

Court File No.: CV-23-00706813-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

GENESIS MORTGAGE INVESTMENT CORPORATION

**Applicant/
Moving Parties**

- and -

1776411 ONTARIO LTD. AND 1333 WEBER STREET KITCHENER LP

Respondents

- And -

**WERNER LEUSCHNER, KAMAL PATEL, JAYKAM DEVELOPERS
LIMITED AND 1639993 ONTARIO LTD.**

**Interested Parties/Guarantors/
Responding Parties**

**IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED,
AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43,
AS AMENDED**

**FACTUM OF THE RESPONDING PARTIES,
WERNER LEUSCHNER, KAMAL PATEL, JAYKAM DEVELOPERS LIMITED
AND 1639993 ONTARIO LTD.**

**(Motion for Declaration re Entitlement to Tarion Enrollment Fee -
returnable June 2, 2026)**

#4756377.1

PART I: OVERVIEW

1. GFD LP brings this motion for:
 - a) a declaration that it is entitled to ~\$168,985.85 in enrolment fees ("**Tarion Fee**") paid by the respondent, 177 Ontario, to Tarion Warranty Corporation ("**Tarion**"); and
 - b) an order directing Tarion to refund the Tarion Fee (the "**Tarion Refund**") to GFD LP.

2. The responding parties, Werner Leuschner, Kamal Patel, Jaykam Developers Limited and 1639993 Ontario Ltd. (collectively the "**Guarantors**") are guarantors and former principals of the respondents, 1776411 Ontario Ltd. ("**177 Ontario**") and 1333 Weber Street Kitchener LP ("**1333 LP**") (collectively the "**Respondents**"). They oppose this motion for two reasons:
 - (a) the Tarion Refund is not a "Purchased Asset", "Deposit" or "Levy" as defined in the APS, and was not conveyed to GFD LP as part of the sale; and
 - (b) in the absence of a contractual right to the Tarion Refund under the APS, the Tarion Refund should be remitted to the party that paid the Tarion Fee, prior to the receivership – in this case, the Receiver on behalf of 177 Ontario.¹

3. The Guarantors request that this motion be dismissed and an order issue directing the Tarion Refund be paid to the Receiver to be held in trust on behalf of 177 Ontario, pending further order of the Court.

¹ Affidavit of Michael Yeung, sworn May 8, 2026 ("**Yeung Affidavit**") at para 2, Moving Party's Motion Record ("**Moving MR**"), Tab 2(A).

PART II - FACTS

Background

4. The Respondents were the former developers of a four-tower condominium project (the “**Project**”) located at 1333 Weber Street East, Kitchener, ON (the “**Real Property**”). Title to the Real Property was formerly held by 177 Ontario.
5. On October 12, 2024, the applicant, Genesis Mortgage Investment Corporation (“**GMIC**”) applied for and obtained an order (the “**Appointment Order**”) appointing KSV Restructuring Inc. as receiver and manager (the “**Receiver**”) over the property, assets and undertakings of the Respondents.²
6. By agreement dated March 4, 2024 (the “**APS**”), the Receiver sold the Respondents’ right, title and interest to certain of their assets as defined in the APS (the “**Purchased Assets**”) to the applicant, Genesis Mortgage Investment Corporation (“**GMIC**”), Elm Acquisitions Corp. and Dorr Capital Corporation (collectively the “**Purchasers**”).³
7. On October 7, 2024, the Purchasers assigned the APS to the moving party, GFD 1333W Limited Partnership (“**GFD LP**”). Each of the Purchasers, including GMIC, is a limited partner in GFD LP.⁴ GMIC is non-arm’s length with GFD LP.
8. On closing, the Purchased Assets as defined in the APS vested in 1333W Lands Ltd., the nominee of GFD LP’s general partner, GFD 1333W GP Inc.⁵ The transaction closed on October 29, 2024.⁶

² Yeung Affidavit at para 6.

³ APS, Exhibit “A” to Yeung Affidavit at para 2.

