*
- (d) *KTech requires the next payment of \$ 10,000.00 to be made by April 30, 2007,*
- (e) *KTech requires the next payment of \$ 4,178.00 due and payable when building components are ready to ship to site,*
- (f) *KTech requires the final payment of \$ 4,777.00 due and payable upon completion of the Building(s)*

- [41] In addition, clause 1.5 of the purchase agreement provided for any requested extras made by Engel. The clause stated that any extra charges or extras incurred during the agreement or requested extras would be paid according to the terms and conditions of the invoice for those extra charges or extras. Engel did request extras from K-Tech Building Systems Inc. that were not set out in the October 4, 2006 purchase agreement, which included items such as upgrades for plywood and upgraded or extra windows and doors, and a porch. These extra items or upgrades were to be paid by Engel as extra payments. The amount paid upfront by Engel for these extra items totalled \$13,201.18. However, Engel did not receive any invoices from K-Tech for those extras, but received emails from Stanley Kondrotas containing a spreadsheet showing the payments made for those extra items.
- [42] Moreover, Engel and her husband had paid to K-Tech all the installment payments as required by the agreement on time as well as payments for the extra items for a total amount of \$56,194.18.

(d) The Money Paid Upfront by Bonnie Engle and David Boomer to K-Tech Building Systems Inc.

- [43] Bonnie Engel and her husband, David Boomer, paid \$56,194.18 by cheques to K-Tech. All the cheques were cashed by K-Tech.
- [44] The amounts and dates of the cheques and what the cheques paid to K-Tech were designated for are listed below:

Oct 4/2006	\$16,695.00	first instalment payment
Dec 21, 2006	\$2,290.00	second instalment payment and \$170 for blue prints
Jan 30, 2007	\$2,819.86	for extras
Feb 28, 2007	\$1,969.84	for extras
Feb 28, 2007	\$1,211.00	for extras
Feb 28, 2007	\$10,000.00	third instalment payment
April 20, 2007	\$4399.18	for extras
April 30, 2007	\$10,000.00	fourth instalment payment
July 13, 2007	\$5,700.00	priority payment (covers fifth instalment and extras)
July 20, 2007	\$1,109.30	for extras

(e) The Building Permit, Obtaining An Engineer, and Pouring of the Concrete Foundation

- [45] The agreement between Engel and K-Tech stated that Engel was responsible for obtaining the building permit for the construction of her cottage. K-Tech provided the blueprints for the cottage to Engel, which had to be sent back several times for corrections. When Engel received the final set of blueprints for the proposed cottage from K-Tech there were still errors, but she submitted them anyway on April 2, 2007, to the Township of South Algonquin along with the application fee and application for a building permit. However, the permit was not issued because there had been problems with the blueprints that were submitted. Before the Building Department for the Township of South Algonquin would issue the permit they required an Engineer's stamp for the structural and foundation plans and for the engineered slab. Stanley Kondrotas informed Engel that he would not arrange for or pay for an engineer to prepare the structural and foundation plans for the cottage, as he believed it was not necessary if Engel informed the municipality that she was

the person building her own cottage and the one who would be responsible for any liability for the construction of the cottage.

- [46] Consequently, Engel decided not to take Stanley Kondrotas' advice and undertake being responsible for any liability, so she decided to proceed with caution and retained and paid for her own engineer to prepare the structural and foundation plans. After the engineer prepared the required plans, she then resubmitted the engineer-stamped plans to the Township of South Algonquin with the building permit application on June 2, 2007. The plans were approved and the building permit was subsequently issued on June 13, 2007.
- [47] The framing for the concrete foundation was then prepared and the concrete was poured on June 27, 2007, by Mike Paplinskie Contracting. Bonnie Engel had also been advised by the concrete foundation contractor that she had to wait 28 days for the concrete to cure, before she could begin the construction of her cottage. However, Stanley Kondrotas disagreed with the foundation contractor and testified that Bonnie Engel did not have to wait 28 days before construction of her cottage could commence and that the concrete foundation could have had weight placed on it much sooner. Thus, based on what the foundation contractor had told Engel about waiting 28 days for the concrete to cure, the foundation would not have been ready until the last week in July of 2007, which would be the earliest date in which construction of the cottage could have been started.

(f) The July 13, 2007 Payment By Engel To K-Tech For Priority

- [48] On July 5, 2007, Stanley Kondrotas informed Engel by email (Exhibit #15) that if she made the fifth installment payment early then she would get priority or move to the front of the queue of cottages to be built by K-Tech. Engel hoping that this would speed up the timeline for getting her cottage started and to be completed made a payment to K-Tech of \$5700 on July 13, 2007, that was for the fifth installment and for extra items. However, delivery of the materials and the manufactured wall panels were not delivered to the Engel property nor was construction or erection of the cottage commenced. Engel also made a payment on July 20, 2007 to K-Tech of \$1,109.30 for extra items. Thus, Engel only had the last instalment payment of \$4,777.00 remaining to make to K-Tech on the agreement, which was due when the cottage had been completed.

(g) The Lawyer's Letter and the Demand for a Full Refund

- [49] Bonnie Engel testified that she believed that Stanley Kondrotas had been deliberately delaying the start date for the cottage and putting off transporting the prefabricated wall panels and other materials to be used in building her cottage to her property and in commencing to build the cottage and in refusing to hand over the panels and materials to her so that she could transport the materials herself to her property or to her brother's warehouse to store the materials.

- [50] In addition, Engel testified that she was worried that K-Tech was having financial difficulties since she had noticed that the materials that used to be stored outside at 1169 Lorimar Drive had been disappearing. She was also worried that she would not get her cottage because of the delays and excuses made by Stanley Kondrotas in commencing the cottage, and as a result of her concerns about the viability of K-Tech and the loss of their money, she and her husband retained the services of a law firm to help them get the return of their money or to obtain the wall panels and materials they had paid for to be delivered to them, so that they could hire someone else to build the cottage from those materials, and to terminate the agreement between Engel and K-Tech. Engel and her husband had been also instructed by their lawyer not to deal with K-Tech or to communicate with Stanley Kondrotas.
- [51] However, Stanley Kondrotas contends that the defendants were still prepared to complete the cottage, but that it had been Engel who had terminated the contract and did not want the cottage to be completed.
- [52] The letter sent by Engel's lawyer dated October 11, 2007 (Exhibit #23), also advised the defendants that Engel demanded all their money paid upfront to be refunded, since K-Tech had breached the agreement because of the unreasonable delay in commencing the construction of the cottage. However, Stanley Kondrotas testified that a refund would not be given as it had been a custom-ordered cottage. However, Stanley Kondrotas had informed Engel that if he could sell the custom-built wall panels and materials for her cottage to someone else, then the money would be paid to Engel.
- [53] Moreover, the letter notified the defendants that Bonnie Engel had considered that the defendants had breached the purchase agreement by their inordinate delay in commencing to build the cottage and for not fulfilling its end of the bargain to provide her with a completed cottage on her property and that Engel demanded a refund of the money that she had paid upfront to K-Tech Building Systems Inc.
- [54] In addition, Stanley Kondrotas responded to Engel's lawyer's letter by sending a faxed letter dated October 18, 2007 (Exhibit # 24), and informed Engel's lawyer that K-Tech had never advised Engel at any time that it would not perform its duties under the signed contract and that K-Tech had also invested significantly into the project by securing the purchase of existing inventory that had belonged to others and had completed the extra exterior walls needed for the building along with ordering the material and components needed in the erection and completion of the building. He also mentioned that the roof trusses were not ready but they would be ready for delivery on October 26, 2007, but had to put the roof trusses on hold because of receiving that letter from Engel's lawyer. He also said that he had to put his men on another job even though they were suppose to deliver the materials to Engel's property during the week of October 18, 2007, as had been agreed to by Engel. He also indicated that there were a number of delays with the construction of the building that had been completely out of their control, which also included Engel's fault for taking considerable time to get the building permit, that Engel had

advised K-Tech that she had run out of money and wanted to delay the building until the Fall of 2007, that K-Tech would have to wait 28 days for the foundation to cure before K-Tech could begin construction, and that these particular delays then caused delay in the components being manufacturing by others, which resulted in the delay in K-Tech receiving those items. He also concluded by saying that K-Tech was still willing to complete the cottage, but would not be responsible for the delay caused by Engel's action in hiring a lawyer and offered the option to Engel that she could still get her cottage.

- [55] Furthermore, Kondrotas also informed Engel's lawyer that repayment would be made to Engel when K-Tech sold Engel's custom-ordered cottage to another purchaser and that option for repayment had already been given to Engel.
- [56] In addition, Stanley Kondrotas testified that it was his view that he still had to finish the cottage and did not like the idea of allowing the wall panels and materials to be provided to Engel so that someone else could finish the job. He also said that it was just not something that he could personally condone or accept as something that should be done, since it was K-Tech who knew how to use their panels and properly put them together to build the cottage.
- [57] However, K-Tech did not refund the money, nor were any of the wall panels or materials for the cottage delivered to Engel or made available for Engel to pick up.

(h) The defendants were locked out by their landlady in December 2007 for arrears in rent

- [58] Bonnie Engel testified that she had noticed that materials and items were beginning to disappear around the K-Tech premises after the summer months of 2007. She also said she had observed that the K-Tech premises had been padlocked at one point. In fact, because of arrears in rent K-Tech's landlady hired a bailiff to distress K-Tech's premises at 1169 Lorimar Drive in the first week of December 2007. The bailiff attended at the K-Tech premises and posted a notice of the distress on the front entrance of the K-Tech premises, changed the locks on the doors, padlocked the exterior part of the premises, and photographed the contents of the inside and the outside the premises occupied by K-Tech.

(i) The Civil Judgment against K-Tech Building Systems Inc. and Stanley Kondrotas

- [59] On Engel's instructions, Engel's lawyer filed a statement of claim (Exhibit #25) in the Superior Court of Justice in Brampton against both K-Tech Building Systems Inc. and Stanley Kondrotas for a breach of contract for not building the cottage and a claim for the money that had been paid to K-Tech by Engel. Engel was successful in her action and had obtained a default judgment (Exhibit #26) against K-Tech Building Systems Inc. and Stanley Kondrotas from Justice Herold of the Ontario Superior Court of Justice dated February 15, 2008, with an order for the defendants

to pay Bonnie Engel the sum of \$60,965.86 and \$1,979 for the costs of the action. Interest on the judgment amount was set at 6% per annum.

- [60] However, Engel has not received any money from the defendants to satisfy that judgment.

(j) Bonnie Engel eventually hired another contractor to build her cottage

- [61] Despite her setback, Engel was determined to fulfill her dream. She hired and paid another contractor, Paplinskie Contracting Ltd., to build her dream cottage. The new contractor began the construction of her cottage a year later in September of 2008. It cost Engel and her husband about \$85,984.92 to have the cottage built by Paplinskie Contracting Ltd. Bonnie Engel now has her dream cottage, although she had to basically pay “twice” for it.

(k) The online complaints filed by David Boomer and Bonnie Engel

- [62] David Boomer filed his complaint against the defendants first with the Ministry responsible for enforcing the Consumer Protection Act, 2002. Boomer completed an online complaint form on the Consumer Protection Branch website on November 22, 2007 and submitted it. He informed this Branch about the acts or omissions committed by K-Tech and Stanley Kondrotas and the substantial amount of money that had been paid upfront to K-Tech for a cottage to be built and the failure of K-Tech to build that cottage or to refund the money back.
- [63] On the other hand, Bonnie Engel did not submit her online compliant against the defendants until March 10, 2009, with the Ministry of Small Business and Consumer Services (the name of the Ministry at that time responsible for enforcing the Consumer Protection Act, 2002). She also mentioned the civil judgment she had already obtained, the amount of money that she had paid to K-Tech for a cottage to be built by K-Tech, and the failure of K-Tech to build the cottage or to refund her money, and that K-Tech and Stanley Kondrotas had disappeared with her money.

(l) The Investigation and Prosecution of K-Tech Building Systems Inc. and Stanley Kondrotas under the Consumer Protection Act, 2002, by the Ministry of Consumer Services

- [64] After receiving written complaints from Engel and her husband, David Boomer, the Ministry of Consumer Services (the present name of the Ministry responsible for enforcing the Consumer Protection Act, 2002) commenced an investigation into the complaints. Subsequently, Paula Charles, a Provincial Offences Officer with the Ministry laid and swore out an information on November 17, 2009, against Stanley Kondrotas and K-Tech Building Systems Inc. for jointly committing five offences under the Consumer Protection Act, 2002. Summons were then issued and served on the defendants to appear in court on January 5, 2010, to answer to the charges.

- [65] On January 5, 2010, the defendants appeared and the matter was adjourned to February 2, 2010. On February 2, 2010, the defendants appeared again and their matter was adjourned until April 6, 2010. On April 6, 2010, the defendants' legal counsel appeared for the defendants and their matter was adjourned until May 4, 2010. On May 4, 2010, the defendants' counsel appeared for the defendants and their matter was adjourned for the purpose of holding a judicial pre-trial conference on June 22, 2010. After the judicial pre-trial conference was conducted, the defendants' matter was adjourned to July 6, 2010 in order to set a two-day trial. On July 6, 2010, the two-day trial date was scheduled for March 9 and 10, 2011, with a confirmation date of February 1, 2011. On February 1, 2011, the March 9 and 10, 2011 dates were confirmed with an additional two days scheduled for November 23 and 24, 2011, to complete the trial. It was to be a four-day trial.
- [66] The defendants' trial on the five charges then commenced and were held on March 9 and 10 and November 23 and 24, 2011. During the period between the first two days of the trial held on March 9 and 10, 2011, and the last two days of the trial held on November 23 and 24, 2011, Terry Kondrotas, the brother of Stanley Kondrotas, passed away. The defence had intended to call Terry Kondrotas as a witness.
- [67] There were six witnesses who testified in the trial. The three who testified for the prosecution were: (1) Bonnie Engel, who contracted with the corporate defendant, K-Tech Building Systems Inc., to supply a prefabricated cottage and erect it on a foundation on Engel's property; (2) David Boomer, Engel's spouse; and (3) Sylvester Lewis, a bailiff.
- [68] And the three who testified for the defence were: (1) Stanley Kondratas, President and director of the corporate defendant and an individual defendant in this proceeding; (2) Michael Markham, a former employee of the corporate defendant, K-Tech Building Systems Inc.; and (3) Debra Hunter, a former employee of the corporate defendant, K-Tech Building Systems Inc.

4. APPLICABLE LAW

- [69] If an individual or a corporation is convicted of engaging in an unfair practice or committing an offence under the Consumer Protection Act, 2002, they would be subject respectively to different range of penalties or fines. An individual would be liable under s. 116(5) to a maximum fine of \$50,000 or to a term of imprisonment of two years less a day, or to both, while a corporation would face a fine up to a maximum amount of \$250,000 [*emphasis is mine below*]:

Offences

116(1) A person is guilty of an offence if the person,

(a) fails to comply with any order, direction or other requirement

under this Act; or

- (b) contravenes or fails to comply with,
 - (i) *in respect of Part II, Consumer Rights and Warranties, subsection 10(1), section 12, subsections 13(2) and (7) and subsections 13.1(1) and (2),*
 - (ii) *in respect of Part III, Unfair Practices, subsection 17(1),*
 - ...
 (viii) *in respect of Part IX, Procedures for Consumer Remedies, subsections 96(1), 98(2) and 99(5).*

Same

- (2) A person who contravenes or fails to comply with a provision of a regulation made under this Act is guilty of an offence.

Corporation

- (3) An officer or director of a corporation is guilty of an offence if he or she fails to take reasonable care to prevent the corporation from committing an offence mentioned in subsection (1) or (2).

Attempt

- (4) *Any person who attempts to commit any offence referred to in subsection (1) or (2) is guilty of an offence.*

Penalties

- (5) An individual who is convicted of an offence under this Act is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than two years less a day, or both, and a corporation that is convicted of an offence under this Act is liable to a fine of not more than \$250,000.

Limitation

- (6) *No proceeding under this section shall be commenced more than two years after the facts upon which the proceeding is based first came to the knowledge of the Director.*

- [70] Furthermore, if the defendants are convicted in this proceeding then the court under s. 117 of the Consumer Protection Act, 2002 may order the defendants to pay compensation or make restitution in addition to any other penalty that could be imposed [*emphasis is mine below*]:

Orders for compensation, restitution

117. *If a person is convicted of an offence under this Act, the court making the conviction may, in addition to any other penalty, order the person convicted to pay compensation or make restitution.*

- [71] In addition, the following definitions set out in s. 1 of the Consumer Protection Act, 2002 are relevant to this proceeding [emphasis is mine below]:

PART I

INTERPRETATION AND APPLICATION

Interpretation

1. In this Act,

“consumer” means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes; (“consommateur”)

“consumer agreement” means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment; (“convention de consommation”)

“consumer transaction” means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement; (“opération de consommation”)

...

