

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE  
TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT  
KINGTOWNS INC. AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE  
"APPLICANTS")**

**AND IN THE MATTER OF TCC/URBANCORP (BAY) LIMITED PARTNERSHIP**

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**RESPONDING FACTUM OF TARION WARRANTY CORPORATION  
(motion returnable June 26, 2018)**

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**AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP  
(ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP  
(MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW  
PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KRI  
RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE  
ON KING INC. AND THE AFFILIATED ENTITIES LISTED IN  
SCHEDULE "A" HERETO**

**RESPONDING FACTUM OF TARIION WARRANTY CORPORATION  
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**PART I - OVERVIEW**

1. Tarion Warranty Corporation ("Tarion") files this factum in response to the motion of the Monitor,<sup>1</sup> who seeks an order declaring that Tarion's delay claims<sup>2</sup> be disallowed in full.
2. As agreed to in the minutes of settlement entered into by Tarion and the Monitor, Tarion will be entitled to claim over against the Urbancorp Vendors<sup>3</sup> for purchasers' delayed closing claims, to the extent that delayed closing claims are capable of being asserted, are asserted, and are determined to be valid under the *Ontario New Home Warranties Plan Act*<sup>4</sup> (together with the regulations promulgated thereunder, the "Act"). Accordingly, this motion is not about Tarion's entitlement to claim over against the Urbancorp Vendors.

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<sup>1</sup> The Monitor is KSV Kofman Inc.

<sup>2</sup> Delay claims may consist of delayed occupancy claims, which refer to claims made by purchasers of condominium units, and delayed closing claims, which refer to claims made by purchasers of freehold homes. The balance of this Factum will refer to delayed closing claims and the corresponding terminology that is relevant to such claims.

<sup>3</sup> The Urbancorp Vendors are Urbancorp (Lawrence) Inc., Urbancorp (St. Clair Village) Inc., Urbancorp (Mallow) Inc., Urbancorp (Woodbine) Inc. and Urbancorp (Bridlepath) Inc.

<sup>4</sup> R.S.O. 1990, c. O. 31 [*Act*].

3. This motion is instead about much narrower issues: (a) whether or not the underlying delayed closing claims of purchasers are *capable* of being validly asserted under the Act; and (b) whether or not Tarion should administer the process to determine this.

4. Tarion does not seek a windfall. At the time it filed its proof of claim in these proceedings, Tarion determined that these claims were capable of being asserted in amounts of \$7,500 each. It did not then, and has not since, determined the validity of any specific claim because none have been filed to date. Tarion only seeks: (a) the opportunity to administer and determine any such claims that are actually asserted by purchasers; and (b) to have access to a reserve of funds to deal with these claims. This Court, therefore, has a turn-key solution with which to deal with the matters raised on this motion.

5. Allowing Tarion's delayed closing claims on this basis would not determine the validity of such claims: it would merely permit Tarion to administer and assess these claims in a manner consistent with the Act. The Ontario Legislature gave Tarion a broad public interest mandate to protect new home purchasers and delegated to it broad powers to accomplish this mandate. To disallow Tarion's claim would pre-empt the procedures in the Act and undermine this delegation of powers.

6. While not determinative of the issue before the Court, these potential purchaser claims likely represent the last source of recovery for purchasers, who to date have seen approval and vesting orders vest out their rights, the cancellation of their development projects, and their claims for contractual damages denied. There is a public interest in upholding purchasers' statutory rights to pursue claims in respect of delayed closing compensation and Tarion's role in determining such claims.

7. Alternatively, if this Court decides that Tarion's claim should be disallowed, then it should do so on the basis that these claims are *incapable* of being asserted by purchasers against either of the Urbancorp Vendors or Tarion (as argued by the Monitor), with the result that Tarion does not have a claim over against the Urbancorp Vendors. This basis is also consistent with the terms on which Tarion settled the balance of its claims against the Urbancorp Vendors, as set out in the minutes of settlement. While disallowing Tarion's claim would deny it the opportunity to administer the purchaser claims, a disallowance on this basis would provide necessary certainty to all parties, including purchasers.

## PART II – THE FACTS

### Provincial Delegation of Powers to Tarion Warranty Corporation

8. Tarion is a private, not-for-profit corporation established in 1976 to protect the rights of new home purchasers and regulate new home builders and vendors. The Government of Ontario has empowered Tarion to administer and enforce the Act. Under the Act and its regulations,<sup>5</sup> Tarion has been designated as the “Corporation” for the purposes of the Act with a mandate to:

- (a) administer the Ontario New Home Warranties Plan, which sets out the warranty protection that new home purchasers are entitled to in Ontario;
- (b) establish and administer a guarantee fund providing for the payment of compensation under the Act;
- (c) license new home builders and vendors and ensure that they abide by the Act (including the investigation of illegal building practices and the promotion of high standards of new home construction);
- (d) protect consumers when builders fail to fulfill their warranty obligations and help to educate new home buyers about their warranty rights; and
- (e) resolve disputes about warranty coverage between vendors and new home purchasers or owners.<sup>6</sup>

9. Accordingly, Tarion has a public interest mandate and it plays a central regulatory role in Ontario regarding the provision of warranty protection to new home purchasers. The Act is consumer protection legislation, and Tarion interprets and carries out its obligations under the Act in a manner consistent with this purpose. Tarion receives no government funding and is financed entirely by fees collected for builder registration and renewal and new home enrolments. Tarion has approximately 370,000 homes under warranty, with 40,000 to 50,000 new home possessions each year.

