Court File No. CV-13-10362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SILVER STREAMS HOMES INC.; SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. AND 2147650 ONTARIO INC.

RESPONDING FACTUM OF TARION WARRANTY CORPORATION
(Motion to Approve Settlement Agreement)
(Returnable June 25, 2015)

Date: June 16, 2015

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PART I – OVERVIEW

1. This factum is filed by Tarion Warranty Corporation ("Tarion") in connection with the motion of the CCAA Debtors[1] for an order: (a) declaring that the CCAA Debtors have the requisite authority to enter into a settlement agreement dated February 17, 2015, among, *inter alia*, the CCAA Debtors and Tarion (the "Settlement Agreement"); or, in the alternative (b) approving the Settlement Agreement.

2. Whether by virtue of the CCAA Debtors having the requisite authority to enter into the Settlement Agreement or by virtue of Court-approval of the Settlement Agreement, it is Tarion's position that the Settlement Agreement should be performed by the CCAA Debtors.

3. In the event that the CCAA Debtors do not have the requisite authority to enter into the Settlement Agreement and Court-approval of the Settlement Agreement is required, then the single issue for this Court to consider is whether or not the security that was posted for the express purpose of being available to Tarion to satisfy the claims of new home purchasers against the CCAA Debtors should be used for that very purpose, or whether the security should

[1] The CCAA Debtors are Silver Streams Homes Inc.; Silver Streams Homes (Puccini) Inc., 2148993 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc. and 2147650 Ontario Inc.

be made available to the CCAA Debtors' general creditor body, as a windfall to those creditors. It is Tarion's position that that the security should be available for use in connection with the purpose for which it was initially posted.

PART II – FACTS

4. Tarion relies on the facts as set out in the affidavits of Imran Jinnah sworn February 26, 2105, March 25, 2015, and April 13, 2015, respectively.

PART III – ISSUE

5. Subject to this Court's determination that the CCAA Debtors have the requisite authority to enter into the Settlement Agreement, the issue before this Court and addressed below is whether or not the Settlement Agreement should be approved.

PART IV – LAW AND ARGUMENT

6. This section of the factum will address the following matters:

   (a) Tarion's regulatory role in the Province of Ontario with respect to the provision of warranty protection to hew home purchasers;

   (b) the *Ontario New Home Warranties Plan Act*[2] (the "Warranties Act") and the provisions thereof that are of particular importance to the motion before this Court;

   (c) the public interest in this Court approving the Settlement Agreement;

   (d) the baseless assertion that the Settlement Agreement amounts to a preference;

   (e) this Court's authority to approve the Settlement Agreement even if its performance will have an effect on the size of the estate available for other creditors; and

   (f) the balance of prejudice that supports the approval of the Settlement Agreement.

[2] R.S.O. 1990, c. O. 31 [*Warranties Act*].

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[2] R.S.O. 1990, c. O. 31 [*Warranties Act*].

Tarion Warranty Corporation

7. Tarion is a private, not-for-profit corporation established in 1976 to protect the rights of new home purchasers and regulate new home builders and vendors in Ontario. Tarion administers the Warranties Act that sets out the warranty protection to which new home purchasers and owners are entitled in Ontario, as well as the scheme for the administration of same. Tarion receives no government funding and is financed entirely by fees collected for builder registration and renewal and new home enrolments. Tarion's role and mandate are well-known in the construction industry. Tarion's mandate is to:

(a) license new home builders and vendors;

(b) ensure builders/vendors abide by the Act;

(c) help educate new home buyers about their warranty rights;

(d) protect consumers when builders fail to fulfill their warranty obligations;

(e) receive and assess warranty claims and resolve disputes about warranty coverage;

(f) investigate illegal building practices; and

(g) promote high standards of new home construction.[3]

8. Accordingly, Tarion plays a central regulatory role in the Province of Ontario with respect to the provision of warranty protection to new home purchasers. Tarion maintains an average of approximately 370,000 homes under warranty, with 40,000 to 50,000 new home possessions each year.

The Warranties Act

9. The Ontario government, through the Ministry of Consumer Services, has empowered Tarion to administer and enforce the Warranties Act and the regulations made thereunder. Pursuant to the Warranties Act[4] and Ontario Regulation 273/04[5], Tarion has been designated as the "Corporation" for the purposes of the Warranties Act, and its objects, in such capacity, include:

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[3] Warranties Act, *supra* note 2, section 2(2).
[4] *Ibid.*, section 2(1), Schedule "B".
[5] O. Reg. 273/04, s. 1, Schedule "B".

(a) the administration of the Ontario New Home Warranties Plan, which sets out the warranty protection that new home purchasers are entitled to in Ontario;

(b) the establishment and administration of a guarantee fund providing for the payment of compensation under the Act;

(c) assisting in the conciliation of disputes between vendors and owners; and

(d) engaging in undertakings for the purpose of improving communications between vendors and owners.[6]

10. Section 6 of the Warranties Act requires that all builders and vendors of new homes in the Province of Ontario must register under the Warranties Act:

> **Registration required**
> 6. No person shall act as a vendor or a builder unless the person is registered by the Registrar under this Act.[7]

11. Section 1 of the Warranties Act defines "builder" and "vendor" as follows:

> **Definitions**
> 1. In this Act,
> "builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by the person or under a contract with a vendor or owner;
> ...
> "vendor" means a person who sells on his, her or its own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner;
> ...[8]

12. Section 22 of the Warranties Act makes the failure to so register a provincial offence:

> **Offences**
> 22. (1) Every person who,
>
> (a) knowingly furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act or the regulations; or
>
> (b) contravenes section 6 or 12 or subsection 18 (4),

[6] Warranties Act, *supra* note 2, section 2(2), Schedule "B".
[7] *Ibid.*, section 6, Schedule "B".
[8] *Ibid.*, section 1, Schedule "B".

> and every director or officer of a corporation who knowingly concurs in such furnishing or contravention is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than one year, or to both.[9]

13. Accordingly, both builders and vendors of new homes in the Province of Ontario are required to register under the Warranties Act, and failure to do so is a provincial offence. Especially in the context of this motion, it is important to bear in mind that registrations are granted to the corporations and people that act as builders and vendors, as opposed to the projects that are built or sold by registrants. Therefore, what appears to be an innocuous misunderstanding (i.e., the failure of the CCAA Debtors, as registrants, to register one Silver Streams entity, among several), has outsized consequences given the statutory scheme of the Warranties Act, as discussed below.

14. In addition to registering builders and vendors, Tarion's regulatory mandate also includes, among other things, safeguarding the guarantee fund established under the Warranties Act that funds payments by Tarion in respect of claims made by new home purchasers.[10] Tarion has a statutory duty in this regard. For this very reason, Tarion is entitled to take security from builders and vendors of new homes under the Warranties Act.[11]

15. The statutory scheme is designed to be cash-neutral so that sufficient security is taken by Tarion from registered builders and vendors to fund any claims made by new home purchasers. For this scheme to properly function, builders and vendors of new homes must be properly registered under the Warranties Act, and adequate, enforceable security must be furnished by such registrants. Otherwise, Tarion would not be able to properly safeguard the guarantee fund and discharge its statutory duty. This is precisely what Tarion did during the registration of the CCAA Debtors, and but for the misunderstanding on the part of the CCAA Debtors, the security posted by them should have been available to Tarion in respect of any claims made by new home purchasers in connection with the CCAA Debtors' residential development project in Richmond

[9] Warranties Act, *supra* note 2, section 22, Schedule "B".

[10] *Ibid.*, section 2(2), Schedule "B".

[11] *Ibid.*, section 7, Schedule "B"; *Ontario New Home Warranty Program v. Lukenda*, [1991] 2 O.R. (3d) 675 at paras. 9-10 (C.A.) [*Lukenda*], Brief of Authorities of Tarion Warranty Corporation, at Tab 1.

Hill, Ontario (the "Puccini Project"), including those purchasers that purchased homes from Silver Streams Homes (Puccini) Inc. ("Puccini"), the non-registrant.

16. At this time, the objecting lien claimants are effectively seeking to intentionally defeat this scheme by transferring commercial risk from themselves, which risk they had ample opportunity to price, and transfer it onto Tarion in its capacity as regulator, contrary to the public interest.

