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## Beware of the 'rogue builders'

A decision of the Ontario Court of Justice last week highlights the importance of buying a new home only from a registered builder, and the risks to the buyer if the home is not enrolled with the [Tarion Warranty Corp.](#)

Back in September 2005, Deosaran Ramcharan bought a house on Poyntz Ave. in Toronto. The following year, he applied for permits to construct an addition and to demolish the house and rebuild a new one, declaring in the application that the Ontario New Home Warranty Program did not apply.

In May 2006, the city issued a building permit for a new house. Three years later, the house was listed on MLS at \$1.15 million as a "brand new 4 bdrm 2 storey detached home in Yonge/Sheppard area. . . . This property is not fully completed, needs to complete kitchen and bathroom, which will be fully completed in 2 wks. . . ."

The house was later transferred to a numbered company and relisted on MLS at \$849,000. It was described as "vacant . . . 80% of the work is complete . . . property to be purchased in 'as-is where-is condition.'"

Julie Stefko bought the house in October 2009 for \$820,000 from the numbered company with Carlos Canejo signing as its representative. Stefko relisted the house on MLS in February 2010, and sold it for \$1.14 million to Navin Gangadin.

At the time Gangadin and his wife, Nadia Mohamed, inspected the house, the appliances were still in their packaging and not connected. An inspection revealed no furniture or window coverings and the hot-water tank had not been installed. The bathrooms, closets and kitchen cupboards were all empty.

As well, there was no water meter and no connection to the city storm sewers. The driveway slope exceeded the permitted amount and there were no window screens. The City of Toronto had not yet issued an occupancy permit.

The transaction closed with a monetary holdback to cover the outstanding deficiencies.

Eventually, despite the fact that Stefko never registered the home with Tarion, the new owners filed three warranty claims with Tarion and received a total of \$95,000 from the indemnity fund.

As a new home, the property was subject to HST, but no evidence was provided to the court that HST was ever charged, included in, or paid on the purchase price.

Eventually, Julie Stefko was charged with the offence of "selling, on her own behalf, a home not previously occupied" and acting as a vendor of the home without being registered under the Ontario New Home Warranties Plan Act.

The trial was held in Toronto on July 11, 2012, before Justice of the Peace Mary Ross Hendriks, and her judgment was released last week.

Based on extensive documentary evidence and the testimony of Mohamed, Hendriks ruled that the house was "not previously occupied" under the Tarion legislation and that Stefko was guilty of an offence under the legislation. A decision on a penalty is awaiting submissions from the lawyers involved.

A number of lessons emerge from this case:

- If a house looks brand new from foundations to roof but has never been occupied, the law requires it to be registered with Tarion.
- The courts will take a common sense approach to whether it has been previously occupied. A mattress on the floor is not enough.
- Buyers and sellers, as well as listing agents and selling agents who fail to consider the requirement for Tarion registration do so at their own risk of serious consequences.
- Buyers of new homes who fail to obtain the necessary confirmation that the seller has included HST in the price and will pay it directly to Ottawa, expose themselves to having to pay the tax themselves, in addition to the purchase price.
- Buyers who fail to protect themselves against "rogue builders," who falsely claim that they lived in the home, will not save money in the long run and may be exposed to an unusually high level of defects and deficiency claims.

(Full disclosure: I am the chair of Tarion's consumer advisory panel and a former board member.)

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## Tarion Warranty Corporation v. Stefko, 2012 ONCJ 552 (CanLII)

Date:	2012-09-05
Docket:	4863 999 10 301903 00
URL:	<a href="http://canlii.ca/t/fskn1">http://canlii.ca/t/fskn1</a>
Citation:	Tarion Warranty Corporation v. Stefko, 2012 ONCJ 552 (CanLII), < <a href="http://canlii.ca/t/fskn1">http://canlii.ca/t/fskn1</a> > retrieved on 2012-09-17
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Case File No. 4863 999 10 301903 00

Citation: *Tarion Warranty Corporation v. Stefko*, 2012 ONCJ 552

**Ontario Court of Justice  
Toronto Region**

**Tarion Warranty Corporation**

**v.**

**Julie Stefko**

**REASONS FOR JUDGMENT**

Before: Her Worship Mary A. Ross Hendriks, Justice of the Peace

Counsel:

Ms. C. Street, Symes Street & Millard LLP..... for Tarion Warranty Corporation  
Mr. S. Van Duffelen, Van Duffelen & Van Duffelen .....for Ms. Julie Stefko

Trial Date: July 11, 2012  
Judgment: September 5, 2012

## INTRODUCTION:

[1] These are my Reasons for Judgment concerning the alleged offence, constituted under Part III of the *Provincial Offences Act*, R.S.O. 1990, c. P. 33, as set out in the Information sworn on August 31, 2010 (“the Information”), and served upon Julie Stefko.