⁴ Yeung Affidavit at para 3.

⁵ AVO, Exhibit “C” to Yeung Affidavit and para 12.

⁶ Yeung Affidavit at para 12.

Tarion

9. Tarion Warranty Corporation is an independent, not-for-profit consumer protection corporation. It is not a Crown agency. It is an administrative authority. It is financed through home enrolment fees, investment income, as well as builder/vendor registration fees.⁷

10. Under the *Ontario New Home Warranties Plan Act*⁸ ("ONHWPA"), "vendors"⁹ and "builders"¹⁰ of "homes"¹¹ as defined in the statute must pay, amongst other things, "enrollment fees"¹² for each new home prior to commencing construction.

11. Enrollment fees are generally non-refundable, unless the development project is cancelled in its entirety or the vendor or builder loses its status.¹³

Conversion of Condominium Units to "Purpose-Built Rentals"

12. GFD LP is currently "in the process of" converting the condominium units in Tower B to "purpose-built rentals".¹⁴ It has disclaimed all 189 agreements of purchase and sale for condominium units pre-sold by the Respondents in Tower B.¹⁵

⁷ [Evolution of ONHWP Act and Tarion Warranty Corporation.](#)

⁸ *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31

⁹ [Section 1](#) and [10.1](#) of the *Ontario New Home Warranties Plan Act*, [R.S.O. 1990, c. O.31](#) ("ONHWPA").

¹⁰ [Section 1](#) and [Section 10.2](#) of the ONHWPA.

¹¹ [Section 1](#) of the ONHWPA.

¹² [Section 10.3](#) of the ONHWPA.

¹³ [Sections 10.4-10.5](#) of the ONHWPA.

[Registrar Bulletin No. 10CH](#) at page 9: "If Tarion determines that the Contract Home is no longer eligible for the statutory warranties, the Contract Home's enrolment will be cancelled and enrolment fees etc. will be refunded." [Registrar Bulletin No. 15 issued Feb 1, 2021 effective Jan 1, 2024](#) and [Registrar Bulletin No. 15 issued Feb 1, 2021 effective Sep 1, 2025.](#)

¹⁴ Yeung Affidavit, para 17.

¹⁵ Yeung Affidavit at para 13.

13. 177 Ontario paid the Tarion Fee prior to the receivership.¹⁶ GFD LP's conversion triggered the Tarion Refund. As a result, the units in Tower B are no longer condominiums and are not "homes" as defined in the ONHWPA.¹⁷

14. 177 Ontario is no longer a "vendor" under the ONHWPA (GFD LP never was a vendor under the ONHWPA). As a result, the statutory basis for the Tarion Fee has ceased to exist and Tarion has confirmed that a refund of the enrolment fees is payable.¹⁸

15. However, just because GFD LP triggered the Tarion Refund does not mean it is entitled to it.

PART III – ISSUE, LAW AND ARGUMENT

ISSUE

16. The sole issue in this motion is which party is entitled to the Tarion Refund. For the reasons set out below, the Guarantors submit that GFD LP has no entitlement to the Tarion Refund, and that the entitlement lies with the Receiver on behalf of 177 Ontario.

LAW

17. The principles of contractual interpretation require the Court to determine the objective intent of the parties at the time the contract was formed, having regard to the language used and the surrounding circumstances or factual matrix.¹⁹

¹⁶ Yeung Affidavit at para 16.

¹⁷ Yeung Affidavit at para 18.

¹⁸ Yeung Affidavit, paras 16, 18, 22.

¹⁹ *Sattva Capital Corp. v. Creston Moly Corp.*, [2014 SCC 53](#) at [paras 47–49](#) ("**Sattva**").

