

Court File No. CV-23-00698395-00CL
CV-23-00698632-00CL
CV-23-00698637-00CL
CV-23-00698576-00CL
CV-23-00699067-00CL

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

B E T W E E N:

KINGSETT MORTGAGE CORPORATION AND DORR CAPITAL CORPORATION

Applicants

- and -

**STATEVIEW HOMES (MINU TOWNS) INC., STATEVIEW HOMES (NAO TOWNS)
INC., STATEVIEW HOMES (ON THE MARK) INC., TLSFD TAURASI HOLDINGS
CORP. AND STATEVIEW HOMES (HIGH CROWN ESTATES) INC.**

Respondents

DORR CAPITAL CORPORATION

Applicant

- and -

HIGHVIEW BUILDING CORP INC.

Respondent

DORR CAPITAL CORPORATION

Applicant

- and -

STATEVIEW HOMES (BEA TOWNS) INC.

Respondent

**ATRIUM MORTGAGE INVESTMENT CORPORATION AND DORR
CAPITAL CORPORATION**

Applicants

- and -

**STATEVIEW HOMES (NAO TOWNS II) INC., DINO TAURASI, AND
CARLO TAURASI**

Respondents

MERIDIAN CREDIT UNION

Applicant

- and -

STATEVIEW HOMES (ELM&CO) INC.

Respondent

**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 MOVING PARTY,
TARION WARRANTY CORPORATION**

(Motion for Declaratory Relief)
(Returnable November 2, 2023)

TORYS LLP

79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2
Fax: 416.865.7380

David Outerbridge (LSO #: 42724V)

Tel: 416.865.7825

Email: douterbridge@torys.com

Adam M. Slavens (LSO#: 54433J)

Tel: 416.865.7333

Email: aslavens@torys.com

Jonathan Silver (LSO#: 70137Q)

Tel: 416.865.8198

Email: jsilver@torys.com

Mike Noel (LSO#: 80130F)

Tel: 416.865.7378

Email: mnoel@torys.com

Lawyers for Tarion Warranty Corporation

TO: SERVICE LIST

TABLE OF CONTENTS

PART I - OVERVIEW 2

PART II - THE FACTS..... 3

 A. Deposits are protected under the Warranties Act 3

 B. Stateview misappropriated Purchaser deposits 5

 C. Purchasers and Tarion are left on the hook..... 7

 D. Mr. Pollack’s October 2 affidavit adduces improper evidence..... 8

PART III - THE ISSUES 8

PART IV - THE LAW 9

 Threshold issue: This Court’s jurisdiction to grant the remedies sought..... 9

 A. Existence of an express trust, and its breach by Stateview 9

 (i) *Stateview held the deposits in trust for the Purchasers’ benefit*..... 9

 (ii) *Stateview breached the deposit trusts*..... 11

 B. Stateview benefitted from unjust enrichment 12

 C. The Purchasers are entitled to a constructive trust over the Proceeds 13

 (i) *There is a strong degree of connection between the deposits and the Proceeds*..... 14

 (ii) *A constructive trust brings other creditors back to the status quo* 16

 (iii) *The parties held a legitimate expectation that the deposits would be returned to Purchasers*..... 18

 (iv) *A money remedy is inadequate* 19

Conclusion: a constructive trust is appropriate 20

 D. Alternatively, the Purchasers are entitled to a “good conscience” trust 21

 E. The Purchasers are entitled to a court-ordered charge as security for their constructive trust remedy 23

 F. That court-ordered charge should rank in priority to, or alternatively equally with, the claims of the Stateview Mortgagees 24

PART V - RELIEF REQUESTED 25

SCHEDULE A

SCHEDULE B

PART I - OVERVIEW

1. This motion seeks a determination that the respondents' assets are subject to a constructive trust or a "good conscience" trust. The respondents – the "**Stateview Vendors**" or "**Stateview**"¹ – were residential real estate developers. The beneficiaries of the requested trust remedy are approximately 729 sets of homebuyers (the "**Purchasers**"), who paid deposits to Stateview totaling approximately \$73,037,000 under agreements of purchase and sale (the "**Purchase Agreements**").²
2. There are two independent legal bases for the granting of a trust remedy on this motion.
3. First, some of the Purchase Agreements expressly provide that Purchaser deposits are to be held in trust. Stateview consistently breached that trust obligation. As a remedy for breach of the express trust, the Purchasers are entitled to a constructive trust or good conscience trust over Stateview's assets.
4. Second, the Stateview Vendors have been unjustly enriched by the Purchasers' deposits. Stateview spent those deposits and is giving nothing to the Purchasers in return. The appropriate remedy for Stateview's unjust enrichment in these circumstances is a constructive trust.
5. Stateview continues to hold title to the real property on which the Purchaser's homes were to be built. The requested trust remedy should be granted over these remaining Stateview

¹ The Stateview Vendors include Stateview Homes (Minu Towns) Inc., Stateview Homes (Nao Towns) Inc., Stateview Homes (High Crown Estates) Inc., Stateview Homes (Nao Towns II) Inc., Stateview Homes (Bea Towns) Inc. and Stateview Homes (Elm&Co) Inc. This list is based on information reported in the Receiver's First Report and remains subject to change. This is a subset of the Stateview Homes group of companies that are the subject of these receivership proceedings.

² These figures are based on information reported in the Receiver's Fifth Report and remain subject to change.

assets. The Purchasers should get the value of their deposits back, through the sale of the real estate they were promised would be the site of their new homes.

6. Tarion asks that the Court order a charge, for the benefit of the Purchasers, that ranks the trust claim ahead of other creditors, including the claims of the applicable first ranking mortgage lenders (the “**Stateview Mortgagees**”). It is appropriate to do so because those lenders registered their security interests with knowledge (or constructive knowledge) of the Purchasers’ entitlement to a trust remedy over the real estate.

7. In the alternative, Tarion asks that the charge rank equally with the claims of the Stateview Mortgagees, on a *pro rata* basis in proportion to the quantum of Stateview equity and lender funds, respectively, used to purchase the real estate that is now to be sold or on some other priority basis so as to provide Purchasers with a meaningful remedy in the circumstances of receivership proceedings.

PART II - THE FACTS

A. Deposits are protected under the Warranties Act

8. Tarion Warranty Corporation is a consumer protection agency that the Ontario government designated to administer the *Ontario New Home Warranties Plan Act*, RSO 1990, c O.31 and its regulations (the “**Warranties Act**”).³ The major purpose of the Warranties Act is to protect purchasers and owners of new homes who, without the protections of the Warranties Act, would be fully exposed to the significant risks associated with new home development.⁴

³ Affidavit of Kevin Brodie, para 2, Tab 2 to Tarion’s Motion Record (the “**Brodie Affidavit**”).

⁴ Brodie Affidavit, paras 3-4.

9. One such risk relates to the deposits that purchasers are generally required to pay to new home vendors when entering an agreement to buy the home. A vendor's subsequent insolvency could wipe out the entire value of the purchaser's financial stake in the project, including their deposit. In response, the Warranties Act provides two principal forms of deposit protection.

