No. S053395
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

STEPHEN CHIU, THE ADMINISTRATOR OF THE ESTATE OF ELIZA KUTTNER, ALSO KNOW AS ELIZA WING-MUN KUTTNER

PLAINTIFF

AND:

THE CORPORATION OF THE DISTRICT OF NORTH VANCOUVER, NORMAN SIBSON and HAZEL SIBSON, LAWRENCE ERNEST PERRAULT, JACQUELINE MARGARET PERRAULT,

DEFENDANTS

WRIT OF SUMMONS

Plaintiff:

Stephen Chiu
Administrator of the Estate of Eliza Wing-Mung Kuttner
also known as Eliza Kuttner
#801-1065 Quayside Drive
New Westminster, B.C. V3M 1C5

Defendants:

The Corporation of the District of North Vancouver
355 West Queens Road
North Vancouver, B.C. V7N 4N5

Norman Sibson and Hazel Sibson
209 – 8888-202nd Street
Langley, B.C. V1M 4A7

Lawrence Ernest Perrault and Jacqueline Margaret Perrault
c/o Lakes Straith & Whyte LLP
Barristers & Solicitors
Suite 301 – 145 West 15th Street
North Vancouver, B.C. V7M 1R9

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom, Canada and Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith:

TO THE DEFENDANT(S):

TAKE NOTICE that this action has been commenced against you by the Plaintiff(s) for the claims set out in this Writ.

IF YOU INTEND TO DEFEND this action, or if you have a set-off or counterclaim that you wish to have taken into account at the trial, YOU MUST

(a) GIVE NOTICE of your intention by filing a form entitled "Appearance" in the above registry of this Court, at the address shown below, within the Time for Appearance provided for below and YOU MUST ALSO DELIVER a copy of the Appearance to the Plaintiff's address for delivery, which is set out in this writ, and

(b) If a statement of claim is provided with this writ of summons or is later served on or delivered to you, FILE a Statement of Defence in the above registry of this court within the Time for Defence provided for below and DELIVER a copy of the Statement of Defence to the plaintiff's address for delivery.

YOU OR YOUR SOLICITOR may file the Appearance and the Statement of Defence. You may obtain a form of Appearance at the Registry.

JUDGMENT MAY BE TAKEN AGAINST YOU IF

(a) YOU FAIL to file the Appearance within the Time for Appearance provided for below, or

(b) YOU FAIL to file the Statement of Defence within the Time for Defence provided for below.

TIME FOR APPEARANCE

If the writ is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including the day of service).

If this writ is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

[or, if the time for appearance has been set by order of the court, within that time.]

TIME FOR DEFENCE

A Statement of Defence must be filed and delivered to the plaintiff within 14 days after the later of

(a) the time that the Statement of Claim is served on you (whether with this writ of summons or otherwise) or is delivered to you in accordance with the Rules of Court, and

(b) the end of the Time for Appearance provided for above.

[or if the time for defence has been set by order of the court, within that time.]

(1) The address of the registry is: The Law Courts 800 Smithe Street Vancouver, B.C. V6Z 2E1
(2) The plaintiff's ADDRESS FOR DELIVERY is: Norton Stewart Barristers and Solicitors 1600-1065 West Georgia Street Vancouver, B.C. V6E 3P3 Fax number for delivery 604/ 689-1248:
(3) The name and office address of the plaintiff's solicitor is: Norton Stewart Barristers and Solicitors 1200 - 1055 West Georgia Street Vancouver, B.C. V6E 3P3 <u>Attention:</u> Bruce M. Gordon

THE PLAINTIFF'S CLAIM IS SET OUT IN THE ATTACHED STATEMENT OF CLAIM.

Date: June 21, 2005

Bruce M. Gordon
Solicitor for the Plaintiff

No.
Registry

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BETWEEN:

STEPHEN CHIU, THE ADMINISTRATOR OF THE ESTATE OF ELIZA WING-MUN KUTTNER, ALSO KNOW AS ELIZA KUTTNER

PLAINTIFF

AND:

THE CORPORATION OF THE DISTRICT OF NORTH VANCOUVER, NORMAN SIBSON and HAZEL SIBSON, LAWRENCE ERNEST PERRAULT, JACQUELINE MARGARET PERRAULT,

DEFENDANTS

STATEMENT OF CLAIM

1. The Plaintiff, Stephen Chiu, Administrator of the Estate of Eliza Wing-Mun Kuttner, also known as Eliza Kuttner resides at #801 – 1065 Quayside Drive, New Westminster, British Columbia V3M 1C5 and is the father of Eliza Wing-Mun Kuttner, also known as Eliza Kutter and is the Administrator of her estate.

