CITATION: Adi Developments (Masonry the West) Inc. v. Tarion Warranty Corp., 2025 ONSC 4853
DIVISIONAL COURT FILE NO.: 773/24-JR
DATE: 20250829

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Backhouse, Lococo and Jensen JJ.

BETWEEN:	)	
	)	
ADI DEVELOPMENTS (MASONRY THE WEST) INC.	)	*Jacqueline Cole* and *Jake Bershadsky*, for the Applicant
	)	
Applicant	)	
– **and** –	)	
	)	
TARION WARRANTY CORPORATION	)	*Alex MacDonald*, for the Respondent
	)	
Respondent	)	
	)	
	)	**HEARD at Toronto:** June 23, 2025

REASONS FOR JUDGMENT

R. A. LOCOCO J.

I. Introduction

[1] The applicant Adi Developments (Masonry The West) Inc. ("Adi") seeks judicial review of the conciliation decision (the "Conciliation Decision") of the respondent Tarion Warranty Corporation ("Tarion"), with reasons in Tarion's Conciliation Assessment Report dated November 15, 2024 (the "Conciliation Report") issued under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 (the "*ONHWPA*").

[2] In the Conciliation Decision, Tarion resolved the dispute between Adi (the builder of a residential condominium development) and Halton Standard Condominium Corporation No. 729 (the condominium corporation) as to whether Adi breached statutory warranties by failing to rectify certain construction issues relating to the condominium's common elements. Tarion decided that 14 of the items in dispute were in breach of the warranties. Tarion also found that the conciliation was chargeable to Adi.

[3] Adi submits that Tarion was unreasonable in finding that some of the construction issues breached the statutory warranties and in determining that the conciliation was chargeable to Adi. Adi asks that the Conciliation Decision be set aside and the conciliation remitted to Tarion.

[4] For the reasons below, I would dismiss the judicial review application.

II. The parties and the statutory scheme

[5] The *ONHWPA* creates statutory warranties that builders and vendors of new homes (including condominiums) must provide to homeowners under the Ontario New Home Warranties and Protection Plan. Tarion is a not-for-profit corporation designated under the *ONHWPA* to administer those warranties: see *ONHWPA*, ss. 2(1), 11(1); Designation of Corporation, O. Reg. 273/04, s. 1.

[6] Adi is the builder and vendor of a residential condominium complex called Masonry The West (the "Complex") located in Burlington, Ontario. Adi became a registered builder under the *ONHWPA* on August 2, 2016, when it entered into a Builder Agreement with Tarion.

[7] The Complex's common elements are owned by the condominium corporation, Halton Standard Condominium Corporation No. 729 ("HSCC 729"). A condominium's common elements are the shared areas within the condominium complex that are owned and used collectively by all unit holders, as set out in the condominium's declaration and description: see *Condominium Act, 1998*, S.O. 1998, c. 19, s. 1(1) (definition of "common elements") and s. 138. HSCC 729's declaration and description was registered under that Act on March 11, 2021.

[8] As the builder and vendor of the Complex, Adi provides statutory warranties to the owners that remain in effect for up to seven years from the warranty commencement date. The warranties that are at issue in this application are the warranties that apply to the Complex's common elements for the first year after registration of HSCC 729's declaration and description (the "one-year warranty") and for the second year after that registration (the "two-year warranty").

[9] The one-year warranty requires that the common elements are (i) constructed in a workmanlike manner, free from defects in material, (ii) fit for habitation, and (iii) constructed in accordance with the *Building Code*:[1] see *ONHWPA*, s. 13(1)(a). The two-year warranty requires (among other things) that the common elements be free from water penetration through the basement or foundation of the Complex and that there be no detachment, displacement or deterioration of exterior cladding: see *Administration of the Plan*, R.R.O. 1990, Reg. 892 under the *ONHWPA* ("Reg. 892"), s. 15(2).

[10] Within one year of filing a declaration and description, a condominium corporation is required to retain a professional engineer for the purpose of preparing a performance audit: see *Condominium Act*, s. 44(1). The purpose of the performance audit is to identify deficiencies in the

[1] *Building Code*, O. Reg. 332/12 under the *Building Code Act, 1992*, S.O. 1992, c. 2, which was in effect at the time of the Conciliation Decision (now superseded by O. Reg. 163/24). Reference to the *Building Code* in these reasons means O. Reg. 332/12.

common elements. A second-year performance audit is to be completed within 24 months of filing the declaration and description.

[11] In connection with the performance audit, the condominium corporation prepares a common elements Performance Audit Tracking Summary ("CE PATS"), which is uploaded to a Tarion-provided web application. The CE PATS system is used to track the progress of repairs to the common elements to address the items listed in CE PATS. The condominium corporation and the builder are required to provide periodic updates as to the status of the listed items: see Tarion's Registrar Bulletin No. 2, *Claims Process – Condominium Common Elements* (issued February 1, 2021)[2] ("Bulletin No. 2"), at p. 6.

[12] For one-year warranty claims, the builder is provided a repair period of 18 months following the first anniversary of the warranty commencement date: Reg. 892, s. 5.5(3). For two-year warranty claims, the builder is provided six months from the second anniversary of the warranty commencement date: Reg. 892, s. 5.6(3).

