

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**S. HUSAINY**

Plaintiff

- and -

**LENNOX INDUSTRIES (CANADA) LTD., LENNOX INDUSTRIES, INC., AND  
LENNOX INTERNATIONAL INC.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

**TO THE DEFENDANTS**

**A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the plaintiff. The claim made against you is set out in the following pages.

**IF YOU WISH TO DEFEND THIS PROCEEDING**, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

**IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.**

**TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED** if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: September 23, 2015

Issued by (S) Signature  
**Local Registrar**

Address of court office: 161 Elgin Street  
2<sup>nd</sup> Floor  
Ottawa, ON K2P 2K1

**TO: Lennox Industries (Canada) Ltd.**  
5-1 Adelaide Street North  
London, Ontario  
N6B 3P4

Tel: 1 (519) 439-3377

Fax: 1 (519) 439-3361

**AND TO: Lennox Industries, Inc.**  
2140 Lake Park Boulevard  
Richardson, Texas  
75080-2254, USA

Tel: 1 (972) 497-5000

**AND TO: Lennox International Inc.**  
2140 Lake Park Boulevard  
Richardson, Texas  
75080-2254, USA

Tel: 1 (972) 497-5000

## DEFINED TERMS

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

(a) “**Lennox Air Conditioner**” means a Lennox brand air conditioner containing a **Lennox Evaporator Coil**;

(b) “**Lennox Evaporator Coil**” or “**Lennox Coil**” means an uncoated copper tube evaporator coil of the following brands:

- Lennox
- Aire-Flo
- Armstrong Air
- AirEase
- Concord and/or
- Ducane;

(c) “**Design Defect**” means the propensity and predisposition of the **Lennox Evaporator Coils** to **Formicary Corrosion**, which results in refrigerant leaks and failure;

(d) “**Formicary Corrosion**” means the particular type of degradation also known as ant’s nest corrosion and pinhole corrosion, which occurs in copper-based alloys;

(e) “**Class**” or “**Class Members**” means all residents in Canada who purchased a **Lennox Air Conditioner** containing a **Lennox Evaporator Coil** and/or a **Lennox Evaporator Coil** (whether separately, as part of an air handler, or as part of a packaged unit);

- (f) “*Courts of Justice Act*” means the *Ontario Courts of Justice Act*, RSO 1990, c. C-43, as amended;
- (g) “*Class Proceedings Act*” means the *Class Proceedings Act*, 1992, SO 1992, c. 6, as amended;
- (h) “*Sale of Goods Act*” means the *Sale of Goods Act*, R.S.O. 1990, c. S.1, as amended;
- (i) “*Consumer Protection Act*” means the *Consumer Protection Act, 2002*, SO 2002, c. 30, Schedule A, as amended;
- (j) “**Consumer Protection Legislation**” means:
- (i) The *Business Practices and Consumer Protection Act*, SBC 2004, c.2, as amended, including ss. 4, 5 & 8-10;
  - (ii) *The Business Practices Act*, CCSM, c. B120, as amended, including ss. 2 & 23;
  - (iii) *Consumer Protection and Business Practices Act*, SNL 2009, c. C-31.1, as amended, including ss. 7, 8, 9 & 10, and *Trade Practices Act*, RSNL 1990, c. T-7, as amended, including ss. 5, 6 & 14;
  - (iv) The *Consumer Protection Act*, RSQ c. P-40.1, as amended, including ss. 219, 228, 253 & 272;
  - (v) The *Consumer Product Warranty and Liability Act*, SNB 1978, c. C-18.1, including ss. 4, 10, 12, 15-18, 23 & 27;
  - (vi) The *Consumer Protection Act*, RSNS 1989, c. 92, including ss. 26 & 28A;
  - (vii) The *Business Practices Act*, RSPEI 1988, c. B-7, as amended, including ss. 2-4;
  - (viii) The *Consumer Protection Act*, SS 1996, c. C-30.1, as amended, including ss. 5-8, 14, 16, 48 & 65; and

- (ix) The *Fair Trading Act*, RSA 2000, c. F-2, as amended, including ss. 6, 7 & 13;
- (k) “**Competition Act**” means the *Competition Act*, RSC 1985, c. C-34, as amended;
- (l) “**Consumer Packaging and Labelling Act**” means the *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38, as amended, including ss. 7, 9 & 20;
- (m) “**Plaintiff**” means S. Husainy;
- (n) “**Defendants**” or “**Lennox**” means Lennox Industries (Canada) Ltd., Lennox Industries, Inc., and Lennox International Inc.; and
- (o) “**Representation**” means the **Defendants’** false, misleading or deceptive representations that the **Lennox Air Conditioners** and/or **Lennox Evaporator Coils** (a) have performance characteristics, uses, benefits and/or qualities which they did not possess, (b) are of a particular standard and/or quality that they are not, (c) are available for a reason that does not exist; and the **Defendants’** (d) use of exaggeration, innuendo and ambiguity regarding their ability to cool the air as well as (e) use of exaggeration, innuendo and ambiguity in failing to disclose that the **Lennox Air Conditioners** and/or **Lennox Evaporator Coils** were plagued by a serious and pervasive **Design Defect**, despite longstanding knowledge;

## THE CLAIM

2. The proposed Representative Plaintiff, S. Husainy, claims on his own behalf and on behalf of the members of the class as defined in paragraph 4 below (the “Class”) as against Lennox Industries (Canada) Ltd., Lennox Industries, Inc., and Lennox International Inc. (the “Defendants”):

- (a) An order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding and appointing the Plaintiff as Representative Plaintiff for the Class Members;
- (b) A declaration that the Defendants are strictly liable for all of the damages suffered by the Class Members;
- (c) A declaration that the Defendants committed fraud by concealment when they concealed and/or suppressed material facts concerning the Lennox Air Conditioners and/or Lennox Evaporator Coils;
- (d) A declaration that the Defendants breached their duty to warn the Plaintiff and Class Members of the defective nature of Lennox Air Conditioners and/or Lennox Evaporator Coils;
- (e) A declaration that the Defendants were negligent in the design, manufacture, testing, inspection, distribution, warranty, advertising, marketing, and/or sale of the Lennox Air Conditioners and/or the Lennox Evaporator Coils;

- (f) A declaration that the Defendants breached their express and/or implied warranty relating to the Lennox Air Conditioners and/or the Lennox Evaporator Coils;
- (g) A declaration that the Defendants breached the *Sale of Goods Act* when they breached the implied condition as to quality or fitness for a particular purpose;
- (h) A declaration that the Defendants made representations that were false, misleading, deceptive, and unconscionable, amounting to unfair practices in violation of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation as well as the *Competition Act*;
- (i) A declaration that the Defendants violated the *Consumer Packaging and Labelling Act* in applying, selling, importing and/or advertising “false or misleading representations” onto the Lennox Air Conditioners and/or Lennox Evaporator Coils and in selling, importing or advertising the Lennox Air Conditioners and/or Lennox Evaporator Coils such that consumers might reasonably be misled with respect to the quality of the product;
- (j) A declaration that the present Statement of Claim is considered as notice given by the Plaintiff on his own behalf and on behalf of “person similarly situated” and is sufficient to give notice to the Defendants on behalf of all Class Members;
- (k) In the alternative, a declaration, if necessary, that it is in the interests of justice to waive the notice requirement under Part III and s. 101 of the *Consumer*

*Protection Act* and the parallel provisions of the Consumer Protection Legislation;

- (l) General damages in an amount to be determined in the aggregate for the Class Members for, *inter alia*, loss of use of the Lennox Air Conditioners, pain, suffering, stress, trouble and inconvenience;
- (m) Special damages in an amount that this Honourable Court deems appropriate to compensate Class Members for, *inter alia*, the purchase price of the Lennox Air Conditioners and/or the Lennox Evaporator Coils [or the overpayment thereof], the out-of-pocket expenses for inspections, repairs and replacements, including replacement refrigerant, and/or the cost of a replacement air conditioner;
- (n) Punitive, aggravated, and exemplary damages in an amount that this Honourable Court deems appropriate;
- (o) An order that Class Members are entitled to a refund of the purchase price of their Lennox Air Conditioners and/or Lennox Evaporator Coils, including, but not limited to sales taxes, based *inter alia* on revocation of acceptance and rescission;
- (p) A declaration that the Defendants are jointly and severally liable for any and all damages awarded;
- (q) In the alternative, an order for an accounting of revenues received by the Defendants resulting from the sale of their Lennox Air Conditioners and/or Lennox Evaporator Coils;

- (r) A declaration that any funds received by the Defendants through the sale of their Lennox Air Conditioners and/or Lennox Evaporator Coils are held in trust for the benefit of the Plaintiff and Class Members;
- (s) Restitution and/or a refund of all monies paid to or received by the Defendants from the sale of their Lennox Air Conditioners and/or Lennox Evaporator Coils to members of the Class on the basis of unjust enrichment;
- (t) In addition, or in the alternative, restitution and/or a refund of all monies paid to or received by the Defendants from the sale of their Lennox Air Conditioners and/or Lennox Evaporator Coils to members of the Class on the basis of *quantum meruit*;
- (u) An order compelling the creation of a plan of distribution pursuant to ss. 23, 24, 25 and 26 of the *Class Proceedings Act*;
- (v) A mandatory order compelling Lennox to recall, repair and/or replace Class members' Lennox Air Conditioners and/or Lennox Evaporator Coils free of charge;
- (w) A permanent injunction restraining the Defendants from continuing any actions taken in contravention of the law, whether tortious, statutory, and/or equitable;
- (x) An order directing a reference or such other directions as may be necessary to determine issues not determined at the trial of the common issues;

- (y) Pre-judgment and post-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to ss. 128 and 129 of the *Courts of Justice Act*;
- (z) Costs of notice and administration of the plan of distribution of recovery in this action, plus applicable taxes, pursuant to s. 26 (9) of the *Class Proceedings Act*;
- (aa) Costs of this action on a substantial indemnity basis including any and all applicable taxes payable thereon; and
- (bb) Such further and other relief as counsel may advise and/or this Honourable Court may deem just and appropriate in the circumstances.

