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## Is secrecy a major structural defect in buyer protection?

How will buyers of new homes in Ontario know the meaning of a "major structural defect" under the Tarion warranty if the corporation imposes a gag agreement on settlements of lawsuits against it?

That's the question after a secret resolution of claim brought by Tim Fuller and Patricia Swick, who bought an Ottawa townhouse in 1998 and spent nine years battling the builder and Tarion Warranty Corp. over outstanding issues.

Under the Tarion program, a house is guaranteed to be free from major structural defects (MSDs) for seven years after possession. Within that time limit, Fuller and Swick submitted a number of MSD claims to Tarion, and all were rejected. They appealed Tarion's decision to the Licence Appeal Tribunal (LAT) in 2006 and their claims were again tossed out.

Unhappy with the LAT decision, the couple retained Ottawa lawyer Christopher Arnold to launch an appeal to the Divisional Court. The case involved key issues surrounding the definition of an MSD, and some industry stakeholders eagerly awaited the ruling.

Suddenly, about a week before the court hearing and nine years after the house was purchased the case was quietly settled and disappeared from the court docket. When I tried to find out how it had been resolved, I was told by all parties the settlement was subject to a "will not disclose" agreement.

According to Tarion's governing regulations, an MSD is defined as a defect in work or materials that materially or adversely affects the load-bearing function of a building.

In its Fuller and Swick decision, however, the LAT appears to have re-interpreted that regulation to add an additional requirement that the defect "should be" one that renders a home "virtually uninhabitable ... unsafe, or in a state of imminent collapse."

Arnold, representing Fuller and Swick, believes the LAT was wrong and cited a 1997 court decision in the Grudzinski case, which supports his position, he says. The "imminent collapse" test, he told me last week, is not and never has been part of the Tarion legislation, and shouldn't form any part of how Tarion defines what is and what is not a MSD.

The Fuller and Swick appeal hinged on four issues the couple claimed were MSDs. Basically, the claims were that load-bearing columns, posts or walls on the main floor were not aligned with or not properly secured to structural supports below. But since the settlement is secret, we will never know how the issue of the MSDs was resolved despite considerable public interest in the issue.

A Tarion spokesman told me this month the non-disclosure term in the settlement was imposed by Tarion "to avoid confusion with others who have different circumstances from assuming that they would be entitled to identical settlement agreements. ... each file is dependent on its own facts."

Frankly, to say that present or future litigants would be confused if the Fuller and Swick settlement was made public insults the intelligence of others involved in claims against Tarion.

The outcome of all Tarion's proceedings and settlements should be public. The program should operate in an open and transparent manner; its culture of secrecy is clearly not in the public interest.

Unfortunately, the public record on the Tarion website records only the "imminent collapse" definition of MSD in the Fuller and Swick case, although my guess is that Tarion backed away from that interpretation with a considerable cash payment to the homeowners.

Marek Tufman is a senior Toronto litigator who represented the successful claimants in the 1997 Grudzinski case, which also involved the definition of an MSD. This week, he told me that although the warranty corporation is entitled by law to impose a gag order, a public statutory body like Tarion "should not maintain a cloak of secrecy over this type of arrangement." There is a substantial public interest in this issue, he added.

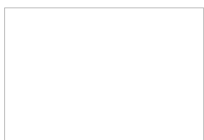
Meanwhile, Linda Williamson, communications manager for the provincial Ombudsman's office, told me the Ombudsman does not have jurisdiction over Tarion. The office, however, is assessing complaints it has received in order to determine whether an investigation is warranted into the degree of protection that Ontario offers to new homeowners.

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<http://www.lat.gov.on.ca/english/decisions/2006/ONHWP/Aug/3409.onhwp.fuller.swick.pdf>

### Licence Appeal Tribunal



#### TIMOTHY FULLER AND PATRICIA SWICK

APPEAL FROM A DECISION OF THE CORPORATION

DESIGNATED FOR THE PURPOSES OF THE ONTARIO NEW

HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DANIEL LAURIN, Vice-Chair

APPEARANCES: TIMOTHY FULLER AND PATRICIA SWICK, Applicants, appearing on their own behalf

DANIEL BOIVIN, Counsel, representing Tarion Warranty Corporation

DATES OF HEARING: June 14-15, 2006 Ottawa

## **REASONS FOR DECISION AND ORDER**

### **BACKGROUND:**

Timothy Fuller and Patricia Swick (the Applicants.) took possession of a dwelling located in Ottawa, Ontario on September 04, 1998. The dwelling is a town house. From a block of seven, it is the first unit on the left. It is identified as block 5.

