



## Final report: Review of the Ontario New Home Warranties Plan Act and the Tarion Warranty Corporation

In November 2015, we:

- initiated an independent review of the *Ontario New Home Warranties Plan Act* and the Tarion Warranty Corporation
- appointed the Honourable J. Douglas Cunningham Q.C. to conduct the review.

This is Justice Cunningham's final report with recommendations.

### Letter to the minister

December 14, 2016

The Honourable Marie-France Lalonde  
Minister of Government and Consumer Services  
6th Floor, Mowat Block  
900 Bay Street  
Toronto ON M7A 1L2

Dear Minister Lalonde:

I am pleased to submit this Final Report of my review of the Ontario New Home Warranties Plan Act and the Tarion Warranty Corporation.

I have approached this review with an open mind and with no preconceived ideas on what a new home warranty program should look like. I have listened to and engaged directly with many individuals with an interest in Ontario's warranty program. I have read the many submissions received during the review. I have learned a great deal about the complexities of new home construction and about the different roles of builders, lenders, municipalities and others. I have become familiar with how other jurisdictions deliver new home warranty protection and builder regulation and with the actual experiences of homeowners, builders and those who work to deliver the warranty protection. And, I have heard about the challenges faced when there is a dispute over warranty coverage.

In today's modern regulatory context there are many viable models for regulating a sector, on a spectrum from direct government regulation to private body self-regulation. Each model will have its own validity with advantages and disadvantages. It can sometimes be difficult to identify one model as necessarily better than another.

In this review of Ontario's new home warranty program, I was faced with the current reality of a corporation, Tarion, and legislation, the Ontario New Home Warranties Plan Act, which have been in place for over 40 years. Tarion continues to operate in a structural framework established in legislation that is 40 years old. That structural framework has assigned it multiple roles from rule-making to adjudication. Inevitably, this framework has given rise to real and perceived conflicts of interest and has presented it with challenges in fulfilling its multiple roles. Notwithstanding the challenges, Ontario, through Tarion, has endeavoured to deliver strong consumer protections for new home buyers.

The regulatory environment for new home construction is complex with multiple layers of oversight from a wide range of players and across an equally wide range of subject matter. The regulation of builders and vendors and the provision of new home warranty protection are but two aspects of that broader regulatory context. Many players including professional regulators, oversight bodies, manufacturers, insurance providers, construction standards organizations and municipalities have, and will continue to have, an important role to play in supporting the broader outcomes of consumer protection and quality home construction in Ontario. New home warranty protection and builder and vendor regulation are two important components of that broader context.

The extensive input I have received and my analysis lead me to believe that there is room for considerable improvement, including with the legislation itself. This improvement can best be achieved with significant change to how the new home warranty protections are delivered and how builders and vendors are regulated.

This Final Report makes recommendations on the new home warranty legislation and how it can be delivered, to best support strong consumer protection and high quality residential construction in Ontario.

I would like to take this opportunity to acknowledge the hard work of your ministry's staff in supporting me throughout the review. I would also like to thank you for the opportunity to undertake this important and timely review, and would be pleased to meet with you at your request.

Sincerely,

The Honourable J. Douglas Cunningham Q.C.

## **Introduction and summary of key recommendations**

### **Introduction**

#### **Background**

In November 2015, Ontario's Minister of Government and Consumer Services (minister) appointed me to examine and make recommendations regarding the Tarion Warranty Corporation (Tarion) and the new home warranty program it administers. On July 22, 2016, I submitted my Interim Progress Report to the minister. That report identified key concerns, based on my review of Ontario's program and experiences in other jurisdictions, and through my consultations with interested parties and written submissions received. It also set out potential options to address those concerns. The eight key areas of focus were:

1. Tarion's role and business model
2. the dispute resolution process for new home buyers and owners
3. consumer education
4. warranty coverage and duration
5. regulation of builders and vendors
6. board governance
7. accountability, transparency and oversight
8. other related issues.

In this Final Report, I present recommendations on how to reform new home warranty legislation and the delivery of programs under that legislation to best serve Ontario's new home buyers and owners, the builders who build those homes, and others involved in the home building industry. This report addresses broad concerns about the best overall model for delivering new home warranty protection, builder and vendor regulation, dispute resolution, and rule-making, as well as

specific questions about program content and process .

For ease of reference, I have structured this report, including my recommendations, to align generally with the eight key areas of focus of my Interim Report. The focus of this report is on the structural context within which new home warranty protection is defined and delivered. Tarion has been operating within the structural framework provided for in the *Ontario New Home Warranties Plan Act* (Act). My recommendations suggest a very different structural framework to better meet the objectives of this important consumer protection legislation.

### **Note of appreciation to participants**

This report and this review have been enriched by input from many organizations and individuals. Many people gave generously of their time, speaking of both their personal and professional experiences and providing constructive and thoughtful suggestions on how the new home regulatory regime might be improved.

I met with many individuals through focus groups, town halls and individual meetings and spoke with others by telephone.

I received written submissions from individuals and organizations and associations through the Tarion Review email account and directly . These submissions were generally thorough and thoughtful. Writers took the time to inform themselves of how warranty programs are operating in other jurisdictions, to canvass the opinions of others and advance concrete suggestions for change. For these efforts and input I am very grateful.

Likewise, I want to thank the many organizations that shared their time and expertise on one or more of the issues being discussed, including staff and members of several regulators and industry and consumer associations . There is much to be learned from the experiences of others.

I also want to thank Tarion's senior management team, staff, and Board of Directors for their input into this review. I was impressed with their dedication and commitment to consumer protection. Tarion delivers a challenging mandate. The environment in which it must operate has become increasingly complex, while the Act has remained almost unchanged since 1976. Despite this it has been proactive in responding to changes and continuously improving the new home warranty program.

### **Challenges with Ontario's new home warranty program**

Ontario's mandatory new home warranty program was established in 1976. The basic structure of the warranty program and how it is delivered has not changed in 40 years. Tarion has made efforts to keep the warranty protection coverage current and deliver value to new home buyers and builders. There have been improvements to the warranty program during that time and in some respects Ontario is a leader in new home warranty protection relative to peers across Canada and the U.S. I have observed that there have been steady enhancements to the warranty over the years. As one key example, Tarion developed the Construction Performance Guidelines, an important document in warranty assessment decisions that has served as a model for other jurisdictions. Nonetheless there are fundamental problems with the current program and delivery structure that should be addressed.

I believe that many of the challenges flow from Tarion's multiplicity of functions, including its dual role of regulator and warranty provider. As a result, multiple stakeholders lack confidence in the processes in place today, and have strong concerns about the current system's perceived and real ability to protect consumers.

I have identified a variety of challenges with how new home buyers and builders are served by Ontario's current new home warranty program, and with how new home builders are regulated:

- Tarion's dispute resolution is not always as accessible or effective as it could be
- consumer information and education is not as helpful or effective as it could be in explaining home maintenance, terms of warranty coverage, how to navigate the claims process and what can be expected with new construction

- changes to warranty protection are developed by Tarion through processes that are ad hoc and not as transparent and consultative as they could be
- builder and vendor regulation is not consistent with modern approaches to consumer protection regulation
- and governance measures intended to provide accountability, transparency and oversight are not aligned with modern and current best practices.

New home warranty is just one part of a much broader and complex framework for new home construction. There can be challenges in linking the roles and responsibilities of different participants in the new home construction sector. Linkages among sector participants should be strong with information sharing and other protocols in place. I believe the structural changes I am recommending provide an opportunity to enhance the coordination of efforts between the warranty and builder regulation sectors and municipal partners including the Ministry of Municipal Affairs, municipalities, and building officials. These parties share a common interest in supporting consumer protection and high quality building that can be supported with strong linkages and coordination of efforts across the new home building sector.

Tarion has adopted an approach of continuous improvement. I have incorporated several of Tarion's suggestions for improvement in my recommendations. Structural change will take time to implement. Pending changes in response to my recommendations, I would strongly recommend that Tarion continue with the opportunities for improvement it has identified in its 2015 Annual Report and elsewhere, for example, building on its enhancements to the builder registration requirements. Some of my recommendations do not depend on legislation and could be implemented operationally in the short term such as improvements to the builder directory. Regarding the current dispute resolution process, Tarion should continue to improve the process through implementation of changes recommended by Ms. Chornenki (the independent, third party dispute resolution expert hired by Tarion to review its process) and accepted by Tarion.

## Guiding objectives

The following objectives have guided me in making my recommendations on the structural framework generally and on specific matters. These objectives provide clear outcomes and should be reflected in the home warranty legislation and its implementation.

I am proposing two overriding objectives for the new home warranty sector going forward:

1. **Consumer Protection:** Deliver strong new home warranty protections for new home buyers and owners;
2. **Building Quality:** Promote high quality residential construction in Ontario and continuous quality improvement;

These two objectives are supported by six additional objectives:

1. **Accountability and Transparency:** An appropriate level of accountability to government and transparency to the public;
2. **Public Confidence:** Organizational structures and processes that drive effective, efficient and fair outcomes and appropriately manage real and perceived conflicts of interest;
3. **Modern Dispute Resolution:** A dispute resolution process for warranty claims that reflects current best practices, is accessible, timely and fair, and accounts for the imbalance in knowledge and expertise that exists between a builder or warranty provider and the homeowner;
4. **Inclusive Rule-making and Standards Setting:** Warranty terms and other rules and standards affecting home builders and homeowners are developed through processes that are inclusive, transparent and accessible;
5. **Modern Regulator:** Strong compliance and enforcement tools and practices to regulate the industry are in place and effectively applied by the regulator; and,
6. **Efficient:** The new home warranty program is efficient and effective with clear roles and accountabilities for all parties.

## Summary of Key Recommendations

A program intended to support the building of high quality homes and deliver new home warranty protection for consumers has four essential functions:

1. Making rules regarding mandatory warranty protections;
2. Administering the warranty program;
3. Adjudicating disputes about those rules; and,
4. Regulating builders and vendors.

Under the Act, Tarion is responsible for all four functions. This approach is unique, at least in Canada, as no other jurisdiction I examined has one organization responsible for all functions. I believe that this multiplicity of roles, at a minimum, gives rise to a perception of conflict of interest and can also result in actual conflicts of interest.

At an executive level, the structure of having the same leadership team responsible for the rules of the monopoly warranty program, financial management of the program, dispute resolution and builder regulation will inevitably give rise to situations where financial objectives compete with other objectives such as consumer protection. At an operational level, there is potential for conflict when the same person receives a claim, investigates it, attempts to assist the parties in resolving the claim and then sits in judgment on the claim if not resolved. While Tarion has worked hard to build internal controls to mitigate this conflict, I believe that current controls do not adequately respond to these challenges in a manner that can achieve the objectives outlined above. I do not believe that this problem and the challenges I have identified can be adequately addressed in the current model without significant and structural changes to the new home warranty sector in Ontario (See Appendix A - Recommended Delivery Model).

**New home warranty protection** should continue to be a mandatory program. Warranty coverage would move from today's monopoly, with Tarion as the only provider, to a multi-provider insurance system. The warranty coverage should be an insurance product. Some private sector insurance companies have expressed interest in participating as warranty providers should a competitive market replace today's monopoly structure. Delivering warranty protection as an insurance product would facilitate participation by private sector insurance companies and introduce financial sector oversight and accountability. An insurance based, multi-provider model exists in British Columbia, Alberta and Saskatchewan and several international jurisdictions.

A new not-for-profit corporation would assume responsibility for managing the warranty for existing homes enrolled with Tarion and could participate as a warranty provider in the new competitive model. Some builders, vendors and homeowners may welcome the option of being able to continue to deal with a not-for-profit alternative.

**Builder and vendor regulation** should be delivered through an administrative authority operating separate from, but in cooperation with, the warranty providers. The current outdated approach to builder and vendor regulation should be updated and aligned with modern practices for sectors regulated through a registration/licensing model.