“future performance agreement” means a consumer agreement in respect of which delivery, performance or payment in full is not made when the parties enter the agreement; (“convention à exécution différée”)

“goods” means any type of property; (“marchandises”)

...

“Ministry” means the Ministry of Consumer and Business Services; (“ministère”)

“officer” includes the chair and any vice-chair of the board of directors, the president and any vice-president, the secretary and assistant secretary, the treasurer and assistant treasurer and the general manager and assistant general manager of the corporation or a partner or general manager and assistant general manager of a partnership, any other individual designated as an officer by by-law or resolution or any other individual who performs functions normally performed by an individual occupying such office; (“dirigeant”)

“payment” means consideration of any kind, including an initiation fee; (“paiement”)

“prescribed” means prescribed by regulations made under this Act; (“prescrit”)

“regulations” means regulations made under this Act; (“règlements”)

“representation” means a representation, claim, statement, offer, request or proposal that is or purports to be,

(a) made respecting or with a view to the supplying of goods or services to consumers, or

(b) made for the purpose of receiving payment for goods or services supplied or purporting to be supplied to consumers; (“assertion”)

“services” means anything other than goods, including any service, right, entitlement or benefit; (“services”)

“supplier” means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds themself out to be a supplier or an agent of the supplier; (“fournisseur”)

- [72] Moreover, s. 2(1) of the Consumer Protection Act, 2002 states that this Act applies to all consumer transactions, except for those transactions listed in ss. 2(2) or 2(3), if either the consumer in the transaction or the person who is engaged in the transaction with that particular consumer is located in Ontario when the transaction takes place [*emphasis is mine below*]:

Application

2(1) Subject to this section, this Act applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place.

Exceptions

(2) This Act does not apply in respect of,

(a) consumer transactions regulated under the Securities Act;

(b) financial services related to investment products or income securities;

- (c) financial products or services regulated under the Insurance Act, the Credit Unions and Caisses Populaires Act, 1994, the Loan and Trust Corporations Act or the Mortgage Brokerages, Lenders and Administrators Act, 2006;
- (d) consumer transactions regulated under the Commodity Futures Act;
- (e) prescribed professional services that are regulated under a statute of Ontario;
- (f) consumer transactions for the purchase, sale or lease of real property, except transactions with respect to time share agreements as defined in section 20; and
- (g) consumer transactions regulated under the Residential Tenancies Act, 2006.

Same

(3) This Act does not apply to the supply of a public utility or to any charge for the transmission, distribution or storage of gas as defined in the Ontario Energy Board Act, 1998 if such charge has been approved by the Ontario Energy Board.

...

Anti-avoidance

3. In determining whether this Act applies to an entity or transaction, a court or other tribunal shall consider the real substance of the entity or transaction and in so doing may disregard the outward form.

Consumer agreements

4. A consumer agreement that meets the criteria of more than one type of agreement to which this Act applies shall comply with the provisions of this Act and of the regulations that apply to each type of agreement for which it meets the criteria, except where the application of the provisions is excluded by the regulations.

[73] In addition, “future performance agreements” are governed by ss. 21 to 26 of the Consumer Protection Act, 2002. Under s. 26(2), if the future performance agreement does not specify a delivery date or commencement date, then a consumer may cancel the agreement at any time before delivery or commencement if the supplier does not deliver or commence performance within 30 days after the date the contract is entered into [emphasis is mine below]:

Future Performance Agreements

Application of sections

21(1) Sections 22 to 26 apply to future performance agreements if the consumer's total potential payment obligation under the agreement, excluding the cost of borrowing, exceeds a prescribed amount.

Exception

(2) Sections 22 to 26 do not apply to agreements that are future performance agreements solely because of an open credit arrangement.

Transition

(3) Sections 22 to 26 apply to future performance agreements entered into on or after the day this section is proclaimed in force.

Same

(4) The Consumer Protection Act, as it existed immediately before its repeal under the Consumer Protection Statute Law Amendment Act, 2002, continues to apply to executory contracts entered into before its repeal.

Requirements for future performance agreements

22. Every future performance agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

Cancelling future performance agreements

23. A consumer may cancel a future performance agreement within one year after the date of entering into the agreement if the consumer does not receive a copy of the agreement that meets the requirements required by section 22.

Rights in other goods not enforceable

24. Any provision in any future performance agreement or in any security agreement incidental to such an agreement under which the supplier may acquire title to, possession of or any rights in any goods of the consumer, other than the goods passing to the consumer under the agreement, is not enforceable.

No repossession after two-thirds paid except by leave of court

25(1) Where a consumer under a future performance agreement has paid

two-thirds or more of his or her payment obligation as fixed by the agreement, any provision in the agreement, or in any security agreement incidental to the agreement, under which the supplier may retake possession of or resell the goods or services upon default in payment by the consumer is not enforceable except by leave obtained from the Superior Court of Justice.

Powers of court

- (2) *Upon an application for leave under subsection (1), the court may, in its discretion, grant leave to the supplier or refuse leave or grant leave upon such terms and conditions as the court considers advisable.*

Late delivery

- 26(1) *A consumer may cancel a future performance agreement at any time before delivery under the agreement or the commencement of performance under the agreement if the supplier,*
 - (a) *does not make delivery within 30 days after the delivery date specified in the agreement or an amended delivery date agreed to by the consumer in writing; or*
 - (b) *does not begin performance of his, her or its obligations within 30 days after the commencement date specified in the agreement or an amended commencement date agreed to by the consumer in writing.*

Delivery or commencement date not specified

- (2) *If the delivery date or commencement date is not specified in the future performance agreement, a consumer may cancel the agreement at any time before delivery or commencement if the supplier does not deliver or commence performance within 30 days after the date the agreement is entered into.*

Forgiveness of failure

- (3) *If, after the period in subsection (1) or (2) has expired, the consumer agrees to accept delivery or authorize commencement, the consumer may not cancel the agreement under this section.*

Deemed delivery or performance

- (4) *For the purposes of subsections (1) and (2), a supplier is considered to have delivered or commenced performance under a future performance agreement if,*
 - (a) *delivery was attempted but was refused by the consumer at the time that delivery was attempted or delivery was attempted but*

not made because no person was available to accept delivery for the consumer on the day for which reasonable notice was given to the consumer that there was to be delivery; or

- (b) *commencement was attempted but was refused by the consumer at the time that commencement was attempted or commencement was attempted but did not occur because no person was available to enable commencement on the day for which reasonable notice was given to the consumer that commencement was to occur.*

5. ISSUES

- [74] The following are issues that have arisen in this proceeding, which need to be resolved:
- (a) Have the defendants been charged under the wrong statute?
 - (b) Does the Ontario New Home Warranties Plan Act apply to the transaction between Bonnie Engel and K-Tech Building Systems Inc.?
 - (c) Is K-Tech Building Systems Inc. a "builder" for the purposes of the Ontario New Home Warranties Plan Act?
 - (d) In the agreement between K-Tech Building Systems Inc. and Bonnie Engel, did K-Tech undertake to perform all the work and supply all the materials for constructing a completed home for Bonnie Engel?
 - (e) Was the proposed cottage a dwelling to be constructed for seasonal use or year-round use?
 - (f) If the Ontario New Home Warranties Plan Act does apply to the transaction between Bonnie Engel and K-Tech Building Systems Inc., does that Act have exclusive jurisdiction over that transaction?
 - (g) Does the Consumer Protection Act, 2002 apply to the transaction between Bonnie Engel and K-Tech Building Systems Inc.?
 - (h) Is K-Tech Building Systems Inc. a "supplier" for the purposes of the Consumer Protection Act, 2002?
 - (i) Is the transaction between K-Tech Building Systems Inc. and Bonnie Engel exempted from the application of the Consumer Protection Act, 2002 by virtue of s. 2(2) of that Act?
 - (j) Does the proposed cottage fall within the definition for "goods" under s. 1 of the Consumer Protection Act, 2002?

- (k) Does the transaction between K-Tech Building Systems Inc. and Bonnie Engel concern “real property” so as to be exempted under s. 2(2) of the Consumer Protection Act, 2002?
- (l) Does the Consumer Protection Act, 2002 apply only to an existing item or goods or does it also apply to an item or goods not yet made or manufactured?
- (m) Can two separate regulatory schemes govern or apply to the transaction between Bonnie Engel and K-Tech Building Systems Inc.?
- (n) Did K-Tech Building Systems Inc. and Bonnie Engel agree that the Consumer Protection Act, 2002 would not apply to their transaction?
- (o) Can K-Tech and Bonnie Engel contract out of the application of the Consumer Protection Act, 2002?
- (p) Has the prosecution proven that both defendants have committed the actus reus of the five offences beyond a reasonable doubt?
- (q) Is Stanley Kondrotas still liable for committing the five offences if he was not a party to the agreement with Bonnie Engel?
- (r) Did Stanley Kondrotas and K-Tech Building Systems Inc. engage in an unfair practice towards Bonnie Engel?
- (s) Did Stanley Kondrotas and K-Tech Building Systems Inc. make false, misleading or deceptive representations to Bonnie Engel?
- (t) Did Stanley Kondrotas and K-Tech Building Systems Inc. make an unconscionable statement to Bonnie Engel?
- (u) Should Stanley Kondrotas have known or ought to have known that Bonnie Engel would not receive a substantial benefit from the agreement on the date the agreement was entered into?
- (v) Did the future performance agreement between Bonnie Engel and K-Tech Building Systems Inc. contain the required terms or conditions prescribed under s. 24 of Ontario Regulation 17/05?
- (w) Did K-Tech Building Systems Inc. unlawfully fail to refund the money back to Bonnie Engel that had been paid upfront by her?
- (x) Was Bonnie Engel legally entitled to a full refund of the money she had paid to K-Tech Building Systems Inc.?

- (y) If a statute does not impose a specific duty on any party is there an offence?
 - (z) As the Consumer Protection Act, 2002, is silent on who has the duty to deliver the future performance agreement with the prescribed requirements to a consumer is there an implied duty on the supplier in the agreement to supply the future performance agreement with the prescribed requirements to the consumer?
- (aa) If the prosecution has proven that both defendants have committed the actus reus of the five offences beyond a reasonable doubt, then have the defendants proven on a balance of probabilities that they have taken all reasonable care in the circumstances in preventing or avoiding committing those five offences?
 - (bb) Is this a vexatious proceeding initiated for the purpose of collecting a civil debt?
 - (cc) Have the actions or conduct of the Crown in the circumstances amount to an abuse of process?

6. ANALYSIS

- [75] To begin, the defendants have been charged with five regulatory offences under the Consumer Protection Act, 2002, in which counts #1, #2, #4 and #5 are classified as strict liability offences. As such, the prosecution is only required to prove the actus reus of those offences beyond a reasonable doubt; they are not required to prove any mental element to ultimately obtain a conviction. If the prosecution is able to meet its burden of proof then the defendants will be convicted of these five offences unless the defendants prove on a balance of probabilities that they had acted with due diligence in preventing or avoiding committing those offences. If the defendants prove they took all reasonable care in the circumstances to prevent or avoid committing the offences then they would be acquitted of those offences: R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353 (S.C.C.).
- [76] For count #3, that particular offence is classified as an objective mens rea offence, in which a mental element has to be proven by the prosecution in addition to the actus reus of the offence. Hence, the prosecution in order for a conviction must prove beyond a reasonable doubt that the defendants' conduct in regards to Bonnie Engle had been a marked departure from the standard of care of a reasonable person in similar circumstances. The defendant would not have a defence of due diligence for a mens rea offence.

- [77] In defending against these charges, the defendants have put forward three distinct arguments for an acquittal or for the remedy of a stay of proceedings for an abuse of process. First of all, they contend that they have been charged under the wrong statute, since the Consumer Protection Act, 2002 does not apply to the transaction between Bonnie Engel and K-Tech, and should have been charged instead under the Ontario New Home Warranties Plan Act, which they contend does govern the transaction in question.
- [78] Alternatively, if they have been charged under the correct statute then the defendants contend that they had always been ready and willing to complete the cottage, as well as being diligent and taking all reasonable care in the circumstances to prevent or avoid committing the five offences, but that it had been the actions of Bonnie Engel nonetheless that had caused the delays, as well as the unforeseen circumstances that had befallen them during that critical time in the summer of 2007, which had been beyond their control, and had prevented them from transporting the wall panels and other building materials to the Engel property and to start the construction of the cottage by the date that had been envisioned by Engel.
- [79] Furthermore, the supposed causes of the delays from Engel's part that had prevented the prefabricated wall panels and other building materials from being delivered or transported to the Engel property and K-Tech not being able to commence the construction of the cottage in the summer of 2007, as the defendants claim, include the suggestion that Engel had not obtained the building permit in a timely fashion which then caused the pouring of the concrete foundation or slab to be done much later than had been anticipated in the summer of 2007; that Engel had run out of money to build the cottage and had wanted to delay the start date for building the cottage until the Fall of 2007 or later, which then prompted Stanley Kondrotas to call his suppliers to cancel the custom-ordered items and the order to manufacture the roof trusses for the cottage; that Engel had not provided proper directions to them on how to get to or find her property which then hampered their ability to deliver the items for building her cottage to her property, and finally, her action in hiring a lawyer to terminate the agreement even though they had always been ready and willing to build the cottage or deliver the materials to Engel.
- [80] As for those unforeseen circumstances which were beyond the defendants' control and which further contributed to the delay in starting the Engel cottage, the defendants pointed to the hospitalization of Stanley Kondrotas' father that had occurred at the time the foundation for the cottage was being poured, which caused Stanley Kondrotas and his brother, Terry Kondrotas, to spend long hours at the hospital instead of being at the company to run the family business; there being bad weather which caused delays in their work at other building projects or sites; that they could not have their workers leave or stop work on those other projects and move them to the Engel property until they had completed the work on those other building projects; that Terry Kondrotas who actually assembles and

constructs the buildings for K-Tech being caught up in personal relationship problems that required him remaining in town in order to sell his house; and finally, in being locked out of their factory and premises by their landlady for arrears in rent, which prevented the defendants from continuing being in business or accessing Engel's wall panels and materials for her cottage.

- [81] Finally, the defendants contend that in allowing this proceeding to continue would be an abuse of the court's process as this proceeding is driven and being used by Bonnie Engel to collect a debt, since Bonnie Engel had already obtained a civil judgment against the defendants and that this proceeding is only being used as a further means to collect that debt by seeking a restitution order, which could ultimately result in a custodial sentence being imposed on Stanley Kondrotas if the restitution order were not complied with.
- [82] Therefore, to resolve these key issues that have been raised by the defendants, it will first be decided whether the defendants have indeed been charged under the wrong statute. In deciding this question, the issue of whether the Ontario New Home Warranties Plan Act does apply to the transaction at issue will be considered first. And, if it does apply, then it has to be determined if that statute has exclusive jurisdiction over the transaction between Bonnie Engel and K-Tech. If the Ontario New Home Warranties Plan Act does not have exclusive jurisdiction over the transaction in question, then it has to be determined next whether the Consumer Protection Act, 2002 also applies to the transaction in question. If the Consumer Protection Act, 2002 does apply, then the prosecution will not have charged the defendants under the wrong statute. Next, if the Consumer Protection Act, 2002 does apply, then it will have to be determined whether the prosecution has proven the defendants have committed the actus reus of the five offences under the Consumer Protection Act, 2002 beyond a reasonable doubt. If the prosecution fulfills their burden of proof, then the defence of due diligence put forth by the defendants will have to be considered in deciding whether the defendants should be convicted or acquitted of these five charges. Finally, the defendants' abuse of process argument will be considered to determine if this is a case where there has been an abuse of process and whether this is one of the clearest of cases in which the extraordinary remedy of a stay of proceedings should be granted.

(A) HAVE THE DEFENDANTS BEEN CHARGED UNDER THE WRONG STATUTE?

- [83] The defendants have been charged jointly for committing five offences under the Consumer Protection Act, 2002, which is one of many provincial statutes that have been enacted by the Ontario Legislature to protect consumers involved in consumer transactions in Ontario. Other consumer protection legislation include the Collection Agencies Act, R.S.O. 1990, c. C.14; Motor Vehicle Dealers Act, 2002, S.O. 2002, c. 30, Sched. B; Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31; Payday Loans Act, 2008, S.O. 2008, c. 9; Real Estate and Business

Brokers Act, 2002, S.O. 2002, c. 30, Sched. C; and the Travel Industry Act, 2002, S.O. 2002, c. 30, Sched. D. However, it should be emphasized at the outset that the Consumer Protection Act, 2002 is a broad piece of legislation that had been enacted to govern most consumer transactions in Ontario.