10. First, all vendors of new freehold homes are required to incorporate a prescribed addendum (the "**Addendum**") to their agreements of purchase and sale with purchasers.⁵ The Addendum provides that, under certain conditions, all monies received by the vendor under the purchase agreement must be held in trust, using a standard form of deposit trust agreement (the "**DTA**") or otherwise secured in a manner acceptable to Tarion. If these requirements are not met, the Addendum deems those monies to be held in trust for the homebuyer's benefit until those conditions are satisfied.⁶

11. A purchase agreement is subject to these trust obligations if the Vendor has made the purchase agreement conditional upon: (i) the vendor's receipt of confirmation that sales of homes in the development project have exceeded a specified threshold by a specified date; or (ii) the vendor's receipt of confirmation that financing for the project on terms satisfactory to the vendor has been arranged by a specified date (together, the "**Trust Conditions**").⁷

12. The prescribed DTA requires the vendor to pay all trust monies to an escrow agent, who must hold those monies in a separate, designated trust account.⁸ Trust monies may be paid out of

⁵ [*Warranty for Delayed Closing or Delayed Occupancy*](#), O. Reg. 165/08, s 9(1).

⁶ Sample Addendum, Schedule A, s 1(c)(iv), Exhibit M to the Brodie Affidavit, p 347.

⁷ Sample Addendum, Schedule A, ss 1(b)(i) and (ii), Exhibit M Brodie Affidavit, p 347.

⁸ Sample Deposit Trust Agreement, ss 4.1 and 4.2, Exhibit N to the Brodie Affidavit, p 357.

that account only when Tarion determines that they can be released under the DTA.⁹

13. The Warranties Act's second form of deposit protection is a compensation framework administered by Tarion. Where a purchaser is entitled to a refund of his or her deposit and is unable to obtain the refund from the vendor, the purchaser may make a claim to Tarion and receive compensation for the lost deposit up to a maximum of \$100,000. If the deposit claim is determined to be valid, then Tarion pays the claim from a guarantee fund that Tarion maintains.¹⁰

14. Tarion, in turn, can then assert a claim for reimbursement against the vendor or other parties for the lost deposit. By regulation under the Warranties Act, Tarion is subrogated to all rights of recovery of, and can maintain a legal action in the name of (or in its own name), any homebuyer to whom Tarion makes a payment on account of those claims.¹¹

B. Stateview misappropriated Purchaser deposits

15. The Stateview Vendors were residential real estate developers subject to the Warranties Act.¹² Under the Purchase Agreements, they received deposits from 765 sets of Purchasers, all in connection with pre-construction freehold homes.¹³ The Stateview Vendors typically included the Addendum in each Purchase Agreement.¹⁴

16. Some of the Addendums attached to Purchase Agreements included the Trust Conditions.¹⁵ In breach of the Trust Conditions, the Stateview Vendors did not execute DTAs.¹⁶

⁹ Sample Deposit Trust Agreement, s 4.4, Exhibit N to the Brodie Affidavit, p 358.

¹⁰ Brodie Affidavit, para 22.

¹¹ Brodie Affidavit, para 22.

¹² Brodie Affidavit, para 5.

¹³ Fifth Report, ss 2.3(3) and (4).

¹⁴ See, e.g., Redacted Sample APS dated October 13, 2022, Exhibit L to the Brodie Affidavit, p 324; Fifth Report of the Receiver dated October 2, 2023, s 2.3(1) and Appendix A (the "**Fifth Report**").

¹⁵ See, e.g., Redacted Sample APS dated October 13, 2022, Exhibit L to the Brodie Affidavit, p 324.

¹⁶ Brodie Affidavit, para 15.

17. Each of the Stateview Vendors executed builder agreements and vendor agreements with Tarion (collectively, the “**Builder/Vendor Agreements**”).¹⁷ The Stateview Vendors agreed under the Builder/Vendor Agreements that they would attach the Addendum to every Purchase Agreement, and would comply with the requirements of the Addendum, including the DTA requirement that arose when Stateview included the Trust Conditions in a Purchase Agreement.¹⁸

18. In March 2023, the Stateview Vendors, their Chief Executive Officer, and their President acknowledged that they were jointly and severally liable in respect of a cheque-kiting scheme that defrauded Toronto Dominion Bank of approximately \$37 million between April 2022 and March 2023.¹⁹ Weeks later, this Court granted orders placing the Stateview Vendors into receivership and appointing KSV Restructuring Inc. as receiver and manager (the “**Receiver**”).

19. Since its appointment, the Receiver has discovered that the Purchaser’s deposits have all been spent.²⁰ Either the Stateview Vendors did not place the deposits in a segregated trust account, or the deposits were not being held in a segregated trust account when the receivership proceedings commenced.²¹

20. Instead – in breach of the deposit trusts imposed by the Addendum for Purchase Agreements with an unmet Trust Condition – the Stateview Vendors used the deposits to fund their real estate development activities, diverted the deposits for inappropriate purposes, or

¹⁷ Brodie Affidavit, para 6.

¹⁸ Sample Builder Agreement, s 3.9.2, Exhibit A to the Brodie Affidavit, p 34; Sample Vendor Agreement, s 3.9.2, Exhibit B to the Brodie Affidavit, p 52.

¹⁹ First Report of the Receiver dated May 29, 2023, s 2.2(2), Exhibit K to the Brodie Affidavit, p 226 (“**First Report**”).

²⁰ Fifth Report, s 7.

²¹ Fifth Report, s 2.3(5).

both.²² The Receiver has not yet independently determined the use of the deposits.²³ No Purchaser has received any portion of their deposit back.

C. Purchasers and Tarion are left on the hook

21. If the Purchase Agreements are terminated or vested out of the applicable Stateview Vendors' estates during the receivership proceedings, the Purchasers will be entitled to a refund of their deposits from the applicable Stateview Vendors, in accordance with the Warranties Act, the Purchase Agreements, the Addendum and the DTA.²⁴

22. If the Purchasers are unable to recover their deposits from the Stateview Vendors in the receivership proceedings, each Purchaser will file a deposit compensation claim with Tarion up to a maximum amount of \$100,000. Those Purchasers whose deposits exceeded that maximum amount will suffer additional losses. Tarion, in turn, will seek reimbursement from the Stateview Vendors (and potentially other parties) on account of those claims, under its rights of subrogation as well as under the Builder/Vendor Agreements and other rights of action.

23. The Receiver is currently conducting a sale and investment solicitation process for the real property held by the Stateview Vendors (the "**Real Property**").²⁵ Upon completion of that process, the Receiver will receive proceeds from the sale of the Real Property (the "**Proceeds**"), which are expected to be the only meaningful source of recovery for Stateview's creditors.

²² Affidavit of Daniel Pollack sworn April 26, 2023, para 24, Exhibit H to the Brodie Affidavit, p 177 (the "**April 26 Pollack Affidavit**").

