



November 15, 2015

By e-mail

MPP Jim McDonell
PC Critic for the Ministry of Government and Consumer Services
Room 343, Main Legislative Building
Toronto, ON, M7A 1A8

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Dear MPP McDonell:

Thank you for your e-mail of November 6, 2015 in which you asked CPBH to respond to the following questions:

1. Are the terms of reference of the review or its scope appropriate and do they encompass CPBH's main areas of concern?
2. Will CPBH and other consumers concerned with Tarion's governance and consumer protection standards be able to contribute exhaustively to the process, based on that scope?

We very much appreciate the opportunity to respond to your questions. We have reviewed the Backgrounder document from the Ministry of Government and Consumer Services, dated November 5, 2015, entitled "Terms of Reference for Tarion Review".

Section 1 of this document responds to your question about the Terms of Reference/Scope. Section 2 of this document responds to your question regarding whether CPBH and consumers will be able to contribute exhaustively to the process.

Section 1 – Terms of Reference/Scope

The November 5, 2015 Terms of Reference document provides a good start for the review. However, there are a number of additional key areas that should be included in this review. These are summarized in this section.

1. Consumer Protection
 - a. Systemic construction defects are a very important consideration for consumer protection. For example, if in a development of 20 similar homes (built at the same time), a defect is found and proven in one or two homes, is there a duty for Tarion to investigate to see if the same defect exists in the other homes and to remedy them? After all, the



warranty is for conformance to the Ontario Building Code (OBC)¹, not “conformance to the OBC only if discovered by the homeowner within the warranty period and brought to the attention of Tarion in writing in all cases.” Therefore, **we submit that this review should include whether Tarion has a duty to investigate and remedy a defect if Tarion has reason to believe that a warrantable defect exists in a home -- even if the owner has not discovered it.**

- b. As already noted, Section 13(1) (iii) of the ONHWP Act (the Act) says that homes must be constructed in accordance with the OBC. But many are of the view that Tarion uses a regulation (that Tarion itself created and approved) to unreasonably limit timeframes for claims. By the time that the homeowner realizes that there is an OBC violation, the claim period may have expired due to the Tarion regulation that unreasonably limits timeframes. Therefore, **we submit that this study should consider whether Tarion can use its regulation to supersede a Section 13(1)(iii) of the Act.**
- c. Many question the qualifications of some of Tarion’s field inspectors and other Tarion representatives. As one specific example, Section 18(1) of the Act says that Tarion shall appoint inspectors. Tarion recently advised that for the several years, Tarion has had three inspectors (for the entire province of Ontario) for this purpose, but they have not conducted any inspections. There are questions regarding who these three inspectors are, and whether they are qualified to conduct these inspections. **We submit that this review should determine whether these three inspectors are qualified to inspect related to Section 18(1).**
- d. Section 18(2) of the Act says that Tarion’s inspectors may inspect a home during its construction. But Tarion has taken the position that it does not do inspections during construction as this is the responsibility of the municipalities. Unfortunately, there are well known problems with municipal inspections, e.g., in February 2014, CTV reported that a recent Auditor General’s report found that the City of Toronto failed to inspect 98,000 building permits across the city in 2012 and failed to inspect 70% of open building violations. Given the serious examples of shoddy construction reported by the media and homeowners - and the problems with municipal inspections in different parts of the province, **we submit that this review should consider whether Tarion’s position to not**

¹ Section 13(1) (iii) of the Ontario New Home Warranties Plan Act.



inspect during construction is reasonable and appropriate given these well-known problems with municipal inspections.

- e. Many wonder about Tarion's "duty to warn" when it discovers a product or service that does not conform to the OBC. **We submit that this should be a key question for this review: Does Tarion have a duty to warn consumers and the industry if it finds a product or service that does not conform to the OBC.**

2. Accountability and Transparency

- a. Consumers often want to know the qualifications of the Tarion inspector (or other Tarion representative) who determine the disposition of their claim. But Tarion has refused to provide that information to some consumers. **We submit that this review should consider whether Tarion has the responsibility to provide homeowners with the qualifications of its inspectors (or other Tarion agents involved in determining the disposition of a claim.)**

3. Board Governance

- a. There is a question as to whether an Ontario public servant serving on the Tarion board is an appropriate role given that Tarion is a private corporation. Some are of the view that this is a conflict of interest – or at least a perceived conflict of interest – for an Ontario public servant. **We submit that this review should consider whether it is appropriate for an Ontario public servant to serve on the board of Tarion.**

