

CITATION: 7084421 Canada Ltd. v. Tarion Warranty Corp., 2025 ONSC 5155
DIVISIONAL COURT FILE NO.: 1578/24 JR
(Oshawa)
DATE: 20250911

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

Newton RSJ and D.L. Corbett and Nakatsuru JJ.

B E T W E E N :)
)
7084421 Canada Ltd.) *Gerald Anthony*, agent¹ for the Applicant
)
Applicant)
)
- and -)
)
Tarion Warranty Corporation) *Cindy Zhou*, for the Respondent
)
Respondent) **HEARD at Oshawa:** January 22, 2025²

2025 ONSC 5155 (CanLII)

REASONS FOR DECISION

D.L. Corbett J.

[1] This is an application for judicial review of a decision of the Respondent Tarion dated August 6, 2024, finding that:

- a. The home municipally known as 103 Edward Street, Aurora (the “Home”) is entitled to statutory warranty coverage under the *Ontario New Home Warranties Plan Act*, RSO 1990, c.O.31 (the “Act”); and
- b. The Applicant is “[t]he vendor responsible for providing the statutory warranties.”

¹ By order of Charney J. dated January 9, 2025, Mr Anthony was granted leave to represent the Applicant in this proceeding.

² The Applicant listed the Attorney General of Ontario (“Ontario”) as an intervenor in the title of proceedings. Ontario was served with the Notice of Application, as required by the *Judicial Review Procedure Act*, RSO 1990, c. J.1, s.9(4). Ontario acknowledged receipt of the Notice of Application and advised that it would not intervene in the application; thus Ontario is not properly included as an intervenor in the title of proceedings.

[2] The Applicant challenges both aspects of Tarion’s decision. It argues that it was not the “vendor” of the Home within the meaning of the Act. Rather, it argues that it was a mortgagee, and that when it exercised its power of sale rights upon mortgage default, the Home was sold on behalf of the mortgagor, Chris Patterson (“Patterson”), and not on behalf of the Applicant mortgagee. It also argues that construction was initiated by Patterson to replace a home that had been destroyed by fire, and that Patterson intended to complete the construction and live in the Home. If Patterson had completed the home and moved into it, as planned, the Act would not apply to the Home. The Applicant argues that “[h]ow it starts is how it ends” and thus that the Act did not, and does not, apply to the Home.

[3] The Applicant also raises several other issues, which are of little merit: I address these summarily later in these reasons.

Summary and Disposition

[4] Tarion’s finding that the Applicant was the “vendor” of the house is supported by the record, is reasonable in all the circumstances, and is consistent with longstanding caselaw: *Re Ontario New Home Warranty Program and Crown Trust*, 1984 CanLII 1892 (“*Crown Trust*”); affd. 1984 CanLII 1892 (Ont. CA). It is reasonable.

[5] Tarion’s finding that the Home was covered by the New Home Warranty Program was ineluctable on the record before Tarion: the issue of how the Home came to be built and Patterson’s intentions in rebuilding was not before Tarion when it made the impugned decision and is not available in this application.

[6] The process before Tarion was fair. The Applicant’s failure to engage in that process effectively is not a basis on which to find that it was treated unfairly. I would not accept the arguments the Applicant seeks to pursue for the first time before this court and see little merit in those arguments in any event. Therefore, for the reasons that follow, I would dismiss this application.

Jurisdiction and Standard of Review

[7] This court has jurisdiction over this application pursuant to ss. 2(1) and 6(1) of the *Judicial Review Procedure Act*, RSO 1990, c. J.1. The standard of review of the impugned decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para. 16. See *Ashcroft Homes v. Tarion Warranty Corporation*, 2023 ONSC 6527 (Div. Ct.).

The Process Below

[8] In October 2020, the Town of Aurora issued a building permit for a new home to be constructed at 103 Edward Street, Aurora. In January 2023, an Occupancy Permit was issued for the Home. In July 2023, the Home was listed for sale. The Applicant was listed as the seller of the Home, under power of sale, and the Home was described in the listing as “brand new and never lived in.”

[9] By agreement of purchase and sale dated July 15, 2023, amended August 4, 2023, title to the Home was sold by the Applicant to Elliott Kent, Aleshia Ing and Gary C. Kent (collectively, the “Buyers”). This sale transaction was completed on August 9, 2023; the Applicant was listed as the “transferor” on the sale deed.

