

Policy Issues concerning

Consumer Protection

and

Newly Built Homes in Ontario - Buyer Beware

July 12, 2021

This is a living document. It will be updated from time to time.

Questions/comments? We will welcome them.

Please contact CPBH by email info@canadiansforproperlybuilthomes.com

Founded in 2004, Canadians for Properly Built Homes (CPBH) is an independent, 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).

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Facebook: <https://www.facebook.com/pages/Canadians-for-Properly-Built-Homes/1613240682226191>

Twitter: @cpbh01 Instagram: cpbh01

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Context

In Canada, consumer protection is primarily the responsibility of the provinces and territories. This report is focused on newly built home policies in relation to consumer protection in Ontario. The purchase of a home is the largest purchase most people make.

It is well-recognized by many that there are serious consumer protection issues in Canada generally.

"...There has been a decline in consumer advocacy since the 1980s in Canada, not because the issues are no longer important, not because there are not people to fight the fight. But largely, I believe, because funding for your work has been on a steady decline...."

■ Senator Ringuette, Keynote Speech, Consumer 150 Conference, 2017

<https://www.piac.ca/wp-content/uploads/2017/10/Senator-Ringuette-Keynote-EN.pdf>

Regarding consumer protection in Ontario, a recent Auditor General of Ontario report highlighted numerous problems with consumer protection as well.

"Ontario needs better oversight of consumer issues, from condos and coffins to cannabis, auditor general says" -- Toronto Star, Dec. 7, 2020

<https://www.thestar.com/politics/provincial/2020/12/07/ontario-needs-better-consumer-oversight-on-everything-from-condos-and-coffins-to-cannabis-auditor-general-says.html>

Housing Policy Issues in Ontario

Policy Issue 1: The need for definitions related to Ontario's newly built homes

Various terms are bandied about by Ministers and ministry officials when discussing homes, including "quality homes", "better built homes", "properly built homes", "defects", etc. But no one in the Ontario Government has been able to explain what these terms mean.

Refer to this document for information concerning this issue of definitions/explanations:

<http://canadiansforproperlybulthomes.com/wp-content/uploads/2021/02/Feb.-12-2021-Final-CPBH-response-to-ON-New-Home-Construction-Licensing-Act-2017-Proposed-Code-of-Ethics-and-Discipline-Committee-and-Appeals-Committee.pdf>

Policy Issue 2: The need for legislation for transparency & accountability re Administrative Authority Oversight Fees

A number of the Administrative Authorities (AA) in Ontario relate to newly built homes. The Auditor General of Ontario's recent audits of some AAs, such as Tarion, TSSA and ESA, have highlighted many serious issues in these housing-related AAs. But the Ontario Government (MGCS) has been receiving millions of dollars annually in mandatory payments from AAs for "oversight" since 2009. What has happened to all of the mandatory oversight fees? CPBH has presented to ON Government Committees related to this issue multiple times. Refer to #2 here at this link for CPBH's presentation to a Government Committee in 2019:

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<http://canadiansforproperlybulthomes.com/wp-content/uploads/2019/08/Jan.-2019-Pre-Budget-ideas-standing-committee.pdf>

Here is a response from MPP Fedeli to CPBH's Committee presentation about the lack of transparency regarding these AA fees: "that's not unusual when they are trying to hide something" (Hansard, Jan. 17, 2018).

In 2015, former PC MGCS Critic MPP Pettapiece asked a question of the MGCS Minister about where these fees paid by Tarion were going but received a vague response. Also in 2015, former NDP Critic Jagmeet Singh requested that the Ombudsman of Ontario get to the bottom of this, but after MPP Singh's departure from the ON NDP, this request fell between the cracks. The Ombudsman of Ontario has refused to provide any information to CPBH about this.

