CITATION: Midnight Building Corp. v Tarion Warranty Corp., 2025 ONSC 2214
DIVISIONAL COURT FILE NO.: 617/24
DATE: 20250523

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. Corbett, Faieta and Rees JJ.

B E T W E E N :	)	
	)	
MIDNIGHT BUILDING CORP.	)	*Jordan Routliff and Broghan Masters*,
	)	for the Applicant
Applicant	)	
	)	
- and -	)	
	)	
TARION WARRANTY CORP.	)	*Shalom Cumbo-Steinmetz and Leora*
	)	*Chapman*, for the Respondent
Respondent	)	
	)	**HEARD at Toronto:** March 31, 2025

ENDORSEMENT

D.L. Corbett J.

[1] At the conclusion of oral argument the panel allowed the application and remitted the case back to the Respondent, Tarion, with reasons to follow.

[2] The Applicant, Midnight, was found liable by Tarion, for the cost to construct a retaining wall incident to construction of a swimming pool (the "impugned finding"), pursuant to the *Ontario New Home Warranties Plan Act*, RSO 1990, c. O.31 (the "Act").

Procedural fairness – Tarion Revisiting An Issue

[3] The impugned finding was one of 23 issues raised with Tarion by the purchaser of the subject home. In a "Conciliation Assessment Report" of the issues, dated January 12, 2023, Tarion accepted that the property had been inspected and approved by the City, and thus that failure to build a retaining wall was not a warranted defect.

[4] Subsequently, on September 5, 2024, Tarion changed its Conciliation Assessment Report to require Midnight to pay the purchaser's cost to construct a retaining wall ($45,688.71, including HST). This change in Tarion's disposition of this issue followed communications to Tarion from

the purchaser, including provision of additional documents and submissions. Midnight was not given notice that Tarion was revisiting the retaining wall issue, and Midnight was not given notice of the additional documents and submissions provided to Tarion by the purchaser.

[5] This was unfair. Midnight was entitled to consider the retaining wall issue resolved unless it was given notice that Tarion was revisiting the issue. If circumstances had changed, or some other basis had been raised that justified Tarion reconsidering its disposition of the retaining wall issue, Midnight was entitled to notice and a meaningful opportunity to provide its side of the story to Tarion before a decision was made: *Baker* v. *Canada (Minister of Citizenship and Immigration*, [1999] 2 SCR 817, paras. 20, 30 and 32.

[6] Therefore, the impugned finding is quashed, and the issue is remitted back to Tarion to decide following a fair process.

Other Issues

(a) LAT's Jurisdiction Over "Reconsideration" Requests

[7] The Applicant argued that Tarion had no jurisdiction to change its initial disposition on the retaining wall issue. I would restate the Applicant's position as follows: once Tarion makes a decision on an item of claim, Tarion has exhausted its jurisdiction, and a homeowner's remedy is an appeal to the LAT.

[8] I agree with the Applicant that once Tarion makes a "decision" it will generally be *functus officio* in respect to the matter decided. However, "decision" in this context is a final decision. The Conciliation Assessment Report dated January 12, 2023 is not, itself, a final decision. It is more like a provisional disposition of issues, part of an ongoing conciliation process. Until Tarion issues a formal decision, it is open to Tarion to re-open an issue it has provisionally disposed of – provided it does so following a fair process.

[9] Tarion does not have a formal reconsideration process. However, it does not need to have such a process to re-open an issue that has not yet been decided on a final basis.

[10] Finally, I would not wish to be taken to have established a firm "rule" precluding Tarion from "revisiting" its own "decisions" in some circumstances. Correcting minor or agreed errors, or engaging in a formal reconsideration, are processes that Tarion could follow, in appropriate cases. Permitting revised or fresh claims in light of changed circumstances is also something that could be available, in appropriate cases, so long as these revised or fresh claims are in accordance with the statutory scheme. Tarion is master of its own processes, and this court will defer to Tarion's procedural choices so long as the process followed is fair to both sides.