[10] Following completion of the sale, the Buyers submitted a Homeowner Warranty Eligibility Form to Tarion, seeking statutory warranty coverage. The Buyers identified the Applicant as “the builder and / or vendor of the Home.”

[11] On November 28, 2023, Tarion gave notice to the Applicant that it was investigating whether the home was eligible for statutory warranty coverage and gave the Applicant an opportunity to provide information and evidence respecting the investigation. The letter includes a form for the Applicant to fill out and return, and states as follows:

... The information available to us indicates that you are the vendor and/or builder of the home who will be responsible for providing the statutory warranties if Tarion determines the home is eligible for coverage.

Tarion is granting you the opportunity to assist with its investigation by providing your side of the story and any evidence indicating whether or not (i) the home is eligible for statutory warranty coverage; and (ii) you are the warranty provider. To assist with the investigation, you must complete and return the enclosed Warranty Eligibility Information Form by **December 12, 2023**. We will rely on the information that you provide us with as part of Tarion’s investigation. We may contact you as the investigation progresses to collect additional information. Please note that we may also contact the homeowner, the Home Construction Regulatory Authority (HCRA) and other parties with knowledge about the construction or sale of the home to discuss information you provide and to gather more information.

It is essential that you provide Tarion with timely, accurate, and complete information to support its investigation. A failure to do so will result in Tarion completing its investigation without the information and evidence that you wish us to consider. You are encouraged to consider promptly obtaining independent legal advice to assist with your response. (emphasis in original)

The letter gave the Applicant notice of the issues, an opportunity to be heard in writing in respect to those issues, and an explanation of the consequences of failing to provide complete and accurate information. Later in the letter, Tarion explains the potential consequences for the Applicant if it is found responsible for covering statutory warranties.

[12] Tarion’s form listed the Buyers as the “Homeowners” for the purposes of the form and it listed the Home as the property under investigation for warranty eligibility. The completed form submitted by the Applicant contained the following questions and answers:

1. Did you enter into an agreement of purchase and sale or construction contract regarding the above home and with the above homeowner(s)? Please provide a copy.

Neither "Yes" nor "No" was specified in response to this question. Handwritten beside the boxes for "Yes" and "No" was stated: "Sold under Power of Sale. Vendor is Chris Patterson."

2. Did you supply all the work and materials to complete the home to legal occupancy standards. If No, please provide details and documentation to confirm the extent of your involvement in the build.

The "No" box was ticked; no further detail or documents were provided.

3. Were any elements of the home (e.g., foundation, framing) pre-existing? Please include details and permit drawings if applicable.

Neither "Yes" nor "No" was indicated; handwritten "unknown" beside the answer boxes.

4. Was the home ever enrolled with Tarion? If No, why not?

Neither "Yes" nor "No" was indicated; handwritten "unknown" beside the answer boxes.

5. If the home was sold via an Agreement of Purchase and Sale, who transferred title to the above-named homeowner(s)?

"unknown"

6. Who applied for the building permit?

"unknown"

7. Do the homeowners owe you any money or have they held funds back? If Yes, please provide details.

"unknown"

8. Are there any liens on the property? If Yes, please provide documentation.

"unknown"

9. Is there any related legal action? If Yes, please provide us with the pleadings...?

"unknown"

10. Did the homeowners hire any of the trades themselves and/or complete any of the work themselves?

“unknown”

11. Use the space below for any additional comments.

This space was left blank.

12. Please provide us with copies of the following documents, if applicable: [9 categories of documents are listed, including “Agreement of Purchase and Sale” and “MLS Listing Agreement” and “Key correspondence with homeowners and other related parties....”]

The Agreement of Purchase and Sale was apparently attached. No other documents were apparently attached.

[13] Tarion’s investigator contacted the Applicant’s principal, Mr Anthony, by telephone. Mr Anthony told the investigator that because the Home was sold under power of sale, he (ie the Applicant) was not responsible for the warranty as the “vendor”. The investigator requested a recorded call with Mr Anthony, and Mr Anthony hung up the phone. Tarion’s investigator left a voice-mail message for Mr Anthony, requesting further communication, and this was not returned.

[14] On June 6, 2024, Tarion wrote to the Applicant advising that it had concluded its investigation and had concluded that (a) the Home is eligible for statutory warranty coverage under the Act, and (b) the Applicant is responsible for the statutory warranties. The balance of the letter describes the process for addressing warranty claims that had been made by the Buyers.

