



Consultation on Topics from the Auditor General Report on Tarion

Submitted to: Tarion Warranty Corporation

Submitted by: Ontario Bar Association



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Introduction

The Ontario Bar Association (“**OBA**”) appreciates the opportunity to provide this submission on the recommendations from the Auditor General Report on Tarion Warranty Corporation (“**Tarion**”).

The Ontario Bar Association

The OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to people and businesses in virtually every area of law in every part of the province. This submission has been prepared by a working group of lawyers from the Real Property Law, Construction and Infrastructure Law and Civil Litigation sections of the OBA.

Overview

The Ontario Bar Association (OBA) has prepared this submission in response to the consultation on topics from the Auditor General Report on Tarion Warranty Corporation (the “Consultation”). We generally support Tarion’s commitment to implementing the recommendations from the Auditor General in order to build a more fair, transparent, and effective new home warranty and protection program to the benefit of both homeowners and builders alike. Below we have set out our responses to the eight (8) recommendations from the Auditor General Report.



Recommendations

1. Establishing new rules and processes to help homeowners better understand the importance of the Pre-Delivery Inspection.

We are in support of the efforts to aid homeowners in understanding the importance of the PDI, which is an important aspect in the new home acquisition process.

We note that there are privacy considerations with providing Tarion with homeowner contact information, and it is important to ensure that this information is controlled with appropriate safeguards and measures (for example, by ensuring that homeowners are aware that their contact information will be shared with Tarion). It should also be prescribed that only relevant contact information is shared with Tarion, and nothing further, which will limit the potential for disclosure of confidential or otherwise irrelevant information. Furthermore, there is great value to adding PDI information electronically to the MyHome Portal because it would allow for one central location where homeowners can access more important information throughout the building process.

Should a builder not comply with the requirement to share PDI information with homeowners, this should be information that is included as a part of Tarion's Ontario Builder Directory, available and accessible to the public, as an incentive for compliance. Inclusion of this information would lead to greater transparency for homeowners, and, by extension, confidence in that particular builder and the market in general.

2. Clarifying information on new home warranties and homeowners' rights in the Homeowner Information Package.

While it is important to ensure that homeowners receive all of the relevant and required information in the Homeowner Information Package (HIP), we caution against the



oversaturation or inundation of information in the HIP. Tarion should remain cognizant that homeowners, although not unsophisticated, are not necessarily lawyers and therefore, may not understand complex legal aspects related to their new home acquisitions. Accordingly, we recommend that the most pertinent and essential information provided should be concise and written in plain language to aid a thorough understanding of new home warranties and homeowners' rights. We recommend that the HIP function like an agreement that includes the most important information summarized clearly in the body of the HIP, with a list of schedules containing more detailed additional information that may be referred to by the homeowners if desired or necessary. This way, homeowners can get the more granular information on specific topics as they require by reviewing the various schedules and appendices to the HIP, without diluting the core and essential information that homeowners ought to know. We also recommend in instances where a homeowner does not understand information related to the acquisition of their new home, that they be encouraged to seek legal advice from a lawyer knowledgeable and competent in the appropriate legal area.

As it stands, the HIP is provided to homeowners in paper copy. We recommend that the HIP also be provided to homeowners electronically to increase ease of access to the information. Electronic disclosure, delivery, and accumulation of documentation has progressed to be the general norm in society today.

3. Changing the Customer Service Standard to improve homeowners' ability to seek assistance from Tarion.

The two (2) 30-day submission deadlines should not be removed altogether, but should be extended in order to balance homeowner rights and the ability for builders to have some certainty in the process. We recommend a timeline of 60 or 90 days. We also recommend that there be some discretionary mechanism in place if a deadline is missed, such that a



homeowner may have the opportunity to submit past the deadline if certain conditions are met. However, while there should be some leeway and flexibility to the process to assist homeowners, there may be some concerns regarding the potential expansion and bootstrapping of claims. Furthermore, there is also significant value in tying the repair deadline to the type of repair to be done, which will allow reasonableness and proportionality to inform the process. For example, structural or more complex repairs might warrant longer periods, whereas cosmetic or simple repairs may warrant shorter timelines. Repair timelines that are related to Seasonal Warranty Items should be adjusted accordingly, such that they can be completed in favourable and/or necessary weather conditions without negatively affecting the allotted repair timeline of the builder. It is important to ensure that the timelines remain simplistic so homeowners understand their responsibilities, and builders have an appropriate amount of time to rectify issues. The appropriate balance of rights, obligations, and interests of homeowners and builders should be considered and implemented by Tarion, so that the process remains fair to all interested parties.

We also recommend providing builders with positive incentives to complete repairs in a timely fashion. For example, the Tarion BuilderLink portal could include the number of outstanding claims a builder has at any given time, which would then incentivize them to reduce that number by completing repairs earlier on in the allotted repair period. BuilderLink could also include certain metrics related to the average time builders take to make repairs as a further positive incentive for builders. Such information, which would be accessible to the public, would create greater knowledge regarding the activity and work product of the builders, which could allow a homeowner to make a more informed decision as to whether to proceed with that particular builder, eventually leading to greater confidence in the market.