[13] The need for a "conciliation" arises if the builder and the condominium corporation cannot agree as to whether (i) certain items are warranted or warrantable (that is, covered by either of the statutory warranties),[3] or (ii) the builder has made adequate repairs. In these circumstances, the condominium corporation may request that Tarion conduct a common elements conciliation to resolve the disputed items: Reg. 892, ss. 5.5(4), 5.6(6). A conciliation may involve an onsite conciliation inspection by Tarion (also attended by representatives of the builder and the condominium corporation), which Tarion may schedule following a meeting with the parties if "the parties are not working to repair the items or otherwise resolve them in a reasonable and diligent manner": Bulletin No. 2, at p. 6.

[14] Upon completion of the conciliation inspection, Tarion will prepare a conciliation assessment report, identifying any items that Tarion found to be warranted: Reg. 892, ss. 5.5(7), 5.6(7). For those items, the builder is provided an additional 90 days following release of the conciliation assessment report to complete repairs: Reg. 892, s. 5.5(8), 5.6(8). If the builder fails to complete repairs to all items found warranted, Tarion will settle all outstanding warranted items directly with the owner (generally by performing or arranging for performance of any required repairs at the builder's expense): Reg. 892, s. 5.5(9), 5.6(9).

[15] As part of the reconciliation process, Tarion also assesses whether a conciliation is chargeable to the builder. In Registrar Bulletin No. 4: *How Chargeability is Determined and Applied*, issued May 1, 2024 ("Bulletin No. 4"), Tarion addressed the circumstances in which it would determine that a charge should be levied against a builder as a consequence of an "unnecessary conciliation". Under the heading "Chargeable Conciliation", Bulletin No. 4 provides, at p. 2:

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[2] In Bulletin No. 2, Tarion provides a "Guideline" that it describes as "a customer service standard for warranty claims made in relation to Common Elements for residential condominiums": Bulletin No. 2, at p. 1.

[3] In the parties' material for this application (and in these reasons), the terms "warrantable" and 'warranted" are used interchangeably to mean the same thing.

> If Tarion decides that conciliation could have been avoided had the builder honoured his/her warranty obligations within the builder repair periods, and if there is no exception to chargeability as outlined in this bulletin under Exceptions To Chargeability, then there is a consequence to the builder for an unnecessary conciliation. This consequence is called a chargeable conciliation and is a mechanism to encourage builders to fulfill their warranty obligations.

[16] In Bulletin No. 4, at p. 4, a conciliation becomes chargeable if (i) Tarion finds one or more reported items to be warranted, (ii) the builder failed to repair or resolve the item(s) during the builder repair period, and (iii) there is no exception to chargeability set out in Bulletin No. 4. Any item found to be warranted, "even if it is considered minor (or the cost to repair is very low)," will result in a chargeable conciliation unless an exception applies.

[17] Under the heading "Exceptions to Chargeability", Bulletin No. 4 provides, at p. 9:

> A conciliation is chargeable if Tarion determines that one or more items are warranted at the conciliation inspection, unless a specified exception to chargeability applies for each and every item that was assessed as warranted.
>
> The general principle underlying the specified exceptions to chargeability is fairness. The exceptions are designed on the principle that a conciliation should not be chargeable if builders could/would have complied with their customer service obligation but, through no fault of their own, were unable to do so.
>
> If a specified exception applies and the conciliation is not chargeable, the builder is still responsible for resolving the warranted item(s). Tarion will work with the builder and homeowner to facilitate fair and reasonable access in situations where there is a dispute about providing access.
>
> [Emphasis added.]

[18] Bulletin No. 4 sets out nine exceptions to chargeability. An exception may apply if, among other things:

a. The owner did not accept "reasonable cash compensation made by the builder to resolve the warranted item(s)": Bulletin No. 4, at p. 11 (the "Settlement Offer Chargeability Exception"); or

b. The builder "did not have a reasonable opportunity to resolve the warranted item(s) during the builder repair periods" because in the course of doing a repair, a "new and different defect" arises that the builder was unaware of but agrees at or before the conciliation to resolve the issue to the warranty standard: Bulletin No. 4, at pp. 12-13. (the "New Issue Chargeability Exception").

[19] If Tarion finds a conciliation to be chargeable, there are two adverse consequences for the builder.

[20] The first consequence is that the builder is required to pay a fee to Tarion. For a conciliation relating to a condominium's common elements, the amount of the fee is $3,000: Bulletin No. 4, at p. 4 and Appendix A; Reg. 892, s. 5.8(2.2). That amount is intended to "reimburse Tarion for conducting the conciliation … if the conciliation inspection results in a chargeable conciliation": Bulletin No. 4, at p. 7. The obligation to pay that amount is in addition to the builder's obligation to perform (or bear the cost of) repairs for items found to be warranted: Bulletin No. 4, at p. 9. The repair obligation is not affected, whether or not the conciliation is found to be chargeable.

[21] The second consequence is set out in Bulletin No. 4, at p. 4:

> The builder's record on the Ontario Builder Directory (maintained by the Home Construction Regulatory Authority) is updated to reflect that the builder has received a chargeable conciliation. The chargeable conciliation is a measure of builder performance. It stays on the builder's record for 10 years.

III. Factual background leading to the Complex's conciliation inspection

[22] As previously noted, HSCC729 became the owner of the Complex's common elements upon registration of HSCC 729's declaration and description on March 11, 2021. That date is the commencement date for the statutory warranties that apply to the Complex's common elements.

[23] HSCC 729 retained the services of an engineer named Bill Dang to conduct the first-year and second-year performance audits for the Complex's common elements. Mr. Dang conducted the performance audits in 2022 and 2023 and uploaded the results to the CE PATS system. Mr. Dang identified various issues, including water leakage in the Complex's underground garage.