[2] The Information alleges that on or about February 25, 2010, Ms. Stefko committed the offence of “selling on her own behalf, a home, not previously occupied, to an owner, and thereby did act as a vendor of a new home located at 187 Poyntz Avenue, at the City of Toronto, in the Region of Toronto, without being registered by the Registrar, pursuant to section 6 of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O. 31, as amended.”

[3] Counsel agree that this is a strict liability offence, and I concur. It is incumbent upon Tarion Warranty Corporation (“Tarion”) to prove the essential elements of this offence beyond a reasonable doubt. Ms. Stefko is entitled to a due diligence defence, based upon a balance of probabilities.

## ISSUES:

[4] There are three issues in this matter:

- (a) Did Ms. Stefko sell the house at 187 Poyntz Ave, Toronto, on her own behalf?
- (b) If the answer is “yes,” was it a home not previously occupied?
- (c) If the answer is “yes,” does a home not previously occupied and not registered under the *New Home Warranties Plan Act* (“the *ONHWP Act*”), become subject to the *ONHWP Act* when it is completed and put up for sale by a subsequent owner?

## DECISION:

[5] Ms. Stefko sold the house at 187 Poyntz Ave., Toronto, on her own behalf. It was a home not previously occupied within the meaning of the *ONHWP Act*. Once Ms. Stefko completed the home and listed it for sale, it should have been registered under the *ONHWP Act*, and she should have been registered as its vendor. Both the *actus reus* and the *mens rea* of this charge have been proven beyond a reasonable doubt and a conviction is entered.

## LIST OF WITNESSES:

[6] The following individuals gave evidence:

- (a) Ms. Nadia Mohamed, the wife of the current owner of 187 Poyntz Ave., Toronto
- (b) Mr. Navin Gangadin, the current owner of 187 Poyntz Ave., Toronto
- (c) Mr. Jeffrey Donnelly, former investigator, Tarion

## SUMMARY OF EVIDENCE:

[7] The following is a summary of the evidence provided at trial. An exclusion order was made prior to hearing the testimony of the witnesses.

### *Testimony of Nadia Mohamed*

[8] Ms. Nadia Mohamed testified that she resides at the home located at 187 Poyntz Ave., Toronto, with her husband, Mr. Navin Gangadin.

[9] She testified that they moved into this home on April 21, 2010. Their real estate agent had found this home listed in a desirable area of north Toronto. They went to see this home the same day, which she believes was either February 23 or 24, 2010.

[10] When she and her husband went with their real estate agent to see this home, which was on either February 23 or 24, 2010, she testified that neither Ms. Stefko nor Ms. Stefko's agent were present.

[11] During this initial viewing, Ms. Mohamed went through every room in this home, and she testified that everything appeared to have been completed. She said that there was no indication that anyone lived in the home. She said that in the kitchen, the appliances were all present, but were covered in plastic and foam and not plugged into the wall outlets. She said that the kitchen cupboards were empty. The basement bathroom still had plastic wrapping around the faucets, and the vanity drawers were all empty. The upstairs bathrooms were also all empty, including all the vanity drawers. The master bedroom had a closet, which was also empty, and devoid of any storage racks or "the pulls to hang things on." There was no furniture in any of the bedrooms, nor anywhere else in the home. There were no window coverings anywhere inside the house.

[12] Ms. Mohamed also testified that when she turned on the water taps inside the home, there was no hot water. The hot water taps ran cold water. In the basement, there was no hot water tank, and no carpets. She said there were cardboard runners over hardwood inside the home.

[13] She concluded that the house was "brand new" which was what she had wanted. She testified that their real estate agent put forward an offer to purchase this home that same evening. The agent had anticipated that this might occur, and had brought an offer with her for Ms. Mohamed and her husband to consider making.

[14] The offer to purchase the home was made in her husband's name alone. Defence counsel objected to her identifying this document. I allowed the objection, and indicated that it could become an exhibit when her husband testified, if he identified the document. Nevertheless, I allowed her direct evidence to be accepted that she was present when her husband signed the offer.