**Adjudication of unresolved warranty disputes** should be delivered through a separate organization independent of warranty providers and the regulator. Warranty providers would continue to have a role to facilitate the resolution of disputes between homeowners and builders. They would also have responsibility to assess and decide on warrantability where agreement is not reached between a builder and homeowner. A homeowner who is not satisfied with a decision could appeal that decision to the independent adjudication body, through a process that is accessible and easily navigated by the homeowner.

**Rule-making on warranty coverage** should be subject to greater government oversight. The government should have final approval on changes to warranty coverage and duration, and changes to standards that apply to builder/vendor registration. The processes for updating warranty coverage and duration, and standards for builder/vendor registration should be more regular, structured and inclusive. While government should make the final decisions, it should base those decisions on the advice developed through robust review processes that fully engage the expertise and knowledge of the new

home construction sector and consumers.

The remainder of this report sets out specific recommendations relating to these four structural pieces. I also provide recommendations on other matters related to warranty program delivery and content, including consumer education and “illegal building”. I believe that the changes I am proposing will strengthen protections for new home buyers and owners, and promote high quality residential construction in Ontario.

## **Delivery of warranty protection for new homes**

### **Detailed recommendations**

#### **Delivery of warranty protection for new homes**

The role of regulator is a natural monopoly; there can be only one regulator for any regulatory regime. The role of warranty provider is not a natural monopoly although by statute Tarion has a monopoly on the delivery of new home warranty protection. . There is no other Canadian jurisdiction that merges the functions of regulator and warranty provider.

Several core problems arise from the merging of functions in place today. These include:

- a lack of dedicated focus to the very different responsibilities of regulator and warranty provider
- a perception of conflict of interest and the risk of actual conflicts of interest between the objectives of the regulator and the warranty provider
- a lack of regulatory oversight of the warranty function otherwise applicable to the insurance sector and
- exclusion of competitive delivery of warranty protection.

In other jurisdictions, warranty protection is generally provided through a competitive model usually as an insurance product. However, Tarion is not regulated as an insurance company nor is the Act’s warranty protection regulated as an insurance product.

Fundamentally, warranty programs are in place to protect new home owners. That is the basis on which decisions about payments from the fund and payments on warranty claims should be made. Decisions should not be influenced by conflicting goals of protecting a fund by refusing or limiting amounts paid out . The rules that a warranty fund provider follows should support the objective of consumer protection.

#### **Competitive model**

I am recommending the introduction of a competitive multi-provider model for warranty protection.

Introducing competition should encourage continuous improvement and innovation. This in turn can lead to better consumer outcomes such as enhancements in warranty protection beyond minimum amounts. It would provide builders with a choice of providers. A builder’s choice of provider can in turn affect a new home purchaser’s choice of builder.

New home warranty protection is delivered by multiple providers in a competitive market in Alberta, British Columbia and Saskatchewan as well as internationally.

Some insurance companies with experience and expertise in providing new home warranty protection in Western Canada have expressed interest in offering services in Ontario should the opportunity present itself. Insurance companies have access to a variety of funding mechanisms and large reserves, making them well suited to respond to extreme financial demands such as a “black swan” event - an unexpected large scale failure. Any risks and costs of introducing new providers can be managed through implementation, including effective regulation of warranty providers.

## **Minimum warranty protections provided for in legislation**

There should continue to be minimum standards that apply to all new home warranty protections. These should be established by government and set out in the act itself or the regulations made under the act. The regular and inclusive consultation process I am recommending for rule-making in Recommendation 29 would support decision making on future amendments and refinements to the warranty protections.

## **Insurance product**

I am recommending that the warranty protection be clearly characterized as an insurance product and made subject to Ontario's Insurance Act .

Warranty coverage today is described and operationalized by Tarion as a form of surety . Under the Act, it is the vendor who warrants to a new home owner that the home is constructed in a workmanlike manner, free from defects in material, fit for habitation, built in accordance with the Building Code, and free of major structural defects. The guarantee fund is available to satisfy that obligation where a vendor fails to do so. Tarion acts as a surety, stepping in when the vendor has not satisfied the warranty obligation.

Tarion is providing an insurance-type product to homeowners but neither Tarion nor the warranty protection are subject to the oversight that would ordinarily apply to an insurance company delivering a similar insurance product . In some jurisdictions where new home warranty protection is provided by insurance corporations, it is identified as a separate class of insurance. In Alberta, there are three separate classes of insurance related to new home protections. In these other jurisdictions, while the warranty provider (insurance company) is ultimately responsible, the builder still plays a role in responding to a homeowner's warranty claim.

Clearly characterizing the warranty protection as an insurance product, would reflect what happens operationally when warranty protection is provided.

An insurance-based warranty protection product would also introduce new oversight by the insurance sector regulator .

That oversight includes:

- requirements for minimum capital
- corporate governance rules
- investment restrictions
- reporting requirements to a designated statistical agency and to the Superintendent of Financial Services regarding claims and premiums
- obligation to refrain from defined unfair and deceptive practices
- requirement to contribute to a compensation association that compensates policyholders who suffer loss when an insurer becomes insolvent and
- obligations to comply with various requirements regarding the insurance policy and the handling of claims.

In addition, as an insurance product, new home warranty protection would benefit from other oversight measures currently in place for insurance companies, including a mandatory complaint process . Complaints against an insurance company can be made to the Financial Services Commission of Ontario. For insurance companies that are members, complaints can be made to the national level General Insurance OmbudService.

## **Existing warranty fund and current enrolments - new not-for-profit corporation**

There are over 365 000 new homes in Ontario with warranty protection under the Act. Each one has coverage that extends

over seven years. At the time of transition to a competitive model, a corporate entity would need to be in place to assume responsibility for existing enrolments. I am recommending that a new not-for-profit corporation be created to assume responsibility for the delivery of warranty protection for homes enrolled under the existing regime.

This new warranty corporation should be allowed to participate in offering warranty protection in competition with private sector providers on a not-for-profit basis. Consistent with the obligations on competitors, it would be subject to oversight of the regulator, currently the Financial Services Commission of Ontario, and would have a range of responsibilities, including:

- assessing the amount needed for reasonably foreseeable contingencies
- considering the distribution of liability for a major building failure
- receiving and assessing claims and,
- providing consumer education

This new not-for-profit corporation would not be the regulator of builders.

Oversight standards should be consistent across all warranty providers. Regulation under the Insurance Act would ensure that all providers, including a new not-for-profit corporation, are subject to the same oversight.

There are examples of similar and successful transitions in Ontario. LAWPRO, a not-for-profit corporation, administers insurance coverage for lawyers and paralegals. In 1995, insurance coverage was the mandate of the Law Society of Upper Canada. Today, LAWPRO describes itself as “a successful, solid insurance company cited for its principled claims management, proactive risk management and innovative approaches to technology for the legal profession.”

Before Alberta introduced its mandatory home warranty program in February 2014, the Alberta New Home Warranty Program was in place for builders voluntarily providing warranty coverage. This voluntary program made changes to adapt to the mandatory requirement and compete with private sector insurance companies providing warranty protection. A new corporation, the New Home Warranty Insurance (Canada) Corporation, was incorporated October 8, 2015, becoming a licensed insurance provider governed by the provisions of the Alberta Insurance Act. On December 1, 2015, that new corporation assumed all warranty liabilities and obligations of the previous voluntary program with underwriting and claims assessment responsibilities. In its published material, the program describes the transition process as follows:

“Throughout 2015, the Program worked diligently to lay the groundwork for a company that now serves as insurance underwriter for the Program’s new home warranty, renovation warranty and related products.”

I note that decisions will need to be made about the existing warranty fund if there are funds remaining at the expiry of the current enrolments and after accounting for preparing the new not-for-profit for ongoing participation in the competitive market. I am confident that the funds can be appropriately dealt with at the appointed time.

Board governance will be an important matter for the new not-for-profit corporation. It will require a level and mix of skills that is appropriate to the oversight of a fund of approximately half a billion dollars.

Moving to a separate corporation to manage the existing warranty fund can provide an opportunity to strengthen and enhance participation by individuals with backgrounds in financial management, accounting, insurance and other warranty fund related skills – skills typically in place for an organization managing a fund of this magnitude. A new corporation focused on warranty protection would be able to ensure a critical mass of expertise internally for overseeing the approximately \$500 million-dollar fund; develop internal capacity to assess and retain investment advisors and managers; provide a deeper level of oversight of the investment operations of the fund; increase external professional oversight of the fund; and be more transparent about the investment operations and performance of the fund.

## Regulation of builders and vendors



## Regulation of builders and vendors

### Separate regulator

I have recommended a competitive multi-provider model for warranty protection. It therefore follows that there will need to be a separate regulator for builders and vendors that is not also a warranty provider. To allow the regulator to compete in providing warranty protection would continue existing conflict of interest concerns and give rise to new ones.

The principle advantage I have heard for having the regulator and warranty provider in a single entity is that information, data and analytics can be easily shared across functions. It was suggested that this would be compromised with a separation of the functions of regulator and warranty provider. I agree that effective and efficient information sharing between the warranty providers and the regulator is essential. I believe this can be adequately addressed through agreements and legislated information sharing obligations.

Introducing a new regulator entity provides an opportunity to address the current anomalous approach to builder and vendor regulation that is not aligned with the approach taken in other regulated sectors.

### Administrative authority structure for new regulator

I have considered whether the regulator should be within government, an agency or an administrative authority . Different jurisdictions have different approaches to how builders are regulated. In Alberta and British Columbia for example, this function is delivered within government.

Ontario has developed a strong administrative authority structure for regulating a range of sectors. This model has been in place since the mid 1990's and applies across various sectors including electrical safety, the real estate sector, motor vehicle sales and travel industry sectors. A 2012 review of Ontario's public services supported the setting up of additional administrative authorities, noting that "Delegated Administrative Authorities have been found to reduce costs to taxpayers, improve regulatory outcomes and efficiency, retain government oversight and increase industry engagement ." The administrative authority model enables the regulator to draw upon sector expertise and knowledge while retaining government oversight over delivery and responsibility for legislation and policy.

There are mechanisms available to support robust consumer engagement within the administrative authority structure. The regulator could, for example, maintain a consumer advisory council, which is common among other administrative authorities.

On the builder side, an administrative authority could continue to work with a variety of organizations, such as the Ontario Home Builders' Association (OHBA), directly and through its builder advisory committee. That committee has provided an opportunity for the OHBA and Tarion to exchange ideas and information on a variety of topics of interest to both. Such an exchange would continue to be important for a new regulator.

I believe that the administrative authority approach provides the necessary balance between government oversight and operational independence.

### Accountability, transparency and oversight

Today's legislation only has one section dealing with the accountability of Tarion to the government and to the people of Ontario. Section 5 simply requires that Tarion report annually to the minister on the affairs of the corporation. The minister submits this report to the Lieutenant Governor in Council and provides it to the Legislative Assembly. In practice, an accountability agreement between the minister and Tarion has been negotiated to augment the one accountability measure provided for in the Act.

Other regulatory bodies administering legislation that has been delegated by government have a range of accountability measures required by legislation, including:

- an administrative agreement or memorandum of understanding between the regulator and government dealing with matters of administration and governance
- annual reporting obligations to the responsible minister with the minister able to specify the information that must be in the report
- ability for the responsible minister to require that performance, governance, accountability or financial reviews be carried out by or on behalf of the regulator or such other person or entity as the minister may specify and,
- oversight of the Auditor General

Tarion, as regulator, is in an anomalous situation when it comes to accountability. Aligning accountability and transparency requirements with those in place for administrative authorities generally would provide greater consistency to government oversight and introduce measures to enhance public confidence in the new home warranty program.

### **Clear statement of purpose for the regulator**

The role of the regulator should be to protect consumers and support the building of high quality homes by qualified builders. The existing legislation does not articulate the purpose of the legislation as being consumer protection. The purpose of a piece of legislation can have an impact on how the legislation is interpreted by the courts. Though not stated in so many words in the Act, several court decisions have described and interpreted the legislation as consumer protection and remedial legislation. The regulator's primary purposes of providing consumer protection and supporting high quality home construction through competent and financially sound builders should be clearly articulated in the legislation.