## **THE PARTIES**

### **The Representative Plaintiff**

3. The Plaintiff, S. Husainy, is an individual residing in the City of Kanata, in the Province of Ontario. In the summer of 2006, Mr. Husainy purchased a Lennox Air Conditioner with a Lennox Evaporator Coil from Energy Centre at 1181 Newmarket Street, in Ottawa, Ontario for a total cost of \$2,817.48 including taxes.

### **The Class**

4. The Plaintiff seeks to represent the following class of which he is a member (the “Proposed Class”):

All residents in Canada who purchased a Lennox Air Conditioner containing a Lennox Evaporator Coil and/or a Lennox Evaporator

Coil (whether separately, as part of an air handler, or as part of a packaged unit).

### **The Defendants**

5. The Defendant, Lennox Industries (Canada) Ltd. (hereinafter “Lennox Corp.”), is a Canadian corporation with its principal place of business in Ontario. It is a wholly-owned subsidiary of Defendant Lennox Industries, Inc. that does business throughout Canada.

6. The Defendant, Lennox Industries, Inc. (hereinafter “Lennox Industries”), is an American corporation with its principal place of business in Texas. It is a large manufacturer of heating, ventilation and air conditioning products for residential use. It is the parent company of Defendant Lennox Canada and it is a subsidiary of Defendant Lennox International Inc. It is the registrant of the Canadian trade-mark LENNOX (TMA712262) which was filed on October 13, 2006.

7. The Defendant, Lennox International Inc. (hereinafter “Lennox International”), is an American corporation with its principal place of business in Texas. It is a parent company of Defendant Lennox Industries.

8. The Defendants are and, have been at all relevant times, engaged in the business of designing, manufacturing, testing, inspecting, distributing, warranting, advertising, marketing, and/or sale of the Lennox Air Conditioners and/or Lennox Evaporator Coils to be free of defects in material and workmanship.

9. Given the close ties between the Defendants and considering the preceding, they are all jointly and severally liable for the acts and omissions of the other.

10. The Defendants are residents in Ontario for the purpose of s. 2 of the *Consumer Protection Act*.

### **THE NATURE OF THE CLAIM**

11. These class proceedings concern the numerous quality, design, and manufacturing defects with the Defendants' Lennox Air Conditioners and/or Lennox Evaporator Coils that render them unmerchantable and unsuitable for use.

12. The Defendants failed to disclose, despite longstanding knowledge, that the Lennox Air Conditioners and/or Lennox Evaporator Coils are defective and predisposed to formicary corrosion and failure, which would cause refrigerant leaks and an inability to fulfill their purpose to cool the air (the "Design Defect"). The Defendants actively concealed the Design Defect and the fact that its existence would cause the units to fail.

13. Further, the Defendants touted the Lennox Air Conditioners' supposed reliability, dependability, comfort, money-saving efficiency, and "industry-leading warranty coverage".

14. The Representation was made for the purposes of promoting, directly or indirectly, the purchase of a product or for the purpose of promoting, directly or indirectly, the business interests of the Defendants. The Representation was made knowingly or recklessly. The Representation was made to the public. The Representation was false or misleading in a material respect, namely as to the performance characteristics, the standard and quality and their use of exaggeration, innuendo and ambiguity in failing to disclose the existence of the Design Defect.

15. At no time prior to entering into the agreements to purchase the Lennox Air Conditioners and/or Lennox Evaporator Coils were Class Members advised of any concerns relating to formicary corrosion.

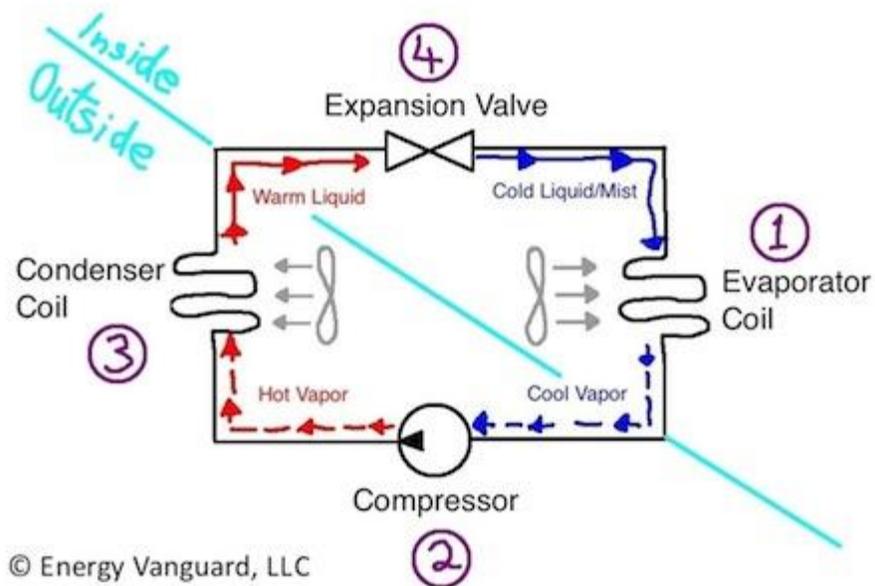
16. The Class Members suffered loss or damage as a result of the Defendants' conduct.

**I. Air Conditioner Basics**

17. An air conditioner is a system or machine that removes heat from an area using a cycle in which heat is moved out of the area where it is hot and cold air is blown out.

18. Air conditioners, including Lennox Air Conditioners, contain a component known as an evaporator coil, which is an essential component to the system along with the compressor, condenser coil, and expansion valve. Inside the evaporator coil, there is a refrigerant (such as Freon, Puron, etc.), which absorbs heat from the air passing over a tube and acts as a heat exchange, thereby cooling the air.

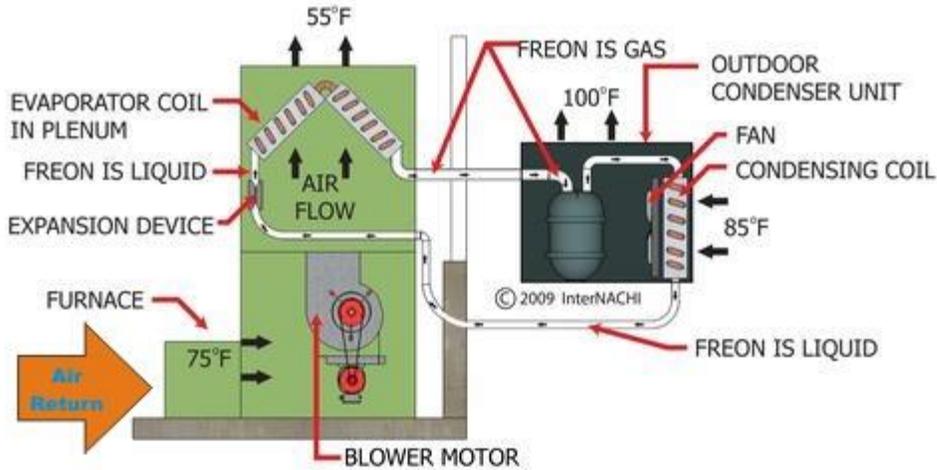
## The Refrigeration Cycle



19. In central air conditioners used for household purposes, the compressor and the condenser are located outside a consumer's house. The compressor compresses the refrigerant into high pressure gas which then travels to the condenser where it is cooled into high pressure liquid.

20. The evaporator for central air conditioners is usually located within the consumer's house and includes of a series of coils known as "evaporator coils." The liquid refrigerant is fed into the evaporator coils where it experiences a pressure drop that results in the refrigerant converting from liquid to gas. This phase conversion absorbs heat from the hot indoor air circulated over the evaporator coils by a fan, which cools the air. The cool air is then blown through the house via ducts.