[24] It is not disputed that Adi conducted repairs to the common elements (including the parking garage) with respect to certain items identified in the performance audits. To address the garage leakage issues, Adi injected a specialized concrete mixture called Sikacrete-321 FS into cracks in the underside of the garage slab (that is, the roof of the underground garage) and provided updates in the CE PATS system. However, Adi says that HSCC 729 and Mr. Dang failed to review Adi's repairs by providing timely responses in CE PATS. Tarion agrees that Adi and Mr. Dang (being HSCC 729's representative) failed to adequately communicate regarding the status of repairs but disputes that the failure to update CE PATS was exclusive to HSCC 729.

[25] On October 9, 2023, HSCC 729 submitted a request to Tarion to conduct a conciliation inspection of certain items identified in the first-year and second-year performance audits.

[26] On January 12, 2024, Brian Sutherland (a Tarion Warranty Services Representative, Common Elements) held a "Pre-Conciliation Common Elements Meeting" with representatives of Adi and HSCC 729 (including Mr. Dang) to discuss the items requested for reconciliation. Following that meeting, Adi and HSCC 729 (with Tarion's concurrence) agreed to extend the timeline to complete builder repairs beyond the 90-day pre-conciliation repair period set out in Reg. 892. By Repair Agreement dated February 2, 2024, the deadline for completion of repairs was extended to March 31, 2024.

[27] By February 2024, HSCC 729 appointed Ben Ankenmann of Edison Engineers Inc. to replace Mr. Dang as their representative. Mr. Ankenmann held different views than Mr. Dang on the sufficiency of some of the repairs Adi made. In particular, Adi says that it had relied on Mr. Dang's position that its repairs for water leakage through cracks in the Complex's parking garage roof slab (by injecting Sikacrete into the cracks from below) were sufficient to satisfy the statutory warranties. Mr. Ankenmann disagreed. His position was that Adi was required to excavate from the surface to address the waterproof coating defects on the topside of the garage roof slab. There were also other construction issues upon which Adi and Mr. Ankenmann did not agree.

[28] Adi and HSCC 729 were ultimately unable to resolve the disputed construction issues within the extended pre-conciliation repair period. Therefore, on May 31, 2024, HSCC 729 requested that the conciliation inspection proceed. On June 6, 2024, Tarion scheduled the conciliation inspection to occur on July 25 and 25, 2024.

[29] On July 23, 2024, Adi made a settlement offer signed by Adi's chief operating officer. The offer acknowledged that "there may be miscellaneous items that were missed during the audit repairs" arising from the first-year and second-year performance audits. The offer provided that "[t]o cover these potential items, we are offering $10,000." The offer also expressed the belief that "this settlement offer fairly addresses the audit finding and any additional concerns."

[30] The conciliation inspection took place on July 25 and July 26, 2024. The inspection was conducted by Brian Sutherland on behalf of Tarion. Ben Ankenmann was present on behalf of HSCC 729, together with a representative of HSCC 729's management company. Rennie Sansom and Steven Turchet were present as representatives of Adi. Mr. Sutherland, Mr. Sansom and Mr. Turchet are affiants in this application and were cross examined on their affidavits.

[31] By email from Mr. Sansom on July 26, 2024, while the conciliation inspection was in progress, Adi increased the amount of its settlement offer from $10,000 to $25,000. HSCC 729 did not accept either offer.

IV. Conciliation Decision

[32] On November 15, 2024, Tarion released its 33-page Conciliation Report. The Conciliation Report included a three-page Assessment Summary, which listed and summarized 14 "Warranted" items, seven "Not Warranted" items, and 17 "Withdrawn" items. Also included was a two-page appendix, which summarized the warranties and protections under the *ONHWPA*.

[33] In the Conciliation Report, Tarion explained its conclusion that 14 of the items identified for inspection were assessed as warranted, that is, in breach of either the one-year warranty or the two-year warranty. If a particular disputed construction issue was found to be a breach of both the one-year warranty and the two-year warranty, each breach was counted as a separate item.

[34] In the covering letter accompanying the Conciliation Report, Tarion stated: "This conciliation is Chargeable for the following reason: Warranted item and no exceptions apply." The Conciliation Report itself did not address the issue of chargeability.

[35] The parties have grouped the 14 warranted items into four categories, which are summarized below.

A. Garage roof (seven items)

[36] The first category of items relates to water leakage through the Complex's garage roof slab. Tarion found seven warranty breaches arising from those items.[4]

[37] The crux of the dispute was whether Adi was required to conduct a repair "from the top" by waterproofing the membrane on the topside of the slab, or whether Adi's Sikacrete injections through the bottom of the garage roof slab were sufficient.

[38] Tarion found that Adi's Sikacrete injections through the garage roof slab were inadequate to address the issue. Tarion identified several areas with delaminating and cracking concrete as well as staining on the garage floor "which had presumably been caused from water previously dripping from the garage roof slab above". The presence of these stains was "indicative that active water leaks have previously occurred at these locations": Conciliation Report, at pp. 3-4.

[39] In addition to the active leaks, Tarion noted that de-icing chemicals were used on driveways and sidewalks situated above the garage during winter months. These salts contained chlorides which could infiltrate the topside of the slab resulting in premature deterioration of the steel inside it: Conciliation Report, at pp. 3-4. Therefore, even if Adi's Sikacrete injections into the garage roof slab prevented water from leaking into the garage space, it did nothing to stop the chloride contaminants from penetrating through the top of the slab.