2. The Defendant, The Corporation of the District of North Vancouver (hereinafter referred to as the "District") is a municipality duly incorporated pursuant to the *Local Government Act* RSBC 1996, Chapter 323, having its address at 355 West Queens Road, North Vancouver, British Columbia.

3. The Defendants, Norman Sibson and Hazel Sibson (hereinafter collectively referred to as the "Sibsons") are retired persons, currently living in Langley, British Columbia. They resided at 2175 Berkley Avenue, North Vancouver, British Columbia between March 31, 1958 and January 13, 2004.

4. The Defendant, Lawrence Ernest Perrault, is an employee of the District of North Vancouver and until January 14, 2005 resided at 2175 Berkley Avenue, North Vancouver, British Columbia. The Defendant, Jacqueline Margaret Perrault, is a nursing unit clerk and until January 14, 2004 resided at 2175 Berkley Avenue, North Vancouver, British Columbia. The Perraults are (hereinafter referred to collectively as the "Perraults").

5. Eliza Kuttner resided at 2440 Chapman Way, North Vancouver, British Columbia, lands and premises legally described as Lot A of Lot 36 Block 1 District Lot 850 Plan 17837 (hereinafter referred to as "Lot A The Kuttner Property") between July

24, 1986 and January 19, 2005.

6. The Corporation of the District of North Vancouver has since August 31, 1979 been the owner of Lot C of Lot 36, Block I, District Lot 850, Plan 17837 (hereinafter referred to as "Lot C the District Property").

7. The Perraults resided at 2175 Berkley Avenue, North Vancouver, British Columbia legally described as Lot 25, Block 3, District Lot 850, Plan 8987 (hereinafter referred to as "Lot 25 the Perrault Property") between January 14, 2004 and January 19, 2005.

8. Lot A the Kuttner Property, Lot 25 the Perrault Property and Lot C the District Property are all contiguous properties. There is an extremely steep contour between these properties starting at the western side of Lot 25, and dropping down 250 feet at a slope of 32° to 35° through Lot C the District Property and terminating at Lot A the Kuttner Property. These three properties are part of an escarpment running North and South of the properties and this escarpment is (hereinafter referred to as the "District Escarpment").

9. On or about January 19, 2005, at approximately 4:00 a.m., the steep slope mentioned in paragraph 10 was subject to a mud and debris slide extending from Lot 25 the Perrault Property, down through Lot C, the Municipal property, and across Lot A the Kuttner Property. This slide is (hereinafter referred to as the "2005 Slide").

10. As a result of the 2005 Slide, the structures and chattel property, including automobiles, located on Lot A the Kuttner Property, were completely destroyed, Eliza Kuttner was killed and Michael Kuttner was seriously injured.

SUBDIVISION OF LOT 25 THE PERRAULT PROPERTY

11. In and around July 1954, Riverside Hills Estates Ltd. (now dissolved) subdivided lands in North Vancouver by way of Subdivision Plan 8987, which was approved by the District Approving Officer on July 5, 1954, and among other lots, created Lot 25 the Perrault Property.

12. In 1958, the District issued a building permit to Riverside Hills Estates Ltd. for the construction of a home on Lot 25 the Perrault Property and subsequently issued an Occupancy Permit after all District inspections.

SUBDIVISION AND DEVELOPMENT OF LOT A THE KUTTNER PROPERTY AND LOT C THE DISTRICT PROPERTY

13. In and around August 1979, Riverside Developments Ltd. (now dissolved) and the District subdivided lands in North Vancouver by way of Subdivision Plan 17837, which was approved by the District Approving Officer on August 17, 1979, and created, among other lots, Lot A the Kuttner Property and Lot C the District Property.

14. In 1980, the District issued a building permit for the construction of a home on Lot A the Kuttner Property and subsequently issued an Occupancy Permit after all District inspections.

