

# GREATER TORONTO HOME BUILDERS ASSOCIATION

April 1999

## THE BUILDER V. THE ONTARIO NEW HOME WARRANTY PROGRAM

### 1. Enrolment Fees

Some time ago, I read an article by the President of The Greater Toronto Home Builders Association, wherein he expressed concern over the decision of the Warranty Program effective February 15<sup>th</sup>, 1999 to increase enrolment fees payable by builders on new homes being built in the Province of Ontario.

Bulletin #27 (revised) prepared by the Warranty Program sets out the explanation for the increase in enrolment fees, and the amount that the Program hopes to recover in the next five (5) years by means of this increase in fees.

A review of the Act and Regulations reveals that enrolment fees, although not officially characterised as such, may be a term or condition of registration of a vendor/builder, and, as such must be paid, prior to the commencement of construction of any home or condominium in the Province of Ontario. (See S.12 of the Act and S.8 of Regulation 892)

As such, these fees are subject to implementation by Regulation (formerly requiring Cabinet approval up to December 18<sup>th</sup>, 1998) because fees concern a term and condition of registration. In other words, if the builder does not pay enrolment fees, he can be revoked for not complying with this term of his continuing registration.

Enrolment fees should always be tied to claims experience and under current circumstances, should not be high, given the security requirements currently imposed by the Warranty Program upon all builders pursuant to the provisions of Bulletins #19 and #28. It is to be noted that the GTHBA did a financial analysis of the Program's finances and determined the increase of enrolment fees to be unwarranted. This may in part be explained by the fact that the Warranty Program has over \$100,000,000.00 in the guarantee fund for the payment of claims not to mention \$500,000,000.00 by way of security from builders.

Recently the Warranty Program has refused to disclose their financial statements to the GTHBA.

A breakdown of how an enrolment fee for any home is ascertained should be required of the Warranty Program by vendor/builders and statistics as to payments with respect to warranty claims experience regarding single family dwellings and condominiums should accompany that breakdown. This evidence should be made available to vendor/builders because the Warranty Program is a non-profit organization in which enrolment fees, registration and renewal fees comprise the guarantee fund and such fund should not necessarily exceed the pay-out experience ascertained on an annual basis.

### 2. Bulletins 19 & 28

Both Bulletin #19 (which deals with the requirement that builders of high-rise condominiums provide both security and supervision during construction) and Bulletin #28 (which requires builders to provide the Warranty Program with security for single family dwellings depending on their builder rating) are guidelines prepared by the Warranty Program to supposedly

assist the Program in determining appropriate terms and conditions of registration of builders of new homes in the Province of Ontario.

These Bulletins have no higher value than guidelines. Because they concern terms and conditions of registration, in order for Bulletins to have the force of law, prior to December 18<sup>th</sup>, 1998, they would have required passage by Regulations approved by Cabinet. This is not the case with respect to any of the Program's Bulletins, whether prior to or subsequent to December 18<sup>th</sup>, 1998. By legislative amendment the Warranty Program has eliminated the need for Cabinet approval of regulations governing terms and conditions of registration. However, as none of the Bulletins are regulations they have no legal effect.

In addition, to the extent these Bulletins are rigidly applied by the Warranty Program, they may unduly fetter or inhibit the discretion of the Program to distinguish amongst builders with different ratings, such that in the case of Bulletin #19 in particular, all builders are treated alike. With respect to Bulletin #28, it appears to be weighted in favour of the large, experienced builder and thereby, may adversely affect the small relatively new builders attempting to break into the market.

The Program has, by the use of these two (2) Bulletins, created a security fund, financed by vendor/builders which is separate and apart from the guarantee fund, which is also funded by vendor/builders.

The security required by the Warranty Program pursuant of Bulletins 19 & 28 tends to immunize the guarantee fund against potential claims or exposure to the Warranty Program until such security has been released back to the builder, at which time the risk and the exposure to the Program has been eliminated. The guarantee fund during this period is, therefore, not at risk and not depleted by payouts. Query how much the interest on the fund, estimated at over \$100,000,000.00 pays for claims on an annual basis?

As suggested, for such stringent conditions to be lawful, they should be passed by Regulation. It is questionable whether the legislation would place such restraints on vendor/builders in the Province of Ontario, as these restraints may have the effect of eliminating hundreds of small builders from effectively carrying on business or entering the market. In addition, such security requirements may tend to increase the cost of new homes to the public, because if a vendor/builder has to place security with the Warranty Program in order to build a home in the Province of Ontario, he may be obliged to pass on all or part of that security payment to the homeowner, by increasing the purchase price of the home in order to maintain a modest profit margin.

Vendor/builders should look long and hard at any security requirements demanded by the Warranty Program, particularly if it is going to unfairly limit the opportunity of the builder to carry on and develop a viable business in the construction industry.

### **3. Warranty Disputes**

The President of the Ontario Home Builders Association recently commented on the fact that builders who have a warranty dispute with the Ontario New Home Warranty Program, do not have a readily available forum for resolving such warranty disputes.

The current policy of the Warranty Program is that, if the builder disputes items of construction that the Program has found warrantable, should the builder not repair these items, then the Program has the option of Proposing to Revoke that builder.

Indeed the most recent policy of the Warranty Program is to Propose to Revoke builders that may have chargeable conciliations, wherein the builder has done the warranty work, but is being revoked because this warranty work was done subsequent to the conciliation decision being rendered.

Builders should be permitted the opportunity to resist what they consider to be adverse warranty decisions in a forum which is both cheap and expeditious.

That forum should be the Commercial Registration Appeal Tribunal and the provisions of Section 16 appear to give ample scope for that concept.

Indeed the Program's utilization of Section 16 as it affects vendor/builders is somewhat inconsistent.

For example, if the Warranty Program rules against a homeowner on a warranty item and the homeowner appeals, the Program immediately adds the vendor/builder to the proceedings before the Commercial Registration Appeal Tribunal, so that the vendor/builder will be bound by any decisions of the Tribunal in respect of the disputed warranty item.

This appears to mean that the builder is a "person affected" as set out in Section 16 of the Act, even though the Program, when requesting the builder be added, claims such builder is not such a "person affected". The rhetorical question is, if the vendor/builder is not a person affected, then why is it being added as a party by the Warranty Program.

Conversely, if the decision rendered by the Program in a warranty issue is against the builder, the homeowner does appeal and the vendor, according to the Program, has no right of appeal under S.16 of the Act. This appears both inconsistent, as well overly onerous to the vendor/builder.

Vendor/builders should be permitted to appeal an adverse decision pursuant to Section 16 of the Act to the Tribunal, and have the warranty dispute between it and the Program resolved expeditiously.

Alternatively the provisions of s.9 or s.17 of the Act could also be utilized, to settle a disputed claim. Section 9, entitles a builder to a registration hearing for alleged breaches of warranty and Section 17, provides for arbitration between builders and homeowners who dispute deficiencies. S.9, should be used before the Warranty Program settles the deficiencies against the builder.

## **Conclusion**

Although the Warranty Program is responsible for maintaining the registration of builders in the Province of Ontario and ensuring a high standard of technical competence and financial responsibility, builder's registration is a right rather than a privilege, and as such, builders should not be required to comply with overly onerous requirements of registration that effectively compromise the ability of builders to carry on their profession, or be denied full access to the Tribunal to resolve warranty disputes.

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