### AIR CONDITIONING SYSTEM



21. All air conditioners use refrigerant in a closed-loop system designed to take advantage of a physical law known as phase conversion to provide cool air. When liquid is converted into gas, the process results in the absorption of heat. Refrigerants are substances that change phase at relatively low temperatures.

22. Like all central air conditioners used for residential purposes, the Lennox Air Conditioners at issue contain evaporator coils. Air conditioner manufacturers, such as the Defendants, have traditionally manufactured evaporator coils using copper tubing. However, copper coils are uniquely vulnerable to a type of degradation known as “formicary corrosion”<sup>1</sup>.

23. Lennox Evaporator Coils render the Lennox Air Conditioners unfit for their ordinary purpose because they are unreasonably susceptible to formicary corrosion, resulting in the loss

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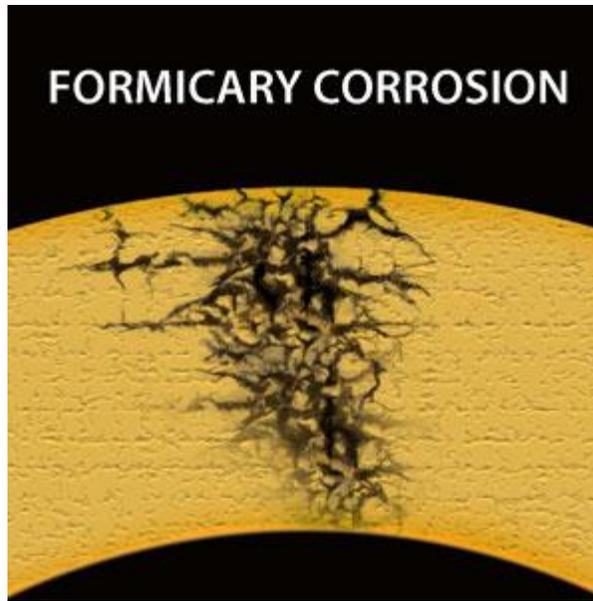
<sup>1</sup> Formicary corrosion is a type of corrosion also referred to as “ant’s nest” corrosion. This is because of the distinct ant tunnel pattern that this type of corrosion makes in copper and copper alloys (the metals that it exclusively attacks).

of refrigerant due to leakage, which reduces and ultimately eliminates the Lennox Air Conditioners' ability to provide cold air.

## **II. Formicary Corrosion**

24. The Air Conditioning Contractors of America ("ACCA") defines formicary corrosion as: "corrosion that occurs in copper based alloys. Due primarily to appearance, and the fact it appears like ant's nests in the copper under magnification it is often referred to as ant's nest corrosion...A second nickname for formicary corrosion is pinhole corrosion due to the small size of the actual holes in the copper".

25. Formicary corrosion is caused by a chemical reaction between molecules known as "volatile organic compounds", oxygen, moisture, and the copper tubes. It is caused by contaminants in the air that collect onto the condensation that forms on indoor coils during a cooling cycle. These contaminants turn into acids when they are exposed to the moisture and etch the copper of the coils in a manner that looks like tunnels in an ant farm. These microscopic etchings within the tubing cause the coil to become thin and porous enough to leak refrigerant.



26. The corrosion initiates from the evaporator coil surface and it progresses into the tube wall fairly quickly - usually within weeks or months.

27. Volatile organic compounds are a large group of carbon-based chemicals that are given off from a host of common household products and activities. For example, volatile organic compounds are given off by composite wood furniture and flooring, carpeting, cleaning and disinfecting products, air fresheners, cosmetics, and numerous other consumer products.

28. Formicary corrosion is a particularly insidious defect in an evaporator coil because the resultant leakage is difficult to detect and usually results in consumers being forced to repeatedly refill their air conditioners with refrigerant, often at significant cost, which only works to mask the defect for a period of time, until the evaporator coil ultimately fails.

29. The problem of formicary corrosion has long been known to those in the industry. According to the NACE International paper dated 1999:

Ant-nest corrosion, sometimes referred to as formicary corrosion, describes a particular form of localized corrosion found in copper tubes used for refrigeration and air conditioning applications. The nature of the attack is of a submicroscopic nature; pits created by this type of corrosion are so fine that they are not visible to the unaided eye.

30. According to a 2002 NACE International, The Worldwide Corrosion Authority study:

This is the continuing saga into a very insidious form of corrosion apparently limited to refrigeration grade copper (i.e., DHP copper, UNS C12200) although other forms of attack, similar in appearance, have been observed in other alloys. This very localized attack is known as "ant-nest corrosion" (a.k.a. formicary corrosion). A previous review of this phenomenon (6) describes the mechanism where the copper base-metal oxidizes to form copper oxides and copper carboxylates (primarily copper formate).

31. In a 2005 article, researchers stated:

Formicary, or ant's nest, corrosion is a little known phenomenon except to those who have experienced it first hand. It may best be described as micro-pitting in that the surface pits generally are so fine that they cannot be seen by the unaided eye. The first realization of a problem usually comes too late – in the form of a leaking tube....

More instances of formicary corrosion have been recorded during the past ten years that ever before.

This type of corrosion most commonly appears in copper tubing in air conditioning and refrigeration equipment...

32. In 2007, Carrier published a report on formicary corrosion, which stated, in part, that:

This issue exists industry-wide. A competitive study has shown identical corrosion failure leaks in all coil brands investigated.... The progression of the corrosion is from the exterior of the tube inward, eating away at the copper, until penetration occurs and a leak results.

33. Air conditioner manufacturers began to recognize copper coils' unique vulnerability to formicary corrosion as changes in housing and consumer behaviour made formicary corrosion more prevalent and recognizable. For example, modern homes are typically made more energy efficient by improved sealing of windows and doors, which results in less heated/cooled air escaping the home. A natural and foreseeable consequence of this increase in energy efficiency is that volatile organic compounds tend to accumulate in the home's air.

34. There are reasonable design and manufacturing techniques available to air conditioner manufacturers, such as the Defendants, to lessen or even prevent the incidence of formicary corrosion. For example, evaporator coils can be manufactured from aluminum, which is not susceptible to formicary corrosion or copper coils can be coated with a polymer sealant or tin plating. Other air conditioner manufacturers utilize these types of techniques and as a result have virtually eliminated the incidence of formicary corrosion in their air conditioners.

35. Despite being aware of the above, i.e. the susceptibility of copper coils to formicary corrosion and its increasing incidence and despite the many available remedies at its disposal, Lennox continued to design and manufacture its Air Conditioners using copper evaporator coils. Lennox continues to fix failed Lennox Evaporator Coils with similarly defective Lennox Evaporator Coils and Lennox has failed to take any of the well-known steps that are available to reduce the susceptibility of the copper in the Lennox Evaporator Coils to formicary corrosion.

36. Lennox Coils are defective because they are manufactured with materials that, within the industry, are well known to be prone to formicary corrosion, which makes the Lennox Coils unreasonably susceptible to premature rupture and refrigerant leaks under normal use and conditions.

37. Lennox has not informed its customers of the Lennox Air Conditioners' susceptibility to formicary corrosion. Lennox knew, or reasonably should have known, that the Lennox Evaporator Coils in its air conditioners were unreasonably susceptible to formicary corrosion and thus defective, but has failed or refused to inform consumers or to initiate other similar action.

38. Lennox has not informed its customers of the causes of formicary corrosion, even when replacing failed Lennox Coils, which would have allowed and enabled customers to make informed decisions about their risks and their options.

39. When a defective coil leaks to the point that it prevents the Lennox Air Conditioner from emitting cold air within the warranty period, Lennox's standard practice is to simply replace the refrigerant in the unit, instead of the defective Lennox Coil. Such a remedy; however, is only temporary and band-aid in nature, and does not address the inherent defect in the Lennox Air Conditioner.

40. After a consumer's warranty is expired, they are left with a defective product that requires a new evaporator coil, but no remedy is offered by the Defendants at this point.

41. Further, even if Lennox does replace the defective Lennox Evaporator Coil in a Lennox Air Conditioner within the warranty period, the replacement coil is equally susceptible to formicary corrosion and likely to prematurely rupture and leak refrigerant under normal use.

42. As a matter of practice, when a Lennox Coil fails due to formicary corrosion, Lennox requires its authorized dealers/service technicians to obtain the failed Lennox Coil from the

Lennox Air Conditioner owner and to return it to Lennox as part of its warranty protocol; otherwise Lennox will not credit the dealer/technician for the work done. In this way, Lennox maintains exclusive control over all evidence relating to the (defective) and failed Lennox Coils, failure rates and in particular root cause analysis of copper Lennox Coil failures.

43. The Defendants have known of the Lennox Air Conditioners' defects and have failed to timely honour their express and implied warranties.

44. Despite knowing of the defects in the Lennox Air Conditioners, Lennox has neither notified all purchasers, builders, and/or homeowners with the Lennox Air Conditioners of the defect nor provided appropriate relief.