- [84] However, despite the broad jurisdiction of the Consumer Protection Act, 2002 over consumer transactions in Ontario, the defendants contend that this particular statute does not apply to the transaction between Bonnie Engel and K-Tech to build a cottage, since the Ontario New Home Warranties Plan Act is the statute that properly governs the transaction in question because the agreement called for constructing a year-round home in accordance with the Ontario Building Code, which they argue is by definition a "home" governed by the Ontario New Home Warranties Plan Act. Moreover, the defendants contend that a year-round home by its inherent nature is not caught by the definition of "goods" under the Consumer Protection Act, 2002, as goods refer to moveable things while the cottage in question did not exist at the time the agreement was entered into by Engel and K-Tech and had to be built permanently on land sometime in the future. And, since the agreement called for a "home" to be built permanently on land owned by Engel then the defendants contend that s. 2(2) of the Consumer Protection Act, 2002, which exempts transactions involving real property from the purview of that statute, would categorically exclude the transaction at issue.
- [85] In addition, the defendants rely on Tamarack North Holdings Ltd. (c.o.b. Tamarack North Ltd.) v. Hallisey, [2007] O.J. No. 66 (QL) (Ont. S.C.J.) and Country Cottage Living Inc. v. Heath, [2009] O.J. No. 4994 (QL) (Ont. S.C.J.) to support their contention that the Ontario New Home Warranties Plan Act applies to the transaction in question, as these two decisions concerned cottages being built for the homeowners who already owned the land and also contained references to the Ontario New Home Warranties Plan Act and warranty coverage for the new cottages being built under the agreements between the builders and the homeowners in those two decisions.
- [86] In response to the defendants' argument that the governing legislation should be the Ontario New Home Warranties Plan Act, the prosecution submits that the defendants do not appear to meet the definition of a "builder" under s. 1 of the Ontario New Home Warranties Plan Act, as they were not contracted to perform "all the work and supply all the materials necessary to construct a completed home" and that the defendants were not actually selling real property, namely land, to Bonnie Engel, but property that is not real property. Furthermore, the October 4, 2006 agreement did not refer to or mention anything about the Ontario New Home Warranties Plan Act applying to the transaction.

(1) Does The Ontario New Home Warranties Plan Act, R.S.O. 1990, C. O.31, Apply To The Transaction Between Bonnie Engel And K-Tech Building Systems Inc.?

- [87] The Ontario New Home Warranties Plan Act is also a piece of consumer protection legislation enacted by the Ontario Legislature that outlines the warranty protection that builders of new homes and condominiums must legally provide to purchasers. Furthermore, the Ontario Legislature has delegated responsibility for the enforcement and administration of the Ontario New Home Warranties Plan Act to the Tarion Warranty Corporation, which is a private corporation established in 1976 to protect the rights of new home buyers and regulate the builders of new homes. The Tarion Warranty Corporation is also responsible for ensuring that builders abide by this legislation and protecting consumers when builders fail to fulfill their warranty obligations. Moreover, the Tarion Warranty Corporation also administers a guarantee fund financed by builder registration and home enrolment fees and pays out claims to homebuyers from that guarantee fund.
- [88] The Tarion Warranty Corporation also protects a purchaser's deposit up to a maximum of \$40,000 paid to a builder if the purchaser signs a purchase agreement for a new home when the sale is not completed because the builder goes bankrupt, the builder fundamentally breaches the purchase agreement, or the purchaser is legally entitled to rescind the purchase agreement.
- [89] The warranty coverage provided under the Ontario New Home Warranties Plan Act applies to new homes constructed by a builder. However, if the purchaser or homeowner exercises significant control over the construction of that new home, such as entering into contracts directly with subtrades or contributes one or more essential elements to the new home such as the footing or foundation, framing, exterior cladding, building envelope, or an electrical, plumbing or heating system, then the new home may not qualify for coverage under the Ontario New Home Warranties Plan Act.
- [90] In addition, the Ontario New Home Warranties Plan Act covers custom or contract homes that are homes built on land or a vacant lot that is already owned by the prospective new home owner under s. 14(2), if the new home is constructed in accordance with a construction contract between the homeowner and a contractor, and the contractor undertakes the performance of all of the work and the supply of all materials necessary to construct the completed home [*emphasis is mine below*]:

Same, construction contract

14(2) Subject to the regulations, an owner of land who has entered into a contract with a builder for the construction of a home on the land and who has a cause of action against the builder for damages resulting from the builder's failure to substantially perform the contract, is entitled to receive payment out of the guarantee fund of the amount by which the amount paid by the owner to the builder under the contract exceeds the value of the work and materials supplied to the owner under the contract.

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.*
- ...

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.*

- [91] However, a custom or contract home is not always covered under the Ontario New Home Warranties Plan Act where the homeowner, rather than a contractor, exercises significant control over the construction of the new home, or is responsible for contributing essential elements to it. In that case, the new home may no longer be characterized as a contract home. Rather, it becomes an "owner-built" home. Hence, contract homes are entitled to statutory warranty coverage, except for "delayed closing coverage", but owner-built homes are not.
- [92] Ergo, the warranty protection is meant for new homes where a builder does the work, and not intended to protect a landowner who is building a home or for situations where separate contractors are building different stages of a home. Where the home is built from the foundation to the finished stage by a builder, the home is likely eligible for statutory warranty coverage where the purchaser could make a claim for compensation from the guarantee fund.
- [93] Consequently, to determine if the Ontario New Home Warranties Plan Act does apply to the transaction between K-Tech and Bonnie Engel, it will have to be determined if the proposed cottage is a "home" that would be covered under that legislation and whether K-Tech is a "builder" under s. 1 of that legislation.
 - (a) Is the proposed cottage to be built for Bonnie Engel a "home" for the purposes of the Ontario New Home Warranties Plan Act?

- [94] The defendants argue that the proposed cottage is a “home” under s. 1 of the Ontario New Home Warranties Plan Act, because it was to be built accordingly to the Ontario Building Code and could be habitable all year-round. In other words, the proposed cottage was not going to be built as a dwelling for temporary or seasonal use.
- [95] A “home” is defined in s. 1 of Ontario New Home Warranties Plan Act to mean a self-contained one-family dwelling either as a detached building, as a detached building sharing a common wall, a building composed of one or more self-contained one-family dwellings that are under one ownership, a condominium dwelling unit, or any other dwelling of a class prescribed by the regulations to the Act that it is a home to which the Act applies, but does not include “*a dwelling built and sold for occupancy for temporary periods or for seasonal purposes*” [emphasis is mine below]:

“home” means,

- (a) a self-contained one-family dwelling, detached or attached to one or more others by common wall,
- (b) a building composed of more than one and not more than two self-contained, one-family dwellings under one ownership,
- (c) a condominium dwelling unit, including the common elements, or
- (d) any other dwelling of a class prescribed by the regulations as a home to which this Act applies, and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes;

- [96] On the other hand, the prosecution submits that the proposed cottage may not come under the jurisdiction of the Ontario New Home Warranties Plan Act, since Bonnie Engel had testified that the proposed cottage would only be used for seasonal purposes because it would not be accessible in the winter months as the roads to her property are impassable or blocked during those months.
- [97] In addition, s. 9.1.1.9 of Part 9 of the Ontario Building Code, Ont. Reg. 350/06, under the heading “Site Assembled and Factory Built Buildings”, deems a manufactured or factory-built building intended for residential occupancy, such as the proposed Engel cottage, to be in compliance with the Building Code if it is designed and constructed in compliance with CSA (Canadian Standards Association) standards:

9.1.1.9. Site Assembled and Factory-Built Buildings

(1) Except as provided in Sentence (2), a manufactured building intended for residential occupancy is deemed to comply with this Code if it is designed and constructed in compliance with,

- (a) CAN/CSA-Z240.2.1, "Structural Requirements for Mobile Homes", and CAN/CSA-Z240.3.1, "Plumbing Requirements for Mobile Homes", if the building is constructed in Sections not wider than 4.88 m, or**
- (b) CSA A277, "Procedures for Factory Certification of Buildings".**

(2) The requirements of this Code shall apply to,

- (a) building components designed and constructed outside the place of manufacture, and**
- (b) site installation of such buildings.**

- [98] The defendants also submit that the proposed cottage was to be built according to the Ontario Building Code, which means it would have been a year-round home and not a dwelling for temporary or seasonal purposes.
- [99] Furthermore, Bonnie Engel had testified that the road to her property is impassible during winter and that her intention was to only use her cottage for seasonal purposes. On the other hand, Stanley Kondrotas testified that they build cottages or recreational homes for year-round living and that the wall panels are manufactured in their factory with foam insulation so that their buildings can be used for year-round living.
- [100] In addition, from the Tarion Warranty Corporation website, online: Tarion: Protecting Ontario's New Home Buyers< <http://services.tarion.com/New-Home-Builders/Pages/Other-Dwellings-Not-Covered-or-Special-Considerations.aspx>>, it indicates that a dwelling built for seasonal purposes would not fall under the coverage of the Ontario New Home Warranties Plan Act because a seasonal home is a home that does not meet the requirements of Part 9 of the Ontario Building Code that are homes built for year-round occupancy. Furthermore, the Tarion website also indicates that the determination of whether a home is a seasonal home is not dependent on whether the intended purpose for the home is for seasonal use or that there is not year-round access to the home. In addition, the website further indicates that panelized or kit homes, such as the proposed cottage to be built by K-Tech, would be covered under the Ontario New Home Warranties Plan Act, if it is built according to Part 9 of the Ontario Building Code [emphasis is mine below]:

Other Dwellings: Not Covered or Special Considerations

...

Seasonal Homes

A seasonal home is a home that does not meet the requirements of Part 9 of the Ontario Building Code and is therefore not built for year-round occupancy. Other considerations, such as seasonal use of the home or lack of year-round access, do not determine whether a home is seasonal for the purposes of the Ontario New Home Warranties Plan Act. Seasonal homes are excluded from statutory warranty coverage.

...

Panelized (Kit) Homes

A panel or “kit” home is a self contained home assembled on-site using factory built finished components. Statutory warranty coverage applies if the panel home is placed on a permanent foundation that meets Part 9 of the Ontario Building Code and was installed by the same builder that sold the home to the purchaser.

[101] Therefore, the proposed cottage would appear to be a “home” that would have fallen within the jurisdiction of the Ontario New Home Warranties Plan Act, since it would have been a dwelling that would have been built according to the Ontario Building Code for year-round occupancy and not constructed as a dwelling for temporary or seasonal purposes. More important, it would not have mattered if Engel had not intended to use the proposed cottage during the winter because the roads to her property would not have been passable or usable in winter, as long as the dwelling would have been built so that it can be occupied year-round. However, even if the proposed cottage would have been the type of dwelling covered by the Ontario New Home Warranties Plan Act, the transaction still may be outside its coverage if K-Tech does not meet the definition of a “builder” under that statute.

(b) Is K-Tech Building Systems Inc. a “builder” for the purposes of the Ontario New Home Warranties Plan Act?

[102] For the instant case, however, the prosecution questions whether K-Tech actually meets the definition of a “builder” under s. 1 of the Ontario New Home Warranties Plan Act, since K-Tech had not been contracted to perform “all the work and supply all the materials” necessary to construct a completed home for Bonnie Engel.

[103] A “builder” is defined in s. 1 of the Ontario New Home Warranties Plan Act as a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home under a contract with an owner [emphasis is mine below]:

Definitions

- 1. In this Act,***

"builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by the person or under a contract with a vendor or owner; ("constructeur")

[104] Hence, if K-Tech had undertaken to perform all the work and supply all the materials necessary to construct a completed home for Engel, then K-Tech would be a "builder" as defined in s. 1.

(i) Did K-Tech and Bonnie Engel agree that K-Tech would undertake to perform all the work and supply all materials necessary to construct a completed home for Bonnie Engel?

[105] The October 4, 2006 agreement did not require or contemplate that K-Tech would do all the work from the foundation to the completed cottage; rather it required Bonnie Engel to hire and pay for her own concrete contractor to construct the concrete foundation on her property. This would have been a significant part of the cottage that would not have been intended to be built by K-Tech under the agreement. Furthermore, Stanley Kondrotas testified that they were not foundation people. Nor had it been the intention that K-Tech would have hired the foundation contractor to do the work.

[106] Therefore, the defendants argument that the Ontario New Home Warranties Plan Act is the governing statute does not carry much weight when K-Tech does not meet the definition of a "builder" for the purposes of that Act, especially when Engel had been responsible for an essential part of the cottage to be built and had contracted and paid for another contractor herself to construct the concrete foundation or slab for her cottage. In addition, Stanley Kondrotas told Engel to act or inform the Township of South Algonquin, in order to obtain a building permit, that she was the owner-builder of the cottage, so that she would not need to hire an engineer to review the structural or foundation plans. Thus, even at that stage of obtaining the building permit K-Tech or Stan Kondrotas did not want to hold themselves out as the "builder" of the cottage in regards to the building permit issued to Engel nor did the defendants even make or include any reference to the Ontario New Home Warranties Plan Act in the October 4, 2006 agreement, which had been prepared by Stan Kondrotas.

(ii) Did K-Tech or Stanley Kondrotas do anything so that the proposed cottage would have new home warranty coverage with the Tarion Warranty Corporation?

[107] In consideration of their argument that the Ontario New Home Warranties Plan Act should be the governing statute, it is particularly apparent that the defendants have not come to this proceeding with clean hands. In other words, there is no evidence that K-Tech had been registered as a builder with the Tarion Warranty

Corporation, that they had enrolled the proposed cottage for warranty protection as a new home, that the enrollment fees for the cottage had been paid, or did they ensure that it had been expressly indicated in the agreement that K-Tech was registered as a “builder” with the Tarion Warranty Corporation and that there would be warranty coverage for the proposed cottage as a new home under the Ontario New Home Warranties Plan Act.

- [108] Moreover, the defendants are endeavouring to use the applicability of the Ontario New Home Warranties Plan Act over the impugned transaction as both a sword and a shield to usurp the applicability of the Consumer Protection Act, 2002. In particular, it is being wielded as a sword in their argument that it is the proper statute governing the transaction even when the defendants did not do anything proactively to enroll the proposed cottage or to specify in the agreement about the cottage being enrolled under the Ontario New Home Warranties Plan Act or to ensure that K-Tech had been registered as a builder with the Tarion Warranty Corporation, which is the corporation mandated with administering that statute. On the other hand, the defendants are also utilizing it as a shield in their argument that the proposed cottage is a “home” covered under that statute and is therefore the proper statute that should be governing the transaction in question, instead of the Consumer Protection Act, 2002.
- [109] It is also obvious that the defendants’ purpose in arguing for the narrower jurisdiction of the Ontario New Home Warranties Plan Act to apply to the transaction in question is a gambit for ousting the broader jurisdiction of the Consumer Protection Act, 2002.
- [110] However, from the defendants’ actions or omissions it is evident that the defendants never had the intention at the outset or at the time the agreement was signed that the transaction between K-Tech and Bonnie Engel would be governed by the Ontario New Home Warranties Plan Act, as K-Tech did not undertake to perform all the work and supply all the materials necessary to construct a completed cottage for Engel, that K-Tech was not registered as a builder with the Tarion Warranty Corporation, that the proposed cottage for Engel had not been enrolled with the Tarion Warranty Corporation or enrolment fees paid, nor had there been any mention in the October 4, 2006 agreement that the proposed cottage would be enrolled with Tarion Warranty Corporation, that K-Tech was registered as a builder with Tarion Warranty Corporation and that the enrollment fees for the proposed cottage would be paid to the Tarion Warranty Corporation or that the proposed cottage would be covered by the new home warranty program.
- [111] As well, It would be inequitable to allow the defendants to use the applicability of the Ontario New Home Warranties Plan Act argument to shield themselves from any liability under the Consumer Protection Act, 2002 when they had not even acted genuinely themselves in having K-Tech registered as a builder with the Tarion Warranty Corporation, or fulfilling the requirements of a builder under that legislation by enrolling the proposed cottage under the warranty plan for warranty

protection and paying the appropriate enrollment fees to protect Bonnie Engel. Moreover, Stanley Kondrotas testified that their family business had been in business providing and building affordable housing with prefabricated components for 30 years, yet there is no evidence that K-Tech or their family business had ever been registered as a builder with the Tarion Warranty Corporation or that they had previously enrolled cottages for protection under this new home warranty plan.

- [112] In addition, Stanley Kondrotas even tried to persuade Bonnie Engel when she was applying for a building permit for the proposed cottage from the Township of South Algonquin that she did not require an engineer to review her structural and foundations plans if she undertook to be responsible for any liability as the owner-builder of the proposed cottage. As such, neither Stanley Kondrotas or K-Tech were holding themselves out to Engel that they were builders of new homes registered with the Tarion Warranty Corporation or intending that the proposed cottage would be enrolled for any new home warranty protection under the Ontario New Home Warranties Plan Act.
- [113] As a result, the Ontario New Home Warranties Plan Act does not appear to apply to the instant transaction, since K-Tech did not undertake in the agreement to perform all the work to complete the cottage or to take any steps to registering as a builder or planning to enroll the proposed cottage for new home warranty protection with the Tarion Warranty Corporation.