### **Eligibility for registration as builder and vendor**

The Act sets out, at a very high level, builder and vendor eligibility requirements. It requires the Registrar to consider the financial position and past conduct of persons applying for registration. For builders, it requires consideration of technical competence to consistently perform the warranties. All other conditions of eligibility are set out in the by-laws that are completely within the discretion of Tarion to make.

In my view, the core elements of eligibility should be set out in the legislation. The act should provide for a robust eligibility framework that reflects the reality of a market place that has both small and large builders and a range of home construction from single family to high rise condominium development. There should be regulation making authority for additional eligibility requirements as well as authority to specify who must meet the eligibility requirements in the case of corporations, partnerships and other business structures.

Currently, in assessing eligibility, Tarion considers past conduct of an individual applicant and of officers and directors of a corporate applicant. It has been suggested that the review of past conduct should extend to a review of the past conduct of others who may play an active or key role in the business, such as shareholders, employees, agents and subcontractors. It is important for the regulator to be able to consider the behavior of the driving minds and key players in an organization. There is merit to this suggestion in particular because of the use of various corporate entities not only from development to development but within a given development. Whose conduct is relevant and how it should impact registration are issues that would benefit from further consideration.

### **Appeals of registration related decisions to LAT**

Registration related appeals for builders and vendors should continue to be heard by the Licence Appeal Tribunal (LAT). These appeals relate to eligibility to be registered, and terms and conditions of registration. LAT has considerable experience on licensing and registration matters across a range of regulated sectors.

## Compliance and enforcement tools

The compliance and enforcement tools available to Tarion are limited under the Act and do not reflect the range of options available to a modern regulator. A broader range of tools can support a proactive, timely and proportional response to compliance and enforcement.

Administrative penalties allow a regulator to assess a monetary penalty against a registrant or licensee as an alternative to prosecution and revocation of registration. Across modern regulators, administrative penalties are increasingly being used as a compliance tool and can assist in driving positive outcomes and promote compliance with requirements of the legislation.

Additional enforcement and compliance tools that should be considered include authority for the regulator to:

- require disclosure of financial and other information;
- impose individual conditions on a registrant at any time, not just at initial registration and renewal;
- make compliance orders against a registrant, for example, if the builder is not complying with the legislation or has failed to respond to the communication from the regulator;
- seek court approval for the appointment of a receiver or receiver manager in situations where there is evidence of financial or governance problems and a risk to the public;
- suspend a registration immediately without the need for a proposal to revoke if it is necessary to prevent further harm to the public; and
- apply to court for an order to freeze assets.

Offence provisions should be reviewed. Currently it is not an offence for the registrant or licensee to make false, misleading or deceptive statements in advertisements and other material as it is in other regulated sectors. This should be considered further within a broad objective of increasing consistency with the approach in other regulated sectors.

## Technical competencies and education

On the question of builder competency and education, the Act requires that a builder applicant show "sufficient technical competence to consistently perform the warranties." Regulation 894 made under the Act expands somewhat on this and empowers the Registrar to require a new applicant to complete a written examination on technical competencies and participate in an interview with the Registrar. The Registrar has discretion whether to require the written examination and interview. I understand that in practice they are generally required, however, these obligations should be mandatory for all new applicants. The requirement to meet technical competencies should be reviewed to ensure that it applies to all new applicants for registration as builder.

## Employee, officer and director technical competency requirements

Some registered builders will do the construction work themselves. Others will rely on properly qualified individuals to complete and oversee the construction of a new home. As with the registered builder, those individuals should also be required to meet the technical competencies that the builder is required to meet. For a corporate entity or partnership, there should be one or more individuals who satisfy the technical competency requirements. The regulations should specify whether one or more of the officers, directors or senior executives of a corporation or one or more partners, must satisfy the technical competency requirements.

## Continuing education

It has become the norm across professional and other regulated sectors to require continuing education as a condition of licensing or registration. In many sectors, such as the legal profession (lawyers and paralegals) and real estate professionals, it is a standing requirement. In other sectors continuing education is not a mandatory requirement but may be ordered in response to complaints or discipline proceedings. Standards and rules for new home construction are not static. Ontario's

Building Code is typically reviewed every five to seven years. The Ministry of Municipal Affairs recently initiated a review which could lead to significant changes to new home construction requirements .

A regular continuing education obligation on builders and vendors can support compliance with construction that meets the most current requirements of the Building Code. Educational requirements could also be tied to complaints, discipline, and warranty claims. Ad hoc programs of education could be tied to external factors such as the introduction of new Building Code requirements. Continuing education could be delivered in a variety of ways – by the regulator, a third-party provider, online or conference. The goal should be for programming that is accessible by the range of builders in the sector, large and small, and throughout the province.

Given the complexity of home construction and the extent to which building practices evolve, I recommend that the appropriate individuals across all registrants be required to satisfy periodic continuing education requirements.

Mandatory initial and continuing education requirements could be introduced gradually and should be based on a risk assessment. Educational requirements could be tied to the role performed by individuals personally or within an organization.

### **Code of ethics**

Codes of ethics have become standard where professionals are licensed and regulated. They apply in both an individual and corporate context. A code of ethics can address aspects of behavior such as honesty and integrity, treating members of the public with courtesy and respect, and responding promptly to requests for information from the regulator. Consistent with other acts that license and regulate businesses and professionals, builders and vendors should be required to comply with a code of ethics established in accordance with the legislation.

### **Builder directory**

Currently, Tarion maintains a builder directory that allows members of the public to access information online about a builder, such as locations where they are building and whether there are any chargeable conciliations against that builder. Tarion determines what information is included in the builder directory. The legislation does not specify what information must be made available publicly. For example, information about offences under the Act, such as convictions for illegal building, is not readily available publicly on the directory. As structured, the builder directory has shortcomings. It is difficult to access and the data is not searchable by individual name. The use of different and numerous corporate structures within a development and across developments can make it difficult for a homeowner to get a complete picture of their builder. The accessibility and transparency of information on the builder directory should be enhanced. It should be possible to search the builder directory by individual name. Tarion currently collects information about controlling principals (a person or combination of persons that either alone or together have a direct or indirect controlling interest in a builder) as part of its registration process but this information is not searchable. The relevance of the information in the builder directory is dependent on accurate linkages between the principals and key individuals of the various registered builders.

Consideration should be given to including additional information such as information about discipline proceedings, provincial offences, and other conduct that goes to an individual's entitlement to be registered. Such additional information would provide consumers with more transparency regarding past builder conduct.

Regarding claims related data, it would be helpful to list information by type of defect (1, 2 or 7-year claim) at a minimum, with water penetration defects separately reported. Information on deposit and delayed closing dollar claims should also be part of the directory.

The builder directory will need to adapt to a new multi-provider context. Legislation will need to address what information is to be shared, how it is to be shared and when. Memoranda of understanding and similar agreements could be enhanced with regulatory requirements as needed.

## Sector outreach

I heard from several individuals about the need for more outreach especially to builders and vendors in smaller and more remote communities. A new regulator should consider how best to meet the obligation of engaging with communities across Ontario. At one time, Tarion had a local presence with regional offices. Some suggested more frequent visits to the smaller and more remote communities or the use of webinars to better reach builders not in the larger urban centres. Others suggested focused communications to builders and vendors in specific geographic areas if, for example, claims data was showing a problem in that area.

## Building Sector Expertise on the Regulator Board

I recommend that the board of the new regulator continue to have representation from the builder sector to ensure the appropriate level of builder expertise. Board members with experience in the building sector would provide knowledge and expertise regarding new home construction. The current builder representative selection process is managed by the OHBA. I recommend that the builder expertise selection process ensures that it captures the broad builder base across the province.

This representation on the board would provide knowledge and expertise from the new home construction sector and would not be to have board members in the position of advocates for, or representatives of, particular builders or association of builders. Change to how builder board members are currently selected may be required to broaden it beyond the current selection process managed by the OHBA.

Constituencies suggested for representation on the board include: consumers, consumer advocacy organizations, OHBA member builders and non-OHBA builders, building officials, engineers, architects, and experienced regulators.

One goal of the new regulator will be to support high quality home construction by financially sound and competent builders. The skills matrix for board members might include knowledge and expertise in product manufacturing, construction material, Building Code, architecture and engineering, condominium construction, and other technical skills. Recognizing that regulation of builders and vendors is also about consumer protection, board members with skills in delivering or advocating for consumer protection would be important. And, as a regulator members with experience in the regulatory sector and practical business experience should also be considered.

Tarion has evolved since its incorporation in 1976 and has, in many respects, been a high functioning organization. Currently, the organization must deal with significant financial issues involving security obligations for registrants and ensuring that the necessary funds are available to respond to projected claims. It must engage on technical and complex construction matters both in setting standards and generally accepted practices. It must engage with consumers and adjudicate disputes. Each of these areas is unique. Board membership is expected to reflect the skills that correspond to the work of the organization. At some point, ensuring the necessary skills are reflected in the board composition becomes challenging.

## Dispute resolution and adjudication

### Dispute resolution and adjudication

#### Independent, neutral and accessible process

A decision about whether a defect in a new home is covered by warranty is an important decision for the homeowner and the builder. Regardless of the dollar value of a claim, it touches on what is likely to be the single biggest purchase an individual or family will make. The homeowner will have a deeply personal and vested interest in how their warranty claim is addressed.

Where there is a dispute, a dispute resolution process must not only deliver justice but also be seen to deliver justice. Independent adjudication offers a chance for a fresh look at a warranty claim that the homeowner and builder or warranty provider have been unable to resolve. The independent adjudication should be visibly neutral and independent from the

warranty providers (See Appendix B Recommended Dispute Resolution for Warranty Protections).

Under my proposed model, homeowners will be required to deal with a warranty provider chosen by their builder. It is important to provide homeowners with reasonable access to an independent party who can review a claim and provide external validation of a decision made by the warranty provider.

An independent adjudicator should continue to provide an alternative to complex and costly litigation – not as a substitute for litigation but as an accessible and cost effective alternative.

With multi-providers in a competitive model, having access to a body of decisions of an adjudicative body on warranty claims can support consistency in the interpretation and application of the warranty legislation.

If a roster system for adjudicator selection is used, there are reputable dispute resolution associations and individuals who can assist in the selection. Standards for being added to the roster could include provable adjudication training and experience, with an evaluation system that considers prior adjudicative decisions of candidates. Existing dispute resolution bodies have a process for engaging neutral adjudicators and avoiding conflicts of interest in assignments. Additional training could be offered with a focus on new home construction. This is not intended to make the adjudicator an expert in home construction but to provide context for the range of standards and expectations and the varied disputes that can arise.

### **Review of decisions of the independent adjudicator**

The courts have a role in reviewing decisions of administrative tribunals. Usually this review is by way of judicial review of a decision, on application to the Divisional Court, a branch of the Superior Court of Justice. The Divisional Court sits in a panel of three. Alternatively, review could be by a single judge of the Superior Court. Decisions on the appropriate level of review and the process for review of decisions of the independent adjudicator will need to be reflected in the final design.

### **Right to sue**

The accessibility and affordability of the independent adjudication process and its neutrality should be such as to encourage most homeowners to choose the proposed adjudication process as an alternative to litigation. However, there may be cases best addressed in the courts and I am not recommending that it be mandatory to access the warranty claim adjudication process.

Homeowners should continue to have access to the courts in the event of a dispute with a builder or a warranty provider as is the case today. It may be, for example, that the dollar value of the claim is well beyond the warranty limits. It is not possible to confirm the degree to which homeowners are accessing the courts today to resolve warranty disputes. However, there have been important decisions of the courts dealing with the new home warranty program, including decisions that speak to the consumer protection aspect of the home warranty legislation. Court decisions will continue to play an important role in the interpretation and implementation of the legislation.

It was noted that in some cases, particularly in the condominium sector, the timelines for warranty claims are such that a party may need to initiate litigation as a precaution to ensure that their claim is brought in time should the warranty process not resolve the matter. I heard from several stakeholders that the current time limits allow a builder to “red line” offers to settle, presenting them late in the day, leaving homeowners with little time to consider or seek legal advice on a proposed settlement. This problem is particularly acute in the context of condominiums. Consideration should be given to whether it would be appropriate to suspend the running of limitation periods for initiating court action where the parties are engaged in the warranty dispute resolution process. It would be important to evaluate the implications of such a change to avoid any unintended consequences on other parties, including construction professionals and subtrades.