18. The factual matrix at the time the Receiver and Purchasers entered the APS on March 4, 2024 is clear: there is no evidence that the Receiver, Purchasers or GFD LP knew about the Tarion Fee. If they did not know about it, they could not have possibly intended to include the Tarion Fee as part of the defined term, Purchased Assets in the APS. Had that been their mutual intention, they would have explicitly listed the Tarion Fee as part of the list of assets that comprised the Purchased Assets. They did not. In fact, the word “Tarion” does not appear anywhere in the APS.²⁰

19. There is no evidence that the Receiver, Purchasers or GFD LP knew about the Tarion Fee until February 4, 2026 – nearly two years after the APS. On that date, GFD LP’s lawyers wrote to Tarion to demand the Tarion Refund after purportedly discovering that Mr. Leuschner had attempted to contact Tarion.²¹

20. GFD LP claims that Tarion support its motion. That is not reflected in the evidence. Tarion was clearly uncomfortable with releasing the Tarion Refund to GFD LP in the absence of a Court order or agreement of the parties.²² That is why GFD LP comes to Court.

ARGUMENT

(A) GFD LP is Not Entitled to the Tarion Refund because the Tarion Fee is not a Purchased Asset

21. 177 Ontario was required under section 10 of the ONHWPA to pay enrollment fees for each of the 189 condominium units it sold in Tower B.²³ It paid ~\$168,985.55 in

²⁰ APS, Exhibit “A” to the Yeung Affidavit.

²¹ Letter from Joseph Blinick (counsel for Purchasers) to Tamini Ahmadi (Tarion) dated February 4, 2026, Ex “G” to Yeung Affidavit.

²² Email from Tamina Ahmadi to Joseph Blinick dated February 13, 2026, Ex “I” to Yeung Affidavit.

²³ Yeung Affidavit at para 8.

enrollment fees for the units in Tower B. As the registered vendor and payor of the Tarion Fee, 177 Ontario is presumptively entitled to the Tarion Refund.²⁴

22. GFD LP's only possible claim to the Tarion Refund is through the APS. Unless the Tarion Refund is a Purchased Asset as defined in the APS, GFD LP has no entitlement to it.²⁵

Purchased Assets and Excluded Assets as Defined in the APS

23. **"Purchased Assets"** are defined at Article 1.1 of the APS and include:

- f) "the benefit of any prepaid expenses or deposits with any Person (including without limitation, the benefit of any prepared rent(, public utility or Governmental Authority."²⁶
- g) "all intangible property (on-site or off-site) relating to the creation of the Buildings or the Project...(save and except those which are Excluded Assets...) and the Levies"²⁷

24. More importantly, the APS defines **"Excluded Assets"** to mean all assets, undertakings and properties of the Receivership Respondents other than the Purchased Assets, including "any monies paid to the Receivership Respondents or on their behalf...on account of a purchase of a condominium unit to be constructed in Tower B in the Project."²⁸

²⁴ [Registrar Bulletin No. 10CH](#) at page 9: "If Tarion determines that the Contract Home is no longer eligible for the statutory warranties, the Contract Home's enrolment will be cancelled and enrolment fees etc. will be refunded." [Registrar Bulletin No. 15 issued Feb 1, 2021 effective Jan 1, 2024](#) and [Registrar Bulletin No. 15 issued Feb 1, 2021 effective Sep 1, 2025](#).

²⁵ APS at Article 12.1(1), Exhibit "A" to Yeung Affidavit.

²⁶ APS at Article 1.1(f) ("**Purchased Assets**") Exhibit "A" to Yeung Affidavit,

²⁷ APS at Article 1.1(g) ("**Purchased Assets**") and 12.1(1), Exhibit "A" to Yeung Affidavit.

²⁸ APS at Article 1.1 ("**Excluded Assets**"), Exhibit "A" to Yeung Affidavit.

25. That is precisely what the Tarion Fee is - monies paid on behalf of the Receivership Respondents (177 Ontario) on account of a purchase of a condominium unit to be constructed in Tower B in the Project. The Tarion Fee is an Excluded Asset.