(2) If the Ontario New Home Warranties Plan Act does apply to the transaction between Bonnie Engel and K-Tech Building Systems Inc., does it have exclusive jurisdiction over the transaction?

- [114] Although it appears that K-Tech does not fulfill the definition of a “builder” under the Ontario New Home Warranties Plan Act, since they had not undertaken to perform all the work for constructing the cottage, as the foundation work was undertaken to be done by Engel, who had hired and paid a contractor to construct the foundation, the proposed cottage nonetheless appears to be the type of “home” that is eligible to be protected under the statutory warranty program administered by the Tarion Warranty Corporation.
- [115] However, the defendants’ argument would only have merit or that the Ontario New Home Warranties Plan Act would only usurp the applicability or jurisdiction of the Consumer Protection Act, 2002, if the statute clearly stated that it had exclusive jurisdiction over the transaction in question. However, there is no provision in the Ontario New Home Warranties Plan Act that clearly states that the statute has exclusive jurisdiction over all transactions related to the construction of homes in Ontario. As a consequence, if the Consumer Protection Act, 2002 also applies to the transaction between K-Tech and Bonnie Engel then the prosecution has not charged the defendants under the wrong statute.

(3) Does the Consumer Protection Act, 2002 apply to the transaction between Bonnie Engel and K-Tech Building Systems Inc.?

[116] Section 2(1) of the Consumer Protection Act, 2002 provides that subject to the exemptions listed in s. 2(2) and s. 2(3) the Act applies to all consumer transactions where the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place [*emphasis is mine below*]:

Application

2(1) Subject to this section, this Act applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place.

[117] Furthermore, a “consumer transaction” is defined in s. 1 of the Consumer Protection Act, 2002 and means any act or instance of conducting business or other dealings with a consumer which also includes a consumer agreement:

“consumer transaction” means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement; (“opération de consommation”)

[118] In addition, a “consumer agreement” is defined in s. 1 and means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment:

“consumer agreement” means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment; (“convention de consommation”)

[119] Furthermore, a “consumer” is defined in s. 1 and means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes:

“consumer” means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes; (“consommateur”)

[120] Finally, a “supplier” is also defined in s. 1 and means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services:

“supplier” means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds themselves out to be a supplier or an agent of the supplier; (“fournisseur”)

[121] Ergo, in order to be governed by the Consumer Protection Act, 2002, a supplier must be involved in selling or supplying “goods or services” to a consumer where one of them is located in Ontario when the transaction takes place.

(a) Is K-Tech Building Systems Inc. a “supplier” for the purposes of the Consumer Protection Act, 2002?

[122] In regards to the transaction at issue, Bonnie Engel was not acting with a business purpose, but for a personal, family or household purpose when she entered into the October 4, 2006 agreement with K-Tech. She had wanted to purchase a cottage from K-Tech to use for her own personal or family purpose. Moreover, she was not involved in the business of reselling the cottage to other persons. Therefore, for the purposes of the Consumer Protection Act, 2002 Engel is a “consumer”.

[123] Furthermore, if Bonnie Engel’s proposed cottage meets the definition for “goods” in s. 1, then K-Tech would have been a supplier in the transaction with Bonnie Engel for the purposes of the Consumer Protection Act, 2002, since K-Tech had agreed to sell Engel for payment a completed cottage using a pre-engineered building system manufactured in their factory, which would then be assembled and erected by them on Engel’s property.

[124] Moreover, the purchase agreement between Bonnie Engel and K-Tech would meet the definition of a consumer agreement if the proposed cottage would be “goods” under the Consumer Protection Act, 2002, as Engel had agreed to pay money for a completed cottage to be built on her property, which would be an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment.

[125] However, the defendants contend that the proposed cottage are not “goods” defined under the Consumer Protection Act, 2002.

(b) Is the proposed cottage “goods” defined under s. 1 of the Consumer Protection Act, 2002?

[126] In their argument against the applicability of the Consumer Protection Act, 2002 to the transaction at issue the defendants rely on several contentions why the proposed cottage are not “goods” defined in s. 1 of that Act. First, they contend the agreement involves a custom-built year-round home that did not exist at the time the agreement was entered into, which by its nature and non-existence would not be “goods”, since goods are moveable property in existence. Second, they contend that because the proposed cottage would be permanently built and completed on a foundation on Engel’s property that the nature of it being permanently attached to land after it is completed would render the proposed cottage to be categorically immovable property and not moveable property. Therefore, the defendants contend that transactions involving the sale or purchase

of such immovable property would be exempt from being governed by the Consumer Protection Act, 2002, since immovable property would in their view be a transaction involving “real property”, which is a type of transaction that is exempted under s. 2(2) of the Act.

- [127] In reply to the defence argument about the inapplicability of the Consumer Protection Act, 2002, the prosecution submits the proposed cottage is not real property since land in any respect had not been sold to Bonnie Engel. Moreover, even if the transaction at issue falls within the jurisdiction of the Ontario New Home Warranty Program Act, the prosecution submits that the Consumer Protection Act, 2002 would still apply in this case because of the applicability provision contained in s. 2(1) of that Act.
- [128] Thus, the first step in determining whether the proposed cottage are “goods” or “real property”, is to consider the definition of goods contained in s. 1, in which “goods” are broadly defined to mean any type of property:

“goods” means any type of property; (“merchandises”)

- [129] Furthermore, at p. 539, in Daphne A. Dukelow’s *The Dictionary of Canadian Law*, 3ed. (Scarborough, Ontario: Thomson Carswell, 2004), “goods’ is defined as any article that is the subject of trade or commerce, but does not include land [*emphasis is mine below*]:

GOODS. N. 1. *Chattels personal other than things in action or money, and includes emblements, industrial growing crops and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale.* 2. *Includes tokens, coupons or other documents or things issued or sold by a seller to a buyer that are exchangeable or redeemable for goods or services. Consumer Protection acts.* 3. Anything that is the subject of trade or commerce. Criminal Code, R.S.C. 1985, c. C-46, s. 379. 4. Any article that is or may be the subject of trade or commerce, but does not include land or any interest therein. Bills of Exchange Act, R.S.C. 1985, c. B-4, s. 188 5. *Includes all personal property other than vessels.* 6. *For greater certainty, includes conveyances and animals. Customs Act, R.S.C. 1985 (2d Supp.), c. 1, s. 2.* 7. “[In the Customs Act, R.S.C. 1970, c. C-40] ... must ... be taken to include all moveable effects of any kind ... In the Customs Tariff ... the word ‘goods’ is given a general meaning to include all personal effects, and not merely to include strictly items of commerce ...” “*Ladakis v. R. (1985), 10 C.E.R. 95 at 102 (Fed T.D.), Collier J.* 8. *Includes wares and merchandise. Factor acts* 9. *Personal Property Consumer Protection acts.* 10. “*Coin is not money ... when it is not used as a means of exchange, or in its aspect as money ... antique coins that are bought and sold in retail shops are treated as wares or merchandise and are goods ...*” *R. v. Vanek, [1969] 2 O.R. 724 at 727, (1970) 1 C.C.C. 111, 6 D.L.R. (3d) 591 (H.C.), Osler J. quoting with approval of the lower court judge.* 11. *Tangible personal property other than chattel paper, documents of title, instruments, money and securities, and includes fixtures, growing crops, the unborn young of animals, timber to be*

cut, and minerals and hydrocarbons to be extracted; Personal Property Security Act, R.S.O.1990, c. P-10, s.1 ...

- [130] Moreover, “real property” is defined at p. 1072, in The Dictionary of Canadian Law, 3ed., as ground or soil and everything annexed to it and all buildings erected on or under or affixed to land [*emphasis is mine below*]:

REAL PROPERTY. 1. “[C]orporeal and incorporeal hereditaments ... land [and] rights in land, ...” Pegg v. Pegg (1992), 38 R.F.L. (3d) 179 at 184, 21 R.P.R. (2d) 149, 1 Alta. L.R. (3d) 249, 128 A.R. 132 (QB), Agrios J. 2. Includes messaages, lands, rents and hereditaments whether freehold or any other tenure whatever and whether corporeal and incorporeal and any undivided share thereof and any estate, right or interest other than a chattel interest therein. 3. The ground or soil and everything annexed to it, and includes land covered by water, all quarries and substances in or under land other than mines or minerals and all buildings, fixtures, machinery, structures and things erected on or under or affixed to land. 4. Includes any estate, interest or right to or in land, but does not include a mortgage secured by real property.

- [131] Therefore, the definition of “goods” in the Consumer Protection Act, 2002 does not limit goods to only moveable or tangible property that is easily transported. Even real property would be “any type of property” so as to be a class of goods, although transactions involving real property are exempted from the application of the Consumer Protection Act, 2002 if it falls under the situations listed in s. 2(2).
- [132] By inference then, goods would include anything that can be manufactured or produced for sale. Thus, components for completing or constructing a cottage that is manufactured or fabricated in a factory would also by definition be any type of property, which would then be “goods” defined in the Consumer Protection Act, 2002.
- [133] Consequently, since the proposed cottage would be “goods” because it is any property, then the Consumer Protection Act, 2002 would apply to the transaction at issue, unless it is a transaction involving real property that is exempted under s. 2(2).

(c) Is the transaction between K-Tech Building Systems Inc. and Bonnie Engel exempted under s. 2(2) of the Consumer Protection Act, 2002?

- [134] Furthermore, certain situations or transactions are specifically exempted from the purview of the Consumer Protection Act, 2002 and those situations are expressly stated in ss. 2(2) and 2(3). These exempted situations include such consumer transactions that are regulated under the “Securities Act”; that are professional services regulated under a statute of Ontario; that are consumer transactions for the purchase, sale, or lease of real property, unless they are related to time share

agreements; that are consumer transactions regulated under the “Residential Tenancies Act, 2006”; or that are consumer transactions related to the supply of a public utility [*emphasis is mine below*]:

Exceptions

2(2) This Act does not apply in respect of,

- (a) consumer transactions regulated under the Securities Act;
- (b) financial services related to investment products or income securities;
- (c) financial products or services regulated under the Insurance Act, the Credit Unions and Caisses Populaires Act, 1994, the Loan and Trust Corporations Act or the Mortgage Brokerages, Lenders and Administrators Act, 2006;
- (d) consumer transactions regulated under the Commodity Futures Act;
- (e) prescribed professional services that are regulated under a statute of Ontario;
- (f) consumer transactions for the purchase, sale or lease of real property, except transactions with respect to time share agreements as defined in section 20; and
- (g) consumer transactions regulated under the Residential Tenancies Act, 2006.

Same

2(3) This Act does not apply to the supply of a public utility or to any charge for the transmission, distribution or storage of gas as defined in the Ontario Energy Board Act, 1998 if such charge has been approved by the Ontario Energy Board.

...

Anti-avoidance

3. In determining whether this Act applies to an entity or transaction, a court or other tribunal shall consider the real substance of the entity or transaction and in so doing may disregard the outward form.

Consumer agreements

4. A consumer agreement that meets the criteria of more than one type of agreement to which this Act applies shall comply with the provisions of this Act and of the regulations that apply to each type of agreement for which it

meets the criteria, except where the application of the provisions is excluded by the regulations.

[135]

Although the defendants contend the transaction involves real property and should therefore be exempted under s. 2(2), it is noteworthy that the Consumer Protection Act, 2002 does not absolutely exempt real property from falling under its purview, since s. 2(2)(f) indicates real property associated with time share agreements are covered by the Consumer Protection Act, 2002 and under s. 109(2) where it states that the Act does apply to real property in relation to certain activity that concerns false, misleading or deceptive representations in an advertisement, circular, pamphlet or material published by any means in respect of any consumer transaction involving real property [*emphasis is mine below*]:

False, misleading or deceptive representation

109(1) *If the Director believes on reasonable grounds that any person is making a false, misleading or deceptive representation in respect of any consumer transaction in an advertisement, circular, pamphlet or material published by any means, the Director may,*

- (a) order the person to cease making the representation; and*
- (b) order the person to retract the representation or publish a correction of equal prominence to the original publication.*

Real property

(2) Despite clause 2(2)(f), this section applies to any representations involving real property.

...

[136] Consequently, the Consumer Protection Act, 2002 will not be applicable to the transaction at issue if it is a transaction regarding the sale, lease, or purchase of real property that is exempted under s. 2(2).

(d) Does the agreement between K-Tech Building Systems Inc. and Bonnie Engel concern a transaction involving “real property” so as to be an exempted transaction under s. 2(2) of the Consumer Protection Act, 2002?

[137]

The defendants contend that the transaction concerns building a year-round home which are not “goods”, but a transaction involving “real property”, and as such, is an exempted transaction under s. 2(2)(f) of the Consumer Protection Act, 2002:

2(2) This Act does not apply in respect of,

- ...
- (f) consumer transactions for the purchase, sale or lease of real property, except transactions with respect to time share agreements as defined in section 20; and

[138]

In this argument, the defendants are suggesting that the cottage to be erected on the Engel property would be in effect a form of real property and not “goods” because it is a home that can be inhabited or used year-round because it was to be built according to the Building Code of Ontario and that the proposed cottage would have been immoveable and permanently attached to land after it would have been completed.

[139]

However, the defendants’ logic falls short by one step because the cottage that was to be constructed on Engel’s property from components and materials was still a type of “goods” that would only be legally transformed into “real property” after the proposed cottage had been completed and became attached to the land owned by Bonnie Engel. Moreover, it would become real property only for Engel’s benefit once the proposed cottage had been completed on her land by operation of law. Up to that point of completion or transformation, it would not have been real property, but still goods. Furthermore, the wall panels and other building materials that were to be transported to the Engel property were not immoveable property, but moveable property. Thus, K-Tech had not sold real property, such as a completed house with the underlying land to Engel under the October 4, 2006 agreement, but “goods”. Moreover, since the proposed cottage was not even built or completed by K-Tech, then the goods sold by K-Tech could not have undergone its legal metamorphosis into real property before the agreement had been cancelled by Engel.

[140]

Ergo, the proposed cottage contracted to be built by K-Tech is not “real property” by definition that is exempted under s. 2(2)(f). Instead, the proposed cottage was “any property”, which are “goods” defined under the Consumer Protection Act, 2002.

(e) Does the Consumer Protection Act, 2002 apply only to an existing item or goods or does it apply to an item or goods not yet made or manufactured?

[141]

The defendants also contend that on the date the agreement was signed on October 4, 2006, there did not exist a cottage on this planet for the agreement to apply to, and therefore, are not “goods” that could be sold to a consumer.

[142] As well, this contention has no merit as the Consumer Protection Act, 2002 provides for “future performance agreements” where goods could be supplied later after the agreement was signed. Furthermore, this public welfare legislation has to be interpreted broadly so that the legislation’s purpose can be fulfilled, and restricting “goods” to only goods that exist at the time an agreement comes into existence would be too narrow an interpretation of “goods”.

(f) Did the defendants and Bonnie Engel contract out of the application of or agree to be exempt from the application of the Consumer Protection Act, 2002?

[143] The defendants submit that because the agreement did not specifically include provisions for a completion date or for a refund, then the parties had agreed to be exempt from those provisions contained in the Consumer Protection Act, 2002 related to refunds and completion dates.

[144] On this issue, the prosecution is correct in their argument that the parties cannot contractually opt out of the application of the Consumer Protection Act, 2002 or any of its provisions.

[145] Moreover, the Consumer Protection Act, 2002, like all public welfare legislation, was enacted to protect consumers or the public. Thus, allowing suppliers of goods or services to consumers to contract out of the application of provisions of the Consumer Protection Act, 2002, which have been enacted to protect consumers would be against public policy as well as undermining the protection provided to consumers under the Consumer Protection Act, 2002, especially to less sophisticated or naive consumers.

(4) Can two regulatory schemes govern or apply to the same transaction?

[146] On the question of whether an accused could be charged under two different pieces of legislation for the same set of facts or circumstances, the Supreme Court of Canada in R. v. Kienapple, [1975] 1 S.C.R. 729 (S.C.C.) at p. 753, affirmed that Parliament, and by necessary implication, a provincial Legislature, had the power to create two separate offences out of the same matter or delict:

Parliament's power to constitute two separate offences out of the same matter is not in question ...