The Applicants provided notice of their claims to Tarion Warranty Corporation (.Tarion.) on August 26, 2005, in relation to 12 specific items, that reads as follows:

1. Structural deficiencies / load bearing column on the main floor does not align with the structural support below the floor. This is causing a significant distortion in the main floor.
2. Structural deficiencies / wood beam at dropped foyer has been notched 1/3 over the support. This beam should be reviewed to determine if the remaining portion of the beam is capable of supporting all specified loads.
3. Structural deficiencies / steel tele-post is not properly secured to the floor...
4. Structural deficiencies / questionable support for load bearing column at the end of the wall between the living room and kitchen. Drawings require double (2-ply) 2 x 10 beams, Trust Joist layout indicates (2) 1-3/4 x 9 LVL beams, and the actual installation is a single LVB beam. A built up wood column and added footing is provided at that location, however, blocking in the ground floor joist may not be adequate.
5. Structural deficiencies / anchor bolts to the foundation are not visible at the garage wall.
6. Fire separation issues (in garage) / large gaps in gypsum board.
7. Fire separation issues (in garage) / improperly sealed joints in gypsum board.
8. Cladding issues / deficiencies with brick veneer; improperly installed or missing through-wall flashing at the foundation.
9. Moisture issues / effloresce on the foundation wall in garage.
10. Moisture issues / staining of drywall in garage.
11. Moisture issues / staining of frame around the window in the master bedroom.
12. Plumbing issues / hammering identified in home.

Tarion inspected the dwelling on January 4, 2006. Tarion issued a decision letter dated January 19, 2006, in which all the claims were denied since they were considered as not constituting a major structural defect, as defined in section 1 of Regulation 892 of the Act. Tarion indicated that there was no defect in work or materials, which has resulted in the failure of any load-bearing portion of the building, or a condition which materially and adversely affects its load bearing function. The Applicants filed a Notice of Appeal with the Licence Appeal Tribunal that was received on February 08, 2006.

### **PREHEARING:**

No pre-hearing took place.

That is where the Tribunal was on the day of the hearing.

### **WITHDRAWAL AT HEARING:**

At the start of the hearing, the Applicants told the Tribunal that they did not want to proceed with item numbers 9, 10 and 12. The Tribunal was then left with items 1, 2, 3, 4, 5, 6, 7, 8, and 11 to adjudicate.

### **EXHIBITS:**

Eight (8) exhibits were filed with the Tribunal:

1. Decision letter dated January 19, 2006 issued by Tarion Warranty Corporation.
2. Notice of Appeal form filed by the Applicants and received at the Tribunal on February 8th, 2006.
3. Applicant.s Book of Documents Volume I.
4. Applicant s Book of Documents Volume II.

5. Engineering reports prepared for the Applicants.
6. Respondent's Book of Documents.
7. Document from the Applicants in relation to the definition of major structural defect.
8. Respondent's Book of Authorities.

**EXPERT WITNESSES:**

The Tribunal did not conduct a voir-dire, since both parties were satisfied with the qualification of both expert witnesses in the present case.

**THE EVIDENCE:**

Witnesses for the Applicants

1. Timothy Fuller

The witness is one of the Applicants. He described to the Tribunal the problems they encountered and gave his opinion about the state of the major structural defects in their home and the other complaints. In his opinion, it was covered by the 7-year warranty, since the load bearing was seriously affected. As per the non structural items, he basically started to repeat what was in the report of his expert witness. At that point the Tribunal intervened and asked the witness to let his expert testify about these items. The witness agreed and continued his testimony.

He was contacted by the builder on December 4th, 2005 (Joe Marshall, Ashcroft's General Construction Manager) Ashcroft asked for an appointment even though Ashcroft had no jurisdiction in the matter; he was interested to see the problems since if the home was afflicted with major structural defects it would have by definition, failed (in Mr. Marshall's opinion). The witness felt he was not obliged to meet with the builder and declined the offer.

The witness told the Tribunal that they have suffered damages. The estimation of all the work to be done is included in their second expert report.

They see their home as an investment and by law they are obliged to report deficiencies to potential buyers before selling it, hence having to bear the brunt of the cost of the repairs.

They are not happy to live around their deficiencies problems.