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<sup>5</sup> Act, s. 2(1); O. Reg. 273/04, s. 1.

<sup>6</sup> Act, ss. 2(2), 13.

## **The Statutory Scheme**

10. The Act regulates the registration requirements for both builders and vendors of new homes in Ontario and sets up the framework for warranty protection.

11. Under section 6 of the Act, all builders and vendors<sup>7</sup> of new homes in Ontario must register under the Act.<sup>8</sup> The failure to do so is a provincial offence.<sup>9</sup> The Urbancorp Vendors are subject to the Act – they were registered with Tarion as vendors for the purposes of the Act. Thus, new home purchasers who entered into agreements with them with the Urbancorp Vendors have the statutory rights given to them under the Act.

12. Section 13 of the Act provides that every vendor of a home provide certain warranties to the owner of that home:

### **Warranties**

13. (1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.<sup>10</sup> [emphasis added]

13. Section 13(1)(c) is relevant because the delayed closing warranties, which are the subject of this motion, are among the warranties prescribed by regulations.

14. Ontario Regulation 165/08<sup>11</sup> addresses these warranties and is aptly entitled “Warranty for Delayed Closing or Delayed Occupancy”. It provides as follows:

### **Delayed closing**

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<sup>7</sup> The act defines “builder” as “a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by the person or under a contract with a vendor or owner” and a “vendor” as “a person who, on the person’s own behalf, sells a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner.” *Act*, s. 1.

<sup>8</sup> *Act*, s. 6.

<sup>9</sup> *Act*, s. 22(1)(b).

<sup>10</sup> *Act*, s. 13(1).

<sup>11</sup> O. Reg. 165/08.

7. (1) If parties enter into a purchase agreement for a freehold home or a vacant land condominium home on or after October 1, 2012, the following are conditions of registration under the Plan:

1. The vendor shall ensure that the parties complete the applicable one of the following documents, for which the form is available for inspection at the offices of the Corporation during normal business hours, and that the completed document forms part of the purchase agreement:

- i. The Freehold Home Addendum (Tentative Closing Date) dated October 1, 2012.
- ii. The Freehold Home Addendum (Firm Closing Date) dated October 1, 2012.

2. Upon request, the vendor shall furnish to the Registrar proof that the applicable document described in paragraph 1, as completed by the parties, forms part of the purchase agreement.

(2) If parties enter into a purchase agreement for a freehold home or a vacant land condominium home on or after October 1, 2012, 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 paragraph 1 of subsection (1) requires form part of the purchase agreement, even if the vendor has not complied with that paragraph.<sup>12</sup> [emphasis added]

15. The Addendum described in this section, and discussed in further detail below, is the Addendum that is attached to the new home purchasers' agreements of purchase and sale with the Urbancorp Vendors (the "Tarion Addendum"). The Act requires the inclusion of the Tarion Addendum, the form of the addendum is established by regulation, and the provisions of the addendum set out the substance of the delayed closing warranty. So while the Tarion Addendum is part of the contracts between new home purchasers and vendors, it flows from the Act as an express requirement.

16. The Act provides for a comprehensive scheme to deal with statutory warranty claims of new home purchasers, including delayed occupancy claims. The Act sets out who is required to do what, when, and exactly how they are supposed to go about doing it. This includes the filing of claims by new home purchasers, the role of vendors, the administration and determination of claims by Tarion, and the appeal rights of new home purchasers to the Licence Appeal Tribunal (the "LAT"), an independent and impartial tribunal that the Government of Ontario specifically created for consumers to address disputes with Tarion, among other things.

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<sup>12</sup> O. Reg. 165/08, s. 7.

17. Section 14 of the Act provides that, subject to the regulations (including the Tarion Addendum required thereby), new home purchasers have a right to receive compensation from Tarion for breaches of warranties by vendors.<sup>13</sup>

18. Generally speaking, claims that are capable of being brought under the Act are first asserted by new home purchasers against the vendor of the home (i.e., the project developer). If those claims are not adequately dealt with by that vendor in the relevant prescribed time periods, purchasers may then assert those claims against Tarion. At that point, those claims, including delayed closing claims, are administered and determined by Tarion in accordance with the Act and Ontario Regulation 892,<sup>14</sup> in particular. This regulation sets out the procedure that is to be followed for the filing, administration, and determination of claims:

4. (1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation in the format that the Corporation specifies.

(2) Forthwith upon receipt by the Corporation of such notice, the Corporation shall furnish or make available to the claimant with such forms as it or the insurers may reasonably require for the purpose of establishing and verifying the claimant's loss.

(3) Revoked.

(4) Promptly after receipt by the Corporation of all information reasonably required to be furnished to it in respect of the claim and after determination of any disputes between the claimant and the vendor as to the liability of the vendor, the Corporation shall serve notice of its decision under section 14 of the Act.