[15] By email sent June 29, 2024, Mr Anthony wrote to Tarion as follows:

I am in receipt of Cheryl MacDonald’s email and your letter. I don’t know who I spoke to several months ago but at the time the person I spoke with was uncertain as to whether [the Applicant] was responsible for the warranty. Apparently a decision was made without providing that information.

Let’s start with the buyer. They bought the house AS IS, no warranty of any kind, as is typical of Power of Sale homes. They have obviously convinced you that they are somehow entitled to something for nothing. They bought the cheapest detached house in Aurora, in part because it was Power of Sale.

The seller was Chris Patterson. His name was on title. He took a hit on the price because he was unable to pay the mortgage. The buyer benefited.

He did not rebuild the house. The insurance company was the general contractor. They controlled every aspect of the reconstruction, and paid for everything.

[The Applicant] had the authority to sell the property to recover their loss. [THE APPLICANT] WAS NOT THE SELLER. At best, the Applicant was the agent. The real estate company was also an agent for the seller. We worked together to sell Chris’s house.

Here is the bottom line. If you do not wish to get into a legal battle over this, kindly reverse your decision. I don't want Tarion to come to me for the next 7 years with warranty claims. I am not afraid to take on Tarion, and will do so if this is not resolved quickly. Kindly review this matter with your legal counsel, and get back to me next week. (capitalization in original)

[16] Tarion responded to Mr Anthony's email on July 3, 2024, as follows:

We have reviewed this matter with legal counsel.

Please note that the [Act] is consumer protection legislation. Homes are entitled to statutory warranty coverage if the definitions of "home", "owner" and "vendor" are met. Whether the home is purchased "as is" or (sic) the price of the home has no effect on warranty coverage. Parties cannot contract out of the [Act].

The evidence indicates that [the Applicant] was the vendor. It is listed as the "Seller" on the Agreement of Purchase and Sale... and it is listed as the "transferor" on the title of transfer....

Please note that this question has already been determined by the "Ontario High Court of Justice" in [*Crown Trust*]. A mortgagee selling under power of sale is a vendor within the meaning of [the Act].

Kindly review the above with your counsel. Should you still wish to dispute Tarion's determination, you may respond via email to request a Decision Letter. Following issuance of the Decision Letter, you may submit a judicial review application.

[17] The Applicant disputed Tarion's decision and the Decision Letter (the decision under review in this proceeding) was provided by email on August 6, 2024. The substance of Tarion's decision is set out as following, beginning on page 3 of the Decision Letter:

In light of the information and documentation received, Tarion is satisfied that

- [the Buyers] are "owners" within the definition of the [Act] because the Home was not previously occupied. This is supported by the sale listing and statements from the neighbours.
- The Home is a self-contained, one family dwelling within the definition of "home" under the [Act].
- [the Applicant] is the "vendor" within the definition of the [Act] because it sold the home on its own behalf. This is supported by the identification of [the Applicant] as the seller on the APS and the transferor on the title transfer. Tarion rejects Mr Anthony's allegation that the mortgagor, Chris Patterson, is the seller. There is no evidence that Mr Patterson had any involvement in the sale of the Home.

Tarion also rejects Mr Anthony's assertion that a mortgagee selling under power of sale is not a "vendor". This issue was resolved by the Ontario High Court of Justice in [*Crown Trust*], which held that a mortgagee selling under power of sale was a vendor within the meaning of the [Act].

Tarion also rejects Mr Anthony's assertion that the home is not eligible for statutory warranties because it was sold "as-is". The [Act] is consumer protection legislation and is to be interpreted liberally to provide that protection. Pursuant to section 1.2, the Act applies despite any agreement to the contrary. Pursuant to s. 13(6), the warranties apply despite any agreement or waiver to the contrary. Vendors and purchasers cannot contract out of the [Act].

The home is therefore entitled to statutory warranty coverage beginning on August 9, 2023. [The Applicant] is the "vendor" within the meaning of the [Act] who is responsible for providing the statutory warranties.

[18] As reflected in the quoted portion of the Decision Letter, Tarion addressed and decided the two issues that had been raised with it by the Applicant: (a) it found that a mortgagee selling under power of sale is a "vendor" within the meaning of the Act, and (b) it found that parties cannot contract out of the Act. These decisions, and the reasons given for them, are grounded in the record that was before Tarion and address all the issues that had been raised with Tarion by the Applicant.