Approval of the Settlement Agreement is in the Public Interest

17. In cases commenced under the *Companies' Creditors Arrangement Act*[12] (the "CCAA"), courts regularly balance the interests of various stakeholders, including the interests of debtor companies, creditors and regulatory bodies, among others. Houlden and Morawetz, in their analysis of the CCAA, have recognized the broad balancing of stakeholder interests as one of the foremost purposes of the CCAA.[13]

18. In undertaking this balancing of interests, courts have acknowledged that they must have regard to the wider public interest. In *Nova Metal Products Inc. v. Comiskey (Trustee of)*[14], the Court of Appeal for Ontario held that

> the [CCAA] was designed to serve a "broad constituency of investors, creditors and employees." Because of that "broad constituency", the Court must, when considering applications brought under the [CCAA], have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.[15]

19. In this way, courts are expected to consider what is in the public interest when considering issues in CCAA cases. This consideration may make a result that is favourable to the public interest the preferable result. The importance of the public interest is also reflected in the CCAA itself. In the case of regulatory bodies, such as Tarion, the CCAA affords them a special status that, among other things, exempts them from the application of the stay of

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[12] R.S.C. 1985, c. C-36 [CCAA].

[13] Houlden, L.W. and Geoffrey B. Morawetz. *Houlden and Morawetz Bankruptcy and Insolvency Analysis*, available on Westlaw, at N§2, Brief of Authorities of Tarion Warranty Corporation, at Tab 2.

[14] (1990), 1 O.R. (3d) 289 (C.A.) [*Nova Metal*], Brief of Authorities of Tarion Warranty Corporation, at Tab 3.

[15] *Ibid.*, at para. 60, Brief of Authorities of Tarion Warranty Corporation, at Tab 3.

proceedings in certain situations.[16] This special status is, in turn, based on the contributions of regulatory bodies to the public interest.[17]

20. In *Lukenda*, the Court of Appeal for Ontario identified the public interest that is furthered by Tarion's administration of the Warranties Act as being

> to protect purchasers of new homes by requiring that vendors and builders be screened for financial responsibility, integrity and technical competence. To assure public protection, it provides for warranties, a guarantee bond and compensation in the event of loss by a purchaser resulting from dealings with a registrant.[18]

21. In *Choo Yick v. Tarion Warranty Corp.*[19], Justice H.A. Rady identified the purposes of the Warranties Act, and Tarion's role thereunder, as follows:

> The Act serves a two-fold purpose: consumer protection and the regulation of the new home building industry. In order to protect consumers, the Act imposes limited mandatory warranties on new home builders in Ontario and provides for the payment of compensation to those purchasers whose builders have failed to honour them. The Act provides for the administration of a mandatory licensing scheme for all new home builders in Ontario.[20]

22. The relief sought by the CCAA Debtors in respect of the approval of the Settlement Agreement is one such instance where this Court should take into account the public interest and, in particular, the statutory scheme under the Warranties Act that is designed to protect consumers when builders fail to fulfill their warranty obligations, and Tarion's role as a regulator discharging a statutory duty.

23. In the present case, the CCAA Debtors were required to, and did, provide letters of credit in the aggregate amount of $920,000 and a cash deposit in the amount of $320,000 in favour of Tarion to secure their obligations to Tarion under the Warranties Act (collectively, the "Security"). The Security was provided to Tarion to allow it to pay for deposit claims and warranty claims by purchasers in connection with the Puccini Project in the event the CCAA Debtors are unable to satisfy their obligations under the Warranties Act. This was done in the

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[16] CCAA, *supra* note 12, section 11.1, Schedule "B".

[17] *Ibid.*, Schedule "B".

[18] *Lukenda, supra* note 11, at para. 7, Brief of Authorities of Tarion Warranty Corporation, at Tab 1.

[19] 2014 ONSC 4488, Brief of Authorities of Tarion Warranty Corporation, at Tab 4.

[20] *Ibid.*, at para. 6, Brief of Authorities of Tarion Warranty Corporation, at Tab 4.

normal course, and is in line with Tarion's mandate to both register new home builders and vendors and to protect consumers when builders fail to fulfill their warranty obligations. As a condition of the former, new home builders and vendors are required to post Security with Tarion to cover the latter.

24. Due to the CCAA Debtors' misunderstanding, Puccini, despite acting as vendor in respect of ninety-five new home sales, was not properly registered under the Warranties Act when it so acted.[21] Nevertheless, by operation of the Warranties Act, the statutory warranties under that Act would apply to these new homes, despite the absence of the vendor's registration, resulting in Tarion being responsible for any warranty claims from new home purchasers or owners. Currently, Tarion is paying claims made by Puccini Project home purchasers on an "out-of-pocket" basis, as it does not have access to the Security. It is this transfer of risk that is detrimental to the safeguarding of the guarantee fund established under the Warranties Act, and is contrary to the public interest.

25. Had Puccini been properly registered with Tarion under the Warranties Act, as this Court was initially so advised in the course of approving the various agreements of purchase and sale in these proceedings, then Tarion would have had access to the Security in respect of claims made by such purchasers and there would not have been a need for the parties to enter into the Settlement Agreement. Therefore, the Settlement Agreement effectively reflects the original intentions and expectations of the parties (including the expectations of the private mortgagees and the construction lien claimants). It was always the intention of the CCAA Debtors that: (i) all of the corporate entities involved with the Puccini Project be properly registered with Tarion; and (ii) Tarion would have recourse and access to the Security for the payment by Tarion of claims made by purchasers against the CCAA Debtors. Over the course of these CCAA proceedings, these intentions were consistently communicated to this Court and the Service List, which includes those parties that are now objecting to the Settlement Agreement.

26. In addition, given the provisions of the Warranties Act that require every new home vendor in the Province of Ontario to be properly registered under that act, the purchasers of the ninety-five Puccini Project homes for which Puccini acted as the vendor and any other party involved with the construction and sale of the Puccini Project homes, including the private

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[21] Affidavit of Imran Jinnah, sworn March 25, 2015, at para. 26, Motion Record of the CCAA Debtors.

mortgagees and the construction lien claimants, should have operated under the same understanding at all relevant times and assumed compliance with the Warranties Act.

27. The Settlement Agreement, once implemented, will restore the CCAA Debtors, the purchasers of the ninety five Puccini Project homes, Tarion, the private mortgagees and the construction lien claimants to the positions that they would have been in had Puccini been properly registered under the Warranties Act.

28. The Security was never intended to be available to the construction lien claimants or any party other than Tarion, and this would have been reflected in the expectations of the parties in interest, including the lien claimants that now object to the Settlement Agreement. Furthermore, given the interplay between the regulatory imperatives of registering new home vendors and builders and safeguarding of the guarantee fund established under the Warranties Act to fund any claims made by new home purchasers, it is in the public interest to approve the Settlement Agreement.

The Settlement Agreement is not a Preference

29. Bald assertions absent any legal authority have been made by objecting creditors that the Settlement Agreement may be an "improper preference".[22] Such assertions are baseless, as under any of the *Fraudulent Conveyances Act*[23] (the "FCA"), the *Assignments and Preferences Act*[24] (the "APA") or the CCAA (collectively, the "Preference Legislation"), the Settlement Agreement is not a preference.

30. Tarion respectfully submits that the analytical frameworks set out in the Preference Legislation do not apply to the present case. The Settlement Agreement is a post-filing agreement of the CCAA Debtors, which agreement was acknowledged as having been received by the monitor in these proceedings. The facts do not support a finding that the intent of the CCAA Debtors in entering into the Settlement Agreement was to defraud, defeat or delay their creditors.

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[22] Affidavit of Zena Hanson, sworn April 2, 2015, Responding Motion Record of Argo Lumber Inc. and Newmar Window Manufacturing.

[23] R.S.O. 1990, c. F.29 [FCA].

[24] R.S.O. 1990, c. A.33 [APA].