### **III. The Defendants' Marketing and Representations**

128. Lennox designed, manufactured, tested, inspected, distributed, warranted, advertised, marketed and/or sold, through distributors, the Lennox Air Conditioners to the Class and their builders, contractors, subcontractors or agents. Lennox Air Conditioners were installed on Class members' structures.

129. As outlined above, Lennox Coils are defective because they are unreasonably susceptible to formicary corrosion and break prematurely during normal use, resulting in the failure to prevent the leakage of vital refrigerant.

130. Lennox expressly and impliedly warranted, via its user manuals, website, brochures, specifications, and/or models that Lennox Air Conditioners are fit for the ordinary purpose in which such goods are used.

131. On its website, Lennox represents the following:

For more than a hundred years, Lennox has set the standard for home comfort with innovative heating, cooling and indoor air quality products. We stand behind those products with industry-leading warranty coverage designed to protect your investment and ensure your peace of mind.

132. Lennox states in its product brochure that “Every component in the 13ACX is designed for exceptional durability and easy maintenance year after year. Every unit is built solid inside and out and thoroughly tested before leaving the factory. And once it’s installed, Lennox’ industry-leading warranty coverage adds another layer of protection for your investment”.

133. Lennox continues to make false representations about the quality and fitness of the Lennox Air Conditioners including, but not limited to:

Reliable performance, ideal comfort and money-saving energy efficiency all come together in one perfect package in the Merit Series 13ACX air conditioner. Its dependable scroll compressor and high-efficiency outdoor coil work together to keep your home comfortable and your energy costs under control.

#### **IV. Summative Remarks**

134. Plaintiff and the Class Members that he seeks to represent suffered economic damages by purchasing the Defendants’ products, did not receive the benefit of the bargain, suffered out-of-pocket losses, and are therefore entitled to damages.

135. The Plaintiff and the Class Members purchased air conditioners and/or evaporator coils that were of a lesser standard, grade, and quality than represented, and did not receive products that met ordinary and reasonable consumer expectations. Therefore, all purchasers of the

Lennox Air Conditioners and/or Lennox Evaporator Coils overpaid, through a higher purchase price, than they would have had the defects been disclosed.

136. In other words, the Plaintiff and members of the Class would not have purchased the Lennox Air Conditioners and/or Lennox Evaporator Coils or would not have paid substantially less had they known that the Lennox Air Conditioners and/or Lennox Evaporator Coils were prone to formicary corrosion.

137. The Defendants placed the Lennox Air Conditioners and/or Lennox Evaporator Coils into the stream of commerce, to be distributed, offered for sale, and sold to the Plaintiff and to the public in Ontario and in other provinces and territories in Canada with the Design Defect.

138. The Defendants knew or ought to have known that purchasers of the Lennox Air Conditioners and/or Lennox Evaporator Coils would not be reasonably able to protect their interests, such that Class Members would be unable to receive a substantial benefit from the from the products and that customers would be relying on the Defendants' representations to their detriment.

139. Canadian consumers were never compensated for damages incurred as a result of purchasing the Lennox Air Conditioners and/or Lennox Evaporator Coils. The Defendants made a false, misleading, and/or deceptive Representation concerning the ability of the Lennox Air Conditioners and/or Lennox Evaporator Coils to fulfill its cooling function.

140. The Class Members have suffered and will suffer injuries, losses or damages as a result of the Defendants' conduct.

### **THE REPRESENTATIVE PLAINTIFF**

141. In the summer of 2006, the Plaintiff purchased a Lennox Air Conditioner (model number XC13) containing a Lennox Evaporator Coil from Energy Centre at 1181 Newmarket Street, in Ottawa, Ontario for a total cost of \$2,817.48 including taxes.

142. The Lennox Air Conditioner came with a ten (10) year warranty on the compressor and a five (5) year warranty on all remaining components.

143. The Plaintiff was neither told, nor did Lennox disclose, that Lennox Air Conditioners contained Lennox Coils that were defective, because they were unreasonably susceptible to formicary corrosion and failure, which would cause the air conditioning units to cease cooling and/or to leak.

144. In July of 2006, the Plaintiff had the Lennox Air Conditioner installed in his residence.

145. At the time of the installation, the Plaintiff was provided with materials which made the following specific representations as they relate to his Lennox Air Conditioner model number XC13:

- “Reliable and responsible home cooling”;
- “Efficient design can result in significant energy savings”;
- “Dependable Copeland Scroll Compressor provides smooth, efficient and reliable operation”;
- “the XC13 provides exceptional comfort”;

- “The Ideal Choice For Your Home Environment and Global Environment”;
- “3-year cooling savings...This chart compares the 3-year savings you can expect from an XC13 air conditioner vs. units with lower efficiency ratings”.

146. In the summer of 2014, after the warranty period had expired, the Plaintiff’s Lennox Air Conditioner failed in that it ceased releasing cool air.

147. Shortly thereafter, the Plaintiff called Energy Centre and a technician came to inspect the unit on June 5, 2014 and on June 11, 2014 at a cost of approximately \$101.64 and \$445.22, respectively, including taxes.

148. The technician informed the Plaintiff that the Lennox Evaporator Coil had broken down and suggested that he should purchase a new air conditioner.

149. The Plaintiff has not yet had the Lennox Evaporator Coil replaced and has not yet purchased a new air conditioning system as the cost is nontrivial and quite expensive.

150. At the time of sale, the Plaintiff was under the reasonable assumption that he was purchasing an air conditioner that was free of any design or manufacturing defects; unbeknownst to him, he overpaid for the purchase price as the Lennox Air Conditioner was in fact suffering from the Design Defect.

151. The Plaintiff was unaware of the existence of the Design Defect until its manifestation and now believes that he was injured at the point-of-sale as the purchase price reflected an air conditioner that was represented to be free of any defects and he suffered a prejudice in that he overpaid.

152. The Plaintiff is currently living without air conditioning, which is stressful, inconvenient and uncomfortable.

153. The Plaintiff discovered, while researching online, that a class action have been instituted in the United States due to the Defendants' failure to disclose and/or properly repair and/or replace, despite longstanding knowledge, its existence and predisposition to premature failure.

154. In consequence, Plaintiff asserts that had he known the true facts, the Plaintiff would not have purchased the Lennox Air Conditioner and he most certainly would not have paid such a high price for it.

155. The Plaintiff has suffered damages as a result of purchasing the Lennox Air Conditioner, including the full purchase price of the Lennox Air Conditioner or alternately its diminished value, the repair and inspection costs, the loss of use, trouble, annoyance, and inconvenience.

## **CAUSES OF ACTION**

### **A. Strict Liability**

156. The Defendants are strictly liable to the Plaintiff and Class Members for the reasons that follow:

- (a) The Defendants designed, manufactured, tested, inspected, distributed, warranted, advertised, marketed and/or sold the Lennox Air Conditioners and/or Lennox Evaporator Coils;

- (b) The Lennox Air Conditioners and/or Lennox Evaporator Coils suffer from serious manufacturing and design defects in that they are susceptible to formicary corrosion and failure, which would cause refrigerant leaks and an inability to fulfill their purpose to cool the air, while other air conditioners do perform their function;
- (c) The Lennox Air Conditioners and/or Lennox Evaporator Coils could have been made in a proper manner but-for the Defendants' business decisions;
- (d) Class Members were entitled to expect that the Lennox Air Conditioners and/or Lennox Evaporator Coils were not plagued by serious and pervasive manufacturing and design defects which predispose them to formicary corrosion;
- (e) Class Members had no opportunity or expertise to inspect the Lennox Air Conditioners and/or Lennox Evaporator Coils;
- (f) The risks inherent in the design of the Lennox Air Conditioners and/or Lennox Evaporator Coils, for example, the use of uncoated copper coils, outweigh any possible benefits of their design and such defects were material contributing causes of the injuries and losses of Class Members; and
- (g) At the time of the injury and loss to Class Members, the Lennox Air Conditioners and/or Lennox Evaporator Coils were being used for the purpose and manner for which they were intended and Class Members were not aware of the Design

Defect and could not, through the exercise of reasonable care and diligence, have discovered such defects.

**B. Tort of Fraud by Concealment**

157. The Defendants made material omissions as well as affirmative misrepresentations regarding the Lennox Air Conditioners and/or Lennox Evaporator Coils.

158. The Defendants knew that the representations were false at the time that they were made.

159. The Defendants concealed and/or suppressed material facts concerning the Lennox Air Conditioners and/or Lennox Evaporator Coils.

160. The Lennox Air Conditioners and/or Lennox Evaporator Coils that were purchased by Class Members were, in fact, defective and unreliable as the Lennox Air Conditioners and/or Lennox Evaporator Coils were predisposed to formicary corrosion.

161. The Defendants had a duty to disclose that the Lennox Air Conditioners and/or Lennox Evaporator Coils were defective and unreliable in that the Lennox Air Conditioners and/or Lennox Evaporator Coils were predisposed to formicary corrosion.