[15] She testified that her husband's offer was not accepted, and that the owner had made a counter-offer. Ultimately, her husband and Ms. Stefko agreed upon a price, and April 15, 2010 was agreed upon as the original closing date.

[16] Ms. Mohamed testified that she and her husband retained Mr. White as their real estate lawyer for this transaction, although she said that she had more contact with him than her husband. About one week prior to the closing date, Mr. White called them to say that technically, the property did not have an occupancy permit, and therefore, the house could not be deemed livable. (See: Exhibit 1).

[17] Because of this problem, the closing date was extended from April 15 to April 21, 2010. This extension was to allow the builder to rectify some issues and obtain the occupancy permit. When asked what the City of Toronto required in order to issue this permit, she replied that the City wanted the hot water tank to be installed, which occurred on April 21, 2010, and the fire alarm systems to be installed. She was unsure of whatever other issues remained outstanding from the City's perspective.

[18] Prior to moving in on April 21, 2010, she and her husband met with the City's inspector, Tony D'Amico, and walked through the house with the "contractor," whom she identified as Carlos Canejo. Mr. D'Amico had what she described as a check list, and the house did not pass. (See: Exhibit 2 – City of Toronto, Inspection Report, for 187 Poyntz Ave., printed on July 5, 2012).

[19] Ms. Mohamed identified a number of serious outstanding issues on the April 21, 2010 closing date, which she described as follows: no water meter on the house; no connection to the city storm line because of the sloped driveway; HVAC was partially missing; window screens were missing; an issue with the width of the basement walk-out; the slope on the driveway exceeded the allowable amount; the primer was missing on the furnace room floor; the hose dips were missing; and the outlets were missing certificates of grading.

[20] She testified that Mr. D'Amico told her to apply to the City of Toronto Committee of Adjustment, asking them for permission to leave the slope of the driveway as constructed. She said that the "builder was supposed to have done this," whom she identified as Ms. Stefko.

[21] Ms. Mohamed testified that Mr. White negotiated a hold back from the purchase price of the house, because of these outstanding deficiencies.

[22] After closing, she said that the only issue addressed was the window screens were fitted and provided over a two-month period by Carlos's employee, named "Joey." She said that Carlos had told them that he had the water meter, and that she and her husband had "waited and waited." Finally, she had to go to the City of Toronto's water works department herself to have it installed.

[23] When she inquired about the issues with the driveway and basement walk out steps, Carlos had advised her that he had to do some paperwork in order to obtain title insurance to cover it, but that this never occurred.

[24] When a water pipe burst inside the home, she called Carlos the next day, who sent Joey to fix it. There were some other plumbing issues in the main floor, and second floor bathroom, which Joey also fixed. There were some electrical problems as well, an electrician was sent to fix them, too. Joey also came by to install the plugs for the central vacuum. She testified that in the first 90 days of being in this home, all the issues that arose were dealt with by either Carlos or Joey.

[25] She further testified that she completed a 30-day form with Tarion, and had to file a second form to deal with an emergency claim when the sump pump froze. As a result of her filing a 30-day form with Tarion, she received approximately \$35,000; and as a result of the emergency form, she received an additional \$5000 from Tarion. She also filed a year-end form, and received an additional \$55,000 from Tarion.

[26] During cross-examination, she stated that she believes Ms. Stefko was the builder and Carlos was the contractor. Prior to closing, she had received an enrollment package from Tarion, and she had filled in the paperwork to enroll the house.

**Mr. Navin Gangadin:**

[27] Mr. Navin Gangadin testified that he is the husband of Ms. Mohamed, and that they live at 187 Poyntz Ave., Toronto, which is their home. They moved into this home on April 21, 2010.

[28] Mr. Gangadin identified his signatures on the agreement of purchase and sale of this home, which was entered as Exhibit 3. He testified that he was the buyer, and that Ms. Stefko was the seller. He put the offer in on February 24, 2010, and received her counter-offer the next day. He accepted her counter-offer of \$1,140,000 to buy this home.

**Mr. Jeffrey Donnelly:**

[29] Mr. Jeffrey Donnelly testified that he used to be employed at Tarion as an investigator, and was so employed at the time of the investigation and charge laid before the court. He worked at Tarion from September 2006 until January 2011. Prior to this position, he had been a police officer in Peel Region for seven years. He is currently employed as the Manager of Investigations and Complaints at the Certified Management Accountants of Ontario, and he is a licensed paralegal.

