RESEARCH MEMORANDUM

To: **??????????**

From: **Bottom Line Research/Laurie Baptiste**

Date: **November 11, 2008**

File No: **???????????**

Re: **ZZZZZZZZZ Construction et al.**
v. XXXXXXXXX Estates et al.

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QUESTIONS PRESENTED:

You act on behalf of XXXXXXXXX Estates ("**XXXXXXXXX**"), the owner of certain lands near Calgary which they are developing for a subdivision called -------. You also act for YYYYYYYY Realty ("**YYYYYYYY**") and WWWWWW ("**WWWWWW**"), the real estate broker and agent who were retained by XXXXXXXXX to act exclusively on behalf of XXXXXXXXX to market and promote ----------; they were later added as defendants to the action.

While the facts are laid out in detail in your Memo to us dated October 21, 2008 [and further details of the circumstances will be examined and discussed within the analysis below], essentially XXXXXXXXX was searching for custom home builders for ---------- and considered several builders, including the plaintiff, ZZZZZZZZZZ Construction Ltd. ("**ZZZZZZZZZZ Homes**"). XXXXXXXXX sent out several proposals to these builders to invite them to contract with XXXXXXXXX to buy and build lots in ----------; however, ZZZZZZZZZZ Homes was generally non-committal and eventually made a counter-proposal that was not acceptable to XXXXXXXXX in a number of respects and which XXXXXXXXX did not accept. Overall, the ZZZZZZZZZZ brothers (the principals of ZZZZZZZZZZ Homes, and collectively with ZZZZZZZZZZ Homes shall be referred to as "**ZZZZZZZZZZ**") turned out to be too difficult to deal with and XXXXXXXXX did not want to do business with them, but when they advised ZZZZZZZZZZ they had decided to go with other builders for "business reasons", the ZZZZZZZZZZ brothers reacted extremely, going on a "verbal rampage" and suggesting there had been some kind of "conspiracy" to keep them out of the ---------- project.

Eventually, ZZZZZZZZZZ sued all involved, claiming they had a binding contract with XXXXXXXXX and, consequently, an interest in ----------, and that XXXXXXXXX breached or repudiated that contract by refusing to recognize their rights. They further claimed that there was a "civil conspiracy" by all the defendants to harm ZZZZZZZZZZ Homes; that the defendants unlawfully induced XXXXXXXXX to breach their contract with ZZZZZZZZZZ

Homes; that YYYYYYYY and WWWWWW negligently induced ZZZZZZZZZ Homes to breach their contract with XXXXXXXXX; that YYYYYYYY and WWWWWW improperly acted as a dual agent to both XXXXXXXXX and ZZZZZZZZZ Homes and breached their fiduciary duties and duties of confidentiality owed to ZZZZZZZZZ Homes; that the defendants made false and misleading representations about ZZZZZZZZZ Homes and made false or negligent misrepresentations to ZZZZZZZZZ Homes about the ---------- project; and that the defendants all owed fiduciary duties to ZZZZZZZZZ Homes, which they breached.

We understand that the pleadings are all filed and the matter is proceeding to trial on November 17, 2008. Thus, you need an overview and analysis of the case law with respect to the causes of action that have been pled against your clients, specifically, you requested we examine: (1) breach of fiduciary duty; (2) breach of confidentiality; (3) civil conspiracy; (4) inducement of breach of contract; (5) misrepresentation, including false or negligent misrepresentation. You also need to know how the *Statute of Frauds* defence applies to your facts.

RED FLAG: Aside from the causes of action you specifically requested we examine, we also noticed at least one other potential cause of action within the Amended Amended Statement of Claim, which was not examined in any depth, but which we wanted to bring to your attention for future consideration -- the tort of "interference with economic interests". This tort has been identified as being separate and distinct from the tort of conspiracy and much broader than the tort of inducing breach of contract or interference with contractual relations: see comments beginning at para. 66 in *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co*. [1996] A.J. No. 722; 187 A.R. 81 (ABCA) ("***Ed Miller***") **[TAB 34]**, and also *Rigco North America LLC v. ExxonMobil Canada Ltd.*, [2007] A.J. No. 516; 2007 ABQB 311; 416 A.R. 396 **[TAB 36]**, per Macleod J.

CONCLUSIONS:

Based on the information and facts presented to us, and our review of the relevant case law, it seems that none of the claims made by ZZZZZZZZZZ stand much chance of success.

1. *Breach of Fiduciary Duty* [by XXXXXXXXX, YYYYYYYY and WWWWWW]

In our view, it is not likely a court would find these are appropriate circumstances in which to impose a fiduciary duty on XXXXXXXXX. That is mainly due to the commercial nature of the transaction between two arms' length parties, the experience and sophistication of both of the parties, and the lack of requisite vulnerability on the part of ZZZZZZZZZZ Homes, as was the case in the central decision of *Lac Minerals Ltd. v. Int. Corona Resources Ltd.*, [1989] S.C.J. No. 83; 2 S.C.R. 574 ("***Lac Minerals***") **[TAB 4]**.

In addition, the same is true for YYYYYYYY and WWWWWW. Aside from any possible finding that they were acting as "dual agents", it is clear a fiduciary relationship could arise between them even outside of an actual agency relationship. In any case, there is arguably no evidence they had any power or discretion over ZZZZZZZZZZ, or that ZZZZZZZZZZ was in any way vulnerable to or dependent on them, and generally, there could be no expectation that they were acting in ZZZZZZZZZZ Homes' interest. They seem to have clearly been XXXXXXXXX's agent and acting on their behalf.

2. *Breach of Confidentiality* [by YYYYYYYY and WWWWWW]

To establish this claim, ZZZZZZZZZZ would have to show: (i) that the information conveyed was confidential; (ii) it was communicated in confidence; and (iii) it was misused by XXXXXXXXX, YYYYYYYY and WWWWWW to the detriment of ZZZZZZZZZZ: ***Lac Minerals***.

Without further details, it is difficult to say if the information referenced by ZZZZZZZZZZ was confidential or whether it was communicated in confidence. However, even it was, the issue would likely come down to whether ZZZZZZZZZZ could establish any misuse of the information by YYYYYYYY and WWWWWW – whether they did in fact share any pertinent confidential information with the other potential builders which put them at an advantage relative to ZZZZZZZZZZ in negotiations with XXXXXXXXX. In addition, it is clear they were not working towards any common objective or joint venture with YYYYYYYY and WWWWWW, as is often the case in which a breach of confidence is found. (They may have been trying to do so with XXXXXXXXX, but they do not specifically claim any breach of confidentiality against XXXXXXXXX, nor is there any indication that XXXXXXXXX misused any confidential information of ZZZZZZZZZZ).

3. *Civil Conspiracy* [by XXXXXXXXX, VVVVVVVV, UUUUUU and their principals]

The three basic elements of this tort are: (i) concerted action taken pursuant to an agreement between two or more persons to act unlawfully or injure another; (ii) a real or constructive intention to injure the plaintiff; and (iii) that the plaintiff suffered damage due to the action(s) of the defendants acting in combination: *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] S.C.J. No. 33; 1 S.C.R. 452 ("***Canada Cement LaFarge***") **[TAB 20]**.

It seems unlikely that a civil conspiracy would be found on these circumstances. Aside from the difficulties inherent in showing such "concerted action taken by agreement", the main difficulty will be showing the requisite intention. That is particularly so given the competitiveness of the land development industry, as acknowledged by ZZZZZZZZZZ. In any event, XXXXXXXXX would likely be able to avoid liability by establishing they were acting out of self-interest and for solid and legitimate business reasons, based on the comments in ***Canada Cement*** and *Murphy*

Oil Co. v. Predator Corp., [2006] A.J. No. 207; 2006 ABCA 69; 384 A.R. 251 ("***Murphy Oil***") **[TAB 21]**.

4. *Inducement of Breach of Contract* [by YYYYYYYY and WWWWWW, and by all defendants]

In our view, given the facts as presented, there arguably could have been no contract formed here between XXXXXXXXX and ZZZZZZZZZZ Homes; thus, there could be no breach of or inducement of breach of contract. Specifically, at no time did ZZZZZZZZZZ accept the terms offered by XXXXXXXXX, instead, they issued what was clearly a counter-offer that was unacceptable and never accepted by XXXXXXXXX. Further, it can be argued that the parties never reached agreement on all the essential terms, as evidenced by ZZZZZZZZZZ's counter-offer, and that a formal contract was specifically contemplated and required as a condition of the bargain, but one was never drafted or executed, thus there was nothing more than an agreement to agree. Finally, even if XXXXXXXXX could somehow be seen as acting badly in their negotiations with ZZZZZZZZZZ, since no agreement was reached, they were entitled to end the negotiations at any time and walk away.

If we are wrong in our views as to formation of a contract, then it is fairly clear that the factors are not present to show inducement of breach of contract, particularly the requirement of proof that all the defendants knew there was a contract in existence, as claimed by the plaintiff, as well as the requisite intention.

5. *Misrepresentation, including False or Negligent Misrepresentation* [by XXXXXXXXX, YYYYYYYY and WWWWWW]

There is a clear distinction between, and separate tests for, negligent misrepresentation versus fraudulent misrepresentation. The key differences are that, in negligent misrepresentation, a "special relationship" must exist between the parties which gives rise to a duty of care and the

representations must have been made negligently rather than fraudulently or recklessly. Both forms of misrepresentation, however, require that the representations be false and that such representations were relied upon to the detriment of the plaintiff.

Regardless of whether the other factors can be shown, the governing factor here seems to be that the representations alleged to have been misrepresentations are arguably either true statements (as stated by these defendants in their Statements of Defence) or statements that were not made by XXXXXXXXX or YYYYYYYY and WWWWWW. In addition, there may be strong policy reasons against any finding of negligent misrepresentation in the circumstances.

6. *Statute of Frauds*

It seems fairly clear that the contract at issue was, or would have been, in its essence in relation to the development and sale of lots of land, and thus needed to be in writing or evidenced by a memorandum in writing, and signed by XXXXXXXXX, pursuant to the Statute of Frauds.

In this case, the only possible memorandum in writing of the alleged contract could be the proposal sent by the plaintiff on March 4, 2005, which was clearly a counter-offer that was never accepted, and was explicitly refused, by XXXXXXXXX. Thus, there could be no enforceable contract, unless the ZZZZZZZZZZ brothers can show any acts of part performance that was "unequivocally refereable" to an oral contract for the sale of land: *Booth v. Knibb Developments Ltd.*, [2002] A.J. No. 957; 2002 ABCA 180, 312 A.R. 173 ("***Booth v. Knibb***") **[TAB 41]**. In this case, there are no explicit claims of acts done in part performance within the Amended Amended Statement of Claim, and the only possible acts of part performance contained within the plaintiff's claim, contained in para. 22 in regards to the detriment it suffered in relation to the alleged misrepresentations, are arguably not sufficient, as they can all be classified as normal pre-contractual acts, as was the case in *Neighbourhoods of Cornell Inc. v. 1440106 Ontario Inc.*, [2003] O.J. No. 2919, 11 R.P.R. (4^{th}) 294; 124 A.C.W.S. (3d) 675 (Ont. Sup. Ct.) **[TAB 31]**,

affirmed on appeal: [2004] O.J. No. 2350; 22 R.P.R. (4th) 176; 131 A.C.W.S. (3d) 852 (ONCA) ("***Neighbourhoods***") **[TAB 32]**.

DISCUSSION:

1. ***Breach of Fiduciary Duty*** [by XXXXXXXXX, YYYYYYYY and WWWWWW]

The claims

The ZZZZZZZZZ brothers claim that YYYYYYYY and WWWWWW acted as a dual agent to both XXXXXXXXX and ZZZZZZZZZ Homes and breached their fiduciary duties (of honesty, good faith and confidence) owed to ZZZZZZZZZ Homes by revealing (to the other defendants) details of discussions and documents pertaining to the approach, negotiation strategy and finances of ZZZZZZZZZ Homes vis-à-vis ----------, and other proprietary information that was expressly and/or impliedly shared in confidence with YYYYYYYY and WWWWWW.

The ZZZZZZZZZ brothers also claim that XXXXXXXXX (and all the defendants) owed certain fiduciary duties to ZZZZZZZZZ Homes, largely due to the relationship between them during the period of discussion and negotiation about which builders would be the exclusive builders in ----------. While the argument is a bit convoluted, it seems they claim a fiduciary relationship was established as a result of: (i) the relationship between them during the time from June 2003 to March 2005; (ii) the defendants gaining access to the goodwill and name of ZZZZZZZZZ Homes, as well as its confidential and proprietary information; (iii) the defendants' knowledge of ZZZZZZZZZ Homes' business plans and vulnerability in respect of access to high end country residential lands; and (iv) the defendants' (assumably, XXXXXXXXX's) ability to exercise discretion concerning utilization of exclusive builders for the development of ----------.

The fiduciary duties claimed to be owed by the defendants, and breached, include: (i) not to appropriate the goodwill and name of ZZZZZZZZZZ Homes; (ii) not to appropriate the opportunities of ZZZZZZZZZZ Homes; (iii) not to appropriate the property of ZZZZZZZZZZ Homes; (iv) not to make use of confidential and proprietary information acquired during the course of their relationship without giving ZZZZZZZZZZ Homes an opportunity to participate in ----------; and (v) not to solicit the customers, staff, trades or consultants of ZZZZZZZZZZ Homes, without giving them an opportunity to participate in ----------.

The Law regarding Fiduciary Duties

The determination of fiduciary duties has proven to be a problematic and often contemplated area of the law, provoking many split decisions, particularly at the Supreme Court level (and particularly between La Forest and Sopinka J.J.).

Madam Justice Conrad of our Court of Appeal provided an excellent discussion of fiduciary obligations in *Luscar Ltd. v. Pembina Resources Ltd.*, [1994] A.J. No. 864; 162 A.R. 35 (ABCA) ("***Luscar***") **[TAB 6]**. That case, and many others, show that the current guiding principles and conceptual approach in this area were first enunciated by Wilson J. of the Supreme Court of Canada in *Frame v. Smith*, [1987] S.C.J. No. 49; 2 S.C.R. 99 **[TAB 3]**. ***Frame v. Smith*** was a family law case in which the father claimed breach of fiduciary obligations against his former wife and her new husband for interfering with his access to his children. The majority of the Supreme Court found a breach of the access order could not properly give rise to a fiduciary relationship.

Wilson J., writing in dissent in ***Frame v. Smith***, disagreed with the majority as to whether fiduciary obligations arose in the case. Nonetheless, she provided **a great summary of the general principles surrounding fiduciary obligations**. She noted there were some recognized categories of relationships which were generally recognized to give rise to fiduciary obligations: director-corporation, trustee-beneficiary, solicitor-client, partners, principal-agent, and life

tenants-remaindermen. However, she noted the categories of relationships giving rise to fiduciary duties were never closed. Wilson J. also discussed the difficulties encountered in dealing with the fiduciary principle, particularly because of the fact the content of the fiduciary duty varies with the type of relationship to which it is applied and the lack of any set of general principles to apply to "new" relationships outside of the recognized categories. See: paras. 57-58.

Wilson J. then enunciated the often-cited **three-step analysis that has proven most useful in recognizing a fiduciary relationship**, at para. 60:

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

The three-step analysis of Wilson J. was later approved by the Supreme Court in ***Lac Minerals*** **[TAB 4]**, by both La Forest J. for the majority as to the result but in the minority on the fiduciary issue, at paras. 145-147, and Sopinka J. writing for the majority on the fiduciary issue but in dissent as to the result, at para. 32.