(5) Claims or conciliations for delayed closing or delayed occupancy made under Ontario Regulation 165/08 (Warranty for Delayed Closing or Delayed Occupancy) made under the Act for all homes with a date of possession on or after May 1, 2004 shall be made in accordance with the administrative procedures for delayed closing or delayed occupancy published by the Corporation.<sup>15</sup>

19. If a new home purchaser disagrees with Tarion's decision, the Act expressly provides them with specialized appeal rights to the Licence Appeal Tribunal.<sup>16</sup> The Tribunal can substitute its opinion for that of Tarion's, and direct Tarion to take any action it considers necessary in light

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<sup>13</sup> Act, s. 14(3).

<sup>14</sup> O. Reg. 892.

<sup>15</sup> O. Reg. 892, s. 4.

<sup>16</sup> Act, s. 16.

of the Act.<sup>17</sup> In this way, the Act provides a complete infrastructure for the administration, determination, and adjudication of new home purchaser claims.

### **The Delayed Closing Regime**

20. As explained above, the Act provides new home purchasers a statutory right to file delayed closing claims in certain situations that are described in the Tarion Addendum, which is created by regulation and attached to agreements of purchase and sale for new homes in Ontario. The delayed closing regime is technical. The portions that are most relevant to the claims of purchasers in the Urbancorp case may be summarized as follows:

- (1) A new home vendor is required to provide a purchaser with a statement of critical dates, including an outside occupancy date.
- (2) If the home is not completed by the outside occupancy date, then the purchaser may terminate the agreement during the thirty day period that follows.<sup>18</sup>
- (3) The Tarion Addendum defines termination for these purposes as the purchaser providing “written notice to the Vendor” of such termination. If the purchaser does not terminate in the thirty day period, the “Purchase Agreement shall continue to be binding on the parties”.<sup>19</sup>
- (4) If the purchaser does terminate during this termination period, then the purchaser will be entitled to delayed closing compensation (in addition to a full refund of all monies paid to the vendor).
- (5) Delayed closing compensation is capped at \$7,500, which amount includes: (i) the payment to the purchaser for living expenses of a set amount of \$150 per day for each day of delay until the date of termination; and (ii) any other expenses (supported by receipts) incurred by the purchaser due to the delay.
- (6) Receipts are not required for the living expense component of compensation, as a set daily amount of \$150 is payable. Purchasers are not required to explain or justify these expenses, which are set as a per diem amount as a proxy for living

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<sup>17</sup> Act, s. 16(3).

<sup>18</sup> *Sample Tarion Addendum*, ss. 7(b), 10(b), Responding Motion Record (RMR), Tab B, pp. 27, 28 [*Tarion Addendum*].

<sup>19</sup> *Tarion Addendum*, s. 10(b), RMR, Tab B, p. 28.



expenses. These living expenses could include, for example, any direct living costs such as for accommodation and meals. Receipts are only required for the other expense components, such as for moving and storage costs.

(7) A purchaser is entitled to assert claims against Tarion in respect of such delayed closing claims to the extent that a vendor and purchaser are unable to agree on whether, and in what amount, delayed closing compensation is owed to the purchaser.

(8) A purchaser is required to assert such a delayed closing claim against Tarion within one year following the termination of the agreement of purchase and sale.

21. Under the old delayed closing regime that was replaced by the current regime in or about 2008, purchasers were required to provide itemized and detailed receipts to support the living expense component of their delayed closing compensation. This process was administratively time-consuming and expensive. As a result, when the current statutory regime was put in place, the requirement to submit itemized and detailed receipts was eliminated and the set amount of \$150 per day was substituted in its place.

22. Accordingly, under the current Tarion Addendum that forms part of the purchase agreement, Tarion multiplies \$150 by the number of days of delay in order to calculate the living expense component of their delayed closing compensation. The addendum does not require, and Tarion does not ask for, any other documentation from the purchaser that would be akin to itemized and detailed receipts – to do so would defeat the purpose of eliminating that requirement in the first place. Itemized and detailed receipts for other expenses are still required to be submitted under the new regime.

23. It is noteworthy that the Tarion Addendum does not refer to “repayment” or “reimbursement”, but rather “compensation.” It is not intended to be dollar for dollar reimbursement, like the old regime. In fact, it is intended to be different than the old regime. It is compensation payable for the consequences of delay according to a capped formula that is simpler and easier to administer. In general, it is not perfect compensation but rather a measure of compensation for purchasers in a bad situation and is set at an amount that may also influence and modify builder behavior to avoid delays.

24. In her cross-examination by the Monitor on this motion, Danielle Peck, a lawyer at Tarion, reaffirmed this point. She explained that this regime is “not called delayed closing reimbursement. It’s called delayed closing compensation.” In her words, “if you are delayed past your... firm closing date you’ve been counting on and that’s in your contract, you get compensation for that, and it’s delayed past that outside occupancy date, you are -- a purchaser can terminate and get compensation for that.”<sup>20</sup>

25. The delayed closing regime represent the last source of recovery for purchasers. Though they are entitled to the return of their deposits (in some cases years after they put them down), purchasers do not receive compensation for the full loss of their bargains. Any compensation received on account of delayed closing compensation is nominal when compared to what purchasers have lost.

### **The Urbancorp Insolvencies**

26. Each of Urbancorp (Lawrence) Inc., Urbancorp (St. Clair Village) Inc., Urbancorp (Mallow) Inc., Urbancorp (Woodbine) Inc. and Urbancorp (Bridlepath) Inc. are subject to creditor protection proceedings under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “CCAA”).

