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Who's liable for house defects?

When a builder wants to construct a new house, he or she applies to the local municipality and obtains a building permit. Construction begins and municipal inspectors regularly visit the house to monitor progress with the foundations, framing, roof, walls, plumbing, electrical and all the other important components of the home.

At least, that's how it's supposed to work. Unfortunately, it didn't turn out that way for Joe and Joanne West, who bought a new home on Lanza Court in Hamilton.

The city didn't issue a building permit for the house until May 17, 2005 after it was finished. Nor did it issue any stop-work orders during construction. As a result, some of the necessary inspections, such as heating, ventilation, framing and plumbing have still not been completed some 20 months after the couple moved in.

The Wests have identified dozens of defects with their home, some of them major and some minor.

Despite the fact that the West home is registered with Tarion Warranty Corporation, the owners have not yet received any money at all and are taking some of their complaints to the Licence Appeal Tribunal.

As detailed on its website, Tarion says it "is responsible for administering the Ontario New Home Warranties Plan Act, which outlines the warranty protection new home and condominium builders must provide by law to their customers. The primary purpose of Tarion is to ensure that builders abide by this legislation, and to step in to protect consumers when builders fail to fulfill their warranty obligations."

Earlier this month, Tarion spokesperson Janice Mandel wrote me saying she "can't publicly discuss the specifics of the homeowner's file," although she did admit that Tarion is in regular contact with the Wests and "the builder has made some repairs in their home both on his own and under the direction of the City of Hamilton."

However, Rob Mitchell, another Tarion spokesperson, had no hesitation in discussing the West case with the *Hamilton Spectator*.

He revealed that Tarion is prepared to cover some of the deficiencies claimed by the Wests, but only in the form of a cash payout and not by repairing the builder's mistakes.

"Because the relationship between the builder and the homeowner has deteriorated, we decided to settle directly with the homeowner," Mitchell told the *Spectator*.

I spoke to Joe West earlier this week and he told me that he had yet to receive any money from Tarion.

In the face of what they perceived as Tarion's unsatisfactory response to their claims, the Wests have decided to bypass the Tarion Warranty Corporation and have commenced a lawsuit against the builder and the City of Hamilton claiming damages of \$1.5 million.

Their case against the city for negligent inspection will be based on the law established in a 2000 decision of the Supreme Court of Canada in the case of *Ingles v. Tutkaluk*.

James Ingles and his wife Valerie Webb owned a 1910 Annex house on MacPherson Ave. They hired a contractor to lower the basement by 18 inches for \$46,000.

The City of Toronto issued a building permit for underpinning the existing foundations. It required that the work had to be inspected and the underpinning had to be at least as wide as the existing foundations.

Two inspectors visited the site during the construction of the foundations, but were unable to measure the depth and width of the footings properly.

Within weeks of completion of the job, the basement began to flood. It turned out that the underpinning was only six inches wide instead of the required 24 inches, and they weren't dug deep enough.

Ingles sued the city and the contractor, winning at trial and losing at the Court of Appeal.

In March 2000 the Supreme Court of Canada handed down the final word in *Ingles v. Tutkaluk*. A seven-judge panel ordered the city and contractor to pay Ingles \$49,368 plus 10 years' interest at 12.9 per cent and costs of the trial and appeals. In all, the city got hit for a bill of \$185,000.

The Supreme Court of Canada has clearly stated that a municipality owes a duty of care to all who might be injured by negligently carrying out its statutory duties. To avoid liability, a city must exercise the standard of care that would be expected of an ordinary, reasonable and prudent inspector in the same circumstances.

Of course, the century house in the Ingles case was not covered by the new home warranty program, but the Wests will no doubt be citing it as precedent if their case gets to trial.

Unfortunately, with the Tarion warranty program not responding to their satisfaction, the Webbs must resort to a potentially long and expensive court case, and a hearing before the Licence Appeal Tribunal, to get the house they expected.

In a telephone interview last month, government services minister Gerry Phillips discussed the Tarion warranty program with me.

"We've got almost 500,000 homes enrolled (in the program)," Phillips said. "Just because not everybody's happy doesn't mean it's not working."

I wonder if Joe and Joanne West would agree.

What do you think? Should unhappy new homeowners have to resort to the courts to get the house they expected? I look forward to your written responses by fax or email, or by snail mail to 10 King St. E., #1400, Toronto M5C 1C3.