(b) Tarion Did Not Give Midnight A Reasonable Opportunity to Make Submissions

[11] After Tarion revisited the retaining wall issue, and provided its new Conciliation Assessment to Midnight, it gave Midnight five days to provide information and submissions in respect to the issue. Tarion argued that this was sufficient notice and opportunity to be heard, in the context of this issue.

[12] Midnight had understood that the issue had been disposed of in January 2023, and it did not know that the issue had been reopened until September 2024. One of Midnight's arguments was that the retaining wall was not an issue in respect to the construction of the house, but in respect to the pool, which was a separate contract. It took the position that alleged deficiencies related to the pool were not warranted under the *Act*.

[13] Tarion's communication to Midnight in September 2024 was not a call for submissions: it indicates that Tarion had come to a determination of both liability and quantum. Tarion gave a short deadline to respond (5 days), a period that is particularly short in the context of the lengthy period between the initial disposition and notice to Midnight that the issue had been reopened. Further, the communication in September 2024 did not include copies of additional materials that had been provided to Tarion by the purchaser.

[14] Procedural fairness includes the appearance of fairness: here, Midnight could quite reasonably infer that Tarion had made the impugned finding before giving notice or an opportunity to make submissions, and that the short deadline for submissions was inconsistent with the long period between the initial assessment and the new assessment.

[15] Procedural unfairness at one stage of a process may be cured later in the process. However, I conclude that Tarion's communication to Midnight in September 2024 did not cure the procedural unfairness because (a) the deadline imposed for response was too short, in the circumstances and (b) it implied that Tarion had already made its mind up on the issue without first giving notice and an opportunity to Midnight to make submissions.

(c) Midnight Did Not Have Notice Tarion Was Considering the Issue Anew

[16] The original Conciliation Assessment was made on the basis of Midnight's statement to Tarion that the City had inspected grading, had passed the work and had closed the building permit for the construction of the house. At the time that statement was made, it was true. However, at that time, the swimming pool was under construction, and it was known to Midnight that the City's inspection was not prospective approval of work that had not yet been completed, including grading related to the swimming pool and whether a retaining wall was required.

[17] Midnight was subsequently put on notice by the City that the building permit had been "reopened" and that the City was requiring that remedial work be done. Midnight proposed a particular approach to building a retaining wall, which was rejected by the purchasers. Tarion argues that Midnight knew that it could have liability for remedial work arising from its construction of the pool in a manner that (in the City's judgment) did not comply with the *Building Code*.

[18] I agree with an aspect of this argument of Tarion's. I agree that Midnight cannot be surprised that the issue has been revisited as a result of changed circumstances: including the City's reopening the building permit, Midnight not remedying the defect identified by the City, and the purchaser remedying the defect at their own expense. None of this, however, defeat's Midnight's right to notice and a chance to make submissions to Tarion in respect to the retaining wall issue following changes in circumstances.

(d) Not Necessary Or Appropriate to Review the Reasonableness of Tarion's Decision

[19] I do not find it necessary or desirable to comment on arguments directed to the reasonableness – or otherwise – of Tarion's disposition of the retaining wall issue. Deciding this issue is in Tarion's jurisdiction, and nothing said in this decision should be read to express an opinion on the merits of the issue.

Disposition

[20] The application is allowed, the impugned finding is quashed, and the issue is remitted back to Tarion for a fresh decision following a fair process.

Costs

[21] The claims for costs – from both sides – are substantially larger than would be expected in this court for a case of this kind. This was not a complicated case, and the amount in issue is about $45,000. I would award Midnight its costs on a partial indemnity basis fixed at $15,000, inclusive – a figure that is at the high end of the range of ordinary partial indemnity costs for a case of this kind in this court.

"D.L. Corbett J."

I agree: "Faieta J."

I agree: "Rees J."

Released: May 23, 2025

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BETWEEN:

Midnight Building Corp.

Applicant

- **And –**

Tarion Warranty Corp.

Respondent

ENDORSEMENT

Released: May 23, 2025