### **Role of warranty provider in dispute resolution**

Many people spoke of problems generally with today’s dispute resolution process. This intersection point between the

homeowner and the warranty system - when disputes between a homeowner and builder are not resolved and Tarion becomes involved - has been particularly contentious. Today's dispute resolution process does not always reach the level of accessibility and effectiveness that it could.

Some homeowners and builders expressed frustration with the dispute resolution process. Problems were often the result of a lack of understanding, on the part of homeowners and builders, of what was covered by warranty. For some disputes, problems arose because of a lack of information about homeowner maintenance obligations. For other disputes, homeowner and builder expectations about what could be done and how quickly were not aligned. In some cases, expert evaluation early in the process might have mitigated the conflict and generated an earlier resolution.

The Act's dispute resolution process was put in place at a time when the only recourse for a homeowner was litigation. The dispute resolution process is called "conciliation" in the Act. Other provisions of the Act make it clear that the intention was that parties to a dispute would access the "conciliation" before proceeding to court. It was meant to improve the situation for homeowners and avoid the need for litigation.

Describing the dispute resolution as "conciliation" may have been correct when first introduced but it is an unfortunate choice of word for today's process that is more akin to adjudication than it is to conciliation. The commonly understood meaning of "conciliation" is a process that assists the parties to come to their own resolution of the dispute. At Tarion today, this "conciliation" process has become an adjudication process.

At various stages of the process, the homeowner will see Tarion as their friend, their advocate, their neutral inspector but, at some point, may also see Tarion as their builder's friend, their builder's advocate and favouring the builder. Some builders have the reverse perception, feeling pressure to repair items that were not warranted and believing that Tarion was motivated to get settlements for extraneous reasons. Either way, the homeowner and the builder are both asked to accept that at the end, Tarion will render a binding decision in a neutral and unbiased manner.

These and other problems were canvassed in detail by Ms. Chornenki in her report, Tarion Warranty Corporation: Independent Dispute Resolution Review - 2015 . Ms. Chornenki makes positive recommendations for improving the current dispute resolution process. While it is my recommendation that adjudication should be through a process that is independent of the warranty providers, the problems identified above will still need to be addressed. New warranty providers should consider those recommendations when establishing their own internal dispute resolution process.

The dispute resolution process I envision would have a role for the warranty provider to support the homeowner and builder in resolving their dispute directly. This would remain a fundamental part of the dispute resolution process, a "facilitation" process that supports homeowners and builders in resolving disputes. In an insurance context, the "facilitator" might be the adjuster or another person whose responsibilities include supporting homeowners and builders in identifying defects and seeking to address them.

In Recommendations 19 and 20 of my Ontario Automobile Insurance Dispute Resolution System Review – Final Report to government , I recommended that "[e]ach insurer should establish an internal review process and be required to inform a claimant how to access it following a benefit denial." I also recommended that "[e]ach insurer will determine how their internal review process is to be structured, but must provide a claimant with a written response that includes the outcome of the review and reasons for the company's decision within 30 days of the claimant's request."

Home warranty providers should have a similar expectation placed on them: to provide an internal review process for denials of warranty coverage. In the insurance context currently, where home warranty protection is delivered as an insurance product, different insurance companies can have different dispute resolution processes. They are however, subject to an outside timeline for providing a decision to a homeowner. In a new multi-provider model, regulations could impose certain obligations, such as time limits within which to advise a homeowner of a decision and the reasons for the warranty claim decision.

The warranty provider might engage independent experts to assist the parties. It is reasonable to assume that many claims will continue to be resolved efficiently and effectively without the need for third party adjudication. The warranty provider, acting as facilitator, would be supporting constructive conversation between the new home owner and the builder and, at this stage, would not necessarily be directly engaged in the dispute.

If the homeowner and builder cannot resolve matters, the warranty provider would then step into the role of adjuster, assess the claim, decide on the claim and, where warranted, arrange for the work to be done. It is at this point, where a claim is determined to not be warranted or a homeowner disagrees with the proposed remedy or repair, that the homeowner would have a right to ask that the matter be heard by an independent adjudicator.

It may be necessary to consider the timelines that should apply, for example, for submitting claims and repair periods. There may be a role for government and the insurance sector regulator to set expectations and minimum requirements.

### **Flexible and accessible process**

I am recommending a process that is flexible and allows for different hearing processes considering the subject matter and dollar value of the claim in dispute. This would allow for a proportionate response to the dollar value and complexity of different disputes. Guidelines could be developed to assist the adjudicator including the possibility of setting dollar value limits under which the default would be a paper hearing. For example, rules might require in person hearings for major structural defect claims but allow for paper hearings for year one disputes.

To support timely and efficient hearings, expectations on hearing times and length of proceedings could be set out in guidelines.

The adjudication process must be accessible to homeowners. One measure that could support accessibility is having the adjudication hearing in the home itself. Tarion field representatives currently attend at the home where necessary. In tomorrow's world, warranty providers' assessors, adjusters and others would attend at the home. Consideration should be given to allowing the adjudicator to determine where to hold a hearing, including in the home.

### **Costs of adjudication process and individual adjudication requests**

My recommendation is that the administrative costs of individual adjudications, including the costs of experts, continue to be funded at minimal cost to the homeowner, as they are currently. Tarion's dispute resolution process imposes limited administrative costs on the new home owner to initiate the process. There is no cost to file a warranty claim, however, there is a \$250 fee to request a conciliation inspection (which may be refunded if at least one claimed item is found to be warranted). The cost to file an appeal to the LAT is a non-refundable \$100. This is a reasonable cost to the homeowner to initiate the dispute resolution process and a similar approach should be continued in a new adjudication system.

Homeowner costs for warranty claims and adjudication should continue to be limited to administration fees that are not cost prohibitive. The rules could allow for reasonable administration fees at various stages of the adjudication process including for example, an initial filing fee, pre-hearing fee and hearing fee.

Consistent with rules for similar adjudicative tribunals hearing appeals of administrative decisions, awarding costs against a homeowner should be limited to exceptional circumstances.

Different rules on allocation of costs may be appropriate for adjudication hearings involving a condominium corporation. In at least some cases, condominium corporations will be in a better position financially to engage experts and bear costs.

Consideration could be given to funding the core administration costs of the adjudication process as is done in the Canadian Motor Vehicle Arbitration Plan, CAMVAP, model in which the costs are funded by the participating manufacturers. In this case the funders would be participating warranty providers.



## Onus of proof

There is currently considerable ambiguity about who must prove what. This should be clarified in the legislation. The homeowner is not the technical expert and must rely on the builder to carry out what is contracted for, engage competent trades people, and have the necessary oversight in place to ensure quality workmanship. A new home owner purchases an end-product and should not be expected to have the expertise to be able to assess whether something is a defect, even if given an opportunity to “inspect”. Consequently, the most a new home owner can be expected to do is provide credible evidence of the symptoms they are experiencing or observing. A homeowner will know the symptoms but should not be expected to prove the cause.

A claimant would be required to provide the necessary supporting documentation setting out a description of the symptoms they are experiencing and where appropriate include photographs and other measurements. In the case of intermittent symptoms or symptoms that are difficult to observe additional time or expert input may be required.

Homeowners might be asked if they have reviewed what is covered by the warranty and whether they have read the definition of what constitutes a major defect. They might be asked whether they believe there has been actual physical damage to one or more parts of their home or whether they think the home is unsafe or unlivable. As to the symptoms, a homeowner would be expected to be specific and provide photographs and other hard evidence where available. They should be asked to note when the symptoms were first noticed and their frequency.

## Use of experts

Tarion does use experts but the process appears to be ad hoc and there is no clear policy on when they are retained, who retains them and how they are paid. In some cases, Tarion will engage them directly while in other cases it has offered a homeowner money to hire the expert. Warranty providers in other jurisdictions will also engage experts as required. The policy regarding the use of experts should be clearly set out and communicated to the homeowner both at the warranty provider level and at the level of the adjudicator.

Some homeowners spoke of the expense of having to hire experts when appealing a warranty decision to the LAT. Many believed they had to engage experts at great cost, to succeed in their claim. If an expert is required, an adjudicator should be able to engage the expert directly at no cost to the homeowner. The expert would be engaged in a neutral capacity to provide input to the adjudicator and not as an advocate for one or the other of the parties. As with the selection of adjudicators, experts should be neutral and preferably drawn from a roster established independently of the warranty providers.

## Self-represented litigants

Some homeowners' experiences before the LAT have been difficult. They have faced the prospect of two opponents, Tarion and the builder, each with their own legal counsel. For many, the LAT appeal process is difficult to navigate without hiring a lawyer.

The adjudication process should make every effort to keep the dispute between the two parties directly concerned: the warranty provider making the decision and the homeowner.

Whether independent adjudication moves to a new entity or remains with the LAT, I believe more can be done to assist self-represented parties. Consideration should be given to whether:

- Further training for adjudicators and staff interacting with self-represented individuals is needed;
- Having templates, checklists and other materials available for adjudicators dealing with self-represented individuals is useful;
- It should be obligatory for an adjudicator to provide self-represented parties with explanations of the process and important concepts prior to the start of the adjudication process; and,

- A more informal and less intimidating setting such as the use of a round table rather than an adjudicator's dais would be beneficial.

## **Rule-making and standards setting**

### **Rule-making and standards setting**

#### **Decision-making**

In Ontario and elsewhere in Canada, government is responsible for creating and reforming laws. The Legislature makes statutes. These statutes typically provide regulation making authority. The regulations set out the more detailed rules, based on what is in the statute. Those regulations are usually either a minister's regulation or a regulation made by the Lieutenant Governor in Council, a Cabinet approved decision.

Under the Act, Tarion has the authority to make by-laws. These by-laws are deemed to be regulations. In practice, and by agreement, Tarion does not exercise this authority without engaging the ministry. While some of the core rules and standards about what is warranted and who needs to be registered are set out in the Act, many additional substantive provisions are established in the Tarion by-laws made under the Act .

New home warranty legislation is fundamentally consumer protection legislation. It seeks to protect consumers by ensuring new homes are built by competent and financially sound builders and by ensuring that someone will step in if a builder fails to honour the warranty obligation. These are important rules of general application. They apply to purchasers, homeowners, builders and vendors of newly built homes and are more appropriately set out in legislation and regulations approved by government.

This approach is consistent with the approach taken by other sectors where program delivery is through the administrative authority structure. It is also consistent with other Canadian jurisdictions that have a mandatory new home warranty program. Government oversight, by way of approval, allows the government to review proposed rules to ensure the public interest is being met and that they achieve the intended outcomes of consumer protection and building quality.

There are some matters that are more process oriented or administrative in nature that should remain at the discretion of the organizations responsible for implementation (e.g., the proper form to complete for a warranty claim or for registration as a builder). It is important to find an appropriate balance between giving a regulator and warranty providers the autonomy they need to operate and government's obligation to protect the public interest. This balancing should include consideration of matters such as efficiency and expertise.

#### **Warranty rules and standards setting review process**

Tarion's current approach to developing and updating rules and standards is ad hoc. It initiates reviews as the need arises. It consults widely when it undertakes a review but does not follow a standardized approach consistently across all reviews. There is no published standard for undertaking reviews.

There should be a standardized and rigorous process of rule-making and standard setting that draws upon the knowledge and expertise of various parties to achieve evidence-based and balanced decision making. Government should explore, in collaboration with stakeholders, the best practices around rules and standards setting, including who should be involved, how often the rules and standards should be reviewed, and what the review process should look like. For example, the government could consider establishing an advisory council with a mandate to make recommendations to government on warranty coverage and duration. Participants would be drawn from across a variety of sectors involved in the home building process, including engineers, architects, building officials, builders, consumers/homeowners, the regulator and warranty providers. This would ensure that sufficient input is received from persons most affected by the proposed rules. A similar process could be considered for the setting of standards for builder and vendor registration.