[19] The Applicant commenced this application by Notice of Application dated September 4, 2024. The grounds for the application set out in the Notice are as follows (paras. 4-9 of the Notice of Application):

4. The Applicant is seeking an order quashing the Decision on the basis of reasonableness and correctness.
5. The Applicant submits that it is not a vendor as defined by the [Act] and the Home Construction Regulatory Authority. As such, the Applicant is not responsible for providing statutory warranty coverage for [the Home].
6. The [Home] was built by a contractor for the use of the then owner so the home did not qualify for statutory warranty coverage.
7. The Applicant would not be a vendor if the other applicable definitions of "home", "builder" and "owner" under the [Act] are not met.
8. The APS stated that the home was being sold as-is with no warranty.
9. The mortgagee selling under power of sale is not acting on his own behalf within the meaning of the [Act].

[20] Ground #4 is generic and proper as an introductory ground of review. Grounds #5, 8 and 9 were grounds raised by the Applicant with Tarion. Grounds #6 and 7 were not raised with Tarion.

New Arguments on Judicial Review

[21] The task of this court is to review Tarion's decision on the basis of the issues and record that were before Tarion.

[22] This court has the discretion to refuse to deal with an issue that could have been raised before the administrative decision maker but is not raised until judicial review. The rationale for declining to hear such an argument rests on a number of considerations: showing respect for the legislative decision to confer first line responsibility on the administrative decision maker to make such decisions; obtaining the benefit, for the court on judicial review, of a decision of the specialized decision maker on the issue; avoiding any unfair prejudice to other parties; and ensuring that there is an adequate evidentiary record to decide the question: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, paras. 22-26. I would add to this list respect for the finality principle: this court should decline to order a fresh hearing below where an applicant failed to raise issues after having been given a reasonable opportunity to raise them in the proceeding under review.

[23] I would exercise my discretion to refuse to deal with issues #6 and #7 in the Notice of Application because they were not raised in the process below and because the Applicant did not provide facts and documents in support of these arguments to Tarion below. The impugned decision does not address these arguments, because they had not been raised by the Applicant, and the underlying investigation did not pursue these issues, again because they had not been raised with Tarion.

[24] Tarion sought the Applicant's position, information and documents in writing, and by way of interview with Tarion's investigator. The Applicant initially stated that it was not responsible for warranties for the Home because its role was confined to selling the Home as a mortgagee exercising its power of sale. That was the sole basis provided by the Applicant during the investigation.

[25] After Tarion provided its decision, in its communication of June 29, 2024, the Applicant restated and expanded on its argument that it was not responsible for warranties because it was acting as a mortgagee exercising its power of sale. It also advanced an argument based on the agreement between it and the Buyers that the house was being sold "as-is" with no warranties.

[26] There is some evidence in the record (not provided by the Applicant) that Mr Patterson owned the original house, that the house burned down, that the Home was built on the site of the destroyed house, that Mr Patterson never occupied the Home, that Mr Patterson did occupy a trailer on the property during periods of construction, and that the Home stood empty for about two years before it was sold. There is little in the record to establish that Mr Patterson had a subjective intention to occupy the Home, or, if he ever did have such an intention, when he changed it. No

argument was made to Tarion on the basis of Mr Patterson’s alleged shifting intentions, and in particular, no argument was made that there was never a “builder” or an “owner” within the meaning of the Act and, as a consequence, that the Applicant could not be a “vendor” within the meaning of the Act.

[27] Tarion has not had the opportunity to investigate an argument grounded on Mr Patterson’s subjective intentions, because it had no notice of that argument. This court does not have the benefit of a decision on this issue from Tarion, because the issue had not been raised with it by the Applicant. For these reasons alone, I would not permit the Applicant to raise these issues for the first time on this application for judicial review. This conclusion is buttressed by two additional factors:

1. The Applicant Failed to Engage in Tarion’s Process

- a. The Applicant was uncooperative during Tarion’s investigation and rested its argument entirely on its position that it was not the “vendor” because it was a mortgagee exercising a power of sale. This lack of cooperation went so far as the Applicant telling Tarion, at questions 4 and 5 of the questionnaire (set out above), that it did not know who transferred title on the Agreement of Purchase and Sale or if the Buyers held back any of the purchase price on closing of their purchase of the Home – facts that were, or should have been, in the knowledge of the Applicant.
- b. The Applicant continued to be uncooperative during Tarion’s investigation when reached by telephone by Tarion’s investigator, repeating its position that it was not the “vendor” because it was exercising a mortgagee’s power of sale rights, unilaterally terminating the call, and declining to speak with Tarion further.
- c. The Applicant’s lack of cooperation came after Tarion’s letter to the Applicant in which Tarion described its process and emphasized the importance of the Applicant providing complete and accurate information to Tarion.