At the new AA, the Home Construction Regulatory Authority's (HCRA) Interim CEO advised in Jan. 2021 that HCRA would be paying in the "range of hundreds of thousands of dollars" to MGCS for oversight fees. He further noted that Tarion would continue to pay these fees as well. In 2020, Tarion paid \$499,000 as per Tarion's financial statements – up from \$378,000 in 2019 and \$266,000 in 2018.

Approximately 15 AAs are paying these mandatory oversight fees annually. Some refer to this as the ON Government's "cash cow". Some call this a "slush fund". It's important to get to the bottom of where these funds are going.

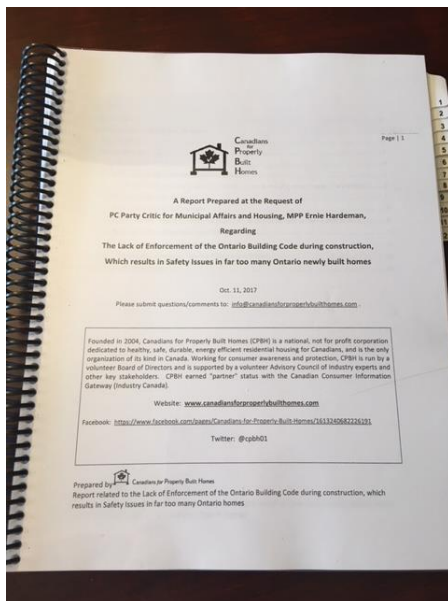
Policy Issue 3: The need for legislation to ensure that the OBC is enforced by municipalities during construction, including responsibilities concerning radon

The lack of enforcement of the Ontario Building Code during construction has been a well-recognized serious problem for decades now. A myriad of reasons has been cited from building booms to the lack of available qualified inspectors, etc., for over 20 years now. CPBH prepared a 107 page report at the request of then-PC Critic Ernie Hardeman which is still relevant today. He responded:

"..Thank you for providing me with your report regarding the lack of enforcement of the Ontario Building Code during construction. It was extremely well done and I appreciate you taking the time to put it together. I agree that we need to look at ways to add more accountability into the system..."

– email from PC MMAH Critic Ernie Hardeman, Nov. 10, 2017

If you would like a copy of this report, please let us know.



Radon: Radon is the second leading cause of lung cancer in Canada, killing more than 3,000 people every year. Issues have been raised about municipalities in ON not carrying out their responsibilities related to radon properly. As an example, here is a link to an Open Letter to the

City of Ottawa that contains considerable information on this subject, including a legal opinion that was provided to all municipalities in ON. <http://canadiansforproperlybulthomes.com/wp-content/uploads/2021/02/Feb.-6-2021-Ottawa-City-Council-Open-Letter.pdf>

An investigative report published in the Toronto Star on May 2, 2021 found that *"...with new buildings posing the highest risks of elevated radon levels, the number of Canadians facing potential exposure is growing. The prevalence of deadly radon gas is rising across Canada as lax building codes allow dangerously high levels to be trapped inside newly built homes....Modern construction methods have created the unintended consequence of trapping the gas inside...."*

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<https://www.thestar.com/news/investigations/2021/05/02/the-invisible-threat-inside-your-home-dangerous-levels-of-radon-gas-are-being-found-in-more-houses-across-canada-than-ever-before.html>

Note that measures to protect people against radon are inexpensive and straightforward during construction. They are less so after construction.

Policy Issue 4 – The need for adequate oversight to get HCRA performing properly – it's off to a very poor start

There are numerous serious issues already plaguing HCRA. CPBH provided feedback to HCRA's CEO and Board Chair on its business plan in an Open Letter that captured the most serious issues. Here is a link to the Open Letter. <http://canadiansforproperlybulthomes.com/wp-content/uploads/2021/05/May-13-2021-HCRA-re-Business-Plan-Open-Letter.pdf>

Sadly, and unacceptably, HCRA didn't show any sense of urgency about these issues when the CEO/Registrar responded to our Open Letter. Appendix 2 provides the response received.