[30] Mr. Donnelly testified that he first became aware of this property on July 13, 2009, when he was driving around the City of Toronto observing the construction of new homes. He noticed that this home was for sale, and that it appeared vacant.

[31] He obtained a copy of the building permit application (see: Exhibit 4). The application was dated March 28, 2006, and the applicant was Deosaran Ramcharan. On this form, it appears that Mr. Ramcharan had indicated that the Ontario New Home Warranty Program did not apply, by checking off "no" to both questions, which ask if it was a new home and if registration was required. During cross-examination, Mr. Donnelly noted that the form indicated that Mr. Ramcharan had checked off "addition to an existing building" under the section, "purpose of application," and that the purpose of the proposed building was "residential" which was the current use of the building. Under description of proposed work, someone wrote "new 2 stry SFD" in what appears to be different handwriting.

[32] He explained that the building permit application is important, because if the *ONHWP Act* does apply, then an enrollment number is required for filing with the City of Toronto. He added that the City of Toronto's building department and inspectors do not take any steps to confirm with the individual that the *ONHWP Act* does not apply, nor does it take steps with Tarion to confirm that the *ONHWP Act* does not apply.

[33] In his opinion, the fact that the applicant advised the City of Toronto that the *ONHWP Act* did not apply is "not significant," since many individuals lack an understanding of the *ONHWP Act*, and there are some "rogue builders" who do not registered with Tarion, as well.

[34] Mr. Donnelly explained that if the builder does not register the building with Tarion and applies for a building permit, then the City of Toronto will issue it if the individual has a valid builder registration number.

[35] On September 28, 2009, he received the MLS listing for this house, which indicated that it was owned by a numbered company, and under power of sale. (See: Exhibit 6).

[36] He also identified the original MLS listing for this house, and the photographs of its interior, dated May 19, 2009 (See: Exhibit 5). The seller at that time was Deosaran Ramcharan. On this listing, the remarks were "brand new," "partly not fully completed...to be done in 2 weeks time."

[37] The house sold for \$820,000 under power of sale. The seller was the numbered company, and the occupancy on the listing indicated that the house was "vacant." It added that, "80% of the work is complete." (See: Exhibit 6).

[38] Mr. Donnelly did not inspect the interior of the home at this time, but he did contact the selling agent, John Stavropoulos. When he asked this agent if the home was inhabitable, he was advised that the home was incomplete, and that the selling price reflected that fact.

[39] In the fall of 2009, he ran a corporate search on the numbered company that owned 187 Poyntz Ave., Toronto, and found that the officers and directors were Arnaldo and Carlos Canejo. He did not believe that any further investigation was required at that time, because the house was not inhabitable and therefore, "not warrantable."

[40] The next thing that occurred was that he received a phone call from Mr. White, on April 12, 2010, who identified himself as the solicitor for Mr. Gangadin and Ms. Mohamed. Mr. White advised him that the property at 187 Poyntz Ave., Toronto, had some deficiencies and did not pass the municipality's final inspection. He gave Mr. Donnelly the name and contact information of the seller's real estate lawyer, Ms. DeSousa, and asked him to make inquiries prior to the closing.

[41] Mr. Donnelly testified that he called back Mr. White, and advised him that he had told Ms. DeSousa how to register with Tarion in order to close the deal. Mr. White called him back on April 16, 2010, and advised Mr. Donnelly that the closing was delayed until April 21, 2010.

[42] Mr. Donnelly checked Tarion's registration database, and the home was still not enrolled and Ms. Stefko had not provided Tarion with a registration application, either.

[43] On April 20, 2010, Mr. Donnelly said that Mr. White called him because there was no confirmation from the sellers of any registration for this home. Mr. Donnelly was advised that he could attend at Mr. White's office and pick up a copy of the agreement of purchase and sale, which he did.

[44] Mr. Donnelly identified the closing documents as the package that he picked up from Mr. White (See: Exhibit 7).

[45] The registration of Ms. Stefko on title, from the numbered company, occurred on October 9, 2009 (See: Exhibit 8). The transferor was the numbered company, and Carlos Canejo had the authority to bind the corporation. The transferee was Ms. Stefko. It was a power of sale.

[46] Mr. Donnelly said that Mr. Gangadin became the registered owner of the property on April 21, 2010 from Ms. Stefko, who was the transferee (See: Exhibit 9). He also obtained the parcel register from the Land Registry Office (See: Exhibit 10). The last entry on p.4 of Exhibit 10 also confirms that the property was transferred, by way of power of sale, on October 9, 2009, from the numbered company to Ms. Stefko.