2. The Applicant Now Seeks to Add to the Record

In its factum (and in oral argument), the Applicant relies on facts that were not before Tarion at the time it made its decision. In particular, the Applicant states:

- a. The Home was owned by Chris Patterson (“Mr Patterson” or the “Borrower”). In 2013, Mr Patterson borrowed money from the Applicant and granted the Applicant a mortgage registered against title to the Home as security for the loan.
- b. In July 2019, the house burned to the ground. The mortgage was in good standing at this time.
- c. The house had been insured and the insurer “agreed to rebuild the house.”

- d. The Borrower entered into a contract with 1403158 Ontario Ltd. (the “Contractor”) to construct the Home.
- e. The Contractor was not a registered builder.
- f. Construction of the Home was completed in 2022.
- g. By the time construction was completed, the Borrower “had already made other living arrangements and chose not to move in.”
- h. The Applicant contacted a law firm regarding selling the Home and was advised that it could be sold “as-is, no warranty because [it] had been built for [Borrower’s] own use.”

None of these facts is cited by the Applicant to the record that was before Tarion and none were relied on by the Applicant in its arguments to Tarion. The facts set out in a, b and f could be found elsewhere in Tarion’s records in some form (if not in detail). The facts set out in c, d and e are not in the record, although other information can be found in the record from which these facts could be inferred. The facts set out in g and h are not to be found anywhere in the record.

An argument based on an allegation that the Home was constructed by Mr Patterson for his own use, and therefore the Home was never insured under the Act, could raise two potential sets of issues: (a) factual issues about what Mr Patterson’s intentions were and when they changed; and (b) legal issues about the application of the Act, depending upon the precise findings of fact related to Mr Patterson’s intentions. No factual findings were made below in respect to (a) and no legal analysis was undertaken below in respect to (b).

[28] The Applicant had an opportunity to raise issues #6 and #7 with Tarion and did not do so. If this court were to permit him to raise them now, on the basis that they are an arguable defence for the Applicant, fairness would require us to return these issues to Tarion for an investigation and a decision by Tarion, which would then be reviewable in this court on a standard of reasonableness. These are not issues which this court should decide at first instance on a fresh, incomplete, and uninvestigated record.

Adding to the Record on Judicial Review

[29] As noted above, the Applicant sets out facts in its factum that are not in the Record. It also included documents in its compendium that were not in the record before Tarion.

[30] Generally, the evidence before the court on judicial review is restricted to the record that was before the decision maker, and evidence that was not before the decision-maker is generally not admissible before this court: *Association of Universities and Colleges of Canada v. The Canadian Copyright Licensing Agency*, 2012 FCA 22, para. 19. This is because the court’s function is to review the legality of the decision when it was made. Stratas JA set out three exceptions to the general rule (at para. 20):

- Evidence may be admissible to set out general background that would assist the courts.
- Evidence may be admissible to show procedural defects that are not apparent from the record or the reasons – for example, a reasonable apprehension of bias or a denial of procedural fairness.
- Evidence may be admissible to show a complete lack of evidence to support a material finding of fact.

See also *Re Keeprite Worers' Independent Union and Keeprite Products Ltd.* (1980), 29 OR (2d) 513 (CA); *Hanna v. Attorney General for Ontario*, 2010 ONSC 4058, para. 13 (Div. Ct.); *Sierra Club Canada v. Ontario (Ministry of Natural Resources and Ministry of Transportation)*, 2011 ONSC 4086, paras. 13, 20 (Div. Ct.).

[31] None of the additional facts relied upon by the Applicant would fit into the exceptions to the general principle against supplementing the record. Further, no good explanation has been provided as to why the Applicant (i) did not provide this information to Tarion during Tarion's process; and (ii) did not advance arguments during Tarion's process for which these additional facts would have been material.

[32] I would exercise my discretion to refuse to permit the Applicant to rely on facts and arguments that were not put by it to Tarion below.

Issue #1 – Is the Applicant a “Vendor” ?

[33] Section 13(1) of the Act provides:

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,
- (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.

[34] Section 1 of the Act provides the following pertinent definitions:

“vendor” means,

- (a) ... a person who, on the person's own behalf, sells a home not previously occupied to an owner....