Sopinka J. added to the enunciation of general principles done by Wilson J. by clarifying that the traditional relationships would not always give rise to fiduciary obligations and that not all obligations existing between the parties to a well-recognized fiduciary relationship would be fiduciary in nature: at paras. 30-31.

Sopinka J. then noted that with traditional relationships, the characteristics or criteria for a fiduciary relationship would be assumed to exist. Conversely, when confronted with a relationship outside of the traditional categories, it was essential that a Court consider what the essential ingredients of a fiduciary relationship were and whether they were present. To this end,

he adopted the “rough and ready guide” enumerated by Wilson J. in *Frame v. Smith* (at para. 32) and then provided the following additional comments, at paras. 32-33:

> **It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.**
>
> **The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability…**
> [Emphasis added]

In his dissenting reasons, La Forest J. clarified that the determination of whether a fiduciary obligation existed outside of the traditional fiduciary relationships would be a question of fact to be determined by examining the specific facts and circumstances surrounding each relationship: at para. 148. La Forest J. did not find Justice Wilson’s three-step analysis as useful in this endeavor, but rather endorsed the following comments of Professor Finn in "The Fiduciary Principle", at para. 148:

> **What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out. But they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship**. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the "fiduciary expectation". **Such a role may generate an actual expectation that that other's interests are being served.** This is commonly so with lawyers and investment advisers. But equally the expectation may be a judicially prescribed one because the law itself ordains it to be that other's entitlement. And this may be so either because that party should, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he has adverted to the matter, or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility.
> [Emphasis added]

La Forest J. did not see vulnerability as a necessary ingredient in every fiduciary relationship, but noted it would often be present and would, as proposed by Wilson J. in *Frame v. Smith*, be a relevant consideration in determining if certain facts giver rise to a fiduciary obligation: at para. 169. While he saw his views on this issue as diverging from those of Sopinka J., arguably the words of Sopinka J., (quoted above, at paras. 32-33), are generally in accord with La Forest's views.

Sopinka J. may have placed more emphasis on the importance of the element of vulnerability, when it is present, but in any event, the definition of vulnerability adopted by both Sopinka J., at para. 51, and La Forest J., at para. 169, in ***Lac Minerals*** was the same definition enunciated by Wilson J. in ***Frame v. Smith***, at para. 63:

> **...This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion** combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. **Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length**… The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any "vulnerability" could have been prevented through the more prudent exercise of their bargaining power....
> [Emphasis added]

La Forest J. elaborated on the concept of "vulnerability" as follows, at para. 170:

> **Persons are vulnerable if they are susceptible to harm, or open to injury. They are vulnerable at the hands of a fiduciary if the fiduciary is the one who can inflict that harm**. **It is clear, however, that fiduciary obligations can be breached without harm being inflicted on the beneficiary**…

One of the central divisions between Sopinka and La Forest J.J. in ***Lac Minerals*** was in their conclusions as to whether the requisite vulnerability and fiduciary obligations arose in the circumstances. Sopinka J., writing for the majority, found no fiduciary duty arose in that case.

In his view, while several factors indicated a fiduciary relationship, those could not overcome the absence of dependency or vulnerability which was essential to the finding of a fiduciary relationship. There was **clearly no physical or psychological dependency** which attracted fiduciary duty in that case. **A dependency of that sort between corporations, while possible, could not exist when the dealings were between experienced mining promoters** who had ready access to geologists, engineers and lawyers. He found if Corona placed itself in a vulnerable position because Lac was given confidential information, that dependency was gratuitously incurred. Corona could have required Lac to undertake not to acquire the Williams property unilaterally. Also important to his finding was that **the parties had not yet** identified the type of relationship they wanted or **advanced beyond the negotiation stage**. The fact that the parties were negotiating towards a common object could not elevate the negotiations to something more. He found no discretionary power had been conferred on Lac to acquire the Williams property, that the supply of confidential information was not necessarily referable to a fiduciary relationship and was at best a neutral factor, and that no practice in the mining industry could support the existence of a fiduciary relationship.

The reasons in *Lac Minerals* were subsequently affirmed by the Supreme Court of Canada in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; 3 S.C.R. 377 ("***Hodgkinson***") **[TAB 7]**, which dealt with fiduciary duties in professional advisory situations. In that case, an investor brought a claim against an accountant who actively sought out the investor and advised him to invest in certain real estate investment projects, but failed to inform the investor that he was also involved with the developers of those projects. **La Forest J.**, this time writing for the majority, at paras. 32-33, **concluded that, in assessing the existence of fiduciary obligations outside of established categories, courts should inquire whether**:

> (i) **given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue**, and

(ii) **whether there was evidence of a mutual understanding that one party had relinquished its own self-interest and agreed to act solely on behalf of the other party**.

Lac Minerals was also followed by our Court of Appeal in *155569 Canada Limited v. 248524 Alberta Ltd.*, [2000] A.J. No. 101; 2000 ABCA 41; 255 A.R. 1 ("***155***") **[TAB 5]**, per Irving, O'Leary JJ.A., which involved a failed shopping center development project which was funded through a limited partnership investment. In ***155***, they were not dealing with a presumptively fiduciary relationship; thus, the issue was whether the facts supported a finding that the developers, along with the principals and directors of the general partner, owed fiduciary duties to the limited partnership. For their analysis, they adopted the three factors indicative of fiduciary obligations outlined by Wilson J. in *Frame v. Smith* and adopted in *Lac Minerals*. They also noted that the element of vulnerability was viewed either as the hallmark or as an indicia of a fiduciary obligation: at para. 90.

Fiduciary Duties in Commercial Relationships

Significantly, many comments have been made by the Supreme Court of Canada and our Court of Appeal in regards to the rarity and undesirability of extending fiduciary duties to relationships between arm's length commercial parties, and that such duties should only be found in exceptional cases where there is truly a need for special protection: ***Luscar***, at paras. 50-51; ***Lac Minerals***, at paras. 27-29, 159, 176 and 179-180; ***Hodgkinson***; ***155***, at paras. 92-92, and *Financial Management Inc. v. Associated Financial Planners Ltd.*, [2006] A.J. No. 132; 1006 ABCA 44; 384 A.R. 70 ("***Financial***") **[TAB 9]**, at paras. 16-17.

In addition, our Court of Appeal in ***Financial*** provided the following useful comments, at para. 18:

> … **A fiduciary relationship does not arise simply because one of the parties to a commercial transaction has wrongly assessed the trustworthiness of the other and reposed confidence in that other party. FMI was a corporate entity, and there is no evidence to show that its principal was an unsophisticated**

> **businessman**; **there is no peculiar vulnerability on the part of FMI, nor are there any other exceptional circumstances** that would justify the imposition of fiduciary obligations.
> [Emphasis added]

There do not appear to be any cases involving claims of fiduciary duties between developers and builders or potential builders. However, in ***Dirom v. Perera***, [2004] A.J. No. 990; 2004 ABQB 657; 372 A.R. 50 ("***Dirom***") **[TAB 8]**, Moreau J. considered an alleged oral contract and fiduciary claim between the plaintiff, a planning and development consultant, and the defendant, a Calgary-based developer.

The defendant in ***Dirom*** acquired lands for development in Fort McMurray and the plaintiff alleged that he and the defendant made an oral agreement to do a development project and share in the profits together. The defendants denied there was any such oral agreement or that Dirom had any ownership claim to the profits. They maintained that Dirom contributed money to the purchase of the lands as a lender only and was repaid, but even if the Court found an oral agreement, it was unenforceable due to the Statute of Frauds and the doctrine of ex turpi causa.

Among the numerous issues considered in that case, was whether the arrangement between the parties gave rise to a fiduciary obligation on the defendant to account for the profits of the developments. Following the reasoning and principles set out in ***Lac Minerals***, ***Frame v. Smith***, and ***Luscar***, Moreau J. found there was a business arrangement struck between the parties that included the division of the profits of the two developments. He found Dirom and Perera started out as friends interested in becoming involved in a development project together. Perera was found to be in control of the day-to-day management of the developments and all aspects of the projects and occupied a role akin to that of a CEO. Thus, he had scope for the exercise of discretion and power and could use that discretion and power to affect Dirom's beneficial interests. Dirom had some experience in commercial property acquisition, but it was his planning expertise, rather than his business experience, which Perera valued for

the projects. Although Dirom was responsible for monitoring his agreement with Perera, he was vulnerable in the sense that he had a limited ability to do so given that all of the accounting information relating to the developments was within Perera's exclusive control. He agreed with the definition of "vulnerability" stated by La Forest J. in *Lac Minerals* at para. 170 and, in the end, found Perera had a fiduciary obligation to account to Dirom for Dirom's share of the development profits due to the arrangement they struck to keep Dirom's role in the development silent and to allow Perera to manage all aspects of the developments. See: paras. 203-206.

Fiduciary Duties and Real Estate Agents

Unlike the hesitation shown in extending fiduciary obligations to arm's length parties in commercial transactions, La Forest J. in ***Hodgkinson*** noted that the opposite was true in the field of real estate: at para. 42. Thus, it seems the relationship between real estate agents and their clients, as an agent/principle relationship, would be considered an established category of fiduciary relationship, having as its essence discretion, influence over interests, and an inherent vulnerability. In such a relationship, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. So, even in established categories of fiduciary relationships, like real estate agent and client, the court must look at the evidentiary factors which support or contradict the existence of a fiduciary relationship between them, [recognizing that the burden of proof will be on the defendant real estate agent to rebut the basic presumption]. See: ***Hodgkinson***, at para. 31, and also *Alwest Properties Ltd. v. Roppelt*, [1998] A.J. No. 1401; 1998 ABQB 1027; 236 A.R. 201 ("***Alwest***") **[TAB 10]**, at paras. 12-13 and 17.

Fiduciary duties have been found on the part of real estate agents in a number of cases, including in Alberta: ***Alwest***, at paras. 12-13 and 17-21; *G.L. Black Holdings Ltd. v. Peddle*, [1998] A.J. No. 1488; 226 A.R. 302 (ABQB) ("***Peddle***") **[TAB 15]**, per Kent J., at para. 45, affirmed, [1999] A.J. No. 1083; 1999 ABCA 264; 244 A.R. 376 **[TAB 16]**; and *Crescent Restaurants Ltd. v. ICR*

Brokerage Inc., [2008] S.J. No. 632; 2008 SKQB 383 ("***Crescent Restaurants***") **[TAB 13]**, at paras. 94-115.

These cases show what is required of a real estate agent, as a fiduciary -- their relationship with their clients is marked by the special elements of trust, confidence and loyalty, which generally requires loyalty, good faith and avoidance of a conflict of duty and self interest. Further, vendors are entitled to the real estate agent's best skill, care and diligence in performance of their tasks. See: ***Alwest***, at paras. 18-20. More specifically, **the duties and obligations of real estate agents** were set out in the 1975 decision of the Ontario High Court in *D'Atri v. Chilcott*, which has been frequently adopted in Alberta and elsewhere, as in Alwest, at para. 21:

> 1. the relationship between a real estate agent and the person who has retained him to sell his property is a fiduciary and confidential one;
>
> 2. there is a duty upon such agent to make full disclosure of all facts within the knowledge of the agent which might affect the value of the property;
>
> 3. not only must the price paid be adequate but the transaction must be a righteous one and the price obtained must be as advantageous to the principal as any other price that the agent could, by the exercise of diligence on his principal's behalf, have obtained from a third person; and
>
> 4. the onus is upon the agent to prove that those duties have been fully complied with.

Alwest involved a claim by Alwest against a real estate agent (Roppelt) for breach of fiduciary duty by failing to disclose certain material facts which may have affected the value of a property sold by Alwest. Roppelt introduced a purchaser to Alwest. Alwest's industrial property was not listed for sale at the time, but negotiations led to a sale. At trial, Lee J. dismissed the action. He found an agent-principal relationship between Roppelt and Alwest was established, but there was a rebuttable presumption that a fiduciary relationship existed unless Roppelt proved otherwise and Roppelt successfully rebutted the presumption to show no fiduciary relationship existed. Lee J. found the principal of Alwest was a sophisticated business man, who did not rely on advice

from Roppelt and did not share any confidential information. Alwest was not found to be at any disadvantage or disability vis à vis Roppelt at any material time and Roppelt appeared to have had little discretion or power, essentially taking all his directions from Alwest. The only advice Alwest relied on was given by their solicitor. And even if there was a fiduciary relationship between Alwest and Roppelt, Lee J. found that all relevant facts had been disclosed and all duties had been carried out.

In addition, Lee J. found that **Roppelt did not become the agent for the vendor alone** once the prospective purchaser was introduced; rather, with the agreement of Alwest, he **continued to work in a "dual agency" role** for both the vendor (Alwest) and the purchaser, in order to close the transaction. Dual agency was not pled as an alleged breach in this case and Lee J. found that dual agency was allowed in Alberta. **In any event, he found Roppelt was only a "dual agent" in the technical sense**, as he was the only realtor involved, and Alwest always knew that fact and agreed to the arrangement. Further, it appeared Roppelt did not act or advise in any way that was adverse to the interests of Alwest, or that benefited the purchaser at the expense of Alwest: at paras. 96-98.

No dual agency was found in ***Peddle***, but it does set out an interesting test to determine if an agent is acting for a vendor or purchaser. In that case, the plaintiff purchaser (Black) sued the defendant real estate agent (Peddle) for profits made by him off the sale of certain land to the plaintiff. Peddle had contacted Black to see if Black had any need for new or additional property. Black was considering an expansion. Peddle found some available land and negotiations proceeded between Black, Peddle and the vendor, but no agreement was reached. Then, Black claimed it learned from Peddle that land was available across the road from the other property. Peddle claimed that when he first became aware of that land, he intended to have his company purchase it. Peddle's company subsequently purchased the land and on the same day, sold two blocks of the land to Black for a significant profit. **Black claimed Peddle had acted as Black's real estate agent and owed a fiduciary duty to Black, which he breached** by failing to divulge their true interest in the property and falsely representing the source of their commission.

At trial, Kent J. allowed Black's action, finding that, **while there was nothing in writing, Peddle was acting as Black's agent,** starting when he first approached Black. **She noted the test set out by the Ontario Court of Appeal** in *Knoch Estate v. Jon Picken Ltd*., in which Finlayson J. said that **the appropriate way to determine if an agent was an agent for the vendor or purchaser was to determine to whom the agent's primary duty lies**. Applying that test to the situation before her, Kent J. had no doubt that Black reasonably understood Peddle's primary duty was to them. See: Para. 43. In addition, Kent J. found the agency relationship between Black and Peddle did not terminate when the deal fell through with the first vendor. **Black reasonably believed that Peddle continued to be its agent**, particularly due to lack of express statement from Peddle that he was no longer their agent and Peddle's failure to disclose to Black his interest in the lands. Finally, Kent J. found Peddle owed fiduciary duties to Black, as set out in the *D'Atri v. Chilcott* case (also relied on in *Alwest*), at para. 45, and found Peddle breached his duties to Black in three ways: (i) by failing to obtain the best price for his principal; (ii) by making an undisclosed profit from the transaction; and (iii) by not adequately disclosing his true interest in the property. Had Peddle fulfilled his duty to Black, Black would have acquired the property at the price Peddle paid for it; thus, Black was entitled to the profit made by Peddle as damages.

