



October 18th, 2016

J. Douglas Cunningham, Q.C.
Amicus Chambers Mediation & Arbitration Group
141 Adelaide St West - #1108
Toronto, ON M5H 3L5

Dear Justice Cunningham:

Re: Ontario New Home Warranties Plan Act and the Tarion Warranty Corporation

On behalf of the more than 200 members of the Residential Construction Council of Ontario (RESCON), I am writing to express our association's feedback to the interim report as part of your review of the Ontario *New Home Warranties Plan Act* and the *Tarion Warranty Corporation*. Our members appreciate the thoughtful, balanced and thorough manner in which you have conducted this timely review thus far. We look forward to discussing our feedback with you.

Scope of the Review:

It is important that the review include a detailed review of the history and evolution of Tarion from its inception to the present day. This will allow for a better understanding of Tarion's corporate culture and bureaucratic approach to many issues.

Jurisdictional Scan:

We agree that examining other jurisdictional approaches of mandatory home warranty coverage is important to determining the best regulatory model for the Ontario marketplace. We hope that the final report will include a detailed review of these jurisdictional approaches with a direct comparison to the proposed Ontario model. This detailed comparison will enable stakeholders to see how the recommend (new) model will lead to the best possible outcomes for all stakeholders. It will be important for the report to describe and explain the significance of the key system outcomes that govern the evaluation of various warranty models.

Potential Transition Challenges:

We believe that the final report should address various transition scenarios and considerations related to the recommend changes to the current regulatory model. Understanding the next steps and the possible unintended consequences will help inform decision-making.

Establishing non-compliance with the Building Code:

To the extent that non-compliance with the Building Code is important to establishing the validity of an insurance claim, it is important that this information be accurate and objective. Tarion often relies on municipal enforcement bodies to determine if there is code compliance – assuming that if a permit is issued there must be compliance. This assumes that municipal building departments are infallible. Based on our industry experience, we believe that there should be mechanisms for Tarion to make an independent assessment based on sound knowledge of the Building Code.

Information on building defects:

As the warranty-surety provider, Tarion collects information on the nature and frequency of building defects for which Tarion is required to pay out.

This information is essential for builders, municipal building code enforcement bodies, designers, Tarion's builder licensing/regulatory body, as well as others who are interested in improving the level of quality and code compliance in new residential building construction. We believe that Tarion should be required to publicly share information on the nature and frequency of building defects addressed by the warranty program. If an alternative warranty system is recommended, such as a competitive system, then all warranty providers should be required to contribute to a central database of building defects. This information would help to reduce the incidence of defects which would contribute to lower warranty premiums.

Specific Issues Raised in the Interim Report:

Tarion's Multiple Roles:

We support the restructuring of Tarion so that separate organizational entities take on the roles of regulator, adjudicator and warranty-surety provider. Given the current operating culture at Tarion, we do not believe that separation through internal "firewalls" will be sufficient. Separating these three roles will foster great accountability, transparency and public trust.

The regulatory and warranty functions in Ontario need to be separate to ensure an open and fair market place for warranty providers that provides the necessary checks and balances. We would like to the government to enable new private sector warranty-surety providers to enter the market place as we see in the British Columbia and Alberta models.

We feel that adjudication should be completed through an independent third party using a binding arbitration process. This new body would be an alternative to the *Licensing Appeal Tribunal* and we hope would have the technical expertise to make sound decisions for all stakeholders.

Timelines:

We support maintaining the current timelines if a more consistent approach to an early intervention process can be developed that is less bureaucratic, promotes initial contact with the builder and is more responsive to concerns raised by both the homeowner and builder.

We believe that fostering healthy dialogue between homeowners and builders should be central to any "Early Intervention" process. This communication approach must begin with the *Home Owner Information* package and be central to all communication efforts with the homeowner. The interim report mentions the idea of a discoverability clause to address latent or hidden defects that could not normally be discovered within the warranty period. This idea needs to be reviewed very carefully as a discoverability provision would add uncertainty and costs to the warranty coverage.

Onus of Proof:

We agree that the onus of proof should be re-examined to allow homeowners to show evidence of credible

defects - as long as the builder is given the opportunity to determine the cause and initiate necessary repairs.

Construction Performance Guidelines:

We support the requirement that a formalized process be developed to ensure that the *Construction Performance Guidelines* be updated on an ongoing basis so that they align with the *Ontario Building Code (OBC)* and industry construction standards. Moreover, subjective and inconsistent interpretation of the Guidelines can be eliminated through better training of Tarion personnel and the use of third party consultants.

Conciliation and Licence Appeal Tribunal (LAT):

We believe that a separation is needed between Tarion's warranty service and its role in adjudicating warranty claims. Consideration should be given to adjudication through third party binding arbitration process using technical expert adjudicators, with optional mediation as a first step. Adjudication through the LAT is not effective because this appeal body lacks the technical competence to fairly assess most TARION issues.