1972 SLIDE

15. In 1972, a surface slide (hereinafter referred to as the "1972 Slide") occurred in the District Escarpment at and above 1425 Lennox Street and damaged the structure at 1425 Lennox Street which is adjacent to the site of the 2005 Slide.

1979 SLIDES

16. On or about December 17, 1979, three surface slides (hereinafter referred to as the "1979 Slides") occurred on the District Escarpment, again, adjacent to the site of the 2005 Slide area and the District obtained from Golder Associates, consulting geotechnical engineers, a preliminary geotechnical report dated January 1980 (hereinafter referred to as the "Golder Report"). The author of the Golder Report was of the opinion there was a potential for further slides in the area.

17. Following the 1979 Slides, the District received a petition from residents of the Riverside/Berkley area to undertake further geotechnical studies to assess the potential for future slides in the area of the District Escarpment, and to recommend corrective action.

18. In and around April and May, 1980, the District's then Mayor sent letters to all property owners in the District Escarpment area advising the District would commission a geotechnical study to determine the nature and location of potential slide hazards and to assess and recommend remedial action provided the owners agreed:

    (a) not to use the geotechnical study as evidence against the District municipality in any litigation regarding the District Escarpment;

    (b) to keep the geotechnical report confidential; and

    (c) that any remedial action recommended would be the responsibility of the property owner which included the District.

19. Notwithstanding that many owners did not accept this arrangement, a report was still commissioned. On or about November 3, 1980 the District received the geotechnical report regarding the District Escarpment from Khlon Leonoff Engineers (hereinafter referred to as the "Klohn Report"). (The Golder Report and the Klohn Report are hereinafter collectively referred to as the "Reports").

20. The District kept the Reports confidential from many owners in the District

Escarpment area, including the Kuttners and other subsequent purchasers until after the 2005 Slide when the Reports were placed on the District's website.

21. The Klohn Report concluded, among other things, that:

(a) there was a significant risk of further slides along the District Escarpment;

(b) the greatest danger for further slides would be to properties at the base of the District Escarpment;

(c) the house at 2175 Berkley Avenue, Lot 25 the Perrault Property, was founded on fill;

(d) the storm water systems of residents on Berkley Avenue resulted in storm water discharging down the District Escarpment;

(e) where there was fill at the crest of the District Escarpment, and where ground water drainage was towards or into the fill, there was a greater potential for instabilities to develop than in areas where such conditions did not exist; and

(f) certain remedial work needed to be done on land on the District Escarpment, including Lot C the District Property.

22. The Klohn Report recommended that the District and property owners carry out remedial work to minimize the potential of further slides. The Klohn Report recommended that:

(a) existing debris would need to be removed, and no new debris placed at or over the crest of the District Escarpment;

(b) vegetative growth should be controlled to allow the homeowner to carry out periodic examinations of drainage, outlets, and inspections of the slopes for any sign of distress;

(c) if at any future time an inspection shows any sign of slope distress, the owner should have a further stability assessment made;

(d) those properties not connected to storm sewers would need to be inspected, energy dispensators should be placed to disperse flows, and non-operational drains replaced;

(e) existing abandoned septic tanks should be removed or filled; and,

(f) homeowners should inspect the drainpipes at least two times each year and should maintain the pipes in good working order.

23. The Klohn Report made certain recommendations specifically relating to Lot 25 the Perrault Property, including that:

    (a) down spouts for drainage should be connected to a closed conduit that is carried over the slope to a point below any fill which has been placed on the lot;

    (b) down spouts, foundation, and driveway drainage should be connected to a conduit;

    (c) interceptor drains should be installed;

    (d) drains should be placed across the backyard natural soils, upslope of any fill material that has been placed on the District Escarpment crest; and

    (e) a trench should be excavated at 1-1/2 feet into hardpan, or at least 5 feet deep across the yard.

24. The Klohn Report further recommended installation of a storm drainage system on Lot C the District Property and other District property along the District Escarpment, including the area of the 2005 Slide.

25. Eliza Kuttner who purchased Lot A, the Kuttner Property in 1986 jointly with her husband did not receive or agree to the contents of the Bell Letter or hear of or become aware of the Reports.