Fraudulent Conveyances Act

31. The FCA provides that every conveyance of real or personal property made with the intent to defeat creditors shall be void.[25] Under the FCA, it is necessary to prove that the debtor both: (i) made a disposition of property; and (ii) intended to defeat creditors.[26]

32. As a preliminary matter, it is Tarion's position that the transactions contemplated by the Settlement Agreement are exempt from the application of the FCA by virtue of being an interest in personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent to defeat creditors, as contemplated by section 4 of the FCA.[27]

33. There is no evidence before this Court of any intention by the CCAA Debtors to defeat their creditors or of any person having knowledge of any such intent. Furthermore, being properly registered under the Warranties Act is a legal requirement to conducting business in the Province of Ontario in the cases of new homebuilders and vendors. Given this legal requirement, it would be incorrect to characterize the Settlement Agreement as a preference. It is better viewed as a pre-condition to remaining in business and similar to the rights provided to critical suppliers under the CCAA. A consequence of not approving the Settlement Agreement would be to effectively reward the CCAA Debtors' illegal failure to register under the Warranties Act by making the Security available to the CCAA Debtors (and ultimately their creditors).

34. In addition, the transactions contemplated by the Settlement Agreement are further exempted by the fact that the Security is comprised, in part, of a letter of credit. The treatise *Creditor-Debtor Law in Canada* states that

> the conveyance of property that is not exigible or attachable at the instance of judgment creditors also cannot be attacked under fraudulent preference or conveyance legislation.[28]

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[25] FCA, *supra* note 23, section 2, Schedule "B".

[26] *Ibid.*, Schedule "B".

[27] *Ibid.*, section 4, Schedule "B".

[28] C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2d ed. (Toronto: Thomson Canada, 1995) at pp. 633 [*Dunlop*], Brief of Authorities of Tarion Warranty Corporation, at Tab 5; Canadian Encyclopedic Digest, available on Westlaw, at Fraudulent Conveyances and Preferences IV.9.(a), Brief of Authorities of Tarion Warranty Corporation, at Tab 6.

35. As a letter of credit is not exigible or attachable at the instance of judgment creditors, it is immune from attack under the FCA, further underlining the opportunistic nature of the objections of the objecting construction lien claimants.

36. In the present case, to the extent that the FCA even applies and the assignment of the agreements of purchase and sale from a non-registered CCAA Debtor, Puccini, to a properly registered CCAA Debtor, Silver Streams Homes Inc., has the effect of elevating the claims of Tarion on account of warranty claims made by new home purchasers, then this is the very same conveyance that was contemplated at the time of the CCAA Debtors' initial registration with Tarion at the outset of the Puccini Project and prior to the commencement of these CCAA proceedings. Furthermore, this conveyance was required by law and was not opposed by any creditors at that time. It is only now that there is an opportunity to potentially benefit from a windfall that creditors are now making allegations of a preference.

37. In determining whether the debtor intended to defeat creditors, certain "badges of fraud" have been established by the jurisprudence giving rise to a rebuttable presumption that the debtor intended to defraud, defeat or delay his, her or its creditors.[29] The non-exhaustive list of "badges of fraud" considered by the courts include:

(a) the conveyance represented substantially all of the debtor's remaining assets at the time;

(b) the debtor remained in possession of, used and/or benefited from the property after the conveyance;

(c) the conveyance was made secretly;

(d) the conveyance was made pending a lawsuit or the commencement of legal proceedings;

(e) a trust was created for the purpose of disguising a fraud;

(f) the title deed gives the grantor the power to revoke the conveyance;

(g) the title deed contains false statements as to the consideration;

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[29] *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.*, 2007 ONCA 425, at paras. 38-39 [*Cobrand*], Brief of Authorities of Tarion Warranty Corporation, at Tab 7.

(h) the consideration is grossly inadequate;

(i) there was unusual haste in completing the transfer or conveyance;

(j) cash is taken in payment rather than a cheque or other traceable instrument;

(k) a close relationship exists between the parties to the conveyance; and

(l) the property is transferred to the transferee without his/her/its knowledge.[30]

38. The above list sets out the badges of fraud that courts will look for in answering the crucial question in any fraudulent conveyance action: whether the plaintiff has proved the fraudulent intent of the debtor.[31] The presence of one or two of these items will not give rise to a rebuttable presumption. Rather, the rebuttable presumption will arise where there is a critical mass of such badges of fraud.[32]

39. In the present case, none of the above-noted badges of fraud are present. In order to comply with the provisions of the Warranties Act, the Security was provided to Tarion for the express purpose of allowing it to pay for deposit claims and warranty claims that might be made by purchasers in connection with the Puccini Project in the event the CCAA Debtors became unable to satisfy their obligations under the Warranties Act. A further purpose of posting the Security was to ensure that it would be available only to Tarion to fund these claims, and not available to the CCAA Debtors or any of their creditors to fund any other claims. In addition, Tarion and the CCAA Debtors operate at arm's length, and the Security was posted, and the Settlement Agreement entered into, in plain view of the CCAA Debtors' creditors and other parties in interest. Notice of the Settlement Agreement was provided to the Service List, and the CCAA Debtors' creditors and other parties in interest were provided with the benefit of objection procedures put in place to ensure procedural fairness. There is no critical mass of badges of fraud.

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[30] *Dunlop, supra* note 28, at pp. 613-15, Brief of Authorities of Tarion Warranty Corporation, at Tab 5.
[31] *Cobrand, supra* note 29, at para. 39, Brief of Authorities of Tarion Warranty Corporation, at Tab 7.
[32] *Dunlop, supra* note 28, at pp. 613-15, Brief of Authorities of Tarion Warranty Corporation, at Tab 5.

40. To the extent that the Settlement Agreement was entered into pending a lawsuit or the commencement of legal proceedings[33], the CCAA Debtors and Tarion have acted properly in all respects and their entry into the Settlement Agreement should not be viewed as a badge of fraud. On the contrary, there is a desire among the parties to settle the regulatory charges against Puccini on a fair basis, in the event that the Settlement Agreement is implemented. If the Security can be used by Tarion for the purpose for which it was initially posted, there would be relatively little value to Tarion in continuing to pursue such regulatory charges. Tarion, in its regulatory capacity, is capable of, and should be encouraged to, enter into a settlement with the CCAA Debtors in order to avoid the waste of judicial resources and the cost of additional regulatory proceedings if it is possible to deal with Puccini's failure to properly register under the Warranties Act in this forum.

41. Courts have acknowledged the benefits of settlement over continued litigation. In *Sparling v. Southam Inc.*[34], the Ontario Supreme Court, High Court of Justice held that

> there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system.[35]

42. In *Epstein v. First Marathon Inc. / Société First Marathon Inc.*[36], Justice Cumming of this Court cited *Sparling* in recognizing that "[t]here is a public interest in the settlement of court actions."[37] Tarion and the CCAA Debtors have worked cooperatively to avoid costly litigation and should not now be penalized for entering in the Settlement Agreement.

43. In the present case, there does not exist the requisite, or any, intent to defraud, defeat or delay creditors, as evidenced by the absence of badges of fraud. As a result, there is not even the presumption of a preference. However, even if there was a presumption of a preference, then for

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[33] On September 3, 2014, a *Provincial Offences Act*, R.S.O. 1990, c. P. 33 summons was issued to Puccini under the Warranties Act, which summons, among other things, charged Puccini with acting as a vendor of a new home without being properly registered under the Warranties Act.

[34] [1988] O.J. No. 1745 (Ont. Sup. Ct., H.C.J.) [*Sparling*], Brief of Authorities of Tarion Warranty Corporation, at Tab 8.

[35] *Ibid.*, at para. 17, Brief of Authorities of Tarion Warranty Corporation, at Tab 8.

[36] [2000] O.J. No. 452 (Ont. S.C.J.), Brief of Authorities of Tarion Warranty Corporation, at Tab 9.

[37] *Ibid.*, at para. 30, Brief of Authorities of Tarion Warranty Corporation, at Tab 9.

the reasons set out above, this presumption is easily rebutted. Accordingly, the Settlement Agreement is not a preference under the FCA.