4. Establishing new rules for the timely Tarion resolution of homeowners' disputes with builders.

We support the goal of Tarion's timely and effective resolution of homeowners' disputes with builders, which is a benefit to both homeowners and builders. In this regard, the new rules should strike the appropriate balance to the rights and interests of both homeowners and builders, without being either party being advantaged or disadvantaged throughout the process. Furthermore, we recognize that this is largely a capacity issue, dependent on the resources available to Tarion. We note that if Tarion increases its capacity to resolve disputes, which is desired and appropriate conceptually, but may become counterproductive in so far as the cost of doing so is filtered down to homeowners, this will only make real estate even more unaffordable for families in Ontario. The complexity of defects should also be considered here; i.e. structural issues will necessarily take longer to be assessed than simpler defects.

5. Establishing a timely and cost-effective Tarion mediation process for homeowners.

The timely and cost-effective resolution for homeowner disputes with Tarion is important and imperative, and we support the proposal for Tarion to establish an internal appeals process for homeowners. We recommend an early mediation with an independent third-party mediator who has some technical knowledge to reduce the need for experts and formal appeals to either Licence Appeal Tribunal and the Courts, thereby avoiding extra costs associated with such formal proceedings. We also emphasize the need for truly independent and impartial mediators, which would strengthen fairness and justice, both perceived and actual, to homeowners as the process proceeds.

In terms of settlement funds, we do not think it appropriate for builders to pay awards for mediations to which they are not a party, which would violate builders rights of fairness and



due process. Inclusion in the mediation process in some way would ensure fairness to builders should they be required to pay as a part of a settlement.

6. Requiring builders to provide Tarion with title information for high-risk proposed condominium construction projects and to disclose restrictions that could cause delay or cancellation of the project.

We are in support of providing more information to homeowners about high-risk proposed condominium projects, however, we do not think the issue is usually related to title information. Typically, planning approvals and financing are major issues for the completion of condominium projects. Pre-construction condominium purchasing is a sophisticated investment vehicle, so we are in support of homeowners being provided more information for these kinds of projects. Some useful information to disclose other than title information might be (a) where the builder is currently at in the building process and further periodical updates as the actual construction proceeds to the project; and (b) whether the project has been financed or not.

7. Implementing a risk-based inspection process to proactively identify potential deficiencies during construction, including those related to the Ontario Building Code during construction.

We recommend basing the risk-based inspection process on the results of Tarion's 2019 pilot program, which information should be utilized as the basis for implementation by Tarion. In other words, it is entirely difficult in the abstract to know what a proper and appropriate threshold for inspections of homes would be necessary to discover non-compliance and deficiencies in order to minimize warranty issues.



8. Improving the Ontario Builder Directory to include additional information about builders.

We support the addition of more information to the Builder Directory as a way to enhance homeowners understanding of the process and the builders they are working with.

The information recommended by Tarion should be appropriately included in the Ontario Builder Directory, which information should include, inter alia, the following:

- (a) all results of Tarion investigations that found the builder's behavior lacked honesty and integrity;
- (b) past convictions for illegal building activities;
- (c) the number and percentage of homes with major structural defects that a builder constructed each year;
- (d) the amount of money a builder owes to Tarion that remains unpaid;
- (e) the number of defects under warranty that a builder refused to repair; and
- (f) the number of defects the builder refused to repair that were due to the builder's non-compliance with the Ontario Building Code.

There may be other pertinent and necessary information that may be included as part of a builders profiled within the Ontario Builder Directory. Furthermore, Tarion should consider the aforementioned information when allowing builders to become Tarion approved in the first instance and/or renewals, including on-going mandatory continuing education programs for all builders.

To reiterate, further information and disclosure as to which builders are responsive and compliant with the Tarion regulations and processes will assist homeowners and create greater confidence in the market and Tarion alike.



9. The warranty compensation caps on claims relating to environmentally harmful substances or hazards, septic systems and condominium common elements and providing compensation to homeowners in instances where they have to relocate while repairs are underway which arose from a warranted item.

While we acknowledge the usefulness of thresholds and caps on claims, there are sometimes building defects which can go far beyond these caps (such as repairs related to asbestos and mold) which may be extensive and expensive to undertake properly. If there is a shortfall in cases like this, it should not fall to the homeowner. The caps used should not be a one-size-fits-all, but they can be helpful when guided by proportionality and reasonableness. We also recommend that there be flexibility to increase or decrease caps if needed and the tracking of such information by Tarion based on past, present, and future claims may be a useful guide in this regard.

It is reasonable to compensate homeowners who are forced to relocate due to the repairs of warranted items. However, we note that the Temporary Relocation Allowance of \$150 per day might not be sufficient to cover the cost of accommodation in some Ontario cities, especially if there are personal items which need to be cleaned due to the defect. We recommend that Tarion adopt a flexible process wherein homeowners can submit additional costs for reimbursement consideration from Tarion above the \$150 per day maximum allotment.

Conclusion

The foregoing represent the general comments of the OBA in relation to the eight (8) specific areas Tarion has sought public consultation. To reiterate, the OBA believes that significant changes should occur to Tarion in order to address the recommendations of the Auditor General of Ontario. However, such changes must strike the appropriate balance to the



interests of all affected parties, including most prominently homeowners and builders, in order to create a system that is transparent, fair, and accountable to all.