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## Tarion warranty fails to protect consumers

When Dave and Iris MacPherson signed an agreement to move into a new home in London, Ont., they never thought they would eventually have to choose between illegally moving into an unfinished house or losing their deposit on the transaction. Unfortunately, that's exactly what happened on closing day.

In July 2004, they signed an agreement to buy a new house from a builder for \$345,500. A \$5,000 deposit was paid to a local real estate agent, and closing was scheduled for Aug. 19, 2004.

When the MacPhersons visited their lawyer on the day of closing, they learned six municipal inspections had not been completed, including the final inspection of the property. Other uninspected items included the excavation, foundations, heating, insulation, vapour barrier and the entire interior.

The MacPhersons met with a local building inspector who told them the Ontario Building Code prohibited occupancy of the house until the house was finished and final inspection had cleared all the health and safety issues in the building.

After hearing from the city and their own lawyer that it was illegal to move into the house without final inspections and an occupancy permit, the MacPhersons refused to close and the deal aborted.

Ultimately, the house did not pass final inspection until Sept. 21, more than a month after the scheduled closing. The MacPhersons found another new house that was ready for immediate occupancy, bought it and happily moved in with their two children.

Meantime, the couple tried to get their \$5,000 deposit money back from the builder, claiming they could not legally move into the house on closing. The builder refused, so they went to the Tarion Warranty Corp. office in London.

Even though they had written proof from the City of London that the house could not legally be occupied, Tarion told them they should have closed, moved into the house and submitted a "30-day form" listing the incomplete items. I believe this is the usual response when new buyers complain about defects, but Tarion spokesperson Janice Mandel did not respond to my question about whether this advice is a standard procedure for them, or how frequently this situation occurs.

I last wrote about the MacPhersons' case in this column two years ago. Since then, they appealed Tarion's refusal to the provincial Licence Appeal Tribunal (LAT). Its decision was released in late 2005, but I only became aware of it recently.

At the LAT hearing, counsel for Tarion took the position that the lack of an occupancy permit is not a fundamental breach of contract, which would allow the buyers to get their deposit back. The Tribunal agreed.

The MacPhersons' lawyer argued unsuccessfully that forcing a buyer to move into a home without completion of the final inspections was illegal.

The Tribunal referred to the case of Ashcroft Homes v. Fuller, but ignored the statement of Justice Peter Cumming, who wrote, "In our view, the obligation was upon the vendor to provide an occupancy permit on or before closing or an explanation as to why such a permit was not necessary. This was not done, which justifies the purchasers, then, on the advice of their lawyer, not closing."

In an earlier case in the Court of Appeal, the late Justice John Arnup wrote that if it had been known on closing that a permit had not been obtained, the purchaser "would then have had a right to refuse to close or to require an occupancy permit to be obtained by the vendors."

In the MacPhersons' case, the Tribunal ruled there was no fundamental breach of contract by the builder, and the buyers could not get their deposit back.

Prior to the LAT ruling, a Tarion spokesman had confirmed to me that Tarion does not force a homebuyer to move into a home or not move into a home. That, wrote Tarion's Rob Mitchell, is a matter of private contract. Tarion will only refund the deposit when there has been a "fundamental breach" of contract.

"A failure to meet the OBC (Ontario Building Code) does not automatically mean the APS (Agreement of Purchase and Sale) has been fundamentally breached," Mitchell wrote.

While the appeal of Tarion's decision to LAT was underway, the builder sued the MacPhersons for \$50,000 damages, and the MacPhersons counterclaimed for their \$5,000 deposit and extra costs.

Dave MacPherson told me last week that shortly before the trial was scheduled in February 2006, the builder declared bankruptcy and the case was passed to its bankruptcy trustee, PricewaterhouseCoopers. The trustee reviewed the case and has decided to return the deposit. When it arrives, MacPherson told me, he will deduct \$1,500 in expenses and donate the remainder to the Children's Hospital of Western Ontario.

I contacted Mandel of Tarion, who wrote to me that "it is understandable that a homeowner may be frustrated at not having outstanding inspections completed prior to the closing date for their home. Tarion's purview is outlined in the Ontario New Home Warranties Plan Act, and we have no authority over the various municipalities in the province that are responsible for completing these inspections."

The lesson to be learned from the MacPherson case is that buyers of new homes should always insert a clause in their purchase agreement requiring all building permits to be signed off on or before closing. Most builders have a clause in their purchase agreements requiring buyers to close whether or not the permits have been signed off.

I always tell clients that it's illegal to move into a house with outstanding permits. If they do, they're taking a significant risk and unfortunately, the Tarion Warranty Program won't protect them unless there is a "fundamental breach of contract."

Ontario's new homebuyers have every right to be confused. The courts including the Ontario Court of Appeal and local building inspectors say that it's illegal to move into an unfinished home where the permits have not been signed off.

At the same time, the Tarion Warranty Corp. and the Licence Appeal Tribunal tell buyers like the MacPhersons they have to move into an unfinished home or risk losing their deposits.

Something is wrong with this picture.

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