162. The Defendants had a duty to disclose these omitted material facts because they were known and/or accessible only to the Defendants who have superior knowledge and access to the facts and the Defendants knew they were not known to or reasonably discoverable by the Plaintiff and Class Members. These omitted facts were material because they directly impact the functionality of the Lennox Air Conditioners and/or Lennox Evaporator Coils. Whether or not

an air conditioner will cool the air is certainly a material concern. The Defendants possessed exclusive knowledge of the defects rendering the Lennox Air Conditioners and/or Lennox Evaporator Coils inherently more unreliable than similar air conditioners.

163. The Defendants actively concealed and/or suppressed these material facts, in whole or in part, with the intent to induce the Plaintiff and Class Members to purchase the Lennox Air Conditioners and/or Lennox Evaporator Coils at a higher price, which did not match their true value.

164. The Plaintiff and Class Members were unaware of these omitted material facts and would not have acted as they did if they had known of the concealed and/or suppressed facts. The Plaintiff's and Class Members' actions were reasonable and justified. The Defendants were in exclusive control of the material facts concerning the Lennox Air Conditioners and/or Lennox Evaporator Coils defects and such facts were not known to the public or to the Class Members.

165. In addition, Class Members relied on the Defendants' Representation that the Lennox Air Conditioners and/or Lennox Evaporator Coils that they were purchasing were reasonably functional and they purchased such Lennox Air Conditioners and/or Lennox Evaporator Coils. Said reliance was reasonable. The Plaintiff and the Class Members were without the ability to determine the truth on their own and could only rely on the Defendants' statements and representations.

166. As a result of the concealment and/or suppression of facts, the Plaintiff and Class Members have sustained and will continue to sustain damages arising from the difference between the price that the Plaintiff and the Class paid and the actual value that they received.

167. As a result of their reliance, the Plaintiff and Class Members have been injured in an amount to be proven at trial, including, but not limited to, their lost benefit of the bargain, overpayment at the time of purchase, loss of use of the Lennox Air Conditioners and/or Lennox Evaporator Coils, inspection, labour, and repair costs, replacement refrigerant costs, cost of replacement air conditioner, pain and suffering, and trouble and inconvenience.

### **C. Tort of Civil Negligence**

168. The Defendants had a positive legal duty to use reasonable care to perform their legal obligations to the Plaintiff and Class Members, including designing, manufacturing, testing, inspecting, distributing, warranting, advertising, marketing, and/or selling Lennox Air Conditioners and/or Lennox Evaporator Coils which are reasonably suitable for their intended uses and to provide true and accurate information to the public to prevent undue risks arising from the foreseeable use of its products.

169. In addition, the Defendants were aware that their customers (including Plaintiff and the Class) relied on them to provide truthful and accurate information regarding the suitability of the Lennox Air Conditioners and/or Lennox Evaporator Coils.

170. It was certainly reasonably foreseeable that if the Defendants were negligent in their duty to provide accurate information regarding the efficacy of the Lennox Air Conditioners and/or Lennox Evaporator Coils, that customers would sustain injury and damages and this, in fact, did materialize.

171. By their acts described herein, the Defendants failed to take reasonable care to ensure that its Lennox Air Conditioners and/or Lennox Evaporator Coils would perform their air cooling function.

172. The Defendants breached their duty of care to the Plaintiff and to the Class Members by offering for sale Lennox Air Conditioners and/or Lennox Evaporator Coils that were not fit for the particular purpose for which they were purchased.

173. The circumstances of the Defendants being in the business of designing, manufacturing, testing, inspecting, distributing, warranting, advertising, marketing, and/or selling Lennox Air Conditioners and/or Lennox Evaporator Coils and placing Lennox Air Conditioners and/or Lennox Evaporator Coils into the Canadian stream of commerce are such that the Defendants were in a position of legal proximity to the Class Members and were therefore under an obligation to be fully aware of their functionality.

174. It was reasonably foreseeable that a failure by the Defendants to design, manufacture test, market, and/or sell a reasonably durable air conditioner and/or evaporator coil, and to thereafter monitor the performance of such mechanism following market introduction (and to take corrective measures when required) would cause harm to the Plaintiff and the members of the Class.

175. The Defendants failed to meet the standard of care required in all the circumstances and were negligent in that:

- (a) They were negligent in the research, design, engineering, development, testing, manufacturing, assembly, distribution, marketing, and sale of the Lennox Air Conditioners and/or Lennox Evaporator Coils;
- (b) They knew or should have known that the design features of the Lennox Air Conditioners and/or Lennox Evaporator Coils, including the use of the uncoated copper, would make them more vulnerable to formicary corrosion;
- (c) They failed to adequately design, manufacture, and/or test the Lennox Air Conditioners and/or Lennox Evaporator Coils to ensure that they were free from defects prior to selling, marketing, installing, and/or distributing them;
- (d) They knew or should have known that if the Lennox Air Conditioners and/or Lennox Evaporator Coils experienced formicary corrosion under conditions of ordinary use;
- (e) They failed to conduct sufficient or any pre-market testing to establish that the Lennox Air Conditioners and/or Lennox Evaporator Coils provided acceptable and durable features;
- (f) They failed to disclose the defects in the design of the Lennox Air Conditioners and/or Lennox Evaporator Coils in a timely manner or at all in certain circumstances;
- (g) The Defendants continued to sell the Lennox Air Conditioners and/or Lennox Evaporator Coils notwithstanding increasing reports of formicary corrosion;

- (h) They failed to properly train their employees responsible for the design, testing, assembly, and manufacturing of the Lennox Air Conditioners and/or Lennox Evaporator Coils;
- (i) The Defendants failed to ensure that their employees complied with the appropriate quality system standards applicable to the design and manufacturing process;
- (j) They failed to properly supervise their employees and subsidiaries;
- (k) They distributed and sold the Lennox Air Conditioners and/or Lennox Evaporator Coils without conducting tests to ensure they were defect-free;
- (l) They knew or should have known that the Lennox Air Conditioners and/or Lennox Evaporator Coils were inherently defective and that they could not properly perform in the manner for which they were intended;
- (m) They failed to take any sufficient steps to cure the fundamental manufacturing and design defects in the Lennox Air Conditioners and/or Lennox Evaporator Coils after they knew of the defects;
- (n) They failed to warn the Class Members that the Lennox Air Conditioners and/or Lennox Evaporator Coils were defective when knowledge of the defects became known to them;
- (o) They placed their commercial interests over all else; and

- (p) They actively concealed the fact that the Lennox Air Conditioners and/or Lennox Evaporator Coils suffered from manufacturing and design defects from the public, including the Class Members.

176. By virtue of the acts and omissions described above, the Defendants were negligent and caused damage to the Plaintiff and to the Class Members.

**D. Tort of Negligent Misrepresentation**

177. The tort of negligent misrepresentation can be made out as:

- (a) There was a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the Plaintiff and to the Class;
- (b) The Defendants made a Representation that was untrue, inaccurate and/or misleading;
- (c) The Defendants acted negligently in making the Representation;
- (d) The Representation were relied upon by the Plaintiff and by the Class reasonably;  
and
- (e) The Plaintiff and the Class sustained damages as a result of their reliance.

178. The Defendants represented to the Plaintiff and the Class Members that the Lennox Air Conditioners and/or Lennox Evaporator Coils were durable and reliable – this Representation was untrue as set forth herein.

179. At the time that the Defendants made the misrepresentations herein alleged, they had no reasonable grounds for believing the Representation to be true, as there was ample evidence to the contrary set forth in detail above.

180. The Defendants made the Representation herein alleged with the intention of inducing Plaintiff and the Class Members to purchase its Lennox Air Conditioners and/or Lennox Evaporator Coils.

181. The Plaintiff and the Class Members relied upon the Representation and, in reliance upon it, purchased the Lennox Air Conditioners and/or Lennox Evaporator Coils. Said reliance was reasonable.

182. Plaintiff and the Class Members were without the ability to determine the truth of these statements on their own and could only rely on the Defendants.

183. Had Plaintiff and the Class Members known the true facts, they would not have purchased the Lennox Air Conditioners and/or Lennox Evaporator Coils or would have paid substantially less than they did.

184. By reason of the foregoing, Plaintiff and each member of the Class are entitled to recover damages and other relief from Defendants.

**E. Breach of Express Warranty**

185. By designing, manufacturing, testing, inspecting, marketing, distributing, supplying warranting, advertising, marketing, and/or selling the Lennox Air Conditioners and/or Lennox

Evaporator Coils, the Defendants created and breached express warranties that the Lennox Air Conditioners and/or Lennox Evaporator Coils were proper for cooling purposes when, in fact, they were not.

186. Lennox expressly warranted via its user manuals, website, brochures, specifications, and/or models that the Lennox Air Conditioners and/or Lennox Evaporator Coils are fit for the ordinary purpose in which such goods are used.

187. Lennox's express warranties were part of the basis of the bargain between Lennox and the Plaintiff and members of the Class.