26. The District owed Eliza Kuttner a general duty of care, a fiduciary duty and a duty pursuant to the Rule in *Rylands v Fletcher* to ensure, or to take reasonable steps to ensure, that the District Escarpment, generally, as well as Lot C the District Property specifically, were properly maintained and kept in safe condition considering the steep slope, the risk of landslide and the other circumstances the District knew or ought to have known generally.

27. The District as a municipal corporation and as a joint developer of Lot A the Kuttner Property and Lot C the District Property owed Eliza Kuttner, as successor in title and/or occupant of Lot A the Kuttner Property, a general duty of care and a fiduciary duty to have developed and authorized the subdivision that created Lot A the Kuttner Property and authorized the construction of structures on Lot A the Kuttner Property only in circumstances where Lot A the Kuttner Property would be safe for its intended use.

28. The District owed Eliza Kuttner a general duty of care and a fiduciary duty to warn or to warn adequately Eliza Kuttner as owner and occupier of Lot A the Kuttner Property of dangers and risks the District knew of or ought to have known regarding the risk of

landslides on the District Escarpment.

29. The District breached its duty of care and a fiduciary duty to ensure that, or to take reasonable steps to ensure that the District Escarpment as well as Lot C the District Property specifically were properly maintained and kept in safe condition considering the steep slope and the other circumstances, particulars of which breaches are as follows:

(a) failing to identify all sites with potential instability for slides;

(b) failing to prepare appropriate recommendations for remedial work to minimize the risk of future escarpment failures;

(c) failing to stabilize over-steep slopes on the District Escarpment;

(d) allowing or failing to prevent fill from being added to the crest of the District Escarpment knowing the additional fill increased the risk of escarpment failure;

(e) failing to reduce the volume of water flow over the slope thereby increasing the risk of escarpment failure;

(f) permitting and/or causing the concentration of the volume of water in specific locations thereby increasing the risk of escarpment failure;

(g) failing to conduct periodic clean-up and maintenance of the District Escarpment;

(h) failing to ensure house, roof and rain drains were connected to the storm sewer system in the area;

(i) failing to ensure drainage systems were implemented in the fashion described in the Reports and reports by municipal staff;

(j) failing to act when it knew the risk of landslide in some areas of the District Escarpment was quite high.

30. The District as a municipal corporation and as a joint developer of Subdivision Plan 17837, breached its duty of care and a fiduciary duty to Eliza Kuttner by developing and authorizing the development of Subdivision Plan 17837 that created Lot A the Kuttner Property and by authorizing the construction and occupation of structures on Lot A the Kuttner Property, particulars of the District's breaches are as follows:

(a) agreeing to take part in and approving the subdivision of Lot A the Kuttner Property and Lot C the District Property without considering the steep slope and obtaining a proper geotechnical report;

(b) agreeing to take part in and approving the subdivision of Lot A the Kuttner Property and Lot C the District Property in spite of recommendations against the same by municipal staff and others;

(c) issuing building permits for construction of houses on Lot 25 the Perrault Property and Lot A the Kuttner Property without considering the steep slope and obtaining appropriate geotechnical reports;

(d) permitting the continuance of construction, proceeding with and passing the inspections on such construction and issuing an occupation permit with respect to such construction for Lot A the Kuttner Property after the 1979 Slides and after receipt of the Golder Report and the Klohn Report regarding the 1979 Slide;

(e) allowing building permits and occupation permits for structures at the base of or the toe of the escarpment when the District knew or ought to have known that even after remedial work was conducted, there would always remain a risk of serious landslide failure and danger to the properties at the base or toe of the District Escarpment.

31. The District breached its duty of care and a fiduciary duty to warn or to warn adequately Eliza Kuttner as owner and occupier of Lot A the Kuttner Property of dangers and risks the District knew of or ought to have known of. Particulars of the District breaches are as follows:

(a) failing to warn when the District knew that the structures at the base or toe of the escarpment faced the greatest risk;

(b) failing to warn when the major thrust of the remedial work recommended by the Reports was to minimize the risk to the properties at the base of the slope from further escarpment failure, and that even if the remedial work were completed there would always remain the risk of serious landslide;

(c) deliberately concealing information in the Reports regarding the 1979 Slide in an effort to avoid political and legal consequences from the owners from time to time of the properties at risk at or near the District Escarpment including the owners and occupants, from time to time, of Lot A the Kuttner Property. Thereby knowingly putting the life, health, safety and property of Eliza Kuttner and her invitees at risk;

THE DUTIES OF THE OWNERS OF LOT 25 THE PERRAULT PROPERTY

32. The Defendants, the Perraults and the Sibsons owed Eliza Kuttner a duty of care to conduct affairs on their property so as to minimize the risks of landslide directly above

Lot A the Kuttner Property.