[40] As stated in the Conciliation Report, at p. 3, HSCC 729 relied on Tarion's Common Element Construction Performance Guidelines, updated October 9, 2012 ("CE-CP Guidelines") and CSA S413 to support its position that a topside repair of the garage roof slab was required to address the water leakage issue. CSA S413 is a certification standard referenced in the *Building Code* that applies to parking structures: see *Building Code*, at s. 4.4.2.1 and Table 1.3.1.2, Item 313. CSA S413 provides that "[a]ll parking structures shall be protected against (a) corrosion; and (b) water leakage through the roof, suspended floors, and below-grade foundation walls."

[41] Tarion found that the garage roof leak items were warrantable. Tarion cited s. 1.1 of the CE-CP Guidelines, which addresses "WATER LEAKAGE THROUGH BURIED ROOF SLAB – EXPOSED TO CHLORIDES". Section 1.1 states in part:

> **Acceptable Performance/Condition**
> Buried roof slabs shall be designed and constructed to prevent water penetration and leakage and to protect the slab from exposure to chlorides in accordance with the Ontario Building Code, including CSA 413 and the design.
>
> **Warranty**

[4] Those seven warranty breaches related to five disputed construction issues, two of which Tarion found to be in breach of both the one-year warranty and the two-year warranty.

One -Year – Ontario Building Code Violations
Two -Year – Building Envelope Water Penetration

Action
The waterproofing system, not meeting acceptable performance, shall be *repaired*.

Remarks
- Repair shall address the material defect in waterproofing system to prevent water from penetrating the building and to reinstate the protection of the slab against chloride contamination.

[Emphasis in original.]

[42] Applying s. 1.1 of the CE-CP Guidelines and the *Building Code*, Tarion concluded that Adi breached the "Two Year Water Penetration – Building Envelope Warranty" for five of the garage roof items, and the one-year warranty for both workmanship and materials for two of the garage roof items.

B. Settlement Offer items (five items)

[43] Prior to the conciliation inspection, HSCC 729 identified five miscellaneous construction issues that Adi agreed were warranted. As previously noted, on July 23, 2024, two days before the conciliation inspection, Adi offered $10,000 as compensation for "miscellaneous items" that it may have been missed during its audit repairs, without identifying in the offer which specific items were covered or how many there were. While the conciliation inspection was in progress, Adi increased the amount of the settlement offer to $25,000. HSCC 729 did not accept either offer. Adi's position is that (i) the settlement offer related to those five miscellaneous items (the "Settlement Offer items"), (ii) the conciliation inspection as it related to the Settlement Offer items fell within the exception to chargeability that may apply if the owner did not accept the builder's offer of "reasonable cash compensation" from the builder to resolve those items.

[44] In the Conciliation Report, Tarion found that each of the five Settlement Offer items was warranted, which Adi did not dispute. However, the Conciliation Report did not address whether the conciliation inspection was subject to a chargeability exception as it related to the Settlement Offer items. As explained further below, Tarion's position is that the conciliation was chargeable to Adi since at least one item was found to be warranted, and exceptions to chargeability did not apply for all 14 warranted items: see Bulletin No. 4, p. 9; Reg. 892, s. 5.8(2.2).

C. Exterior cladding (Item 105)

[45] HSCC 729 directed Tarion to an area of "exposed and unfinished detailing" adjacent to the condominium's roof terrace access ramp, where previously installed sheet waterproofing membrane had been removed. Tarion observed that the exposed detailing was not protected and would likely be susceptible to water penetration. Tarion determined that the exposed detailing's current condition constituted a defect in the exterior cladding which resulted in its detachment, displacement, or physical deterioration. Tarion found this item to be in breach of the "Two-Year Cladding Warranty" and assessed it as warranted: Conciliation Report, at p. 16.

D. Tenting of a waterproofing membrane (Item 121)

[46] HSCC 729 directed Tarion to locations where "tenting" was occurring in the waterproof flooring membrane on the roof terrace of one of the units. Tarion noted that "it was apparent that the membrane had become debonded from the substrate below": Conciliation Report, at p. 18. Adi's position was that repairs were not required since no leaks were occurring into the interior of the unit below. Tarion found that the debonding and detachment of this membrane was a breach of the "One-Year Workmanship and Materials Warranty" and assessed this item as warranted: Conciliation Report, at p. 18.

E. Conciliation Decision – summary

[47] In summary, as set out in the Conciliation Report, Tarion found that 14 of the construction items in dispute were in breach of the warranties. As well, as set out in the covering letter for the Conciliation Report, Tarion found that the conciliation was chargeable to Adi.

V. Judicial review application

[48] On December 16, 2024, Adi brought a Notice of Application for Judicial Review of the Conciliation Decision. Adi submits Tarion was unreasonable in finding that all 14 construction items breached the statutory warranties and in determining that the conciliation was chargeable to Adi. Adi asks that the Conciliation Decision be set aside and the conciliation remitted to Tarion.

A. Jurisdiction and standard of review

[49] There is no appeal from a conciliation decision by Tarion under ss. 5.5(7) and 5.6(7) of Reg. 892. The Divisional Court's jurisdiction is restricted to a judicial review of the decision: *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, ss. 2(1), 6(1).

[50] Upon judicial review of an administrative decision, there is a presumption that the standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 23. The parties agree that the reasonableness standard of review applies in this case.

[51] Reasonableness review "finds its starting point in the principle of judicial restraint" but remains "a robust form of review" rather than "a 'rubber-stamping' process or a means of sheltering administrative decision makers from accountability": *Vavilov*, at para. 13. In conducting a reasonableness review, the court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. The court must focus on the decision actually made, including the justification offered for it: *Vavilov*, at para. 15.