Assignments and Preferences Act

44. The APA provides that every transfer of property made by an insolvent person with the intent to defeat, hinder, delay or prejudice creditors, or to give a creditor an unjust preference over any one or more creditors, is void as against the other creditors.[38] Under the APA, it is necessary to prove that: (i) a transfer of property was made; (ii) at the time of the transfer, the transferor was insolvent, unable to pay his/her/its debts when due or on the eve of insolvency; and (iii) the transfer was made with an intent to defeat, hinder, delay or prejudice one or more creditors, or with an intent to give one or more creditors an unjust preference over the other creditors.[39]

45. As a preliminary matter, it is Tarion's position that the transactions contemplated by the Settlement Agreement are exempt from the application of the APA by virtue of being, *inter alia*, a payment made in the ordinary course of business, a payment of money to a creditor, or a good faith transfer of property for value, as contemplated by section 5 of the APA.[40] There is no evidence before this Court of any intention by the CCAA Debtors to defeat their creditors or any person having knowledge of any such intent. There is also no evidence before this Court that the Settlement Agreement, the approval of which is in the public interest, is somehow unjust. Furthermore, as discussed above, being properly registered under the Warranties Act is a legal requirement to conducting business in the Province of Ontario for new homebuilders and vendors. Given this legal requirement, it would, therefore, be incorrect to characterize the Settlement Agreement as a preference. As is the case under the analytical framework set out in the FCA, it is more accurately viewed as a pre-condition to remaining in business.

46. In addition, the transactions contemplated by the Settlement Agreement are further exempted from scrutiny by the fact that the Security is comprised, in part, of a letter of credit. As discussed above, property that is not exigible or attachable at the instance of judgment

[38] APA, *supra* note 24, section 4, Schedule "B".
[39] APA, *supra* note 24, section 4, Schedule "B".
[40] *Ibid.*, section 5, Schedule "B".

creditors also cannot be attacked under fraudulent preference or conveyance legislation.[41] Therefore, the Settlement Agreement is immune from attack under the APA on this basis as well.

47. In the present case, to the extent that the APA even applies, the discussion above with respect to the FCA is equally relevant to the analysis under the APA. The primary differences between the requirements under the FCA and APA are: (i) the insolvency requirement under the APA that is absent from the FCA[42]; and (ii) in respect of transactions attacked within sixty days, there is a presumption, *absent evidence to the contrary*, that the transaction was made with the relevant intent to be an unjust preference.[43] Importantly, this presumption is rebuttable and given that the underlying facts of the Settlement Agreement are the same, regardless of which legislation they are examined under and which party bears the onus of proving intent, there remains no evidence to suggest that the requisite intent was present in order to result in the Settlement Agreement being a preference. The above discussion concerning the absence of "badges of fraud" in relation to fraudulent preferences, and the facts and reasons cited therein apply to the analysis under the APA as well. Regardless of where the presumption lies, there are no facts to support a finding by this Court that the debtor intended to defraud, defeat or delay its creditors under the APA or that anything about the Settlement Agreement is unjust. Accordingly, Tarion submits that the Settlement Agreement is not a preference under the APA.

CCAA

48. Under the CCAA, fraudulent preferences and fraudulent conveyances are treated in the same way as they are under the *Bankruptcy and Insolvency Act*[44]. Section 36.1 of the CCAA provides as follows:

> [s]ections...95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.[45]

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[41] *Dunlop, supra* note 28, at p. 633, Brief of Authorities of Tarion Warranty Corporation, at Tab 5; Canadian Encyclopedic Digest, available on Westlaw, at Fraudulent Conveyances and Preferences IV.9.(a), Brief of Authorities of Tarion Warranty Corporation, at Tab 6.

[42] In the present case, there is no question that the CCAA Debtors, including Puccini, are insolvent at this time, though at the time of the initial registrations they were not.

[43] Transactions that are attacked outside of sixty days, are not subject to this presumption.

[44] R.S.C. 1985, c. B-3 [BIA].

[45] CCAA, *supra* note 12, section 36.1, Schedule "B".

49. Pursuant to section 95 of the BIA, every transfer of property or charge thereon, payment, obligation incurred and judicial proceeding taken by an insolvent person in favour of a creditor with a view to giving that creditor a preference over the other creditors within three months prior to the bankruptcy is deemed fraudulent and void as against the trustee-in-bankruptcy.[46] Under the CCAA, it is necessary to prove that the preferential payment: (i) was made to a creditor, (ii) was made within the relevant time period, which in the case of arm's length parties in the present case, is three months before the date on which these CCAA proceedings were commenced; (iii) was made by the debtor company; and (iv) gave the creditor a preference in fact over the other creditors.[47] If the first three elements of the test are satisfied, then it is presumed that the transaction was made with a view to giving the creditor a preference over the other creditors. The burden then shifts to the creditor to rebut the presumption.

50. The provisions of the CCAA concerning preferences that incorporate by reference the BIA provisions concerning the same, are not applicable in the present case as the Settlement Agreement was not entered into within the relevant time period. The Settlement Agreement was instead a post-filing agreement of the CCAA Debtors, a copy of which agreement was acknowledged as received by the monitor in these proceedings on or about the date of its execution by the parties. As such, these CCAA provisions are inapplicable to the present case. Nevertheless, even if the CCAA provisions were applied to the present case, the above discussion concerning the absence of "badges of fraud" in relation to fraudulent preferences, and the facts and reasons cited therein, show that there are no facts to support a finding by this Court that the Settlement Agreement is a fraudulent preference pursuant to the CCAA.

This Court has the Requisite Authority to Approve the Settlement Agreement even if its Performance will have an Effect on the Size of the Estate Available for Other Creditors

51. A CCAA supervising judge has jurisdiction to approve transactions, including settlements in the course of overseeing proceedings during a stay period and prior to any plan of arrangement being proposed to creditors.[48] A Settlement Agreement may be approved if it is:

[46] BIA, *supra* note 44, section 95, Schedule "B".

[47] BIA, *supra* note 44, section 95, Schedule "B"; CCAA, *supra* note 12, section 36.1, Schedule "B".

[48] *See*: *Nortel Networks Corp., Re*, 2010 ONSC 1708, at para 71 [*Nortel*], Brief of Authorities of Tarion Warranty Corporation, at Tab 10; *Calpine Canada Energy Ltd., Re*, 2007 ABCA 266, at para. 23 [*Calpine*], Brief of Authorities of Tarion Warranty Corporation, at Tab 11.

(a) consistent with the spirit and purpose of the CCAA; and (b) fair and reasonable.[49] As discussed below, even if a settlement agreement has the effect of preferring certain creditors over other creditors by impacting the size of the estate available to such creditors, courts may, and have, approved such agreements, notwithstanding the fact that such agreement may benefit some creditors more than others. Therefore, even if this Court accepts the contention that the Settlement Agreement has the effect of preferring Tarion over other creditors, which contention Tarion disagrees with, such would not be an impediment to this Court approving the Settlement Agreement.

Spirit and Purpose

52. The CCAA is a flexible instrument and part of its purpose is to allow debtors to balance the conflicting interests of stakeholders.[50] In the present case, the interests of stakeholders are best balanced by restoring Tarion, the CCAA Debtors and the purchasers of the ninety five Puccini Project homes, the private mortgagees and the construction lien claimants to the positions that they would have been in had Puccini been properly registered under the Warranties Act, consistent with the CCAA Debtors' intentions and the previous representations to this Court in these CCAA proceedings. Making the Security available to the CCAA Debtors' general creditor body as a windfall to those creditors is not consistent with the spirit and purpose of the CCAA.

Fair and Reasonable

53. A settlement agreement is fair and reasonable if it balances the interests of all parties; treats parties equitably, including creditors who are not signatories to the agreement, and benefits the debtor company and its stakeholders generally.[51] Being properly registered under the Warranties Act is a legal requirement to conducting business in the Province of Ontario in the cases of new homebuilders and vendors. It is a pre-condition to remaining in business. The reasonable expectations of the parties at all relevant times would have included compliance by the CCAA Debtors with this legal requirement. Had Puccini been properly registered with Tarion under the Warranties Act, as this Court was consistently advised that it was in approving

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[49] *Nortel*, *supra* note 48, at para. 73, Brief of Authorities of Tarion Warranty Corporation, at Tab 10.
[50] *Ibid.*, at para. 74, Brief of Authorities of Tarion Warranty Corporation, at Tab 10.
[51] *Ibid.*, at para. 73, Brief of Authorities of Tarion Warranty Corporation, at Tab 10.

the various agreements of purchase and sale in these proceedings, then Tarion would have had access to the Security in respect of claims made by such purchasers and there would not have been a need for the parties to enter into the Settlement Agreement. Therefore, the Settlement Agreement effectively reflects the intentions and expectations of the parties.