²³ Fifth Report, s 2.3(6).

²⁴ [Ontario New Home Warranties Plan Act](#), RSO 1990, c O.31, s 14(1); Redacted Sample APS dated October 13, 2022, s 48, Exhibit L to the Brodie Affidavit, p 301; Redacted Sample APS dated November 5, 2022, s 48, Exhibit C to the Supplemental Brodie Affidavit, p 414.

²⁵ Fifth Report, s 3.

D. Mr. Pollack's October 2 affidavit adduces improper evidence

24. The Receiver has delivered the affidavit of Daniel Pollack sworn October 2, 2023, in opposition to Tarion's motion. This Court should strike out as inadmissible, or in any event give no weight to, paragraphs 8-14 and 16 of that affidavit on the basis that: (i) it is hyperbole and argument; and (ii) even if properly considered to be opinion evidence, such opinions could be given, if at all, only by a qualified expert.

PART III - THE ISSUES

25. The issues in this motion are:

- (a) Did the Stateview Vendors hold deposits in trust for the benefit of Purchasers and breach those deposit trusts and their fiduciary duties thereunder?
- (b) Did the Stateview Vendors benefit from unjust enrichment through their misappropriation of the deposits at the expense of Purchasers?
- (c) Are Purchasers entitled to a constructive trust over the Proceeds as a result of the Stateview Vendors' breach of trust and/or unjust enrichment?
- (d) Alternatively, are Purchasers entitled to a "good conscience" trust over the Proceeds?
- (e) As security for the amounts the Stateview Vendors hold in trust, are Purchasers entitled to a Court-ordered charge?
- (f) Should that charge rank in priority to, or (in the alternative) equally with, the claims of the Stateview Mortgagees?

26. Tarion submits that the answer to each question is yes. Tarion thus seeks: (i) a declaration

that each of questions (a) through (f) is answered in the affirmative; and (ii) a charge for the benefit of the Purchasers, ranking in priority to, or alternatively equally with, the claims of the Stateview Mortgagees, over the assets of the Stateview Vendors in the amount of approximately \$73,037,000 as security for the constructive and/or “good conscience” trusts.

PART IV - THE LAW

Threshold issue: This Court’s jurisdiction to grant the remedies sought

27. This Court has jurisdiction to grant the requested declaratory relief. Under section 97 of the *Courts of Justice Act*, this Court can grant declarations of right in respect of real and not theoretical questions that the claimant has a real interest in raising.²⁶ Tarion meets those criteria.

A. Existence of an express trust, and its breach by Stateview

(i) Stateview held the deposits in trust for the Purchasers’ benefit

28. Under the Addendum, all Purchaser deposits paid to the Stateview Vendors under a Purchase Agreement with an unmet Trust Condition were required (and deemed) to be held in trust by Stateview for the benefit of the Purchaser.

29. Each Purchase Agreement that the Stateview Vendors entered into with a Purchaser incorporated, or was required to incorporate, the Addendum, which provides that all monies, including deposits, paid under that Purchase Agreement are deemed “to be held in trust by the Vendor for the Purchaser on the same terms as are set out in [the DTA]” until the Trust Conditions are satisfied.²⁷ The DTA, among other things, requires vendors to pay trust monies to an escrow agent to be held in a separate, designated and segregated trust account until Tarion

²⁶ *Solosky v R.*, [1979] S.C.J. No. 130 (Q.L.), 105 D.L.R. (3d) 745 (S.C.C.), para 12.

²⁷ Sample Addendum, s 1(c)(iv), Exhibit M to the Brodie Affidavit, p 347.

determines that the deposit funds can be released in accordance with the DTA.²⁸

30. The trust created by the Addendum is an express trust. To be valid, an express trust must meet the well-established “three certainties” – the certainties of intention, subject matter and objects.²⁹ All of these certainties were present for Purchase Agreements with an unmet Trust Condition. The Purchase Agreement and the Addendum clearly establish the first two certainties: the deposits form the subject matter of the trusts, and the Purchasers form the objects.

31. The third certainty – intention – arises in one of two ways.

32. Addendum attached. First, in each case where the Addendum was attached to a Purchase Agreement and that Purchase Agreement contained an unmet Trust Condition, both the Purchasers’ and the Stateview Vendors’ intention was reduced to writing in the Addendum: the intention was that the deposits were to be held in trust.

33. Addendum not attached. Second, if there are Purchase Agreements that did not attach the Addendum, the intention of the Stateview Vendors to hold the deposits in trust was reduced to writing at the time that they entered into the Builder/Vendor Agreements with Tarion. Section 3.9.2 of the Builder/Vendor Agreements demonstrate Stateview’s intention for the Addendum to apply and, by the Addendum’s operation, for the deposits to be held in trust:

3.9.2 The vendor of a project ... shall ensure every agreement of purchase and sale shall have the appropriate Addendum attached to it in accordance with the requirements set out in Regulation 892.³⁰

²⁸ Sample Deposit Trust Agreement, s 4.4, Exhibit N to the Brodie Affidavit, p 358.

²⁹ *Henry v Henry*, [1999] O.J. No. 4089, 30 E.T.R. (2d) 89 (Ont. C.A.) ([Westlaw](#)), para 14; *Howitt v Howden Group Canada Ltd.*, [1999] O.J. No. 706, 170 D.L.R. (4th) 423 (Ont. C.A.), para 8.

³⁰ Sample Builder Agreement, s 3.9.2, Exhibit A to the Brodie Affidavit, p 34; Sample Vendor Agreement, s 3.9.2, Exhibit B to the Brodie Affidavit, p 52 [emphasis added].

34. Likewise, each Purchaser advanced their deposits with the intention that the applicable Stateview Debtor would comply with their statutory obligations. Those obligations include those under Regulation 165/08 of the Warranties Act, which provides that:

9. (1) If, on or after February 1, 2021, parties enter into a purchase agreement for a freehold home or a vacant land condominium home, the vendor shall,

(a) ensure that the parties complete either,

(i) the Freehold Home Addendum (Tentative Closing Date) dated October 7, 2020, or

(ii) the Freehold Home Addendum (Firm Closing Date) dated October 7, 2020;

(b) ensure that the document required to be completed under clause (a) forms part of the purchase agreement; [...]³¹

35. Each of the three certainties is thus met for all Purchase Agreements, including those Purchase Agreements that did not attach the Addendum. All deposits paid on account of a Purchase Agreement with an unsatisfied Trust Condition were therefore held by the Stateview Vendors in trust for the benefit of Purchasers.

(ii) *Stateview breached the deposit trusts*

36. The Stateview Vendors breached the trusts and violated the three duties of trustees:³²

(a) Breach of trust. The deposits are no longer held by the Stateview Vendors, in breach of the DTA, which required the Stateview Vendors to hold the deposits in a segregated trust account. The deposits were either never placed in such an account or were removed from it by the time receivership proceedings were commenced.³³

³¹ Warranty for Delayed Closing or Delayed Occupancy, O. Reg. 165/08, s 9(1) [emphasis added].