[147] Furthermore, although the Supreme Court of Canada in R. v. Prince, [1986] 2 S.C.R. 480, [1986] S.C.J. No. 63 (QL), at paras. 9-10, acknowledged the rule against multiple convictions, it nevertheless recognized that Parliament (or a provincial Legislature) by clearly expressing its intention in a piece of legislation

can also mandate that an accused person could receive multiple convictions for the same matter or delict:

The variance of views within the judiciary and in the learned journals suggests that the time may well be ripe for a review of the jurisprudence in this area. The appropriate point of departure is, of course, the judgment of the majority in Kienapple in which an accused was indicted on two counts in respect of a single act of non-consensual sexual intercourse with a thirteen year old girl who was not his wife. The defendant, Kienapple, was charged with rape contrary to s. 143 and unlawful carnal knowledge of a female under fourteen years of age contrary to s. 146(1) of the Criminal Code. At page 744, Laskin J. said:

It is plain, of course, that Parliament has defined two offences in ss. 143 and 146(1), but there is an overlap in the sense that one embraces the other when the sexual intercourse has been with a girl under age fourteen without her consent. It is my view that in such a case, if the accused has been charged, first, with rape and, secondly, with a s. 146(1) offence, and there is a verdict of guilty of rape, the second charge falls as an alternative charge and the jury should be so directed. Correlatively, however, the jury should also be directed that if they find the accused not guilty of rape they may still [page488] find him guilty under s. 146(1) where sexual intercourse with a girl under age fourteen has been proved.

(Emphasis added.)

In describing the rationale underlying his conclusion Laskin J. referred to a principle that there ought not to be multiple convictions for the same "delict", "matter" or "cause". At p. 750, he explained:

The relevant inquiry so far as res judicata is concerned is whether the same cause or matter (rather than the same offence) is comprehended by two or more offences.

(Emphasis added.)

And at p. 751:

If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in a second count, the situation invites application of a rule against multiple convictions:

(Emphasis added.)

The majority judgment at p. 753, however, recognized that Parliament could create two separate offences out of the same matter and could mandate multiple convictions if it made clear its intentions in this regard.

[148] Moreover, the Supreme Court in R. v. Prince, at para. 24, recognized that a single act of an accused can involve two or more delicts against society which bear little or no connection to one another [*emphasis is mine below*]:

Numerous other cases can be cited to illustrate that a single act of an accused can involve two or more delicts against society which bear little or no connection the one to the other. *R. v. Logeman* (1978), 5 C.R. (3d) 219 (B.C.C.A.) involved charges of driving while suspended and impaired driving; *R. v. Lecky* (1978), 42 C.C.C. (2d) 406 (N.S. Co. Ct.), contributing to juvenile delinquency and trafficking in a narcotic; *R. v. Earle* (1980), 24 Nfld. & P.E.I.R. 65 (Nfld. C.A.), [page495] breach of recognizance and possession of a narcotic; *R. v. Pinkerton* (1979), 46 C.C.C. (2d) 284 (B.C.C.A.), breach of probation and common assault; *R. v. Pere Jean Gregoire de la Trinite* (1980), 60 C.C.C. (2d) 542 (Que. C.A.), contempt of court and unlawfully detaining children. Notwithstanding that a single act of the accused appears in each of these cases to have given rise to two charges, Kienapple was held to be inapplicable. In my view, these cases were correctly decided. If an accused is guilty of several wrongs, there is no injustice in his or her record conforming to that reality. In short, I agree with the following remarks of Lambert J.A. in *R. v. Harrison* (1978), 7 C.R. (3d) 32 (B.C.C.A.), at p. 37:

It is not sufficient to consider the charges and to ask whether conviction on one will involve conviction on another. It is not sufficient to consider the facts and to ask whether only one act is involved. The facts and the charges must be considered together and in their relationship to each other.

There must be a relationship of sufficient proximity firstly as between the facts, and secondly as between the offences, which form the basis of two or more charges for which it is sought to invoke the rule against multiple convictions.

[149]

Thus, the law recognizes that a person may be charged for committing an offence under two different statutes, such as an offence under the Consumer Protection Act, 2002 and an offence under the Ontario New Home Warranties Plan Act for the same matter or under the same set of circumstances. In other words, just because a person is prosecuted under one statute does not preclude them from being prosecuted under another statute for the same matter. However, even though a person could face two separate prosecutions for the same matter they cannot be penalized twice in regards to the same matter, if they are in fact for the same wrongful act or omission. This principle has been confirmed in R. v. Kienapple, [1975] 1 S.C.R. 729 (S.C.C.).

(5) The Proposed Cottage Are “Goods” For The Purpose Of The Consumer Protection Act, 2002

[150]

In sum, “goods” under the Consumer Protection Act, 2002 are defined to mean any type of property and such definition is broad enough to include real property as goods. However, if the consumer transaction involves the sale, lease or purchase of real property then the Consumer Protection Act, 2002 does not apply to this type of transaction by virtue of s. 2(2)(f). In regards to the instant case, the cottage that was to be built by K-Tech

for Bonnie Engel was not real property or had not become real property before the agreement was cancelled by Engel, as the cottage was not being sold attached to land or had it become legally attached with the land in any respect. Therefore, the Consumer Protection Act, 2002 applies to the transaction between K-Tech and Bonnie Engel and is not a transaction that is exempted under s. 2(2).

(B) HAS THE CROWN PROVEN THAT THE DEFENDANTS COMMITTED THE ACTUS REUS OF THE FIVE OFFENCES BEYOND A REASONABLE DOUBT?

(1) IS STANLEY KONDROTAS LIABLE FOR THE ACTIONS OF THE CORPORATE DEFENDANT?

[151] There is a contention that Stanley Kondrotas did not commit any of the offences because it had been the corporate defendant, K-Tech Building Systems Inc., that had contracted with Bonnie Engel, and is therefore, the person who is actually responsible for fulfilling the agreement with Bonnie Engel.

[152] However, s. 116(3) of the Consumer Protection Act, 2002 provides that an officer or director of a corporation is guilty of an offence if they fail to take reasonable care to prevent the corporation from committing an offence mentioned in ss. 116(1) or 116(2):

Corporation

116(3) An officer or director of a corporation is guilty of an offence if he or she fails to take reasonable care to prevent the corporation from committing an offence mentioned in subsection (1) or (2).

[153] Accordingly, if it is determined that K-Tech has committed the actus reus of these five offences beyond a reasonable doubt, then Stanley Kondrotas as an officer and director of K-Tech would also be equally liable for committing those same five offences according to s. 116(3), unless he can prove on a balance of probabilities that he took all reasonable care to prevent K-Tech from committing those five offences.

(2) HAVE THE DEFENDANTS COMMITTED THE OFFENCES CONTAINED IN COUNTS #1 TO #5 BEYOND A REASONABLE DOUBT?

[154] In deciding whether the prosecution has proven that the defendants committed the five offences beyond a reasonable doubt, it would be expedient to deal with counts #4 and #5 first before dealing with counts #1, #2 and #3, since the issue concerning the prescribed requirements for a future

performance agreement in counts #4 and #5 affects the determination of the remaining three counts.

(a) COUNT #4 – FAILING TO DELIVER FUTURE PERFORMANCE AGREEMENT CONTAINING PRESCRIBED REQUIREMENTS

[155] Under count #4, the defendants have been jointly charged with failing to deliver to Bonnie Engel a future performance agreement on October 4, 2006, containing the information required by s. 24 of Ont. Reg. 17/05, which is contrary to s. 22 of the Consumer Protection Act, 2002, and, thereby, committed an offence under section 116(2).

(i) Did the future performance agreement between Bonnie Engel and K-Tech Building Systems Inc. fail to contain requirements prescribed under s. 24 of Ont. Reg. 17/05?

[156] The agreement between Bonnie Engel, a consumer, and K-Tech, a supplier, is a “future performance agreement” defined under s. 1 of the Consumer Protection Act, 2002, since Engel did not receive her completed cottage at the time the agreement was entered into on October 4, 2006:

“future performance agreement” means a consumer agreement in respect of which delivery, performance or payment in full is not made when the parties enter the agreement; (“convention à exécution différée”)

[157] In addition, s. 22 of the Consumer Protection Act, 2002 requires that a future performance agreement be in writing and delivered to the consumer and that it be made in accordance with the prescribed requirements:

Requirements for future performance agreements

22. Every future performance agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

[158] What those prescribed requirements are or what is required to be contained in a future performance agreement is set out in s. 24 of the General Regulation, Ont. Reg. 17/05, enacted under the Consumer Protection Act, 2002 [emphasis is mine below]:

Requirements for future performance agreements

24. For the purpose of section 22 of the Act, a future performance agreement that is not a gift card agreement to which sections 25.2 to 25.5 apply shall set out the following information:

1. *The name of the consumer.*
2. *The name of the supplier and, if different, the name under which the supplier carries on business.*
3. *The telephone number of the supplier, the address of the premises from which the supplier conducts business, and information respecting other ways, if any, in which the supplier can be contacted by the consumer, such as the fax number and e-mail address of the supplier.*
4. *A fair and accurate description of the goods and services to be supplied to the consumer, including the technical requirements, if any, related to the use of the goods or services.*
5. *An itemized list of the prices at which the goods and services are to be supplied to the consumer, including taxes and shipping charges.*
6. *A description of each additional charge that applies or may apply, such as customs duties or brokerage fees, and the amount of the charge if the supplier can reasonably determine it.*
7. *The total amount that the supplier knows is payable by the consumer under the agreement, including amounts that are required to be disclosed under paragraph 6, or, if the goods and services are to be supplied during an indefinite period, the amount and frequency of periodic payments.*
8. *The terms and methods of payment.*
9. *As applicable, the date or dates on which delivery, commencement of performance, ongoing performance and completion of performance are to occur.*
10. *For goods and services that are to be delivered,*
 - i. *the place to which they are to be delivered, and*
 - ii. *if the supplier holds out a specific manner of delivery and will charge the consumer for delivery, the manner in which the goods and services are to be delivered, including the name of the carrier, if any, and including the method of transportation to be used.*
11. *For services that are to be performed, the place where they are to be performed, the person for whom they are to be performed, the supplier's method of performing them and, if the supplier holds out that a specific person other than the supplier will perform any of the services on the supplier's behalf, the name of that person.*

12. *The rights, if any, that the supplier agrees the consumer will have in addition to the rights under the Act and the obligations, if any, by which the supplier agrees to be bound in addition to the obligations under the Act, in relation to cancellations, returns, exchanges and refunds.*
13. *If the agreement includes a trade-in arrangement, a description of the trade-in arrangement and the amount of the trade-in allowance.*
14. *The currency in which amounts are expressed, if it is not Canadian currency.*
15. *Any other restrictions, limitations and conditions that are imposed by the supplier.*
16. *The date on which the agreement is entered into.*

(ii) As the Consumer Protection Act, 2002, is silent on who has the duty under s. 22 to deliver a future performance agreement to the consumer containing the prescribed requirements contained s. 24 of Ont. Reg. 17/05, is there an implied duty on the “supplier” to perform such duty?

[159]

The prosecution argues that because the Consumer Protection Act, 2002 is public welfare legislation, then this particular legislation must be interpreted broadly to achieve the purpose of that legislation, and as such, the only reasonable interpretation of who has the duty to perform the duty set out in s. 22 is the “supplier”.

[160]

In R. v. Elm Tree Nursing Home Inc., [1987] O.J. No. 491 (QL) (O.C.A.), Goodman J.A. writing for the Court of Appeal for Ontario, held that if the legislation in question is silent on who has the duty to comply with a specific act or does not impose a duty on an accused person to act, then there would be no offence [*emphasis is mine below*]:

Where it was intended that a duty be placed on a licensee or administrator or other person that certain acts be done, various sections expressly so provide. In those instances it is clear that a failure of the person to fulfill the duty imposed by the regulation constitutes an offence under the Act. It is equally clear that any person who does an act which is prohibited by the provisions of the regulation will be guilty of an offence and it is not necessary that the prohibition be directed against a particular individual. In my opinion, however, where sections of Regulation 690 do not create a duty or where they create a duty but do not expressly impose such duty on any person there can be no offence created under those sections within the meaning of s. 19 of the Act.

[161]

However, in Ontario (Ministry of Labour) v. Enbridge Gas Distribution Inc., 2010 ONSC 2013 (Ont. S.C.J.), at paras. 48 and 49, the

same issue arose on who had the duty to act when the statute was silent on who had that duty to act. In resolving that issue, Bellamy J. reasoned that to properly interpret the legislation to determine who had that duty it should be based on the interpretation which best promotes public safety and the public welfare purpose of the legislation while respecting the procedural rights of the accused party [*emphasis is mine below*]:

The legislature must have intended something when it included the word "accurately" in s. 228(1). The only party that can ensure accuracy is the party conducting the locate, that is Enbridge or its agent PUL. It is inconceivable that the legislature intended to create a duty on an excavator who has no control or legal ability either to do the locate or to do it accurately. If the legislature intended to ensure that the locate was done accurately, there is only one party who could bear that responsibility: the owner, the party to whom the legislature directs the inquiry to be made.

This interpretation best promotes the public safety and welfare purpose of this public welfare legislation, while respecting the procedural rights of the accused company. The best way to ensure public safety when dealing with inherently dangerous commodities such as gas is to prohibit anyone but the owner, or its agent, from accurately locating and marking it. Public safety is not enhanced by narrowing the range of who can be responsible, by moving away from a "belt and braces" approach. Public safety is not enhanced by immunizing from liability the owners of a service if they are in error.

[162] Therefore, since the Consumer Protection Act, 2002 is a public welfare statute, then provisions in this particular legislation must be interpreted broadly to achieve the legislative purpose of protecting consumers in dealings with suppliers. Moreover, the Consumer Protection Act, 2002 applies to future performance agreements, which are consumer agreements between a supplier and a consumer where the supplier agrees to supply goods or services for payment. Hence, the only logical and reasonable interpretation of who would have the duty set out in s. 22 to deliver a future performance agreement to the consumer containing the requirements prescribed in s. 24 of Ont. Reg. 117/05 would be the "supplier". Furthermore, this interpretation that the "supplier" has that duty under s. 22 is supported by s. 24 itself, which contains many references to the "supplier", such as in s. 24(2) which requires the "name of the supplier" to be contained in the future performance agreement; in s. 24(3) which requires the "telephone number of the supplier" to be contained in the future performance agreement; in s. 24(6) which requires the "the amount of the charge if the supplier can reasonably determine" to be contained in the future performance agreement; and in s. 24(12) which requires the "rights, if any, that the supplier agrees the consumer will have in addition to the rights under the Act and the obligations, if any, by which the supplier agrees to be bound in addition to the obligations under the Act, in relation to cancellations, returns, exchanges and refunds."

[163] Furthermore, the Consumer Protection Act, 2002 defines "consumer agreements" for the purpose of this legislation to be between "suppliers" and consumers and since only the "suppliers" are obligated to provide

the goods or services to the consumer by that agreement, then it is not only logical, but the only reasonable interpretation that can be made that “suppliers” would have the duty to deliver a future performance agreement to the consumer containing the prescribed requirements.

(iii) **Did the defendants fail on October 4, 2006, to deliver to Bonnie Engel a future performance agreement containing the information required by s. 24, thereby committing an offence under s. 116(2) of the Consumer Protection Act, 2002?**

[164] The prosecution contends that the future performance agreement between K-Tech and Bonnie Engel did not contain the prescribed requirements that are set out in s. 24 of Ont. Reg. 117/05. Furthermore, s. 116(2) of the Consumer Protection Act, 2002 makes it an offence for a person who contravenes or who fails to comply with a provision of a regulation made under the Act to be guilty of an offence:

116(2) A person who contravenes or fails to comply with a provision of a regulation made under this Act is guilty of an offence.

[165] In this regard, the October 4, 2006 purchase agreement (Exhibit #5) between Bonnie Engel and K-Tech did not mention or contain the requirement set out in s. 24(9) of Ont. Reg. 117/05 of the “date or dates on which delivery, commencement of performance, ongoing performance and completion of performance are to occur.” In fact, Engel has never received an actual delivery date or start date for the construction of her cottage or the completion date for the cottage by email or orally from K-Tech or from Stanley Kondrotas. Therefore, the prosecution has proven beyond a reasonable doubt that the corporate defendant, K-Tech Building Systems Inc., committed the offence contained in count #4, of not complying with s. 24(9) of Ont. Reg. 17/05, and s. 22 of the Consumer Protection Act, 2002, and thereby committed an offence under s. 116(2) of the Consumer Protection Act, 2002.

[166] As for the defence of due diligence in regards to the requirements of the future performance agreement, Stanley Kondrotas testified that he had been the one who had prepared the agreement and that he had taken the best clauses and provisions from other agreements used by other companies that had been reviewed or drafted by a lawyer. However, there is no proof or evidence that the standard agreement used by K-Tech or the October 4, 2006 agreement had been drafted or reviewed by a lawyer on behalf of K-Tech before the agreement was entered into with Bonnie Engel. If the standard contract used by K-Tech had been reviewed by a lawyer to ensure that it complied with all statutory requirements, especially the Consumer Protection Act, 2002, then it would have likely contained those requirements set out in s. 24 of Ont. Reg. 17/05 for future performance agreements.