33. The Perraults and/or the Sibsons breached their duty of care to conduct affairs on their property so as to minimize the risks of landslide failure directly above Lot A the Kuttner Property, particulars of which breaches are as follows:

(a) adding debris material to the crest of the Escarpment knowing the additional fill increased the risk of landslide;

(b) adding debris material to the crest of the Escarpment after becoming aware of the contents of the Reports;

(c) failing to implement the drainage recommendations in the Reports;

(d) failing to reduce the volume of water flowing over the slope thereby increasing the risk of landslide;

(e) concentrating the volume of water in specific locations thereby increasing the risk of landslide;

(f) altering the vegetation on the slope by removing natural cover and trees thereby increasing the risk of landslide;

(g) failing to implement the remedial measures recommended in the Klohn Report, or any measures to reduce the risk of slide activity on the Perrault property;

(h) failing to construct and/or adequately maintain a proper drainage system for the Perrault property;

(i) failing to construct and/or adequately maintain a proper retaining wall at the west side of the Perrault property;

(j) allowing the fill material to remain on the Perrault property without proper measures for drainage and support;

(k) installing a large concrete pool on the Perrault property at the west side of the Perrault property;

(l) disposing of the soil excavated for the installation of the concrete pool on the slope adjacent to the Perrault property, thereby adding to the steepness and instability of the slope;

(m) failing to ensure that the residence, concrete pool and other improvements on the Perrault property were situated on competent soils or foundations;

(n) removing trees and vegetation located on and around the Perrault property, thereby reducing the stability of the Perrault property and adjacent slope;

(o) placing excessive loads on a concrete retaining wall at the westerly edge of the Perrault property resulting in its failure and triggering of the subject landslide.

34. Eliza Kuttner's death occurred as a result of the 2005 Slide and the negligence, failure to warn, breach of fiduciary duty and Nuisance of the Defendants.

35. The Plaintiff, Stephen Chiu, as the Administrator of the Estate of Eliza Wing-Mung Kuttner, also known as Eliza Kuttner, (date of birth: March 26, 1961), brings this action for the benefit of Michael Hugh Kuttner, husband of the deceased (date of birth: August 15, 1945) and Amita Kuttner, daughter of the deceased (date of birth: December 4, 1990) (herein all referred to as the "Family").

36. As a result of the death of Eliza Kuttner, the Family has incurred medical, funeral and other expenses.

37. Before her death Eliza Kuttner, age 44, a college instructor, contributed to the support of the members of the Family and by her death they have been deprived of her assistance, maintenance and support and lost such additional savings as the deceased would have accumulated during her normal life time which would have accrued to them on her death.

38. In addition, the members of the Family have been deprived of Eliza Kuttner's efforts as a devoted wife and mother, including a loss of her love, guidance, comfort, care, example and encouragement.

39. The Plaintiff pleads the provisions of the *Family Compensation Act* R.R.S.B. 1996, ch. 126.

WHEREFORE THE PLAINTIFF CLAIMS AGAINST THE DEFENDANTS:

a. general damages;

b. special damages;

c. interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, C. 79 (formerly R.S.B.C. 1979, C. 76);

d. costs; and

e. such further and other relief as this Honourable Court may deem necessary.

PLACE OF TRIAL: Vancouver, B.C.

Dated: June 21, 2005

Bruce M. Gordon
Solicitor for the Plaintiff

THIS **STATEMENT OF CLAIM** is filed and delivered by Bruce M. Gordon, of the law firm of Norton Stewart, Barristers & Solicitors, whose place of business and address for service is Suite 1200 - 1055 West Georgia Street, Vancouver, B.C. V6E 3P3 (687-0555).

No.
Registry

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PLAINTIFF

AND:

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DEFENDANTS

WRIT OF SUMMONS AND STATEMENT OF CLAIM

NORTON STEWART
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Attention: Bruce M. Gordon

BMG/sb.
File No.: 4729-10