Some say that HCRA and Tarion have made a mockery of the path to a fair regime for home construction regulation and consumer protection as laid out by Justice Cunningham in his 2016 Tarion Review. <https://www.ontario.ca/document/final-report-review-ontario-new-home-warranties-plan-act-and-tarion-warranty-corporation>

It's important to remember that both HCRA and Tarion are supposed to be "consumer protection organizations". The Ministry of Government and Consumer Services receives mandatory oversight fees from AAs, but clearly there are issues with this oversight as mentioned in #2 above.

Policy Issue 5 – The need for legislation to end the practice of used/damaged furnaces being sold in newly built homes

Within this document

<http://canadiansforproperlybulthomes.com/wp-content/uploads/2021/02/Feb.-12-2021-Final-CPBH-response-to-ON-New-Home-Construction-Licensing-Act-2017-Proposed-Code-of-Ethics-and-Discipline-Committee-and-Appeals-Committee.pdf>

there is a significant section concerning used/damaged furnaces being sold in some newly built homes, without disclosure to the unsuspecting purchasers. CPBH's position is that this practice must be banned. Builders have alternate sources of heat during construction, at minimal cost to builders. It appears that a key issue is a convenience factor for builders. Builders' convenience must never trump consumer protection.

Since submitting that document to the Ontario Government on Feb. 12, 2021, CPBH received a legal opinion that the Ontario Government is allowing builders to break the law when it comes to furnaces in newly built homes. Here is the link to the legal opinion:

<http://canadiansforproperlybulthomes.com/wp-content/uploads/2021/03/Feb.-28-2021-Moher-Legal-Letter-of-Opinion-re-Consumer-Protection-Act.pdf>

Former Minister Thompson responded in a letter dated Apr. 16, 2021 saying that the Consumer Protection Act, 2002, does not cover all consumer transactions – seeming to suggest that this issue of builders secretly selling used furnaces is not covered by the Consumer Protection Act. Lawyer Brian Moher responded by pointing out R. v. K-Tech Building Systems Inc., 2012 ONCJ 219 CanLii which addressed that a person may be charged under both Acts – the Consumer Protection Act and the Ontario New Home Warranties Plan Act.

<http://canadiansforproperlybulthomes.com/wp-content/uploads/2021/04/R.-v.-K-Tech-Building-Systems-Inc.-2012-ONCJ-219-CanLII-paras-114-115-and-149.pdf>

Therefore, we wrote again to Minister Thompson and Deputy Minister Hughes about this on Apr. 23, 2021, and also requested that they explain why their ministry decided to investigate/charge this company and the owner in R. v. K-Tech Building Systems Inc., 2012, but MGCS has not done this for many other consumers who have written to MGCS over the years (and some many times) related to their newly built homes. This remained unanswered by Minister Thompson and Deputy Minister Hughes, who both have now since left these positions in MGCS.

Policy Issue 6 – The need for legislation to end Tarion’s monopoly and introduce a multi-warranty model

While Tarion claims that it is moving forward in making changes related to the Auditor General’s recommendations, many homeowners continue to complain about how Tarion is treating them, e.g., denied claims, slow response times, etc. CPBH’s position continues to be that Tarion is beyond repair. Here is a link to our response to the Auditor General’s report:

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<http://canadiansforproperlybulthomes.com/wp-content/uploads/2019/11/11-3-19FinalCPBHstatement-AGofONaudit-Tarion.pdf>

Indeed, regular feedback from Ontarians continuing to fight with Tarion indicates that these deep cultural problems within Tarion continue.

Tarion’s 2020 financial statements also provide evidence of the continued serious problems. For example, once again, Tarion paid more in salaries and benefits than it paid out in homeowners’ claims. Investments and equity now total \$974,922,000, which is almost \$52 million more than in 2019. Why is the Ford Government continuing to allow Tarion to accumulate this excessive wealth, while it denies homeowners’ claims? Further, Tarion continues to limit the maximum payout to \$300,000, while average home prices in different parts of Ontario exceed \$1 million.

