

**ONTARIO
SUPERIOR COURT OF JUSTICE**

The Honourable Madam

) **TUESDAY**, the **29th** day

Justice Baltman

) of **MAY**, 2012

BETWEEN:

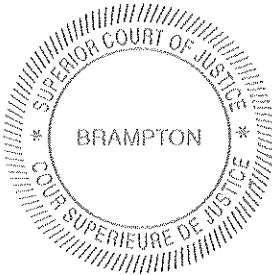
KEVIN BARWIN

Plaintiff

- and -

**IKO INDUSTRIES LTD., CANROOF CORPORATION INC.,
and I.G. MACHINE & FIBERS LTD.**

Defendants



Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION made by the Plaintiff for an order that this action be certified pursuant to the *Class Proceedings Act, 1992*, SO 1992, c 6 was heard on May 29, 30, & 31, 2012 at the Court House, 7755 Hurontario Street, Brampton, Ontario.

ON READING the materials filed by the parties, and on hearing the submissions of counsel for the Plaintiff and counsel for the Defendants, for written reasons released July 19, 2012 and endorsement following attendance dated September 13, 2102 and supplementary reasons released October 2, 2012 following written submissions on behalf of the parties:

1. **THIS COURT ORDERS** that the within action is certified as a class proceeding pursuant to the *Class Proceedings Act, 1992*, SO 1992, c 6, s 5(1).
2. **THIS COURT DECLARES** that the relief sought on behalf of the Class is for negligence and for conduct contrary to certain provincial consumer protection legislation

causing economic loss damages allegedly suffered as a result of alleged defects in IKO Organic Shingles.

3. **THIS COURT ORDERS** that the Class is defined as:

All persons that own, have owned, lease, or have leased, and all those who have or may pursue claims through or in the name or right of those who own or have owned, lease or have leased, buildings, homes, residences, or any other structures located in Canada that contain or have ever contained IKO Organic Shingles*.

*IKO Organic Shingles mean all asphalt organic shingles manufactured by or on behalf of IKO Industries Ltd., Canroof Corporation Inc., or I.G. Machine & Fibers Ltd. whether sold under the names Chateau, Renaissance XL, Aristocrat, Total, Armour Seal, Superplus, Armour Lock, Royal Victorian, Cathedral XL, Ultralock 25, Armour Plus 20, Armour Tite, Chateau Ultra Shadow (laminated organic), Cathedral XL, Crowne 30, or otherwise.

4. **THIS COURT ORDERS** that the Subclass is defined as:

All persons that own, have owned, lease, or have leased, and all those who have or may pursue claims through or in the name or right of those who own or have owned, lease or have leased, buildings, homes, residences, or any other structures located in British Columbia, Saskatchewan, Manitoba, Quebec and/or New Brunswick that contain or have ever contained IKO Organic Shingles.

5. **THIS COURT ORDERS** that putative members of the Class may opt out of the class proceeding by sending a written request to opt-out to Class Counsel to the address specified in the full Notice of Certification. The request to opt-out must contain the information specified in the full Notice of Certification. Written requests to opt out must be postmarked no later than 90 days of the first date of the publication of the summary Notice of Certification.

6. **THIS COURT ORDERS** that the proceeding is certified on behalf of the Class in respect of the following common issues:

Negligence Claims

- (a) Did the Defendants, or any of them, owe a duty of care to Class Members to:
- (1) ensure that the IKO Shingles were designed and manufactured properly and in a good and workmanlike manner;
 - (2) ensure that the IKO Shingles would under normal conditions, usage and applications last a reasonable period of time;
 - (3) engage in adequate research and testing in respect of the design of IKO Shingles;
 - (4) accurately represent the nature and quality of the IKO Shingles; and
 - (5) upon discovering that the IKO Shingles were defective and prone to premature failure, promptly remove the IKO Shingles from the marketplace, disclose the defects to Class Members, and take other appropriate remedial action?
- (b) Did the Defendants, or any of them, breach any of the above-listed duties of care to Class Members?
- (c) If at the conclusion of the common issues trial the court finds that the IKO Shingles are defective and prone to premature failure, are class members entitled to mitigate their damages by removing and replacing their IKO Shingles?