The Tribunal asked the witness if one of his complaints #50 (Structural Anomaly - Basement) contained in a previous decision of this Tribunal *Timothy Fuller and Patricia Swick* (February 25, 2002) was the same that he was bringing back at the present hearing:

At page 9 of the decision:

#50 Structural anomaly - Basement (number taken from Conciliation Report)

This claim involves a footing pad supporting an upright beam shown in Exhibit # 8, photo 12. Proof of the Applicant's claim would require evidence from an expert. Mr. Fuller indicated that at this time he did not want to pursue this further. The Applicants not proceeding with this claim, the Applicant's claim is denied.

The witness answered in the positive.

In cross-examination the witness told the Tribunal that he was not an engineer. He was not qualified to say if a building would collapse or not. He possesses no professional knowledge in the building industry. He told the Tribunal that he was able to use every room in the house on the 2 floors and had full use of his basement, and that it was fully used since the date of possession. When he realized in the spring of 2004 that there was a bump in his floor he did not notify Tarion or his builder. He obtained an expert report in July of 2004 but did not communicate it to Tarion until May 2006.

2. Alasdair Higginson

The witness is a structural engineer and building science professional with the firm of consulting engineers, Buchan, Lawton, Parent Ltd of Ottawa, Ontario. He possesses 10

years of experience conducting structural investigations. He received a B. Eng at Carleton University in civil engineering in 1996.

The witness had produced 2 different engineering reports one dated July 16, 2004 and the second one dated May 11, 2006. Both reports were requested by the Applicants. The witness testified that he noted problems on his first inspection on May 19 2004 that he classified as follows:

Structural deficiencies:

The witness told the Tribunal that architectural drawings showing the framing layout for the home and trust joist framing plan were provided by the owner for review.

He noted that the load bearing column on the main floor, supporting loads from the second floor, is not properly aligned with the structural supporting members below the ground floor framing. (wood blocking, steel beam and steel telepost) The offset of this load has caused a significant bump in the main floor over the wood blocking and the floor sheathing is separating from the floor joists. Since the load is not properly transferred to the steel beam and telepost, it appears to be loading an unsheathed wood stud wall and causing the studs to buckle. Proper support for this column must be provided.

The wood beam at the dropped foyer floor has the top 1/3 notched over the support. This beam should be reviewed to determine if the portion of beam remaining has sufficient strength to support all specified loads. There are teleposts that are not properly secured to the floor. Questionable support for load bearing column exists at interior end of wall between kitchen and living room. Architectural drawings indicate double 2-ply 2 x 10 beams. Trust joist layout indicates 2 . 1 3/4 x 9 1/2 LVL beams, and actual installation is a single LVL beam. A built up wood column and added footing is provided at that location, however, blocking in the ground floor joist space may not be adequate. Finally, anchor bolts to foundation are not visible at the garage walls.

Fire separation issues in the garage:

There are large gaps and openings in gypsum board. Also there are improperly sealed joints in gypsum board.

Cladding issues:

Deficiencies were noted with the brick veneer, including it was improperly installed or missing through-wall flashing at the foundation wall and shelf angles.

He concluded in the summer of 2004 that all issues required further investigation to determine the full extent of deficiency involved and to devise an appropriate remedial plan.

Second Report

Furthermore he testified that he revisited the dwelling in the spring of 2006 and provided a second more detailed report dated May 11, 2006. His conclusions were basically the same with more details and proposals on how to fix the problems identified. He also provided an estimate of the costs of the repairs:

For structural repair costs:

Improperly supported ground floor column: \$ 1500.00

Notched wood beam below dropped foyer floor: no cost

Improperly secured steel teleposts: \$ 300.00

Improperly supported ground floor wall and column: \$ 1600.00

Anchor bolts to foundation wall (assume 10 bolts) \$ 650.00

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For a total of \$ 4050.00

He also provided an estimate for non-structural issues as follow:

Fire separation issues - Seal gap in the fire separation at the garage roof \$ 500.00

Cladding issues . Install proper through-wall flashing \$ 2000.00

Moisture issues . further investigation

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For a total of \$ 2500.00

In cross-examination the witness admitted that despite his observations to the effect that some of the complaints did not meet the Building Code Specifications, in his opinion, he was unable to find any evidence that the load bearing of the house was affected or that there was any failure of column or supporting walls. Furthermore, he was unable to say if the anchor bolts in the garage were missing, or camouflaged by a second structure added during construction on the first one. He was unable to say if any of the structures will fall or not.