54. Importantly to this analysis, the equitable treatment of the parties does not mean the equal treatment of the parties.[52] A settlement will almost always have an impact on the financial circumstances of a debtor and will invariably have an effect on the size of the estate available for other creditors.[53] This, by itself, is not an impediment to the approval of a settlement agreement in CCAA cases. In fact, courts have displayed a willingness to approve settlement agreements and other arrangements between debtor companies and their creditors that have the effect of preferring certain creditors over others where such agreements and arrangements are consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances.

55. For example, in *Air Canada*, Justice Farley approved an operating agreement between Air Canada and Deutsche Lufthansa Aktiengesellschaft ("DLA") that provided for the payment of pre-filing debts by Air Canada to DLA on the basis of, *inter alia*, DLA being a critical vendor able to supply unique services to Air Canada and there being support for the agreement from other interested parties, despite the objections of other parties.[54] In *Nortel*, Justice Morawetz (as he then was) approved a settlement agreement between Nortel and certain employee groups that, *inter alia*, permitted Nortel to make both current service payments and special payments to certain pension plans on the basis that the employees are in "special circumstances" and have a "unique interest in the settlement of their claims".[55] In approving the settlement, Justice Morawetz also cited the support of other interested parties, despite the objections of other parties:[56] In those same proceedings and with respect to letters of credit, specifically, Justice Morawetz' Initial Order provides that the debtor companies may, with the approval of the monitor, post additional cash collateral into existing cash collateral accounts as additional and

[52] *See*: *Air Canada, Re*, [2003] O.J. No. 5319 (Ont. S.C.J. [Commercial List]), at para 7 [*Air Canada*], Brief of Authorities of Tarion Warranty Corporation, at Tab 12; *Sammi Atlas Inc., Re*, [1998] O.J. No. 1089 (Ont. Ct. Jus, Gen. Div. [Commercial List]) at para. 4, Brief of Authorities of Tarion Warranty Corporation, at Tab 13.

[53] *Calpine*, *supra* note 48, at para. 30, Brief of Authorities of Tarion Warranty Corporation, at Tab 11.

[54] *Air Canada*, *supra* note 52, at paras. 2-6, Brief of Authorities of Tarion Warranty Corporation, at Tab 12.

[55] *Nortel*, *supra* note 48, at para . 74, Brief of Authorities of Tarion Warranty Corporation, at Tab 10.

[56] *Nortel*, *supra* note 48, at para. 75, Brief of Authorities of Tarion Warranty Corporation, at Tab 10.

continuing security for existing, renewed and new letters of credit and other similar instruments, including, *inter alia*, in favour of Export Development Canada, and that such posting "shall not and will not constitute a fraudulent preference, fraudulent conveyance, oppressive conduct, settlement or other challengeable, voidable or reviewable transaction under any applicable law."[57] These cases show that courts may, and have approved agreements or arrangements that have the effect of preferring certain creditors over other creditors and that by itself, is not an impediment to the approval of a settlement agreement in CCAA cases.

56. In the present case, Tarion is a uniquely situated creditor that operates further to the public interest and is in many ways akin to a critical supplier for the reasons discussed above. Therefore, even if the Settlement Agreement is found to prefer Tarion over other creditors, this Court still has good reason to approve it, as favoured by the balance of prejudice.

The Balance of Prejudice Favours Approving the Settlement Agreement

57. On one hand, given the interplay between the regulatory imperatives of registering new home vendors and builders and safeguarding of the guarantee fund established under the Warranties Act to fund any claims made by new home purchasers, it is in the public interest to approve the Settlement Agreement. The approval of the Settlement Agreement will restore Tarion, the CCAA Debtors and the purchasers of the ninety five Puccini Project homes, the private mortgagees and the construction lien claimants to the positions that they would have been in had Puccini been properly registered under the Warranties Act, consistent with the CCAA Debtors' intentions and previous representations in these CCAA proceedings.

58. On the other hand, if the opportunistic objections to the Settlement Agreement by certain of the construction lien claimants are sustained by this Court, then those parties will receive a windfall, as the Security was never intended to be available to the construction lien claimants or any party other than Tarion.

59. Furthermore, if the Settlement Agreement is approved, the balance of the Security, if any, will be available for the CCAA Debtors' general creditor body after claims made by new home purchasers are processed, determined and paid out from the Security. This is in keeping with the expectations of the parties and will prevent a result in which the objecting lien claimants are

[57] Fifth Amended and Restated Initial Order dated January 14, 2009, in the CCAA proceedings of Nortel Networks Corporation et al., at para. 7(c), Brief of Authorities of Tarion Warranty Corporation, at Tab 14.

permitted to effectively transfer commercial risk from themselves, which risk they had ample opportunity to price, and transfer it onto Tarion in its capacity as regulator, contrary to the public interest. For all of the above reasons, Tarion respectfully submits that the Settlement Agreement should be approved.

PART V - ORDER REQUESTED

60. Subject to this Court's determination that the CCAA Debtors have the requisite authority to enter into the Settlement Agreement, for the reasons set forth herein, Tarion respectfully requests that this Court make an order approving the Settlement Agreement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of June, 2015.

Adam M. Slavens

Lawyers for Tarion Warranty Corporation

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Ontario New Home Warranty Program v. Lukenda*, [1991] 2 O.R. (3d) 675

2. Houlden, L.W. and Geoffrey B. Morawetz. *Houlden and Morawetz Bankruptcy and Insolvency Analysis*, available on Westlaw, at N§2

3. *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (C.A.)

4. *Choo Yick v. Tarion Warranty Corp.*, 2014 ONSC 4488

5. C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2d ed. (Toronto: Thomson Canada, 1995)

6. Canadian Encyclopedic Digest, available on Westlaw, at Fraudulent Conveyances and Preferences IV.9.(a)

7. *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.*, 2007 ONCA 425

8. *Sparling v. Southam Inc.*, [1988] O.J. No. 1745 (Ont. Sup. Ct., H.C.J.)

9. *Epstein v. First Marathon Inc. / Société First Marathon Inc.*, [2000] O.J. No. 452 (Ont. S.C.J.)

10. *Nortel Networks Corp., Re*, 2010 ONSC 1708

11. *Calpine Canada Energy Ltd., Re*, 2007 ABCA 266

12. *Air Canada, Re*, [2003] O.J. No. 5319 (Ont. S.C.J. [Commercial List])

13. *Sammi Atlas Inc., Re*, [1998] O.J. No. 1089 (Ont. Ct. Jus, Gen. Div. [Commercial List])

14. Fifth Amended and Restated Initial Order dated January 14, 2009, in the CCAA proceedings of Nortel Networks Corporation et al.

SCHEDULE "B"
RELEVANT STATUTES

Ontario New Home Warranties Plan Act
R.S.O. 1990, CHAPTER O.31

Definitions

1. In this Act,

"builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by the person or under a contract with a vendor or owner; ("constructeur")

"Corporation" means the corporation designated under section 2; ("Société")

"guarantee fund" means the provision made by the Corporation for compensation under the Plan; ("fonds de garantie")

"home" means,

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

(b) a building composed of more than one and not more than two self-contained, one-family dwellings under one ownership,

(c) a condominium dwelling unit, including the common elements, or

(d) any other dwelling of a class prescribed by the regulations as a home to which this Act applies,

and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes; ("logement")

"inspector" means an inspector appointed by the Corporation under section 18; ("inspecteur")

"Minister" means the Minister of Consumer and Business Services; ("ministre")

"owner" means a person who first acquires a home from its vendor for occupancy, and the person's successors in title; ("propriétaire")

"Plan" means the Ontario New Home Warranties Plan referred to in section 11; ("Régime")

"prescribed" means prescribed by the regulations; ("prescrit")

"Registrar" means the Registrar appointed by the Corporation under section 3; ("registrateur")

"regulations" means the by-laws of the Corporation made under section 23; ("règlements")

"sell" includes entering into an agreement to sell; ("vendre")

"Tribunal" means the Licence Appeal Tribunal; ("Tribunal")

"vendor" means a person who sells on his, her or its own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner; ("vendeur")

"warranty" means a warranty set out in section 13. ("garantie") R.S.O. 1990, c. O.31, s. 1; 1999, c. 12, Sched. G, s. 30 (1); 2001, c. 9, Sched. D, s. 13.