There is a range of organizations with an interest in the matter of systemic problems including for example, Canadian Home Builders' Association ([CHBA](#)), [OHBA](#), Building Inspectors Advisory Committee ([BIAC](#)), Large Municipalities Chief Building Officials ([LMCBO](#)), and the Institute for Catastrophic Loss Reduction. The knowledge and expertise of these and similar organizations could be of great value to the rule-making process.

Warranty providers and the regulator will have extensive information on claims, defects and related matters. Other organizations such as municipalities will similarly have data dealing with construction matters and systemic problems. This information should be available and consideration should be given to how best to gather the data, analyze it and share the information across organizations with a view to protecting consumers and supporting quality home building.

Other jurisdictions, notably British Columbia, undertake research. British Columbia's Licensing and Consumer Services (formerly the Homeowner Protection Office), a branch of [BC Housing](#), has initiated research projects dealing with building envelope, airtightness and energy consumption. While a rules council may not necessarily actively engage in direct research itself, it will have an interest in studies and other technical research relating to new home construction and can engage with researchers and research organizations as appropriate.

Having a more inclusive and transparent process could also help address the negative public perceptions that exist by more clearly highlighting to all parties the complexities and costs of changes to the scope and duration of the warranty. These complexities include balancing expanded warranty coverage with its impact on the cost of housing. There may be value in having an advisory council administered jointly by the regulator and the warranty providers given their shared interest in achieving consumer protection and high quality building.

## **Construction performance guidelines**

The Construction Performance Guidelines (Guidelines) is a critical document that sets out the standards against which a defect is measured. If the standard is not met, a defect is warrantable. If the standard is met, the defect is not warranted. As the Guidelines states, it "provides measurable benchmarks to assist homeowners and builders with performance related issues arising from workmanship and material deficiencies in new residential construction". "The Guidelines are intended to complement the Ontario Building Code and are supplemented by any applicable guidelines or standards produced by industry associations. They do not replace manufacturer warranties."

Given the importance of the Guidelines to homeowners, builders and warranty providers, there should be a formal, transparent and inclusive process for keeping the Guidelines current and relevant, reflecting new construction practices and materials. Other jurisdictions (e.g., Alberta) are establishing a regular and inclusive review process for comparable documents.

The government should also consider whether the Guidelines should be incorporated into the regulations made under warranty legislation. This could be, for example, through a process of rolling incorporation (where updates are automatic) if an inclusive and structured rule-making process is established and a regular schedule of review and updating is in place.

The Guidelines are directly relevant to how the Building Code provisions of the warranty are applied. It is critical that the Guidelines remain aligned with the Building Code. The Ministry of Municipal Affairs and municipal staff, especially Building Code officials, can provide information and concrete examples about the Building Code provisions and how they are being interpreted and applied. Their knowledge and expertise should be part of any review of the content of the Guidelines and how the Guidelines are being used for warranty claims.

## **Consumer education**

## **Consumer education**

## Providers of consumer education

Homeowners do not always receive sufficient information about key matters of home purchasing and ownership. Sometimes information is not provided in a clear, accessible format that homeowners can readily be expected to understand. These concerns should be addressed.

Consumer education covers a range of matters including:

- home maintenance
- the home purchase process
- the content of the warranty protection
- the process for submitting a claim and having a defect remedied
- what can be expected of a product that is built with material that is, by its nature, variable such as the grain of a wood floor, or how humidity in a home affects windows and
- how to access information and help when things go wrong.

Efforts to address consumers' need for information across all areas should be enhanced and should be a shared responsibility.

An example of one situation where having the information and background necessary is particularly important to a new home buyer is at the pre-delivery inspection, or PDI. The PDI is important to both the new home buyer and the builder. It establishes the condition of the home at the time the buyer takes possession. The PDI is intended to allow the new home buyer to identify problems and defects in place at the time they take possession. The importance of the PDI is underscored by Tarion, which says “[t]he PDI Form does not represent a request for warranty service, so if you fail to note an item this does not necessarily impact your warranty coverage. However, if the problem concerns a damaged or missing item, it may be difficult to establish that this condition existed before you moved in if it is not noted on the PDI Form.” A new home buyer may not appreciate the difficulties he or she may face in a subsequent claim under the warranty if the item was not initially identified in the PDI.

A home inspector might be able to assist a new home buyer with the PDI but the buyer may not know that they have a right to engage a home inspector to attend with them at the PDI. While the Tarion website does note that a homeowner can have someone attend with them at a PDI, it must be remembered that at this stage, the new home buyer has likely not been dealing with Tarion .

Education will be important to subsequent buyers of homes that are still under warranty. Those purchasers may not be aware of existing warranty protections that still apply to the home. There is no requirement that they receive the Home Owner's Information Package that the original buyer would have received at the time of the original purchase.

I recommend consideration be given to introducing additional measures to protect successive homeowners. For example, vendors could be obliged to confirm whether there is warranty coverage on the home. Alternatively, it could be a requirement to include a warranty enrolment number for the home as part of the purchase and sale documentation.

Consideration should also be given as to whether successive homeowners should receive information in terms of previous claims, existing claims, repairs made, and what remains on the warranty.

## Delivering consumer education

I heard from several individuals that they would welcome the option of having different means of communicating information. Some preferred hard copy while others thought that electronic communication worked well.

Participants from the condominium sector emphasized the need for a more pro-active outreach on the part of the regulator

and warranty provider, such as attending condominium board and unit owner meetings. I understand that this was done more in the past. Participants from outside the Greater Toronto Area and larger urban centers saw a need for a more pro-active approach to reaching new home owners generally in those communities.

### **Support of other sectors for consumer education**

Consumer education needs cannot be met by one organization alone. There are opportunities to collaborate with other sectors such as the real estate sector, the lending sector (banks and similar entities as well as private lenders), the legal profession, as well as the organizations that oversee them. Stronger linkages should be in place generally, between the regulator and warranty providers and others participating in new home building and purchasing to support the delivery of consumer education. These include real estate professionals, lawyers, municipal planning and building officials, title insurance providers, and lenders (bankers and private lenders), to name a few.

### **Consumer advocacy office**

Some suggested that an advocacy office be established with a mandate to help consumers with the warranty claims process. It was suggested that this office could assist new home purchasers and owners in navigating the warranty claim process, including supporting homeowners in discussions with the builder and the regulator. It was also suggested that such an office might have an active role in the adjudication process. Others recommended a consumer advisory council with a focus on education.

While there is merit to these suggestions, I believe that the cumulative effect of my recommendations can alleviate many of the problems that are currently being experienced by homeowners, reducing the need for such an organization.

### **Other matters**

### **Other matters**

I have dealt with the larger structural questions about the delivery model and some of the specifics of how a new regulator, warranty providers and independent adjudication might be structured and operate and how the need for consumer education might be addressed. The Terms of Reference for this Review included: whether to extend oversight of the Ontario Ombudsman, alignment with the Freedom of Information and Protection of Privacy Act, disclosure of compensation information, and Open Data policies. I have recommended that a new administrative authority regulator be established with powers and responsibilities, as well as government oversight, aligned with similar administrative authorities. Accordingly, decisions on the above four items should be consistent with the approach taken across administrative authorities generally. On the warranty side, as I have recommended a multi-provider approach that would include private sector insurance companies, decisions on these matters are best addressed by the financial sector regulator.

I now turn to other matters that were raised in the consultations. They are important and warrant individual comment.

### **Warranty coverage and duration and other protections**

#### **Content of warranty protection**

I am not making specific recommendations about warranty coverage and duration with one exception. In light of the difficulties some home purchasers have faced as a result of Urbancorp's financial problems, I am recommending an immediate review of deposit protection. I discuss this in more detail below.

Regarding the specifics of warranty coverage and duration, I have recommended a more inclusive and structured process for rule-making. Specific decisions on warranty coverage and duration are best addressed in that context.

Currently, the Act sets out certain basic provisions about warranty coverage and deposit protection. Any additions to the

warranty or other protections are set out in by-laws under the Act. The Act gives Tarion the authority to make these by-laws. By-laws have been made providing for additional warranty coverage and other protection such as deposit protection, beyond what is provided for in the Act.

As a rule of general application, the content of that warranty protection should be set out in legislation, either in the act or the regulations made under the act. Having warranty coverage set out in the legislation is necessary in a multi-provider model to ensure consistency and a minimum base line for warranty coverage and other protections. A new system requiring government approval of changes will introduce the necessary accountability over rule changes.

The subject of “latent defects” was discussed. Latent defects are defects that may be hidden or concealed or simply inactive for some time. They may be defects in the design, workmanship or materials that are not readily apparent, in some cases for many years, or until another problem calls for destructive testing and the problem becomes apparent. Some recommended a provision that would extend the period of warranty coverage, having it run from when a defect is discovered or could reasonably be expected to have been discovered – a discoverability clause. Others argued that this is a question of how long warranty coverage should last – what is the expected life span and when is a defect, if present, likely to manifest itself. Questions around latent defects and discoverability would benefit from being considered as part of a detailed review of warranty coverage and duration.

### **Deposit protection**

Since February 1, 2003, the maximum amount of deposit protected by the guarantee fund for freehold homes has been \$40 000 and \$20 000 for condominium units . The Act protects amounts that “the person paid to the vendor as a deposit to be credited to the purchase price under the closing”. These amounts have not changed for 13 years. The provincial average price for all homes sold in October 2016 was a record \$561 896, rising 19 per cent from a year earlier. In comparison, the provincial average for homes sold in January 2007 was under \$300 000. The Greater Toronto Area alone saw a 21.1 % increase on a year over year basis in October 2016, with an average selling price for all home types of \$762 975. The amount of deposit that a purchaser is asked to provide will presumably have seen a corresponding increase.

In the condominium sector, funds paid in advance of closing, including funds advanced for some upgrades, must be held in trust in accordance with Condominium Act rules . In the event of builder failure, absent a case of fraud or other criminal activity, the funds are available to reimburse the new home purchasers. This obligation to hold in trust applies to deposits toward the initial purchase price, including funds paid towards the cost of upgrades that are fixtures, such as countertops. Unlike deposits paid to purchase a condominium unit, deposits paid to purchase a freehold home are not required to be held in trust.

Also, for freehold homes, funds paid towards the cost of upgrades do not benefit from deposit protection. I have not been provided with a reasonable rationale for this distinction. For the purchaser, any money paid prior to closing is in effect a deposit.

I am recommending that an assessment of deposit protection be initiated immediately and include consideration of whether:

- the current deposit amounts are reasonable considering the increasing price of homes;
- amounts should be indexed or tied to the purchase price of the home;
- the trust obligation could be extended to freehold homes without negatively impacting smaller builders; and,
- the distinction between money paid for upgrades and other amounts paid under the agreement of purchase and sale should be removed, with all monies paid in advance treated as deposit monies that benefit from the deposit protection.

### **Illegal building and owner built homes**

#### **Owner built home**

Currently, someone building a home for their personal use is not required to enroll the home for warranty protection under the Act. The person building does not need to be registered as a builder and the home does not need to be enrolled for warranty protection. This owner built exemption has given rise to problems.

While a new home may initially be intended for personal occupation, there is no assurance that circumstances won't change. The home might be sold on the resale market during the 7-year warranty period that would have applied to the home if it were not an owner built home. It is important that efforts be made to ensure quality construction for all new homes. A system of mandatory registration for all builders could be one approach to supporting that outcome.

There is also the question of mandatory warranty coverage for all new homes, including homes built by an owner for their personal occupation. It is my recommendation that warranty protection should be mandatory for all new homes, including owner built homes intended for personal occupation.

In principle, someone buying a new home during the warranty coverage period should not be disadvantaged because the owner builder did not need to have warranty protection in place when it was constructed. It is still a new home being sold on the open market during the warranty period, and consumers who purchase it should have every protection available to them.

While I have recommended that all new homes should have warranty coverage, there are different ways to ensure warranty protection is in place in the event the home is sold during the warranty period. For example, consideration could be given to whether the mandatory enrolment of a home for warranty coverage should be at time of building or at the time of sale if sold during the period of warranty coverage.