[167] And, although the defendants did not argue the point that they were unaware of the s. 24 requirements for future performance agreements, it would not have mattered, since ignorance of the law is not a defence under the common law or under s. 81 of the Provincial Offences Act, R.S.O. 1990, c. P.33.

[168] Moreover, Stanley Kondrotas, as an officer and director of K-Tech, did not take all reasonable care for the circumstances in preventing K-Tech from committing this offence of failing to deliver to Bonnie Engel on October 4, 2006, a future performance agreement containing the information required by s. 24. He did not have the agreement reviewed by a lawyer to ensure it satisfied all statutory requirements in Ontario before K-Tech utilized the agreement he prepared for Engel.

[169] Therefore, neither K-Tech nor Stanley Kondrotas had taken all reasonable steps to prevent K-Tech from committing the offence of failing to deliver a future performance agreement to Bonnie Engel that contained the prescribed requirements set out in s. 24(9).

[170] As such, both K-Tech Building Systems Inc. and Stanley Kondrotas are guilty beyond a reasonable doubt of committing the offence set out in count #4.

(b) COUNT #5 – FAILING TO REFUND PAYMENT

[171] Under count #5, the defendants, as the supplier, have been jointly charged with committing the offence of failing to refund payment to Bonnie Engel, a consumer, within fifteen days of being given notice of cancellation of the consumer agreement, on or about October 30, 2007, in accordance with s. 96(1) of the Consumer Protection Act, 2002, and s. 79(1) of Ont. Reg. 17/05, and thereby, committed an offence under s. 116(1)(b)(viii).

(i) Was Bonnie Engel entitled to the refund of her \$56,194.18 that she had paid to K-Tech Building Systems Inc.?

[172] Bonnie Engel, through her lawyer, cancelled the agreement with K-Tech in a letter sent by fax from her lawyer dated October 11, 2007 (Exhibit #23) to K-Tech, and received by K-Tech and acknowledged by Stanley Kondrotas on October 18, 2011. The prosecution submits that Engel had a legal right under s. 26(2) of the Consumer Protection Act, 2002 to cancel her agreement with K-Tech at any time after November 3, 2006. Specifically, the prosecution argues that where the delivery date or commencement date is not specified in the future performance agreement between K-Tech and Bonnie Engel, then Engel, the consumer, may cancel the agreement at any time before delivery or commencement if K-Tech, the supplier, does not deliver or commence

performance within 30 days after the date the agreement had been entered into on October 4, 2006 [emphasis is mine below]:

Late delivery

- 26(1)** A consumer may cancel a future performance agreement at any time before delivery under the agreement or the commencement of performance under the agreement if the supplier,
- (a) does not make delivery within 30 days after the delivery date specified in the agreement or an amended delivery date agreed to by the consumer in writing; or
 - (b) does not begin performance of his, her or its obligations within 30 days after the commencement date specified in the agreement or an amended commencement date agreed to by the consumer in writing.

Delivery or commencement date not specified

- (2)** If the delivery date or commencement date is not specified in the future performance agreement, a consumer may cancel the agreement at any time before delivery or commencement if the supplier does not deliver or commence performance within 30 days after the date the agreement is entered into.

[173] Therefore, since K-Tech had not delivered any of the wall panels or materials to Engel to construct Engel's cottage or commence construction of the cottage on Engel's property within the 30-day period following October 4, 2006, then Engel was legally in her right to cancel the agreement at any time before delivery or commencement by K-Tech upon giving proper notice to K-Tech as required under s. 92 the Consumer Protection Act, 2002. Moreover, there is no dispute about whether Engel had given proper notice to K-Tech. In any event, K-Tech was aware of Engel's notice that Engel was cancelling the future performance agreement that K-Tech entered into on October 4, 2006, with Engel, since Stanley Kondrotas, on behalf of K-Tech, had acknowledged receiving the letter from Engel's lawyer concerning the cancellation of the agreement with K-Tech by sending out a response by fax to Engel's lawyer that was dated October 18, 2007 (Exhibit #24).

[174] Furthermore, s. 92(4) of the Consumer Protection Act, 2002 specifies that where Engel had given her cancellation notice to K-Tech in writing other than by personal service, then the notice shall be deemed to be given when it was sent:

Notice given when sent

- 92(4)** If notice in writing is given other than by personal service, the notice

shall be deemed to be given when sent.

[175] As such, the letter sent by Engel's lawyer regarding Engel's cancellation of the agreement had been sent by fax dated October 11, 2007, and under s. 92(4) this would have been the date on which the cancellation notice would have been given to K-Tech.

[176] Moreover, the Consumer Protection Act, 2002 sets out the obligations that would be imposed on the consumer and the supplier in respect to the cancellation of consumer agreements and are provided for in ss. 94, 95 and 96, which includes the requirement under s. 96(1) that the supplier is obligated to refund any payments made by the consumer under the agreement and that the consumer would have a right of action under s. 96(6) against the supplier if the supplier fails to refund the payments made by the consumer [*emphasis is mine below*]:

Cancellation

94(1) If a consumer has a right to cancel a consumer agreement under this Act, the consumer may cancel the agreement by giving notice in accordance with section 92.

Effective time

(2) The cancellation takes effect when the consumer gives notice.

Effect of cancellation

95. The cancellation of a consumer agreement in accordance with this Act operates to cancel, as if they never existed,

- (a) *the consumer agreement;*
- (b) *all related agreements;*
- (c) *all guarantees given in respect of money payable under the consumer agreement;*
- (d) *all security given by the consumer or a guarantor in respect of money payable under the consumer agreement; and*
- (e) *all credit agreements, as defined in Part VII, and other payment instruments, including promissory notes,*
 - (i) *extended arranged or facilitated by the person with whom the consumer reached the consumer agreement, or*
 - (ii) *otherwise related to the consumer agreement.*

Obligations on cancellation

96(1) If a consumer cancels a consumer agreement, the supplier shall, in accordance with the prescribed requirements,

- (a) refund to the consumer any payment made under the agreement or any related agreement; and
- (b) return to the consumer in a condition substantially similar to when they were delivered all goods delivered under a trade-in arrangement or refund to the consumer an amount equal to the trade-in allowance.

Repossession or return of goods

(2) Upon cancelling a consumer agreement, the consumer, in accordance with the prescribed requirements and in the prescribed manner, shall permit the goods that came into the consumer's possession under the agreement or a related agreement to be repossessed, shall return the goods or shall deal with them in such manner as may be prescribed.

Reasonable care

(3) If a consumer cancels a consumer agreement, the consumer shall take reasonable care of the goods that came into the possession of the consumer under the agreement or a related agreement for the prescribed period.

To whom obligation owed

(4) The consumer owes the obligation described in subsection (3) to the person entitled to possession of the goods at the time in question.

No further obligation

(5) Compliance with this section discharges the consumer from all obligations relating to the goods and the consumer is under no other obligation, whether arising by contract or otherwise, to take care of the goods.

Right of action

(6) If a consumer has cancelled a consumer agreement and the supplier has not met the supplier's obligations under subsection (1), the consumer may commence an action.

Same

(7) If a consumer has cancelled a consumer agreement and has not met the consumer's obligations under this section, the supplier or the person to whom the obligation is owed may commence an action.

[177] Therefore, once K-Tech had received notice that Engel was legally cancelling the agreement, then K-Tech, as the supplier, had to comply with s. 96(1) and refund any payment made by Engel to K-Tech under the future performance agreement of October 4, 2006. Furthermore, K-Tech had to comply with s. 79(1) of Ont. Reg. 17/05, which required K-Tech to refund Engel's money back to her within 15 days of the date on which Engel had given notice to K-Tech that she was cancelling the agreement [*emphasis is mine below*]:

Supplier obligations on cancellation

79(1) A supplier who is required to comply with subsection 96(1) of the Act shall do so within 15 days after the day the consumer gives notice to the supplier in accordance with section 92 of the Act that the consumer is cancelling the consumer agreement.

[178] Hence, K-Tech was obligated to fully refund Engel's payments made under the agreement back to her by October 26, 2007, which is 15 days after the cancellation notice date of October 11, 2007.

[179] Furthermore, the prosecution contends that Bonnie Engel did not forgive the late delivery or commencement of constructing the cottage on Engel's property under s. 26(3) of the Consumer Protection Act, 2002, which provides that if the consumer agrees to accept delivery or authorize commencement then the consumer may not cancel the agreement under s. 26(2) [*emphasis is mine below*]:

Forgiveness of failure

26(3) If, after the period in subsection (1) or (2) has expired, the consumer agrees to accept delivery or authorize commencement, the consumer may not cancel the agreement under this section.

[180] For the purposes of s. 26(3), Engel could not have agreed to accept delivery or authorize commencement of the cottage on Engel's property, since she had not received an actual date for delivery or commencement of the erection of the cottage nor did K-Tech notify Engel that it had been ready to deliver or commence to erect the cottage on a specific date or attempt to deliver or commence construction of the cottage on Engel's property, before Engel had cancelled the agreement on October 11, 2007. As such, s. 26(3) did not bar Engel from cancelling the agreement.

(ii) **Did the defendants, as the supplier, fail to refund payment to Bonnie Engel, a consumer, within fifteen days of being given notice of cancellation of the consumer agreement on or about October 30, 2007, thereby committing an offence under s. 116(1)(b)(viii) of the Consumer Protection Act, 2002?**

[181] The prosecution contends that the defendants failed to comply with s. 96(1) of the Consumer Protection Act, 2002 in not refunding to Bonnie Engel, a consumer, any payment she made to K-Tech under the October 4, 2006 agreement within 15 days of Engel giving notice of the cancellation of that agreement. Furthermore, s. 116(1)(b)(viii) of the Consumer Protection Act, 2002 makes it an offence for a person who contravenes or who fails to comply with s. 96(1) to be guilty of an offence [*emphasis is mine below*]:

116(1) A person is guilty of an offence if the person,

...

(b) contravenes or fails to comply with,

(viii) in respect of Part IX, Procedures for Consumer Remedies, subsections 96(1), 98(2) and 99(5).

[182] Moreover, as the agreement was entered into on October 4, 2006 and the agreement did not specify a completion or commencement date, then according s. 26(2), K-Tech would have had to deliver or commence the cottage on Engel's property by November 3, 2006, which is 30 days after the agreement was entered into. Therefore, Bonnie Engel's right to cancel this future performance agreement at any time before delivery or commencement of the cottage by K-Tech on Engel's property crystallized on November 3, 2006, as K-Tech did not deliver or commence the erection of the cottage on Engel's property within the 30 days following October 4, 2006.

[183] In regards to taking all reasonable care in preventing this offence from being committed by K-Tech, Stanley Kondrotas is also the Treasurer of K-Tech, in addition to being the President and director of K-Tech, and as such, would have been well aware of the finances and financial health of K-Tech at that critical time in the summer of 2007, and as an officer and director of K-Tech he would also be responsible for ensuring that K-Tech complies with all laws, as well as with provisions of the Consumer Protection Act, 2002. Furthermore, Stanley Kondrotas cannot rely on ignorance of the law as a defence that he did not know that K-Tech was obligated under the Consumer Protection Act, 2002 to refund the money back to Engel once Engel had lawfully cancelled the agreement with K-Tech. In addition, Stanley Kondrotas testified that it was his view that a refund was not warranted as K-Tech had expended resources for the custom-ordered panels and that it was not K-Tech's policy to give refunds for custom-ordered cottages. However, it is not K-Tech's policy regarding refunds

that governs the obligation to refund the money to Engel, but s. 96(1) of the Consumer Protection Act, 2002 that governs the situation.

[184] In addition, once Engel had lawfully cancelled the agreement in accord with the Consumer Protection Act, 2002, then Stanley Kondrotas, as the President, Treasurer and director of K-Tech had to make sure that K-Tech refunded fully the money paid by Engel on the future performance agreement within 15 days of K-Tech receiving that cancellation notice.

[185] Moreover, Stanley Kondrotas did not take any steps in seeking legal advice about K-Tech's legal obligation to refund the money once Engel cancelled the agreement or to ensure that the payments made by Engel were set apart from any operating funds or not used by K-Tech as operating funds, since Engel had the legal right to cancel the agreement at any time before delivery or commencement after November 3, 2006.

[186] Nor did Stanley Kondrotas have the legal agreement reviewed by a lawyer to ensure that the agreement complied with the requirements of the Consumer Protection Act, 2002 in regards to what had to be included in future performance agreements.

[187] In addition, it did not matter that K-Tech may have expended time and materials to manufacture the custom-ordered wall panels or components for the cottage or that K-Tech had expended money to fulfill their obligations in the agreement with Engel. Engel was legally entitled to cancel the agreement at any time before delivery or commencement if K-Tech did not deliver or commence construction of the cottage on Engel's property within 30 days following the date the agreement was entered into.

[188] Furthermore, Stanley Kondrotas had replied to Engel's lawyer about the excessive delay in completing the cottage and that there had been no breach of the agreement between K-Tech and Engel and that it had been Engel that had caused the delay. Kondrotas also testified that because the cottage was to be custom-built and that some of the prefabricated wall panels were custom made that no one in the industry would refund the money. In addition, Kondrotas testified that he informed Engel that he would refund the money if he could find someone who would purchase the cottage and wall panels manufactured for Engel. However, cancelling a future performance agreement that does not meet the requirement under s. 22 of the Consumer Protection Act, 2002 is not fault-based but is simply the right of a consumer exercising their right to cancel a future performance agreement at any time before delivery or commencement according to s. 26(2) of the Consumer Protection Act, 2002. Moreover, K-Tech could not refuse to refund the money paid upfront by Engel unless they had actually attempted delivery or commencement of the cottage on Engel's property according to s. 26(4) of the Consumer Protection Act, 2002 [emphasis is mine below]:

26(4) For the purposes of subsections (1) and (2), a supplier is considered to have delivered or commenced performance under a future performance agreement if,

- (a) delivery was attempted but was refused by the consumer at the time that delivery was attempted or delivery was attempted but not made because no person was available to accept delivery for the consumer on the day for which reasonable notice was given to the consumer that there was to be delivery; or
- (b) commencement was attempted but was refused by the consumer at the time that commencement was attempted or commencement was attempted but did not occur because no person was available to enable commencement on the day for which reasonable notice was given to the consumer that commencement was to occur.

[189] In regards to the attempt provision of s. 26(4), K-Tech did not attempt to deliver the materials or wall panels to Engel or attempt to commence construction of the cottage on Engel's property, but instead Stanley Kondrotas used the excuse that they had completed the wall panels for the cottage and were loaded on a trailer in July of 2007 and were ready and willing to perform their part of the agreement, but that Engel had hired a lawyer to cancel the agreement.

[190] In addition, despite being ready to deliver the wall panels and materials to Engel's property the defendants contend that they did not have proper direction to Engel's property because it was in an area where a municipal address was not enough to locate the property. However, Engel testified that she had made many efforts to be available to show K-Tech's workers on how to find her property or to lead them there, as long as K-Tech told them what day they were going to be delivering the materials to her property. Also, David Boomer testified that he had even booked vacation time from work so that he could personally be at the property when the materials were being delivered to show the workers where the property was and to give any instructions or direction to the workers for commencing the erection of the cottage on their property. Furthermore, Engel testified she had provided a hand-drawn map with directions to her property (see Exhibit #55) to Terry Kondrotas, who was to be in charge of erecting the cottage.

[191] In addition, when K-Tech kept delaying delivery or commencement of the erection of the cottage, Engel had requested from Stanley Kondrotas the materials and wall panels that she had paid for so that she could pick them up herself and then take the materials and panels to her brother's warehouse for storage. However, Stanley Kondrotas did not agree to this arrangement and testified that it was not the way he did business and that K-Tech had always provided the materials and did the work to complete the building.

[192] However, the evidence shows that K-Tech had not actually been ready to perform their end of the bargain as they contended, since Stanley Kondrotas had cancelled or stopped the order to manufacture the roof trusses for the cottage. Kondrotas also indicated in his letter to Engel's lawyer that he did resubmit the order to the manufacturer for the roof trusses and that the roof trusses would have been ready on October 26, 2007. Despite Kondrotas' comment about the roof trusses being ready, Engel had already cancelled the agreement under s. 26(2) before the roof trusses would have even been available to K-Tech. Furthermore, Kondrotas also testified that he had not ordered the roof shingles yet, but would do so from a local dealer. Thus, K-Tech would not have been able to provide or deliver all the materials necessary to construct the cottage before Engel cancelled the agreement.

[193] Therefore, since K-Tech had failed to refund the money to Engel within 15 days of being notified that Engel had cancelled the agreement on October 11, 2007, then the prosecution has proven beyond a reasonable doubt that K-Tech committed an offence under s. 116(1)(b)(viii) on or about October 30, 2007, by not complying with s. 96(1).