188. Lennox breached its express warranties because the Lennox Air Conditioners and/or Lennox Evaporator Coils were not fit for the ordinary purpose in which they are used and because they were not free from defects in materials and workmanship that affect performance under normal use and maintenance.

189. Specifically, the Lennox Air Conditioners are defective because the Lennox Evaporator Coils are unreasonably susceptible to formicary corrosion and failure, and thus improperly or prematurely crack and break under normal use, rendering them unfit for their ordinary purpose. Lennox also breached its express warranty by refusing to repair the Lennox Air Conditioners and/or by "fixing" failed Lennox Evaporator Coils with similarly defective replacement Lennox Evaporator Coils (i.e., made of uncoated copper).

190. The Plaintiff and members of the Class relied upon the representation or warranty that they would be supplied Lennox Air Conditioners and/or Lennox Evaporator Coils, and/or replacement Lennox Evaporator Coils, free of defects.

191. The Plaintiff and members of the Class sustained injuries and damages as a result of the breach because (a) they paid a price premium due to the misrepresentations and omissions of material fact in the packaging, marketing, advertising on the Lennox Air Conditioners; (b) the Lennox Air Conditioners did not have the attributes or value promised, and/or (c) they paid out of pocket to replace a failed Lennox Evaporator Coil, which was replaced with a similarly defective Lennox Evaporator Coil.

192. By reason of the foregoing, Plaintiff and each member of the Class are entitled to recover damages and other relief from Defendants.

#### **F. Breach of Implied Warranty of Merchantability**

193. Lennox is a merchant that sold air conditioning units to the Plaintiff and the Class members for residential use.

194. A warranty that goods shall be merchantable and fit for the ordinary purposes for which such goods are used is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

195. Lennox's implied warranty that the Lennox Air Conditioners and/or Lennox Evaporator Coils were merchantable was part of the basis of the bargain between Lennox and Plaintiff and members of the Class.

196. Lennox breached the implied warranty of merchantability because the Lennox Air Conditioners and/or Lennox Evaporator Coils were not of merchantable quality or fit for their ordinary and intended use and because they contained a defect at the time of their sale that resulted in, and continues to result in, leaking of refrigerant and failure of the product, when used in a normal, foreseeable and customary way.

197. The defects at issue are latent defects. The Plaintiff and members of the Class could not have known about their Lennox Air Conditioners and/or Lennox Evaporator Coils propensity for failure.

198. The Plaintiff and members of the Class sustained injuries and damages as a result of the breach.

199. As a direct and proximate result of Lennox's breach of the implied warranty of merchantability, the Plaintiff and members of the Class have suffered damages in amount to be determined at trial including direct monetary losses incurred by the Plaintiff and members of the Class in connection with attempted repair of the Lennox Air Conditioners and/or the price premium paid for the Lennox Air Conditioner, or such further damages to be proven at trial.

#### **G. Breach of Implied Warranty of Fitness for a Particular Purpose**

200. Lennox sold and promoted the Lennox Air Conditioners, which it placed into the stream of commerce. Lennox knew or had reason to know of the specific use, i.e., home cooling, for which the Lennox Air Conditioners were purchased, and it impliedly warranted that the Lennox Air Conditioners were fit for such use.

201. The Plaintiff and Class members reasonably relied upon the expertise, skill, judgment, and knowledge of Lennox and upon its implied warranty that the Lennox Air Conditioners were fit for the purpose and use of cooling homes.

202. Through the conduct alleged herein, Lennox has breached the implied warranty of fitness for a particular purpose. The defectively designed Lennox Air Conditioners were not fit for the particular purpose for which they were purchased by the Plaintiff and Class Members to perform.

203. The Plaintiff and the Class purchased the Lennox Air Conditioners for a particular purpose of being able to cool their homes. Lennox knew that the Plaintiff and Class members were purchasing the Lennox Air Conditioners for this purpose and marketed the products for this particular purpose.

204. The Plaintiff and Class members relied on Lennox's misrepresentations by purchasing the Lennox Air Conditioners.

205. Lennox knew or had reason to know that the Plaintiff and Class members were influenced to purchase the Lennox Air Conditioners through Lennox's expertise, skill, judgment, and knowledge in furnishing the products for their intended use.

206. The Lennox Air Conditioners were not fit for their particular intended use because the design or manufacturing defects alleged herein render them incapable of properly providing cool air to the Plaintiff and Class members' homes as they contain defective Lennox Evaporator Coils

which are unreasonably susceptible to formicary corrosion, which causes them to crack and break under normal use.

207. Lennox's actions, as complained of herein, breached their implied warranty that the Lennox Air Conditioners were fit for such use.

208. The Plaintiff and Class members have incurred damages as described herein as a direct result of the failure of Lennox to honor its implied warranty. In particular, the Plaintiff and Class members would not have purchased the Lennox Air Conditioners had they known the truth about the defects or would certainly not have paid such a high price as they did; nor would they have suffered the collateral effects and damages associated with these defects.

### **CAUSATION**

209. The acts, omissions, wrongdoings, and breaches of legal duties and obligations of the Defendants directly and proximately caused the Plaintiff's and Class members' damages.

210. The Plaintiff pleads that by virtue of the acts, omissions and breaches of legal obligations as described above, they are entitled to legal and/or equitable relief against the Defendants, including damages, consequential damages, attorneys' fees, costs of suit and other relief as appropriate in the circumstances.

### **DAMAGES**

#### **Compensatory Damages (Economic Losses)**

211. By reason of the acts, omissions and breaches of legal obligations of the Defendants, the Plaintiff and Class Members have suffered injury, economic loss and damages, the particulars of which include:

- a. Purchase price of the Lennox Air Conditioners and/or Lennox Evaporator Coils or the overpayment of the purchase price as the difference in value of the Lennox Air Conditioners and/or Lennox Evaporator Coils free from defects and the Lennox Air Conditioners and/or Lennox Evaporator Coils as actually received;
- b. Expenses associated with loss of use;
- c. Inspection, labour, and repair costs;
- d. Replacement refrigerant costs;
- e. Replacement evaporator coil costs;
- f. Cost of replacement air conditioner;
- g. Trouble and inconvenience; and
- h. Such further and other damages the particulars of which will be provided prior to trial.

**Punitive, Exemplary and Aggravated Damages**

212. The Defendants has taken a cavalier and arbitrary attitude to its legal and moral duties to the Class members.

213. At all material times, the conduct of the Defendants as set forth was malicious, deliberate and oppressive towards their customers and the Defendants conducted themselves in a wilful, wanton and reckless manner, without regard for the public as to warrant a claim for punitive damages.

214. In addition, it should be noted since the Defendants are parts of highly-revered, multi-million dollar corporations, it is imperative to avoid any perception of evading the law without impunity. Should the Defendants only be required to disgorge monies which should not have been retained and/or withheld, such a finding would be tantamount to an encouragement to other businesses to deceive their customers as well. Punitive, aggravated and exemplary damages are necessary in the case at hand to be material in order to have a general deterrent effect on other corporations as well as a specific deterrent to the Defendants themselves.

### **STATUTORY REMEDIES**

215. The Defendants are in breach of the *Sale of Goods Act*, the *Consumer Protection Act*<sup>2</sup>, the *Competition Act*, the *Consumer Packaging and Labelling Act* and/or other similar/equivalent legislation.

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<sup>2</sup> While the *Consumer Protection Act* applies only in Ontario, other Canadian provinces have similar consumer protection legislation including, but not limited to: the *Consumer Protection Act*, CQLR c P-40.1 at ss. 41, 215, 216, 218, 219, 220(a), 221(g), 228, 239, 253, 270 & 272; the *Fair Trading Act*, RSA 2000, c F-2 at ss. 5-7, 7.2, 7.3, 9 & 13; the *Business Practices and Consumer Protection Act*, SBC 2004, c 2 at ss. 4-9, 171 & 172; *The Business Practices Act*, CCSM, c B120 at ss. 2-9 & 23; the *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1 and the *Trade Practices Act*, RSNL 1990, c T-7 at ss. 5-7 & 14; the *Business Practices Act*, RSPEI 1988, c B-7

216. The Plaintiff pleads and relies upon consumer protection and trade legislation and common law, as it exists in this jurisdiction and the equivalent/similar legislation and law in other Canadian provinces and territories. The Class Members have suffered injury, economic loss and damages caused by or materially-contributed to by the Defendants' inappropriate and unfair business practices, which includes the Defendants being in breach of applicable Consumer Protection laws.

**A. Breach of the *Sale of Goods Act***

217. At all times relevant to this action, the Plaintiff and Class Members were "buyer[s]" within the meaning of that term as defined in s. 1 of the *Sale of Goods Act*.

218. At all times relevant to this action, the Defendants were "seller[s]" within the meaning of that term as defined in s. 1 of the *Sale of Goods Act*.

219. The transactions by which the Plaintiff and Class Members purchased their "goods" from the Defendants were "sale[s]" within the meaning of those terms as defined in s. 1 of the *Sale of Goods Act*.