“home” means,

- (a) A self-contained one-family dwelling, detached or attached to one or more others by one or more common wall,

...

“owner” means a person who first acquires a home from its vendor for occupancy, and the person’s successors in title;

[35] Tarion found that the Buyers are “owners” within the meaning of the Act. It is evident that the Buyers are the persons “who first acquired title to” the Home: the Home was not previously occupied when the Buyers purchased it. Tarion found that the Home fits the definition of “home”, as a detached “self-contained one-family dwelling.” Tarion found that the Applicant is the “vendor”, having sold the home on its own behalf to the owners.

[36] Tarion considered the Applicant’s argument that it did not sell the home on its own behalf, but rather sold it on behalf of Mr Patterson. Tarion rejected this argument on the basis that a mortgagee selling a home to an owner in the exercise of its power of sale is a “vendor” as found in *Crown Trust*.

[37] I see no reviewable error in Tarion’s findings. *Crown Trust* is the controlling authority on this issue. It has been good law in Ontario for forty years. The court in *Crown Trust* found as follows (paragraphs not numbered in the original):

What is crucial to the determination of this appeal, however, is whether or not a mortgagee selling under his power of sale, sells “on his own behalf “within the meaning of this statute. In this regard, it is of some importance to note that in effecting the sale, the law imposes a duty on a mortgagee to act in good faith, with reasonable care, and to account for any surplus to subsequent encumbrancers and the mortgagor. He cannot act with the free hand of an absolute owner. However, that does not mean that the respondent’s submissions are correct.

The words used in a statute must be construed in their ordinary and natural meaning Having due regard to the subject- matter and object of the statute. In my view the object of the statute is to provide the warranties set out in s. 13 of the Act to persons who first acquire a home from its vendor for occupancy, and to protect such persons from any unscrupulous, financially irresponsible, or technically incompetent persons from whom they might purchase.

Black’s Law Dictionary defines “behalf” as benefit or advantage, amongst others. In the context of this statute the words “on its own behalf” are equivalent to “for its own benefit”, or “for its own advantage”. A “person who sells on his own behalf “therefore is a person who sells for his own benefit or advantage. There is no doubt in my mind that a mortgagee selling under a power of sale sells primarily for his own benefit or

advantage and secondarily for the benefit or advantage of the subsequent encumbrancers and mortgagor. The proceeds of sale belong exclusively to the mortgagee to the extent of the mortgage debt and costs of sale. Any surplus belongs to the subsequent encumbrancers and mortgagor in accordance with their respective priorities. The mortgagee being one of the persons for whose benefit or advantage the sale is effected, it cannot be said that the sale was not effected on his behalf. To achieve the result contended for by the respondent a "vendor" would have to be defined as a person who sells on his sole or exclusive behalf. In my view, restricting the words to that extent is not warranted.

In arriving at that conclusion, I am not unmindful of the results which might obtain in other cases. To take an extreme example, let us suppose that the mortgagee is an elderly widow who inherited a small cash sum from her deceased husband and whose only income is an old age pension. Seeking some secure investment of her inheritance, she takes the advice of her solicitor and invests it in a building mortgage. On completion of construction of the home the builder-mortgagor becomes insolvent and goes into default. It is then necessary for her to sell the home under power of sale. She would then have to be registered under the Act. This would involve payment of a fee of \$350 and satisfying the registrar under the statute of her financial responsibility. With her capital tied up in the mortgage in default, and with the meagre income of her pension, this might not be an easy thing to accomplish. The requirement of registration would amount to a real hardship in her case.

At the other end of the scale, however, are sophisticated investors, banks and trust companies who may take mortgages on a whole subdivision, being fully prepared to install services and complete construction of any and all uncompleted homes in order to protect their investments should the builder default. I do not believe that the Legislature intended that purchasers of such homes from the mortgagee selling under power of sale should be deprived of the warranties new home buyers otherwise would be entitled to.

In any event, the statute is unambiguous and it is not open to me in such a case to construe plain and unambiguous words in such a way as to avoid a harsh result in a particular case. That is a matter for the Legislature to consider: see 32 Hals., 4th ed., p. 410, para. 895.

There is one further consideration. A mortgagee who forecloses on the mortgaged property and then sells it, would clearly be a "vendor" under the statute. If the respondent's submission is correct, the mortgagee's choice of remedy would determine whether or not the home buyer was entitled to the statutory warranties. I do not believe that the Legislature intended to leave new home buyers' rights under the statute in the hands of mortgagees and dependent on their discretion.