³² Valard Construction Ltd. v Bird Construction Co., 2018 SCC 8, paras 17-18.

³³ Fifth Report, s 2.3(5).

- (b) Profited from trust property. The Stateview Vendors profited from, rather than safeguarded, the deposits. They used trust property to fund their real estate development activities or diverted that property for inappropriate purposes.³⁴
- (c) Acted dishonestly. There is also substantial evidence that the Stateview Vendors acted dishonestly. The Stateview Vendors' have acknowledged serious fraudulent and other inappropriate conduct in their financial dealings.³⁵

B. Stateview benefitted from unjust enrichment

37. The trust analysis above relates to Purchase Agreements with unmet Trust Conditions, which is a subset of the agreements that the Receiver has identified. If the Court agrees that Purchasers with unmet Trust Conditions benefit from an express trust under the Addendum, it will be necessary for the Receiver to review the Purchase Agreements to determine which ones have unmet Trust Conditions, and to report back to the Court with the results.

38. In addition to the Addendum's express trust which benefits some Purchasers, all Purchasers are entitled to a constructive trust remedy, or a good conscience trust remedy, as a result of the Stateview Vendors having been unjustly enriched by their misappropriation of the Purchasers' deposits.

39. The three required elements of unjust enrichment are established in the circumstances:

- (a) Enrichment. Unjust enrichment requires the respondent to have obtained an enrichment of some economic value or benefit.³⁶ The Stateview Vendors received

³⁴ April 26 Pollack Affidavit, para 24.

³⁵ First Report, s 2.2(2).

³⁶ [Kerr v Baranow](#), 2011 SCC 10, para 38.

such a benefit from the deposits, which they either used to fund their development activities or misappropriated for their personal gain.

- (b) Corresponding deprivation. The claimant must have given something to the respondent that the respondent received and retained.³⁷ Here, the Purchasers were deprived of the deposits that they paid to the Stateview Vendors.
- (c) No juristic reason. There is no juristic reason justifying Stateview's misconduct.³⁸ Under the Purchase Agreements, Stateview was not legally permitted to take the benefit of the deposits while giving the Purchasers nothing in return. Unjust enrichment exists in the contractual context where the claimant stands deprived of its contractual entitlement and relief from the court would support the contract's essential aim.³⁹

C. The Purchasers are entitled to a constructive trust over the Proceeds

40. Given the Stateview Vendors' unjust enrichment in respect of all Purchasers, and their breach of the Addendum's express trust for certain Purchasers, the proper remedy is to impress the Proceeds from the sale of the Real Property with a constructive trust for Purchasers' benefit.

41. A constructive trust is an equitable remedy that comes into existence, regardless of a party's intent, when the law imposes an obligation on a party to hold specific property for another.⁴⁰ Courts retain discretion to award a constructive trust as a remedy to prevent unjust enrichment, give effect to the parties' intentions, or deter wrongdoing (such as a trustee's breach

³⁷ [Kerr v Baranow](#), 2011 SCC 10, para 39.

³⁸ [Kerr v Baranow](#), 2011 SCC 10, para 40.

³⁹ [Moore v Sweet](#), 2018 SCC 52, para 73; [Aber Resources Ltd. v Winspear Resources Ltd.](#), 2000 BCSC 463, para 62.

⁴⁰ [Hussaini v Crowe Soberman Inc.](#), 2019 ONSC 642, para 55.

of fiduciary obligation).⁴¹ A court must consider the competing equitable interests to decide whether, on balance, the court should exercise its discretion to award a constructive trust as opposed to a monetary award for damages.⁴²

42. Courts often consider several factors when weighing those equities, four of which are salient in the present circumstances: (i) the degree of connection between the misappropriated property and the property over which the constructive trust is to be impressed; (ii) the interests of other creditors; (iii) the parties' legitimate expectations; and (iv) the adequacy of a monetary damages award. No single factor is determinative. Each factor is discussed here in turn.

(i) *There is a strong degree of connection between the deposits and the Proceeds*

43. First, there must be a sufficient degree of connection between the disputed asset and the misappropriated trust property.⁴³ The strongest connection is established through tracing – where the misappropriated trust property can be traced through to separate disputed property. In this case, tracing may demonstrate that the Real Property was purchased, maintained or improved, in whole or in part, with the Purchaser's deposits; the Receiver's investigation into the spending of the deposits is not yet complete. But regardless of that investigation, tracing is not required for a constructive trust to arise in the insolvency context – particularly where forensic tracing would be difficult and expensive.⁴⁴

⁴¹ [Pettkus v Becker](#), [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 (S.C.C.), para 37.

⁴² [Baltman v Coopers & Lybrand Ltd.](#), [1996] O.J. No. 3963, 43 C.B.R. (3d) 33 (Ont. Gen. Div. [In Bankruptcy]) ([Westlaw](#)), para 46.

⁴³ [Kerr v Baranow](#), 2011 SCC 10, para 51; [Peter v Beblow](#), [1993] 1 S.C.R. 980, 101 D.L.R. (4th) 621 (S.C.C.), para 30; [Moore v Sweet](#), 2018 SCC 52, para 91; [306440 Ontario Ltd. v 782127 Ontario Ltd.](#), 2014 ONCA 548, para 30.

⁴⁴ [Byer \(Re\)](#), 2022 BCSC 2018, para 92; [British Columbia \(Securities Commission\) v Bossteam E-Commerce Inc.](#), 2017 BCSC 787, paras 16, 36.

44. Instead, Supreme Court jurisprudence provides that a constructive trust can be impressed upon disputed property where the claimant's monetary contribution to the acquisition, maintenance or improvement of that property is "linked or causally connected" to the property.⁴⁵ This principle has been regularly adopted by courts in commercial and insolvency contexts.⁴⁶

45. Here, the strong connection between the deposits and the Real Property meets the threshold for a constructive trust. The deposits were a fundamental and necessary component of the Stateview Vendors' real estate development projects. Some of the deposits were directly applied to improve the value of the Real Property, including to pay development charges and cash in lieu of parkland dedication.⁴⁷

46. However, the connection between the deposits and the acquisition of Real Property was deeper than that – it was causal in nature. The deposits were a fundamental and inseverable component of the Purchase Agreements, without which the Stateview Vendors would have been unlikely to obtain financing for the developments, including mortgage lending. Certain mortgage lenders may have also specified minimum sale thresholds as a condition precedent to the advance of monies under their loans. But for the deposits and the Purchase Agreements they facilitated, it is reasonable to conclude that the Real Property would never have been acquired or developed to its current status.

⁴⁵ *Moore v Sweet*, 2018 SCC 52, para 91; *Pettkus v Becker*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 (S.C.C.), para 49; *Peter v Beblow*, [1993] 1 S.C.R. 980, 101 D.L.R. (4th) 621 (S.C.C.), para 30; *Palachick v Kiss*, [1983] 1 S.C.R. 623, 146 D.L.R. (3d) 385 (S.C.C.), para 27; *Sorochan v Sorochan*, [1986] 2 S.C.R. 38, 29 D.L.R. (4th) 1 (S.C.C.), para 31.