He also agrees with the Counsel for the Respondent that transfer of weight to a post that it initially was not supposed to support does not change the fact that it is still supported and that the load bearing of the structure is not affected.

Witnesses for the Respondent

### 3. Robert Fisher

The witness is currently employed by Tarion Warranty Corporation as a field claims representative. He had previously worked in the engineering field of designing optical telephone equipment (optical division).

He performed the inspection of the dwelling on December 1, 2005 and filed a report of his findings on January 18, 2006.

His detailed warranty assessment report said that he did not notice any load-bearing support structure problems and no evidence of defects in work or material that adversely affects the use of the home for which it was intended.

In relation to complaint number 1, the witness said that the homeowner clarified his complaint as being a concern of the supporting structure under the specified area. The area in question is supported by various wood beams and associated floor joists, which are in turn supported by wood framed walls. In relation to complaint number 2, there was no noticeable downward deflection of the beam when viewed from the basement area and the floor area above the beam displayed no noticeable bounce when walked on.

Regarding complaint number 3, the jack post in question was checked with a four-foot level and found to be plumb in both the north-south plane and the east-west plane. The top of the jack post is secured to the metal I beam and the base of the jack post rests on the concrete basement floor slab and is not fastened to the floor. In relation to complaint number 4, the floor joist above the middle basement wall was not observed to be distorted in any way and the groupings of five 2x4 supports were observed to be firmly and securely in place with no noticeable bowing. The second floor area directly above this area was observed and no cracks in the drywall were noticed. In addition, the living room hardwood floor immediately adjacent to and east of the fireplace, located on the main floor of the living room, was found to be sloping towards the hallway. The living room area above the floor joist in question displayed no noticeable bounce when walked on.

With item complaint 5, the east side of the garage wall is finished with drywall and, as such, the existence or non-existence of anchor bolts could not be determined in this area.

The west side of the garage was viewed and no protruding anchor bolts were observed.

Anchor bolts may exist below the top 2x4 on the garage sill and as such could not be viewed. No evidence of movement of the garage walls relative to the foundation was observed. In relation to complaint number 6, small cracks in some of the joints between the drywall sheets in the garage were observed, which are typical or normal shrinkage of materials. As per complaint number 7, the drywall joints to the roof peak wood sheeting areas were observed to not be caulked. Complaint number 8, no defect with the brick cladding was observed. As per complaint 11, there is no water penetration at this point, just a small stain approximately one inch in diameter over the east master bedroom

window.

(Complaints 9 -10 and 12 were withdrawn)

In his opinion none of these nine (9) items of complaint constitutes a major structural defect.

In cross-examination he told the Tribunal that he had inspected about 50 homes before showing up at the Applicants dwelling. All the reports are reviewed by senior personnel at Taron before being released.

#### 4. Vincent Ferraro

The witness is a member of Daley Ferraro Associates, Engineering Services situated in Ottawa, Ontario. He received a Bachelor of Civil Engineering & Engineering Mechanics from McGill University in 1979, as well as a Master of Engineering, Specialty in Structures and Micro-Climate Engineering, from the University of Western Ontario in 1984. He is a member of Professional Engineering Associations in Ontario, Quebec and Nova Scotia and also a member of IABASE. (International Association for Bridge and Structural Engineering)

The witness visited the dwelling owned by the Applicants on May 12, 2006. He followed the items of complaint submitted by the Applicants and after a thorough investigation reached the following observations and conclusions:

#### Observations

The residence under investigation is a seven-year old two-story dwelling with a partially finished basement. The structure is comprised of typical wood framing supported on a poured concrete foundation. Floor joists and floor beams, as viewed from the basement area, are part of the .Silent Floor. system produced by Trust Joist MacMillan. Various beams are of the .Timberstrand LSL. variety. The house is an end unit of a townhouse row of seven.

The building contains structural and non-structural deficiencies.

The structural deficiencies are:

##### 1. Column misalignment near entrance (Main floor to basement)

The main floor column was observed to be misaligned relative to the steel telepost in the basement by approximately one foot. In an attempt to compensate, the contractor installed a stub column between the top of the beam in the basement and the floor sheathing. This attempt is without merit and is in fact harmful, as it places stresses on the floor sheathing, which it cannot take. In addition the steel basement column is not fixed at its base, and was installed after the concrete floor was poured. This also raises the concern that there may not be a footing beneath it. Column misalignment and lack of fixity are a structural deficiency according to the Ontario Building Code (OBC 1995) and lack of proper footings would also be considered as such. However, this is nothing major. There is no significant movement or damages. The condition of the floors and the basement are proof of that.