[52] A reasonable decision is one that is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires a reviewing court to defer to such a decision: *Vavilov*, at para. 85. The relative expertise of administrative decision makers with respect to the questions before them is a relevant consideration in conducting reasonableness review: *Vavilov*, at paras. 31, 92-93.

[53] Formal reasons for a decision will not always be necessary and may, where required, take different forms: *Vavilov*, at para. 119. In such circumstances, a reviewing court may look to the record as a whole to understand the decision and its rationale: *Vavilov*, at para. 137. There will nonetheless be situations where neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable: *Vavilov*, at para. 138.

[54] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on that basis, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency": *Vavilov*, at para. 100.

B. Issues to be determined

[55] Adi submits that Tarion was unreasonable in finding that certain of the construction items breached the statutory warranties. Adi also says that it was unreasonable for Tarion to determine that the conciliation was chargeable to Adi.

[56] On this application, the issues are:

a. Garage roof leakage: Was it unreasonable for Tarion to find that the garage roof items were warranted?

b. Tenting of waterproofing membrane: Was it unreasonable for Tarion to find that the "tenting" of waterproofing flooring membrane (Item 121) was warranted?

c. Settlement Offer items: Did Tarion unreasonably fail to consider whether a chargeability exception applied to the Settlement Offer items?

d. Exposed exterior cladding: Did Tarion unreasonably fail to consider whether a chargeability exception applied to the exposed detailing adjacent to the roof terrace access ramp (Item 105)?

[57] I will consider each of those issues in turn.

VI. Analysis and conclusions

A. Garage roof leakage: Adi has not demonstrated that it was unreasonable for Tarion to find that the garage roof items were warranted

[58] Adi submits that it was unreasonable for Tarion to find that the garage roof items were warranted.

[59] Tarion found that two of the garage roof items breached the one-year warranty (for workmanship and materials) and five of the items breached the two-year warranty (for water penetration of the building envelope). Adi submits that Tarion had insufficient evidence to

conclude that Adi either breached a requirement of the *Building Code* (for the one-year warranty to apply) or that the building envelope did not prevent water penetration (for the two-year warranty to apply): see *ONHWPA*, s. 13(1)(a); Reg. 892, s. 15(2).

[60] Adi says that instead of applying the statutory provisions and relevant caselaw, Tarion erred by determining the issue solely by reference to the CE-CP Guidelines. Adi describes the CE-CP Guidelines as Tarion-created "soft law" policy guidelines that do not have the force of law and cannot unlawfully fetter interpretation of the governing statutory provisions, including the *ONWHPA* and the *Building Code*. Adi argues that to the extent that Tarion relies solely on an interpretation of the CE-CP Guidelines in determining that Adi breached the warranties, this amounts to an unlawful fettering of its discretion.

[61] Adi acknowledges that there was water leakage through the garage ceiling slab but says that it fully addressed the issue by injecting Sikacrete compound into the ceiling cracks from below. Adi maintains that it was standard industry practice to repair water leaking through a parking slab by injecting Sikacrete. It also submits that Tarion did not provide an adequate explanation why it found that injecting Sikacrete was not sufficient, given the harsh and burdensome impact on Adi and Complex residents of requiring a method of repair that would require significant excavation of the property to repair the waterproofing membrane.

[62] Adi agrees that both the *Building Code* and the statutory language of the two-year warranty require that the garage roof slab be protected against water leakage. However, Adi submits that HSCC 729 failed to meet its burden of demonstrating that there was any actual water leakage following Adi's repairs. Adi says that the evidence before Tarion showed that water leakage had existed at some point in the past, but that at the time of the conciliation inspection, the garage roof slab protected against and prevented water penetration.

[63] Adi also challenges Tarion's conclusion that Adi's repairs failed to protect the top of the garage roof slab against corrosion resulting from exposure to chloride contaminates in the de-icing salts. Adi submits Tarion had insufficient evidence to conclude that any of the garage roof items were under areas exposed to such chlorides. Adi says that although HSCC 729's representative Mr. Ankenmann stated that areas were possibly exposed to chlorides or that chloride exposure would be expected, HSCC 729 did not provide evidence substantiating this concern, nor did it upload documentation to the CE PATS system to show that the leaks were located under areas exposed to chlorides. Adi also argues that Tarion failed to analyze where the alleged leaks were occurring, which Adi says was necessary because some of the garage roof items were under topographical areas that could not have been exposed to chlorides.

[64] Contrary to Adi's submissions, Mr. Sutherland deposed in his affidavit that he confirmed that the crack locations were below areas that were exposed to chlorides, including asphalt roadways, sidewalks, townhome garages and patios. As well, Mr. Turchet (a field engineer employed by Adi and one of its affiants) confirmed on cross-examination that such areas, including patios, can be exposed to de-icing salt. Mr. Turchet also stated that de-icing salts are used aggressively at the Complex, and that water must be passing through the waterproofing membrane to cause leaks into the underground garage. He also confirmed that water stains with a yellow

discoloration in areas of the underground garage were indicative of rust in the garage roof slab, confirming that there is corrosion of materials.

[65] As explained below, I conclude that Adi has not demonstrated that it was unreasonable for Tarion to find that the garage roof items were subject to the statutory warranties. In reaching that conclusion, Tarion reasonably relied on s. 1.1 of the CE-CP Guidelines, which requires compliance with the requirements of the *Building Code*.