Despite the findings regarding dual agency in *Alwest*, real estate agents acting in a dual role have been considered to owe fiduciary obligations to both vendors and purchasers: ***Crescent Restaurants***, at paras. 116-133. In that case, Peter was the owner and original vendor of Primes, and Lloyd was the sole real estate agent involved in dealing with both the vendor and two successive purchasers in what was in effect a "flip" of Primes. By written agreement, Lloyd was Peter's exclusive listing agent for Primes. Further, **the Court found** that even after the expiry of the exclusive listing agreement, **an agency relationship continued based on the conduct of the parties** -- Lloyd continued to be Peter's listing agent by his words and actions, as Peter continued to give Lloyd instructions and Lloyd continued to try to sell Primes. Further, the Court found, and Lloyd admitted, that he also became an agent to the first purchase, Knibbs, as he was

instructed by Knibbs to prepare an offer to purchase and then presented it to Peter. **Thus, Lloyd was found in a dual agency relationship with both the vendor and purchaser**. See: paras. 87-88. Further, the Court found Lloyd owed fiduciary duties to Peter as his listing agent and dual agent in the circumstances of the case, following *Alwest* and *Frame v. Smith*, at paras. 94-95. The Court was satisfied that Peter was peculiarly vulnerable to Lloyd's actions as his agent in the circumstances of the "flip" of Primes. As well, Peter was at the mercy of Lloyd, the only person who held all the cards, so to speak, without advising Peter of all the facts so Peter could have the opportunity of making sound decisions: at para. 102.

The Court noted dual agency relationships were common in the real estate business and that while it may not happen in every case, **brokers in a dual agency situation could be found to owe fiduciary duties to both vendors and purchasers**. **And more importantly, ignorance on the part of brokers as to who is their principal, or principals**, in a particular transaction or the nature and scope of the legal relationship between them **would be no excuse** if brokers violate the fiduciary obligations inherent in such relationships. See: para. 117. As a dual agent Lloyd owed Peter several fiduciary duties, but in addition, his foundational and fundamental **duties as a fiduciary were not to deceive or mislead the vendor or purchaser by words or silence and to be fair to both parties**: at para. 119.

Again, while there do not appear to be any cases involving claims of dual agency and/or fiduciary duties between potential builders for a development and the agent of the developer's broker, in ***489212 Ontario Ltd. v. Participactive Dynamics Inc.***, [1994] O.J. No. 780; 38 R.P.R. (2d) 32; 47 A.C.W.S. (3d) 5 (Ont. Ct. G.D.) **[TAB 11]**, Wilson J. considered whether the plaintiff developer/vendor's exclusive selling agent also acted for the purchaser in the transaction, and whether fiduciary duties of disclosure were breached (i.e. whether the real estate broker had a duty to disclose his personal holdings in the development project to potential purchasers). In this case, the one agent involved in the transaction was found to be clearly in a fiduciary position as listing agent to the vendor. **The issue was whether he also became a dual agent for both the vendor and purchaser and was in a fiduciary relationship with the purchaser**, as claimed by

the purchaser. The Court found the purchaser relied on the agent for advice about the appropriate offering price in the Agreements as well as the appropriate sign-back price; however, the purchaser did have independent legal advice concerning the terms of the Agreements.

Wilson J. found there was never disclosure made by the agent of his personal involvement with the vendor. Further, the efforts made by the agent during the listing periods were wholly inadequate and were the reason the units did not sell, not the slow-down in the market.

As to whether the agent had been in a fiduciary relationship with the purchasers, the Court cited and relied on the test set out by Wilson J. in *Frame v. Smith* (at para. 93). The Court found that while the agent felt their sole fiduciary obligation was to the vendor and could only become a dual agent by the vendor providing their written permission, their view failed to recognize that **an agency relationship, fiduciary in nature, can arise by common law**: at para. 94. Further, the view that the sole fiduciary relationship in a real estate transaction lay with the vendor paying the commission was previously shattered by the Ontario Court of Appeal. **Thus, a court could find that a particular agent had become the agent for both the vendor and the purchaser**. In that circumstance, it would be appropriate to explore the duties that arise and **determine to whom the agent's primary duty lies**: at para. 97. Ultimately, the Court found the prerequisites for a fiduciary relationship were proven – and that the agent **was in the position of a dual agent with fiduciary obligations to both vendor and purchaser – including providing investment advice and direction to the purchaser in an atmosphere of trust**. See: para. 101.

Wilson J. found the **obligations of a dual agent** were outlined clearly by the Ontario Court of Appeal in *Raso v. Dionigi*, in which it was held that, because of the obvious conflict of interest, the normal rule is that an agent cannot act for both vendor and purchaser. However, dual agency is not prohibited absolutely – the one narrow exception to the rule is if the agent can show he has complied with his obligation of disclosure, including both:

(i) making full, timely and fair disclosure to both of his principals, including disclosure of all material circumstances and of everything known to the agent respecting the subject matter of the contract which would be likely to influence the conduct of the principal (that would be over and above disclosure of when the agent has gained an advantage in the transaction, has information might affect the value of the property, or when a conflict of interest exists); and

(ii) establishing that the parties to the transaction (i.e. his two principals, the vendor and the purchaser) were at arms length and that, after receiving the information the principals, agreed to what was done by the agent or what the agent proposes to do.

[NOTE: The decision in ***Participactive*** was affirmed on appeal in a very brief judgment: [1997] O.J. No. 3856; 13 R.P.R. (3d) 32; 74 A.C.W.S. (3d) 155 (ONCA) **[TAB 12]**].

In general, **it is clear that an agency relationship can be implied from the circumstances and conduct of the parties**, but there must be some course of conduct to indicate acceptance of an agency relationship; mere silence will be insufficient. The asset of the agent will be implied from the fact that he has acted intentionally on another's behalf and the assent of the principal will be implied when the circumstances clearly indicate that he has given authority to another to act on his behalf. See: *Christensen (Estate) v. Proprietary Industries Inc*., [2004] A.J. No. 763; 2004 ABQB 399 ("***Christensen***") **[TAB 16]**, per MacLeod J., at paras. 34-35, in reference to Fridman, *The Law of Agency*, 7th ed. (Toronto: Butterworths, 1996) at pp. 59-60.

It has also been well established that the **burden of proving agency lies upon the party alleging** that the agency existed: ***Christensen***, at para. 34.

Application of the Law to Your Clients' Case

The effect of the case law seems to be that in assessing the existence of fiduciary duties outside of the established or traditional categories, courts must make the two inquiries outlined in ***Hodgkinson***, while also considering the three factors outlined by Wilson J. in ***Frame v.***

Smith. In addition, it is clear that fiduciary duties will rarely be found between arm's length commercial parties, and only in exceptional cases.

Obvious issues with ZZZZZZZZZZ's claims about the fiduciary duties alleged to be owed to it are: (i) ZZZZZZZZZZ had no opportunities that were appropriated that were not already opportunities available to all the potential builders; (ii) there is no clear indication that any property of ZZZZZZZZZZ was appropriated; (iii) ZZZZZZZZZZ was given "an opportunity", several of them in fact, to participate in ----------, they just were not ultimately selected as one of the exclusive builders.

XXXXXXXXX's situation seems like that found by the majority in ***Lac Minerals*** – there is arguably no fiduciary duty because of the absence of any dependency or vulnerability, which is essential to a finding of fiduciary duty. The ZZZZZZZZZZ brothers, by their own admission, were sophisticated, experienced and very successful in their business and apparently had several other potential building opportunities. Further, the parties had not yet advanced beyond negotiations and had not yet clarified their relationship, let alone whether they would be working together; no discretionary power had been conferred on XXXXXXXXX (at least none that XXXXXXXXX did not rightly have from the beginning as the vendor and developer); any supply of confidential information by ZZZZZZZZZZ does not necessarily reference a fiduciary relationship and is at best a neutral factor; there was clearly no physical or psychological dependency here, as is unlikely in dealings between experienced arm's length parties, such as XXXXXXXXX and ZZZZZZZZZZ; finally, if ZZZZZZZZZZ put itself in a vulnerable position because XXXXXXXXX was given confidential information, that dependency could be seen as gratuitously incurred.

XXXXXXXXX's situation is distinguishable from ***Dirom*** and other cases where a joint venture or similar relationship is found, as that is not the nature of the relationship between XXXXXXXXX and ZZZZZZZZZZ.

In addition, there appears to be no other exceptional circumstances -- ZZZZZZZZZZ was simply trying to win a contract as builders for a development project and were unsuccessful; that does not seem to be the type of exceptional circumstance envisioned by the Courts to justify imposing a fiduciary duty.

In regards to YYYYYYYY and WWWWWW, as real estate agents, a fiduciary duty is assumed but can be rebutted. They were clearly the agent for XXXXXXXXX; however, as shown in the cases, what must be determined is whether they also became an agent for ZZZZZZZZZZ. It is clear that the court will have to look at the circumstances and conduct of the parties to determine whether such a dual agency existed, and that whether, as in Participactive, YYYYYYYY and WWWWWW were providing investment advice and direction to ZZZZZZZZZZ in an atmosphere of trust. In any event, the cases also make it clear that fiduciary duties could arise, even outside such a finding.

In our view, it seems that YYYYYYYY/WWWWWW, as the only realtor involved, could arguably be seen as a "dual agent" in the technical sense at most, as in ***Alwest***. Arguably, they were at all times acting on behalf of, and in the best interests of XXXXXXXXX and thus, their primary duties were owed to XXXXXXXXX. In addition, there is no indication that ZZZZZZZZZZ relied on them for advice or direction about their negotiation strategy or the offer they made, or in any other sense. It seems most likely ZZZZZZZZZZ dealt with YYYYYYYY/WWWWWW merely in their capacity as the agent for XXXXXXXXX – that is apparent even on the fact of their letter dated March 4, 2005 advising they are interested to participate as a builder in ----------, trusting they will deliver their proposal to XXXXXXXXX and requesting an immediate response from XXXXXXXXX. There is no evidence, in that letter or anywhere else, of ZZZZZZZZZZ issuing instructions to YYYYYYYY/WWWWWW to act on their behalf in the transaction.

2. ***Breach of Confidence/Confidentiality*** [by YYYYYYYY and WWWWWW]

In the alternative to their claims regarding fiduciary duties, ZZZZZZZZZZ specifically claims that YYYYYYYY, through WWWWWW, breached duties of confidentiality owed to ZZZZZZZZZZ Homes by sharing confidential information, including documentation and details of discussions between WWWWWW and officers of ZZZZZZZZZZ Homes with the officers of each of the corporate Defendants, which pertained to the approach and negotiation strategy of ZZZZZZZZZZ Homes vis-à-vis ----------, financial details and other proprietary information of ZZZZZZZZZZ Homes, that was expressly or impliedly shared in confidence with YYYYYYYY and WWWWWW. The only result they seem to claim is that the defendants made unauthorized use of their goodwill, name and confidential and proprietary information, increasing their profits as the expense of ZZZZZZZZZZ.

Such a duty can exist – to keep the confidence of a party with respect to information not in the public domain, of commercial or industrial value, given on a business-like basis, and with some avowed common object in mind – but it is clear that to be actionable, the information must be proven to be misused by the confide to the detriment of the confidor: ***Lac Minerals*** **[TAB 4].**

While the Court in ***Lac Minerals*** was divided over the issue of the existence and breach of a fiduciary relationship in that case, the Court was unanimous in finding that Lac breached a duty of confidence owed to Corona. La Forest J. set out **the test to determine whether there has been a breach of confidence**, at para. 129 – it involves establishing three elements:

(1) the information conveyed was confidential;

(2) it was communicated in confidence; and

(3) it was misused by the party to whom it was communicated to the detriment of the party communicating it.

La Forest J. further explained the test, particularly the third element of the test, at paras. 135 and 139:

> The receipt of confidential information in circumstances of confidence **establishes a duty not to use that information for any purpose other than that for which it was conveyed**. If the information is used for such a purpose, and detriment to the confider results, the confider will be entitled to a remedy.
>
> . . .
>
> **In establishing a breach of a duty of confidence, the relevant question to be asked is, "what is the confidee entitled to do with the information**?" and not, "to what use he is prohibited from putting it?" **Any use other than a permitted use is prohibited and amounts to a breach of duty**. When information is provided in confidence, **the obligation is on the confidee to show that the use to which he put the information is not a prohibited use**.

With respect to the first element of the test, Sopinka J. noted the appropriate test to determine if information was confidential, which was similar to the guideline approved by La Forest J., at para. 58:

> The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, **namely, it must not be something which is public property and public knowledge**. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

With respect to the second element of the test, Sopinka J. noted it is the “reasonable man test” that is used to determine whether the information was imparted in circumstances where an obligation of confidence arises, as articulated in Coco v. A. N. Clark (Engineers) Ltd., at para. 63:

> In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard

> the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence: The trial judge, at p. 775, found that it was obvious to Sheehan that the information was confidential and that:
>
> It was transmitted with the mutual understanding that the parties were working towards a joint venture or some other business arrangement and, in my opinion, was communicated in circumstances giving rise to an obligation of confidence.

In the case before him, La Forest found the elements of breach of confidence had been established, specifically because: (1) Corona had communicated private, unpublished information to Lac; (2) although the matter of confidence had not been raised, there was a mutual understanding between the parties that they were working towards a joint venture and that valuable information was communicated to Lac under circumstances giving rise to an obligation of confidence; and (3) the information provided by Corona was the **springboard** that led to Lac's acquisition of the Williams property, which use had not been authorized by Corona. The receipt of confidential information in circumstances of confidence established a duty not to use that information for any purpose other than that for which it was conveyed. Lac acted to Corona's detriment when it used the confidential information to acquire the Williams property, which Corona would otherwise have acquired.

The test for breach of confidence laid out in ***Lac Minerals*** was followed by our Court of Appeal in *Walter Stewart Realty Ltd. v. Traber,* [1995] A.J. No. 636; 174 A.R. 45 (ABCA) ("***Walter Stewart***") **[TAB 19]**, per Bracco, and Conrad JJ.A., an appeal that concerned a breach of confidence action arising from a land development project in Lethbridge, Alberta. Stewart, of Walter Stewart Realty, was a licensed realtor and a real estate developer who became aware of certain land, that was available for sale, which the city felt could not be serviced and thus was undevelopable. Stewart believed the land could be serviced from the bordering subdivision and set about trying to locate investors for a joint venture to fund the project. He was put in touch with the respondent, Traber, as a potential financier of the project. **He extracted a promise from Traber to keep secret and confidential the information he was about to disclose**, then advised him of the availability and potential of the lands as compared to its characterization by the city. He and Traber viewed the land, discussed the potential terms of a joint venture, and

Stewart believed a joint venture was agreed to. Stewart met with city officials and the vendor of the land to make the necessary arrangements, but eventually the subject property was transferred at Traber's instructions, and without the knowledge of Stewart, into the name of his family holding company, rather than the newly incorporated company the appellant alleged was the intended recipient of the land.

In that case, the respondents argued on appeal that the information at issue did not have the "necessary quality of confidentiality", as it was not “secret”, and hence that the trial judge erred in finding a breach of confidence. However, the Court found the trial judge properly addressed the issue and reasonably found Stewart’s actions fell squarely within the required test approved by Sopinka J. in *Lac Minerals* – that a confidential document can be the result of work done by the maker upon materials that are public, but it becomes confidential because the maker used his brain to produce a particular result. In the trial judge’s view, Stewart satisfied the test by recognizing the potential of the land, investigating until he felt he knew why the land was considered undevelopable, and concluding he could persuade counsel to amend the general municipal plan: at para. 13.

Abode Properties Ltd. v. Schickendanz Bros. Ltd., [1999] A.J. No. 1407; 1999 ABQB 902; 254 A.R. 91 (“***Abode Properties***”) **[TAB 18]**, was an action for breach of contract and breach of confidence arising from the parties' failed joint venture to purchase and develop land. The plaintiff became aware of an opportunity to purchase land in Canmore and began negotiating the terms of a joint venture with the defendants. Believing they had reached an oral agreement, the plaintiff disclosed information to the defendants about the environmental condition of the land. After the joint venture fell through, the defendants bought the land alone, following which the value of the land increased significantly.