There is no failure of weight bearing capacity.

##### 2. Notched wood beam below entrance foyer

The wood beam below the entrance is a twin 9 1/2 by 1 3/4 Timberstrand LSL Beam, which primarily supports second floor elements. The beam has been notched to approximately 2/3 of its depth 6 1/2. Calculations indicate that while it is not desirable, it remains adequate to support the applied load. Therefore the beam is not defective for this reason. However, we noted as a separate item that the beam bears on the opposite concrete wall by 1 . According to the building code, the minimum bearing for beams shall be 3 (Section 9.23.8.2) Manufacturer s specifications call for a minimum bearing of 2 . Therefore, the beam bearing is considered to be a structural defect. However, there is currently no damage associated with this deficiency. It is not a major structural deficiency. There is no sign of failure or imminent failure.

### 3. Steel telepost not secured to floor

This issue has been discussed in complaint number 1.

### 4. Support beneath wall separating kitchen & living room

The wall separating the kitchen from the living room is supported on a single 9 x 1 LSL beam, which in turn is supported at mid span by a retrofit wood column with an intermediate eccentric stub column. We understand that the original design called for twin LSL 9 x 1 beams at this location. Based on the fact that the LSL beam is supported near mid-length means that its capacity is not in question. However the eccentric and imperfect support is contrary to building code requirement. (OBC Sections 9.23.8.3, (.23.9.8 (4)) As such the eccentric support represents a structural deficiency which should be corrected. However, except for the floor bowing seen by the fireplace on the main floor, there are no current structural damages arising from this deficiency. It was noted also that the wood column supporting the LSL beam was a retrofit column with retrofit footing installed by the contractor after a larger deficiency was discovered by the city inspector. These 4 complaints have not resulted in reduced load carrying capacity of the foundation system at the current time. The presence of these deficiencies has not adversely affected the use of the building for its intended purposes to the present. However, despite current conditions, the structural deficiencies represent weaknesses in the structure that will likely cause accelerated deterioration and future problems.

The non structural deficiencies are:

### 05. Non-visible anchor bolts in garage

Only one anchor bolt was seen in the garage. While they may be hidden and present, the building code requires that they be installed at a spacing of 7.6. (OBC Section 9.3.6(2) and (3)) However it is not a structural deficiency resulting in damage to this point. No shifting, no lateral shifting from the inside and no brick cracks from the outside were noticed.

### 06. Gaps in drywall between units

The OBC requires construction of a one-hour fire separation between residential suites (OBC Section 9.10.9.11) The presence of penetrations across the gypsum board in the garage represents weaknesses in the fire wall, which must be sealed to control fire passage. This is a building envelope infraction. This is nothing major and has no bearing on the capacity of roof trusses.

### 07. Gap in drywall Flashing

Same comments as above with complaint number 06.

### 08. Through-wall flashing

The brick masonry wall along the front walkway was seen to have adequate weep holes. While we could not see the through-wall flashing, which is required by the building code to extend beyond the brick (OBC Section 9.20.13.6(1), there is no evidence of water entry on the garage side of the wall or other water related damage. We would have seen water penetration and deterioration of wood and masonry if it had been the case. While this may be a code deficiency (we could not see the through-wall flashing which is required to extend beyond the brick) there have been no consequences to this date and will likely not be any in the future, presuming the flashing is present but not visible.

### 09. Effloresce on Foundation wall by garage

### 10. Drywall stain in garage

### 12. Plumbing noises

(withdrawn)

### 11. Water stains around master bedroom window

Several small water spots were observed on the inside soffit surface of a window frame in the master bedroom. A small amount of water entered through the building and roof

interface, probably due to ice damming during the wintertime. This appears to be an isolated event not associated with a building deficiency.

These non structural deficiencies have not diminished the load carrying capacity of the structure nor the intended use of the building.

**AUTHORITIES:**

The Respondent filed a book of authorities received in evidence as Exhibit 8.