The Tarion Ombuds office has also finally released a report related to an evaluation of its office conducted by an external evaluator. Shockingly, the evaluator couldn’t complete the assessment as planned, as homeowners wouldn’t participate in this review. CPBH has been hearing for years from many of Ontario’s homeowners that they do not have confidence in that Ombuds office – and this refusal by Ontario’s homeowners appears to be further evidence of this. More than 1,000 homeowners complained to the Ombuds office about Tarion over a two-year period – why would they not participate in this external review? Here is a link to CPBH’s Open Letter to the Tarion board chair about that botched evaluation:

<http://canadiansforproperlybulthomes.com/wp-content/uploads/2021/07/July-6-2021-final-Tarion-Board-Chair-re-botched-evaluation.pdf>

The PCs supported ending Tarion’s monopoly while in Opposition. But then, once in power, they started talking about further consultations – and then they tried to justify not ending the monopoly based on these consultations. But they refused to release the results of their consultations. Watch this little video that explains what happened when CPBH finally received the results of those consultations via Freedom of Information requests:

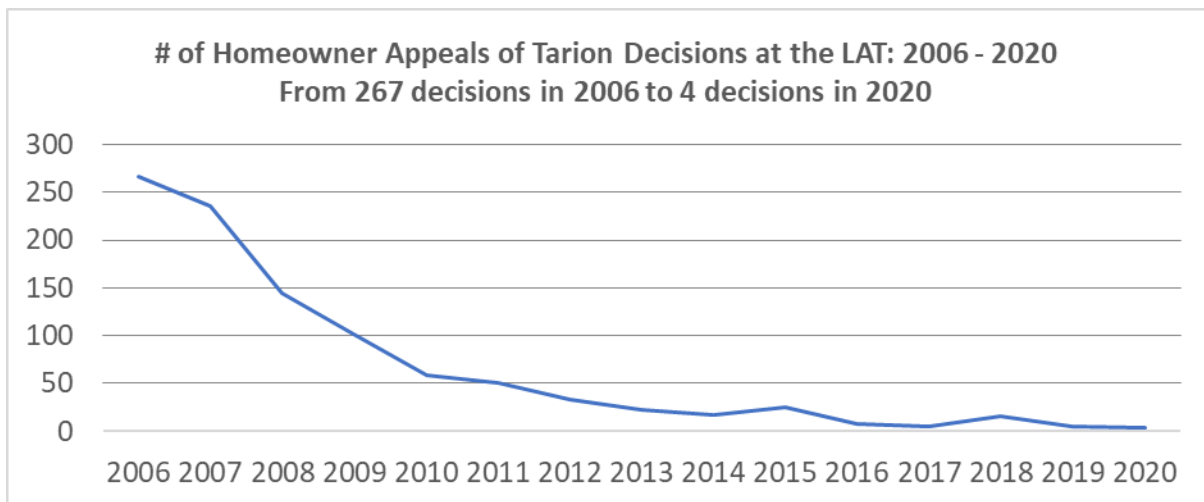
<https://www.youtube.com/watch?v=qZH8nVbPKxE>

In response to our request that Premier Ford and Min. Thompson explain this to Ontarians, we received a response from Min. Thompson – her story changed from “extensive consultations” to a “feasibility assessment” which they refuse to reveal, even via Freedom of Information. Here is a short video about that: <https://www.youtube.com/watch?v=NYJ9mxu-fjs>

CPBH’s position is that Justice Cunningham’s recommendation to end Tarion’s monopoly and introduce a multi-warranty provider system in Ontario is the best option. No system is perfect – but a multi-warranty provider system is the best option.