McIntyre J. also adopted the test for a breach of confidence claim, as enunciated in ***Lac Minerals***: at para. 31. In considering the first requirement, that the information be “confidential”, he noted several cases showing when information conveyed was confidential, and

when it wasn't. First, in *LAC Minerals*, the fact that an adjacent property likely contained mineral-bearing deposits was confidential information because it was the secret result of the plaintiff's extensive drilling and exploration program on the property. Next, in *Pharand Ski Corp. v. Alberta*, the plaintiff's discovery of a potential ski area site for the 1988 Olympics was confidential because the plaintiff recognized the value of the area only through some ingenuity and put together a concept plan for the area which reflected its potential as a unique site. *Ridgewood Resources Ltd. v. Henuset* was cited as an example of when information about the potential of oil lands was not found to be confidential because it was in the public domain. Although the defendant did not know the information before it was disclosed to him by the plaintiff, and although the information was only known to a small group of people, it was nevertheless in the public domain as the community in which the information would have any significance was itself a small group. See: paras. 33-34.

In ***Abode Properties***, the information disclosed fell into three categories: (i) the existence of an opportunity to buy the CP lands -- found not to be confidential because the land was on the market; (ii) the environmental conditions of the lands, as set out in several reports – two of which were not found to be confidential because the information was either available from CP to any interested purchaser or from the Town of Canmore, but one (the Curtis information) was confidential because it was obtained as a result of private testing ordered by the parties and paid for by the parties, and it was not disclosed to others; and (iii) the specifics about Abode's offer to CP to purchase the land, including closing date and price -- was found to be confidential as it was not in the public domain and the plaintiff considered the information to be secret.

As to whether either of the two pieces of information found to be confidential were communicated in confidence, considering the test of the reasonable man, the Court found the specifics of the Abode bid to CP were disclosed with the understanding the parties would "keep it quiet", coupled with the secrecy which one would expect to surround joint venture negotiations of that kind, amounted to the circumstances in which an obligation of confidence arose. However, the plaintiff failed to establish the second step of the test in regards to the Curtis

information. While Curtis had disclosed the information to the defendant at the plaintiff's instructions, the defendant had a right to receive the information and use it in any way it chose, as he had ordered and paid for one of the assessments which resulted in the Curtis information. Thus, any secrets which were conveyed in the Curtis information belonged to the defendant as much as to Abode. See: paras. 44-46.

Finally, as to whether the confidential information (the specifics of the Abode bid to CP) was misused by the defendant to the detriment of the plaintiff, the Court was satisfied the defendant **did not receive any advantage over others by knowing the specifics of Abode's bid and that the defendant did not use this confidential information from Abode as a springboard to acquire the CP Land for itself** – the defendant was actively looking for land in that area and would likely have discovered it soon on his own, and if anything, the defendant's dealings with the plaintiff only delayed their making of a bid on the land, as he refrained from bidding until negotiations with the plaintiff broke down. In any event, the defendant's actions were not actually detrimental to Abode. The Court noted that in *Lac Minerals*, it was found that "but for" the defendant's actions, the plaintiff would have acquired the lands in dispute for itself. However, in Abode Properties, the defendant did nothing to hinder Abode from closing on its own, had it been able to do so – Abode neither had the resources, or the ability to raise funds, to buy the land. The defendant's offer was just one of several submitted to CP by the time Abode's offer lapsed. See: paras. 49-51.

Application of the Law to your Clients' case

In order to establish this claim, ZZZZZZZZZZ will have to establish all three factors identified in ***Lac Minerals***. However, without further details, it is difficult to assess whether the information at issue was confidential or whether it was communicated in confidence. YYYYYYYY/WWWWWW specifically deny receiving any confidential information from ZZZZZZZZZZ or that any information imparted was shared in confidence. However, even assuming both to be the case, ZZZZZZZZZZ would still need to establish that the information

was misused by YYYYYYYY and WWWWWW to the detriment of ZZZZZZZZZ. Since any such information conveyed to YYYYYYYY/WWWWWW could only be used for the purpose for which it was conveyed, we must first consider, as directed in ***Lac Minerals***, what YYYYYYYY/WWWWWW were entitled to do with the information, as any use other than that would be prohibited. The obligation would be on YYYYYYYY/WWWWWW to show any use was not prohibited.

Any information given by ZZZZZZZZZ to YYYYYYYY/WWWWWW would have been in the context of ongoing negotiations in regards to ZZZZZZZZZ becoming a builder for the ---------- project, with the full knowledge that YYYYYYYY/WWWWWW were XXXXXXXXX's exclusive agent. Further, there is no claim that ZZZZZZZZZ extracted any promise of silence, or that there was any other obligation of confidence, and nothing to indicate YYYYYYYY/WWWWWW used any such information outside of the context of the negotiations. Surely, in such a context, any information given to YYYYYYYY/WWWWWW by ZZZZZZZZZ was at least intended to be passed on to XXXXXXXXX. However, whether they would have been entitled to share any such information with the defendant builders, is not so likely. No response is made in YYYYYYYY/WWWWWW's Statement of Defence in that regard.

Finally, it is also unlikely that ZZZZZZZZZ can meet the third requirement, as it does not seem they can show, as indicated in ***Lac Minerals*** and ***Abode Properties***, that "but for" the defendants' actions, even assuming they were true, they would have concluded a contract with XXXXXXXXX. Like ***Abode Properties***, the counter-offer of ZZZZZZZZZ was just one of several being considered by XXXXXXXXX in their ultimate decision as to who would be the exclusive builders for the ---------- project. Further, that counter-offer, on its face, was unacceptable to XXXXXXXXX, so it was not accepted and they chose to go with the other builders for good business reasons.

3. ***Civil Conspiracy*** [by XXXXXXXXX, VVVVVVVV and UUUUUU and their principals]

The ZZZZZZZZZZ brothers claim there was a "civil conspiracy" by all the defendants to harm ZZZZZZZZZZ Homes by purposely interfering with its economic interests and that they agreed to cooperate together to remove ZZZZZZZZZZ Homes as one of the exclusive builders "**to be involved**" in ---------- with the specific purpose of causing significant and permanent damage to ZZZZZZZZZZ Homes and its reputation.

More specifically, they claim the defendants, XXXXXXXXX, VVVVVVVV and UUUUUU, were all aware that an "enforceable contract" existed between XXXXXXXXX and ZZZZZZZZZZ Homes, pursuant to which ZZZZZZZZZZ Homes was to be one of the exclusive builders in ----------. They note that VVVVVVVV and UUUUUU received similar "offers" from XXXXXXXXX around the same time (April and August of 2004 and February of 2005). They further claim these defendants were aware, between April 2004 and March 2005, that ZZZZZZZZZZ Homes was an extremely successful competitor in upscale country residential developments in the area, and were aware that the supply of upscale country residential land was becoming more scarce. Further, these defendants were aware that ZZZZZZZZZZ Homes would likely rely on its becoming one of the exclusive builders in ---------- and thus, bypass other similar opportunities arising around the same time, resulting in severe economic loss and damage to ZZZZZZZZZZ Homes if the land they were expecting was ultimately not available to them. It is claimed these defendants were also aware that ZZZZZZZZZZ provided its expertise and experience in assisting XXXXXXXXX in planning for and marketing the development, preparing architectural control guidelines and providing access to ZZZZZZZZZZ Homes' goodwill, trade secrets, confidential and proprietary information and business practices for the purposes of planning, marketing and developing ----------. They claim VVVVVVVV and UUUUUU "acted in concert, or alternatively each acting alone", threatened XXXXXXXXX that they would not participate in ---------- if ZZZZZZZZZZ Homes was allowed to participate and required XXXXXXXXX to breach its contract with ZZZZZZZZZZ Homes. Finally, they claim

that XXXXXXXXX, VVVVVVVV and UUUUUU then conspired together to exclude ZZZZZZZZZZ Homes from ---------- **by unlawful means**, including breach of contract, inducing breach of contract, by taking and making use of the property and goodwill of ZZZZZZZZZZ Homes, including trade secrets, confidential and proprietary information and business practices, and by soliciting potential clients of ZZZZZZZZZZ Homes or business associates or employees, in order to attract competing business, and by making false and disparaging remarks about ZZZZZZZZZZ Homes in order to solicit such business.

It is widely recognized that the essential elements of the tort of civil conspiracy in Canada was settled and set out well by Estey J. in ***Canada Cement LaFarge*** **[TAB 20]** From his judgment, at pp. 456-472, it is clear that **there are three basic elements to this tort**:

1. **Agreement** -- an actionable conspiracy will not arise unless and until there is **concerted action taken pursuant to an agreement** between two or more persons to act unlawfully or to injure another – a common intention is enough; an actual contract is not required;

2. **Intention** – there must be a real or constructive intent to injure the plaintiff – thus, either a predominant motive to damage or cause injury to the plaintiff, or intent to act unlawfully and knowledge, in the circumstances, that injury to the plaintiff would probably ensue; and

3. **Damage --** the Plaintiff suffered damage due to the action of the Defendants acting in combination.

Thus, the outcome of ***Canada Cement Lafarge*** results in three situations in which civil conspiracy may arise. There will be an actionable conspiracy if:

1. two or more persons agree and combine to act unlawfully with the predominant purpose of injuring the Plaintiff;

2. the defendants combine to act lawfully with the predominant purpose of injuring the Plaintiff; or

3. the defendants combine to act unlawfully, their conduct is directed towards the Plaintiff, and the likelihood of injury to the Plaintiff is known to the Defendants or should have been known to them in the circumstances.

Significantly, it has been made clear that **self-interest permits defendants to avoid liability, notwithstanding damage to the Plaintiff, where it is shown to be the predominant purpose**, as was the case in *Canada Cement Lafarge* itself: at p. 466. In addition, Estey J. found that the main effect of a finding that a conspiracy by unlawful means has been made out is to exclude the negative defence of predominant legitimate motive, that is, the advancement of the defendants' own legitimate interests. See: p. 469.

In ***Canada Cement Lafarge***, the plaintiff, British Columbia Lightweight Aggregate Ltd. ("**BCLA**"), a supplier of lightweight aggregate, ceased business and was awarded damages at trial for the tort of conspiracy to injure after its clients, the defendant manufacturers and suppliers of cement and various concrete products (Ocean Construction and Canada Cement Lafarge), began using another aggregate to produce its light-weight concrete. BCLA had earlier sought to establish or secure markets for their lightweight aggregate and entered into agreements with the defendants whereby the defendants undertook to purchase certain volumes of lightweight aggregate exclusively from BCLA, and would not enter the lightweight aggregate supply business themselves. Eventually, those agreements expired and BCLA elected not to seek a renewal. The defendants had earlier combined and entered into marketing arrangements to share between them the concrete market in British Columbia.

At trial, it was found that the actions of the defendants, who had earlier pleaded guilty to a charge of conspiring to prevent or unduly lessen competition in the production of cement contrary to s. 32(1)(c) of the Combines Investigation Act, had made it impossible for BCLA to improve its market position. Further, it was found at trial and on appeal that, while the defendants did not deliberately conspire to drive BCLA out of business, they did intend to eliminate all competition, which included BCLA. The defendants appealed to the Supreme Court of Canada in regards to the necessary elements for an action for conspiracy to injure.

The defendants' appeal was allowed and Estey J., for a unanimous Supreme Court, found that BCLA was not entitled to claim for damages under this tort because **the necessary intention to injure did not exist**. While there was no doubt the conduct of the defendants, in entering into the market-sharing agreements, was unlawful (they were convicted of offences under federal statute and fined), that conduct was not directed towards the plaintiff, but to the public who were purchasers of the defendants' products. There was no evidence and no finding at trial that the predominant purpose of the defendants' conduct was to cause injury to the plaintiff in its business. The Court found **the defendants had discontinued their use of BCLA's product for solid business reasons and not because of any plan calculated to damage it** (the new product was one third less expensive and had no supply difficulties as there had been with BCLA's product). Further, the evidence revealed no loss traceable by reason of the defendants' combination and market-sharing agreements, to the account of the plaintiff.

Our Court of Appeal adopted the principles set out in *Canada Cement Lafarge* in ***Murphy Oil*** **[TAB 21]**. That case dealt with competitive activities in the natural gas industry, with the parties each alleging that the others had exceeded the bounds of appropriate conduct within that industry. The events began in late 1999 when the plaintiffs made a significant natural gas discovery in British Columbia. The defendants became aware of the discovery and later successfully placed bids for mineral leases for lands adjacent to the plaintiffs' test wells. The plaintiffs then commenced an action against the defendants alleging various torts including trespass, wrongful taking of trade secrets and confidential information, conversion, interference with economic interests and concealment.

The defendants denied any wrongdoing, claiming that all the information they utilized was in the public domain, much of it having been disseminated by the plaintiffs. They filed a counterclaim, claiming that the plaintiffs had illegally interfered with their economic interests, causing them to suffer substantial damage, and that many of the plaintiffs' actions were part of a conspiracy – a concerted course of action with the intended and predominant purpose of destroying the

defendants' business and the livelihood. The plaintiffs applied for summary judgment and the chambers judge dismissed most of the defendants' counterclaim. The defendants appealed that decision.

The Court of Appeal found none of the errors complained about by the defendants warranted appellate intervention and dismissed the appeal. With respect to the tort of civil conspiracy, the Court noted that the chambers judge relied on *Canada Cement Lafarge* to ascertain the necessary parameters: at para. 36. **The plaintiffs denied any conspiracy, as defined in *Canada Cement Lafarge*. Rather, they alleged they were motivated by a desire to protect their legitimate business interests**: at para. 37. The chambers judge had dismissed the defendants' counterclaim alleging conspiracy because the evidence supporting the claim consisted of hearsay statements without supporting affidavits. In considering whether an inference could be drawn that the actions of the plaintiffs were intended to harm the defendants, **the chambers judge was satisfied that there were legitimate business reasons for the plaintiffs' actions**. In addition, with respect to many of the allegations, the chambers judge noted there was no evidence that Apache was even aware of Murphy's various actions. Consequently, **the "conspiracy" largely fell apart: Apache could not have conspired to do things of which it was unaware**. See: para. 42.

The Court of Appeal found the following conclusions of the chambers judge were "far from unreasonable" and survived the standard of review, at paras. 42-43:

> - On an application for summary judgment the plaintiff must show that it has a factual basis for its assertion that the conduct was in furtherance of a conspiracy. **It is insufficient that the conduct could have been the result of the conspiracy where the conduct is easily explained by lawful motives**.
>
> - **Nor does the pursuit of legitimate business goals for the predominant purpose of economic advancement constitute a conspiracy, even if it may have caused the complaining party to suffer injury**.

- **Additionally, an inference that defendants entered into an agreement to injure the plaintiff or commit an unlawful act may only be drawn where the facts do not fairly admit of any other inference**.

- The conduct the Respondents point to as evidencing a conspiracy and as described above is not unlawful in and of itself, and is innocently and easily explained by Murphy and Apache's desire to further their own business concerns and protect their interests at Ladyfern.

- **The oil and gas industry is very competitive**. The risk of drainange [sic] of a field by competing interests raises the stakes. **The actions of the Applicants, even when viewed in their totality, offer no factual basis upon which to reasonably infer an agreement between Apache and Murphy, the predominant purpose of which was to injure Predator or the livelihood of its principals**. **The evidence permits of one objective inference only: that Murphy and Apache's predominant purpose was to protect their own interests in the field and that such actions were lawful**. Accordingly, the applicants have established that there is no genuine issue for trial in relation to the conspiracy claims.