27. During the course of these proceedings (and the precursor proceedings), the project lands on which purchasers’ new homes were to have been constructed were sold, and the purchasers’ agreements of purchase and sale were vested out by the court orders approving such sale transactions. The resulting claims of purchasers were dealt with, in part, by a reverse claims process dealing with deposit claims and Justice Newbould’s decision dealing with contractual damages claims. Neither the reverse claims process nor Justice Newbould’s decision addressed (or perhaps even contemplated) purchasers’ statutory delayed closing claims.

### ***Justice Newbould enforces the limitation of liability clause***

28. In the claims process, a large number of home buyers made claims for damages resulting from their purchase agreements not being performed. The Monitor moved for those claims to be disallowed, relying on the exclusion of liability clause in the purchase agreements. That exclusion of liability clause specifically carved out costs included in the Tarion Addendum: “the

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<sup>20</sup> *Cross-Examination of Danielle Peck*, at p. 17, lines 9-16.

Vendor shall not be responsible or liable to the Purchaser in any way for any damages or costs... other than those costs set out in the Tarion Addendum.”<sup>21</sup>

29. In deciding the matter, Justice Newbould stated that the issue was “whether the exclusion of liability clause as properly construed prevents a damage claim.”<sup>22</sup> What was *not* before him was whether the agreements were terminated. Justice Newbould disallowed the claims strictly based on his interpretation of the exclusion of liability clause.

30. Justice Newbould wrote that the Urbancorp entities had “no ability to complete the purchase agreements,”<sup>23</sup> but he did not determine that the contracts were terminated. The Monitor did not ask Justice Newbould to make that finding, nor has the Monitor asked any court to disclaim and terminate the purchase agreements.

#### ***Tarion’s claim and settlement***

31. Because the agreements of purchase and sale were not expressly terminated under the approval and vesting orders or by any other court order in these proceedings, Tarion has proceeded on the basis that these contracts have not been terminated. If one of the Court, the purchasers, the Urbancorp Vendors, or the Monitor pre-determine this issue by terminating the agreements of purchase and sale prior to a delayed closing claim being filed (let alone a claims bar date), then this pre-determination of the issue would undoubtedly impact Tarion’s analysis.

32. However, it is not up to Tarion to pre-determine this issue before any delayed closing claims have been filed and that is precisely why Tarion has not done so. In the absence of a clear pre-determination by the parties, Tarion had no choice but to consider the possibility of delayed closing claims and the related issues prior to the claims bar date.

33. Prior to that date, and with reference to the Act, the Addendum, and Tarion’s obligations thereunder, Tarion’s consumer protection mandate, and Tarion’s standard procedures for delayed claims administration, Tarion concluded the following with respect to Urbancorp delayed closing claims:

- (1) Purchasers are capable of filing valid delayed closing claims; and

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<sup>21</sup> *April 18 Endorsement*, at para. 9, Motion Record (MR), Tab 2E [*Endorsement*].

<sup>22</sup> *Endorsement*, at para. 9, MR, Tab 2E.

<sup>23</sup> *Endorsement*, at para. 23, MR, Tab 2E.

- (2) In the event that such claims are filed by purchasers, the compensation due to purchasers in connection with such claims if found to be owing will be \$7,500 for each home.

34. No claims have been made to date, and no claims may be made, but Tarion cannot assume that that such claims *cannot possibly* be made. In response to a question on cross-examination regarding Tarion’s approach to these claims, Ms. Peck explained that Tarion “hasn’t seen these – any of these claims yet”, but that a valid claim could be made if it was made “within the termination period, proper notice being given in writing and [based on] how [Tarion] would assess it at the time under the addendum.”<sup>24</sup>

### **PART III – LAW AND ARGUMENT**

#### **The Issue**

35. The issues before this Court are:

- (1) whether or not the underlying delayed closing claims of purchasers are *capable* of being validly asserted under the Act; and
- (2) whether or not Tarion should administer the process to determine this.

36. Tarion submits that:

- (1) the gating issue of whether or not the agreements of purchase and sale have been terminated has not yet been determined in these proceedings, meaning that purchasers are *capable* of validly asserting delayed closing claims under the Act; and
- (2) Tarion should have the opportunity to determine and assess whether any delayed closing claims are valid, consistent with its statutory mandate, and access to a reserve if such claims are valid.

37. In contrast, the Monitor suggests that this Court is in a position to declare that “home buyers cannot legally seek recovery for delayed closing compensation.”<sup>25</sup> Tarion disagrees, but if this Court decides that it can make this determination on this motion, it should do so on the basis that these claims are incapable of being asserted. While disallowing Tarion’s claim for this

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<sup>24</sup> *Cross-Examination of Danielle Peck*, at p. 19, lines 17-24.

<sup>25</sup> *Factum of the Monitor*, at para. 45.

reason would deny Tarion its statutorily mandated opportunity to administer the purchaser claims, disallowing Tarion's claim on this basis would provide needed certainty to all parties. The apparent disconnect between the way in which Tarion and the Monitor have framed the issues goes to the heart of the argument about how delayed closing claims should be determined.