⁴⁶ *Director under the consumer and commercial relations Act v Toronto Dominion Bank*, [2003] 64 O.R. (3d) 97, 40 C.B.R. (4th) 127 (Ont. C.A.), paras 37-38; see also, *Exponents Canada Inc. v Sharma*, 2014 ONSC 7097, paras 77-78; *306440 Ontario Ltd. v 782127 Ontario Ltd.*, 2014 ONCA 548, paras 28-30.

⁴⁷ April 26 Pollack Affidavit, para 23.

(ii) A constructive trust brings other creditors back to the status quo

47. A second factor considered by the courts is the impact a constructive trust would have on other creditors. This is a factor that can be effectively managed by the Court, having regard to the various interests of creditors and deciding the precise terms of such constructive trust. Here, Stateview's other creditors' interests would not be unfairly prejudiced by the imposition of a constructive trust. To the contrary, it would be unjust to permit Stateview's other creditors to receive the value of deposits that enabled, or have become incorporated into, the Proceeds because of Stateview's wrongdoing.

48. While proprietary remedies in an insolvency context must be balanced against the interests of the other creditors, this Court and others have recognized that those interests hold little weight where other creditors were not entitled to the disputed property in the first place:⁴⁸

As pointed out by Justice Morawetz in *Redstone*, the interests of the general body of creditors in a bankruptcy is not a factor that will render the imposition of a constructive trust unjust if the property over which the trust is imposed would not have been available to the creditors without the wrongful acts of the insolvent defendant. In such a case it would be unjust to permit the general body of creditors to benefit from the wrongful acts of that defendant.⁴⁹

49. The Ontario Court of Appeal has affirmed this principle, holding that that the equities between faultless secured creditors and trust claimant victims of a debtor's misconduct favour a constructive trust remedy for those claimants where: (i) the trust claimants were not, and did not intend to be, creditors of the debtor and had not accepted the risk of economic harm in its insolvency; (ii) the secured creditor could not reasonably expect to benefit from the debtors' use

⁴⁸ *Redstone Investment Corp., Re*, 2015 ONSC 533, para 82.

⁴⁹ *0731431 B.C. Ltd. v Panorama Parkview Homes Ltd.*, 2021 BCSC 607, para 490.

of misappropriated trust funds to increase the value of its business assets; and (iii) the secured creditor had other security that it could look to in order to satisfy its claims.⁵⁰

50. The Court of Appeal's analysis applies squarely to the Addendum's express trust. Had the Stateview Vendors complied with their trust obligations under the Addendum and the DTA and held the deposits in segregated trust accounts, those monies would not have been available to satisfy claims of Stateview's other creditors in the first place. Stateview wrongly applied the deposits to maintain and improve the value of Real Property. It would be unfair to allow other creditors to receive the surplus value of the Proceeds generated by those wrongful activities.

51. The Purchasers, for their part, never accepted the risk of economic harm in Stateview's insolvency. They expected that Stateview would comply with the Addendum trust that they contracted for in their Purchase Agreements, or otherwise expected Stateview to comply with its statutory obligations and abide by the terms of the Addendum (as discussed in the next section).

52. In the case of the constructive trust sought to remedy Stateview's unjust enrichment, a similar analysis applies. The Real Property is owned by Stateview, and Stateview's other creditors hold security over the Real Property because of the misuse of the Purchasers' deposits. The other creditors should not be able to benefit from a security position that exists only because of unjust enrichment.

53. The imposition of a constructive trust in the Proceeds returns all creditors to the *status quo*. By segregating the surplus value of the Proceeds that was generated by Stateview's

⁵⁰ [*Director under the consumer and commercial relations Act v Toronto Dominion Bank*](#), [2003] 64 O.R. (3d) 97, 40 C.B.R. (4th) 127 (Ont. C.A.), paras 40-43.

misappropriation of the Purchasers' property, a constructive trust would ensure that value goes only to the Purchasers who are entitled to it.

(iii) *The parties held a legitimate expectation that the deposits would be returned to Purchasers*

54. Another factor considered by the courts in deciding whether to impose a constructive trust is whether the parties held a legitimate expectation that the deposits would be safely held. As the Supreme Court has noted, the legitimate expectations of the parties are a “fundamental concern” in determining whether to award a constructive trust remedy.⁵¹

55. In the case of the Addendum's express trust, the Purchasers and the Stateview Vendors all held a legitimate and reasonable expectation that the deposits would be held in trust and safeguarded for the Purchasers' benefit until the Trust Conditions were satisfied. In the case of Purchase Agreements that included the Addendum, this expectation was reduced to writing at the time those agreements were signed.

56. The parties likewise held this expectation for deposits advanced under Purchase Agreements that failed to attach the Addendum. The Purchasers expected that Stateview would comply with its statutory obligations, and the Warranties Act regulations explicitly required Stateview to incorporate the Addendum into each Purchase Agreement.⁵² Likewise, the

⁵¹ [Peter v Beblow](#), [1993] 1 S.C.R. 980, 101 D.L.R. (4th) 621 (S.C.C.), para 10; *Baltman v Coopers & Lybrand Ltd.*, [1996] O.J. No. 3963, 43 C.B.R. (3d) 33 (Ont. Gen. Div. [In Bankruptcy]) ([Westlaw](#)), para 43.

⁵² [Warranty for Delayed Closing or Delayed Occupancy](#), O. Reg. 165/08, s 9(1).

Stateview Vendors' expectation that the Addendum would govern every Purchase Agreement was reduced to writing in their Builder/Vendor Agreements with Tarion.⁵³

57. Stateview's secured creditors also held, or ought to have held, this same expectation. Mortgage lenders are sophisticated commercial entities familiar with the statutory framework established by the Warranties Act and the home development industry's standard practices. They knew, or ought to have known, that each of Stateview's Purchase Agreements would include the Addendum and, consequently, that the deposits would be held in trust in accordance with the DTA while there were unmet Trust Conditions. None of Stateview's creditors could reasonably have expected to receive the benefit of the deposits in the event of Stateview's insolvency.

58. A similar analysis applies to the constructive trust arising from Stateview's unjust enrichment. Neither the Purchasers nor the Stateview Vendors expected that Stateview could use the deposits without providing a home to the Purchasers in return. It was understood and agreed that, if the home was not provided, Stateview would refund the Purchaser's deposit.