Application of the Law to Your Clients' Case

The cases above show that a finding of civil conspiracy is unlikely in XXXXXXXXX's case. Aside from the difficulties inherent in showing there was "concerted action taken by the defendants pursuant to an agreement" to act unlawfully or injure ZZZZZZZZZZ, the other difficulty they will face is showing the requisite intention, as there must be a predominant motive to injure the plaintiff, or an intent to act unlawfully knowing the plaintiff is likely to be injured. This is particularly so given the competitiveness of the land development industry, as plainly acknowledged by ZZZZZZZZZZ, similar to the oil and gas industry noted in ***Murphy Oil***, and also the fact that the most likely predominant purpose of XXXXXXXXX in the circumstances was just to protect and advance their own interests in the pursuit of legitimate business goals.

In addition, there is no finding of illegal activity, as in ***Canada Cement***, and the alleged "unlawful acts" on which ZZZZZZZZZZ relies, at least in part, to establish this claim – breach of contract, inducing breach of contract, etc. -- are themselves dependent on rather uncertain claims.

4. ***Tort of Inducing Breach of Contract or Interference with Contractual Relations***

The ZZZZZZZZZZ brothers claim they had a binding contract with XXXXXXXXX and, consequently, an interest in ----------, and that XXXXXXXXX breached or repudiated that contract by refusing to recognize their rights. They claim that XXXXXXXXX, either directly, or through YYYYYYYY and/or WWWWWW, issued a series of written offers (on April 14, 2004, August 16, 2004, and February 11, 2005) to sell building lots in ---------- to ZZZZZZZZZZ Homes as part of a proposal pursuant to which ZZZZZZZZZZ Homes, VVVVVVVV and UUUUUU were to be exclusive builders. They claim these written offers were each accepted by ZZZZZZZZZZ Homes (on April 30, 2004, August 30, 2004 and February 14, 2005, respectively) and further confirmed during a meeting on March 8, 2005. They do not provide further details of the form of their acceptance, other than to say they were oral and written. As a result of the alleged offers and acceptance, they say ZZZZZZZZZZ Homes was entitled to participate among a group of four exclusive builders in ---------- and to acquire building lots.

The ZZZZZZZZZZ brothers also claim that each of the defendants, including YYYYYYYY and WWWWWW, with knowledge of the contract between XXXXXXXXX and ZZZZZZZZZZ Homes and without legal justification, unlawfully induced XXXXXXXXX to breach their contract with ZZZZZZZZZZ Homes or otherwise interfered with the contractual relations between ZZZZZZZZZZ Homes and XXXXXXXXX.

Finally, the ZZZZZZZZZZ brothers claim YYYYYYYY and WWWWWW "negligently induced" ZZZZZZZZZZ Homes to present a further "proposal" to XXXXXXXXX by way of a letter dated March 4, 2005 in which they advise, in writing, that ZZZZZZZZZZ Homes is interested in participating as a builder in ----------, but only on certain terms and conditions and

request an immediate response from XXXXXXXXX to their "proposal". They say that proposal was intended to be supplementary to the existing contract between them to develop ---------- and would not have been made but for the representations and inducement of YYYYYYYY and WWWWWW that ZZZZZZZZZZ Homes was "going to be removed" as one of the exclusive builders unless they made such a proposal.

Formation of Contract – Principles and Essential Elements

This issue necessitates that we first examine whether there was, in fact, a contract formed between XXXXXXXXX and ZZZZZZZZZZ Homes.

There is no shortage of judicial writing on the basic principles and essential elements relevant to the formation of contracts. Given your clients' circumstances, we have made an effort to examine those cases which involve contracts, or alleged contracts, for the sale of land, specifically, ***Abode Properties***, supra **[TAB 18]**, *642718 Alberta Ltd. (c.o.b. CNE Centre) v. Alberta (Minister of Public Works, Supply and Services)*, [2004] A.J. No. 870; 2004 ABQB 539; 368 A.R. 53 ("***CNE***") **[TAB 22]**, *32262 B.C. Ltd. v. 411676 Alberta Ltd.*, [1995] A.J. No. 436; 170 A.R. 67 (ABQB) ("***32262")*** **[TAB 24]**, *Fuhr Farms Ltd. v. Melcor Developments Ltd.*, [2005] A.J. No. 854 (ABQB) ("***Fuhr Farms***") **[TAB 25]**, *Kevel Holdings Ltd. v. 408230 Alberta Ltd.*, [1994] A.J. No. 35; 148 A.R. 286 (ABQB) ("***Kevel***") **[TAB 28]**, *Klemke Mining Corp. v. Shell Canada Ltd.*, [2007] A.J. No. 301; 2007 ABQB 176; 419 A.R. 1 ("***Klemke***") **[TAB 29]**, and *Robert Michaels Group v. Shaw Communications Inc.*, [2004] A.J. No. 1164; 2004 ABQB 745; 134 A.C.W.S. (3d) 602 ("***Robert Michaels Group***") **[TAB 33]**.

We found the following **well settled principles of contract law** discussed in these cases that are highly relevant to XXXXXXXXX's circumstances:

- **The offeror decides who he will make an offer to and the offeror decides what he will offer**: ***32262***, at para. 35.

- **The offeree must communicate his acceptance of the offer**. If acceptance of an offer is not communicated before revocation is communicated, then the offer has been revoked and is not capable of being accepted. An offer which is not stated to be irrevocable may be revoked at any time before the offer is accepted: ***Kevel***, at para. 17, and ***32262***, at para. 35.

- **It is open to the parties to specify the mode of communication of acceptance**, and where no particular mode of acceptance is expressly required, the offer may be accepted in the manner to be implied from the nature of the offer and the circumstances in which it is made: ***Kevel***, at para. 17.

- **The offeree must accept what is offered to create a contract --** the offeree cannot pick and choose – he cannot choose to accept some parts of the offer and reject other parts **--** the offeree accepts all or he accepts nothing – the highly prized consensus ad idem creates the contract and there cannot be that consensus unless what is offered, not something else, is accepted -- any suggested modification in the original offer is considered by the courts to be a counteroffer, even if the modification suggested is very slight, and the burden would then be on the plaintiff to establish its counter offer was accepted -- **the courts cannot force the offeror into a contract not the same as the terms he was agreeable to**: ***32262***, at paras. 35, 41, 45, 48, 53;

- **A binding agreement requires agreement on the essential terms**; an otherwise valid agreement will not fail because the parties do not agree on the exact terms and details of terms that are unimportant to them. A contract will be enforceable, even if a more comprehensive contract would have been desirable, provided the essential terms have been agreed to. For an agreement to be uncertain, an essential term must be missing such that without the essential term or terms, the Court cannot ascertain the real intentions of the parties. To determine whether the parties reached a "meeting of the minds" or consensus ad idem on the essential terms of a contract and intended to contract is determined on an objective standard, by a review of the whole of the conduct of the parties, including conversations and written communications: ***Robert Michaels Group***, at paras. 16, 17, 19, and ***Klemke***, at paras. 159-160, 165.

- **An agreement to make an agreement in the future** (i.e. an agreement to agree) **is not enforceable**, even if the parties have identified the terms upon which such later contract will be made. Further, an agreement that is subject to the condition that a contract is executed is not enforceable until such contract is executed: ***Kevel***, at para. 26, ***Robert Michaels Group***, at paras. 54-59, and ***Klemke***, at paras. 179-181.

- **A written document is only needed when it is a condition precedent or term of the bargain as opposed to a mere expression of the bargain already arrived at**, and the language and context must be viewed carefully to determine whether the

formal contract is required for an agreement to have been made: ***Abode***, at para. 26, and ***Robert Michaels Group***, at paras. 54-59.

- **The test for contract formation is an objective one** – a party's intentions are only relevant to the extent they were apparent to the other party as well and the question is whether there was an objective intention to be bound: ***CNE***, at para. 17.

In addition, some of the facts of these cases are also somewhat illuminating. First, ***Kevel*** was a case in which a purchaser of real property in a deal which failed to close sought the return of its deposit. Miller J. saw the core issue was whether what took place in the transaction (relating to a second amendment agreement) was merely an agreement to enter into an agreement, or an actual agreement between the parties. The court found the vendor was prepared to risk the entire transaction if it could not be relieved of the mortgage assumption clause. That alteration of the deal was of prime concern to the vendor, and a request to extend the closing deadline was of secondary significance. However, in the court's view, the parties reached a concluded agreement to introduce the two amendments into the transaction, and, if there was initially an agreement to enter an agreement subject to confirmation by clients on both sides, that had all been accomplished. Another major issue was whether the vendor had attached a clear condition that the second amendment agreement was not to be binding on it until the purchaser executed and delivered the signed agreement to the vendor's solicitor. At the heart of the vendor's position was the contention it was a condition precedent to the extension of the closing date that the second amendment agreement be fully executed by both sides. However, nowhere was there an express condition in writing that the second amendment agreement had to be executed by the purchaser before it would be binding on the vendor. Thus, the court found that the vendor had failed to satisfy the burden of proof of showing that there was such a condition precedent.

Miller J. in ***Kevel*** also noted the case of *Jen-Den*, in which the purchaser orally accepted the vendor's counter-offers for the sale of land. However, before the purchaser signed the contract, the vendor revoked the counter-offers. The issue was whether the counter-offers could be accepted orally. The Manitoba Court of Appeal in that case looked at the surrounding circumstances in order to determine what form of acceptance was called for, including: that the

parties were not dealing face-to-face but through an agent; the offers to purchase were made on a form which had attached to them forms of acceptance; the subject-matter of the offers was land and both parties knew a memorandum in writing signed by the party to be charged was required; the change proposed in terms inserted in the counter-offers was substantial; and both the defendant and plaintiff assumed that something in writing would be necessary to signify acceptance of the counter-offers. In those circumstances, the Court said that the acceptance of the offer had to be in writing. As a result, the Court held that the vendor was entitled to revoke the counter-offers before the purchaser signed the acceptances. See: ***Kevel***, at paras. 18-20.

In ***32262***, Master Funduk found the agreement signed was not binding on either of the parties as it was not accepted as-is by the plaintiff. The Plaintiff did not accept the offer that had been made. The agreement as amended by the plaintiff constituted a counter-offer and was not itself accepted. Master Funduk held that since the offeree altered the offer before accepting it, the offeree's action was in effect a counter offer by him. That meant that the offeree rejected the offeror's offer and made an offer to the offeror. The parties' positions were then reversed and the matter was still just one of basic contract law -- if the counter offer was accepted a contract was formed; if not accepted then there was no contract: at para. 51.

In ***Abode Properties***, discussed above in relation to breach of confidence, also involved an issue as to whether the parties had a contract (to form a joint venture to purchase and develop land) despite the fact they did not execute a written agreement. The Court noted the parties did hold negotiations which led to agreement on almost all provisions of a contract: at para. 25. However, the Court found the parties there specifically contemplated that their agreement would contain detailed terms and conditions to be finalized in writing through legal counsel and the defendant made it clear in his communications with the plaintiff that a written contract was very important to him, e.g. in his letters he was careful not to commit to an agreement. Thus, the Court concluded that a written document was a condition of the bargain between the parties and their failure to execute a written contract showed they never reached an agreement. See: para. 27. Moreover, the Court found the parties did not reach agreement on all essential terms of the

bargain during their negotiations: at para. 28. In particular, one unresolved term of the bargain was the arbitration clause, which the defendant never agreed to. The Court found in this case, that was an essential term of the agreement for both parties as it was inextricably linked with the issue of control over the venture; thus, the parties never had a contract and the cause of action for breach of contract failed: at paras. 29-30.

Robert Michaels Group involved an action for breach of contract. The defendant, Shaw, had set up a deal in which a third party was to buy property and lease it back to Shaw. That deal fell through, so the property was purchased by a corporation wholly owned by Shaw, who then entered into negotiations to sell the shares of the corporation to the plaintiff, Robert Michaels Group. The property was the only asset of the corporation. The Michaels Group made an offer in writing in September 1995, but Shaw did not accept the offer. The Michaels Group claimed that an agreement was reached in October through phone conversations with Shaw's representative; although it was claimed that representative did not have the requisite authority. Negotiations continued through December 1995, by which time most of the essential terms had been agreed to, though no written agreement had been executed, then Shaw ended the negotiations. The Michaels Group claimed to have completed an oral purchase agreement with Shaw which was wrongfully terminated. In Shaw's view, an agreement had not been entered into, and even if it had, an oral agreement was not sufficient to bind the parties. At trial, the plaintiff's action was dismissed. Moen J. found the Michaels Group was not able to show, on a balance of probabilities, that a binding contract – either written or oral -- existed between the parties.

Moen J. found the first offer by the Michaels Group was a written offer that required written acceptance, which set a formal tone for communications. Moen J. further found that, even if a written agreement was not required by the parties, **no oral agreement was reached**. Shaw's representative was not authorized to make such a deal on behalf of Shaw. In addition, **the Michaels Group knew that the terms of the offer were not acceptable to Shaw, and the matters had not been resolved on the date the purported agreement was made**. Although negotiations had continued and most, if not all, of the essential terms had been agreed to by

December, the parties had not yet reached a binding agreement. Both parties continued to negotiate for better terms and the parties had failed to sign a written agreement setting out those terms, and a signed written agreement encompassing the essential terms of the contract was a condition precedent to a binding agreement. **Thus, an agreement between the parties never crystallized**. **Finally, even though Shaw was unreasonable** in refusing to extend the closing date, **Shaw was entitled to put an end to the negotiations and walk away**. See: paras. 94-98, 104-106, 118-121.

Of importance to the decision reached, Moen J. noted the Supreme Court of Canada case of *Harvey v. Perry*, in which the parties had a meeting where they agreed on the terms, however the subsequent written agreement prepared by the purchaser changed some of those terms. The Court found the change in the agreement was not an error, but rather demonstrated that the purchaser was still attempting to obtain more favourable terms. Thus, the Court found the purchaser failed to establish a contract had been concluded: at para. 19.

In ***CNE***, the defendant Alberta had listed certain land for sale and CNE offered to purchase it. Alberta received a higher offer, but CNE made a still higher second offer. The second offer was processed by Alberta's senior management and approved, but ultimately not accepted. CNE filed a caveat against the title of the parcel. A meeting was then arranged between representatives of the parties and CNE alleged Alberta made, and CNE accepted, an oral offer to sell part of the land at a price to be determined by an appraisal. A third offer for the amount of the appraisal and Alberta's standard form offer to purchase was sent to CNE. Alberta had not signed the form. CNE signed the form and returned it. CNE heard nothing for several months and then learned that Alberta had rejected the third offer. Read J. found there was no agreement made at the meeting. At most, there was a simple offer that remained unaccepted by the Plaintiffs when they left the meeting or a gratuitous promise made by Alberta but not enforceable by the Plaintiffs: at para. 47. Read J. further found that the words of the third offer were not a written version of the oral agreement to sell the parcel. It was an offer to purchase which CNE was invited to sign as offerees and return to Alberta for acceptance. It was a revocation of the original offer reached at

the meeting. In signing and returning it, CNE accepted this revocation. CNE thus left themselves open to the possibility that Alberta would not accept the offer, which is what happened. Therefore, CNE had no enforceable agreement to purchase the 35 acre parcel. See: paras. 49-50.

In addition, it is interesting that Read J. found **CNE was treated shabbily by Alberta – they were strung along for months by the process insisted on by Alberta and put to effort and expense for naught**; however, it did not appear that the Province breached the rules of normal business practice and fair play and Alberta did not breach any enforceable agreement with CNE.