Designation of Corporation

2. (1) The Lieutenant Governor in Council shall designate a non-profit corporation incorporated without share capital under the *Corporations Act* to be the Corporation for the purposes of this Act. R.S.O. 1990, c. O.31, s. 2 (1).

Objects

(2) Upon its designation, the objects of the Corporation are extended to include,

(a) the administration of the Ontario New Home Warranties Plan;

(b) the establishment and administration of a guarantee fund providing for the payment of compensation under section 14, whether by the establishment of a fund for the purpose or by contract with licensed insurers;

(c) assisting in the conciliation of disputes between vendors and owners; and

(d) engaging in undertakings for the purpose of improving communications between vendors and owners. R.S.O. 1990, c. O.31, s. 2 (2).

Application of *Insurance Act*

(3) The *Insurance Act* does not apply to the Corporation and its undertakings in respect of any matter within its objects or authorized by this Act. R.S.O. 1990, c. O.31, s. 2 (3).

Registrar

3. (1) The Corporation shall appoint a Registrar who shall perform the duties and exercise the powers given to the Registrar by this Act and the regulations under the supervision of the Corporation and who shall perform such other duties as are assigned by the Corporation. R.S.O. 1990, c. O.31, s. 3.

Deputy Registrars

(2) The Corporation may appoint one or more Deputy Registrars who have and may exercise the powers and duties of the Registrar that the Registrar specifies. 1998, c. 18, Sched. E, s. 187.

References to Registrar

(3) If the Registrar so specifies, references in this Act and the regulations to the Registrar shall be deemed to refer to a Deputy Registrar. 1998, c. 18, Sched. E, s. 187.

Revenues and expenses

4. All money payable under this Act to the Corporation shall be retained by the Corporation and applied to defray the expenses incurred and expenditures made in the carrying out of its duties under this Act and otherwise for the purposes of its objects set out in subsection 2 (2). R.S.O. 1990, c. O.31, s. 4.

Annual report

5. (1) The Corporation shall make a report annually to the Minister upon the affairs of the Corporation. 2000, c. 26, Sched. B, s. 15 (1).

Tabling

(2) The Minister shall,

(a) submit the report to the Lieutenant Governor in Council;

(b) lay the report before the Assembly if it is in session; and

(c) deposit the report with the Clerk of the Assembly if the Assembly is not in session. 2000, c. 26, Sched. B, s. 15 (1).

Disclosure by Corporation

(3) The Corporation may give a copy of its report under subsection (1) to other persons before the Minister complies with subsection (2). 2000, c. 26, Sched. B, s. 15 (1).

Registration required

6. No person shall act as a vendor or a builder unless the person is registered by the Registrar under this Act. R.S.O. 1990, c. O.31, s. 6.

Registration of vendors and builders

7. (1) An applicant is entitled to registration by the Registrar except where,

(a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of the applicant's undertakings;

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on the applicant's undertakings in accordance with law and with integrity and honesty;

(c) the applicant is a corporation and,

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty; or

(d) in the case of an application for registration as a builder, the applicant does not have sufficient technical competence to consistently perform the warranties. R.S.O. 1990, c. O.31, s. 7 (1).

Conditions of registration

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant or imposed by the Tribunal or prescribed by the regulations. R.S.O. 1990, c. O.31, s. 7 (2).

Registration not transferable

(3) A registration is not transferable. R.S.O. 1990, c. O.31, s. 7 (3).

Refusal to register

8. (1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 7. R.S.O. 1990, c. O.31, s. 8 (1).

Revocation and refusal to renew

(2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if the registrant were an applicant, or where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts or is in breach of a term or condition of the registration. R.S.O. 1990, c. O.31, s. 8 (2).

Notice of proposal to refuse or revoke

9. (1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant. R.S.O. 1990, c. O.31, s. 9 (1).

Notice requiring hearing

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal. R.S.O. 1990, c. O.31, s. 9 (2).

Powers of Registrar where no hearing

(3) Where an applicant or registrant does not require a hearing by the Tribunal in accordance with subsection (2), the Registrar may carry out the proposal stated in the notice under subsection (1). R.S.O. 1990, c. O.31, s. 9 (3).

Powers of Tribunal

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar. R.S.O. 1990, c. O.31, s. 9 (4).

Conditions of order

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act. R.S.O. 1990, c. O.31, s. 9 (5).

Parties

(6) The Registrar, the applicant or registrant who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section. R.S.O. 1990, c. O.31, s. 9 (6).

Voluntary cancellation

(7) The Registrar may cancel a registration upon the request in writing of the registrant and this section does not apply to the cancellation. 2009, c. 33, Sched. 10, s. 11.

Continuance pending renewal

(8) Where, within the time prescribed therefor or, if no time is prescribed, before expiry of the registration, a registrant has applied for renewal of a registration and paid the prescribed fee, the registration shall be deemed to continue,

(a) until the renewal is granted; or

(b) where the registrant is served with notice that the Registrar proposes to refuse to grant the renewal, until the time for giving notice requiring a hearing has expired and, where a hearing is required, until the Tribunal has made its order. R.S.O. 1990, c. O.31, s. 9 (8).

Appeal

(9) Even if a registrant appeals an order of the Tribunal under section 11 of the *Licence Appeal Tribunal Act, 1999*, the order takes effect immediately but the Tribunal may grant a stay until the disposition of the appeal. 1999, c. 12, Sched. G, s. 30 (2).

Further applications

10. A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed. R.S.O. 1990, c. O.31, s. 10.

Ontario New Home Warranties Plan

11. (1) The Ontario New Home Warranties Plan is continued under the name Ontario New Home Warranties Plan in English and Régime de garanties des logements neufs de l'Ontario in French and is comprised of the warranties and the guarantee fund and compensation provided for by this Act. R.S.O. 1990, c. O.31, s. 11 (1).

Disclosures on entering into contract

(2) When a vendor enters into a contract for the sale of a home to an owner or for the construction of a home for an owner, the vendor shall deliver to the owner such documentation and notices respecting the Plan as are prescribed by the regulations. R.S.O. 1990, c. O.31, s. 11 (2).

Notice of commencing construction

12. A builder shall not commence to construct a home until the builder has notified the Corporation of the fact, has provided the Corporation with such particulars as the Corporation requires and has paid the prescribed fee to the Corporation. R.S.O. 1990, c. O.31, s. 12.

Warranties

13. (1) 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, and

(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. R.S.O. 1990, c. O.31, s. 13 (1).

Exclusions

(2) A warranty under subsection (1) does not apply in respect of,

(a) defects in materials, design and work supplied by the owner;

(b) secondary damage caused by defects, such as property damage and personal injury;

(c) normal wear and tear;

(d) normal shrinkage of materials caused by drying after construction;

(e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;

(f) damage resulting from improper maintenance;

(g) alterations, deletions or additions made by the owner;

(h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;

(i) damage resulting from an act of God;

(j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;

(k) damage caused by municipal services or other utilities;

(l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession. R.S.O. 1990, c. O.31, s. 13 (2).

Certificate of completion

(3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate. R.S.O. 1990, c. O.31, s. 13 (3).

Term of warranty under subs.(1)

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed. R.S.O. 1990, c. O.31, s. 13 (4).

Privity of contract

(5) A warranty is enforceable even though there is no privity of contract between the owner and the vendor. R.S.O. 1990, c. O.31, s. 13 (5).

Application of warranties

(6) 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. R.S.O. 1990, c. O.31, s. 13 (6).

