

Focus REAL PROPERTY

Deconstructing new home warranties



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When clients are involved in the construction, sale or purchase of a new home in Ontario, knowledge and understanding of the *Ontario New Home Warranties Plan Act* is essential for their legal counsel. However, confusion often arises over definitions in the act, the requirement of registration, and the availability of warranty protection for the consumer.

The purpose of the act is two-fold: first, it regulates the new home-building industry with a mandatory licensing scheme for builders and vendors; and secondly, it protects consumers by imposing statutory warranty obligations on vendors of new homes. The plan is administered by Tarion Warranty Corporation, a non-profit corporation self-funded through fees paid by builders of new homes.

The act covers nearly all new homes and condo units in Ontario. Under section 1, “an owner” is a person who acquires a home from a vendor for occupancy, and the person’s successors in title. An “owner-built” home, which the act excludes from coverage, is when the landowner owns the lot and exercises significant control over the construction and/or contributes one or more essential element to the home. An owner-built home is covered by the statutory warranty when it is sold by the owner before being occupied, and in that situation the owner may be required to register as a vendor or builder under the act.

According to section 6, no one may act as a builder or vendor unless registered. A builder “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.” Likewise, a vendor “sells on [their] behalf a home not previously occupied to an owner” and includes a builder who “constructs a home under a contract with the owner.” Penalties for non-compliance are severe, and include fines up to \$25,000 and/or imprisonment up to one year for individuals, and fines up to \$100,000 for corporations.

In making the builder/vendor determination, the act has been given a broad and liberal interpretation by the courts, as befits the fact that it is remedial legisla-

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tion designed to protect consumers. For example, a person may be a builder even though some work was performed by others, including the owner. In *R. v. Segal* [2006] O.J. No. 1034, Justice Paul Reinhardt said: “The definition of a ‘builder’ has been interpreted as meaning the provision of a significant portion of construction. A home is not taken outside the purview of the Act only because the owner was responsible for some work or materials.”

In *JRC Developments Ltd. v. Tarion Warranty Corp.* [2010] O.J. No. 5089, Justice Anne Molloy said that determining if a contractor is a builder involves “who was responsible for completing the essential elements of the home and who had control over the construction.”

In *Tarion Warranty Corporation v. Kozy* (2011), 109 O.R. (3d) 180, the Ontario Court of Appeal applied a contextual reading of the definition of “builder” with other provisions of the act. The court said: “This approach requires an interpretation of ‘builder’ that would cover persons who build a home but leave some work to be performed by the owner.” It added that it is important, given the purpose of the act, not to deny such owners warranty coverage.

In order to be a “vendor” under the act, a person must sell, on their own behalf, a home that has not been previously occupied. Since *occupancy* is not defined in the act, the courts must determine what constitutes occupancy in each case. Factors that may be considered by the courts in making this determination include the length of the alleged occupancy, whether or not an occupancy permit was granted, the presence or absence of functional appliances or furniture, and evidence of an official change of



address. Where occupancy is not found, the seller will be considered a vendor for the purposes of the act.

While the act says registration is mandatory, it is silent about what happens to purchasers/

owners when the vendor and/or builder has, in contravention of the act, failed to register or enrol the home in the plan. A review of the position taken by Tarion in recent court cases, including before the Court of Appeal in

Tarion Warranty Corporation v. Boros [2011] O.J. No. 2149), suggests that warranty coverage — which goes up to \$300,000 for construction defects — is nonetheless available to purchasers. This coverage is available even if the properties are not registered.

Lawyers with clients who are involved in the construction, sale or purchase of a new home should definitely be aware of the provisions of the *Ontario New Home Warranties Plan Act*, the requirements of registration, and the availability of warranty coverage. In interpreting the definitions, a review of the case law is also recommended, keeping in mind the role of the act as consumer protection legislation.

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