Punitive Damages

- (d) (1) Does the conduct of the Defendants, or any of them, give rise to a *prima facie* entitlement to punitive damages?
- (2) If the answer to (d)(1) is yes, should an award of punitive damages be made against the Defendants, or any of them? If so, in what amount?

7. **THIS COURT ORDERS** that common issue d(2) above shall be determined following the resolution of individual issues and the quantum of compensatory damages.
8. **THIS COURT ORDERS** that the proceeding is certified on behalf of the Subclass in respect of the following common issues:

Consumer Protection Claims

Fit for Purpose

- (a) Are IKO Shingles “fit for the purpose for which goods of that kind are ordinarily used”, as per *Consumer Protection Act*, RSQ c P-40.1, s 37?
- (b) Are the Defendants subject to and in violation of a deemed warranty that “where the consumer expressly or by implication makes known to the retail seller any particular purpose for which the product is being bought, that the product supplied under the contract is reasonably fit for that purpose, whether or not that is a purpose for which the product is commonly supplied, except that this warranty is deemed not to be given where the circumstances show that: (i) the consumer does not rely on the retail seller’s skill or judgment; or (ii) it is unreasonable for the consumer to rely on the retail seller’s skill or judgment”, as per *The Consumer Protection Act*, RSS 1996, c C-30.1, s 48(e)?

Durable

- (c) Are IKO Shingles “durable in normal use for a reasonable length of time, having regard to their price, the terms of the contract and the conditions of their use”, as per *Consumer Protection Act*, RSQ c P-40.1, s 38?
- (d) Are the Defendants subject to and in violation of a deemed warranty that “the product and all its components are to be durable for a reasonable period, having regard to all the relevant circumstances of the sale, including: (i) the description and nature of the product; (ii) the purchase price; (iii) the express warranties of the retail seller or manufacturer; and (iv) the necessary maintenance the product normally requires and the manner in which it has been used”, as per *The Consumer Protection Act*, RSS 1996, c C-30.1, s 48(g)?

Design Defect

- (e) Did the Defendants supply a “consumer product that is unreasonably dangerous to person or property because of a defect in design, materials or workmanship”, as per *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1, s 27?

Misrepresentation

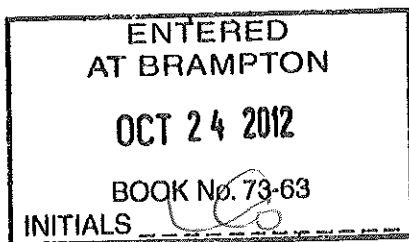
- (f) Did the Defendants make a statement on the packing of IKO Shingles that IKO Shingles comply with CSA A123.1 and/or a statement in the IKO written warranties specifying a particular warranty period? If so, in making such statement(s), did the Defendants engage in an “unfair” or “deceptive” practice in violation of the following statutory provisions:
- (1) *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 4;
 - (2) for claims arising prior to July 5, 2004, the former *Trade Practice Act*, RSBC 1996, c 457, s 3;
 - (3) *The Business Practices Act*, SM 1990-91, c 6, s 2;
 - (4) *Consumer Protection Act*, RSQ c P-40.1, s 40 and 41; and
 - (5) *The Consumer Protection Act*, RSS 1996, c C-30.1, s 5.
- (g) If at the conclusion of the common issues trial the court finds that IKO has violated the above-referenced statutory provisions, what remedies are members of the subclass entitled to and should the court order restitution of all or part of the monies or other consideration paid by the class members in relation to IKO Shingles?

9. **THIS COURT ORDERS** that Kevin Barwin is appointed as representative plaintiff for the Class.
10. **THIS COURT ORDERS** that the litigation plan is hereby approved in the form attached hereto as Schedule “A”.

Date:



The Honourable Justice Baltman



SCHEDULE "A"

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

BRENDA WHITE and KEVIN BARWIN

Plaintiffs

- and -

IKO INDUSTRIES LTD., CANROOF CORPORATION INC.,
and I.G. MACHINE & FIBERS LTD.