As noted above, *Crown Trust* was affirmed by the Court of Appeal and is binding authority on Tarion and on this court. Accordingly, Tarion's finding that the Applicant was a "vendor" was reasonable: I would not give effect to this ground of review.

Issue #2 – Home Sold “As-Is”

[38] The agreement of purchase and sale provided that the home was sold “as-is” without any warranties. The Applicant argues that the Buyers will receive “something for nothing” if they receive warranties under the Act.

[39] Section 1.2 of the Act provides:

This Act applies despite any agreement to the contrary.

[40] Section 13(6) of the Act provides:

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.

[41] Tarion found that “[v]endors and purchasers cannot contract out of the [Act].” This conclusion is reasonable and flows from the clear language of ss. 1.2 and 13(6) of the Act. I would not give effect to this ground of review.

Issue #3 – Application of the Act

[42] The Applicant argues that the Act does not apply because construction was undertaken by Mr Patterson to build a house on his property for his own use. There are multiple problems with this argument.

[43] First, as discussed above, this issue was not raised with, investigated by, or decided by Tarion at first instance. For reasons I have explained, this court should not consider this issue at first instance, and circumstances do not justify referring this issue back to Tarion for investigation and decision.

[44] Second, although there is some evidence in the record which could support this argument, there are substantial gaps in the evidence in the record below. For reasons explained above, I would not permit the Applicant to add to the record in respect to this issue. There is no evidence from Mr Patterson as to his intentions, and whether or if they changed.

[45] Third, it is not apparent that, even if Mr Patterson originally intended to rebuild and occupy, this would mean that this plan could be abandoned, and the house sold to a third party without warranties under the Act. The obligations of “builders” and “vendors” are distinct, and it would create a substantial loophole in the Act to find that the obligations of a “vendor” are limited because the person holding title changed his intentions along the way. I would not decide this point definitively: it is sufficient to note that the Applicant’s position on this issue is, at best, highly debatable, and the issue should be decided in a case where the issue has been raised before it, Tarion has had an opportunity to investigate the issue and make factual findings, and then Tarion has decided the issue at first instance.

Other Arguments

[46] The Applicant raises the following issues which may be disposed of summarily:

- a. Was the Applicant denied procedural fairness because no hearing was held?
- b. Would the Buyers be unjustly enriched if they receive warranties under the Act?
- c. Is the impugned decision “in violation of the *Mortgages Act*”?
- d. “Does the legislation violate the *Constitution Act*”?
- e. *in terrorem* and unequal treatment arguments.

[47] The Applicant sought and was granted permission to be represented by its principal, Mr Anthony. Mr Anthony is not a lawyer, and the court does not expect that he would present and develop his arguments as a lawyer would do. This said, the court expects that arguments raised before the court are properly developed. When they are not, the court will generally dispose of them summarily unless there is some good reason to conduct a more probing analysis. None of

the “other arguments” listed above requires more than cursory explanation: each is apparently devoid of merit.

Procedural Fairness

[48] The Applicant argues that Tarion was required to hold a hearing pursuant to the *Statutory Powers Procedures Act*, RSO 1990, c. S.22 (the “*SPPA*”). Tarion argues that the *SPPA* does not apply because Tarion is not a “tribunal” and does not exercise a “statutory power of decision” within the meaning of the *SPPA*. It further argues that the Act does not require that Tarion hold a hearing: *SPPA*, s. 3(1).

[49] This issue was not raised with Tarion by the Applicant during Tarion’s process and was not raised by the Applicant in its Notice of Application: the Applicant raised the issue for the first time in its factum.

[50] The Applicant’s entire argument on this point is as follows:

“Tarion made the decision without a hearing and without consent from the Applicant”
[followed by quotation of the text of *SPPA*, s. 4.1].

[51] Tarion’s responding submissions include references to ss. 3(1) and 4.1, but no other legal authorities, and in particular, no jurisprudence related to the application of the *SPPA* or common law procedural fairness requirements to Tarion.

[52] The only procedural fairness issue raised by the Applicant is the failure to hold a hearing. This issue may be disposed of easily, without addressing broader issues of procedural fairness in detail.

[53] Subsection 3(1) of the *SPPA* provides:

Subject to subsection (2), this Act applies to a proceeding by a tribunal I the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision.