Tarion Fees are not a Prepaid Expense or Deposit

26. The Guarantors do not dispute that Tarion, as a regulatory and administrative authority, falls within the definition of "Governmental Authority" as defined in the APS.²⁹ However, that is only one part of the definition of Purchased Asset set out in Article 1.1(f).

27. Article 1.1(f) also refers to "the benefit of any **prepaid expenses or deposits** with any Person... or Governmental Authority." Although the Tarion Fee is paid to a Governmental Authority, it was neither a "prepaid expense" nor a "deposit":

- (a) a "**prepaid expense**" refers to ordinary course operating expenses paid in advance (e.g., prepaid rent, insurance, or service contracts) that benefit the ongoing operation of the business. The Tarion Fee is a statutory regulatory fee paid to enroll a home in a specific consumer protection program. It is a mandatory cost of regulatory compliance, not an ongoing commercial operating prepay.
- (b) a "**deposit**" refers to funds held as security for the performance of an obligation (e.g., security deposits or landlord damage deposits) that are expected to be returned upon the completion of a commercial

²⁹ "**Governmental Authority**" means governments, regulatory authorities, governmental departments, agencies, commissions, bureaus, officials, ministers, Crown corporations, courts, bodies, board, tribunals or dispute settlement panels or other law or regulation making organizations or entities: (a) having or purporting to have jurisdiction on behalf of any nation, province, republic, territory, state or other geographic or political subdivision thereof, including, without limitation, any municipality in which the Property is located; or (b) exercising, or entitled or purporting to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power, and "Governmental Authority" means any one of them. Article 1.1 of the APS, Exhibit "A" to the Yeung Affidavit.

relationship. The Tarion Fee was paid to enroll 177 Ontario under the ONHWPA to obtain statutory warranty coverage. It was not a security deposit. There was no expectation that it would be refunded upon completion of the Project.³⁰

Tarion Fees are not Intangible Property

28. Article 1.1(g) of the definition of "Purchased Assets" refers to "all intangible property... relating to the creation of the Buildings or the Project, including without limitation... the Levies."

29. The Tarion enrolment is not "intangible property" capable of commercial sale. It is a personal, statutory regulatory status tied exclusively to the builder's or vendor's license and registration under the ONHWPA.

30. Statutory regulatory licenses and registrations are granted solely to the registrant and cannot be vested or transferred via a commercial sale agreement. A statutory license is not a proprietary right.

31. Tarion issues licenses to a builder or vendor based on the specific qualifications, character, and compliance of the registrant. The right is inherently personal and cannot exist independently of that specific registrant.

Tarion Fees are not Levies

³⁰ [ONHWPA at section 10.1\(c\)](#).

[Registrar Bulletin No. 15 \(Enrolment Fees\) – Effective Date: Sep 1, 2025](#) at page 2 provides: Treatment of Enrolment Fee on Cancellation - A portion of the Enrolment Fee is refundable if the enrolments are cancelled by the Registrar. The following amounts are not refundable:

- 1) The applicable cancellation fee per enrolment (this amount, if any, will be shown on Schedule A)
- 2) Any amount of the Enrolment Fee which has been designated for the purpose of Capital Replenishment (this amount, if any, will be shown on Schedule A)

32. **"Levies"** means all municipal development charges, any other amount paid to the municipality or other Governmental Authority as a prerequisite to obtaining a building permit for the construction of the Project or any part thereof or in respect of any development thereon.

33. The Tarion Fee is not a Levy. It has nothing to do with obtaining a building permit, which is granted at the municipal level. It is paid pursuant to the ONHWPA, not the Planning Act or any municipal by-law. It is paid as a prerequisite to commencing construction of a home (or offering a home for sale) under s. 10.2(4) of the ONHWPA, not as a prerequisite to obtaining a building permit. A building permit is issued by a municipal official under the *Building Code Act*³¹ based on compliance with the *Ontario Building Code*³², which is entirely separate from Tarion's warranty enrolment scheme.