Defendants

Proceeding under the *Class Proceedings Act*, 1992

**PLAINTIFFS' LITIGATION PLAN
Dated as of April 25, 2012**

**ARTICLE ONE
INTERPRETATION**

Defined Terms

1.1 In this plan:

- (1) **"Class Action"** means Ontario Superior Court of Justice Action No. CV-09-00005758CP (Brampton);
- (2) **"Class Counsel"** means Siskinds LLP;
- (3) **"Court"** means the Ontario Superior Court of Justice;
- (4) **"CPA"** means the *Class Proceedings Act, 1992*, SO 1992, c 6;
- (5) **"IKO Organic Shingles"** means all asphalt organic shingles manufactured by or on behalf of IKO Industries Ltd., Canroof Corporation Inc., or I.G. Machine &

Fibers Ltd. whether sold under the names Chateau, Renaissance XL, Aristocrat, Total, Armour Seal, Superplus, Armour Lock, Royal Victorian, Cathedral XL, Ultralock 25, Armour Plus 20, Armour Tite, Chateau Ultra Shadow (laminated organic), Cathedral XL, Crowne 30, or otherwise.

**ARTICLE TWO
COMMUNICATING WITH CLASS MEMBERS**

- 2.1 Class Counsel will regularly report to class members through its firm's class action website (www.classaction.ca) and as otherwise provided in this Litigation Plan. Class Counsel's website shall include an electronic form that persons can complete in order to receive additional information about the class action.
- 2.2 Class Counsel will provide class members with updates of all major steps in the Class Action.
- 2.3 Class Counsel will designate a person to answer communications from class members concerning the Class Action. Class Counsel is able to communicate with class members in English and French.

**ARTICLE THREE
LITIGATION STEPS PRIOR TO THE COMMON ISSUES TRIAL**

- 3.1 After disposition of the certification motion, assuming success for the Plaintiffs, the Parties shall attend a case management conference to set a schedule for the remaining steps in the Class Action, which are described below.

Notice of Certification

- 3.2 The Plaintiffs will ask the Court to approve:

- (1) the form and content of the long-form and summary notice of the certification of the Class Action (the “Notice of Certification”); and
- (2) the means by which Notice of Certification will be disseminated to class members (the “Notice Program”).

3.3 The Plaintiffs propose that the long-form and summary Notice of Certification be disseminated in accordance with the following Notice Program:

- (1) The long-form Notice of Certification will be:
 - (i) sent by direct mail to the following persons in Canada as identified in the Defendants’ records:
 - (A) any person who has filed a warranty claim regarding IKO Shingles;
 - (B) any person who has inquired with the Defendants’ warranty or client services departments or otherwise regarding IKO Shingles;
 - (C) any person who has commenced individual litigation against the Defendants regarding IKO Shingles; and
 - (D) distributors of IKO Shingles, along with a request that the notice be forwarded to their customers who might be class members.

If the Defendants have not produced to the Plaintiffs the information necessary to provide direct mail notice to the persons identified above, the Plaintiffs will ask the Court to require the Defendants to produce such information.

For persons residing in Quebec, the Notice of Certification will be sent in English and French.

- (ii) sent by direct mail or email to any person who has inquired with Class Counsel regarding the Class Action. As of April 24, 2012, more than 2,000 persons have inquired with Class Counsel regarding the Class Action. Class Counsel has been maintaining a database with names and addresses for such persons.

Additionally, notice will be sent to any persons who have contacted counsel in the related Alberta and Quebec litigation.

For persons residing in Quebec, the Notice of Certification will be sent in English and French;

- (iii) posted by Class Counsel, in English and French, on its website. Class Counsel will implement measures to ensure that its website is among the first websites listed when a user completes an internet search that is topically related to IKO Shingles and/or the Class Action.