That book contained several cases. The cited cases were:

***Re McGlade (August 11, 2003), (L.A.T.)***

The Tribunal said at page 11:

Many homeowners are not aware of the burden of proof that they must satisfy in order to meet the definition of major structural defect as stated in Regulation 892. This definition is quite restrictive. Either there must be a failure of the load bearing portion of the building or the building cannot be used for its intended purposes. As has been illustrated by the caselaw this warranty was intended to deal with extremely serious problems of construction, which can take place over a lengthy period of time. The legislature has permitted homeowners to have a long warranty period of seven years as it is recognized that major structural defects might either not happen immediately upon possession of a home or might develop slowly over time.

***Re Kennedy (July 16, 1982), (C.R.A.T.)***

The Tribunal said at page 110:

A major structural defect in our view and as we have found in the past must inter alia, be one which renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse.

***Re Fields (October 21, 1982), (C.R.A.T.)***

The Tribunal said at page 92:

The use of the word .major. in the all-important phrase .major structural defect., which was devised by the Legislature in its wisdom when it framed this Statute, was almost certainly deliberate. Without it we are left with two words only viz. .structural defect . and the warranty would apply to anything qualifying for that bare definition. But it doesn't, because the Legislature has used the word .major.. The defect must therefore be .major. to be warranted. In this case that has not been proven, although the onus is very clearly upon a claimant to do so in order to succeed.

***Re Allan, {1999} O.C.R.A.T.D. No.7***

The Tribunal said at paragraph 31:

The possible lateral flexing of the steel I-beam described in Claim # 20 is not a major structural defect according to the definition of a major structural defect in Regulations. In the case of Galko {1994} CRAT this Tribunal considered what would amount to a major structural defect. .Major. was compared to .minor. and the conclusion was that the defect must be one that renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse. None of these standards apply here and there was nothing visibly wrong.

***Re Lowry, {1999} O.C.R.A.T.D. No. 256***

The Tribunal said at page 15, Paragraph 97-98 and 99:

97. In Pengelly (1995) O.C.R.A.T. No. 60 this Tribunal considered the issue of potential future problems. At paragraph 16 the Tribunal states:

.The Angelo Proestos (1992) CRAT 758 and Dan Vera (1988) 17 CRAT 185 cases established that a fear of future potential problems cannot constitute a major structural defect..

98. This principle was more recently affirmed by this Tribunal in the Mark and Lynne Allan case released in January 1999. The Tribunal found at page 7:



Mr. Baxter testified that the problem is that the studs behind the brick would rot in time. At the most, this is a problem that could arise in the future. Two cases establish that fear of future problems cannot constitute a major structural defect, Proestos (1992) CRAT 758 and Dan Vera (1988) 17 CRAT 185.

99. The Tribunal notes that in the Allan case the Tribunal found that a steel beam was not anchored and presented a danger of considerable magnitude that was clearly a major structural defect. The Tribunal found that the beam was unsafe and adversely affected the load-bearing function of the house. However, in the case now before this Tribunal, there is insufficient evidence of any major structural defect, and there is no evidence of any imminent . danger of considerable magnitude..

**Re Pergunas, {2002} O.L.A.T.D. No. 294**

The Tribunal said at paragraph 66, 67 and 68:

66. Counsel for the Program states that the onus is on the Applicant to show the problem meets the definition of major structural defect. After reiteration of the evidence Counsel directed the Tribunal to a number of cases.

67. In the case of Galko {1997} O.C.R.A.T.D. No. 111 there is a discussion of the concept of major structural defect. It is stated at page 3 .A major structural defect in our view and as we have found in the past must inter alia be one which renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse..

68. In the case of Re Buss O.C.R.A.T.D. No. 257 it is stated that prospective fears do not make a defect a major structural defect. In the case of Lowry O.C.R.A.T.D. No. 256 the Tribunal quotes two cases Proestos (1992) CRAT 758 and Dan Vera (1988) 17 CRAT 185 for the proposition that fear of future problems cannot constitute a major structural defect. In the case of Re Restagno O.C.R.A.T.D. No. 129 the Tribunal found that there was no major structural defect as there was .no failure to any load bearing portions or any major negative impact on its load bearing function. . The use of the building was not materially and adversely affected.

**Re Mazza (October 7, 2003), (L.A.T.)**

The Tribunal said at page 24:

The Tribunal in Ban characterized the Applicants evidence as follows:

The comments by Mr. Wong and the Applicants are speculative in nature and are directed to a situation which could develop at some point in the future if the repairs are not effected. The Tribunal cannot take such speculation into account when making a determination on whether or not there is a major structural defect in a home. (emphasis added)(at page 14)

There is little difference in the present case. The Mazza home, it was agreed by all, has not fallen down and the foundation is presently supporting the loads of the home. There has been no shear failure. There are no observed horizontal cracks in the foundation also accompanied by foundation displacement. In fact, the basement is mostly finished and is used by the Mazzas as a living place.