Consideration could also be given to introducing a mandatory public builder registry system as has been done in Alberta. The registry is searchable by municipal address for every new home built as of February 1 2014 .

## **Illegal building**

I also heard a great deal about "illegal building". "Illegal building" captures unregistered builders (persons who construct a home for resale knowing that they should be registered as a builder with Tarion but were not) and "disguised builders" (persons who build new homes that they claim they are building for their personal occupation to take advantage of the owner built exemption but who intend to sell the home). While warranty coverage is available for homes built by unregistered builders who should have been registered but aren't, it is not available for builders who take advantage of the owner built exemption and subsequently sell the home. Tarion has been working with municipalities to proactively respond to the problem of unregistered and disguised builders but it continues to be a problem. In either case, if the home is subsequently sold within the warranty period, the responsibility is on the purchaser to determine whether there is warranty coverage.

Tarion has initiated a pilot project to address some of the problems with illegal building. Before a building permit is issued, confirmation is required from Tarion that the home is not one that must be enrolled in the warranty program. This allows Tarion to determine whether the owner builder exemption from registration and enrolment applies before construction begins on the home. Notwithstanding these efforts, I believe more needs to be done to protect new home buyers from illegal building.

Alberta's legislation has introduced a rule that no building permits are to be issued unless the applicant provides evidence that the new home has been registered and has the necessary insurance in place or is otherwise exempt . There may be value in considering a similar approach in Ontario.

## **Changes to key definitions and other legislative provisions**

Many of the changes that I am recommending, if accepted, will require changes to legislation. This is an opportunity to update key definitions and terms that have been problematic over the years, including the definitions of builder and vender, what constitutes a home for warranty coverage purposes and what is meant by "previously occupied".

## **Builder/vendor definitions**

The Act appears to have assumed that there would be one builder and one vendor associated with any given new home construction. However, today's business structure for new home construction might have an umbrella group (a name but not necessarily incorporated entity) and several operating companies. Within one development there may be one or more operating companies. Some may perform specialized tasks such as marketing or after sales service. Regardless of the number of companies involved, only one will currently be registered as the builder/vendor under the Act in respect of a home enrolled in the warranty plan. A holding company may be involved to fund the registered builder/vendor. In some cases, the builder/vendor corporation will be dissolved or abandoned once the development is complete, and this might happen during the warranty period. Meanwhile, the new home owner is unaware of the complex legal corporate structures that are at play and while believing they are dealing with "their builder" for the entire warranty period, they may in fact be dealing with a completely different person or entity. Greater clarity and transparency is required.

It was suggested that warranty obligations should be extended to suppliers and subtrades. Some subtrades have their own licensing requirements and oversight bodies. To introduce a warranty obligation through a separate regulator could conflict with the function of those regulators and could seriously complicate the process from a consumer perspective. Builders and vendors can deal with liability issues through their contracts with those subtrades. Those are commercial arrangements, not consumer contracts, and I am not recommending that suppliers and subtrades be captured by the new regulator.

## **Definition of "home" for purposes of warranty protection**

Not every building that can be used as a residence is covered by the warranty protection. For example, prefabricated homes are not covered as the builder is not supplying all the material or work. Also excluded are dwellings built for "seasonal purposes" such as cottages. And yet, depending on the zoning, those dwellings may be lived in for significant periods of time during the year. Whether these exceptions are still applicable in today's real estate market should be considered.

Homes that were previously occupied are also excluded from the definition of home for purposes of warranty coverage. This could include, for example, a model home in a subdivision that was used as an office. The legislation should be clear on what degree of previous occupation results in no warranty protection and the meaning of "previously occupied" should be clear to avoid an inconsistency in the application of such a rule.

Some newly built homes have pre-existing elements in them. In some cases, a home will be treated as a renovation by Tarion and not covered by warranty and in other cases it will be treated as new construction and covered by warranty. For example, a builder may have demolished a home but kept the foundation or one of the outside walls. It is not clear what level of pre-existing elements will result in no warranty coverage. This should be clarified. There may also be value in considering whether warranty protection should extend to home renovations generally and if so, in what circumstances.

## **Condominium specific issues**

The growth in condominium construction in Ontario has been significant. Today, more than 50 per cent of new homes being built are condominium units .

Condominium ownership gives rise to unique problems that do not necessarily apply in a freehold home context. For example, in some condominiums, a purchaser may take occupancy of a unit before the common elements are complete and yet, the timelines for warranty coverage start to run as of the date of occupancy.

Unit owners may have an exclusive use common element, such as a balcony. As a common element, it may not be clear to the unit owner who is responsible for identifying defects. The role of the condominium board in the warranty claims process for common elements may not always be well understood by a unit owner.

Condominium corporations are required to have a performance audit of the common elements completed within one year of registration. This performance audit is filed directly with Tarion and a copy provided to the corporation. The performance



audit identifies defects in the common elements and constitutes a claim for warranty purposes. A proper performance audit requires timely access to the appropriate supporting documentation, including drawings and plans. Measures should be in place to support that access.

The uniqueness of the condominium sector and the complexities that apply to it are such that there may be advantages to addressing the condominium issues separately in the legislation.

## **Timelines and considerations for implementation of legislative change**

My recommendations are far reaching and, if implemented, will result in significant and large scale change. Some will require legislation and others may be introduced through operational change. Transformational change will necessarily require that risks be assessed and mitigation strategies put in place. Several stages of implementation will need to be designed.

Service continuity in the home warranty sector is a priority. Consumers will need to be assured of continued service throughout the transition. Registered builders should see a smooth transition to a new regulator and new requirements should be introduced in a way that minimizes any disruption to the process of new home buying and warranty protection.

Tarion as it exists currently would be replaced with a different regulator body and different warranty providers. The goal for any structural change is to have a seamless transition to the new framework with careful and measured implementation strategies. The knowledge and expertise within the Tarion organization, as well as its dedication and commitment to consumer protection and high quality new home construction, will be important to the transition to a new warranty protection delivery model.

Many members of the new home construction sector and the public have contributed their time, energy, expertise and ideas to this review process. A process to ensure that they continue to be able to access information on what steps are being taken to implement accepted recommendations should be considered, as well as the opportunity to provide ongoing input.

Throughout my consultations, both in my meetings with individuals and in the submissions received, it was clear that there is a shared commitment to both consumer protection and the building of high quality homes. I am confident that this shared commitment and the dedication and commitment of the Tarion organization can support the successful implementation of the changes I have recommended.

## **Appendices**

### **Appendix A - Recommended delivery model**

#### **Assurance provision**

- Newly created non-profit
- Private insurance companies

#### **Regulation of builders**

- Newly created administrative authority

#### **Rule making**

- Government

#### **Adjudication of homeowner disputes**

- Independent adjudicator

## **Appendix B - Recommend dispute resolution for warranty protections**

### **Step 1 - Issue identification**

1. Homeowner identifies issue and submits claim to the warranty provider
2. Warranty provider contacts the builder regarding the claim
3. Builder inspects the issue and determines whether and/or how they will resolve the issue

### **Step 2 - Internal dispute resolution**

4. If homeowner is dissatisfied with the builder's response, they homeowner can submit a request to the warranty provider for a review of the claim
5. Warranty provider conducts an assessment and makes a decision of warrantability

### **Step 3 - Adjudication**

6. If homeowner disagrees with the warranty provider's decision, he/she can appeal to an independent third party adjudicator
7. Independent adjudicator reviews the decision and determines whether to accept, reject, or amend the decision
8. Independent adjudicator issues decision

## **Appendix C – Consolidated list of recommendations**

### **Delivery of warranty protection for new homes**

1. New home warranty protection should be delivered through a competitive model
2. Minimum standards for mandatory warranty protections should be set out in legislation
3. Warranty protection should be treated as an insurance product with oversight by the insurance sector regulator
4. A new not-for-profit corporation should be established to assume responsibility for existing enrolments and be permitted to participate in the competitive model

### **Regulation of builders and vendors**

5. A separate entity should regulate builders and vendors
6. The regulator entity for builders and vendors should be structured as an administrative authority
7. The new regulator should be subject to accountability, transparency and oversight requirements that align with provisions in place for similar administrative authorities
8. The legislation should articulate the purpose of builder and vendor regulation to be protecting consumers and promoting high quality new home construction
9. The legislation should include minimum requirements for registration as a new home builder or vendor
0. Appeals of registration related decisions should continue to be to the Licence Appeal Tribunal
  1. The legislation should provide for an enhanced compliance and enforcement framework for the regulator
  2. All new applicants for registration as a builder should be required to meet minimum technical competencies
  3. Employees of builder registrants carrying out key functions and responsibilities of the builder such as site managers and those officers, directors, senior executives and partners as are stipulated in regulation, should be required to meet minimum technical competencies

4. There should be mandatory continuing education requirements for all registrants and other individuals required to meet technical competencies
5. A code of ethics should be established for builders and vendors
6. The current builder directory should be enhanced to improve the accessibility and transparency of information that is available on the directory
7. The regulator should adopt a proactive approach to sector outreach
8. The board of the new regulator should continue to have strong builder expertise

### **Dispute resolution and adjudication**

9. Where homeowners disagree with a decision of a warranty provider they should have access to neutral and independent adjudication delivered by a body separate from the warranty provider
10. There should continue to be a process for a court to review an adjudicator's decision
11. Homeowners should continue to have a right to sue
12. Each warranty provider should be required to have an internal dispute resolution process in place to facilitate the resolution of disputes between new home owners and builders and an internal review process for its decisions
13. The adjudicator should be empowered to use a range of hearing options from paper hearings, telephone conference hearings and technology based hearings such as online, through to in-person hearings or a combination of these processes
14. Costs of an adjudication should be set by the adjudicator with limited power to award costs against the homeowner in exceptional circumstances only
15. The onus on the homeowner in advancing a warranty claim should be clearly articulated in the legislation and provide that the onus on the homeowner is to establish the credible symptoms of a defect and not the cause of a defect
16. Warranty providers should be required to clearly communicate their policy on use of experts in evaluating claims and an adjudicator should be permitted to engage an expert with responsibility for the cost of the expert determined by the adjudicator
17. The rules of procedure that apply to an adjudication hearing should be structured to support an accessible, affordable and timely process, with attention to the needs of self-represented homeowners

### **Rule-making and standards setting**

18. Government should have final approval of rule-making on warranty protection and standards for builder and vendor registration
19. Government, in collaboration with affected parties, should establish more robust, transparent, inclusive and regular processes for reviewing warranty rules and standards for builder and vendor registration
20. Government should establish a more robust, transparent, inclusive and regular process for reviewing the Construction Performance Guidelines and consider incorporating the Guidelines into regulation

### **Consumer education**

21. The regulator, warranty providers, and independent adjudication entity should be required to provide consumer education
22. Consumer education should be accessible and delivered in a variety of formats including paper, electronic, online and in person and efforts made to engage more directly with consumers, particularly condominium boards
23. The regulator and warranty providers should actively engage with other parties who can support their consumer education responsibilities

### **Other matters**

4. An immediate review should be initiated to consider the adequacy of current deposit protection rules
5. All new homes should have warranty coverage even if owner built and intended for personal occupation
6. Key definitions and terms that have been problematic over the years should be clarified, including the definitions of builder and vender, what constitutes a home for warranty coverage purposes and what is meant by “previously occupied”
7. A review of the condominium specific provisions of warranty coverage, including timelines for submitting claims, should be undertaken to ensure they adequately address the complexities of condominium ownership and the shared responsibilities of unit owners and the condominium corporation

#### **Appendix D – Written submissions from organizations**

Note to reader: I received many helpful submissions from individuals and organizations. For privacy reasons the following list is limited to submissions from organizations.

Adjudicate.ca

AirGenuity Inc.

Aviva Canada

Bowser Technical Inc.

Burstein & Greenglass LLP

C3PX Engineering Limited

Canadian Condominium Institute

Canadians for Properly Built Homes (including change.org material)

Canlight Management Inc.