(2) The summary Notice of Certification will be:

- (i) posted once in the following newspapers, in either English or French, as is appropriate for each newspaper, subject to each having reasonable publication deadlines and costs:

- (A) The Globe and Mail, National Edition
- (B) Montréal La Presse
- (C) Montréal The Gazette
- (D) Le Soleil

- (ii) be published once in the following industry magazines in either English or French, as is appropriate for each magazine, subject to each having reasonable publication deadlines and costs:

- (A) Roofing Canada Magazine
- (B) Canadian Contractor Magazine
- (C) Home Builder Magazine

- (iii) sent to industry associations in both English or French, requesting voluntary distribution to their membership:

- (A) Canadian Roofing Contractors' Association (CRCA)
- (B) Canadian Home Builders Association

3.4 Class Counsel will consult with an experienced notice provider to develop an online notice program. Such program might include, subject to reasonable costs, the development of a Facebook page regarding the Class Action and/or paid advertising on internet search engines (such as Google and Bing) and/or industry websites.

- 3.5 The Plaintiffs will ask the Court to order that the costs of the Notice Program be paid by the Defendants. Alternatively, the costs of Notice Program will be paid by the Plaintiffs in the first instance with the right reserved to the Plaintiffs to seek the recovery of these costs from the Defendants by order of the judge presiding at the trial of the common issues.
- 3.6 On July 9, 2010, the Court issued an endorsement requiring the Defendants to provide notice of the Class Action to putative class members before settling any warranty claims. The notice informs putative class members that they can contact Class Counsel for additional information about the Class Action. The Plaintiff will ask the Court to order that this notice be updated to reflect the fact that the Class Action has been certified as a class proceeding.

Opt-Out Procedure

- 3.7 The Notice of Certification shall advise putative class members of their rights to opt-out of the Class Action.
- 3.8 The Plaintiffs propose the following opt-out procedure:
- (1) A person may opt-out of the Class Action by sending a written election to opt-out to Class Counsel at an address to be specified in the Notice of Certification. The written election must be signed by the putative class member and contain a statement to the effect that the putative class member wants to be excluded from the Class Action.
 - (2) Written elections to opt-out must be postmarked no later than ninety (90) days after the Notice of Certification is first published.

Pleadings

3.9 The Defendants shall provide statements of defence no later than thirty (30) days following the date on which the Court renders a decision with respect to certification.

Document Exchange and Management

3.10 Within sixty (60) days after the close of pleadings or as otherwise agreed to by the Parties, the Parties shall attend a “meet and confer” in order to develop a discovery plan in accordance with Rule 29.1. In developing the discovery plan, the Parties shall consult with the Sedona Canada Principles Addressing Electronic Discovery.

3.11 In accordance with Rule 30 and the discovery plan, the Parties shall provide documentary discovery.

3.12 Class Counsel are able to handle the intake and organization of the documents that will likely be produced by the Defendants and will use data management systems to organize, code and manage the documents.

3.13 The same data management systems will be used to organize and manage all relevant documents in the possession of the Plaintiffs.

Examinations for Discovery

3.14 The Parties shall conduct examinations for discovery in accordance with Rule 31.

3.15 The Plaintiffs will examine for discovery at least one representative from each of the Defendants but cannot, until the production of documents has been completed, estimate the time required for each examination, including undertakings and refusals.

3.16 The Plaintiffs may ask the Court for an order allowing it to examine multiple representatives of one or more Defendant, if necessary and/or for an order allowing more than seven hours of cross-examination.

3.17 The Parties can select to conduct examination for discovery by written questions in accordance with Rule 35.

Expert Reports

3.18 Class Counsel anticipate the exchange of detailed expert reports. All expert reports will be exchanged within 180 days of the completion of examinations for discovery, unless the Court orders otherwise.

Motions

3.19 Although no motions other than those indicated in this litigation plan are currently anticipated by the Plaintiffs, additional motions may be required and will be scheduled as the case progresses.

Mediation

3.20 The Plaintiffs will participate in mediation if the Defendants are prepared to do so.

Clarification of the Common Issues

3.21 Following certification, examinations for discovery and the exchange of expert opinions and before the trial of the common issues, the Plaintiffs may ask the Court for an order to clarify and/or redefine the common issues, if required.

ARTICLE FOUR THE COMMON ISSUES TRIAL

4.1 The common issue trial will proceed pursuant to Rules of Court. The common issue trial will determine:

- (1) Were the IKO Shingles defective, not of merchantable quality, prone to premature failure and/or unfit for the purpose for which they were sold, distributed and marketed?
- (2) Were the Defendants in violation of the relevant provincial consumer protection legislation? If so, what remedies are available under the applicable consumer protection legislation?
- (3) Were the Defendants negligent in the design, manufacturing and testing of IKO Shingles?