(iv) A money remedy is inadequate

59. A fourth consideration in deciding whether to impose a constructive trust is whether a monetary award for damages, as opposed to a proprietary constructive trust, is an adequate remedy in the circumstances. As the Supreme Court has noted, "the court may take into account the probability of the award's being paid as well as the special interest in the property acquired

⁵³ Sample Builder Agreement, s 3.9.2, Exhibit A to the Brodie Affidavit, p 34; Sample Vendor Agreement, s 3.9.2, Exhibit B to the Brodie Affidavit, p 52.

by the contributions” when determining if a monetary award is sufficient.⁵⁴ The respondent’s insolvency generally renders personal remedies inadequate.⁵⁵

60. A money award would be meaningless in light of Stateview’s insolvency. Damage awards are unsecured claims that would receive no recovery in circumstances where the Proceeds will be distributed to secured creditors in Stateview’s receivership. A personal remedy also fails to recognize that a portion of the value realized through the Proceeds is directly attributable to the Purchasers’ property that Stateview misappropriated, as discussed above.

Conclusion: a constructive trust is appropriate

61. In sum, a constructive trust is a fair and equitable remedy for Stateview’s breach of trust and unjust enrichment. There is a substantial connection between the misappropriated deposits and the value of the Real Property realized through the Proceeds. A constructive trust does not unfairly impair the interests of Stateview’s other creditors, but rather, brings them back to the *status quo* that would have existed but for Stateview’s wrongdoing. It was, or ought to have been, the reasonable expectation of all parties – including creditors – that this *status quo* would be maintained. Even if in the Court’s view there is prejudice that needs to be addressed in the context of a constructive trust remedy, then this Court is well situated to address such prejudice in the design of the constructive trust. Finally, a damages award would be a meaningless given Stateview’s insolvency.

⁵⁴ [Peter v Beblow](#), [1993] 1 S.C.R. 980, 101 D.L.R. (4th) 621 (S.C.C.), para 34; [Lac Minerals Ltd. v International Corona Resources Ltd.](#), [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 (S.C.C.), paras 72-73.

⁵⁵ [0731431 B.C. Ltd. v Panorama Parkview Homes Ltd.](#), 2021 BCSC 607, para 488.

D. Alternatively, the Purchasers are entitled to a “good conscience” trust

62. In the case of the express deposit trust under the Addendum, the Purchasers are entitled to a “good conscience” constructive trust as an alternative to the constructive trust remedy described above. While constructive trusts are available to remediate unjust enrichment and breaches of trust, the Supreme Court has recognized that “good conscience” constructive trusts are also available to remedy wrongdoing, based on a distinct analytical rationale.

63. A constructive trust “may be imposed where good conscience so requires,” or where equity demands a proprietary remedy to “sustain the integrity of the laws which [the court] supervises.”⁵⁶ In this context, a constructive trust is a “broad and flexible equitable tool which permits courts to gauge all the circumstances of the case, including the respective contributions of the parties, and to determine beneficial entitlement.”⁵⁷

64. Justice Morawetz re-articulated the four-part test for a “good conscience” constructive trust for this Court in the insolvency context: (i) the respondent must have been under and equitable obligation in respect of the spent or diverted property; (ii) the disputed property must have come into the respondent’s hands through activities in breach of that equitable obligation; (iii) there must be a legitimate reason for the claimant to seek a proprietary remedy; and (iv) there must be no other factors rendering the trust unjust.⁵⁸ Each factor is discussed in turn.

65. Equitable Obligation. First, the respondent must have been under an equitable obligation in respect of the property of the type that courts enforce in relation to the activities giving rise to

⁵⁶ *Soulos v Korkontzilas*, [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214 (S.C.C.), paras 12 and 34; see also, *British Columbia (Securities Commission) v Bossteam E-Commerce Inc.*, 2017 BCSC 787, paras 29-31.

⁵⁷ *Moore v Sweet*, 2018 SCC 52, para 90.

⁵⁸ *Redstone Investment Corp., Re*, 2015 ONSC 533, para 68.

the assets in its hands.⁵⁹ A fiduciary duty is one such obligation.⁶⁰ As described in detail above, the Addendum required Stateview to hold the deposits in trust for the benefit of Purchasers. Stateview's fiduciary obligations required them to, among other things, safeguard the deposits in a segregated trust account until the Trust Conditions were met for the corresponding Purchase Agreement. Stateview was prohibited from misappropriating the deposits for its own gain.

66. Breach of Obligation. Second, the disputed property must come into the respondent's hands as a result of activities in breach of the respondent's equitable obligations.⁶¹ As discussed above, Stateview breached its fiduciary obligations. It failed to safeguard the deposits in accordance with the Addendum and the DTA, and the resulting value of the Real Property in its hands was directly increased by Stateview's collection and misappropriation of the deposits.

67. Legitimate Reason for Remedy. Third, the claimant must establish a legitimate personal or public policy reason to seek a proprietary remedy.⁶² This factor is generally met where the respondent's insolvency renders a money remedy ineffective.⁶³ As discussed, a proprietary remedy is the only effective way to make the Purchasers whole in Stateview's receivership.

68. There are also compelling public policy reasons to impose a meaningful remedy. The Warranties Act requires the Addendum to be incorporated into agreements of purchase and sale for freehold homes and relies on trust law to ensure that the Addendum is upheld. Without meaningful enforcement of that legislative framework, there is little incentive to prevent future

⁵⁹ [Redstone Investment Corp., Re](#), 2015 ONSC 533, para 68.

⁶⁰ [Moore v Sweet](#), 2018 SCC 52, paras 32-33; [0731431 B.C. Ltd. v Panorama Parkview Homes Ltd.](#), 2021 BCSC 607, para 482.

⁶¹ [Redstone Investment Corp., Re](#), 2015 ONSC 533, para 68.

⁶² [Redstone Investment Corp., Re](#), 2015 ONSC 533, para 68.

⁶³ [0731431 B.C. Ltd. v Panorama Parkview Homes Ltd.](#), 2021 BCSC 607, para 488.

developers from similarly circumventing these trust rules for personal gain. Likewise, secured creditors would have little incentive to perform due diligence on future borrowers if those creditors were permitted to retain the benefit of misappropriated trust property. There would also be greater risk imposed on future purchasers entering into similar agreements.

69. No Unjust Factors. Finally, courts impose a “good conscience” trust only if nothing otherwise renders the trust unjust. The primary concern in an insolvency context is the interests of other creditors.⁶⁴ As discussed, had Stateview held the deposits in a segregated trust account, those monies would have been unavailable to other creditors in the first place. A good conscience trust therefore does not prejudice those creditors’ interests. A constructive trust is fair and appropriate in the circumstances, given in particular the established fact of Stateview’s fraudulent and otherwise inappropriate financial conduct.

E. The Purchasers are entitled to a court-ordered charge as security for their constructive trust remedy

70. The Stateview Vendors are insolvent, and the deposits have been spent or misappropriated. The practical realities of this matter require an appropriate mechanism to give effect to proprietary remedies arising from Stateview’s wrongful conduct. That mechanism is a court-ordered charge or lien.