[66] As previously noted, s. 1.1 of the CE-CP Guidelines sets out the performance standard that requires garage roof slabs to be designed and constructed "to prevent water penetration and leakage and to protect the slab from exposure to chlorides in accordance with the Ontario Building Code, including CSA 413". Section 1.1 provides that repairs to the "waterproofing system" are required if that performance standard is not met.

[67] In the CE-CP Guidelines, Tarion provided guidance relating to construction performance standards that incorporated the requirements of the *Building Code*, an Ontario regulation. The *Building Code* in turn references CSA S413, a certification standard that applies to parking structures, the terms of which are reflected in s. 1.1 of the CE-CP Guidelines. In these circumstances, Adi is not justified in dismissing the CE-CP Guidelines as "soft law" policy guidelines on which Tarion unreasonably relied when deciding that the garage leak issues were covered by the warranties. The CE-CP Guidelines by their terms are grounded in the statutory requirements of the *ONHWPA*, the *Building Code Act* and the regulations under those statutes.

[68] In any case, as a registered builder under the *ONHWPA*, Adi became contractually bound to adhere to Tarion's Registrar Bulletins (together with the *ONHWPA* and the regulations) when it signed the Builder Agreement in 2016: see Builder Agreement, s. 2.1. When determining whether construction issues are warranted, it is reasonable for Tarion to base its decisions on the construction performance guidelines set out in those bulletins. In *8149 v Tarion Warranty Corp.*, 2014 CanLII 86273 (ON LAT), at (the second) para. 10, the Licence Appeal Tribunal (the "LAT") recognized that the construction performance guidelines are a "good starting point … with the application of common sense" to determine if a particular construction condition attracts warranty coverage.

[69] As well, I am not persuaded by Adi's other submissions relating to the garage roof items. In large measure, Adi is challenging Tarion's factual findings, on matters within its purview, that grounded its determination that the statutory warranties applied. In the Conciliation Report, at p. 3, Tarion stated:

> Injection repairs from the underside of the roof slab may prevent water from entering into the parking garage space, however it will not prevent chloride contaminated water from infiltrating into the concrete slab from the topside. The long term infiltration of chloride contaminated water into a concrete slab may result in the premature deterioration of the reinforcing steel within the slab.
>
> The protection of buried roof slabs from exposure to chlorides is prescribed by the Ontario Building Code, CSA 413 and Tarion CE CPG Article 1.1. The current

> condition of this claim item does not satisfy these requirements, and is a breach of the One-Year Workmanship and Materials Warranty. At the identified crack locations where the garage roof slab will be exposed to chlorides (from de-icing chemicals) repairs must be completed to address the material defect in the waterproofing system on the topside of the slab to prevent water from penetrating into the building, and to reinstate the protection of the slab against chloride contamination.

[70] Those findings were open to Tarion on the evidence and are owed deference. I see no grounds to interfere upon review.

[71] Accordingly, Adi has not established that it was unreasonable for Tarion to conclude that the garage roof items were subject to the statutory warranties.

B. Waterproofing membrane tenting: Adi has not demonstrated that it was unreasonable for Tarion to find that the "tenting" of waterproofing flooring membrane (Item 121) was warranted

[72] Adi submits that it was unreasonable for Tarion to find that the "tenting" of waterproof flooring membrane (Item 121) was warranted.

[73] Tarion determined that "tenting" in the waterproof flooring membrane on a roof terrace occurred when the membrane "debonded from the substrate below": Conciliation Report, at p. 18. Tarion found that the debonding and detachment was a breach of the "the One Year Workmanship Warranty and the One Year Materials Warranty".

[74] Adi submits that Tarion's warrantability assessment was unreasonable because Tarion (a) ignored the evidence Adi provided that there was no defect in the material, (b) had no evidentiary basis for concluding that there was a failure to construct in a workmanlike manner, and (c) failed to consider legal authority indicating that cosmetic defects are not necessarily warrantable.

[75] On the first point (regarding defect in material), Adi's submits that the debonding was purely cosmetic, with no impact on the membrane's waterproofing capabilities. Prior to the conciliation inspection, Adi uploaded to CE PATS a bulletin from the membrane's manufacturer (the "Dec-Tec Bulletin"), stating that the "[b]ubbles are a cosmetic issue and as such will not impair the integrity of the watertight system." Adi says that Tarion failed to consider and address the Dec-Tec Bulletin when deciding that the Item 121 issue was a defect in material that breached the one-year warranty.

[76] On the second point (regarding workmanship), Adi notes that "[w]hether construction was done in a workmanlike manner has been defined as "falling below 'industry standards'"": see *11594 v. Tarion Warranty Corp.*, 2019 CanLII 29106 (ON LAT), at para. 18. Adi says that construction work industry standards are prescribed by the *Building Code* or the CE-CP Guidelines. Adi notes that neither standard was mentioned in the Conciliation Report or the documents HSCC 729 uploaded to the CE PATS system.

[77] On the third point (legal authority regarding cosmetic defects), among other things, Adi cites previous LAT decisions that it says support the view that cosmetic defects are not necessarily warrantable. For example, in *11594 v. Tarion*, the LAT considered whether a symmetry issue with a cathedral ceiling was warrantable under the one-year warranty. At para. 11, the LAT stated that the owners "at all times framed the issue as one of aesthetics, not one of structure." On that basis, the LAT indicated, at para. 17, that the workmanship warranty (rather than the materials warranty) was the matter in issue in that case:

> As indicated, the parties agree this is an aesthetic issue alone. The question therefore is whether that can amount to a breach of the warranty that the home is constructed in a workmanlike manner, pursuant to section 13(1)(a)(i) of the [*ONHWPA*]. I find that it does not.