38. In its argument, the Monitor cited the fact that the opportunity for some purchasers to file delayed closing claims has come and gone. This may be, but this fact is irrelevant to whether or not the opportunity existed in the first place and whether or not the opportunity still exists for other purchasers. It is Tarion's position that purchasers were or are capable of filing delayed closing claims and that each such claim should be administered and determined on its merits.

**No need to deny Tarion's opportunity to assess delayed closing claims**

39. The Monitor is asking this Court to declare that purchasers have no right to make delayed closing claims – it should not do so for two reasons:

- (1) delayed closing claims of purchasers are capable of being validly filed because no party or court has determined whether or not the agreements of purchase and sale have been terminated; and
- (2) Tarion should be allowed to fulfill its statutory mandate and assess these claims, if filed.

40. Each reason is addressed in turn.

***(1) Delay claim capable because termination has not been determined***

41. The Monitor suggests that a delayed closing claim is not possible because the purchase agreements have been terminated. But this issue has not been determined because:

- (1) ***Justice Newbould did not decide that the purchase agreements were terminated or frustrated.*** At no point did Justice Newbould declare that the purchase agreements were terminated as a result of the Monitor's sales process. The Monitor contends that Justice Newbould found that the agreements were "effectively at an end."<sup>26</sup> In fact, he only said that Urbancorp had "no ability to complete" the purchase agreements.<sup>27</sup> But a declaration of inability to complete a

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<sup>26</sup> Notice of Motion returnable June 26, 2018, at paras. 18-19, MR, Tab 1 [Notice of Motion].

<sup>27</sup> Endorsement, at para. 23, MR, Tab 2E.

purchase agreement is not an event of termination as defined under the Tarion Addendum. For the purposes of delayed closing, termination under the Tarion Addendum means that the purchaser has provided “written notice to the Vendor.”<sup>28</sup> And, as explained below, this is not termination at common law, either.

- (2) ***No party has terminated the contracts.*** Neither the Monitor nor the home buyers have taken the necessary actions to terminate the contracts. The home buyers’ mere knowledge that the vendors are incapable of closing does not automatically terminate or discharge the agreements.<sup>29</sup> Termination under the delayed closing regime in the Tarion Addendum only occurs upon written notice to the Vendor.<sup>30</sup> Even at common law, termination only occurs if a purchaser gives “clear and unequivocal” notice that they wish to be discharged from the contracts.<sup>31</sup> No notice in any form has been given, let alone the written notice required by the Tarion Addendum. Even to the extent that something less than written notice may suffice, that notice has been something less than clear and unequivocal in this case.

Further, a contract cannot be terminated by a monitor acting as though it has been terminated.<sup>32</sup> Section 32(1) of the CCAA<sup>33</sup> gives the Monitor the power to approve of the disclaiming of a debtor company’s contracts,<sup>34</sup> but the Monitor has not done so for the home buyer agreements and that statutory procedure has not been followed in this case.<sup>35</sup>

- (3) ***Unclear that the contracts are frustrated, or that frustration means termination.*** Because the Monitor and purchasers have not terminated the contracts, there is no reason for this Court to rely on the common law doctrine of frustration to make

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<sup>28</sup> *Tarion Addendum*, s. 10(b), RMR, Tab B, p. 28.

<sup>29</sup> *Brown v. Belleville (City)*, 2013 ONCA 148, at para. 42 [*Brown*], Respondent’s Book of Authorities (RBOA), Tab 1.

<sup>30</sup> The Addendum includes two other methods of termination, but neither are applicable in this case.

<sup>31</sup> *Brown*, at para 42, RBOA, Tab 1.

<sup>32</sup> *Notice of Motion*, at para. 19, MR, Tab 1.

<sup>33</sup> R.S.C. 1985, c. C-36 [CCAA].

<sup>34</sup> CCAA, s.32(1).

<sup>35</sup> *Affidavit of Danielle Peck*, at para. 13, RMR, Tab 1, p. 5.

such a declaration. For the purposes of delayed closing, termination under the Tarion Addendum does not include frustration. But assuming it did, the test for frustration is difficult to meet and fact-specific – the event that frustrates the contract must not be the fault of either party.<sup>36</sup> Moreover, in the insolvency context, courts have been reluctant to rely on the doctrine of frustration as a means of absolving the debtor of liability.<sup>37</sup> And in any event, if this Court finds the contracts frustrated, the Court of Appeal has explained that “[s]trictly speaking, a frustrated contract is not terminated.”<sup>38</sup>

42. For these reasons, it is far from clear that the contracts have been terminated or frustrated, and even if they have been frustrated, that this means they are terminated. As a result, and with the issue not having otherwise been pre-determined, Tarion concluded that purchasers are capable of filing valid delayed closing claims.

***(2) Tarion should be allowed to fulfill its statutory mandate***

43. Because the agreements have not necessarily been terminated, Tarion is best placed to determine whether any delayed claims are valid, if such claims are filed.

44. In cases commenced under the CCAA, courts regularly balance the interests of various stakeholders, including the interests of debtor companies, creditors and regulatory bodies, among others. Houlden and Morawetz, in their analysis of the CCAA, have recognized the broad balancing of stakeholder interests as one of the foremost purposes of the CCAA.<sup>39</sup> In undertaking this balancing of interests, courts have acknowledged that they must have regard to the wider public interest, which would include public interests identified by the Province of Ontario. The public interest at stake in this motion is the right of new home purchasers to pursue statutory claims in respect of delayed closing compensation and Tarion’s role in determining such claims.