220. The Defendants were aware that consumers purchased the Lennox Air Conditioners and/or Lennox Evaporator Coils for the particular purpose of cooling their residence and there is therefore an implied warranty or condition that the goods will be reasonably fit for such purpose and/or would be in merchantable condition.

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at ss. 2-4; the *Consumer Protection Act*, SS 1996, c C-30.1 at ss. 5-8, 14, 16 & 23-25; the *Consumer Product Warranty and Liability Act*, SNB 1978, c 18.1 at ss. 10-13, 15, 23 & 27; the *Consumer Protection Act*, RSNS 1989, c 92 at ss. 26-29.

221. The Lennox Air Conditioners and/or Lennox Evaporator Coils, when sold and at all times thereafter, were not merchantable and are not fit for the ordinary purpose for which air conditioners and/or evaporator coils are used. Specifically, the Lennox Air Conditioners and/or Lennox Evaporator Coils are inherently defective in that they are at risk of developing formicary corrosion.

222. The Defendants committed a fault or wrongful act by breaching the implied condition as to quality or fitness for a particular purpose. By placing into the stream of commerce a product that was unfit for the purpose for which it was marketed and/or advertised, as per s. 15 of the *Sale of Goods Act*, the Defendants are liable. The Class is entitled to maintain an action for breach of warranty under ss. 51 and 55 of the *Sale of Goods Act*.

**B. Breach of the *Consumer Protection Act***

223. At all times relevant to this action, the Plaintiff and Class Members were “consumer[s]” within the meaning of that term as defined in s. 1 of the *Consumer Protection Act*.

224. At all times relevant to this action, the Defendants were “supplier[s]” within the meaning of that term as defined in s. 1 of the *Consumer Protection Act*.

225. The transactions by which the Plaintiff and Class Members purchased the Lennox Air Conditioners and/or Lennox Evaporator Coils were “consumer transaction[s]” within the meaning of that term as defined in s. 1 of the *Consumer Protection Act*.

226. By failing to disclose and actively concealing the corrosion propensities of the Lennox Air Conditioners and/or Lennox Evaporator Coils, the Defendants have engaged in an unfair

practice which was and is “false, misleading or deceptive” and/or “unconscionable” within the meaning of ss. 14, 15 and 17 of the *Consumer Protection Act* as follows:

- (a) Representing that the Lennox Air Conditioners and/or Lennox Evaporator Coils have performance characteristics, uses, benefits and/or qualities, which they did not possess;
- (b) Representing that the Lennox Air Conditioners and/or Lennox Evaporator Coils are of a particular standard and/or quality that they are not;
- (c) Representing that the Lennox Air Conditioners and/or Lennox Evaporator Coils are available for a reason that does not exist; i.e. reliable residential cooling; and
- (d) Using exaggeration, innuendo and ambiguity regarding their ability to provide a cooling function or failing to state that the Lennox Air Conditioners and/or Lennox Evaporator Coils were plagued by a serious and pervasive Design Defect, despite longstanding knowledge.

227. The Representation was and is unconscionable because *inter alia* the Defendants know or ought to know that consumers are not reasonably able to protect his or her interests and are unable to receive a substantial benefit from the subject-matter of the Representation.

228. The Plaintiff states that the Representation was and is false, misleading, deceptive and/or unconscionable such that it constituted an unfair practice which induced the Plaintiff and the Class to purchase the Lennox Air Conditioners and/or Lennox Evaporator Coils as a result of which they are entitled to damages pursuant to the *Consumer Protection Act*.

229. The Plaintiff and the Class Members relied on the Representation.

230. The reliance upon the Representation by the Plaintiff and Class Members is established by his or her purchase of the Lennox Air Conditioners and/or Lennox Evaporator Coils. Had the Plaintiff and Class Members known that the Representation was false and misleading they would not have purchased the Lennox Air Conditioners and/or Lennox Evaporator Coils.

**C. Breach of the *Competition Act***

231. At all times relevant to this action, the Defendants' businesses were "business(es)" and the Lennox Air Conditioners and/or Lennox Evaporator Coils were "product[s]" within the meaning of that term as defined in s. 2 of the *Competition Act*.

232. The Defendants' acts are in breach of s. 52 of Part VI of the *Competition Act*, were and are unlawful, and render the Defendants liable to pay damages and costs of investigation pursuant to s. 36 of the *Competition Act*.

233. The Defendants made the Representation to the public and in so doing breached s. 52 of the *Competition Act* because the Representation:

- (a) Was made for the purpose of promoting, directly or indirectly, the use of a product or for the purpose of promoting, directly or indirectly, the business interests of the Defendants;
- (b) Was made to the public;

- (c) Was false and misleading in a material respect; and
- (d) Stated performance characteristics, uses, benefits and/or qualities of the Lennox Air Conditioners and/or Lennox Evaporator Coils that were false and not based on adequate and proper testing and stated a particular standard, quality and grade that was not based on adequate and proper testing.

234. The Plaintiff and Class Members relied upon the Representation by buying the Lennox Air Conditioners and/or Lennox Evaporator Coils and suffered damages and loss.

235. Pursuant to s. 36 of the *Competition Act*, the Defendants are liable to pay the damages which resulted from the breach of s. 52.

236. Pursuant to s. 36 of the *Competition Act*, the Plaintiff and Class Members are entitled to recover their full costs of investigation and substantial indemnity costs paid in accordance with the *Competition Act*.

237. The Plaintiff and Class Members are also entitled to recover as damages or costs, in accordance with the *Competition Act*, the costs of administering the plan to distribute the recovery in this action and the costs to determine the damages of each Class Member.

**D. Breach of the *Consumer Packaging and Labelling Act***

238. At all times relevant to this action, the Defendants were “dealer[s]” within the meaning of that terms as defined in s. 2 of the *Consumer Packaging and Labelling Act*.

239. At all times relevant to this action, the Lennox Air Conditioners and/or Lennox Evaporator Coils were “prepackaged product[s]” within the meaning of that terms as defined in s. 2 of the *Consumer Packaging and Labelling Act*.

240. At all times relevant to this action, the Representation, including those relating to the fitness, durability, testing, and reliability of the Lennox Air Conditioners and/or Lennox Evaporator Coils as well as their warranty coverage that was made to the public on the Lennox Air Conditioners and/or Lennox Evaporator Coil labelling (including all product accompaniments), were “label[s]” within the meaning of that terms as defined in s. 2 of the *Consumer Packaging and Labelling Act*.

241. At all times relevant to this action, the Representation that was made to the public on the Defendants’ website, brochures, and otherwise, were “advertise[ments]” within the meaning of that terms as defined in s. 2 of the *Consumer Packaging and Labelling Act*.

242. The Defendants designed, manufactured, tested, inspected, distributed, warranted, advertised, marketed and/or sold the Lennox Air Conditioners and/or Lennox Evaporator Coils with “false or misleading representations” under s. 7 of the *Consumer Packaging and Labelling Act* in that they used descriptions and/or illustrations of the type, quality, performance, and/or function that may reasonably be regarded as likely to deceive the Plaintiff and Class Members.

243. In addition, the Defendants sold and/or advertised the Lennox Air Conditioners and/or Lennox Evaporator Coils which were packaged and/or labelled in such a manner that the Plaintiff and Class Members might, and were, reasonably be misled with respect to the quality of the product.

244. As such, the Defendants breached ss. 7 and 9 of the *Consumer Packaging and Labelling Act* and are liable to pay damages as a result under s. 20.

### **WAIVER OF TORT, UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST**

245. The Plaintiff pleads and relies on the doctrine of waiver of tort and states that the Defendants' conduct, including the alleged breaches of any of the *Sale of Goods Act*, the *Consumer Protection Act*, and/or the *Competition Act*, constitutes wrongful conduct which can be waived in favour of an election to receive restitutionary or other equitable remedies.

246. The Plaintiff reserves the right to elect at the Trial of the Common Issues to waive the legal wrongs and to have damages assessed in an amount equal to the gross revenues earned by the Defendants or the net income received by the Defendants or a percent of the sale of the Lennox Air Conditioners and/or Lennox Evaporator Coils as a result of the Defendants' false Representation which resulted in revenues and profit for the Defendants.

247. Further, the Defendants has been unjustly enriched as a result of the revenues generated from the sale of the Lennox Air Conditioners and/or Lennox Evaporator Coils and as such, *inter alia*, that:

- (a) The Defendants has obtained an enrichment through revenues and profits from the sale of the Lennox Air Conditioners and/or Lennox Evaporator Coils;
- (b) The Plaintiff and other Class Members have suffered a corresponding deprivation including the price of the Lennox Air Conditioners and/or Lennox Evaporator Coils; and

- (c) The benefit obtained by the Defendants and the corresponding detriment experienced by the Plaintiff and Class Members has occurred without juristic reason. Since the monies that were received by the Defendants resulted from the Defendants' wrongful acts, there is and can be no juridical reason justifying the Defendants retaining any portion of such monies.

