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Is secrecy a major structural defect in buyer protection?

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How will buyers of new homes in Ontario know the meaning of a "major structural defect" under the Tarion warranty if the corporation imposes a gag agreement on settlements of lawsuits against it?

That's the question after a secret resolution of claim brought by Tim Fuller and Patricia Swick, who bought an Ottawa townhouse in 1998 and spent nine years battling the builder and Tarion Warranty Corp. over outstanding issues.

Under the Tarion program, a house is guaranteed to be free from major structural defects (MSDs) for seven years after possession. Within that time limit, Fuller and Swick submitted a number of MSD claims to Tarion, and all were rejected. They appealed Tarion's decision to the Licence Appeal Tribunal (LAT) in 2006 and their claims were again tossed out.

Unhappy with the LAT decision, the couple retained Ottawa lawyer Christopher Arnold to launch an appeal to the Divisional Court. The case involved key issues surrounding the definition of an MSD, and some industry stakeholders eagerly awaited the ruling.

Suddenly, about a week before the court hearing – and nine years after the house was purchased – the case was quietly settled and disappeared from the court docket. When I tried to find out how it had been resolved, I was told by all parties the settlement was subject to a "will not disclose" agreement.

According to Tarion's governing regulations, an MSD is defined as a defect in work or materials that materially or adversely affects the load-bearing function of a building.

In its Fuller and Swick decision, however, the LAT appears to have re-interpreted that regulation to add an additional requirement that the defect "should be" one that renders a home "virtually uninhabitable ... unsafe, or in a state of imminent collapse."

Arnold, representing Fuller and Swick, believes the LAT was wrong and cited a 1997 court decision in the Grudzinski case, which supports his position, he says. The "imminent collapse" test, he told me last week, is not and never has been part of the Tarion legislation, and shouldn't form any part of how Tarion defines what is and what is not a MSD."

The Fuller and Swick appeal hinged on four issues the couple claimed were MSDs. Basically, the claims were that load-bearing columns, posts or walls on the main floor were not aligned with or not properly secured to structural supports below. But since the

identical settlement agreements. ... each file is dependent on its own facts."

Frankly, to say that present or future litigants would be confused if the Fuller and Swick settlement was made public insults the intelligence of others involved in claims against Tarion.

The outcome of all Tarion's proceedings and settlements should be public. The program should operate in an open and transparent manner; its culture of secrecy is clearly not in the public interest.

Unfortunately, the public record on the Tarion website records only the "imminent collapse" definition of MSD in the Fuller and Swick case, although my guess is that Tarion backed away from that interpretation with a considerable cash payment to the homeowners.

Marek Tufman is a senior Toronto litigator who represented the successful claimants in the 1997 Grudzinski case, which also involved the definition of an MSD. This week, he told me that although the warranty corporation is entitled by law to impose a gag order, a public statutory body like Tarion "should not maintain a cloak of secrecy over this type of arrangement." There is a substantial public interest in this issue, he added.

Meanwhile, Linda Williamson, communications manager for the provincial Ombudsman's office, told me the Ombudsman does not have jurisdiction over Tarion. The office, however, is assessing complaints it has received in order to determine whether an investigation is warranted into the degree of protection that Ontario offers to new homeowners.

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