Consumers Council of Canada

Degagne Carpentry

DelZotto, Zorzi LLP

Echelon Insurance

E&H Property Management

First Canadian Title Insurance Company

Frendel Kitchens Limited

Gibson Kennedy & Company

Hellyer Engineering Limited

J.L.C. Group

Lio & Associates

Michael J. Murphy Management

Municipality of Centre Hastings

Nelligan O'Brien Payne LLP

Ontario Building Officials Association

Ontario Home Builders' Association

Ontario Real Estate Association

Progressive Home Warranty Ltd.

Residential Construction Council of Ontario

Shibley Righton LLP

Tarion Warranty Corporation

Tarion Warranty Corporation, Ombudsperson

Tarion Warranty Corporation, Consumer Advisory Council

Westmount Guarantee Services Inc.

## **Appendix E – Glossary**

### **Administrative authority**

In Ontario, administrative authorities (AAs) are not-for-profit corporations that operate at arm's length from the government. These self-funded entities assume financial, operational, and legal responsibility for administering legislation, which includes delivering day-to-day delegated services such as registration or licensing, inspection, enforcement, and fee setting. AAs are governed by independent boards of directors and are self-financed from fees collected from regulated professionals and businesses.

Some administrative authorities are responsible for administering a compensation fund. Consumers can file a claim with the AA to receive compensation from the fund.

The government oversees AAs and is responsible for the legislation and regulations that are administered and enforced by the AAs.

### **By-laws of Tarion**

Section 23 of the Ontario New Home Warranties Plan Act provides that the Corporation delegated to administer the warranty program (in this case Tarion) may make by-laws on a range of topics including what homes are covered by warranty and the extent and duration of the warranty. These by-laws are deemed to be regulations and have the same force and effect as regulations made by government.

### **Builder**

A person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home (or a project in relation to a residential condominium conversion project), whether for the purpose of sale by the person or under a contract with a vendor or owner.

### **Chargeable conciliation (see also conciliation below)**

A consequence to the builder if Tarion decides that a conciliation inspection could have been avoided had the builder honoured his/her warranty obligations within the builder repair period and if there is no exception to chargeability as outlined in Builder Bulletin 20 under Exceptions to Chargeability.

### **Common elements**

Common elements are the parts of a condominium property that are not part of a unit. Unit owners share in the ownership of the common elements. Common elements can include things like hallways, elevators, fitness facilities, roofs, heating systems and grounds.

### **Conciliation**

A process whereby Tarion determines whether a disputed item listed on a claim given to Tarion is covered by a warranty and whether repairs or compensation are required.

### **Condominium**

Condominium (or condo) refers to a form of property ownership whereby unit owners own their individual unit and share in the ownership and expenses of the common elements. Condominiums are self-governing communities with by-laws and rules to guide their operation and business affairs. A condominium may be any kind of housing, including high-rise or low-rise apartments, a townhouse or stacked townhouse, or a detached or semi-detached house.

### **Construction performance guidelines**

A set of guidelines that give a detailed outline of how homes should perform within a warranty period. The guidelines are used to make decisions on whether an item is warrantable.

### **Deposit protection**

A form of consumer protection that protects the deposit paid to a builder under an agreement of purchase and sale up to a maximum amount. In Ontario, Tarion protects deposits if a builder goes bankrupt, if a builder fundamentally breaches the agreement of purchase and sale or if a purchaser has a statutory right to treat the Agreement of Purchase and Sale as terminated. Deposits are protected up to a maximum of \$20 000 for condominium units and \$40 000 for other new homes.

### **Facilitation**

Facilitation is a form of dispute resolution whereby an individual, the facilitator, assists parties in finding a mutual resolution.

### **Financial services commission of Ontario (FSCO)**

The Financial Services Commission of Ontario (FSCO) is a government agency that currently regulates the insurance sector; pension plans; loan and trust companies; credit unions and caisses populaires; the mortgage brokering sector; co-operative corporations in Ontario; and service providers who invoice auto insurers for statutory accident benefits claims. FSCO is accountable to the Minister of Finance.

### **Home**

A home, for the warranty purposes identified in the Ontario New Home Warranties Plan Act, is a self-contained one-family dwelling, detached or attached by a common wall; a building composed of more than one and not more than two

self-contained, one-family dwellings under one ownership; a condominium dwelling unit, including the common elements; and any other dwelling as prescribed in the regulations. Temporary dwellings, such as rental properties or seasonal properties, are not considered a home for the purposes of the Ontario New Home Warranties Plan Act.

### **Illegal building**

The Ontario New Home Warranties Plan Act requires all new home builders to register with Tarion. If a builder enters into an agreement of purchase and sale or a construction contract with a purchaser without being registered, the construction is considered illegal building.

### **Insurance Act**

The [Insurance Act \(https://www.ontario.ca/laws/statute/90i08\)](https://www.ontario.ca/laws/statute/90i08) governs the insurance industry in Ontario. Among other things, it sets out requirements and processes for the Insurance Ombudsman and licensed insurance businesses.

### **Major structural defect**

A defect in work or materials that results in failure of a structural load-bearing element of a building or that materially and adversely affects the ability of a structural load-bearing element of the building to carry, bear and resist applicable structural loads for the usual and ordinary service life of the element, or a defect in work and material that materially and adversely affects the use of a significant portion of the home for usual and ordinary purposes having regard to any specific provisions in the agreement of purchase and sale.

### **Ontario building code**

The Building Code is a regulation under the *Building Code Act, 1992*, and is administered by the Ministry of Municipal Affairs. The Building Code regulates new construction (including renovation) including fire safety, accessibility, energy efficiency, and other building systems. Municipalities and other principal authorities enforce the Building Code through reviewing and issuing building permits and inspections during construction by local building officials.

### **Owner builder**

An owner builder is someone who builds a home intended for their personal use either directly or by hiring someone to build the home for them and exercises significant control over the construction. In Ontario, owner builders are not required to register with Tarion and the home is not covered by the Ontario New Home Warranties Plan Act.

### **Predelivery inspection (PDI)**

A mandatory inspection of a new home by the builder and the purchaser, done before the purchaser takes possession of the home. Builders must provide purchasers with a Homeowner Information Package on or before the predelivery inspection. During this inspection, purchasers can ask their builder about the home and identify possible defects. The builder is required to fill out a [PDI form](#) and record any defects, and provide copies of the form to Tarion and the purchaser.

### **Regulations**

Regulations are laws that set out detailed rules, based on what is in a statute. Usually the authority to make regulations is given to the Lieutenant Governor in Council or a government Minister.

### **Safety and Consumer Statutes Administration Act (SCSAA)**

Under [SCSAA](#), an organization can be designated as a delegated administrative authority (DAA) with responsibility to administer the legislation in a regulated sector. Accountability, transparency and oversight rules are as provided for under the [SCSAA](#) and it requires that an agreement be in place between the proposed administrative authority and government before it can be designated under [SCSAA](#). Where there is a need for different accountability, transparency or oversight rules for a given

sector, the approach is to set out those rules in the governing statute rather than by designation under SCSAA.

## Security

A builder may be required to give security to Tarion to protect the guarantee fund should the builder fail to meet their warranty obligations. Tarion can use the security to mitigate losses. Different builders may be required to provide different forms of security and in different amounts, based on several risk factors including what they are proposing to build and their financial information.

## Tarion Warranty Corporation

Tarion is an independent, not-for-profit corporation with responsibility for administering the Ontario New Home Warranties Plan and regulating new home builders and vendors.

## Vendor

Vendor is identified in the Ontario New Home Warranties Plan Act as a person who, on the person's own behalf, sells a home not previously occupied to an owner and includes a builder, who acts as such under a contract with the owner.

## Warranty

A warranty is a guarantee that something will perform as promised or as required. The Ontario New Home Warranties Plan Act provides that every vendor warrants to a new home owner that their home is: constructed in a workmanlike manner and is free from defects in material, is fit for habitation, is constructed in accordance with the Ontario Building Code and is free of major structural defects.

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## Footnotes

- footnote [1] <sup>^</sup> Throughout this Final Report I will refer to builders and vendors. The *Ontario New Home Warranties Plan Act* requires that both builders and vendors be registered. The vendor and builder may be the same person but not always. The contract to purchase a new home is made with the vendor. And while the Act imposes several conditions and restrictions on builders, it is the vendor who warrants to the owner that the home is constructed in a workmanlike manner and is free from defects, is fit for habitation, and constructed in accordance with the Building Code; is free of major structural defects; and any other warranties that may be prescribed in the regulations. Section 17 of the Act speaks in terms of conciliation of disputes “between the owner and a vendor.” However, in fact, it is the builder that most home owners and Tarion deal with when there is a warranty dispute. I have referred to the builder or builder/vendor in this Final Report for ease of reference.
- footnote [2] <sup>^</sup> See Appendix D for a list of written submissions from organizations.
- footnote [3] <sup>^</sup> These included LAWPRO (the insurance provider for lawyers and paralegals), the Canadian Motor Vehicle Arbitration Plan (CAMVAP) and the Safety, Licensing Appeals and Standards Tribunals Ontario (SLASTO) a cluster of adjudicative tribunals that includes the Licence Appeal Tribunal (LAT).
- footnote [4] <sup>^</sup> Tarion 2015 Annual Report. Web. 4 December 2016. <http://annualreport2015.tarion.com/online-version/page/10> (<http://annualreport2015.tarion.com/online-version/page/10>)
- footnote [5] <sup>^</sup> Chornenki, Genevieve. Independent End-to-End Dispute Resolution Process Review. Web. 4 December 2016. <https://www.tarion.com/About-Tarion/Documents/Report.pdf> (<https://www.tarion.com/About-Tarion/Documents/Report.pdf>).
- footnote [6] <sup>^</sup> As far back as 1996, there has been discussion about the function of the regulator and monopoly status of the warranty provider. See: Strategies for Change: *Ontario New Home Warranties Plan Act* Proposals for Legislative Change. October 1996. Aubrey L. LeBlanc President/Registrar.



- footnote [1] ^ Section 2 of the Act allows the government to designate a non-profit corporation to administer the Ontario New Home Warranties Plan. Tarion is the only corporation designated under the Act
- footnote [2] ^ I was made aware of a Licence Appeal Tribunal decision in which the evidence given by the Tarion representative was that the decision not to revoke a licence, notwithstanding that the registered builder was insolvent, was influenced by wanting to avoid the liability exposure the fund would have for deposits paid. This is an example of a conflict that Tarion faces when trying to carry out its various responsibilities. Licence Appeal Tribunal 5519 – [ONHWPA](#) – CLAIM – motion: Decision released March 2, 2010: This LAT decision is also enlightening in its overview of the various corporate entities and umbrella group structures that are used in the new home construction sector and the problems this can present a regulator when registering builders and vendors as required by the legislation and holding those registrants accountable for delivering on the warranties under the Act and indemnifying the warranty fund.
- footnote [3] ^ [R.S.O. 1990, c.I.8.](#)
- footnote [4] ^ Ontario's current warranty coverage has been described as a surety model. Surety insurance is a class of insurance under Ontario's Insurance Act. It is defined as insurance under which an insurer undertakes to guarantee the due performance of a contract or undertaking or the payment of a penalty or indemnity for any default.
- footnote [5] ^  
New legislation should address who provides the warranty commitment and how it is satisfied in a context of multiple corporations for builders and vendors. See: Ontario New Home Warranties Plan Act, [R.S.O. 1990, c. O.31](#). Section 13. Web. 4 December 2016 <https://www.ontario.ca/laws/statute/90o31> (<https://www.ontario.ca/laws/statute/90o31>)
- footnote [6] ^ Subsection 2(3) of the Act provides that the Insurance Act does not apply to Tarion and its undertakings in respect of administering the warranty plan and establishing and administering the guarantee fund.
- footnote [7] ^ Classes of Insurance Regulation. Web. 4 December 2016 [http://www.qp.alberta.ca/documents/Regs/2011\\_144.pdf](http://www.qp.alberta.ca/documents/Regs/2011_144.pdf) ([http://www.qp.alberta.ca/documents/Regs/2011\\_144.pdf](http://www.qp.alberta.ca/documents/Regs/2011_144.pdf))
- footnote [8] ^ Oversight at the provincial level is currently provided by the Financial Services Commission of Ontario. A report dated March 21, 2016 has recommended that a new, independent and integrated regulator called the Financial Services Regulatory Authority ([FSRA](#)) be established. See: Review of the Mandates of the Financial Services Commission of Ontario, Financial Services Tribunal, and the Deposit Insurance Corporation of Ontario. Web. 4 December 2016 <http://www.fin.gov.on.ca/en/consultations/fSCO-dico/mandate-review-final-report.html> (<http://www.fin.gov.on.ca/en/consultations/fSCO-dico/mandate-review-final-report.html>)
- footnote [9] ^ How to Resolve a Complaint about Insurance. Web. 4 December 2016 <https://www.fSCO.gov.on.ca/en/insurance/complaints/Pages/default.aspx> (<https://www.fSCO.gov.on.ca/en/insurance/complaints/Pages/default.aspx>)
- footnote [10] ^ General Insurance Ombudsman. Web. 4 December 2016 <https://www.giocanada.org/> (<https://www.giocanada.org/>)
- footnote [11] ^ 366 264 was the total number in 2015, per Tarion's 2015 Annual Report. There were 57 788 enrolments in 2015.
- footnote [12] ^ Licensed Insurance Companies in Ontario. Web. 5 December 2016. [https://www5.fSCO.gov.on.ca/Licensing/LicClass/eng/lic\\_companies\\_class.aspx](https://www5.fSCO.gov.on.ca/Licensing/LicClass/eng/lic_companies_class.aspx) ([https://www5.fSCO.gov.on.ca/Licensing/LicClass/eng/lic\\_companies\\_class.aspx](https://www5.fSCO.gov.on.ca/Licensing/LicClass/eng/lic_companies_class.aspx))
- footnote [13] ^ [LAWPRO](#) History. Web. 4 December 2016 <https://www.lawpro.ca/AboutLawpro/history.asp> (<https://www.lawpro.ca/AboutLawpro/history.asp>)
- footnote [14] ^ The New Home Warranty Insurance (Canada) Corporation. Web. 4 December 2016