(B) The Tarion Refund Should be Remitted to the Receiver on behalf of 177 Ontario

34. The Tarion Fee was paid out of the capital of 177 Ontario prior to the receivership. Because of the receivership, the Tarion Refund should come back to 177 Ontario through the Receiver.

35. Because the Tarion Fees are not "Purchased Assets" under the APS, they were never conveyed to GFD LP. Permitting GFD LP to pocket the Tarion Refund now would result in an inequitable windfall and unjust enrichment. GFD LP would receive a refund of fees it never paid, in respect of a regulatory warranty scheme it actively bypassed to its own financial advantage.

³¹ [Building Code Act, 1992, S.O. 1992, c. 23.](#)

³² [Ontario Building Code](#)

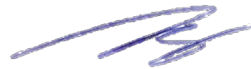
36. The only equitable and legally sound result is for the Tarion Refund to be remitted to vendor/payor, which in this case, is the Receiver on behalf of 177 Ontario.

PART V: ORDER SOUGHT

37. The Guarantors respectfully request an Order:

- a) dismissing GFD LP's motion with costs;
- b) declaring that the Tarion Enrollment Fees do not constitute "Purchased Assets" under the APS;
- c) ordering and directing Tarion Warranty Corporation to remit the full amount of the Tarion Refund, plus any accrued interest, to the Receiver on behalf of 1776411 Ontario Ltd. and directing the Receiver to hold the monies in trust until further order of the Court; and
- d) ordering GFD LP to pay the Guarantors' costs of this motion on a partial-indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



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SCHEDULE A – CASE LAW

[*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53](#)

SCHEDULE B - STATUTES

Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31

Requirements for vendors of homes

10.1 A vendor shall not sell or offer to sell a home unless the vendor,

- (a) is licensed as a vendor under the New Home Construction Licensing Act, 2017;
- (b) has provided the Registrar with the particulars that the Registrar requires and in the manner that the Registrar requires;
- (c) has paid the Registrar the fee that the Registrar requires;
- (d) has complied with the other requirements, if any, that are prescribed;
- (e) has received confirmation from the Registrar that the home,
 - (i) qualifies for enrolment in the Plan, if construction of the home has not commenced, or
 - (ii) has been enrolled in the Plan, if construction of the home has commenced; and
- (f) has provided the registrar appointed under section 35 of the New Home Construction Licensing Act, 2017 with a copy of the confirmation described in clause (e).

Requirements for builders of homes

10.2 (1) Subject to the prescribed requirements or restrictions, if any, a builder shall not offer to enter into a construction contract unless the builder,

- (a) is licensed as a builder under the New Home Construction Licensing Act, 2017; and
- (b) has complied with the other requirements, if any, that are prescribed.

Offering to commence construction

(2) A builder shall not offer to commence constructing a home unless the builder has complied with clauses (1) (a) and (b).

Construction contract

(3) Subject to the prescribed requirements or restrictions, if any, a builder shall not enter into a construction contract unless the builder,

- (a) is licensed as a builder under the New Home Construction Licensing Act, 2017;
- (b) has notified the Registrar of the intention to commence construction;
- (c) has provided the Registrar with the particulars that the Registrar requires and in the manner that the Registrar requires;
- (d) has paid the Registrar the fee that the Registrar requires;
- (e) has complied with the other requirements, if any, that are prescribed;
- (f) has received confirmation from the Registrar that the home has been enrolled in the Plan; and

(g) has provided the registrar appointed under section 35 of the New Home Construction Licensing Act, 2017 with a copy of the confirmation described in clause (f).

Commencing construction

(4) A builder shall not commence constructing a home unless the builder has complied with clauses (3) (a) to (g).

Cancellation of enrolment

10.5 Subject to section 10.6, at any time after the Registrar enrolls a home in the Plan, the Registrar may cancel the enrolment if the Registrar determines that the home ceases to meet the definition of a home in subsection 1 (1).

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**ONTARIO
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Proceeding commenced at Toronto

**FACTUM OF THE RESPONDING PARTIES,
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