**ARTICLE FIVE
LITIGATION STEPS FOLLOWING THE COMMON ISSUES TRIAL**

5.1 Following the common issue trial, assuming success in favour of the Plaintiffs, the Parties shall attend a case management conference to determine the process to be followed in bringing the Class Action to a final resolution, including the resolution of individual issues relating to causation and damages.

Resolution of Individual Issues

5.2 The Plaintiffs will ask the Court to specify and oversee procedures to be followed for determining the individual issues, in accordance with ss. 25 and 26 of the CPA. In doing so, the Court may dispense with any procedural steps that are considered unnecessary or authorize special procedural steps, including rules relating to the admission of evidence and means of proof. The procedures to be implemented might include the following aspects:

- (1) setting a claims bar date by which date claimants will be required to file their claims.

(2) creating a standard claim form and filing procedure. As part of the claim form, claimants might be required to file evidence establishing, *inter alia*:

- (i) the claimant has or had IKO Shingles installed on his/her/its house, building or other structure;
- (ii) the claimant has experienced a failure(s) in respect of his/her/its IKO Shingles;
- (iii) the number of IKO Shingles the class member has installed on his/her/its home or other building;
- (iv) the extent and nature of any damages caused by the failure(s) of the IKO Shingles;
- (v) any expenses incurred by the claimant in repairing damage caused by the failure(s) of the IKO Shingles, including any consequential damages caused by the failure of the IKO Shingles (including damage to the roof below the IKO Shingles and damages to interior of the house, building or other structure); and
- (vi) expenses incurred repairing and/or replacing the IKO Shingles.

The claim form will contain detailed instructions regarding the nature of the evidence required to support the claim.

(3) appointing an independent third-party to receive and process claims (the “Adjudicator”). The Adjudicator must have English and French capabilities. The Adjudicator will be responsible for *inter alia*:

- (i) responding to class member inquiries regarding the claims process;
- (ii) receiving claim forms;
- (iii) reviewing claims for completeness, notifying class members of any deficiencies in their claim forms and providing class members with the opportunity to remedy any deficiencies;
- (iv) assessing claims, including making a determination as to whether the claimant:
 - (A) is a class member;

- (B) has experienced a failure(s) of his/her/its IKO Shingles;
 - (C) the amount of the claimant's damages, including the claimant's prorated share of any punitive damages award and/or prejudgment and post-judgment interest award; and
 - (D) whether the claim is a member of the subclass, as defined in the notice of motion, and, if so, the claimant's prorated share of any damages awarded pursuant to the consumer protection legislation, including any prejudgment and post-judgment interest award.
- (v) issuing a claim decision to the class member, the Defendants and Class Counsel in respect of the matters outlined in paragraph 5.2(3)(iv) above; and
- (vi) reporting to counsel and the Courts as required.
- (4) creating a mechanism for claimants and Defendants to dispute the Adjudicator's findings pursuant to paragraph 5.2(3)(iv)(A) to (C) and for claimants to dispute the Adjudicator's findings pursuant to paragraph 5.2(3)(iv)(D). Defendants shall also be permitted to dispute claims on the basis that the principal cause of the failure of the claimant's IKO Shingles was improper installation or some other factor completely unrelated to the design and manufacture of IKO Shingles. The mechanism for disputing claims might include the following aspects:
- (i) Appointing independent third-parties to resolve disputed findings and disputes regarding causation (the "Referees"). The Referees shall be appointed on a regional basis, across Canada. At least one Referee must have English and French capabilities. Alternatively, disputes could be resolved by the Court.
 - (ii) The development of a standardized form for claimants and Defendants to dispute the Adjudicator's findings, and for the Defendants to dispute causation.
 - (iii) The development of a standardized form for claimants and Defendants to respond to the disputed findings, and for claimants to respond to disputes regarding causation. The Defendants shall have no standing to respond to disputed findings regarding section 5.2(3)(iv)(D).
 - (iv) The Defendants will be entitled to inspect the claimant's roof and attic area of the building or other structure for the purposes of disputing

causation, and the claimant must provide the Defendants with reasonable access to his/her/its property for this purpose.