[47] Mr. Donnelly also identified the undated letter he sent to Ms. Stefko, which he testified he sent in late June or early July, 2010, in which he told her how to register with Taron and supply enrollments for her home (See: Exhibit 11). He did not receive any response from her. It is clear that Ms. Stefko was not registered under the ONHWP Act as of February 25, 2010 (See: Exhibit 12).

[48] He testified that he prepared the charge before this court, and attended on the first appearance date in court, providing her with a Notice under the *Evidence Act* and some other documents.

[49] During cross-examination, he was asked about the City's building report (See: Exhibit 2, at p.2). Mr. Donnelly interprets this report as indicating that new footings were put in and that they passed inspection. He was also asked if a home was built with some pre-existing footings, what would Taron's position would be; and he replied that if 40% or less of the footings were pre-existing, then Taron would consider the home warrantable.

#### **ANALYSIS:**

##### ***Findings of Fact:***

[50] Based on all of the documentary evidence entered at this trial, a reliable chronology of events has emerged.

[51] The property was transferred to Jacqueline and Norman Fraser in 1949, and was not transferred again until it was conferred to Deosaran Ramcharan on September 19, 2005 (See: Exhibit 10).

[52] While the property was owned by Mr. Ramcharan, a significant number of charges were placed on the property (See: Exhibit 10).

[53] On March 28, 2006, Mr. Ramcharan filed an Application for a Permit to Construct or Demolish, under the *Building Code*, declaring in it that the Ontario New Home Warranty Program did not apply. Further, while he indicated on this form that this was an addition to an existing property, he also indicated that it was for a new two-storey single family dwelling. This inherent contradiction on the face of this form cannot be explained at this trial (See: Exhibit 4).

[54] On May 24, 2006, the City of Toronto issued a building permit, the permit type being for "new houses" in favour of Mr. Ramcharan, who was both the applicant and the owner. (See: Exhibit 2).

[55] The house was put up for sale by Mr. Ramcharan, on MLS, on May 19, 2009, with an asking price of \$1,150,000. In this MLS listing, it was described as a "Brand New 4 Bdrm 2 Storey Detached Home in Yonge/Sheppard area.... This Property is Not Fully Completed, Needs to Complete Kitchen and Bathroom, Which Will Be Fully Completed in 2 Wks Time. Buyer to Verify All Appliances and Job Completion Are Done Before Closing." (See: Exhibit 5).

[56] The house was subsequently transferred to 1654947 Ontario Inc. The house was listed on MLS again on September 9, 2009, by 1654947 Ontario Inc., under power of sale. It was listed for \$849,000, and sold for \$820,000 to Ms. Stefko. In this listing, the house was described as "vacant." The agent had described it as: "80% of the work is complete" and added that the "property is to be purchased in ' as is where is condition.'" (See: Exhibit 6).

[57] Ms. Stefko purchased the house for \$820,000 on October 9, 2009 by way of power of sale (See: Exhibit 10).

[58] When the house was transferred to Ms. Stefko from 1654947 Ontario Inc. on October 8, 2009, under transferor, it indicates that Carlos Canejo had the authority to bind the corporation (See: Exhibit 8).

[59] Ms. Stefko listed the house on MLS on February 22, 2010, and it was listed as being "vacant." The house was listed for \$1,098,888 and sold for \$1,140,000 (See: Exhibit 7).

[60] The Agreement of Purchase and Sale between Ms. Stefko and Mr. Gangadin, dated February 25, 2010, for this property, was for \$1,140,000, with a closing date of 6 p.m. on April 15, 2010 (See: Exhibit 3). Under clause 7 of this agreement, if this transaction was subject to G.S.T., it was included in the purchase price. However, no statement of adjustments showing whether or not Ms. Stefko remitted H.S.T on the sale of this house was provided during this trial.

[61] The City of Toronto conducted some inspections with respect to this closing, and on April 20, 2010, the inspection did not pass, after the City "Conducted site visit, met with Carlos (Contractor)." A further inspection was done again the next day, with "Carlos (Contractor)" and the property failed to pass again. (See: Exhibit 2).