Compensation

14. (1) Subject to the regulations, a person who has entered into a contract to purchase a home from a vendor is entitled to receive payment out of the guarantee fund for the amount that the person paid to the vendor as a deposit to be credited to the purchase price under the contract on closing if,

(a) the person has exercised a statutory right to rescind the contract before closing; or

(b) the person has a cause of action against the vendor resulting from the fact that title to the home has not been transferred to the person because,

(i) the vendor has gone into bankruptcy, or

(ii) the vendor has fundamentally breached the contract. 1998, c. 19, s. 185 (1); 2000, c. 26, Sched. B, s. 15 (2).

Same, construction contract

(2) Subject to the regulations, an owner of land who has entered into a contract with a builder for the construction of a home on the land and who has a cause of action against the builder for damages resulting from the builder's failure to substantially perform the contract, is entitled to receive payment out of the guarantee fund of the amount by which the amount paid by the owner to the builder under the contract exceeds the value of the work and materials supplied to the owner under the contract. 1998, c. 19, s. 185 (1).

Same, breach of warranty

(3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,

(a) the person became the owner of the home through receiving a transfer of title to it or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and

(b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty. 1998, c. 19, s. 185 (1); 2000, c. 26, Sched. B, s. 15 (3, 4).

Same, major structural defect

(4) Subject to the regulations, an owner who suffers damage because of a major structural defect mentioned in clause 13 (1) (b) is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct the major structural defect if the owner makes a claim within four years after the warranty expires or such longer time under such conditions as are prescribed. 1998, c. 19, s. 185 (1).

Interpretation, substantial performance

(5) For the purposes of this section, a contract is substantially performed if it is substantially performed within the meaning given by subsection 2 (1) of the *Construction Lien Act*. 1998, c. 19, s. 185 (1).

Other recovery

(6) In assessing the amount for which a person is entitled to receive payment out of the guarantee fund under this section, the Corporation shall take into consideration any benefit, compensation, indemnity payable, or the value of work and materials furnished to the person from any source. 1998, c. 19, s. 185 (1).

Performance

(7) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under this section. 1998, c. 19, s. 185 (1).

Condominiums

15. For the purposes of sections 13 and 14,

(a) a condominium corporation shall be deemed to be the owner of the common elements of the corporation;

(b) subject to clauses (c) and (d), if dwelling units are included in the property of a condominium corporation, the warranties on the common elements of the corporation take effect on the date of the registration of the declaration and description;

(c) no warranties shall take effect on the common elements of a common elements condominium corporation or a vacant land condominium corporation;

(d) the warranties on common elements of a phased condominium corporation, that are added to the corporation after the registration of the declaration and description take effect on the date of the registration of the amendments to the declaration and description that created them; and

(e) the amalgamation of two or more condominium corporations does not affect or extend the warranties on the common elements of the amalgamating corporations. 1998, c. 19, s. 185 (2).

Liability of vendor

15.1 For the purposes of sections 13 and 14, a person, who at any time has registered as a vendor under this Act with respect to a home, for which the builder has complied with section 12 and has substantially completed the construction, shall be deemed to be a vendor of the home even if another person sells the home to an owner or completes a transaction to sell the home to an owner. 1998, c. 18, Sched. E, s. 188.

Notice of decision under s. 14

16. (1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected. R.S.O. 1990, c. O.31, s. 16 (1).

Notice requiring hearing

(2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal. R.S.O. 1990, c. O.31, s. 16 (2).

Powers of Tribunal

(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation. R.S.O. 1990, c. O.31, s. 16 (3).

Parties

(4) The Corporation, the person or owner who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section. R.S.O. 1990, c. O.31, s. 16 (4).

Conciliation of disputes

17. (1) The Corporation may, upon the request of an owner, conciliate any dispute between the owner and a vendor. R.S.O. 1990, c. O.31, s. 17 (1).

Idem

(2) Where there is a dispute between a vendor and an owner arising out of the contract, neither party shall commence any proceeding in respect thereof until after fifteen days after the party notifies the Corporation of the dispute for the purpose of giving the Corporation an opportunity to effect conciliation. R.S.O. 1990, c. O.31, s. 17 (2).

Information to Corporation

(3) Each party to a dispute shall supply the Corporation with such particulars thereof as the Corporation requires. R.S.O. 1990, c. O.31, s. 17 (3).

Arbitration

(4) Every agreement between a vendor and prospective owner shall be deemed to contain a written agreement to submit present or future differences to arbitration, subject to appeal to the Divisional Court, and the *Arbitrations Act* applies. R.S.O. 1990, c. O.31, s. 17 (4).

Inspectors

18. (1) The Corporation shall appoint inspectors for the purposes of this Act. R.S.O. 1990, c. O.31, s. 18 (1).

Power of entry

(2) An inspector may, for the purpose of inspecting a home during its construction, enter in or upon and inspect the premises constituting the site of the construction at any time without a warrant. R.S.O. 1990, c. O.31, s. 18 (2).

Powers of inspector

(3) For the purposes of an inspection, the inspector may,

(a) require the production of the drawings and specifications of a home or any part thereof, including any drawings prescribed by the regulations, for his or her inspection and may require information from any person concerning any matter related to a home or part thereof;

(b) be accompanied by any person who has special or expert knowledge of any matter in relation to a home or part thereof; and

(c) alone or in conjunction with such other person or persons possessing special or expert knowledge, make such examinations, tests, or inquiries as are necessary for the purposes of the inspection. R.S.O. 1990, c. O.31, s. 18 (3).

Obstruction of inspectors

(4) No person shall hinder, obstruct, molest or interfere with or attempt to hinder, obstruct, molest or interfere with an inspector in the exercise of a power or performance of a duty under this Act. R.S.O. 1990, c. O.31, s. 18 (4).

Restraining order

19. (1) Where it appears to the Corporation that any vendor or builder does not comply with this Act or the regulations, despite the imposition of any penalty in respect of such non-compliance and in addition to any other rights it may have, the Corporation may apply to the Superior Court of Justice for an order directing such person to comply with such provision and, upon the application, the court may make the order or such other order as the court thinks fit. R.S.O. 1990, c. O.31, s. 19 (1); 2000, c. 26, Sched. B, s. 15 (5).

Appeal

(2) An appeal lies to the Divisional Court from an order made under subsection (1). R.S.O. 1990, c. O.31, s. 19 (2).

Service of notice

20. Any notice or document required by this Act to be served or given may be served or given personally or by registered mail addressed to the person to whom notice is to be given at the person's last known address and, where notice is served or given by mail, the service shall be deemed to have been made on the fifth day after the day of mailing unless the person to whom the notice is given establishes that the person, acting in good faith, through absence, accident, illness or other cause beyond the person's control, did not receive the notice, or did not receive the notice until a later date. R.S.O. 1990, c. O.31, s. 20.

Certificate of evidence

21. The following statements are admissible in evidence as proof, in the absence of evidence to the contrary, of the facts stated in them for all purposes in any proceeding or prosecution, without the need for proving the office or signature of the Registrar, if the statements purport to be certified by the Registrar:

1. A statement as to the registration or non-registration of any person.
2. A statement as to the filing or non-filing of any document or material required or permitted to be filed with the Corporation.
3. A statement as to any other matter pertaining to a registration, non-registration, filing or non-filing of any person. 1998, c. 18, Sched. E, s. 189.

Offences

22. (1) Every person who,

(a) knowingly furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act or the regulations; or

(b) contravenes section 6 or 12 or subsection 18 (4),

and every director or officer of a corporation who knowingly concurs in such furnishing or contravention is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than one year, or to both. R.S.O. 1990, c. O.31, s. 22 (1).

Corporation

(2) Where a corporation is convicted of an offence under subsection (1), the maximum penalty that may be imposed upon the corporation is $100,000 and not as provided therein. R.S.O. 1990, c. O.31, s. 22 (2).

Limitations

(3) A proceeding under clause (1) (a) shall not be commenced after the first anniversary of the day on which the facts upon which the proceeding is based first came to the knowledge of the Registrar. 1998, c. 19, s. 185 (3).

Same

(4) A proceeding under clause (1) (b) shall not be commenced after the second anniversary of the day on which the facts that gave rise to the offence were discovered. 1998, c. 19, s. 185 (3).