71. Sections 243 and 183 of the BIA grant this Court broad jurisdiction at law and in equity to exercise original, auxiliary and ancillary jurisdiction in receivership proceedings.⁶⁵ As the Supreme Court recently recognized, “Sections 243 and 183 of the BIA authorize courts to do

⁶⁴ [Redstone Investment Corp., Re](#), 2015 ONSC 533, paras 68, 81-82; [0731431 B.C. Ltd. v Panorama Parkview Homes Ltd.](#), 2021 BCSC 607, para 490.

⁶⁵ [Bankruptcy and Insolvency Act](#), R.S.C., 1985, c. B-3, ss 183 and 243.

what practicality demands in the context of a receivership.”⁶⁶

72. This Court regularly exercises that jurisdiction to grants charges over debtor assets in insolvency proceedings. For example, where the insolvency legislation’s objectives are fulfilled through the value provided by a receiver’s borrowings, DIP financing, a stalking horse break fee or a key employee retention plan, this Court regularly grants charges as security for that value, even if the security primes secured creditors.⁶⁷ In each case, the value is fair and reasonably necessary to permit the debtor’s restructuring to proceed more effectively or efficiently.

73. Here, the constructive trust remedy will not serve its purpose as a proprietary remedy unless it is accompanied by a charge or lien as security for the remedy. For the Real Property sale process to proceed efficiently and unimpeded, without Purchaser objections, practicality demands a fair and efficient mechanism to recognize the nature of the Purchasers’ claims. The Receivership Proceedings will proceed more efficiently for all parties, and the objectives of the BIA will be advanced, if this Court grants a charge or lien to reflect the Purchasers’ proprietary constructive trust claims and remove that uncertainty.

F. That court-ordered charge should rank in priority to, or alternatively equally with, the claims of the Stateview Mortgagees

74. Tarion asks that the Court order a charge, for the benefit of the Purchasers, that ranks the trust claim ahead of the claims of the Stateview Mortgagees. It is appropriate to do so because these lenders registered their security interests with knowledge (or constructive knowledge) of the Purchasers’ entitlement to a trust remedy over the real estate.

⁶⁶ *Peace River Hydro Partners v Petrowest Corp.*, 2022 SCC 41, para 9.

⁶⁷ See, e.g., *Timminco Ltd., Re*, 2012 ONCA 552, paras 5-6; *Comstock Canada Ltd., Re*, 2013 ONSC 4700, para 20.

75. In the alternative, Tarion asks that the charge rank equally with the claims of the Stateview Mortgagees, on a *pro rata* basis in proportion to the quantum of Stateview equity and lender funds, respectively, used to purchase the Real Estate or on some other priority basis to give Purchasers a meaningful remedy in the circumstances of receivership proceedings.

PART V - RELIEF REQUESTED

76. For the foregoing reasons, Tarion respectfully requests:

- (a) declarations that: (i) all deposits advanced pursuant to Purchase Agreements with an unmet Trust Condition were held in trust by the Stateview Vendors for the benefit of the corresponding Purchasers, and the Stateview Vendors breached those trusts; (ii) the Stateview Vendors were unjustly enriched by the Purchaser's deposits; (iii) the Purchasers are entitled to a constructive trust in the Proceeds as a remedy for the Stateview Vendors' breach of trust and unjust enrichment; and (iv) in the alternative, in respect of Stateview's breach of the express trust, that the Purchasers are entitled to a "good conscience" trust in the Proceeds as a remedy for the Stateview Vendors' breach of trust; and
- (b) a charge, ranking in priority to the claims of the Stateview Mortgagees, on the assets of the Stateview Vendors in the amount of \$73,037,000 as security for the constructive and/or "good conscience" trusts (or an alternative Court-order charge or priority).



ALL OF WHICH IS RESPECTFULLY SUBMITTED

this 26th day of October, 2023.

David Outerbridge / Adam M. Slavens
Jonathan Silver / Mike Noel

Lawyers for Tarion Warranty Corporation

SCHEDULE A – LIST OF AUTHORITIES

1. [*Solosky v R.*](#), [1979] S.C.J. No. 130 (Q.L.), 105 D.L.R. (3d) 745 (S.C.C.)
2. [*Henry v Henry*](#), [1999] O.J. No. 4089, 30 E.T.R. (2d) 89 (Ont. C.A.)
3. [*Howitt v Howden Group Canada Ltd.*](#), [1999] O.J. No. 706, 170 D.L.R. (4th) 423 (Ont. C.A.)
4. [*Valard Construction Ltd. v Bird Construction Co.*](#), 2018 SCC 8
5. [*Kerr v Baranow*](#), 2011 SCC 10
6. [*Moore v Sweet*](#), 2018 SCC 52
7. [*Aber Resources Ltd. v Winspear Resources Ltd.*](#), 2000 BCSC 463
8. [*Hussaini v Crowe Soberman Inc.*](#), 2019 ONSC 642
9. [*Pettkus v Becker*](#), [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 (S.C.C.)
10. [*Baltman v Coopers & Lybrand Ltd.*](#), [1996] O.J. No. 3963, 43 C.B.R. (3d) 33 (Ont. Gen. Div. [In Bankruptcy])
11. [*Peter v Beblow*](#), [1993] 1 S.C.R. 980, 101 D.L.R. (4th) 621 (S.C.C.)
12. [*306440 Ontario Ltd. v 782127 Ontario Ltd.*](#), 2014 ONCA 548
13. [*Byer \(Re\)*](#), 2022 BCSC 2018
14. [*British Columbia \(Securities Commission\) v Bossteam E-Commerce Inc.*](#), 2017 BCSC 787
15. [*Palachick v Kiss*](#), [1983] 1 S.C.R. 623, 146 D.L.R. (3d) 385 (S.C.C.)
16. [*Sorochan v Sorochan*](#), [1986] 2 S.C.R. 38, 29 D.L.R. (4th) 1 (S.C.C.)
17. [*Director under the consumer and commercial relations Act v Toronto Dominion Bank*](#), [2003] 64 O.R. (3d) 97, 40 C.B.R. (4th) 127 (Ont. C.A.)
18. [*Exponents Canada Inc. v Sharma*](#), 2014 ONSC 7097
19. [*Redstone Investment Corp., Re*](#), 2015 ONSC 533
20. [*0731431 B.C. Ltd. v Panorama Parkview Homes Ltd.*](#), 2021 BCSC 607
21. [*Lac Minerals Ltd. v International Corona Resources Ltd.*](#), [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 (S.C.C.)
22. [*Soulos v Korkontzilas*](#), [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214 (S.C.C.)
23. [*Peace River Hydro Partners v Petrowest Corp.*](#), 2022 SCC 41
24. [*Timminco Ltd., Re*](#), 2012 ONCA 552
25. [*Comstock Canada Ltd., Re*](#), 2013 ONSC 4700

SCHEDULE B – TEXT OF STATUTES AND REGULATIONS

Warranty for Delayed Closing or Delayed Occupancy, O. Reg. 165/08

Delayed closing after *New Home Construction Licensing Act, 2017*

9 (1) If, on or after February 1, 2021, parties enter into a purchase agreement for a freehold home or a vacant land condominium home, the vendor shall,

- (a) ensure that the parties complete either,
 - (i) the Freehold Home Addendum (Tentative Closing Date) dated October 7, 2020,
or
 - (ii) the Freehold Home Addendum (Firm Closing Date) dated October 7, 2020;
- (b) ensure that the document required to be completed under clause (a) forms part of the purchase agreement; and
- (c) upon request, furnish to the Registrar proof that the requirement in clause (b) is met.