The decision in ***CNE*** was varied on appeal, but only in regards to costs; the appeal in regards to the existence of a contract was dismissed and the findings of the trial judge upheld: [2005] A.J. No. 1177; 2005 ABCA 292; 371 A.R. 390 **[TAB 23]**.

In ***Fuhr Farms***, Murray J. had to consider an application by Fuhr Farms for an order to discharge two caveats filed by the respondent Melcor against its land. Both parties were in land development and were well versed in that business. The parties were also familiar with each other, having done business together previously. Fuhr was developing certain land and discussed with Melcor the possibility of it acquiring an interest in the land. In August 2004, Melcor wrote Fuhr a letter framed as an "Offer to Purchase" which outlined a proposed agreement to “acquire and joint venture the lands”. Fuhr accepted the terms of the letter. The parties were supposed to enter into a purchase and sale agreement, joint venture agreement and management agreement regarding the land, which they instructed their solicitors to prepare. **The agreements were prepared but were not signed because of certain unresolved issues** regarding the joint venture agreement. The caveats were registered when **Fuhr was about to accept an offer to purchase the land from a third party**, **claiming there was no enforceable agreement, only an agreement to negotiate terms** of the joint venture. **He also claimed there no intention to create contractual relations between the parties until the agreements were finalized**. Melcor claimed that the August letter was an offer to purchase that was accepted by Fuhr and that the parties had reached a consensus about the terms of the agreements. In the end, Murray J.

dismissed the application, finding the offer letter created a binding agreement (that Fuhr would sell, and Melcor would purchase, a half interest in the land); thus, Melcor demonstrated a prima facie claim to an interest in the land, as reflected by the caveats. Murray J. was of the opinion that the offer letter was "the spawning document" -- on its face, it created a binding agreement for the sale and purchase of the lands and the intention of the parties was discernible from the four corners of that agreement: at para. 37. The parties had agreed, as a term of that contract, that they would formalize an Agreement for Sale which was to contain "clauses normal to the purchase and sale of real estate by closing". Further, the parties had negotiated over an extended period of time to prepare and formalize the three agreements, and while none were executed, there was sufficient evidence that the essential terms were agreed on.

Issues similar to those in *Fuhr Farms*, also arose in ***Klemke***. In that case, the plaintiff mining corporation had alleged the defendant companies (all participants in a joint venture mining project), orally agreed in a meeting to grant the plaintiff certain mining and consulting work in connection with a mine to be built. The defendants denied an agreement was made, and suggested there was no contract and no intention to contract since a formal contract was not drafted and signed. Instead, the defendants suggested the meeting and documents reflected ongoing negotiations and discussions or agreements to agree in the future rather than binding contractual obligations. Alternatively, the defendants asserted that it was a condition precedent to the agreement that the plaintiff be competent to perform the work, and that the plaintiff was not. **Smith J. ultimately found the parties had entered into an oral agreement followed by a Memorialization of that agreement**, or alternatively, they entered into a written agreement and competence was not a condition precedent, as the plaintiff was both able and willing to perform its obligations under the agreement. By refusing to honour the agreement, the defendants had caused a huge loss to the plaintiff for mining work and consulting work.

The ultimate question in the case was whether a legally enforceable contract was formed between the parties or just an agreement to agree. Smith J. held, after an objective review, that a reasonable observer with all of the facts would have been convinced of Shell's intention to

contract -- the scope of the work and the price were sufficiently set out, and the parties intended to enter a contractual relationship. The Court noted there was a considerable relationship between the parties before the times material to the Agreement; so they were far from strangers. Further, Western's representative had several opportunities to deny the Agreement and he did not do so. In addition, the Memorialization further reflected the intention to be bound – it was clear, it contained all the essential terms, and its terms were to be converted in due course into a formal legal contract containing those same terms. Smith J. found the language throughout the Memorialization and Term Sheet reflected an acknowledgement of the agreement, with phrases such as, "Albian and KMC agree to the following ..."; "[t]he letter and terms are said to reflect our understanding ..."; and "Albian and KMC have agreed ...": at para. 170. Smith J. also noted that the Memorialization was not a formal contract but was rather a collection of documents that reflected the essential terms of a contract that the parties negotiated. Its purpose was to record the oral Agreement and to serve as a map for the formal contract that would follow: at para. 173. **The circumstances showed that the parties would have entered into a formal contract based upon the Memorialization, thus the absence of a formal contract did not preclude there being the requisite intent and a binding contract**: at para. 175-178.

In addition, Smith J. **saw the Memorialization as an agreement, and not an agreement to agree**, as there were no outstanding essential terms left to be determined: at para. 190. Smith J. **also noted the nature of the industrial/commercial environment** in which the project was planned required that details work themselves out as issues arose once a contract was already in place. The fact that the parties continued to negotiate did not change Smith J.'s view on their intention to be bound, because **in such a business, a deal could be made during the course of negotiations**. Thus, the absence of a formal contract did not preclude the formation of a binding contract in that case. See: paras. 191-193.

The findings and reasoning of the trial judge in ***Klemke*** were affirmed following an appeal by the defendants: [2008] A.J. No. 725; 2007 ABCA 257; 433 A.R. 172, per Costigan, Martin and Watson JJ.A. **[TAB 30]**.

Application of Law to Your Client's Case

In our view, the facts as presented do not seem capable of showing that any contract was formed between XXXXXXXXX and ZZZZZZZZZZ Homes.

Again, remember the important principles stated above – the offeror decides who he will make an offer to, what he will offer and the offeree must accept exactly what is offered to create a contract and must communicate that acceptance to the offeror. In your clients' case, it seems fairly clear that while there were fairly extensive discussions, meetings and negotiations between the parties, and several written proposals, or offers to contract, sent from XXXXXXXXX to ZZZZZZZZZZ and the other potential builders, ZZZZZZZZZZ was generally non-committal and did not give any indication they accepted the terms being offered by XXXXXXXXX as they were.

Further, recall it is open to the parties to specify the mode of communication of acceptance. In your clients' case, the evidence of WWWWWW contained in his notes shows that he told ZZZZZZZZZZ on more than one occasion that XXXXXXXXX required a written proposal from them.

Eventually, instead of providing a written proposal that accepted the terms laid out XXXXXXXXX, ZZZZZZZZZZ made a counter-proposal via letter dated March 4, 2005. That proposal was clearly a counter-offer, which revoked any previous offer by XXXXXXXXX, as it contained several substantial alterations to the terms previously offered by XXXXXXXXX which were not acceptable to XXXXXXXXX. Thus, as in ***32262***, the parties' positions were reversed and if the counter offer was accepted by XXXXXXXXX, then a contract would have been formed. However, it is clear that XXXXXXXXX did not accept the counter-offer from ZZZZZZZZZZ and, in fact, specifically rejected it, both through YYYYYYYY/WWWWWW and directly in meeting on March 16, 2005.

In addition, it seems clear here that, while the parties held extensive negotiations which led to agreement on many provisions of the alleged contract, as in ***Abode Properties*** and ***Klemke***, the circumstances show that there could have been nothing more than an agreement to agree, as an agreement a written and formal document was a condition of the bargain between them and was shown to be very important to XXXXXXXXX. That is evidenced by several factors: (i) XXXXXXXXX's offers or proposals were all sent in written form; (ii) the first letter from XXXXXXXXX dated April 14, 2004, specifically stated that they were "prepared to enter into agreements with you and the other builders providing all three firms agree to the terms of this proposal" and that "upon acceptance of the terms of this proposal the developer and the builders will enter into a formal agreement outlining the terms and conditions that will govern the development and marketing of this project"; (iii) the third letter from XXXXXXXXX dated February 11, 2005, indicated that a standard purchase and sale agreement, a lot hold term sheet and a maintenance/letter of credit agreement was still to be provided; and (iv) as stated above, ZZZZZZZZZZ was told that they had to provide a proposal in writing, as the other builders had done, in order to be considered for the project. Thus, the failure to execute any written contract arguably showed the parties never reached an agreement. Further and also as in ***Abode Properties*** and ***Roberta Michaels Group***, the parties clearly did not reach agreement on all essential terms of the bargain, as indicated by ZZZZZZZZZZ's counter-offer, which shows they were still trying to obtain more favourable terms from XXXXXXXXX.

Also similar to the facts in ***Robert Michaels Group***, in this case, ZZZZZZZZZZ arguably must have known that the terms of their proposal would not automatically be acceptable to XXXXXXXXX and that matters had not been resolved so as to forma binding contract. Moreover, both ***Robert Michaels Group*** and ***CNE*** show that even if XXXXXXXXX was seen as acting badly or unreasonably towards ZZZZZZZZZZ in deciding who would be the exclusive builders, and "strung them along" and then excluded them at the last moment, they were still entitled to put an end to the negotiations and walk away, provided they did not breach the rules of normal business practice.

Cases like ***Fuhr Farms*** and ***Klemke***, are clearly distinguishable from the facts of your clients' case, as: there was no clear acceptance of any offer by either XXXXXXXXX or ZZZZZZZZZZ; the formal agreements contemplated by XXXXXXXXX's correspondence do not appear to have ever been prepared, let alone signed; agreement was not reached on all of the essential terms; and no Memoralization exists that contains all the essential terms and shows the parties intended to be bound. Specifically, the wording in the correspondence between XXXXXXXXX and ZZZZZZZZZZ stands in stark contrast to the wording of the letters in ***Klemke***, which contained phrases such as, "Albian and KMC agree to the following …", "the letter and terms are said to reflect our understanding …", and "Albian and KMC have agreed …". No such wording appears in the correspondence between XXXXXXXXX and ZZZZZZZZZZ Homes.

We would like to note that it seems in their Amended Amended Statement of Claim, ZZZZZZZZZZ may be alleging there was a contract for them to participate and be an exclusive builder, aside from any contract to acquire lots. However, as discussed later in this Memorandum in regards to the Statute of Frauds, the correspondence would seem to negate such a view. In specific, we note that the wording of the first paragraph in the second letter issued by XXXXXXXXX, dated August 16, 2004, could be seen as assuming or that XXXXXXXXX already agreed that ZZZZZZZZZZ was accepted as one of the exclusive builders and that all that need be done is to agree on the terms of the actual lot sales, as it says, "we are pleased to update you …and outline the procedures to be followed for the lot sales to yourselves…". However, their following letter, dated February 11, 2005, clearly shows they were still in the process of deciding who the exclusive builders would be – that letter shows they were then proposing an exclusive group of 4 builders, instead of just 3, as was previously the case. [Interestingly, that seems to have been one of the terms of disagreement between the parties, as in ZZZZZZZZZZ's counter-offer, they stated as one of their terms and conditions that there be only 3 builders, including ZZZZZZZZZZ].

Inducing Breach of Contract or Interference with Contractual Relations

Assuming that a contract, oral or otherwise, was in fact formed between XXXXXXXXX and ZZZZZZZZZZ Homes, and is sufficient to meet the requirements of the Statute of Frauds, as discussed below, the next issue is whether there were any acts constituting an inducement of a breach that contract.

The main case on the tort of interference with contractual relations or intentional inducement of breach of contract is *369413 Alberta Ltd. v. Pocklington*, [2000] A.J. No. 1350; 2000 ABCA 307; 271 A.R. 280 ("***Pocklington***") **[TAB 35]**, per Côté and Fruman JJ.A. and Rooke J. (ad hoc). In that case, Gainers was in deep financial trouble. Negotiations with the province of Alberta, its largest creditor, had collapsed. The day before Alberta called Gainers' loans and began to seize its assets, Peter Pocklington, the sole director and beneficial shareholder of Gainers, transferred a valuable asset (shares of a subsidiary company) from Gainers to a company he owned. The transfer, made without Alberta's knowledge or consent, placed the asset beyond Alberta's reach. Complaining that the transaction breached its loan agreement with Gainers, **Alberta sued Pocklington for intentionally inducing Gainers to breach that contract**. [Under the contract, Gainers had agreed not to sell or otherwise dispose of its assets without the prior written consent of Alberta, except in the ordinary course of business.] The trial judge decided that the transfer did not breach the loan agreement and dismissed the action; however, Fruman J.A., for the Court, allowed the appeal.

In regards to the elements of the tort at issue, Fruman J.A. concluded that, **in order to find that a defendant intentionally induced a breach of contract, seven elements had to be established**:

(1) the existence of a contract;
(2) knowledge or awareness by the defendant of the contract;
(3) a breach of the contract by a contracting party;
(4) the defendant induced the breach;
(5) the defendant, by his conduct, intended to cause the breach;

(6) the defendant acted without justification; and
(7) the plaintiff suffered damages.

These elements were based on ***Ed Miller*** **[TAB 34]** and also *Jackson v. Trimac Industries Ltd.*

In regards to the requisite "intent" that a plaintiff had to demonstrate the defendant had (to induce the breach of contract), Fruman J.A. noted the intent component of this tort was most difficult to understand, but provided the following conclusions based on her review of the case law and authorities, at paras. 38-44:

- Originally, the tort required the breach to be the result of wilful, deliberate and direct conduct which the defendant knew or hoped would result in a violation of the plaintiff's contractual rights.

- However, courts soon recognized that intent can also be inferred when the consequences of the conduct were a necessary or reasonably foreseeable result, because people are presumed to intend the reasonable consequences of their acts.

- The intention to bring about a breach of contract need not be the primary object; it is sufficient if the interference is necessarily incidental to attaining the defendant's primary objective.

- Intention can also be established when the defendant was reckless or wilfully blind to a breach. The defendant need not have actually known the precise terms of the contract or that his object only could be accomplished through breach of the contract. "If - turning a blind eye - he went about it regardless of whether it would involve a breach, he will be treated just as if he had knowingly procured it".

- Turning a blind eye may include situations in which the defendant failed to seek advice or employ the means available to obtain the necessary knowledge.

- If the defendant acted under a bona fide belief that contractual rights would not be infringed, liability will not be found even though the belief turned out to be mistaken. But for a mistaken belief to be bona fide, rather than the result of recklessness or wilful blindness, some basis for the belief must exist, and some reasonable effort must have been made by the defendant to learn the truth.

- In some cases a distinction is drawn between direct interference, for which the breach must be a foreseeable or reasonable consequence of the conduct, and indirect interference, for which the breach must be a necessary or substantially certain consequence.

In that case, Fruman J.A. first found the conclusion irresistible that the transfer of the asset was not done in the ordinary course of Gainers' livestock slaughtering and meat processing business; thus, the transfer of the asset to Pocklington without Alberta's consent breached the Agreement at issue. Further, she found the case involved direct interference – Pocklington executed the documents to complete the transfer of the asset, which transfer caused Gainers to breach the Agreement. Therefore, if the breach was a reasonable or foreseeable consequence of that transfer, or alternatively, if Pocklington completed the transfer recklessly, was wilfully blind to its consequences, or was indifferent as to whether or not it caused a breach, the necessary intent element for the tort would be met: at para. 45. She found Pocklington had sought legal advice prior to the transfer; however, he nevertheless signed the documents to give effect to the transfer, and retained the asset despite Alberta's early protests and the lawyer's apparent reservations. He had the means of knowledge, but chose to act without legal advice. Thus, **Pocklingon was wilfully blind to the consequences of his actions and showed clear indifference to the breach**. The intent component of the tort is satisfied. See: para. 56.

Fruman J.A. also considered a possible defence to the tort and said in some situations, a defendant's plea of justification could avoid liability. However, she found the **defence of justification is only available when the defendant caused the breach while acting under a duty imposed by law**. The issue in each case is whether, upon consideration of the relative significance of all the factors, the defendant's conduct should be tolerated despite its detrimental effect on the interests of others. See: para. 57. She found Pocklington's position as director of Gainers could not provide justification for his actions – in transferring the asset to his own company, he was not discharging his legal duty to act honestly and in good faith with a view to the best interests of Gainers; he was acting solely in his own interests: at para. 69.