4. Other Matters

- a. Section C of the Terms of Reference refers to "examining current business model for provision of warranties". It is unclear whether this refers to the monopoly model that Tarion currently enjoys. **We submit that the appropriateness of a monopoly model should be a key focus for this review.** Many, including CPBH, have been calling for the revocation of Tarion's monopoly status for many years. It is interesting to note that other Canadian provinces have decided to steer away from the monopoly model.
- b. Some homeowners argue that new home warranty is unnecessary, and should not be a mandatory requirement for Ontario's consumers. The view is often that if homeowners cannot resolve issues directly with the builder, then the regular courts are available. Therefore, **we submit**



that this review should consider whether home warranty should be mandatory for purchasers of newly built homes.

- c. The Terms of Reference appear to focus on Tarion's warranty responsibilities. However, it is important to note that Tarion is also the regulator of the industry.
 - i. **We submit that this review should consider whether it is appropriate for Tarion (or any other organization) to have the dual roles of regulator and warranty provider.**
 - ii. **We submit that this review should consider whether Tarion is doing an adequate job as regulator of the industry, given the problems reported via the media and consumer complaints regarding shoddy construction, including OBC violations.**
- d. Governments of other provinces have retained control of their warranty providers. **We submit that this review should consider whether the Government of Ontario should retain control of its warranty provider(s).**
- e. Tarion itself determines whether homeowners can appeal its decisions to the License Appeal Tribunal (LAT). There have been numerous instances where the homeowners wanted to appeal Tarion's decisions at the LAT, but Tarion refused to give the homeowners the right to go to the LAT. **We submit that this review should consider whether it is appropriate that Tarion controls if homeowners can proceed to the LAT to appeal a Tarion decision.**
- f. Tarion is always represented at the LAT by legal counsel and sometimes by technical experts. But homeowners often self-represent as they cannot afford legal counsel and/or technical experts. **We submit that this review should consider whether consumers who wish to proceed to the LAT should be entitled to funding from Tarion's warranty fund to hire legal counsel and/or technical experts.**
- g. Many consumers are of the view that their claim was wrongfully denied by Tarion. **We submit that this review should consider whether consumers should be entitled to resubmit their rejected claims to another body for consideration.**
- h. The government has been receiving an "oversight payment" from Tarion since 2009, approximating \$1.3 million to date. In large part, the cost of this "oversight fee" is borne by home purchasers. Many wonder whether this is appropriate, and what this money is specifically being used for by



the Government of Ontario. Minister Oraziotti recently responded to MPP Pettapiece, the former PC Critic, that *“the oversight fee amount that is charged is based on various costs incurred by government. For example, costs related to the development and administration of the administrative agreement between the authority and government and costs incurred for policy development and amendments to legislation and regulations administered by the authority.”* But there have been no amendments to the legislation, and Tarion approves its own regulations. **We submit that this review should consider a) whether it is appropriate for the Government of Ontario to charge an “oversight fee” to Tarion, b) whether the amount charged to Tarion is appropriate, given the amount of government “oversight” that has been conducted, and c) how this oversight fee is being used by the Government of Ontario.**

Section 2 – Ability of CPBH and consumers to be able to contribute exhaustively

Unfortunately, at this point it is still not clear what the process will be for consumers and CPBH to contribute to this process. Some consumers have already contacted the office of Mr. Cunningham, and have received a response such as the following from him: *“I’m sure we will be in touch just as soon as I’m up and running.”*

There are a number of concerns that have arisen already. We will summarize the main concerns at this time.

1. **Legal agreements** - Many consumers are not able to contribute to this process as they signed a legal confidentiality agreement (also known as a “gag order”) in order to reach an agreement with their builder and/or Tarion.
2. **Confidentiality and privacy** - CPBH has heard questions and concerns from a number of consumers about confidentiality related to this process. Many are very concerned about potentially negatively impacting their property values, and want to ensure that their communications remain confidential. This issue was also raised in relation to comments made by Minister Oraziotti, as reported in Ellen Roseman’s Toronto Star column dated November 9, 2015. I wrote the following to Minister Oraziotti on November 10, 2015 in an e-mail, but I have not yet had a response from Minister Oraziotti:



Roseman's column: *"Will the consumer ministry turn over its correspondence from frustrated home buyers to Justice Cunningham? Yes, Orazietti said."*