[54] The “power[s] of decision” exercised by Tarion are conferred on it by the Act. The Act does not require Tarion to hold a hearing. No basis for such a requirement arising “otherwise by law” was identified or argued by the Applicant.

[55] Tarion is subject to common law requirements of procedural fairness. As noted above, Tarion gave notice to the Applicant of the issues it was investigating, the potential consequences to the Applicant, and gave the Applicant an opportunity to provide “its side of the story” in writing and in a phone call with the Tarion investigator. The Applicant’s response is set out above, in full, and did not include a request to provide further information. Tarion gave notice to the Applicant that it would decide matters on the basis of its investigation, and the Applicant asked Tarion to conclude that the Applicant was not responsible for statutory warranties for the Home.

[56] I am satisfied that Tarion gave notice to the Applicant, explained the process and potential consequences to the Applicant, and gave the Applicant a fair opportunity to be heard in writing and by telephone. I am satisfied that the Applicant engaged in Tarion’s process to the extent that it wished to do so, and did not request or expect a hearing. I would not engage in a more elaborate examination of procedural fairness issues (see: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817) in a case where they have not been adequately raised, particularised, and argued before this court, and in a case where basic requirements of procedural fairness have so obviously been met.

Unjust Enrichment

[57] The Act is consumer protection legislation. The Buyers are not “unjustly enriched” by receiving that which the Legislature has provided may not be defeated by contract. Tarion’s reasonable conclusion that “[v]endors and purchasers cannot contract out of the [Act]” is a complete answer to the unjust enrichment argument: there is a “juristic reason” the Buyers are entitled to warranties even though they agreed to buy the property “as-is”.

The *Mortgages Act*

[58] In the factum, the Applicant states, baldly, that Tarion’s impugned decision violates “several sections” of the *Mortgages Act*. This unparticularized, undeveloped argument does not require analysis from this court. There is no apparent conflict between the *Mortgages Act* and the Act, and the Applicant is not entitled to a more detailed analysis of an argument that is so unparticularized.

The *Constitution Act*

[59] This issue is not properly before this court because this issue was not raised below with Tarion, was not raised in the Notice of Application, and because no Notice of Constitutional Question was served on the Attorneys General of Ontario and Canada: *Courts of Justice Act*, s. 109(1), Rule 4.11. Further and in any event, bald claims of unconstitutionality – as have been asserted in this case – do not raise an arguable position that would require reasons from this court. See, for example, para. 48 of the Applicants’ Factum where it is argued, without particularization, that “[i]t violates a number of sections of the *Constitution Act*.” Finally, there is no apparent basis for the bald claims of unconstitutionality.

The *in terrorem* and Unequal Treatment Arguments

[60] The Applicant argues in its factum that if the impugned decision stands, “no mortgagee would take possession of houses which had not been occupied. It would become virtually impossible for builders to get financing.” *Crown Trust* has been the leading authority on this point for 40 years. The Legislature has not found it necessary to intervene in the last forty years.

[61] The Applicant argues that the impugned decision would only apply to a small private lender such as the Applicant but would not apply to large institutional lenders. No legal basis is set out for such a conclusion. The leading case – *Crown Trust* – involved an institutional lender. No case

was cited to this court where the principle in *Crown Trust* was held not to apply to an institutional lender.

Conclusion

[62] Tarion’s impugned decision was sound in law and reasonable on the facts on the basis of the record and arguments made to Tarion. The Applicant largely refused to engage in the process before Tarion because of its stated view that it was not responsible as a mortgagee exercising its power of sale. It was wrong in its view. It is not entitled to re-run the process on the basis of different arguments and different facts because it is unhappy with how the case was decided by Tarion on the basis of the information and arguments it made to Tarion.

Disposition

[63] I would dismiss the application. Tarion does not seek costs and so none are ordered.

“D.L. Corbett J.”

I agree: “Newton R.S.J.”

I agree: “Nakatsuru J.”

Released: September 11, 2025

CITATION: 7084421 Canada Ltd. v. Tarion Warranty Corp., 2025 ONSC 5155
DIVISIONAL COURT FILE NO.: 1578/24 JR
(Oshawa)
DATE: 20250911

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

**NEWTON RSJ and D.L. CORBETT and
NAKATSURU JJ.**

BETWEEN:

7084421 Canada Ltd.

Applicant

– and –

Tarion Warranty Corporation

Respondent

REASONS FOR DECISION

D.L. Corbett J.

Released: September 11, 2025