[62] Clearly, Ms. Stefko bought the house on October 9, 2009 from a numbered company, and re-listed it on February 22, 2010, without ever moving into it. I fully accept the testimony of Ms. Mohamed, who said that the house appeared to be brand new, and the few appliances contained therein were still in their packaging. There was not a stick of furniture in the house, nor any window coverings, and the hot water tank had not been connected. The City of Toronto had not provided Ms. Stefko with an occupancy permit prior to her listing the house for sale, and the closing date had to be extended because the house failed to pass inspection.

[63] Based on the extensive documentary evidence, and the detailed and uncontroverted testimony of Ms. Mohamed, who described this house as both new and vacant, I hereby find that 187 Poyntz Ave., Toronto was a "home not previously occupied" at the time of its sale by Ms. Stefko to Mr. Gangadin.

##### ***Findings of Law:***

[64] The *ONHWP Act* provides:

#### **Registration Required**

6. No person shall act as a vendor or a builder unless the person is registered by the Registrar under this Act.

[65] Under subsection 22(1)(b) of the *ONHWP Act*, it is an offence to contravene [section 6](#), as follows:

## Offences

- (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.

[66] Section 1 of the *Act* provides the relevant definitions:

“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;

“home” means,

- (a) a self-contained one-family dwelling, detached or attached to one or more others by [a] 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 connection therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes;

“owner” means a person who first acquires a home from its vendor for occupancy, and the person's successors in title;

“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.

[67] Ms. Stefko has been charged with failing to register as a vendor. No one has been charged with failing to register as a builder.

[68] Defence counsel argues strenuously that if the home was never registered under the *ONHWP Act* at the building permit stage, then it remains outside the statute once it has been completed. He maintains that the *Building Code Act, 1992, S.O. 1992, c. 23*, clearly speaks to the issuance of a building permit by the chief building official, unless the applicant is a builder or vendor as defined in the *ONHWP Act* and is not registered under that statute, as per [section 8\(2\)\(b\)](#) of the *Building Code Act, 1992*.

[69] Defence counsel asserts that the fact that some homes are not covered by warranty is a fact of life, by virtue of the operation of these two statutes. He asserts that his client should never have been charged, since the home was never within the ambit of the *ONHWP Act*. He maintains that when Mr. Ramcharan originally obtained the building permit, he was both the owner and the builder, and that the house was therefore exempt, and that the status of this house has not changed. He argues that the *ONHWP Act* attaches to the house from the outset, or the house remains exempt.

[70] Chief Justice Winkler, in an endorsement supporting his order to grant leave to appeal to the Ontario Court of Appeal found in *Tarion Warranty Corporation v. Kozy*, [2011 ONCA 795 \(CanLII\)](#), 2011 ONCA 795 (CanLII), at para. 9., found as follows:

The interpretation of the definition of “builder” is a question of law. As to whether it is essential in the public interest, the issue of the definition of “builder” is central to the entire statute. This is consumer protection legislation which affects any potential new home buyer in Ontario.

[71] In *Kozy*, the Court of Appeal considered the definition of the word “builder,” which is much more expansive than the definition of the word “vendor,” and applied a contextual reading of the definition with other provisions of the *ONHWP Act*, in keeping with the spirit of the consumer protection purpose of the legislation, see: *Kozy*, at paragraphs 14 and 20.

[72] Thus, in *Kozy*, the Court of Appeal held at paragraph 14:

This approach requires an interpretation of “builder” that would cover persons who build a home but leave some work to be performed by the owner. Courts have recognized that the *Act* contemplates that owners will often perform some work relating to a construction project: see, for example, *Ontario New Home Warranty Plan v. McPhail*, [1997] O.J. No. 4570, at para. 21 (C.J.), MacDonnell Prov. J. (discussing s.13(2)(a) of the *ONHWP Act*, which provides that ONHWP warranties do not cover “work supplied by the owner”). Given the purpose of the *Act*, it is important not to deny such owners New Home Warranty Program coverage. To hold that a contractor who leaves some work to a homeowner is not a “builder” would therefore be inconsistent with the statutory scheme.

[73] In *Tarion Warranty Corporation v. Boros*, [2011 ONCA 374 \(CanLII\)](#), 2011 ONCA 374 (CanLII), the Ontario Court of Appeal dismissed the appeal brought by Tarion with respect to acquittals entered on the charges of acting as a “builder” of a new home under [section 6](#) without registration and of commencing construction of a new home without enrolling the home with Tarion.



[74] However, in *Boros*, there was no dispute between the parties that at the outset, the couple intended to build a home on a property for their own occupancy, and thus the *Act* did not apply to them “because they were owners intending to build for their own occupation.” See: *Boros*, para. 16.