Warranty Coverage and Duration:

Our member builders are open to modifying Tarion's process for assessing the warranty program coverage, amounts and duration to better reflect the unique housing markets in Ontario, in particular the high prices in the Greater Toronto Area (GTA).

Builder Registration and Renewal Process:

We support making changes to encourage the participation of smaller builders in the marketplace by adjusting the registration and renewal fee structure. We agree that there are opportunities to implement new risk based approaches to assess builder capability.

Initial Registration and Renewal Requirements:

We believe that Tarion's registration requirements require review to ensure that innovative small builders are not pushed out of the marketplace. We therefore support the call to evaluate builders based on a sliding scale and past experience.

Builder Education:

We support the call to extend the current educational requirements to existing builders, along with making the criteria more flexible to allow for more builders to participate.

Compliance Tools:

We believe that Tarion **does not** need additional compliance tools if the current ones are applied in a consistent manner. We are open to further consultation to determine if a risk-based approach to compliance that utilizes third party technical consultants has merit.

Builder Directory:

We support enhancements to the *Builder Directory* to provide more timely information to homeowners.



We recognize that a rating system based on chargeable conciliations that differentiates between significant and minor chargeable conciliations should be considered, since not all chargeable conciliations are based on the same degree of defect or builder failure. But this requires further discussion and industry consensus. We are also supportive of the call to develop a system allowing the tracking of builders registered under multiple names.

Board Governance:

We support a review of the Tarion Board of Directors to ensure its governance includes representation from other industry professionals such as engineers, architects, building officials, and home inspectors. We agree that the Board composition must strike the right balance between skill competencies and the representation of interests.

Government's Role:

We support the call to align Tarion's accountability agreement with the Ontario government with those of other administrative authorities. Requiring Tarion to submit publicly accessible business plans to the Minister of Government and Consumer Services would be helpful.

We also recognize that government officials will always be under pressure from advocacy groups and special interests. Separating the roles of regulator, adjudicator and warranty-surety provider will promote confidence and accountability, but this will not entirely remove the advocacy efforts that some groups may undertake.

Disclosure of Information:

Given the public interest and its role as a government agency, we support the call for Tarion to disclose more information including its billing and compensation practices.

Illegal Building:

Our member builders agree that an increased level of "illegal building" and "flipping" is taking place. Under Tarion's mandate all homes including illegally built homes, have warranty coverage and approximately \$2 million has been paid out on such illegally constructed homes. While measures were introduced through the Building Code to require sharing of building permit information with Tarion to reduce this problem, this approach may not have been sufficient. Other potential approaches that could be considered include mandatory warranty coverage for new or existing owner-built homes that are sold within the warranty period as required for example under the competitive warranty system in Victoria, Australia. This would help to level the playing field.

Inspections & Field Review Consultants:

Our industry is not concerned about implementing proactive inspections for all building types. We are however, much more concerned with the qualifications and training of inspectors and field representatives. Our industry feels that many of these individuals are not properly trained and therefore lack the expertise to fairly evaluate problems.

As previously noted, there is a wide spread perception in our industry that Tarion field representatives apply



the home warranty standards inconsistently. We feel that this is an indication that Tarion field representatives may not be sufficiently trained and therefore lack the technical expertise to understand problems and apply the standards in place.

Communication:

Tarion is a difficult organization to communicate with. We feel that this is in part due to the complex role the organization plays, but also the operating culture that has developed over time. Our member builders often complain about the fact that Tarion staff seem unwilling to provide them with a straight answer to a simple good faith question of compliance. We believe that the new regulatory model must encourage an evolved operating culture at Tarion that builds a culture of proactive communication with stakeholders.

As previously noted, the current system creates an unintended and unnecessary adversarial process where anxious consumers contact Tarion without first notifying their builder when they perceive a problem. Our members have noted that Tarion was intended to be a final point of resolution, but it is now the first point of contact for a consumer that believes that there is a problem with their new home.

Communication with new homeowners is a shared responsibility. Our industry believes that Tarion and builders must work collaboratively to improve the messages to new homeowners to promote confidence, rather than fear, and where possible, improve the dialogue between buyers and builders. A healthy dialogue between homeowners and their builders will reduce the current administrative burden placed on Tarion and lead to better outcomes for all parties.

In conclusion, our industry association welcomes your questions, comments and ideas. We look forward to discussing our positions with you in person. Please contact my colleague Mr. Anthony Fernando to coordinate the next steps. He can be reached by email: fernando@rescon.com and by telephone: 905-760-7777 (x 112). Thank you for your consideration.

Sincerely,

Richard Lyall
President, RESCON

CC:

Hon. Marie-France Lalonde, Minister of Government and Consumer Services
Mr. Glen Padassery, Ministry of Government and Consumer Services