- (v) The ability to cross-examine the claimants and Defendants on the contents of the claim form and standardized forms. To the extent possible, cross-examinations shall be conducted in writing or by teleconference. Claimants and Defendants must apply to the Referee for permission to conduct cross-examinations by way of video conference or in-person, and must show that the other forms of cross-examination are inadequate in the circumstances. The Defendants will be responsible for arranging for the transcription of the cross-examinations.
 - (vi) Subject to the Referees' availability and the geographical distribution of claimants, disputes shall be heard by the Referee who is located geographically nearest to the claimant.
 - (vii) To the extent possible, the Referee shall resolve the dispute based on the claim form, standardized forms, and transcripts of any cross-examinations. Where, in the Referee's view, additional submissions are necessary, the Referee can request additional submissions from the claimant and/or the Defendants. In doing so, the Referee shall consider whether such submissions can be made in writing or by way of teleconference or video-conference.
 - (viii) Where the Referee considers it necessary and appropriate, the Referee can request that the Defendants submit expert evidence regarding the cause of the failure of the IKO Shingles.
 - (ix) The Referee shall issue a decision to the claimant, the Defendants and Class Counsel regarding the subject matter of the dispute.
 - (x) The Referee's decision shall be final and binding, and shall be subject to no further right to review.
 - (xi) At any stage in the dispute resolution process, the claimant and Defendants can agree to settle the disputed claims.
 - (xii) Class Counsel shall be available to provide assistance to claimants in the dispute resolution process.
- (5) payment of eligible claims. The Defendants shall be required to make direct payment to eligible claimants promptly after the Adjudicator has issued its findings or, if there is a dispute, promptly after the Referee has issued its decision. Before issuing payment of the claims, the Defendants shall deduct and remit to Class Counsel:

- (i) any amounts awarded by the Court in respect of Class Counsel fees, disbursements and applicable taxes; and
- (ii) in the event that the Court orders that administrative costs or some portion of them are to be paid out of class members' recovery, any amounts approved by the Court in respect to notice and administration costs, including the fees of the Adjudicator and Referees.

5.3 The claims procedure shall, wherever practical, utilize a paperless, electronic web-based technology system.

Notice of the Resolution of Common Issues and Claim Procedure

5.4 Class Counsel will prepare a notice, the form and content of which is to be approved by the Court, informing class members of the resolution of the common issues and the claim procedure (the "Notice of Resolution"). The Plaintiffs may ask that the Notice of Resolution be published in the same or similar manner as the Notice of Certification.

Reporting to the Court

5.5 The Parties will report to the Court on a regular basis or as required by the Court with the following information with respect to each claimant:

- (1) the claimant's name and address;
- (2) the Adjudicator's findings;
- (3) whether the claimant and/or Defendants have disputed the Adjudicator's findings and, if so, the result of the Referees' review;
- (4) the amount of the claim, including any relevant deductions for Class Counsel fees and/or administration costs; and
- (5) the date of payment of the claim.

Costs of Administration

5.6 The Plaintiffs will ask the Court to order that the Defendants pay all administration costs, including the costs of the Notice of Resolution and the fees of the Adjudicator and Referees. If the Court does not to so order, the Plaintiffs will seek an order that these costs be paid out of the total recovery after payment of counsel fees, disbursements and applicable taxes, but before any distribution to eligible class members

**ARTICLE SIX
AMENDMENT OF THIS LITIGATION PLAN**

6.1 This litigation plan may be amended from time to time by directions given at case conferences or by further order of the Court.

ONTARIO SUPERIOR COURT OF JUSTICE

Proceeding commenced at Brampton

Proceeding under the *Class Proceedings Act, 1992*

**ORDER
Certification**

Siskinds LLP
Barristers & Solicitors
680 Waterloo Street
London, ON N6A 3V8

Charles M. Wright LSUC # 36599Q
Linda Visser LSUC #52158I
Tel: (519) 672-2121
Fax: (519) 672-6065

Lawyers for the Plaintiff