In ***Ed Miller***, the ABCA had to consider, among other issues, whether Caterpillar was guilty of the tort of inducing breach of contract, otherwise called interference with contractual relations. That case involved a parts policy adopted by Caterpillar which prevented dealers from selling to Miller. Miller then sued Caterpillar for, *inter alia*, unlawful interference with its business and interference with contractual relations, and claimed the defendants conspired to unduly lessen competition contrary to the Combines Investigation Act.

Cote J.A. for the Court was careful to note that **sufficient knowledge by the defendant was critical, and intent to cause harm was not sufficient for this tort**: at para. 29. The authorities showed, including decision of the ABCA, that **what the law required was that the defendant knew there was a contract, knew its relevant terms and knew the act(s) it contemplates will likely break it or interfere with its performance**: at paras. 31 and 59-60. Further, **knowledge of precise terms was not necessary if the defendant had the means of knowledge, yet deliberately disregarded them**: at para. 37. Thus, the defendant will be liable only if he acted (a) knowingly or recklessly, or (b) knowing that the plaintiff probably had a contract whose performance would be interfered with, or (c) intending to end the plaintiff's contract. And the knowledge must arise before the defendant's act is begun or continued: at para. 39. He noted that modern cases made a defendant liable who turned a blind eye to whether his acts would induce breach of a contract known to exist, and agreed that knowledge of unimportant terms was not necessary. But to be liable, the defendant must have known that his acts would probably interfere with performance of the plaintiff's contract. See: paras. 47-48.

Significantly, the Court noted, at para. 56, **that competitors often dislike each other. And competitors almost always wanted to hurt each other's business**. Further, **it was commonplace that competition was not only legal, but often mandated**. Some competitor somewhere drives another out of a market, or even out of business entirely, every week of the year -- **so long as it commits no crime, tort, or other actionable wrong, that is perfectly legal**. The permissible limits of competition were precisely the limits of criminal, torts, contract, and equity prosecutions or suits. If hating a competitor and wishing that it were out of business were

an actual cause of action, then many businesses carrying on perfectly fair competition would be guilty of economic torts to their competitors all the time. Thus, **a malicious motive was not an element of this tort -- intent to hurt, or to drive out of business is irrelevant**: at paras. 57 and 62-63. Thus, in that case, Cote J.A. held that any suggestion Caterpillar intended to interfere with performance of Miller's contract when Caterpillar thought it no longer existed, postulated the impossible: at para. 61.

Application of the Law to Your Clients' Case

Again, in our view, no contract could arguably have been formed on the facts as presented; thus, there could be no breach of inducement of such breach, as alleged. However, in the event we are wrong on that conclusion, it is fairly clear that the factors are not present to show an inducement of breach of contract occurred, particularly the requirement that all the defendants knew there was a contract in existence. Each of the defendants, in their Statements of Defence, specifically denies there was any contract, or that they knew of the existence of any contract between XXXXXXXXX and ZZZZZZZZZZ, or that they did anything to induce the breach of such a contract, which they deny existed.

Further, while the test for "intention" here seems much wider than for a tort like conspiracy, there is no evidence of any such intention, nor can such intention be inferred, given, as in ***Ed Miller***, any suggestion that the defendants intended to interfere with performance of a contract between XXXXXXXXX and ZZZZZZZZZZ Homes arguably postulates the impossible, as none of the defendants ever thought such a contract existed. Further, as noted in ***Ed Miller***, the fact that the parties are competitors who dislike each other and want to hurt each other's business is not only commonplace, but also often mandated under competition laws, and as long as there is no crime, tort or other actionable wrong, perfectly legal and incapable of providing the necessary intent for the tort of inducing breach of contract.

5. ***Misrepresentation, including False or Negligent Misrepresentation***

The ZZZZZZZZZZ brothers seem to claim that the defendants made misrepresentations about ZZZZZZZZZZ Homes to its customers, potential customers, employees, consultants and trades in an attempt to solicit business and harm ZZZZZZZZZZ Homes as a competitor (see: para. 19 of their Amended Amended Statement of Claim), and that they also made "false or negligent" representations to ZZZZZZZZZZ Homes about the ---------- project which were intended to be, and were, relied on by ZZZZZZZZZZ to its detriment concerning the exclusive participation of ZZZZZZZZZZ Homes in ---------- (see: paras. 21-23 of their Claim), including that they provided confidential information to XXXXXXXXX, turned down other competitive offers and arranged for some marketing and deposits for pre-sales to its customers, which caused ZZZZZZZZZZ substantial harm, loss and damage.

Given the wording of their Claim, ZZZZZZZZZZ may only be alleging negligent misrepresentation; however, by stating the representations were "false or negligently made", then they may be indicating the statements made were "knowingly false", and perhaps alluding to fraudulent misrepresentation.

The cases show there is a clear distinction and separate tests for negligent misrepresentation versus fraudulent misrepresentation. Essentially, negligent misrepresentation is an honest but negligent representation (i.e. "innocent") and a fraudulent misrepresentation is a negligent but knowingly false misrepresentation (i.e. deceit). See: comments by Iacobucci J. writing in dissent in *BG Checo Int. Ltd. v. British Columbia Hydro & Power Authority*, [1993] S.C.J. No. 1; [1993] 1 S.C.R. 12 ("***BG Checo***") **[TAB 38]**, at paras. 120-126.

The elements of each of these torts are well established and were fairly recently set out by Coutu J. in *40 Sunpark Plaza Inc. v. 850453 Alberta Inc.*, [2007] A.J. No. 100; 2007 ABQB 54; 413 A.R. 200 ("***Sunpark***") **[TAB 37]**, as well as by Philips J. in *Sethi v. Dawnne*, [2002] A.J. No.

1006; 2002 ABQB 736; 10 Alta. L.R. (4th) 294 ("***Sethi***") **[TAB 39]**. In the latter case, Phillips J. explained that all elements of the torts had to be established and that the key differences between fraudulent misrepresentation and negligent misrepresentation is that in negligent misrepresentation, a "special relationship" must exist between the parties which gives rise to a duty of care and the representations must have been made negligently rather than fraudulently or recklessly. **Both forms of misrepresentation, however, require that the representations be false and that such representations were relied upon to the detriment of the plaintiff**. See: ***Sethi***, at paras. 16 and 19.

First, **the tort of deceit or fraudulent misrepresentation is proved when it is shown that**:

(1) a false representation has been made;

(2) dishonestly, that is,
   a. knowingly,
   b. without belief in its truth, or
   c. recklessly, careless whether it be true or false;

(3) with the intention that the representee will rely on the representation; and

(4) the representee has in fact been induced to act upon the representation.

See: ***Sunpark***, at para. 31 and ***Sethi***, at para. 12.

Coutu J. further noted that **the motive of the representor is irrelevant**; there need be no intention to cheat the representee; **it is not necessary that the defendant actually knew his representations were false**; and that it is no defence to fraudulent misrepresentation that, by reasonable diligence, the plaintiff could have discovered the truth: at paras. 32-44.

In ***Sunpark***, the defendant company owned land and wanted to develop it, so hired a development company. As the defendant did not have money to develop the lands, he offered to sell the lands to the plaintiff. Negotiations ensued and the plaintiff offered to buy the land for a stated price and provided a deposit. The defendant's representative then advised the plaintiff that

the purchase price was additional to the deposit. Subsequently, the plaintiff discovered that the deposit did apply to the purchase price and commenced an action to recover it. **Coutu J. found the defendants liable for false misrepresentation**, as she found a false representation was made – costs were falsely represented to be higher than what they were in the buyout calculation document and the plaintiff was wrongly told the deposits were forfeited when they were not -- the false representations were made recklessly and/or carelessly with respect to whether they were true or false, the representation was made with the intention that the representee would rely on it; and the plaintiff did so rely: at paras. 33-42.

Coutu J. also considered the tort of negligent misrepresentation, even thought it was not necessary, given her findings above. She found, at para. 47, that the Supreme Court of Canada in *Q. v. Cognos* clearly set out **the required elements for a successful negligent misrepresentation action**:

> (1) there must be a duty of care based on a 'special relationship' between the representor and the representee;
> (2) the representation in question must be untrue, inaccurate or misleading;
> (3) the representor must have acted negligently in making said representation;
> (4) the representee must have relied, in a reasonable manner, on the said negligent misrepresentation; and
> (5) the reliance must have been detrimental to the representee in the sense that changes resulted.

See also: ***Sethi***, at para. 18.

She further noted, at para. 49, that it was well established in Canadian law that the existence of a duty of care in tort (including negligent misrepresentation), was to be determined through an application of a two-part test:

> (i) Is there a sufficiently close relationship between the parties (the defendant and the person who has suffered the damage) so that, in the reasonable

> contemplation of the defendant, carelessness on its part might cause damage to that person? If so,
>
> (ii) Are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damage to which a breach of it may give rise?

Moreover, that proximity can be seen to exist between a defendant-representor and a plaintiff-representee when two criteria relating to reliance may be said to exist on the facts: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable. The plaintiff and the defendant can be said to be in a 'special relationship' whenever these two factors inhere. See: para. 50.

In addition, the **factors to be considered under the policy part of the test** were as follows, at para. 53:

> In other words, in cases where the defendant knows the identify of the plaintiff (or a class of plaintiffs) and where the defendant's statements are used for the specific purpose or transaction for which they were made, policy considerations surrounding indeterminate liability will not be of any concern since the scope of liability can be readily circumscribed.

Finally, she noted **five non-exhaustive indicia of reliance**, at para. 58:

> (1) The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made.
> (2) The defendant was a professional or someone who possessed special skill, judgment, or knowledge.
> (3) The advice or information was provided in the course of the defendant's business.
> (4) The information or advice was given deliberately, and not on a social occasion.
> (5) The information or advice was given in response to a specific enquiry or request.

In the case before her, she found the background circumstances very important: at para. 51. She noted Kovac and Johnston were not a purchaser and vendor who had no previous connection – they had dealings pertaining to the construction of condominiums. Further, it was clear there was concerns about whether the plaintiff could financially support the cost of construction, as the first cheque asked for bounced. So, at all times, the discussion was centred not on the market value of the property, which is the usual case, but in terms of "pay us our costs incurred and a $400,000 bonus" to take over the project. Buyout calculations representing the costs were shown to Kovac.

Thus, she found the first requirement of a “special relationship” was met. The defendant ought reasonably to have foreseen that the plaintiff would rely on his representation (in fact Johnston admitted that) and Kovac was reasonably relying on Johnson’s representations. Further, she found there were no considerations which ought to negative or limit the scope of the duty; the class of persons to whom the duty is owed or the damage arising from the breach. She was also satisfied the policy considerations did not limit the duty Johnston owed to Kovac. Further, the land purchase costs were untrue or inaccurate as they were represented to be much more than they actually were. She had already found recklessness and carelessness for fraudulent misrepresentation, which encompassed a lower standard of negligence, and she found Johnson’s reliance was, in that case, reasonable. In addition, she found all five indicia of reliance were present and that the reliance was detrimental to Kovac in that damages resulted – Kovac would have paid much less than what he did pay if the costs had been represented correctly. Thus, the tort of negligent misrepresentation was also proven.

Claims of fraudulent and negligent misrepresentation were also made in ***BG Checo***. In that case, the majority, led by La Forest J., found Hydro was liable to Checo for breach of contract, but found that contract did not preclude Checo from also suing in tort. They found **the real fault was that Hydro misrepresented the situation and Checo may have relied on that representation in performing its other obligations under the contract**. Having to devote its resources to that extra work might have prevented Checo from meeting its original schedule, thereby resulting in Checo incurring acceleration costs in order to meet the contract completion

date. Such costs were also arguably be reasonably foreseeable. The majority found no evidence of an intention non the part of Hydro to deceive, thus the found Hydro should not be liable for fraudulent misrepresentation. However, they found the tender documents, which were subsequently incorporated into the contract, contained certain negligent misrepresentations which induced Checo to enter into the contract.

In ***Sethi***, the action arose out of the sale of shares of a business by the Defendant to the Plaintiff. The Plaintiff alleged fraudulent or negligent misrepresentation on the part of the Defendant in that she fraudulently or negligently misrepresented the net profits of her business for the year 1997 and the extent of her distribution network - more specifically, the number of agents selling for her business and their sales area. However, **the Court did not find the Plaintiff succeeded in his claim for either tort**. The Court found **both torts depended on false, misleading or inaccurate statements having been made and in that case, the Plaintiff failed to show the Defendant made any** false, misleading, or inaccurate statements. Furthermore, there was no evidence whatsoever of an intent to defraud and no evidence of negligence on the part of the Defendant. The Court found that any misunderstanding that could have arisen during the meeting in question regarding what agents sold for the company was certainly corrected via a fax to the Plaintiff only three days later, well before the Closing Date of the transaction. In addition, the **Court would have denied the Plaintiff's claim based on reliance alone** – as any false representation arising from the meeting in question could not have been relied on by the Plaintiff following receipt of the fax and at no time after that did the Plaintiff contact the Defendant with a concern about missing agents or agents not selling. Phillips J. found the principle that applied in that case was:

> If a man to whom a representation has been made knows at the time or discovers before entering into a transaction that the representation is false, or resorts to other means of knowledge open to him, and chooses to judge for himself in the matter, he cannot avail himself of the fact that there has been misrepresentation, or say that he has acted on the faith of the representation.

The Court also found no representation in the Purchase and Sale Agreement as to the number of agents that would be in place at the time of the Closing Date, and held that if the Plaintiff had relied on the Defendant's statement regarding the number of agents as claimed, then a clause dealing with that representation should have been inserted into the Agreement or at the very least, the Plaintiff would have requested such a clause, which was not done. See: paras. 48-63.

The Court in ***Sethi*** also emphasized that **the final aspect of such claims is proof of damages or loss**: at para. 64.

Finally, there does not seem to be any action for mere "misrepresentation", outside of either fraudulent or negligent misrepresentation. However, in situations where a contract is formed, a party can rely on misrepresentations made prior to formation of, or in, the contract in order to rescind the contract: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] S.C.J. No. 60; 3 S.C.R. 423, at para. 44. [Note: Case has not been included as it is not otherwise helpful].

Application of Law to Your Client's Case

ZZZZZZZZZZ's success in regards to their claims for fraudulent or negligent misrepresentation will in large part depend on whether they can establish that the alleged representations were made and that they were false, as required by the tests set out in ***Sunpark*** and ***Sethi***. Further, to establish fraudulent misrepresentation, they would have to show the alleged representations were made either knowing them to be false or reckless about whether they were, with the proper intention that ZZZZZZZZZZ would, and did, rely on them. To show there was negligent misrepresentation, they would have to establish there was a "special relationship" between themselves and XXXXXXXXX, based on the usual foreseeability of harm and reasonable reliance, as well as that XXXXXXXXX acted negligently in making the representations, and that ZZZZZZZZZZ relied on them to their detriment, in the sense that changes resulted.

We saw in ***Sunpark***, it was important to the findings of both fraudulent and negligent misrepresentation that the parties had a previous relationship and that it was clear the plaintiff had financial concerns [remember, the representations alleged were in regards to the actual cost of the purchase]. Further, the Court in that case found false representations had been made about the cost of the purchase and amount of the deposit, which were clearly relied on by the plaintiff to its detriment – the plaintiff would have paid $200,000 less if the costs had been represented correctly. In ***Sethi***, the court found the plaintiff failed to show the defendant made any false, misleading or inaccurate statements as alleged. Further, there was no evidence of any intent to defraud and no evidence of negligence. The Court found any misunderstanding that may have arisen was corrected before the closing date and that there could have been no reliance, since any misinformation was corrected and at no time did the plaintiff contact the defendant with any relevant concerns.