[78] At para. 21, the LAT further explained: "I find that aesthetics alone in this case is not sufficient to prove a breach of warranty in the absence of any evidence that the construction of the ceiling was somehow outside of industry standards or not done in a workmanlike manner." Adi submits that in the current matter HSCC 729, like the owner in *11594 v. Tarion*, did not provide evidence that the workmanship for Item 121 "fell below industry standards": see *11594 v. Tarion*, at para. 18.

[79] Tarion disputes that the tenting in the waterproofing was merely an issue of "cosmetic" bubbling, as addressed in the Dec-Tec Bulletin. In Mr. Sutherland's affidavit, he deposed that there was water staining on the edges of the waterproofing membrane, where the membrane was debonded and tenting, which was evidence of ponding. On cross examination, he stated that there were four areas of debonding and tenting on the terrace deck floor. Adi's affiant Mr. Turchet agreed on cross-examination agreed that this item was unsightly.

[80] Tarion also submits that rather than supporting Adi's position, the Dec-Tech Bulletin informed Tarion's conclusion that debonding of waterproof flooring was a defect in workmanship and materials. Tarion says that the Dec-Tec Bulletin confirms that both causes of "bubbling" that it identifies (being moisture or improper installation) were Adi's fault since they failed to allow materials to dry or used the wrong materials for the installation.

[81] In any case, Tarion argues that even if the issue in Item 121 is properly categorized as cosmetic, it does not automatically follow that the one-year warranty is not breached. Tarion relies on LAT decisions that indicate that the key consideration is not whether the defect was "cosmetic" or "aesthetic", but rather whether the alleged defect is readily apparent and caused by defective material or workmanship: see *5188-5457 v Tarion Warranty Corp.*, 2010 CanLII 100818 (ON LAT), at Item 5; *8149 v Tarion*, at (the first) para. 10. There is no dispute that tenting of the waterproof membrane was readily apparent in this case.

[82] On the record before the court, I conclude that Adi has not established that it was unreasonable for Tarion to find that the tenting of waterproofing flooring membrane (Item 121) was subject to the statutory warranty. In the Conciliation Report, Tarion provided a sufficient explanation of why it found Item 121 to be warranted. While the explanation was succinct, Adi has not demonstrated that the standard of justification, intelligibility and transparency set out in

Vavilov was not met. Whether or not the issue in Item 121 was properly characterized as cosmetic, it was open to Tarion to conclude that Item 121 was subject to the statutory warranty. I see no reason to interfere with that finding upon review.

C. Settlement Offer items: Adi has not demonstrated Tarion unreasonably failed to consider whether a chargeability exception applied to the Settlement Offer items

[83] In the Conciliation Report, Tarion found that the Settlement Offer items were warranted, which Adi does not dispute. However, Adi submits that in deciding that the conciliation was chargeable to Adi, Tarion unreasonably failed to consider whether a chargeability exception applied to those items.

[84] Adi says that its offer of $10,000 (later raised to $25,000) to compensate HSCC 729 for the Settlement Offer items fell within the Settlement Offer Chargeability Exception, which applies if the owner does not accept "reasonable cash compensation made by the builder to resolve the warranted item(s)": Bulletin No. 4, at p. 11. Adi does not advance the argument that other chargeability exceptions apply to those items.

[85] Bulletin No. 4, at para. 11, provides that for the Settlement Offer Chargeability Exception to apply:

> Tarion must consider the proposed cash settlement offer to be reasonable in the circumstances in terms of dollar amount and timing of the offer. The homeowner must also be given a reasonable amount of time to consider the settlement offer before the conciliation. What is reasonable may depend on the size and complexity of the settlement. At minimum, 24 hours should be provided.

[86] Tarion disputes that Settlement Offer Chargeability Exception applied to either of Adi's offers, taking into account each offer's (i) terms, (ii) timing, and (iii) amount.

[87] With respect to the offers' terms, Tarion emphasizes that a conciliation is chargeable if Tarion finds that "one or more items is warranted at the conciliation inspection unless a specified exception to chargeability applies for each and every item that was assessed as warranted" (emphasis added): Bulletin No. 4, at p. 9. Adi's offers did not indicate which specific items were covered by the offers, referring only to an unspecified number of "miscellaneous items". But accepting Adi's position that the offers applied only to the five Settlement Offer items, Tarion says that neither offer would meet the requirements of the Settlement Offer Chargeability Exception since the offers did not cover "each and every item that was assessed as warranted".

[88] With respect to the timing of the offers, Tarion submits that only the $10,000 offer was relevant, since for an offer to qualify, it must be submitted a reasonable time before the conciliation. The later $25,000 offer was made while conciliation inspection was in process. Tarion argues that the timing of the $10,000 offer (less than 48 hours before the conciliation inspection) was unreasonable, noting that Bulletin No. 4, at p. 11, states that "[w]hat is reasonable may depend on the size and complexity of the settlement. At minimum, 24 hours should be provided." Tarion submits that it was reasonable to conclude that a period of less than 48 hours (even though more than the 24-hour minimum) was insufficient in this case, given the time it would take for HSCC

729's volunteer board of directors to meet with the engineer and review the offer to determine whether it should be accepted.

[89] With respect to the amount of the $10,000 offer, Tarion submits that even if qualified for consideration from a timing perspective, it was reasonable to conclude that the amount of the $10,000 was insufficient. Among other things, Tarion says the fact that Adi raised the offer amount to $25,000 once the conciliation was in progress indicated Adi's recognition that the original $10,000 offer was inadequate.