Policy Issue 7 – The need for legislation to replace the LAT for appeals of Tarion decisions

CPBH has been conducting an annual analysis of outcomes of decisions for homeowners who have taken their appeals to the LAT since 2006. Overall, homeowners have lost approximately 85% of the time. In 2019, homeowners lost 100% of the time. Various reasons have been cited including an unfair playing field, operational problems at the LAT, most homeowners are self-represented while Tarion is always represented, etc. In recent years, most homeowners will not take their cases to the LAT as is evidenced by this graph:



Here is a link with our 2020 report:

<http://canadiansforproperlybuilthomes.com/wp-content/uploads/2021/06/2020-Licence-Appeal-Tribunal-Analysis-2.pdf>

Here is a link with a special report we prepared in 2017 at the request of former Attorney General Naqvi. These issues are all still relevant:
<http://canadiansforproperlybulthomes.com/wp-content/uploads/2019/08/Sept.-12-2017-CPBH-Final-report-for-AG-Naqvi-re-LAT-process-issues.pdf>

Policy Issue 8 – The need to pass and implement adequate consumer protection legislation related to private home inspections

The private home inspection industry in Ontario has been in turmoil for decades. There continues to be a lack of qualified private home inspectors, which is a serious consumer protection issue. CPBH encourages purchasers of newly built homes to hire their own private inspector to inspect during construction, given the ongoing problems of new home construction often not meeting the minimal Ontario Building Code. CPBH has considerable information about private home inspections on our website:

<http://canadiansforproperlybulthomes.com/what-weve-learned/home-inspections/>

In 2017, the Wynne Government passed “The Putting Consumers First Act”, which included private home inspection. But the Ford Government has been letting this legislation gather dust. Finally, after many inquiries, CPBH received a letter from Minister Thompson dated Feb. 1, 2021 that said:

“...While the Home Inspection Act, 2017 was passed on April 13, 2017, it is not yet in force. My ministry is reviewing public and industry consultation feedback to determine an approach that will address their concerns. It is important that we get this right for consumers and businesses...”

Some wonder what “businesses” Minister Thompson is concerned about. Home inspection businesses? Builder businesses? It’s important to remember that this is coming from the Minister responsible for consumer protection.

Rumours have been swirling since 2018 that the Ford Government has conducted “secret” consultations regarding this legislation. We have raised this issue with Minister Thompson of alleged secret consultations, but she has not responded. CPBH has requested to be allowed to participate in these consultations, but we have not had a response to this request either.

Meanwhile, various industry sources have alleged that the private home inspection industry has declined 40-50% since the Ford Government took power. We have asked Minister Thompson

about this alleged significant industry decline, but she has not yet answered about that. We have heard from some consumers that they could not find a qualified home inspector.

Here is a link with CPBH's 2017 deputation regarding Bill 59 for further information:

<http://canadiansforproperlybulthomes.com/wp-content/uploads/2019/08/Feb.-23-2017-Final-CPBH-Deputation-re-Bill-59-Home-Inspection.pdf>

Conclusion:

The purchase of a home/condo is the largest purchase most people make. Unfortunately, there are numerous serious issues plaguing the new home construction market as discussed in this report. Further, consumer protection is very weak, and the Ford Government appears to be more interested in catering to the development industry than protecting consumers.

People considering purchasing a newly built home/condo should carefully consider the information in this report before proceeding. We encourage you to read the information at the links, and watch the videos.

While there are good builders in Ontario, there are far too many poor and marginal builders, and purchasers have no reliable, objective means of knowing who the good builders are. It could be you, your child, your parents, your friends next who have their lives turned upside down simply because they purchased a newly built home.

CPBH does not hear from people who are satisfied with their newly built home/condo. Obviously some are happy with their purchase. The people we hear from are typically in deep trouble just because they purchased a newly built home/condo from a Tarion/HCRA-approved builder.

Buyer beware.