Tribunal

The Tribunal did its own research and the leading case of *Kennedy* (1982) 11 CRAT 109 has set the standard which has been followed to date, and that is:

A major structural defect in our view and as we have found in the past must inter alia be one, which renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse.

Also in the same year, the case of *Dr. Louis Fields* (1982) CRAT Volume 11, p.88 at p.92 and 93 dealt with the term .major. with respect to structural defects and held as follows:

The use of the word .major. in the all important phrase major structural defect, which was devised by the Legislature in its wisdom when it framed the Statute, was almost certainly

deliberate. Without it we are left with two words only viz. .structural defect. and the warranty would apply to anything qualifying for that bare definition. But it doesn't, because the Legislature has used the word .major.. The defect must therefore be .major. to be warranted. In this case that has not been proven, although the onus is very clearly upon a claimant to do so in order to succeed.

and later:

In passing the Tribunal notes that the use of the word .major. implies the fact that there exists an antonym to that word or complementary opposite which is the word .minor.. That is to say, the concept of a .major structural defect. implies the complementary concept of a .minor structural defect.. The Legislature must have had both such kinds of deficiencies in contemplation . one warranted and one not warranted.

In the case of *McArthur* (1989) CRAT 213, a defect complained of was of certain problems with the windows which were not closing properly as well as the bowing of exterior metal sills. This was the result of a differential movement between the wood frame wall and the brick veneer, which was caused by the shrinkage of the wood framing. The former New Home Warranty Program accepted that this was a structural defect, but not a major structural defect. In this case, it was proven that the structural integrity of the home was in no way threatened by the shrinkage.

At page 216:

The defects in the structure through shrinkage can be characterized as a structural defect. The question is, however, is this structural defect a major one and therefore subject to the four-year warranty? The Tribunal believes it is not because the home is suitable for living and the owners have made full use of it.

The decision of *Donald and Belle Murchie* (LAT 2004) written by Vice-Chair Jane Weary should apply in the present hearing:

She wrote at page 10:

To support their claim for warranty under the Act, the Applicants are required to establish that their home has major structural defects as such are defined in the Act in Regulation 892. As has been noted in countless prior decisions of this Tribunal, many owners simply fail to inform themselves of the restrictive case they are required to meet under the legislative definition of .major structural defect ..

In *McGlade* (LAT 2003) Ms. Hiley, Vice-Chair of the Tribunal, stated at page 11:

Many homeowners are not aware of the burden of proof they must satisfy in order to meet the definition of major structural defect as stated in Regulation 892. This definition is quite restrictive. Either there must be a failure of the load-bearing portion of the building or the building cannot be used for its intended purposes. As has been illustrated by the case law this warranty was intended to deal with extremely serious problems of construction, which can take place over a lengthy period of time. The legislature has permitted homeowners to have a long warranty period of seven years as its recognized that major structural defects might either not happen immediately upon possession of a home or might develop slowly over time.

Over the years, the interpretation given to major structural defect by this Tribunal has further restricted the warranty protection. In *McGlade*, the Vice-Chair also provided a helpful review of the case law on the issue, some of which follows:

*Robert & Donna Simmie* (CRAT 1997):

In this case there was a major structural defect claim regarding the interior, load bearing footing. The Tribunal found that cracks, gaps and blemishes were annoying but did not constitute a major structural defect, as they did not materially and adversely affect the use of the building.

*David and Beverly Buss* (CRAT 1998)

In this case it was held that a prospective fear could not be adjudicated upon by the Tribunal. Instead the Tribunal must look at the existing condition of the property not its future condition.

\* (Already cited by the respondent)

*Mark and Lynne Allan* (CRAT 1999)

This case reiterates that the onus is on the homeowner to validate the claim for major structural defect. It states, on page 6: .in the case of *Galoko* (CRAT 1994) this Tribunal considered what would amount to a major structural defect. .Major. was compared to .minor. and the conclusion was that the defect must be one that renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse.. As noted in the *Buss* decision, referenced above, this Tribunal has further held that such defects in structure must be present at the time of the claim. In the 2003 decision of *Mazza*, the Tribunal rejected the Applicant.s claim, finding that the case for structural failure was speculative since the cracked basement and foundation walls posed only a possible future threat to the structural integrity of the home in question, avoidable were preventive repairs undertaken. The Tribunal quoted an earlier decision of *Ban* (LAT 2002) as follows:

The case law is quite clear as regards major structural defect. As stated in the Richards case it needs to be a threat to the structural integrity of the home and not a failure to repair a defect, which could lead to further deterioration, or a more serious defect in the future.