[90] I conclude that Adi has not demonstrated that in deciding that the conciliation was chargeable to Adi, Tarion unreasonably failed to consider whether a chargeability exception applied to the Settlement Offer items.

[91] In making that determination, I agree with Tarion that it was reasonable to conclude that Adi's settlement offers did not meet the requirements of the Settlement Offer Chargeability Exception, since Adi's offers did not cover "each and every item that was assessed as warranted". I accept Tarion's submissions in support of that conclusion.

[92] In any case, I agree with Tarion that it was reasonable to conclude the Settlement Offer Chargeability Exception did not apply to Adi's offers, taking into account the terms, timing and amount of the offers. I accept Tarion's submissions in support of that conclusion.

[93] Tarion made its chargeability determination in accordance with the guidance it provided to construction industry participants in Bulletin No. 4 as to the circumstances in which it would find a conciliation to be chargeable to the builder registered under the *ONHWPA*. Deference is owed to Tarion's determinations relating to a conciliation's chargeability, including the application of chargeability exceptions under Bulletin No. 4.

[94] When determining whether it is reasonable to make a chargeability finding in a particular case, it is relevant to consider the consequences of doing so. As a result of Tarion's finding that the conciliation was chargeable in this case, Adi bears the stigma of disclosure of that finding on the Ontario Builder Directory, which is not insignificant for a construction industry participant. However, from a wider perspective, the consequences are relatively modest. Adi is required to pay a fee of $3,000 for a common elements conciliation under s. 5.8(2.2) of Reg. 892. Since the Settlement Offer items were properly warranted (which Adi does not dispute), Adi's obligation to bear the cost of repairs for those items is not affected by the chargeability finding.

[95] In all the circumstances, I see no basis for interfering with Tarion's chargeability finding upon review in this case.

D. <u>Exposed exterior cladding:</u> Adi has not demonstrated that Tarion unreasonably failed to consider whether a chargeability exception applied to the exposed detailing adjacent to the roof terrace access ramp (Item 105)

[96] In the Conciliation Report, at p. 16, Tarion observed that an area of exposed and unfinished detailing adjacent to the roof terrace access ramp (identified as Item 105) was not protected and

would likely be susceptible to water penetration. Tarion found this item to be in breach of the "Two-Year Cladding Warranty" and assessed it as warranted.

[97] Adi does not challenge this finding but submits that in deciding that the conciliation was chargeable to Adi, Tarion failed to consider whether a chargeability exception applied to Item 105. Adi argues that this item fell within the New Issue Chargeability Exception.

[98] Adi says that the issue that HSCC 729 identified on the CE PATS system as Item 105 was "[e]xposed and unprotected sheet applied waterproofing or roofing material [that] is present adjacent to the Building A roof terrace access ramp." According to Adi, it repaired this issue prior to the conciliation inspection. Adi says that what Tarion warranted in the Conciliation Report was a new concern, that is, exposed detailing that would likely be susceptible to water penetration. Adi states that this specific concern was not communicated to Adi at any time prior to the conciliation inspection. Adi submits that the New Issue Chargeability Exception applied since the item that Tarion warranted was "a new or different defect" that Adi was "unaware of" but agreed "at or before the conciliation to resolve the issue to the warranty standard": Bulletin No. 4, at pp. 12-13.

[99] Tarion disagrees. Tarion submits that in addressing Item 105 prior to the conciliation inspection, Adi removed the exposed waterproofing membrane that HSCC 729 identified, but Adi did not take steps to protect the exposed detailing below the removed material. Therefore, Tarion says that rather than addressing a new item, Adi was required to rectify its incomplete previous repair by reinstalling protective waterproofing membrane. On that basis, Tarion submits that it was reasonable to conclude that no exceptions to chargeability applied to Item 105.

[100] I conclude that Adi has not demonstrated that Tarion unreasonably failed to consider whether a chargeability exception applied to Item 105. In doing so, I accept Tarion's submissions in support of the conclusion that the warranted item was an incomplete repair to the construction issue that HSCC 729 identified as Item 105. It was reasonable to conclude that the New Issue Chargeability Exception did not apply, and no other chargeability exception relating to this item was advanced.

[101] In any event, even if the New Issue Chargeability Exception applied to this item, the Conciliation Report identified 13 other items that Tarion found to be warranted. As previously stated, to make the conciliation chargeable, there needs to be only one item found to be warranted to which no exceptions apply. No basis has been advanced to support the conclusion that chargeability exceptions applied to all the other items.

[102] In these circumstances, I see no basis for concluding that it was unreasonable for Tarion to determine that the conciliation was chargeable to Adi.

VII. Disposition

[103] Accordingly, I would dismiss the application for judicial review and order Adi to pay costs to Tarion in the agreed amount of $25,000 all inclusive.

_____

Lococo J.

_____

Backhouse J.

_____

Jenson J.

Date: August 29, 2025

CITATION: Adi Developments (Masonry the West) Inc. v. Tarion Warranty Corp., 2025 ONSC 4853
DIVISIONAL COURT FILE NO.: 773/24-JR
DATE: 20240729

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Backhouse, Lococo and Jensen JJ.

BETWEEN:

ADI DEVELOPMENTS (MASONRY THE WEST) INC.

Applicant

– **and** –

TARION WARRANTY CORPORATION

Respondent

REASONS FOR JUDGMENT

R. A. LOCOCO J.

Date: August 29, 2025