In my e-mail to Minister Orazietti, I said: *"Please advise if you plan to obtain the consumers' consent before turning over this correspondence to Justice Cunningham. If you do not plan to obtain the consumers' prior consent, please advise if this action of turning over these records to Justice Cunningham would be in compliance with the Freedom of Information and Protection of Privacy Act. In the past, your Ministry turned over copies of consumers' correspondence to Tarion without the consumers' prior consent, and some consumers were very upset by this and complained to your Ministry and to the Information and Privacy Commissioner. Ultimately, we were informed that these actions by your Ministry of turning over consumers' correspondence to Tarion without their prior consent did not comply with this Act, and your Ministry discontinued this practice. As you should be aware, many consumers are very concerned about negatively impacting their property values with reports of outstanding construction defects. Even before this Roseman column, some consumers advised CPBH that they will not participate in this process with Justice Cunningham as they are concerned about their privacy. CPBH is doing everything we can to encourage consumers to be part of this process."*

3. Statements by Minister Orazietti (reported in the Toronto Star) have served to undermine the credibility of this review - That same November 9, 2015 Star column reported the following:

"Orazietti calls himself a consumer advocate. Yet he appears to like the status quo. "The review will take an independent look at the organization to see if improvements can be made," he said, adding that he expects no big changes. "I anticipate that Justice Cunningham will find Tarion's processes validated as good consumer protection measures."

Therefore, in my November 10, 2015 e-mail to Minister Orazietti, I said: *"Some have concluded that you have already determined the outcome of this review. Consumers' comments already appearing in the Star's on-line section include:*

- *"So Minister Orazietti states he believes that the probe will validate Tarion's processes and he expects no big changes. Hardly the comments of an impartial person who is willing to wait for the evidence. Comments like that throw cold water on what seemed like a positive step...."*



- *"One hundred percent agreement that Orazietti's apparent predetermination of the outcome is anything but impartial. Begs the question, why is he applying handcuffs to this important process. Tarion has not been reviewed in 40 years, and is well past it's due date. Hands off, Minister."*
- *"This is absurd!!!! Apparently Minister Orazietti has already concluded the results of the investigation. Why bother with this investigation if the results have already been concluded. This is yet again a sham. Shame on Minister Orazietti. Does he think consumers are stupid??? Apparently he does."*

"CPBH has also heard directly from a number of consumers who initially were enthusiastic about this review but who now say that they will not be participating in it because of these comments from you reported in the Star. This is very unfortunate. Your comments - as reported by the Toronto Star - appear to have undermined the credibility of this process. It is clear that Justice Cunningham only has a role to investigate and make recommendations. Decisions regarding what recommendations will be accepted will rest with you as the Minister, as we understand it."

It remains to be seen how credibility for this review will be established, particularly given the damage that has been caused by these comments by Minister Orazietti as reported by Toronto Star columnist Ellen Roseman.

4. **Budget allocation for this review** - There are questions being raised about the funding allocated to this process. There is an unconfirmed report that this initiative has a budget of only \$140,000, which, if accurate, seems inadequate. Further, we have no information at this point regarding how much time new homeowners and consumer advocacy groups such as CPBH will be afforded compared to the other stakeholders listed.

We will respond more fully to your question concerning Section 2 of this report as more information becomes available.

There is one additional point that we wish to make at this time. Consumers, CPBH, and (PC and NDP) MPPs alike have strongly expressed that Bill 106 must be amended to include Tarion reform to enhance consumer protection for condo owners. But it appears that the Government is trying to stall any Tarion reform until this review takes place. Obviously, given the very serious concerns with shoddy condos and the lack of adequate consumer protection, we feel strongly that Tarion reforms must be included in Bill 106.



If there are any questions, or if you would like additional information concerning the contents of this letter, please do not hesitate to let me know. Thank you again for the opportunity to provide you with our responses to your questions concerning this review. We hope you find our input helpful.

Yours truly,

Dr. Karen Somerville, PhD
President

Cc:

Honourable Minister David Oraziatti, Ministry of Government and Consumer Services
MPP Jagmeet Singh, NDP Critic for Government and Consumer Services
Honourable J. Douglas Cunningham

Founded in 2004, Canadians for Properly Built Homes (CPBH) is a national, not for profit corporation dedicated to healthy, safe, durable, energy efficient residential housing for Canadians, and is the only organization of its kind in Canada. Working for consumer awareness and protection, CPBH is run by a volunteer Board of Directors and is supported by a volunteer Advisory Council of industry experts and other key stakeholders. CPBH earned "partner" status with the Canadian Consumer Information Gateway (Industry Canada).