[194] Moreover, Stanley Kondrotas, as an officer and director of K-Tech did not take all reasonable care for the circumstances in preventing K-Tech from committing the offence of failing on October 30, 2007, to refund payment to Bonnie Engel, a consumer, within fifteen days of being given notice of cancellation of the consumer agreement, to the supplier, in accordance with section 96(1) of the Consumer Protection Act, 2002, and section 79(1) of Ont. Regulation 17/05 and, thereby, committed an offence under section 116(1)(b)(viii).

[195] As such, both K-Tech Building Systems Inc. and Stanley Kondrotas are guilty beyond a reasonable doubt of committing the offence set out in count #5.

(c) COUNT #1 – MAKING A FALSE, MISLEADING OR DECEPTIVE REPRESENTATIONS TO ENGEL ABOUT ORDERING MATERIALS AND ABOUT COMPLETING COTTAGE

[196] Under count #1, the defendants have been jointly charged with engaging in an unfair practice in relation to Bonnie Engel, a consumer, by making a false, misleading or deceptive representation to Engel that K-Tech would purchase, order or fabricate the materials and components of the building; would load, pack, brace, and arrange delivery of the materials and components for the said building; and K-Tech would erect and complete the building, referred to in that future performance agreement entered into with Bonnie Engel, a consumer, on October 4, 2006, in a good and workmanlike order according to the Specifications referred to in said future performance agreement and in accordance with the Ontario Building Code and failed to do so, contrary to

section 17(1) of the Consumer Protection Act, 2002, and thereby, committed an offence under section 116(1)(b)(ii).

(i) Did the defendants engage in an unfair practice by making a false, misleading, or deceptive representation to Bonnie Engel on October 4, 2006, thereby committing an offence under s. 116(1)(b)(ii) of the Consumer Protection Act, 2002?

[197] Section 17(1) of the Consumer Protection Act, 2002 prohibits K-Tech from engaging in an unfair practice in relation to Bonnie Engel. Furthermore, if K-Tech engages in one of the acts listed in sections 14, 15, or 16, then K-Tech would have been deemed to be engaging in an unfair practice [*emphasis is mine below*]:

Unfair practices prohibited

17(1) No person shall engage in an unfair practice.

One act deemed practice

(2) A person who performs one act referred to in section 14, 15 or 16 shall be deemed to be engaging in an unfair practice.

[198] In addition, the acts of unfair practice which the prosecution contends K-Tech had engaged in are specifically set out in s. 14(2)(8) and 14(2)(9) [*emphasis is mine below*]:

False, misleading or deceptive representation

14(1) It is an unfair practice for a person to make a false, misleading or deceptive representation.

Examples of false, misleading or deceptive representations

(2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations:

...

8. *A representation that the goods or services or any part of them are available or can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed.*

9. *A representation that the goods or services or any part of them will be available or can be delivered or performed by a specified time when the person making the representation knows or ought to*

know they will not be available or cannot be delivered or performed by the specified time.

- ...
14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.

[199]

The prosecution contends that the defendants contravened s. 17(1) of the Consumer Protection Act, 2002 by engaging in an unfair practice by making a false, misleading or deceptive representation to Bonnie Engel. Furthermore, s. 116(1)(b)(ii) of the Consumer Protection Act, 2002 makes it an offence for a person who contravenes s. 17(1) to be guilty of an offence:

116(1) A person is guilty of an offence if the person,

...

(b) contravenes or fails to comply with,

...

(ii) in respect of Part III, Unfair Practices, subsection 17(1),

[200]

Furthermore, as the agreement was entered into on October 4, 2006, and the agreement did not specify a completion or commencement date, then according to s. 26(2), K-Tech would have had to deliver or commence the construction of the cottage on Engel's property by November 3, 2006. Since there had been no delivery or commencement of the cottage on Engel's property within the 30-day period following the date the agreement was entered into, then Engel had the legal right to cancel the agreement at any time before delivery or commencement of the cottage on Engel's property. Moreover, Stanley Kondrotas testified that it would take six to eight weeks for the roof trusses for the cottage to be manufactured after they were ordered. In addition, K-Tech or Kondrotas had not even ordered the roof shingles prior to Engel cancelling the agreement. Therefore, K-Tech could not have performed their obligations to deliver or commence the cottage on Engel's property by November 3, 2006, as the roof shingles had not even been ordered and the roof trusses would not have been manufactured before the 30-day period had expired.

[201]

Moreover, Stanley Kondrotas, as an officer and director of K-Tech did not take all reasonable care for the circumstances in preventing K-Tech from committing the offence of engaging in an unfair practice in relation to Bonnie Engel, a consumer, by making a false, misleading or deceptive representation to Engel that K-Tech would "purchase or order the materials",

which is contrary to s. 17(1) and thereby, committed an offence under s. 116(1)(b)(ii) of the Consumer Protection Act, 2002.

[202] As such, both K-Tech Building Systems Inc. and Stanley Kondrotas are guilty beyond a reasonable doubt of committing the offence set out in count #1.

(d) COUNT #2– MAKING A FALSE, MISLEADING OR DECEPTIVE REPRESENTATIONS TO ENGEL ABOUT PRIORITIZING ENGEL'S ORDER FOR EARLY PAYMENT

[203] Under count #2, the defendants have been jointly charged with committing the offence of engaging in an unfair practice in relation to Bonnie Engel, a consumer, by making a false, misleading or deceptive representation to Engel on July 5, 2007, that K-Tech would prioritize her order in consideration of an early payment and then failed to do so, contrary to section 17(1) of the Consumer Protection Act, 2002, and thereby, committed an offence under section 116(1)(b)(ii).

(i) Did the defendants engage in an unfair practice by making a false, misleading or deceptive representation to Bonnie Engel on July 5, 2007, thereby committing an offence under s. 116(1)(b)(i) of the Consumer Protection Act, 2002?

[204] Stanley Kondrotas had represented to Engel on July 5, 2007 that she would receive priority if she made an early payment, but K-Tech did not deliver or commence construction of the cottage on Engel's property between July 5, 2007, the date the priority payment was made, to October 11, 2007, the date the notice of the cancellation of the agreement had been made to K-Tech. In addition, Stanley Kondrotas testified that Engel had told him that she ran out of money and needed to delay the start of the construction of the cottage until the Fall of 2007 or later, but Engel in her communications or e-mails to Stanley Kondrotas had constantly pressed him for a date to commence construction of the cottage during that period, which contradicts Stanley Kondrotas' testimony about Engel wanting to delay construction of the cottage. This and other contradictions such as not having a map to Engel's property despite a map Engel had drawn and given to Terry Kondrotas had been sitting in a file folder that Stanley Kondrotas had with him during his testimony and that K-Tech was ready to perform its end of the bargain when Kondrotas had not even ordered the roof trusses or roof shingles.

[205] Moreover, Stanley Kondrotas, as an officer and director of K-Tech did not take all reasonable care for the circumstances in preventing K-Tech from committing the offence of with engaging in an unfair practice in relation to Bonnie Engel, a consumer, by making a false, misleading or deceptive representation to Engel about receiving priority when she did not,

contrary to s. 17(1) and thereby, committed an offence under s. 116(1)(b)(ii) of the Consumer Protection Act, 2002.

[206] As such, both K-Tech Building Systems Inc. and Stanley Kondrotas are guilty beyond a reasonable doubt of committing the offence set out in count #2.

(e) COUNT #3 – MAKING UNCONSCIONABLE REPRESENTATION TO ENGEL

[207] Under count #3, the defendants have been jointly charged with committing the offence of engaging in an unfair practice in relation to Bonnie Engel, a consumer, of making an unconscionable representation to Bonnie Engel on October 4, 2006, that they would fulfill the obligations as required under the future performance agreement dated October 4, 2006, with Bonnie Engel, when Stanley Kondrotas knew or ought to have known that Bonnie Engel would be unable to receive a substantial benefit from the subject matter of their representation, contrary to s. 17(1) of the Consumer Protection Act, 2002, and thereby, committed an offence under s. 116(1)(b)(ii).

[208] Furthermore, s. 15(1) of the Consumer Protection Act, 2002 defines an unfair practice to include making an unconscionable representation. In addition, s. 15(2) lists factors that can be taken into account on whether a representation made by a supplier to a consumer is unconscionable and includes s. 15(2)(c), in which the person making the representation knows or ought to know that the consumer is unable to receive a substantial benefit from the subject-matter of the representation [*emphasis is mine below*]:

Unconscionable representation

15(1) It is an unfair practice to make an unconscionable representation.

Same

(2) Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know,

...

(c) that the consumer is unable to receive a substantial benefit from the subject-matter of the representation;

(i) Did the defendants engage in an unfair practice by making an unconscionable representation to Bonnie Engel on October 4, 2006 where they ought to have known that Engel would be unable to receive a substantial benefit from the subject

**matter of their representation, thereby committing an offence
under s. 116(1)(b)(ii) of the Consumer Protection Act, 2002?**

[209] The prosecution submits that the offence in count #5 is an objective mens rea offence, which requires that the prosecution prove beyond a reasonable doubt that K-Tech's conduct toward Bonnie Engel was a marked departure from the standard of care of a reasonable person in similar circumstances: R. v. Hundal, [1993] S.C.J. No. 29 (QL) (S.C.C.).

[210] Although it could be held that the defendants knew or ought to have known on October 4, 2006, the date that the agreement was entered into, that K-Tech could not have fulfilled their end of the agreement by delivering or commencing the cottage on Engel's property within the 30-day period following the date the agreement was entered into by the requirement of s. 26(2), since Stanley Kondrotas had indicated that it takes six to eight weeks to receive the roof trusses after they are ordered from the manufacturer, it does not mean that the defendants knew or ought to have known that that Bonnie Engel would be unable to receive a substantial benefit from the subject matter of their representation that they would fulfill the obligations as required under the future performance agreement dated October 4, 2006, with Bonnie Engel.

[211] However, because of the operation of s. 26(2) which crystallized after the 30-day period expired, Engel had the right to cancel the agreement at any time before delivery and the commencement of the cottage on Engel's property. This put the defendants in a precarious position about being ready to deliver and commence construction of the cottage on Engel's property, since Engel could cancel at any time she wanted to, if the defendants had not attempted to or made delivery or commenced erection of the cottage.

[212] On the other hand, as long as Engel did not cancel the agreement the defendants could still perform their end of the agreement.

[213] Furthermore, there was evidence that K-Tech had three other projects for building homes or cottages in 2007, besides the proposed cottage for Engel, and that workers from K-Tech had been working at those three projects during 2007. In addition, this was not a business without a history of completing cottages or buildings, but one with 30 years experience as a family business with a factory and inventory and an array of machinery for manufacturing engineered wall panels and components to be used in the construction of buildings. And, although the defendants were sitting precariously in a position of having the agreement cancelled at any time by Engel because of the agreement that Stanley Kondrotas had prepared was done without a completion date stated in it, the defendants did not know or ought to have known on October 4, 2006, at the time the agreement was signed that Bonnie Engel would be unable to receive a substantial benefit from the subject matter of their representation that they would fulfill the obligations as required under that future performance agreement, considering they had

completed cottages on other agreements in the past and had completed three other building projects in 2007, and that K-Tech had workers who could manufacture and construct the cottage for Engel on October 4, 2006.

- [214] On the other hand, the financial situation for K-Tech may not have been as rosy as Stanley Kondrotas was portraying it was on October 4, 2006, since the financial clouds certainly were in the background in the summer of 2007, considering that Debra Hunter, the office secretary, was laid off in the summer of 2007 because K-Tech could not afford to employ her. However, that financial cloud had not been evident when the agreement was entered into. Moreover, Stanley Kondrotas testified that the rent for K-Tech was \$12,000 a month for their offices and factory, so to keep financially afloat would have required at least three projects like Engels' cottage to come in every year just to pay the rent.
- [215] Moreover, a reasonable person would not have foreseen the consequence that K-Tech would have been unable to complete the Engel cottage on October 4, 2006, although the defendants were in a precarious position in regards to Engel after November 3, 2006, since Engel had the right to cancel the agreement at any time.
- [216] Therefore, the prosecution has not proven beyond a reasonable doubt that both K-Tech Building Systems Inc. and Stanley Kondrotas have committed the actus reus of the offence contained in count #3. As a result, both defendants are not guilty of committing the offence set out in count #3 and acquittals will be entered for the defendants.

(C) ON A BALANCE OF PROBABILITIES HAVE THE DEFENDANTS PROVEN THAT THEY ACTED WITH DUE DILIGENCE IN PREVENTING OR AVOIDING COMMITTING THE OFFENCES?

- [217] The defendants contend they have taken all reasonable care in the circumstances to prevent or avoid committing the Consumer Protection Act, 2002 offences. As it has been determined that the prosecution has not proven the actus reus of the offence for count #3 beyond a reasonable doubt, then the due diligence defence would only be considered in relation to counts #1, #2, #4 and #5.
- [218] First of all, the defendants contend that they had always intended to fulfill their end of the purchase agreement, but due to unforeseen financial and personal family problems they were unable to complete the cottage. In addition, the defendants argue they were ready and willing to complete the cottage but that it had been Engel who had caused delays, which affected K-Tech being able to arrange their busy schedule to fit in the delivery of the materials to Engel's property and the start of construction on her cottage.

(1) The Sword Of Damocles In S. 26(2)

[219] Since the future performance agreement had been improperly prepared by Stanley Kondrotas and did not contain a completion date as required by s. 24 of Ont. Reg. 17/05, the defendants were put into a perilous position in relation to Bonnie Engel. That is to say, the defendant's position is analogous to being under the Sword of Damocles. And, because the agreement did not contain a completion date, the Consumer Protection Act, 2002 provided Bonnie Engel with the right to cancel the agreement under s. 26(2) if K-Tech did not deliver or commence performance within 30 days of the agreement being entered into on October 4, 2006.

[220] Therefore, any due diligence argument put forth by the defendants would effectively be constrained by the operation of Engel's legal right under s. 26(2) of the Consumer Protection Act, 2002, which provided her with the right after November 3, 2006, to cancel the agreement at any time before delivery or commencement of the construction of the cottage on Engel's property. Moreover, because Engel had the right to cancel the agreement at any time after November 3, 2006, then the defendants would only be able to contend that they had taken all reasonable care in the circumstances to prevent or avoid committing the offences contained in counts #1, #2 and #5 if they were in fact ready and able to deliver and commence erecting the cottage at any point after November 3, 2006, otherwise Engel could exercise her right to cancel. In other words, the defendants had to be ready and able to deliver or commence erection of the cottage, which would require that all materials had to be purchased, all orders had to be placed and delivered, and all wall panels had to be manufactured, packed, and ready to be transported on November 3, 2006. As a result of the operation of s. 26(2), time would be of the essence for the defendants.

[221] Although Engel did not exercise her s. 26(2) right to cancel the agreement immediately after November 3, 2006, her failure to exercise that right immediately would not be her forgiveness of K-Tech's failure to deliver or commence erection of the cottage or her acquiescence or agreement to any delay by K-Tech in delivery of the materials or commencement in erecting the cottage.

(2) Stanley Kondrotas' credibility

[222] The prosecution submits that the testimony from Stanley Kondrotas was inconsistent and contained contradictions, and as such, no weight should be placed on his testimony. In that regard, Kondrotas did contradict himself when he first testified that K-Tech was ready to deliver and construct the cottage and that all wall panels were manufactured and all materials were ready to be delivered to Engel's property, including the roof trusses, and then later said that the roof trusses were not ready and that the roof shingles had not been ordered yet. In addition, Kondrotas complained that Engel had not given K-Tech any directions on how to get to Engels's property and that they would not be able to find Engel's property to deliver the materials based on a municipal address or legal description

of the property and then contradicted himself when he pulled out of the file in his possession a hand-drawn map with directions to Engel's property that Engel had given to Terry Kondrotas a year earlier. Kondrotas was also evasive to questions about the financial viability of K-Tech and the point when K-Tech started having financial difficulties. Therefore, Kondrotas has not been straightforward in his testimony, and as such, there can be no weight put on Kondrotas' testimony that all the materials were obtained and that K-Tech was ready to deliver the materials and commence construction of the cottage, especially when the roof trusses were not yet manufactured nor were the roof shingles for the cottage ordered when Engel cancelled the agreement on October 11, 2007.

(3) Count #4 – future performance agreement did not contain prescribed requirements

[223] Furthermore, the defendants did not take all reasonable steps to ensure the future performance agreement delivered to Bonnie Engle on October 4, 2006 contained the prescribed requirements set out in s. 24 of Ont. Reg. 17/05. Stanley Kondrotas testified he had prepared the agreement so that it would be simple to read and used clauses for the K-Tech agreement that he had taken from other companies' agreements. He did not take the reasonable step in having a lawyer prepare or review the agreement for compliance with all statutory requirements before he used it for the agreement with Engel.