[75] In *Boros*, the matter became contentious when the couple changed their intention, thus triggering the legal issue of whether or not the Mr. Boros was subject to the provisions of the *ONHWP Act* when it was decided that the property would be sold, see: paragraph 17.

[76] The Court of Appeal was quite clear in *Boros*, particularly in paragraphs 43-49, that the intention of the parties is key when deciding who falls within the definition of “builder.” Again, as in *Kozy*, the Court of Appeal has implicitly taken a contextual approach to the interpretation of this legislation.

[77] In *Carreiro v. Moreira*, [1998] O.J. No. 2648, Justice Gans considered the issue of who is a vendor within the meaning of the *ONHWP Act*, in the context of a civil law suit. Sidonio Moreira undertook construction of a new house, in which he briefly lived during its construction. Because of his broken engagement, the house was listed with the real estate brokerage, Homelife. Moreira concluded an agreement of purchase and sale with Carreiro, but refused to register as either a builder or vendor under the *ONHWP Act* for the purposes of the new home warranty. Carreiro brought an action for a declaration that the purchase agreement was unenforceable and sought damages, and he was granted summary judgment. The court held that the purchase and sale agreement was unenforceable as a result of Moreira's refusal to register, and further, the court held that Moreira did not properly occupy the house for his personal use.

[78] In *Carreiro v. Moreira*, Justice Gans took a pragmatic and contextual approach. He noted the absence of any appliances inside the home, and the absence of an occupancy permit from the municipality, thus ruling that occupancy had not taken place, at paragraphs 12 to 13 of his judgment:

Having regard to its plain and ordinary meaning, I am not persuaded, however, that Sidonio “occupied” the House prior to his decision to sell as that word is used in the Act, even on uncontroverted evidence. I am of the opinion, after considering the dictionary definitions provided me, for ‘occupancy’ to occur there must be an element of residency or tenancy. Simple possession does not and should not suffice. The absence of appliances, such as a refrigerator, suggests to me that Sidonio was merely sleeping at the House and not much more. Such does not create a residence for the purposes of the Act.

Furthermore, it seems to be that for occupancy to occur, it must be premises on the legal occupation of the premises, which eliminates occupation by squatters and by Sidonio, who, in the instant case, stayed at the House in the absence of an occupancy permit or its equivalent issued by the then City of North York. The evidence is clear that the House was not in a state of final completion until the first part of December, some seven months after he vacated it, sufficient to warrant an inspection by municipal authorities.

[79] In *Tarion Warranty Corporation v. Oppedisano*, 2007 ONCJ 687 (CanLII), 2007 ONCJ 687, His Worship Leaman considered the issue of who is a vendor within the meaning of section 6 of the *ONHWP Act*, and he took into consideration a number of factors. First, he accepted the evidence of the defendant that he had purchased a building lot to be near his parents and with the intention of using it as his matrimonial home. The defendant had become engaged shortly after purchasing the lot. He enlisted the assistance of his friends who had construction experience, and he had obtained an occupancy permit. He had moved into the home after he had obtained the occupancy permit, and had instructed Canada Post to redirect his mail to this address.

[80] In *Oppedisano*, the defendant had obtained a homeowners policy from a local insurance company. He had also notified his two employers of his change of address for taxation purposes, and produced T4 slips to this effect. The defendant's own evidence, corroborated by a friend, was that the defendant had moved into the property, enjoying what His Worship had termed a “Spartan existence,” that included a bed, toiletries, a toaster oven, a microwave, a small refrigerator, a kitchen table and chairs, some cutlery and some clothes.

[81] In *Oppedisano*, the defendant's intention changed and he decided to put the home up for sale because of the illnesses of his future in-laws. In dismissing the charge, His Worship Leaman found that the defendant had previously occupied the house. Again, implicitly, His Worship Leaman took a contextual approach to the interpretation of this statute, which included actual occupancy and the obtaining of the occupancy permit when considering the meaning of “vendor.”

