

ONTARIO REAL ESTATE LAWYERS ASSOCIATION

April 1999

The Ontario New Home Warranty Program and Acting for Vendors and Builders of New Homes in Real Estate Transactions

For many years I acted as outside counsel to the ONHWP, retained on a case by case basis to deal with the builders registration issues or to defend the Program's decision regarding warranty items that were disputed by the owners of new homes in the Province of Ontario.

For the last year I have been involved in acting on behalf of vendors and builders of new homes in the Province of Ontario which often involves dealing with the ONHWP regarding registration requirements. In the last year the issue of those requirements and how they may impact on the closings of new residential homes in Ontario, has been an increasing cause of concern for vendors, purchasers and their solicitors.

1. Acting as Solicitor for Vendors of New Homes

If you find yourself in the position of acting for either major developers or smaller vendor/builders of new homes in the Province of Ontario, you may have encountered the issue of the production by you on behalf of your client of a Warranty Program enrolment number for the home and a Certificate of Completion and Possession, so that the purchaser can be assured that his home is properly enrolled with the Program and therefore there is proper coverage under the Act.

However, in many instances the Warranty Program will reassess a vendor/builder's yearly registration prior to the annual renewal period, and if it determines that it requires further financial security from the vendor/builder, it will require the vendor/builder to provide security forthwith, failing which the Warranty Program often refuses to provide to the vendor/builder the enrolment number and the Certificate of Completion and Possession that purchaser's solicitors require on the closing date for new homes. The Act requires that the enrolment fee be paid prior to the commencement of construction and when it is paid by the vendor/builder the home is, by statute, enrolled.

That being the case the enrolment number is assignable to the home and the vendor/builder upon processing of the enrolment fee, should be made available to the registrant at that time, and not withheld.

With respect to the Certificate of Completion and Possession, this is a pre delivery inspection document which is prepared by the Warranty Program and provided to the vendor/builder, to be executed by the purchaser and the vendor/builder, which sets out items of completion or deficiency that are confirmed by both parties prior to closing.

Neither of these items, being the enrolment number or the Certificate of Completion and Possession, bear on title to the property nor do they bear on the existence or non-existence of warranty coverage under the Act. Even a vendor/builder that is not registered with the Program must provide coverage under the Act pursuant to the provisions of section 13 wherein such vendor/builder is obligated to provide warranties to owners of new homes. A vendor/builder need not be a registrant to be liable under the Act. Of course, the Program

can prosecute such entities who do not register under the legislation, but coverage per se is not affected.

The Warranty Program when determining whether a vendor/builder should be registered, reviews financial and technical information and proposes terms and conditions of registration.

That registration lasts for a period of one (1) year, at which time an Application for Renewal of Registration is required of the vendor-builder and the terms and conditions of registration may be varied.

However, the Program through its Risk Assessment Department frequently reviews the performance of vendor/builders between renewal dates, and may determine on the basis of such risk analysis that the vendor-builder is required to provide additional security as a term or condition of registration that was not part of the terms of the vendor/builder's original registration or subsequent renewal.

If the vendor/builder is reluctant to comply with these additional requirements forthwith, the Warranty Program may refuse to provide the vendor/builder with enrolment numbers and Certificates of Completion and Possession for pending closings (i.e.: homes that have been completed and are ready to close).

This requirement for payment of additional security may create havoc with the vendor/builder's budgeted and projected finances, and for the smaller vendor/builders in the Province of Ontario, such onerous requirements often eliminate any profit that is projected on the sale of homes.

In the circumstances where the Warranty Program refuses to release enrolment numbers and CCP's, the closing is jeopardized as purchasers and their solicitors are reluctant to close without confirmation from the Warranty Program that the enrolment number has been assigned to the home, thereby ensuring that the home is covered under the Act and that the builders registration is in good standing.

The fact is that this request for additional security by the Warranty Program or any security issue initiated by the Warranty Program with respect to a registered builder, is a matter that is separate and apart from the obligation of the Warranty Program to provide enrolment numbers and CCP's for closings.

The Warranty Program is obliged to provide the enrolment numbers and CCP's for all enrolled homes, prior to closing without the threat of withholding them to obtain more security, thereby jeopardizing the closing of the transaction.

A recent case of the Tribunal entitled ONHWP v. V. Marques Construction Ltd., confirmed that the Warranty Program cannot impose additional security requirements between renewal periods.

To the extent that the Warranty Program refuses to release this information (enrolment numbers and CCP's) and for that reason the closing is delayed or does not occur, then the Warranty Program may be exposed to an action for damages, because it may have frustrated the closing of the transaction.

Vendors solicitors should, if they are faced with this problem, communicate with the Program and require that the enrolment fees and the CCP's be forwarded to their client so as not to jeopardize any closings.

2. Purchasers, Solicitors and the Ontario New Home Warranty Program

If you are acting for the purchaser of a new home in the Province of Ontario, your client will want assurance that the vendor/builder is registered and the home has been properly enrolled so that coverage is afforded to it should the vendor/builder either default on his warranty obligations or become insolvent.

However, if the builder is a registered builder and the home has been enrolled, the Program has no right to withhold the enrolment number and the Certificate of Completion and Possession. Any purchaser's solicitor can ascertain from the Program whether the vendor/builder is registered and the home enrolled, and should demand from the Program, production of the enrolment number and the Certificate of Completion and Possession to be completed at the time of the pre delivery inspection. As has been mentioned the Tribunal has recently ruled the Program cannot reassess terms and conditions of registration during the one (1) year registration period.

In any event, the failure of the Program to produce this information in my view does not jeopardize title, nor can it be used as a reason for refusing to perform the contract. If the home is a new home, built in the Province of Ontario, then by definition, the "vendor" of that home warrants the home for deficiencies and the Warranty Program guarantees these warranties pursuant to sections 13 and 14 of the Ontario New Home Warranties Plan Act.

3. Conclusion

By way of conclusion the problem to which I have made reference is a "manufactured one" wherein the Warranty Program is attempting to use the leverage of withholding enrolment numbers and CCP's from vendor/builders who are reluctant to provide the Warranty Program with additional security, after they have already been registered or renewed, so that the vendor/builders will provide such security rather than jeopardize the closing, or their continuing ability to obtain building permits and construct new homes.

In order to avoid jeopardizing the closing, in the face of demands that might be made by the Warranty Program to vendors for additional security, solicitors for both vendors and purchasers should confirm with the Program that the builder is registered and the home in question is enrolled. Once that is confirmed then the closing can occur without further problem, because there is coverage.

In addition solicitors should require the Warranty Program to provide this information for the benefit of purchasers and vendors so that closings do not become a traumatic experience in circumstances where a vendor is being asked by the Program to provide additional security before it will release pertinent documentation required on closing.