248. Further, or in the alternative, the Defendants are constituted as constructive trustees in favour of the Class Members for all of the monies received because, among other reasons:

- (a) The Defendants were unjustly enriched by receipt of the monies paid for the Lennox Air Conditioners and/or Lennox Evaporator Coils;
- (b) The Class Members suffered a corresponding deprivation by purchasing the Lennox Air Conditioners and/or Lennox Evaporator Coils;
- (c) The monies were acquired in such circumstances that the Defendants may not in good conscience retain them;
- (d) Equity, justice and good conscience require the imposition of a constructive trust;
- (e) The integrity of the market would be undermined if the court did not impose a constructive trust; and
- (f) There are no factors that would render the imposition of a constructive trust unjust.

249. Further, or in the alternative, the Plaintiff claims an accounting and disgorgement of the benefits which accrued to the Defendants.

### **COMMON ISSUES**

250. Common questions of law and fact exist for the Class Members and predominate over any questions affecting individual members of the Class. The common questions of law and fact include:

- (a) Do the Lennox Air Conditioners and/or Lennox Evaporator Coils suffer from a manufacturing and/or design defect?
- (b) Did the Defendants know or should they have known about the Lennox Air Conditioners and/or Lennox Evaporator Coils defects and, if yes, how long have the Defendants known about the defects?
- (c) Did the Defendants misrepresent the Lennox Air Conditioners and/or Lennox Evaporator Coils or fail to adequately disclose the true defective nature of the Lennox Air Conditioners and/or Lennox Evaporator Coils?
- (d) Did the Defendants engage in unfair, false, misleading, or deceptive acts or practices regarding the designing, manufacturing, testing, inspecting, distributing, warranting, advertising, marketing, and/or sale of their Lennox Air Conditioners and/or Lennox Evaporator Coils?
- (e) Are the Defendants strictly liable for the damages suffered by Class Members?

- (f) Did the Defendants commit the tort of fraud by concealment when they concealed and/or suppressed material facts concerning the efficacy of the Lennox Air Conditioners and/or Lennox Evaporator Coils?
- (g) Do the Defendants owe the Class members a duty to use reasonable care?
- (h) Did the Defendants act negligently in failing to use reasonable care to perform their legal obligations, to, *inter alia*, properly design, manufacture, test, inspect, distribute, warrant, advertise, market, and/or functional air conditioners?
- (i) Were the Defendants negligent in the design, manufacture, testing, inspection, distribution, warrant, advertising, marketing, and/or sale of the Lennox Air Conditioners and/or Lennox Evaporator Coils;
- (j) Did the Defendants fail in their duty to provide accurate information regarding the functionality of the Lennox Air Conditioners and/or Lennox Evaporator Coils?
- (k) Did the Defendants fail to take reasonable care to ensure that its Lennox Air Conditioners and/or Lennox Evaporator Coils would perform their cooling function?
- (l) Did the Defendants breach their duty of care to the Plaintiff and to the Class Members by offering for sale Lennox Air Conditioners and/or Lennox Evaporator Coils that were not fit for the particular purpose for which they were purchased, i.e. residential cooling?

- (m) Did the Defendants breach their express and/or implied warranties?
- (n) Did the Defendants intend or foresee that the Plaintiff and/or other Class Members would purchase the Lennox Air Conditioners and/or Lennox Evaporator Coils based on their unfair practices and/or tortious conduct?
- (o) Did the Defendants' negligence proximately cause loss or injury and damages?
- (p) Did the Defendants' acts or practices breach the *Sale of Goods Act*, the *Consumer Protection Act*, the *Competition Act* and/or other similar/equivalent legislation?
- (q) Have Class Members been damaged by the Defendants' conduct and, if so, what is the proper measure of such damages?
- (r) Were the Defendants unjustly enriched?
- (s) Should an injunctive remedy be ordered to prohibit the Defendants from continuing to perpetrate their unfair, false, misleading, and/or deceptive conduct?
- (t) Are the Defendants responsible to pay punitive, aggravated, and/or exemplary damages to Class Members and in what amount?

### **EFFICACY OF CLASS PROCEEDINGS**

251. The members of the proposed Class potentially number in the hundreds of thousands if not more. Because of this, joinder into one action is impractical and unmanageable.

Conversely, continuing with the Class Members' claim by way of a class proceeding is both practical and manageable.

252. Members of the proposed Class have no material interest in commencing separate actions. In addition, given the costs and risks inherent in an action before the courts, and the small amount being claimed by each person, many people will hesitate to institute an individual action against the Defendants. Even if the Class Members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of the Defendants would increase delay and expense to all parties and to the court system.

253. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory and inconsistent judgments on questions of fact and law that are similar or related to all members of the class.

254. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice.

255. The Plaintiff has the capacity and interest to fairly and fully protect and represent the interests of the proposed Class and has given the mandate to his counsel to obtain all relevant information with respect to the present action and intends to keep informed of all developments.

In addition, class counsel is qualified to prosecute complex class actions.

## **LEGISLATION**

256. The Plaintiff pleads and relies on the *Class Proceedings Act*, the *Courts of Justice Act*, the *Sale of Goods Act*, the *Consumer Protection Act*, the *Negligence Act*, the *Competition Act* and other Consumer Protection Legislation.

## **JURISDICTION AND FORUM**

### **Real and Substantial Connection with Ontario**

257. There is a real and substantial connection between the subject matter of this action and the province of Ontario because:

- (a) Lennox Industries (Canada) Ltd. has its head office in Ontario;
- (b) The Defendants engage in business with residents of Ontario;
- (c) The Defendants derive substantial revenue from carrying on business in Ontario;  
and
- (d) The damages of Class Members were sustained in Ontario.

258. The Plaintiff proposes that this action be tried in the City of Ottawa, in the Province of Ontario as a proceeding under the *Class Proceedings Act*.

## **DEFENDANTS' JOINT AND SEVERAL LIABILITY**

259. The Plaintiff pleads that by virtue of the acts and omissions described above, the Defendants are liable in damages to himself and to the Class Members and that each Defendant

is responsible for the acts and omissions of the other Defendants within the same corporate grouping for the following reasons:

- (a) Each was the agent and/or affiliated with the other;
- (b) Each companies' business was operated so that it was inextricably interwoven with the business of the other as set out above;
- (c) Each company entered into a common advertising and business plan to design, manufacture, test, inspect, distribute, warrant, advertise, market, and/or sell the Lennox Air Conditioners and/or Lennox Evaporator Coils;
- (d) Each owed a duty of care to the other and to each Class Member by virtue of the common business plan to design, manufacture, test, inspect, distribute, warrant, advertise, market, and/or sell the Lennox Air Conditioners and/or Lennox Evaporator Coils; and
- (e) The Defendants intended that their respective businesses be run as one global business organization.

260. The Plaintiff and the other Class Members are entitled to legal and equitable relief against the Defendants, including damages, consequential damages, attorneys' fees, costs of suit and other relief as appropriate.

261. The Plaintiff and Class Members are entitled to recover damages and costs of administering the plan to distribute the recovery of the action in accordance with the *Consumer Protection Act*.

### **SERVICE OUTSIDE ONTARIO**

262. The originating process herein may be served outside Ontario, without court order, pursuant to subparagraphs (a), (c), (g), (h) and (p) of Rule 17.02 of the *Rules of Civil Procedure*. Specifically, the originating process herein may be served without court order outside Ontario, in that the claim is:

- (a) In respect of personal property situated in Ontario (rule 17.02(a));
- (b) For the interpretation and enforcement of a contract or other instrument in respect of personal property in Ontario (rule 17.02 (c));
- (c) In respect of a tort committed in Ontario (rule 17.02(g));
- (d) In respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (rule 17.02(h));
- (e) The claim is authorized by statute, the *Competition Act* and the *Consumer Protection Act* (rule 17.02(n)); and
- (f) Against a person carrying on business in Ontario (rule 17.02(p)).

Date: September 23, 2015

**CONSUMER LAW GROUP P.C.**

251 Laurier Ave. West  
Suite 900  
Ottawa, Ontario  
K1P 5J6

Jeff Orenstein  
LSUC# 59631G  
jorenstein@clg.org

Andrea Grass  
LSUC# 65051R  
agrass@clg.org

Tel: (613) 627-4894  
Fax: (613) 627-4893

Lawyers for the Plaintiff

**S. HUSAINY**  
Plaintiff

**LENNOX INDUSTRIES (CANADA) LTD. *et alii.***  
Defendants

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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**PROCEEDING COMMENCED IN OTTAWA**

Proceeding under the *Class Proceedings Act, 1992*

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**STATEMENT OF CLAIM**

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**CONSUMER LAW GROUP P.C.**  
251 Laurier Ave. West, Suite 900  
Ottawa, Ontario, K1P 5J6

Jeff Orenstein  
LSUC# 59631G  
jorenstein@clg.org

Andrea Grass  
LSUC# 65051R  
agrass@clg.org

Tel: (613) 627-4894  
Fax: (613) 627-4893

Lawyers for the Plaintiff