Appendix 1 – Feb. 11, 2021 Article in The Lawyer's Daily

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www.thelawyersdaily.ca

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Real Estate

Consumer group concerned about effectiveness of new home construction regulator

By John Schofield

(February 11, 2021, 9:36 AM EST) -- A consumer protection organization for new homebuyers is warning that Ontario's recently launched Home Construction Regulatory Authority (HCRA) is already making some of the same mistakes as its predecessor agency, Tarion, which was criticized by the province's auditor general in 2019 for favouring homebuilders over buyers. "HCRA has recently provided lofty statements, e.g., 'effective engagement' and 'regulatory excellence' and 'building trust,' but it is off to a very poor start," Karen Somerville, president of the Ottawa-based Canadians for Properly Built Homes (CPBH) said in an e-mail to *The Lawyer's Daily*.

The Toronto-based HCRA officially began its mandate on Feb. 1 as the agency overseeing licensing and regulatory compliance for new homebuilders and vendors. Tarion will continue to administer the new home warranty program. A 2016 independent review conducted by former Superior Court associate chief justice J. Douglas Cunningham recommended that Tarion's warranty and regulatory functions be split. "Today's launch of the HCRA is another great example of our commitment to strengthening consumer protection for our province," Government and Consumer Services Minister Lisa Thompson said in a Feb. 1 news release. "The HCRA will ensure that new homebuilders and vendors are held to professional standards and that all buyers and owners of new homes are well-informed and feel confident that their homes have been built properly." But, like Tarion, the HCRA board does not include anyone with a background in consumer advocacy, said Somerville. Instead, it is made up of former high-ranking bureaucrats, a corporate executive and the president of a home construction firm. She also claimed that the information in the HCRA's public directory of builders remains unreliable, as it was under Tarion, and she expressed concern about HCRA's lack of transparency. In public webinars in January, she said, HCRA representatives did not respond to some questions and the regulator has not answered CPBH's repeated requests for information on how many former Tarion employees have been hired by HCRA. Somerville

said she is concerned that HCRA is not fully independent of Tarion. "Some say," she added, "that HCRA and Tarion have made a mockery of the path to a fair regime for home construction regulation and consumer protection as laid out by Justice Cunningham in his 2016 Tarion review."

Edward Lynde, an associate with Toronto-based construction law firm McLaughlin & Associates and a member of the Ontario Bar Association's construction and infrastructure law section, said that legislation has equipped HCRA with a broad mandate and stronger regulatory and enforcement powers than Tarion — but its effectiveness will depend on how well those powers are put into action. "Tarion just wasn't working and it was failing homeowners," he told *The Lawyer's Daily*. "So here we are in 2021 with the HCRA. "They're saying all the right things, and it all relates to creating a consumer-based model that leads to confidence in the marketplace with respect to residential builds," he added.

"That being said, just like anything when there's a seismic and large-scale change, let's see how it actually gets implemented on a practical level. And it's anyone's guess frankly." Lynde said the accuracy of the builders' directory will be one key to restoring consumer confidence. He noted that it will include information such as the name of the licensee, number of homes built, a 10-year history, licensing conditions, offences if charged, offences if guilty and orders made by HCRA's discipline committee. "Residential construction has been a bit of a wild west," he said. "There are some fantastic residential builders, but there are some poor ones, too, and it's really hard for the marketplace to understand the difference. "Hopefully this works," he added. "Conceptually, it appears to be structured the right way. But will the investigations actually be done properly and will complaints be dealt with appropriately? It's one thing to say it. It's another to actually do it."

The HCRA's interim CEO, Tim Hadwen, a lawyer and former assistant deputy minister of education labour relations in the Ministry of Education, said the regulator will set licensing standards for conduct, competence and financial responsibility. It will go beyond Tarion, in part, he said, by establishing for the first time a code of ethics, a discipline committee for violations of the code and an appeals committee. As part of its more effective licensing process, he noted, HCRA has introduced a mandatory criminal record and judicial matters check and an attestation about the presence of interested persons (in addition to principals, directors and officers) who have a material influence over the company's decision making. The government is conducting public consultations on the proposed code of conduct, and Hadwen said he expects it to be put in place by the end of the year. The regulator will address consumer complaints through an "accessible and streamlined" complaints process, he said, and will have a broader range of regulatory tools, including the power to set conditions on licences, to revoke and suspend licences, to issue compliance orders, to issue warnings, to require education courses and, in the future, the ability to impose fines and administrative penalties. "The overall package of developments, both legislative, regulatory and from a policy point of view," he told *The Lawyer's Daily*, "really strengthens the approach to licensing and compliance and does enhance consumer protection for new home buyers in Ontario."