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<sup>36</sup> *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, at para. 55, RBOA, Tab 2.

<sup>37</sup> *Re Optenia Inc.* (2002), 37 C.B.R. (4th) 308 (Ont. Sup. Ct.), RBOA, Tab 3; *CIBC World Markets Inc. v. Blue Range Resources Corp.* (2002), 12 B.L.R. (3d) 286 (Alta. Q.B.), RBOA, Tab 4; *Rice v. Jones* (1938), 20 C.B.R. 87 (Ont. C.A.), RBOA, Tab 5.

<sup>38</sup> *Ontario Nurses’ Association v. Mount Sinai Hospital* (2005), 75 O.R. (3d) 245, at para. 5, n. 2 (WL), RBOA, Tab 6.

<sup>39</sup> L.W. Houlden & Geoffrey B. Morawetz, “Houlden and Morawetz Bankruptcy and Insolvency Analysis,” *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Toronto: Thomson Reuters) at N§2 (WL), RBOA, Tab 15.

45. In *Nova Metal Products Inc. v. Comiskey (Trustee of)*<sup>40</sup>, the Court of Appeal for Ontario held that

the [CCAA] was designed to serve a “broad constituency of investors, creditors and employees.” Because of that “broad constituency”, the Court must, when considering applications brought under the [CCAA], have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.<sup>41</sup>

46. In this way, courts are expected to consider what is in the public interest when considering issues in CCAA cases. This consideration may make a result that is favourable to the public interest the preferable result.

47. ***Tarion’s public protection role.*** The Province of Ontario has clearly identified a public interest in the regulation of new home builder and vendors and the need to protect consumers by delegating to a regulatory body certain powers, including the determination of warranty claims. Courts have agreed.

48. In *Choo Yick v. Tarion Warranty Corp.*,<sup>42</sup> Justice Rady identified the purposes of the Act, and Tarion’s role thereunder, as follows:

The Act serves a two-fold purpose: consumer protection and the regulation of the new home building industry. In order to protect consumers, the Act imposes limited mandatory warranties on new home builders in Ontario and provides for the payment of compensation to those purchasers whose builders have failed to honour them. The Act provides for the administration of a mandatory licensing scheme for all new home builders in Ontario.

The Act also sets out an administrative procedure to be followed after a warranty claim is made to the builder and Tarion. Timelines are imposed on builders to complete the warranted repairs. If the builder and homeowner do not agree on whether a defect amounts to a warranted item, Tarion may be contacted to conciliate the dispute and conduct an inspection. If an agreement cannot be reached, Tarion is to make a warranty assessment whether the claim is covered under the warranty.

If the builder is unwilling or unable to honour its warranty, after the prescribed time, Tarion provides the homeowner with compensation.<sup>43</sup>

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<sup>40</sup> (1990), 1 O.R. (3d) 289 (C.A.) [*Nova Metal*], RBOA, at Tab 7.

<sup>41</sup> *Nova Metal*, at para. 60, RBOA, at Tab 7.

<sup>42</sup> 2014 ONSC 4488 [*Choo Yick*], RBOA, at Tab 8.

<sup>43</sup> *Choo Yick*, at paras. 6-8, RBOA, Tab 8.



49. In *Ontario New Home Warranty Program v. Lukenda*,<sup>44</sup> the Court of Appeal for Ontario identified the public interest that is furthered by Tarion’s administration of the Act as being

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 for warranties, a guarantee bond and compensation in the event of loss by a purchaser resulting from dealings with a registrant.<sup>45</sup>

50. To underline the public interest involved and the importance of consumer protection in the administration of the Act, the Court of Appeal expressly found that “in order to effect the purposes of the [Act], a broad and liberal interpretation of its provisions is appropriate.”<sup>46</sup>

51. ***Tarion is best placed to determine purchaser claims.*** This Court need not undermine the delegation of powers to Tarion by the Government of Ontario and the scheme of the Act. This Court also need not depart from prior judgments of this Court and the Court of Appeal recognizing that the public interest is best served by permitting Tarion to do precisely what it has been empowered to do.

52. In the administrative law context, many Courts have recognized that statutorily delegated decision makers are best-placed to make decisions falling exclusively within their mandates. This is especially so when the public interest is at stake. For example, the Supreme Court recently held that a law society’s “determination of the manner in which its broad public interest mandate will best be furthered is entitled to deference. The public interest is a broad concept and what it requires will depend on the particular context.”<sup>47</sup> Similarly, courts have held that a security commission’s decisions made in the public interest are owed “broad latitude and judicial deference.”<sup>48</sup>

53. Tarion is similar to those statutory actors – the legislature has delegated to Tarion broad regulatory powers, and consistent with its expertise, Tarion has established a process for the fair administration of warranty claims pursuant to the Act. There is no reason for this Court, at this

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<sup>44</sup> (1991), 47 O.A.C. 388 [*Lukenda*], RBOA, Tab 9.

<sup>45</sup> *Lukenda*, at para. 7, RBOA, Tab 9. See also *Mandos v. Ontario New Home Warranty Program* (1995), 86 O.A.C. 382 (C.A.), RBOA, Tab 10.