(4) Count #5 – failure to provide refund within 15 days of being given notice of cancellation

[224] Bonnie Engel was legally entitled to cancel the agreement under s. 26(2) at any time before delivery or commencement of the erection of the cottage. Engel exercised that right and notified K-Tech of that cancellation on October 11, 2007. Once that notice of cancellation was given, K-Tech had to refund the payments made under the agreement within 15 days. K-Tech failed to refund the payments to Engel within the 15 days. The defendants in regards to this offence did not take all reasonable steps to prevent or avoid committing this offence. Stanley Kondrotas did not take any steps to have a proper future performance agreement prepared nor did he ensure that the payments made by Engel were available to be returned to Engel within 15 days.

(5) Count #1 – engaged in unfair practice by making false, misleading, or deceptive representation that K-Tech would deliver or purchase or order materials

[225] Since time was of the essence after November 3, 2006, and Engel had the legal right to cancel the agreement at any time after that date before delivery or commencement of the erection of the cottage, the defendants were required to be ready and able to proceed and that all materials were purchased or ordered at any point after November 3, 2006, in order for the defendants to say that they had

taken all reasonable care to prevent or avoid committing the offence contained in count #1. In fact, the defendants had not taken all reasonable care, since Stanley Kondrotas had testified that the roof shingles had not even been ordered and that the roof trusses were not even going to be ready until October 26, 2007, which would mean the roof trusses would have only been ready two weeks after the agreement had been cancelled by Engel on October 11, 2007.

- [226] Although it is understandable about Stanley and Terry Kondrotas' need to be with their ill father at the hospital during that critical time to commence the Engel cottage before winter or bad weather would make it unreasonable for construction of the cottage, Stanley Kondrotas cannot use the protection of the corporate veil when he needs it to escape liability when it is to his advantage and then to rely on his personhood and human frailties to argue unforeseen circumstances such as his father's hospitalization and Terry Kondrotas' personal problems and the need for Terry Kondrotas to stay in town to sell his home, when a corporation who does not have human frailties is not subject to these human problems and could still have provided the cottage to Engel. In other words, Stanley Kondrotas could have ensured that K-Tech hired other builders or construction workers to deliver the wall panels and other building materials to the Engel property and complete the cottage in a timely fashion. Thus, K-Tech could have fulfilled its obligation with Engel, as it would not have had the same personal problems besetting Stanley Kondrotas or Terry Kondrotas, since K-Tech is a separate legal person.
- [227] Therefore, Stanley Kondrotas as an officer and director of K-Tech did not take all reasonable care to ensure that K-Tech not commit the offence contained in count #1 of making false, misleading or deceptive representations that K-Tech would purchase, order or fabricate the materials and components of the building; that K-Tech would load, pack, brace, and arrange delivery of the materials and components for the said building; and that K-Tech would erect and complete the building in a good and workmanlike order according to the Specifications referred to in said future performance agreement and in accordance with the Ontario Building Code.

(6) Count #2 – engaged in unfair practice by making false, misleading or deceptive representation that K-Tech would prioritize Engel's order for an early payment

- [228] Bonnie Engel had paid \$56,194.18 to K-Tech in total and \$4178 of that amount was a payment made on July 13, 2007 as the priority payment because Stanley Kondrotas had insinuated to Engel that K-Tech had many projects on the go and that making that early payment would get Engel priority. However, from July 13, 2007, when Engle made the priority payment until October 11, 2007, when Engel cancelled the agreement, K-Tech did not deliver the materials to Engel's property or commence erection of the cottage. There was no evidence that there were any other projects in which Engel received priority over, because if there were that many projects keeping K-Tech busy then K-Tech would not have been in

financial difficulties and K-Tech could have been hiring more employees instead of reducing the number of employees. Moreover, the defendants did not take all reasonable care in the circumstances to prevent or avoid committing the offence under count #2 of making a false, misleading or deceptive representation that K-Tech would prioritize Engel's order for an early payment, especially when there were no other projects left for K-Tech, but Engel's cottage.

(7) **Have the defendants proven on a balance of probabilities that they had taken all reasonable care in the circumstances to prevent or avoid committing the offences contained in counts #1, #2, #4, and #5?**

[229] Neither K-Tech Building Systems Inc. nor Stanley Kondrotas had taken all reasonable care in the circumstances to prevent or avoid committing the offences contained in counts #1, #2, #4, and #5. As a result, the prosecution has proven beyond a reasonable doubt that both K-Tech Building Systems Inc. and Stanley Kondrotas are guilty of committing the offences contained in counts #1, #2, #4, and #5.

(D) ABUSE OF PROCESS ARGUMENT

[230] Finally, the defendants contend that this proceeding is being used to collect a civil debt and therefore would be an abuse of the court's process. They further contend that Bonnie Engel has already obtained a civil judgment for \$60,965.86 and \$1,979 for the costs against K-Tech Building Systems Inc. and Stanley Kondrotas, and that they have not done all they could to collect that outstanding debt, and that this proceeding is being used to obtain a restitution order, which may be a persuasive mechanism for collecting that debt, since Stanley Kondrotas would be subject to receiving a custodial sentence if he did not comply with that restitution order.

[231] However, the prosecution submits that the defendants' argument about a restitution order is premature because a restitution order is only a possibility that arises as an issue during the sentencing stage, which would only come about if the defendants were indeed convicted of the charges.

[232] Moreover, the Court of Appeal for Ontario held in R. v. Devgan, [1999] O.J. No. 1825 (QL), at paras. 18 to 22, that a civil judgment cannot purport to usurp the power given to a sentencing judge nor can a civil judgment operate as a bar to a compensation or restitution order on the basis of res judicata and that the existence of a civil judgment is but a factor for the sentencing judge to consider in exercising the discretion on whether or not a compensation or restitution order is to be granted [*emphasis is mine below*]:

In R. v. Carter (1990), 9 C.C.L.S. 69 (Ont. Gen. Div.), a decision not referred to by the parties, Borins J. (as he then was) considered this very issue. In

Carter, the accused was convicted of numerous fraud-related offences. On sentencing, the accused, like the appellant in the instant case, opposed the making of a compensation order under s. 725(1) because the victim had previously obtained a civil judgment against him. The application for compensation was also opposed by the accused on the ground that as an undischarged bankrupt he was unable to pay the amount of any compensation order.

Borins J. rejected both arguments. At p. 4 of his reasons, he said:

In my view, it is settled law that the granting of a compensation order is part of the sentencing process and is separate and distinct from the process of civil recovery, and that the existence of an unsatisfied civil judgment against an accused is simply a circumstance for the sentencing judge to take into consideration in the exercise of the judge's discretion in determining whether or not a compensation order is to be granted. Similarly, the fact that an accused is bankrupt and may not have the financial ability to pay a compensation order are circumstances for the sentencing judge to consider. This conclusion is based on two decisions of the Supreme Court of Canada, R. v. Zelensky; and R. v. Fitzgibbon [citations omitted]; and the decision of the Ontario Court of Appeal in R. v. Scherer (1984), 16 C.C.C. (3d) 30. In my opinion, this is a proper case in which to issue a compensation order. [Emphasis added.]

The position of the appellant cannot succeed for the same reasons referred to in Zavitz and Carter. Just as s. 725 does not purport to interfere with any right of civil recourse, neither can a civil judgment purport to usurp the power given to a sentencing judge under s. 725(1). Compensation orders are discretionary, both as to whether an order should be made and as to amount. At most, the existence of a civil judgment is but a factor for the sentencing judge to consider in exercising this discretion.

*I also note that certain essential requirements for the application of the doctrine of res judicata are not met in this case. Specifically, the availability of res judicata depends on identity of parties and of subject matter. The compensation orders are intended for an entirely different purpose than the civil remedies, namely as part of the sentencing process. Moreover, the Crown was a party to both compensation orders but was not involved in the civil actions. Similarly, the complainants were both parties in the civil actions but were not parties at the criminal proceedings. See Maynard v. Maynard, [1951] S.C.R. 346 at 358-59; and Spencer-Bower and Turner, *The Doctrine of Res Judicata* (2nd. ed., 1969) at pp. 18-19.*

The argument that a civil judgment operates as a bar to a compensation order under s. 725(1) of the Criminal Code on the basis of res judicata therefore fails.

[233] Furthermore, the prosecution submits that the defendants' argument for issue estoppel in regards to the restitution question is not applicable, since the parties in this proceeding are not the same parties as in the civil proceeding, since Bonnie Engel is only a witness for the prosecution in the present proceeding, and while Engel had been a party in the civil proceeding, the prosecution (Ministry of Consumer Services) had not been a party in the civil proceeding and that the

prosecution is not relitigating the same issues or challenging the results decided in the civil proceeding between Engel and the defendants: Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64 (QL) (S.C.C.).

[234] In addition, both Bonnie Engel and David Boomer had filed E-complaints with the Ministry against K-Tech Building Systems Inc. and Stanley Kondrotas. David Boomer had filed his E-complaint first. He filed his complaint online with the Consumer Protection Branch on November 22, 2007, while Bonnie Engel filed her E-complaint online with the Ministry of Small Business and Consumer Services on March 10, 2009. However, David Boomer in his E-complaint (Exhibit #47) stated that he wanted to get the money, as did Bonnie Engel in her E-complaint (Exhibit #27) indicate that she wanted to get the money from the civil judgment.

[235] Moreover, David Boomer had already filed his E-complaint on November 22, 2007, with the Ministry against the defendants before the Statement of Claim had even been filed by Bonnie Engel at the Superior Court of Justice. On the other hand, the civil judgment was not granted against K-Tech Building Systems Inc. and Stanley Kondrotas until February 15, 2008.

[236] In addition, the Consumer Protection Act, 2002 expressly provides that if K-Tech failed according to s. 96(1) to refund Bonnie Engel's payments made on the October 4, 2006, agreement, then Engel had the right to bring an action against K-Tech and Stanley Kondrotas under s. 96(6) of the Consumer Protection Act, 2002 [*emphasis is mine below*]:

Right of action

96(6) If a consumer has cancelled a consumer agreement and the supplier has not met the supplier's obligations under subsection (1), the consumer may commence an action.

[237] Therefore, the Consumer Protection Act, 2002 permits Engel to commence a civil action against the defendants for repayment separately from any prosecution the Ministry of Consumer Services may bring against the defendants.

[238] Furthermore, after the Ministry received complaints against K-Tech and Stanley Kondrotas, the Ministry investigated the complaint and decided to charge K-Tech and Stanley Kondrotas with jointly committing five offences under the Consumer Protection Act, 2002. In addition, the Ministry had not been a party in the civil suit launched by Bonnie Engel against K-Tech Building Systems Inc. and Stanley Kondrotas. Equally, Bonnie Engel is not a party in these proceedings, but a witness for the Ministry in this prosecution of the defendants. Moreover, when the Ministry proceeds with a prosecution it is acting for the public interest, and not necessarily for the complainants.

[239] Therefore, the Crown in initiating these proceedings against the defendants and in conducting this prosecution has not acted in vexatious manner or improperly that would make their actions an abuse of the court's process in continuing with this prosecution.

7. DISPOSITION

(a) Charges against K-Tech Building Systems Inc.

[240] Therefore, based on the totality of the evidence, the prosecution has fulfilled its burden in proving beyond a reasonable doubt that the corporate defendant, K-Tech Building Systems Inc., has committed the offence of "engaging in an unfair practice" by making a false, misleading or deceptive representation to Bonnie Engel that they would purchase, order or fabricate the materials and components of a cottage, that they would load, pack, brace, and arrange delivery of the materials and components for the cottage, and that they would erect and complete the cottage in a good and workmanlike order according to the Specifications in accordance with the Building Code and referred to in the future performance agreement entered into with Bonnie Engle on October 4, 2006, and failed to do so, contrary to s. 117 and 116(1)(b)(ii) of the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A.

[241] And that based on the totality of the evidence, the prosecution has fulfilled its burden in proving beyond a reasonable doubt that the corporate defendant, K-Tech Building Systems Inc., has committed the offence of "engaging in an unfair practice" by making a false, misleading or deceptive representation to Bonnie Engel that they would prioritize her order in consideration of an early payment and failed to do so, contrary to s. 117 and 116(1)(b)(ii) of the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A.

[242] And that based on the totality of the evidence, the prosecution has not fulfilled its burden in proving beyond a reasonable doubt that the corporate defendant, K-Tech Building Systems Inc., has committed the offence of "engaging in an unfair practice" by making by making an unconscionable representation to Bonnie Engel that they would fulfill the obligations as required under the future performance agreement dated October 4, 2006, when Stanley Kondrotas ought to have known that Bonnie Engel would be unable to receive a substantial benefit from the subject matter of his representation, contrary to s. 117 and 116(1)(b)(ii) of the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A.

[243] And that based on the totality of the evidence, the prosecution has fulfilled its burden in proving beyond a reasonable doubt that the corporate defendant, K-Tech Building Systems Inc., has committed the offence of "failing to deliver a future performance agreement" to Bonnie Engel containing the information required by s. 24 of Ontario Regulation 17/05", contrary to s. 22 of the Act, thereby

committing an offence under s. 116(2) of the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A.

[244] And that based on the totality of the evidence, the prosecution has fulfilled its burden in proving beyond a reasonable doubt that the corporate defendant, K-Tech Building Systems Inc., has committed the offence of “failing to provide a refund payment” to Bonnie Engel within 15 days of being given notice of cancellation of the consumer agreement by Bonnie Engel, in accordance with s. 96(1) of the Act, and s. 79(1) of Ont. Reg. 17/05, thereby committing an offence under s. 116(1)(b)(viii) of the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A.

[245] Accordingly, a conviction will be entered against the corporate defendant, K-Tech Building Systems Inc., for committing counts #1, #2, #4 and #5 while an acquittal will be entered for the corporate defendant, K-Tech Building Systems Inc., for count #3.

(b) Charges against Stanley R. Kondrotas

[246] As s. 116(2) of the Consumer Protection Act, 2002 makes an officer or director of a corporation guilty of an offence if they fail to take reasonable care to prevent the corporation from committing that offence, and as Stanley Kondrotas has not shown on balance of probabilities that he took all reasonable care in the circumstances in preventing K-Tech Building Systems Inc. from committing the offences under counts #1, #2, #4, and #5, then Stanley Kondrotas will also be found guilty of committing those same offences.

[247] Therefore, based on the totality of the evidence, the prosecution has fulfilled its burden in proving beyond a reasonable doubt that Stanley R. Kondrotas has committed the offence of “engaging in an unfair practice” by making a false, misleading or deceptive representation to Bonnie Engel that they would purchase, order or fabricate the materials and components of a cottage, that they would load, pack, brace, and arrange delivery of the materials and components for the cottage, and that they would erect and complete the cottage in a good and workmanlike order according to the Specifications in accordance with the Building Code and referred to in the future performance agreement entered into with Bonnie Engle on October 4, 2006, and failed to do so, contrary to s. 117 and 116(1)(b)(ii) of the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A.

[248] And that based on the totality of the evidence, the prosecution has fulfilled its burden in proving beyond a reasonable doubt that Stanley R. Kondrotas has committed the offence of “engaging in an unfair practice” by making a false, misleading or deceptive representation to Bonnie Engel that they would prioritize

her order in consideration of an early payment and failed to do so, contrary to s. 117 and 116(1)(b)(ii) of the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A.

[249] And that based on the totality of the evidence, the prosecution has not fulfilled its burden in proving beyond a reasonable doubt that Stanley R. Kondrotas has committed the offence of "engaging in an unfair practice" by making an unconscionable representation to Bonnie Engel that they would fulfill the obligations as required under the future performance agreement dated October 4, 2006, when Stanley Kondrotas ought to have known that Bonnie Engel would be unable to receive a substantial benefit from the subject matter of his representation, contrary to s. 117 and 116(1)(b)(ii) of the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A.

[250] And that based on the totality of the evidence, the prosecution has fulfilled its burden in proving beyond a reasonable doubt that Stanley R. Kondrotas has committed the offence of "failing to deliver a future performance agreement" to Bonnie Engel containing the information required by s. 24 of Ontario Regulation 17/05", contrary to s. 22 of the Act, thereby committing an offence under s. 116(2) of the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A.

[251] And that based on the totality of the evidence, the prosecution has fulfilled its burden in proving beyond a reasonable doubt that Stanley R. Kondrotas has committed the offence of "failing to provide a refund payment" to Bonnie Engel within 15 days of being given notice of cancellation of the consumer agreement by Bonnie Engel, in accordance with s. 96(1) of the Act, and s. 79(1) of Ont. Reg. 17/05, thereby committing an offence under s. 116(1)(b)(viii) of the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A.

[252] Accordingly, convictions will be entered against Stanley R. Kondrotas for committing counts #1, #2, #4 and #5, while an acquittal will be entered for Stanley R. Kondrotas for count #3.

Dated at the City of Brampton on April 13, 2012.

QUON J.P.
Ontario Court of Justice