[82] In *Tarion Warranty Corporation v. Dhakal*, [2011] O.J. No. 3342, His Worship Conacher also considered the meaning of “vendor” within section 6 of the *ONHWP Act*. In this case, Dhakal sold, on his own behalf, a home that had not been previously occupied, to an owner. At the time of the agreement of purchase and sale, construction was substantially complete on a new residence that was built following the demolition of the pre-existing residence. The construction project was completed under Dhakal's supervision. His Worship found that Dhakal use of the home was “minimal and sporadic” at paragraph 42, while accepting his personal circumstances were complicated because he was separated and hoping for a reconciliation. Most importantly, His Worship found, at paragraph 30, that the absence of the occupancy permit was critical:

It is the view of this Court that a consideration of “occupancy” for these purposes must date from the time that the appropriate building inspection authority issues a permit for occupancy, whether interim or final, in some form, whether oral or written. The analysis would then include a consideration of the nature of the “occupation” from that time forward. Anyone moving into a new home prior to such authority being obtained must be said to do so at their own peril and, however one might characterize such action, it cannot be said to be “occupancy” within the meaning of the O.N.H.W.P. Act definition of “Vendor”.

[83] In terms of statutory interpretation, I rely on *Greater Essex County District School Board v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada*, Local 552, 2012 ONCA 482 (CanLII), 2012 ONCA 482, at paragraph 50:

Context is everything. As the Supreme Court of Canada observed in *Bell ExpressVu Limited v. Rex*, 2002 SCC 42 (CanLII), 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, citing Elmer Dreidger, *Construction of Statutes* (Toronto: Butterworths, 1983) at 87, “Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [emphasis added]”

[84] In the case before me, the context is that the house at 187 Poyntz Ave., Toronto was brand new, and never occupied by anyone, when it was bought and re-sold prior to completion of its construction. There is no evidence that Ms. Stefko ever intended to occupy the home herself. In fact, she re-listed it

prior to the final completion of construction and prior to obtaining the occupancy permit. Ms. Stefko purchased the house from a numbered company, which sold it to her by way of power of sale, authorized by Carlos Canejo. For reasons unknown, Ms. Stefko continued to have Mr. Canejo meet with the purchaser's wife and the City of Toronto building department, to remedy any deficiencies required prior to the closing of the sale of the property to Mr. Gangadin, during April 2010.

[85] Ms. Stefko failed to reply to the undated letter from Mr. Donnelly, on behalf of Tarion, asking her to register with Tarion with respect to the sale of 187 Poyntz Ave., Toronto, and advising her to reply to him by July 16, 2010. Thus, Ms. Stefko was warned that Tarion believed that she was a "vendor" and provided her with an opportunity to address the issue prior to closing, and she chose not to do so. The real estate lawyer acting for the purchaser had provided the contact information of Ms. Stefko's real estate lawyer to Mr. Donnelly, and he testified that he had made contact with her counsel, as well. Thus, she had the opportunity to address the issue prior to closing through her counsel, and again chose not to do so.

[86] In *Boros*, at paragraph 21, the Court of Appeal cited its earlier decision in *Mandos v. Ontario New Home Warranty Program* 1995 CanLII 3158 (ON CA), (1995), 86 O.A.C. 382 at p. 383, where it had held that:

The [Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O-13](#) is remedial legislation and should be given a fair and liberal interpretation.

[87] The definition of who is a "vendor" is a question of law, and is separate from the definition of "builder."

[88] It would defeat the purpose and objects of this legislation if the assertion that the *ONHWP Act* did not apply on the original Application for a Permit to Construct or Demolish, as originally filed by Mr. Ramcharan in 2006, constituted a full answer and defence to this charge against Ms. Stefko, since Mr. Ramcharan re-sold the house before he completed construction of it and while it remained uninhabitable. Implicitly, the subsequent purchasers of this property after Mr. Ramcharan were both investors, the first being a numbered company and the second being Ms. Stefko, who never occupied the house while its construction was being completed. It was re-sold by Ms. Stefko to Mr. Gangadin, prior to obtaining an occupancy permit, and even at that point, the water heater was still not connected.

[89] As a matter of public policy, it would be disingenuous to allow Ms. Stefko to escape the requirement to register as a "vendor," based on the historical assertions of Mr. Ramcharan, who appears to have been the original builder, on a permit application, and I decline to do so.

[90] I hereby find that Ms. Stefko was the "vendor" of the home within the meaning of the *ONHWP Act*, and ought to have been so registered with Tarion.

**ORDER:**

[91] Both the *actus reus* and the *mens rea* of this charge have been proven beyond a reasonable doubt, and a conviction is hereby entered.

[92] Please provide the court with your submissions with respect to penalty.

**Dated at Toronto, this 5<sup>th</sup> day of September, 2012.**

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**Mary A. Ross Hendriks, J.P.**

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