<https://www.anhwp.com/NHWIC> (<https://www.anhwp.com/NHWIC>)

- footnote [15] ^ Tarion 2015 Annual Report. Web. 4 December 2016 <http://annualreport2015.tarion.com/online-version/page/10> (<http://annualreport2015.tarion.com/online-version/page/10>)
- footnote [1] ^ Administrative authorities are private not-for-profit corporations that administer regulatory programs, under accountability and governance agreements with government.
- footnote [2] ^ Commission on the Reform of Ontario's Public Services (Drummond Report). Web. 4 December 2016 <http://www.fin.gov.on.ca/en/reformcommission/chapters/report.pdf>. (<http://www.fin.gov.on.ca/en/reformcommission/chapters/report.pdf>)
- footnote [3] ^ With respect to Auditor General oversight, it applies to the Technical Standards and Safety Authority, and would apply to the two proposed condominium administrative authorities.
- footnote [4] ^ Ontario New Home Warranty Program v. Lukenda (1991), 1991 CanLII 7167 (ON CA) (<http://www.canlii.org/en/on/onca/doc/1991/1991canlii7167/1991canlii7167.html>), 2 O.R. (3d) 675 (Ont. C.A.), at p. 676 "The major purpose of the Plan Act is to protect purchasers of new homes by requiring that vendors and builders be screened for financial responsibility, integrity and technical competence. To assure public protection, it provides warranties, a guarantee bond and compensation in the event of loss by a purchaser resulting from dealings with a registrant. In order to effect this purpose of the Plan Act, a broad and liberal interpretation of its provisions is appropriate"; Mandos v. Ontario New Home Warranty Program (1995), 1995 CanLII 3158 (ON CA) (<http://www.canlii.org/en/on/onca/doc/1995/1995canlii3158/1995canlii3158.html>), 86 O.A.C. 382, at p. 383: "The Ontario New Home Warranties Plan Act (<http://www.canlii.org/en/on/laws/stat/rso-1990-c-o31/latest/rso-1990-c-o31.html>), R.S.O. 1990, c. O-13 (<http://www.canlii.org/en/on/laws/stat/rso-1990-c-o13/latest/rso-1990-c-o13.html>) is remedial legislation and should be given a fair and liberal interpretation."
- footnote [5] ^ The Registrar is appointed by Tarion. The Registrar performs the duties and exercises the powers given to the Registrar by the Act, including decisions on registration of builders and vendors.
- footnote [6] ^ Motor Vehicle Dealers Act, 2002, S.O. 2002, c. 30, Sched. B. Section 21. Web. 4 December 2016 <https://www.ontario.ca/laws/statute/02m30>. (<https://www.ontario.ca/laws/statute/02m30>)
- footnote [7] ^ Ibid., section 10. This immediate suspension could be effective for a defined period allowing the registrant to seek a review of the immediate suspension before LAT. LAT could order the immediate suspension to continue or revoke it.
- footnote [8] ^ Ibid., section 28.
- footnote [9] ^ Ontario New Home Warranties Plan Act, R.S.O. 1990, c.O.31. Section 7 (1) (d). Web. 4 December 2016. <https://www.ontario.ca/laws/statute/90o31> (<https://www.ontario.ca/laws/statute/90o31>).
- footnote [10] ^ R.R.O. 1990, Reg. 894: Terms and Conditions of Registration of Builders and Vendors. Section 1. – 0.1, 0.2. Web. 4 December 2016 <https://www.ontario.ca/laws/regulation/900894>. Becoming a Registered Builder. Tarion. Web. 4 December 2016 <http://www.tarion.com/builders/becoming-a-registered-builder/Pages/Educational-Requirements-.aspx> (<http://www.tarion.com/builders/becoming-a-registered-builder/Pages/Educational-Requirements-.aspx>)
- footnote [11] ^ The Ministry is consulting on a range of Building Code matters including how to improve energy efficiency and water conservation in new home construction. Potential Changes to Ontario's Building Code. Web. 5 December 2016. <http://www.mah.gov.on.ca/Page14996.aspx> (<http://www.mah.gov.on.ca/Page14996.aspx>)
- footnote [12] ^ See definition of chargeable conciliation in Appendix E – Glossary.
- footnote [13] ^ Currently, a builder can either accept a warranty decision and carry it out or refuse to accept it leaving Tarion to implement the decision. The consequence for a builder of a conciliation decision that is not in the builder's favour is a chargeable conciliation which forms a part of the public record about that builder and a possible impact on their entitlement to be registered. If the builder wants to dispute the consequence of the decision as a

chargeable conciliation this is done through the Builder Arbitration Forum. If a consequence resulted in some impact on their registration, such as a proposal to revoke the registration, the appeal is to the Licence Appeal Tribunal.

- footnote [14] <sup>^</sup> Delegated Administrative Authority Review. Elaine Todres and Associates. (2009). Web. 5 December 2016. [https://www.tarion.com/resources/Documents/DAA\\_Model\\_Review\\_Report.pdf](https://www.tarion.com/resources/Documents/DAA_Model_Review_Report.pdf) ([https://www.tarion.com/resources/Documents/DAA\\_Model\\_Review\\_Report.pdf](https://www.tarion.com/resources/Documents/DAA_Model_Review_Report.pdf))
- footnote [1] <sup>^</sup> Chornenki, supra Note 3.
- footnote [2] <sup>^</sup> Ontario Automobile Insurance Dispute Resolution System Review – Final Report. Web. February 2014 <http://www.fin.gov.on.ca/en/autoinsurance/drs-final-report.pdf>. (<http://www.fin.gov.on.ca/en/autoinsurance/drs-final-report.pdf>)
- footnote [3] <sup>^</sup> Mendes, Errol et al., 2013. ADR-Research and Analysis Report. Web. 4 December 2016 . <http://opo-boa.gc.ca/autresrapports-otherreports/evalform-formeval/red-adr-eng.html> (<http://opo-boa.gc.ca/autresrapports-otherreports/evalform-formeval/red-adr-eng.html>)
- footnote [4] <sup>^</sup> CAMVAP 2015 Annual Report. Web. 4 December 2016.<http://www.camvap.ca/annual-reports/2015-annual-report/> (<http://www.camvap.ca/annual-reports/2015-annual-report/>)
- footnote [1] <sup>^</sup> Tarion has authority to make by-laws that are deemed to be regulations. To supplement the by-laws, Tarion has created a series of bulletins referred to as “Builder Bulletins” to support the implementation and interpretation of the Act and the regulations.
- footnote [2] <sup>^</sup> Technical Research. BC Housing. Web. 13 December 2016. <https://www.bchousing.org/research-centre/research-publications/technical-research> (<https://www.bchousing.org/research-centre/research-publications/technical-research>)
- footnote [3] <sup>^</sup> Construction Performance Guidelines, Third Edition. Web. 4 December 2016.<http://www.tarion.com/warranty-protection/Documents/CPG%203rd%20Edition%20Jan%201.pdf> (<http://www.tarion.com/warranty-protection/Documents/CPG%203rd%20Edition%20Jan%201.pdf>).
- footnote [1] <sup>^</sup> Your Pre-Delivery Inspection and Closing, Tarion. Web. 4 December 2016 <http://www.tarion.com/homeowners/yourpredelivery/Pages/What-Is-A-Pre-Delivery-Inspection.aspx>. (<http://www.tarion.com/homeowners/yourpredelivery/Pages/What-Is-A-Pre-Delivery-Inspection.aspx>)
- footnote [2] <sup>^</sup> Ibid.
- footnote [1] <sup>^</sup> <https://www.ontario.ca/laws/regulation/900892>
- footnote [2] <sup>^</sup> Ontario New Home Warranties Plan Act, 1990, c.O.31. Section 14. Web. 4 December.<https://www.ontario.ca/laws/statute/90o31> (<https://www.ontario.ca/laws/statute/90o31>)
- footnote [3] <sup>^</sup> This includes all types of homes and new and resale homes.
- footnote [4] <sup>^</sup> Ontario home sales set new October record. Web. 4 December 2016. <http://creastats.crea.ca/orea/> (<http://creastats.crea.ca/orea/>)
- footnote [5] <sup>^</sup> Toronto Real Estate Board. Market Watch October 2016. Web. 8 December 2016. [http://www.trebhome.com/market\\_news/market\\_watch/2016/mw1610.pdf](http://www.trebhome.com/market_news/market_watch/2016/mw1610.pdf) ([http://www.trebhome.com/market\\_news/market\\_watch/2016/mw1610.pdf](http://www.trebhome.com/market_news/market_watch/2016/mw1610.pdf))
- footnote [6] <sup>^</sup> Not captured under the trust obligation are funds paid for personal property that is included in a proposed unit and not permanently affixed to the land. Condominium Act, 1998, S.O. 1998, c.19. Section 81. Web. 5 December. <https://www.ontario.ca/laws/statute/98c19> (<https://www.ontario.ca/laws/statute/98c19>)
- footnote [7] <sup>^</sup> Public Search. New Home Buyer Protection Program (NHBPP). Web. 4 December 2016. <http://homewarranty.alberta.ca/public-registry/> (<http://homewarranty.alberta.ca/public-registry/>)
- footnote [8] <sup>^</sup> Home Warranty. Alberta Government. Web. 4 December 2016.

<http://www.homewarranty.alberta.ca/> (<http://www.homewarranty.alberta.ca/>)

- footnote [9] ^ Units Under Construction by Intended Market and Census Subdivision for Centres 10,000+, 2015. Canada Mortgage and Housing Corporation. Web. 30 November 2016. [https://www.cmhc-schl.gc.ca/popup/stda/conehoco/eng/Table\\_4\\_2\\_2015\\_e.xlsx](https://www.cmhc-schl.gc.ca/popup/stda/conehoco/eng/Table_4_2_2015_e.xlsx) ([https://www.cmhc-schl.gc.ca/popup/stda/conehoco/eng/Table\\_4\\_2\\_2015\\_e.xlsx](https://www.cmhc-schl.gc.ca/popup/stda/conehoco/eng/Table_4_2_2015_e.xlsx))

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