(2) The vendor warrants to the purchaser that the vendor will comply with the requirements applicable to the home that are imposed by section 7 of the applicable Addendum that forms part of the purchase agreement under subsection (1), even if the vendor has not complied with that subsection.

(3) The Corporation shall keep the forms for the documents mentioned in subsection (1) available for inspection at the offices of the Corporation during normal business hours, and shall make them available on the Corporation's website.

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

Compensation

14 (1) Subject to the regulations, a person who has entered into a contract to purchase a home from a vendor is entitled to receive payment out of the guarantee fund for the amount that the person paid to the vendor as a deposit or other payment to be credited to the purchase price under the contract on closing if,

- (a) the person has exercised a statutory right to rescind the contract before closing; or
- (b) the person has a cause of action against the vendor resulting from the fact that title to the home has not been transferred to the person because,
 - (i) the vendor has gone into bankruptcy, or
 - (ii) the vendor has fundamentally breached the contract.

Same, construction contract

(2) Subject to the regulations, an owner of land who has entered into a contract with a builder for the construction of a home on the land and who has a cause of action against the builder for damages resulting from the builder's failure to substantially perform the contract, is entitled to receive payment out of the guarantee fund of the amount by which the amount paid by the owner to the builder under the contract exceeds the value of the work and materials supplied to the owner under the contract.

Same, breach of warranty

(3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,

(a) the person became the owner of the home through receiving a transfer of title to it or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and

(b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

Same, major structural defect

(4) Subject to the regulations, an owner who suffers damage because of a major structural defect mentioned in clause 13 (1) (b) is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct the major structural defect if the owner makes a claim within four years after the warranty expires or such longer time under such conditions as are prescribed.

Interpretation, substantial performance

(5) For the purposes of this section, a contract is substantially performed if it is substantially performed within the meaning given by subsection 2 (1) of the Construction Act.

Timelines and procedures for claims

(5.0.1) The timelines and procedures associated with claims for compensation from the guarantee fund may be prescribed by regulation made by the Lieutenant Governor in Council.

Conflict

(5.0.2) In the event of a conflict, a regulation made by the Lieutenant Governor in Council for the purposes of subsection (5.0.1) prevails over a by-law of the Corporation passed under section 23.

Delayed occupancy or closing

(5.0.3) Subject to the regulations, a person who has entered into an agreement to purchase a home from a vendor is entitled to receive payment out of the guarantee fund for a delay in,

- (a) occupancy of the new home, as determined by the regulations; or
- (b) closing the agreement of purchase and sale, as determined by the regulations.

Evidence required of claimant

(5.1) Subject to subsection (5.2), a claimant under a claim,

- (a) shall explain, in accordance with the regulations, the reasons for the concern giving rise to the claim;
- (b) if the claim does not relate to an entitlement to receive compensation out of the guarantee fund under subsection (1) or (2) or is not a prescribed claim, shall include, in the reasons for the concern giving rise to the claim, a description of the symptoms of the concern that have been observed or experienced, unless the regulations provide otherwise; and
- (c) is not required to prove the cause of the concern giving rise to the claim if the claimant has complied with clauses (a) and (b), unless the regulations provide otherwise.

Exception

(5.2) Subsection (5.1) does not apply to,

- (a) a claim after the Corporation makes a decision mentioned in subsection (1) in respect of the claim; or
- (b) a claim in respect of common elements or prescribed property of a condominium corporation.

Response of Corporation

(6) The Corporation shall investigate the concern giving rise to a claim to verify that it relates to an entitlement to receive compensation out of the guarantee fund under subsection (1), (2), (3) or (4) and, if it does, shall determine whether the claimant is entitled to receive such compensation and how it will deal with the claim.

Inquiries, etc.

(7) In investigating a concern under subsection (6), the Corporation may make any inquiries, conduct any inspections or apply any technical and other expertise that it considers appropriate.

Expert help

(8) An individual making an inquiry or conducting an inspection under subsection (7) on behalf of the Corporation may be accompanied by one or more persons with special expert or professional knowledge, and other persons as necessary, as the individual considers advisable.

Conduct of inquiries, etc.

(9) The Corporation shall ensure that any actions it takes under subsection (7) are done in accordance with the regulations, if any.

Process of dealing with claims

(10) In dealing with a claim, the Corporation may use a range of processes for inquiring into the claim and for engaging with the claimant and other affected parties.

Other recovery

(11) In determining the amount for which a claimant is entitled to receive payment out of the guarantee fund, the Corporation shall, subject to the prescribed requirements or restrictions, if any, take into consideration any benefit, compensation or indemnity payable or the value of work and materials furnished to the claimant from any source.

Performance

(12) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages that are claimed.

Notice of decision

(13) When the Corporation makes a decision in respect of a claim, it shall serve notice of the decision, together with reasons for the decision, on the claimant and the other persons, if any, that are prescribed.

Appeal to tribunal

(14) A notice under subsection (13) shall state that the claimant is entitled to appeal the decision to the tribunal by providing notice to the tribunal, to the Corporation and to the other persons, if any, that are prescribed, in the form and within the time that is prescribed.

Copy of notice of appeal

(15) The Corporation shall provide a copy of any notice of appeal it receives under subsection (14) to the relevant vendor or builder and to any other persons that may be prescribed.

Dispute resolution

(16) The right to a hearing before the tribunal does not preclude the Corporation from making available one or more voluntary dispute resolution processes for a claim.

Tribunal hearing

(17) If the tribunal receives a notice of appeal under subsection (14), it shall appoint a time for and hold a hearing.

Parties

(18) The Corporation and the claimant are the parties to the proceedings before the tribunal under this section, unless the regulations provide otherwise.

Order

(19) After holding a hearing, the tribunal may,

(a) by order, direct the Corporation to take the action that the tribunal considers the Corporation ought to take in accordance with this Act and the regulations; and

(b) for the purposes of the order, substitute its opinion for that of the Corporation.

Other remedies unaffected

(20) Unless the regulations specifically provide otherwise, nothing in this Act restricts the remedies otherwise available to an owner or any other prescribed person for the failure of another person to perform a duty imposed by this Act.

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed, 2001, c. 4, s. 33]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

- (e) in the Province of Prince Edward Island, the Supreme Court of the Province;
- (f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;
- (g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court;
and
- (h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Superior Court jurisdiction in the Province of Quebec

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

Courts of appeal — common law provinces

(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

Court of Appeal of the Province of Quebec

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

Supreme Court of Canada

(3) The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of receiver

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part

of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of disbursements

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