Hadwen said the HCRA intends to do more to maintain consistency across the sector by curtailing unethical and illegal builders and fostering a safer, fairer and more informed marketplace. To that end, it will also focus on consumer education, providing practical information to consumers to help them make informed decisions. The construction and real estate bars could potentially be more involved in helping builders and homebuyers move through the regulator's expanded processes, he said. There may also be a need to help vendors and purchasers with certain disclosures, which will remain unchanged for now but could be updated in the future. One of the regulator's immediate priorities is to ensure a smooth

transition from Tarion, said Hadwen. To facilitate that, all valid Tarion licences will automatically become HCRA licences and the time for filing renewals has been extended for a transitional period of 150 days. The HCRA was originally designated under the *New Home Construction Licensing Act, 2017*. The *Rebuilding Consumer Confidence Act, 2020*, passed in July 2020, is also intended to protect consumers and promote higher quality home construction.

If you have any information, story ideas or news tips for The Lawyer's Daily please contact John Schofield at john.schofield@lexisnexis.ca or call 905-415-5891.

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Appendix 2 Response from HCRA CEO and Registrar to CPBH's feedback on HCRA's 2021-22 Business Plan

Email dated June 2, 2021

"Dear Dr. Somerville,

Thank you for sharing your "Open Letter" regarding the HCRA's 2021-22 Business Plan. We appreciate your engagement and continued interest in the Home Construction Regulatory Authority (HCRA).

As an organization still in its early stages, having launched in February 2021, it's important to note that this business plan is only one year in scope. Going forward, the HCRA will undertake a strategic planning process that will build on the HCRA's early work. As noted in the business plan, the HCRA is committed to involving its stakeholders in this process and we are grateful for the "Open Letter" from Canadians for Properly Built Homes (CPBH). Your extensive feedback will be useful in informing this future exercise. Thank you for taking the time to provide such depth of input.

As you know, the HCRA is a new, independent regulatory authority responsible for licensing home builders and vendors. Where Tarion previously had two jobs – as both regulator and warranty manager – the HCRA has a single focus on licensing. This enables the HCRA to foster improvement in the conduct and competency of builders and increase consumer confidence while also ensuring a fair marketplace.

Many of the comments in the "Open Letter" refer to the HCRA Board of Directors. For clarity, I want to take the opportunity to remind CPBH that the HCRA's board oversight model is set out in the Administrative Agreement that is publicly available on the HCRA website. I encourage you to review this document, as it is the key oversight tool for the HCRA and the Minister of Government and Consumer Services. Within the Administrative Agreement, is a requirement for a competency-based board governance framework. As such, the HCRA board must have members with experience in consumer advocacy, regulatory oversight, and residential construction. The board, like the HCRA, is independent and separate from Tarion – none of the HCRA's board members also serve on the Tarion board.

Dr. Somerville, I was pleased to meet directly with you and Canadians for Properly Built Homes on May 4th and was encouraged by the level of engagement and interest your organization has in consumer protection, not just here in Ontario, but across the country. I appreciated the

opportunity to discuss all of the issues that you enumerated in your "Open Letter" and look forward to the continued dialogue about how all of the parties working to protect new home buyers in this province can work together to achieve stronger protection for consumers.

Sincerely,

*Wendy Moir Acheson
CEO and Registrar, HCRA*

CC: Virginia West – Chair, HCRA Board of Directors"