By-laws

23. (1) The Corporation may make by-laws,

(a) governing applications for registration of vendors and builders and the expiration and renewal of registration;

(b) prescribing the terms and conditions of registration;

(c) requiring the payment of fees on applications for registration or renewal of registration and prescribing the amounts thereof;

(d) prescribing the fees payable by builders to the Corporation in respect of the construction of a home or any class of home;

(e) governing applications for and the issuance of certificates under subsection 13 (3);

(f) governing agreements entered into between the Corporation and vendors or builders;

(g) providing for the establishment and maintenance of the guarantee fund and governing procedures for claiming and determining claims for compensation from the guarantee fund;

(h) governing the procedures for conciliation of disputes and providing for the payment and refunding of fees respecting requests for conciliation;

(i) prescribing classes of dwellings that are homes;

(j) specifying warranties in addition to those provided for in clause 13 (1) (a) or (b) and the time of expiration thereof;

(k) defining major structural defects for the purpose of clause 13 (1) (b);

(l) requiring vendors and builders to be bonded or to provide other security in such form, on such terms and with such collateral security as are prescribed, and providing for the forfeiture of bonds or other security and for the disposition of the proceeds;

(l.1) specifying information that a person is required to include in a claim for compensation from the guarantee fund;

(m) subrogating the Corporation or a named insurer to any right of recovery of a person in respect of a claim paid out of the insurance under the Plan and costs and providing the terms and conditions under which an action to enforce such rights may be begun, conducted and settled;

(m.1) allowing prescribed persons to inspect homes during or after their construction and requiring builders or vendors to pay the costs of the inspections;

(n) prescribing any matter required or authorized by this Act to be, or referred to in this Act as, prescribed by the regulations;

(o) prescribing forms for the purposes of the Corporation and forms for claims for compensation from the guarantee fund. R.S.O. 1990, c. O.31, s. 23 (1); 1994, c. 27, s. 94; 1998, c. 18, Sched. E, s. 190; 1998, c. 19, s. 185 (4-7).

***Legislation Act, 2006*, Part III**

(2) A by-law passed under subsection (1) shall be deemed to be a regulation to which Part III (Regulations) of the *Legislation Act, 2006* applies. R.S.O. 1990, c. O.31, s. 23 (2); 2006, c. 21, Sched. F, s. 136 (1).

Act binds Crown

(3) This Act, except sections 6 to 10, binds the Crown. R.S.O. 1990, c. O.31, s. 23 (3).

Ontario New Home Warranties Plan Act
ONTARIO REGULATION 273/04

Designation of Corporation

1. The corporation known as Tarion Warranty Corporation, formerly Ontario New Home Warranty Program, is designated as the Corporation for the purposes of the Act. O. Reg. 273/04, s. 1.

2. Omitted (revokes other Regulations). O. Reg. 273/04, s. 2.

Companies' Creditors Arrangement Act
R.S.C., 1985, c. C-36

Meaning of "regulatory body"

11.1 (1) In this section, "regulatory body" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

- (*a*) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and
- (*b*) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

...

Application of sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

Interpretation

2. (2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

- (*a*) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";
- (*b*) to "trustee" is to be read as a reference to "monitor"; and
- (*c*) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

Fraudulent Conveyances Act
R.S.O. 1990, CHAPTER F.29

Where conveyances void as against creditors

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns. R.S.O. 1990, c. F.29, s. 2.

...

Where s. 2 applies

4. Section 2 applies to every conveyance executed with the intent set forth in that section despite the fact that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of good faith and want of notice or knowledge on the part of the purchaser. R.S.O. 1990, c. F.29, s. 4.

Assignments and Preferences Act
R.S.O. 1990, CHAPTER A.33

Nullity of gifts, transfers, etc., made with intent to defeat or prejudice creditors

4. (1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced. R.S.O. 1990, c. A.33, s. 4 (1).

Unjust preferences

(2) Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed. R.S.O. 1990, c. A.33, s. 4 (2).

When there is presumption of intention if transaction has effect of unjust preference

(3) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, in and with respect to any action or proceeding that, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure. R.S.O. 1990, c. A.33, s. 4 (3).

Idem

(4) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, if the debtor within sixty days after the transaction makes an assignment for the benefit of the creditors, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure. R.S.O. 1990, c. A.33, s. 4 (4); 1993, c. 27, Sched.

"Creditor" for certain purposes to include surety and endorser

(5) The word "creditor" when used in the singular in subsections (2), (3) and (4) includes any surety and the endorser of any promissory note or bill of exchange who would upon paying the debt, promissory note or bill of exchange, in respect of which the suretyship was entered into or the endorsement was given, become a creditor of the person giving the preference within the meaning of those subsections. R.S.O. 1990, c. A.33, s. 4 (5).

Assignments for benefit of creditors and good faith sales, etc., protected

5. (1) Nothing in section 4 applies to an assignment made to the sheriff for the area in which the debtor resides or carries on business or, with the consent of a majority of the creditors having claims of $100 and upwards computed according to section 24, to another assignee resident in Ontario, for the purpose of paying rateably and proportionately and without preference or priority all the creditors of the debtor their just debts, nor to any sale or payment made in good faith in the ordinary course of trade or calling to an innocent purchaser or person, nor to any payment of money to a creditor, nor to any conveyance, assignment, transfer or delivery over of any goods or property of any kind, that is made in good faith in consideration of a present actual payment in money, or by way of security for a present actual advance of money, or that is made in consideration of a present actual sale or delivery of goods or other property where the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor. R.S.O. 1990, c. A.33, s. 5 (1).

Transfer to creditor of consideration for sale invalid

(2) In case of a valid sale of goods or other property and payment or transfer of the consideration or part thereof by the purchaser to a creditor of the vendor under circumstances that would render void such a payment or

transfer by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, is void as respects the creditor to whom it is made. R.S.O. 1990, c. A.33, s. 5 (2).

Effect of assignment not in accordance with Act

(3) Every assignment for the general benefit of creditors that is not void under section 4, but is not made to the sheriff nor to any other person with the prescribed consent of creditors, is void as against a subsequent assignment that is in conformity with this Act, and is subject in other respects to the provisions thereof until and unless a subsequent assignment is executed in accordance therewith. R.S.O. 1990, c. A.33, s. 5 (3).

Security given up upon void payment to be returned

(4) Where a payment has been made that is void under this Act and any valuable security was given up in consideration of the payment, the creditor is entitled to have the security restored or its value made good to him before, or as a condition of, the return of the payment. R.S.O. 1990, c. A.33, s. 5 (4).

Exceptions:

(5) Nothing in this Act,

wages

(a) affects the *Wages Act* or prevents a debtor providing for payment of wages due by him or her in accordance with that Act;

surrender of securities

(b) affects any payment of money to a creditor where the creditor, by reason or on account of the payment, has lost or been deprived of, or has in good faith given up, any valid security held for the payment of the debt so paid unless the security is restored or its value made good to the creditor;

exchange of securities

(c) applies to the substitution in good faith of one security for another security for the same debt so far as the debtor's estate is not thereby lessened in value to the other creditors; or

certain securities to be valid

(d) invalidates a security given to a creditor for a pre-existing debt where, by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor in the belief that the advance will enable the debtor to continue the debtor's trade or business and to pay the debts in full. R.S.O. 1990, c. A.33, s. 5 (5).

Bankruptcy and Insolvency Act
R.S.C., 1985, c. B-3

Preferences

- 95. (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
(*a*) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and
(*b*) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

- **Preference presumed**

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(*a*) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

- **Exception**

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(*a*) a margin deposit made by a clearing member with a clearing house; or
(*b*) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

- **Definitions**

(3) In this section,

"clearing house"
« chambre de compensation »

"clearing house" means a body that acts as an intermediary for its clearing members in effecting securities transactions;

"clearing member"
« membre »

"clearing member" means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary;

"creditor"
« créancier »

"creditor" includes a surety or guarantor for the debt due to the creditor;

"margin deposit"
« dépôt de couverture »

"margin deposit" means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations.

Court File No. CV-13-10362-00CL

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SILVER STREAMS HOMES INC.; SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. AND 2147650 ONTARIO INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

RESPONDING FACTUM OF
TARION WARRANTY CORPORATION
(Motion to Approve Settlement Agreement)
(Returnable June 25, 2015)

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