In your clients' case, there is arguably no indication of any previous, or sufficiently close, relationship between them and ZZZZZZZZZZ and no real indication of any requisite negligence, recklessness, intention or reliance that would put the circumstance outside of normal negotiations between arm's length parties. In that regard, there would seem to be good policy reasons to exclude a finding of negligent misrepresentation, as there was in relation to a finding of fiduciary duty (above). Even if it could be said that the representations made were false and that XXXXXXXXX knew ZZZZZZZZZZ would reasonably rely on them, there are arguably no special circumstances here to show why the parties would not expect the normal rules of contract law would apply to govern their relationship. Similar to ***Sethi***, even if ZZZZZZZZZZ was initially under the impression that they would be one of the exclusive builders for XXXXXXXXX, any such mistaken impression was clearly corrected by the subsequent discussions and correspondence between the parties. In the end, as discussed above under formation of contracts, despite any of the alleged representations, it seems to have been made clear to ZZZZZZZZZZ that a formal written contract was required and that they had to submit a written proposal to XXXXXXXXX in order to be considered and accepted as one of the

exclusive builders. The written proposal submitted by them was in fact a counter-offer, and thus they left it open for XXXXXXXXX to either accept or reject.

In any event, as stated by the defendants in their Statements of Defence, it seems that the representations alleged to have been either fraudulent or negligent misrepresentations are either true statements, or statements that were not made by XXXXXXXXX or YYYYYYYY and WWWWWW. That in itself, if proven, would successfully preclude the misrepresentation claims of ZZZZZZZZZZ.

6. ***Statute of Frauds***

Finally, you claim reliance on the *Statute of Frauds* in your Statement of Defence. Thus, you need to know how, or if, the *Statute of Frauds* defence applies to your facts.

The ***Statute of Frauds***, (1677), 29 Cha. 2, c. 3 **[TAB 2]**, was enacted in England in 1677 in response to concerns that frauds were being perpetrated based on oral evidence. The Act generally requires that agreements pertaining to an interest in land, including the buying and selling of land, must be in writing and signed by those parties involved, or by some other person lawfully authorized to sign on their behalf. The *Statute of Frauds* has been received as law in most Canadian jurisdictions, including Alberta, has been legislatively adopted in several provinces in language similar to that of the 1677 Act, but modified significantly in British Columbia and repealed in Manitoba: CED Contracts, VI – Statute of Frauds – Writing Requirements, § 296 and 297 **[TAB 43]**; and *Austie v. Aksnowicz*, [1999] A.J. No. 93; 1999 ABCA 56; 232 A.R. 118 ("***Austie***") **[TAB 40]**, per Heatherington, O'Leary and Cote JJ.A, leave to appeal to SCC dismissed: [1999] S.C.C.A. No. 172.

Specifically, section 4 of the Statute essentially provides that:

> **No Action shall be brought ... whereby to charge the Defendant** upon any special promise to answer for the debt default or miscarriages of another person ...

> **unless the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writing and signed by the party to be charged** therewith or some other person there unto by him lawfully authorized. [Emphasis added]

Many cases in Alberta have discussed the ancient statute, such as ***Austie***, *Pena v. Kocian*, [2006] A.J. No. 987; 2006 ABQB 602; 152 A.C.W.S. (3d) 787 ("***Pena***") **[TAB 42]**, per Chrumka J., and ***Booth v. Knibb*** **[TAB 41]**, and have established the following principles:

- The statute requires a written contract for the sale of land, or a finding of an oral agreement confirmed with some written Memorandum evidencing the agreement. The Memorandum must contain all the essential terms of the contract, and must show that the parties both agreed to those terms: ***Austie***, at para. 26; ***Pena***, at para. 75.

- Parties, property and price are material terms but there may be other additional essential terms; however, oral evidence is not admissible to cure the omission of any necessary terms. What is material and essential must be determined on a subjective basis as to what the parties considered material: ***Hunter's Square***, cited below, at para. 33.

- A document can be a sufficient Memorandum even if not created for that purpose at all and can be anything at all as long as it evidences there was an agreement -- wills, minute books, and letters to others have sufficed in this regard: ***Austie***, at para. 26; ***Pena***, at para. 75.

- The Memorandum must be signed by the defendant, as the person "who is charged": ***Austie***, at para. 37.

- If there is no written Memorandum, the statute does not make the contract void, only unenforceable: ***Pena***, at para. 75.

- If there is no written Memorandum but the Court finds an oral agreement, then the agreement can be enforced through the doctrine of "part performance"; however, the acts or conduct of the person alleging the oral agreement must be found to be "unequivocally referable" to the contract alleged and to nothing else: ***Pena***, at paras. 75-76; and ***Booth v. Knibb***.

One of the main cases on the principles and effect of the *Statute of Frauds* in Alberta seems to be the decision by our Court of Appeal in ***Austie***. In that case, there were various negotiations and

offers, both oral and written, and the trial judge found a contract to sell farm land. The judge found the defendant had signed one offer, prior to his final determination to accept it, and then after his decision to accept, further negotiations and some modification to the written offer, the plaintiff asked the defendant to sign the document again, and the defendant said he did not have to as he already signed it once. The alleged vendor appealed, denying that any completed deal was ever made, and pleading s. 4 of the Statute of Frauds. Cote J.A. for the Court allowed the appeal, finding that, aside from the evidence about whether the defendant had to sign again, there was no suggestion that the defendant approved the written amendment, thus it was impossible to say it was a written contract: at para. 30. **In any event, he found the written offer there was by the plaintiff, and not by the defendant**, and the Statute called for a memorandum signed by the defendant, as the person to be charged, not one signed by the plaintiff: at para. 37.

In the view of Cote J.A., the trend of modern legislation repealing the Statute of Frauds was to call for more writing in contracts and commercial transactions and the idea that one could validly sell a valuable piece of land entirely by oral discussions ran contrary to the expectations of most lay people; one could almost say the absence of writing would cast into doubt intention to create binding legal relations. Thus, he felt no compulsion to undermine the Statute. Interestingly, he held that the fact the defendant may have been using the offers from the plaintiff to shop for a better price elsewhere was irrelevant – **each party was free in law to do whatever he wished, unless and until a binding and enforceable contract was formed**. See: paras. 55-56.

Nonetheless, as stated above, the case law makes it clear that an oral agreement for the sale of land can be enforceable, but only if the plaintiff can rely on the **doctrine of part performance** – i.e. if evidence shows conduct that was "unequivocally referable" to an oral contract for the sale of land: *Booth v. Knibb*. In that case, the Alberta Court of Appeal reviewed the leading decisions dealing with the doctrine of part performance and concluded that the payment of taxes, water levies, insurance premiums, repairs and improvements, and utilities were not unequivocal acts referable to the contract only. The Court also noted that the mere payment of money, including deposits, by itself, had been held to be insufficient. See: para. 29.

The Court in *Booth v. Knibb* also found the fact the Booths remained on the land and sought to repurchase the land when they had funds to do so, were equivocal and equally consistent with an informal tenancy agreement as to the alleged oral contract for the purchase of the land. Such actions may have demonstrated their desire to do so, but did not unequivocally indicate that a sale contract existed. In addition, the Court found as relevant certain conduct and statements made by Booth in the course of previous foreclosure litigation which contradicted the allegation there was an enforceable oral agreement to sell the land. See: paras. 30-32 and 37.

However, in *Pena*, Chrumka J. found it was clear that the various and numerous acts done by the plaintiffs – various renovations to the property and the payment of a cash deposit, in performance of an alleged contract for the sale of a Canmore property which they had been renting from the defendant, were in their own nature unequivocally referable to the property: at paras. 88-89.

In ***Neighbourhoods*** **[TABS 31 and 32]**, the plaintiff (attempted purchaser) alleged an oral agreement for the sale of land pursuant to a tape recording of a telephone conversation constituted a memorandum in writing within the meaning of s. 4 of the Statute of Frauds. Alternatively, it was claimed there was sufficient acts of part performance of the oral agreement -- Cornell had developed a concept for development of the land and created a consulting team to work on it, and contacted and arranged meetings with municipal officials who would have to approve the development. However, the defendants' application for summary judgment was allowed. The Court did not find sufficient evidence of the alleged oral agreement to satisfy the Statue of Frauds, nor sufficient acts of part performance.

The Court in ***Neighbourhoods*** found some of the work done by the plaintiff constituted pre-contractual due diligence and could not be considered part performance. Further, the activities relied upon by Cornell were as consistent with its belief that a contract would eventually be concluded between the parties as a belief that there was a contract in place. Cornell knew that 1440106 insisted on a short due diligence period and a quick closing date. It also thought that

their differences could be resolved. In such circumstances, **it was reasonable that Cornell would undertake activities that might ordinarily be considered as post-contractual due diligence or preliminary planning and development work even though a final agreement was not yet reached**. In any event, there was no oral contract between the parties.

Again, it is trite to say that for the Statute to apply, the alleged contract must involve an interest in or the sale of land, and there are not many cases on that point. However, Moen J. in *Robert Michaels* Group, discussed above in relation to formation of contracts, found that the *Statute of Frauds* did not apply to the transaction in that case, as the essence of the transaction was a share purchase agreement and not an agreement respecting the sale of land (even though the company's only asset was a certain piece of land). That was because a corporation is a separate legal entity from its shareholders and ownership of shares in companies owing land did not, on its own, create an interest in land for the shareholders because the shareholders have no individual interest or separate right to the land owned by the company. See: paras. 125-130.

Hunter's Square Developments Inc. v. 351658 Ontario Ltd., [2002] O.J. No. 2800; 60 O.R. (3d) 264; 115 A.C.W.S. (3d) 339 (Ont. Sup. Ct.), at paras. 31-39 **[TAB 26]**, affirmed on appeal: [2002] O.J. No. 4694; 62 O.R. (3d) 302; 8 R.P.R. (4th) 29; 118 A.C.W.S. (3d) 649 (ONCA) ("***Hunter's Square***") **[TAB 27]**, at para. 3, is important as it shows that agreements for the purchase of lots in land ready for development must comply with the Statute of Frauds. That case involved the purchase of land for commercial development coupled with an ongoing business relationship during the life of the vendor take back mortgage. It was also undisputed that all of the parties clearly contemplated signing a formal written contract: Ont. Sup. Ct. decision, at para. 29.

Similar to *Hunter's Square*, the *Neighbourhoods* case also shows that an agreement to purchase prime development land must comply with the Statute of Frauds.

Application of Law to Your Client's Case

In our view, the contract contemplated and discussed between XXXXXXXXX and the potential builders, including ZZZZZZZZZZ Homes, would be a contract that was at its essence for the purchase and sale of lots – i.e. "land" – within the subdivision. Again, ZZZZZZZZZZ may be alleging there was a contract for them to participate and be an exclusive builder, separate and apart from any contract to acquire the lots. While such a contract might not fall prey to the Statute of Frauds, it seems clear from the correspondence or proposals issued by XXXXXXXXX in April 2004, August 2004 and February 2005, that the contemplated contract, or formal agreement, was to govern both the relationship between XXXXXXXXX, as the developer, and the exclusive builders (who agreed to their terms), as well as the sale of the individual lots to the builders, a key part of the agreement.

Thus, s. 4 of the *Statute of Frauds* would seemingly require that such a contract, involving the sale of land, be in writing or evidenced in writing and signed by XXXXXXXXX in order to be enforceable: ***Austie***. There is no written agreement and there appears to be no sufficient memorandum in writing of an oral agreement. The only possible written memorandum would be the letter from ZZZZZZZZZZ to YYYYYYYY/WWWWWW dated March 4, 2005, but as in ***Austie***, that was clearly a counter-offer issued by ZZZZZZZZZZ to XXXXXXXXX which was not acceptable for a number of reasons and which was expressly rejected. Further, there is clearly no signature by XXXXXXXXX on that document.

In the event we are wrong in that view, there is only scant evidence of conduct that could be considered sufficient part performance. In fact, there is no such conduct specifically claimed by ZZZZZZZZZZ, and the only possible actions claimed that could constitute part performance are found in para. 22 of the Amended Amended Statement of Claim in relation to ZZZZZZZZZZ's relilance on certain misrepresentations to its detriment, such as providing their goodwill, name and confidential information, turning down other competing offers, trying to market ----------

and arrange for deposits for pre-sales. In our view, even assuming such conduct is proven by the plaintiff, similar to our discussion above in relation to misrepresentation, such acts are equivocal and equally consistent with ordinary course pre-contractual diligence and a normal part of doing business in such a competitive industry, as with the alleged contract for an interest in or purchase of land.

END

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1. Research Memorandum

2. Legislation – ***Statute of Frauds***

Fiduciary Duties - General

3. ***Frame v. Smith***, [1987] S.C.J. No. 49; 2 S.C.R. 99

Fiduciary Duties – Commercial Relationships

4. ***Lac Minerals Ltd. v. Int. Corona Resources Ltd.***, [1989] S.C.J. No. 83; 2 S.C.R. 574

5. ***155569 Canada Limited v. 248524 Alberta Ltd.***, [2000] A.J. No. 101; 2000 ABCA 41; 255 A.R. 1

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7. ***Hodgkinson v. Simms***, [1994] 3 S.C.R. 377; 3 S.C.R. 377

8. ***Dirom v. Perera***, [2004] A.J. No. 990; 2004 ABQB 657; 372 A.R. 50

9. ***Financial Management Inc. v. Associated Financial Planners Ltd.***, [2006] A.J. No. 132; 1006 ABCA 44; 384 A.R. 70

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10. ***Alwest Properties Ltd. v. Roppelt***, [1998] A.J. No. 1401; 1998 ABQB 1027; 236 A.R. 201

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16. ***Christensen (Estate) v. Proprietary Industries Inc.***, [2004] A.J. No. 763; 2004 ABQB 399

17. [CASE OMITTED – NOT NEEDED]

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18. ***Abode Properties Ltd. v. Schickendanz Bros. Ltd.***, [1999] A.J. No. 1407; 1999 ABQB 902; 254 A.R. 91

19. ***Walter Stewart Realty Ltd. v. Traber***, [1995] A.J. No. 636; 174 A.R. 45 (ABCA)

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21. ***Murphy Oil Co. v. Predator Corp.***, [2006] A.J. No. 207; 2006 ABCA 69; 384 A.R. 251

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22. ***642718 Alberta Ltd. (c.o.b. CNE Centre) v. Alberta (Minister of Public Works, Supply and Services)***, [2004] A.J. No. 870; 2004 ABQB 539; 368 A.R. 53, varied on appeal.

23. ***642718 Alberta Ltd. v. Alberta (Minister of Public Works, Supply and Services)***, [2005] A.J. No. 1177; 2005 ABCA 292; 371 A.R. 390

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31. ***Neighbourhoods of Cornell Inc. v. 1440106 Ontario Inc.***, [2003] O.J. No. 2919, 11 R.P.R. (4th) 294; 124 A.C.W.S. (3d) 675 (Ont. Sup. Ct.), affirmed on appeal

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37. ***40 Sunpark Plaza Inc. v. 850453 Alberta Inc.***, [2007] A.J. No. 100; 2007 ABQB 54; 413 A.R. 200

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42. ***Pena v. Kocian***, [2006] A.J. No. 987; 2006 ABQB 602; 152 A.C.W.S. (3d) 787

43. CED Contracts, VI – Statute of Frauds – Writing Requirements, § 296 and 297.