<sup>46</sup> *Lukenda*, at para. 7, RBOA, Tab 9.

<sup>47</sup> *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, at para. 34, RBOA, Tab 11.

<sup>48</sup> *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1993), 14 O.R. (3d) 280, at para. 59 (Gen. Div.) (WL), per Blair J, RBOA, Tab 12; *Gordon Capital Corp. v. Ontario (Securities Commission)*, [1991] O.J. No. 934, at para. 38 (Div. Ct.) (WL), RBOA, Tab 13.

junction, to deny Tarion the opportunity to determine claims falling exclusively under its purview, and claims arising in respect of delayed closing claims are neither too remote nor too speculative to be considered valid and provable claims.<sup>49</sup>

**Alternatively, this Court should determine that the claims are incapable of being asserted**

54. If this Court accepts the Monitor's argument, and decides that Tarion's claim should be disallowed, then it should do so on the basis that delayed closing claims are *incapable* of being asserted by purchasers against either of the Urbancorp Vendors or Tarion (as argued by the Monitor), with the result that Tarion does not have a claim over against the Urbancorp Vendors. While disallowing Tarion's claim would deny it the opportunity to administer the purchaser claims, a disallowance on this basis would be consistent with the Court-approved minutes of settlement entered into between Tarion and the Monitor (and the terms on which Tarion settled the balance of its claims against the Urbancorp Vendors) and provide necessary certainty to all parties, including purchasers. It is also on this basis, in part, that this motion is being brought by the Monitor.<sup>50</sup>

**PART IV - RELIEF REQUESTED**

55. Tarion requests that this Court allow Tarion's claim, allow Tarion to receive and process delayed occupancy claims, and provide Tarion with access to a reserve to pay those claims (the balance of which, if any, would be released when the liability for such claims is determined and satisfied according to the statutory framework described above).

56. But if this Court agrees with the Monitor, it should do so on the basis that the claims are incapable of being asserted against the Urbancorp Vendors and Tarion.

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<sup>49</sup> *Confederation Treasury Services Ltd. (Re) (In Bankruptcy)* (1997), 96 O.A.C. 75, at para. 4 (Ont. C.A.), RBOA, Tab 14.

<sup>50</sup> As agreed to in the minutes of settlement entered into by Tarion and the Monitor, Tarion will be entitled to claim over against the Urbancorp Vendors for purchasers' delayed closing claims, to the extent that delayed closing claims are capable of being asserted, are asserted and are determined to be valid under the Act.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



\_\_\_\_\_  
Adam M. Slavens



\_\_\_\_\_  
Jonathan Silver

Lawyers for Tarion Warranty Corporation

**SCHEDULE “A”**  
**LIST OF AUTHORITIES**

**Cases**

1. *Brown v. Belleville (City)*, 2013 ONCA 148
2. *Mac-G Canada Inc. v. Element Construction Ltd.*, 2015 ABQB 632
3. *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58
4. *Re Optenia Inc.* (2002), 37 C.B.R. (4th) 308 (Ont. Sup. Ct.)
5. *CIBC World Markets Inc. v. Blue Range Resources Corp.* (2002), 12 B.L.R. (3d) 286 (Alta. Q.B.)
6. *Rice v. Jones* (1938), 20 C.B.R. 87 (Ont. C.A.)
7. *Ontario Nurses’ Association v. Mount Sinai Hospital* (2005), 75 O.R. (3d) 245 (C.A.)
8. *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (C.A.)
9. *Choo Yick v. Tarion Warranty Corp.*, 2014 ONSC 4488
10. *Ontario New Home Warranty Program v. Lukenda* (1991), 47 O.A.C. 388 (C.A.)
11. *Mandos v. Ontario New Home Warranty Program* (1995), 86 O.A.C. 382 (C.A.)
12. *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32
13. *Ainsley Financial Corp. v. Ontario (Securities Commission)*, [1993] 14 O.R. (3d) 280 (Gen. Div.)
14. *Gordon Capital Corp. v. Ontario (Securities Commission)*, [1991] O.J. No. 934 (Div. Ct.)
15. *Confederation Treasury Services Ltd. (Re) (In Bankruptcy)*, 1997 CanLII 3544 (Ont. C.A.)

**Texts**

16. Houlden, L.W. & Geoffrey B. Morawetz, “Houlden and Morawetz Bankruptcy and Insolvency Analysis,” *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Toronto: Thomson Reuters)

**SCHEDULE “B”**

***Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31*.....2**

**Ontario Regulation 273/04.....6**

**Ontario Regulation 165/08 .....7**

**R.R.O. 1990, Regulation 892.....8**

***Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36* .....9**

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

**Designation of Corporation**

2. (1) The Lieutenant Governor in Council shall designate a non-profit corporation incorporated without share capital under the *Corporations Act* to be the Corporation for the purposes of this Act.

**Objects**

- (2) Upon its designation, the objects of the Corporation are extended to include,
- (a) the administration of the Ontario New Home Warranties Plan;
  - (b) the establishment and administration of a guarantee fund providing for the payment of compensation under section 14, whether by the establishment of a fund for the purpose or by contract with licensed insurers;
  - (c) assisting in the conciliation of disputes between vendors and owners; and
  - (d) engaging in undertakings for the purpose of improving communications between vendors and owners.