#### **THE LAW:**

The *Ontario New Home Warranties Plan Act* states:

Section 4.(1):

Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

Section 13 of the Act states:

- (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.
- (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.

(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.

(4) A warranty under subsection (1) applies only in respect of claims made hereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

(5) A warranty is enforceable even though there is no privity of contract between the owner and the vendor.

(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.

Section 14 of the Act states:

(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

(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.

(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

(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.

(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* (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

(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.

Section 16 of the Act states:

(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.

(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.

(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.

(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.

Regulation 892, Section 1 states:

"major structural defect means for the purposes of clause 13 (1)(b) of the Act, any defect in work or materials,

(a) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or

(b) that materially and adversely affects the use of such building for the purpose for which it was intended.

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a loadbearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

Section 16 of Regulation 892 states:

16. Where a home was enrolled after the 31st day of December, 1990, the claim for damages because of a major structural defect may be made within seven years of the date specified in the certificate of completion and possession.

#### **APPLICATION OF LAW TO FACTS FOUND PROVEN:**

What is the proper definition of .major structural defect. in the current case? In our opinion, a major structural defect should be one that renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse.

There is absolutely no evidence in the present case that has been presented from the Applicants to substantiate such a claim. To the contrary, from their own admission they have occupied their house fully since the date of possession in 1998.

The Tribunal has a great deal of sympathy for the Applicants with the problems they have encountered with their home. The Tribunal fully realizes that the purchase of a home is, for the majority of the people living in Ontario, the biggest investment of their lives and the majority also take 20 years or more to pay off their mortgage.

Having said that the Tribunal must look at the entire evidence and try to understand what happened in the present case.

The Applicants filed a claim with Tarion and a decision letter was issued on February 08, 2001. An appeal was filed by them and a hearing took place on September 25 and 28, 2001. In his decision Vice-Chair Douglas Macintosh wrote that over 100 complaints were addressed in two different conciliation reports. Tarion found that 46 complaints were warranted and 61 were not warranted. Cory Beverdam, the Program s warranty representative, who has wide experience in house construction, prepared the reports.

They were awarded \$ 12,455.00 compensation by the Tribunal at that time.

That raises the next question for the Tribunal why the Applicants waited within the final week of the 7-year warranty period to file a claim.

They knew at least since 2003 of their structural problems and they waited two more years before notifying Tarion. The Applicants had in their possession a report by an engineering firm that told them there were problems.

In the eyes of the Tribunal there exists the notion of a duty to fix and maintain your property. The Applicants did not notify Tarion. Why? Was it because it was just annoying and it had no effect on the use of the home? We do not know.

There is absolutely nothing wrong with the second floor. No evidence was presented that there were major problems in the garage either.

From the evidence presented there has been no change in the structural situation between the first and the second reports of the engineer Mr. Higginson.

The dwelling is stable. Nothing imminent is on the horizon.

**CONCLUSION:**

In many hearings before the Tribunal, the applicants do not understand what the requirements are for their claim to qualify as a .major structural defect..

The burden of proof lies with the Applicants in the present case, and the onus is on the Applicants to satisfy the Tribunal that the complaints are filed pursuant to the relevant section of the Act. By their own admission, (report of their expert) only the first five items are classified as major structural defects, hence, items 6 to 12 were not presented as such and are therefore rejected. (9,10 and 12 were already withdrawn at the beginning of the hearing) Of the first five items none qualifies as a major structural defect.

The warranty provided by the legislation does not support the current claims. The warranty purports to provide remedies to those owners who are frustrated in their actual ability to substantially make use of the home or who have major problems that the building is structurally at risk. Such has not been established by the evidence here.

**DECISION:**

Pursuant to the authority vested in it by section 16. (3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs Tarion Warranty Corporation to disallow the Applicants claims.

LICENCE APPEAL TRIBUNAL

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Daniel Laurin, Vice-Chair

*RELEASED: August 16, 2006*

File name: 3409.nhw.fuller.swick

The decision will also be available on Quicklaw at a later date.