...

**Registration required**

6 No person shall act as a vendor or a builder unless the person is registered by the Registrar under this Act.

...

**Registration of vendors and builders**

7. (1) An applicant is entitled to registration by the Registrar except where,
- (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of the applicant's undertakings;
  - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on the applicant's undertakings in accordance with law and with integrity and honesty;
  - (c) the applicant is a corporation and,
    - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or
    - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty; or
  - (d) in the case of an application for registration as a builder, the applicant does not have sufficient technical competence to consistently perform the warranties.

### **Conditions of registration**

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant or imposed by the Tribunal or prescribed by the regulations.

### **Registration not transferable**

(3) A registration is not transferable.

...

### **Warranties**

**13 (1)** Every vendor of a home warrants to the owner,

- (a) that the home,
  - (i) is constructed in a workmanlike manner and is free from defects in material,
  - (ii) is fit for habitation, and
  - (iii) is constructed in accordance with the Ontario Building Code;
- (b) that the home is free of major structural defects as defined by the regulations; and
- (c) such other warranties as are prescribed by the regulations.

### **Exclusions**

(2) A warranty under subsection (1) does not apply in respect of,

- (a) defects in materials, design and work supplied by the owner;
- (b) secondary damage caused by defects, such as property damage and personal injury;
- (c) normal wear and tear;
- (d) normal shrinkage of materials caused by drying after construction;
- (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
- (f) damage resulting from improper maintenance;
- (g) alterations, deletions or additions made by the owner;
- (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
- (i) damage resulting from an act of God;
- (j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
- (k) damage caused by municipal services or other utilities;
- (l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.

**Certificate of completion**

(3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.

**Term of warranty under subs.(1)**

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

**Privity of contract**

(5) A warranty is enforceable even though there is no privity of contract between the owner and the vendor.

**Application of warranties**

(6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

...

**Same, breach of warranty**

14(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.

...

**Notice of decision under s. 14**

16 (1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.

**Notice requiring hearing**

(2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after



service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.

### **Powers of Tribunal**

(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

### **Parties**

(4) The Corporation, the person or owner who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

...

### **Offences**

**22 (1)** Every person is guilty of an offence who,

- (a) knowingly furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act or the regulations;
- (b) contravenes section 6 or 12 or subsection 18 (4); or
- (c) contravenes subsection 17.4 (3). 2015, c. 28, Sched. 1, s. 154 (10).

**Ontario Regulation 273/04**

**Designation of Corporation**

1. The corporation known as Tarion Warranty Corporation, formerly Ontario New Home Warranty Program, is designated as the Corporation for the purposes of the Act.

## Ontario Regulation 165/08

### Delayed closing

7. (1) If parties enter into a purchase agreement for a freehold home or a vacant land condominium home on or after October 1, 2012, the following are conditions of registration under the Plan:

1. The vendor shall ensure that the parties complete the applicable one of the following documents, for which the form is available for inspection at the offices of the Corporation during normal business hours, and that the completed document forms part of the purchase agreement:

i. The Freehold Home Addendum (Tentative Closing Date) dated October 1, 2012.

ii. The Freehold Home Addendum (Firm Closing Date) dated October 1, 2012.

2. Upon request, the vendor shall furnish to the Registrar proof that the applicable document described in paragraph 1, as completed by the parties, forms part of the purchase agreement.

(2) If parties enter into a purchase agreement for a freehold home or a vacant land condominium home on or after October 1, 2012, 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 paragraph 1 of subsection (1) requires form part of the purchase agreement, even if the vendor has not complied with that paragraph.

**R.R.O. 1990, Regulation 892**

**Claims — Not Condominium Common Elements**

4. (1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation in the format that the Corporation specifies.

(2) Forthwith upon receipt by the Corporation of such notice, the Corporation shall furnish or make available to the claimant with such forms as it or the insurers may reasonably require for the purpose of establishing and verifying the claimant's loss.

(3) Revoked:

(4) Promptly after receipt by the Corporation of all information reasonably required to be furnished to it in respect of the claim and after determination of any disputes between the claimant and the vendor as to the liability of the vendor, the Corporation shall serve notice of its decision under section 14 of the Act.

(5) Claims or conciliations for delayed closing or delayed occupancy made under Ontario Regulation 165/08 (Warranty for Delayed Closing or Delayed Occupancy) made under the Act for all homes with a date of possession on or after May 1, 2004 shall be made in accordance with the administrative procedures for delayed closing or delayed occupancy published by the Corporation.

(6) The fees payable by the vendor in connection with conciliations for delayed closing or delayed occupancy made under Ontario Regulation 165/08 (Warranty for Delayed Closing or Delayed Occupancy) made under the Act for all homes with a date of possession on or after May 1, 2004 are as set out in sections 4.0.1 and 4.0.2.

*Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36*

**Disclaimer or resiliation of agreements**

**32 (1)** Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Court File No. CV-16-11549-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KINGTOWNS INC. AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE "APPLICANTS")

AND IN THE MATTER OF TCC/URBANCORP (BAY) LIMITED PARTNERSHIP

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
(Commercial List)

Proceeding commenced at Toronto

**RESPONDING FACTUM OF**  
**TARION WARRANTY CORPORATION**  
(motion returnable June 26, 2018)

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