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## 5. COMMON DEFINITION OF “VENDOR”

### General Background

The Home Construction Regulatory Authority (HCRA) is the regulator with responsibility to license builders and vendors of new homes in Ontario under the New Home Construction Licensing Act (NHCLA). Tarion Warranty Corporation (Tarion) is the administrator of the warranty plan and is the financial backstop for warranty obligations of vendors under the Ontario New Home Warranties Plan Act (ONHWPA).

This advisory applies to the word “vendor” as used in both the NHCLA and the ONHWPA. It is intended to be read in conjunction with the advisories for “home”, “builder” and “owner”.

### Legislation – Act and Regulation

The word “vendor” is defined in s.1 of the NHCLA as:

- “Vendor” has the same meaning as “vendor” as defined in s.1 of the Ontario New Home Warranties Plan Act.

S.1 of ONHWPA defines “vendor as:

- “Vendor” means:
  - a) except in relation to a residential condominium conversion project, a person who, on the person’s own behalf, sells a home not previously occupied to an owner and includes a builder, as defined in clause (a) of the definition of “builder”, who acts as such under a contract with the owner; or
  - b) in relation to a residential condominium conversion project, a person who, on the person’s own behalf, sells a home in the project to an owner and includes a builder, as defined in clause (b) of the definition of “builder”, who acts as such under a contract with the owner.

This bulletin provides information on how the word “vendor” will be interpreted for purposes of the NHCLA and the ONHWPA.

### Quick Reference Guide – Who is a “vendor”?

In connection with the sale or transfer of a home, the vendor is the person who:

- On the person’s own behalf, sells or transfers a home not previously occupied to an owner.



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- On the person's own behalf, sells or transfers a unit in residential condominium conversion project, which unit has not been previously occupied, to an owner.
- Is the builder, if the builder is acting under a contract with an owner to construct a home.

The definition of "vendor" is important for several reasons including:

- The NHCLA regulates "vendors" and requires that they be licensed.
- A vendor cannot enter into an agreement of purchase and sale for a (new) home unless that person has received confirmation from Tarion that the home qualifies for enrolment under the ONHWPA.
- The builder of a (new) home (under contract with a vendor) cannot commence construction of the home until it has enrolled the home with Tarion under ONHWPA.
- The "vendor" of a (new) home is deemed to provide the statutory warranties and protections available for a home (as defined) under ONHWPA (as long as the definitions of home, builder and owner are also satisfied).

When a third-party is engaged to act as the vendor on behalf of someone selling a new home, that third party must be licensed as a vendor. It is not unusual for a project to involve several corporations, one of which will be licensed as the vendor. For example, a large-scale development may be planned that will move ahead in phases. At each phase, there will need to be a vendor who is licensed and who is responsible for warranty coverage.

## Vendor core competencies for licensing purposes

To be licensed as a vendor under the NHCLA, a person must meet competency requirements. It is worth noting that vendors who fail to meet the competency requirement and do not qualify for a licence, cannot act or hold themselves out as a vendor.

The competency requirements for vendor licensing purposes are set out in the regulation made under the NHCLA.

These core competency requirements are:

1. Business Planning and Management
2. Financial Planning and Management
3. Project Management and Supervision
4. Legal Issues in Housing
5. Customer Service and Tarion Requirements

A vendor is typically the person who will do one or more of: acquire land, arrange for the design and construction of a home (including contracting with designers and builders), and complete the sale of that home.



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## When must a person be licensed as a vendor under the NHCLA?

A vendor licence is required if a person wants to act as a vendor or hold themselves out as a vendor of a new home. S.37 (1) of the NHCLA provides that:

- “No person shall act or hold oneself out as a vendor, offer to sell or transfer a new home, including as prescribed, or sell or transfer a new home, including as prescribed, unless the person is licensed as a vendor and meets the other prescribed requirements, if any.”

This prohibition on acting as or holding out that the person is a vendor without first being licensed under the NHCLA has a corresponding provision in the ONHWPA. S.10.1 of the ONHWPA provides that:

- “A vendor shall not sell or offer to sell a home unless the vendor ...is licensed as a vendor under the New Home Construction Licensing Act, 2017.”

These prohibitions also apply to a contract home insofar as the builder constructing the home under contract with the owner is deemed to be the vendor for purposes of licensing and warranty coverage. This is reflected in the latter part of the NHCLA and the ONHWPA definitions of “vendor” which refer to builders of contract homes.

## When is a person acting or holding themselves out as a vendor such as to require licensing?

If a person intends to act or hold themselves out as a vendor, then the NHCLA requires that the person be licensed.

A person acting as a vendor or holding themselves out as a vendor of a home such as to require licensing under the NHCLA, includes a person who communicates that they have authority to offer to sell or transfer or to sell or transfer a home that meets the definition of “home” under the NHCLA and the ONHWPA.

The terms of the business arrangement or contract between an owner of land on which a new home is constructed and the person they are in business with or have contracted with to carry out the responsibilities of a vendor would be relevant considerations in determining whether a person was holding themselves out as a vendor.

The content of advertising and other promotional material, depending on the content and nature of the advertising and promotional material, would also be relevant considerations, as would the taking of deposits, for example, as part of a reservation agreement allowing the person to make an offer to purchase at a future date.



## Meaning of sell or offering to sell, and transfer or offering to transfer

S.1 of the ONHWPA defines “sell” as including entering into an agreement to sell. For a person to be engaged in the act of selling a home, it is not required that the actions necessarily conclude with an agreement to sell.

Selling would include:

- a) An actual sale that has closed – could be the transfer/deed of land evidences the sale.
- b) Entering an agreement to sell that has not yet closed.
- c) Offering to enter an agreement which is not yet accepted by the prospective purchaser.
- d) Marketing or advertising that falls short of an offer but that might be characterized as an “invitation to treat.”

Selling or offering to sell is not restricted to situations where there is an agreement to sell or negotiations for such an agreement. The NHCLA will also apply to other activity that has a similar outcome to selling, namely transferring the interest or right in the home, such as gifting the interest or right, or negotiations to gift the interest or right. A transfer might also, for example, result from a bequest under a will or a lottery or raffle win.

In the case of a contract home (built under contract with an owner of land), “selling” would include offering to enter an agreement to build a contract home, and entering the agreement.

What constitutes an interest or right in the home is discussed in the advisory on the common definition of “Home.”

## Sale or transfer by person completed by person other than the licensed vendor

To ensure warranty coverage is not compromised if a home is sold or transferred by someone other than the licensed vendor, s.48 of the NHCLA and s.15.1 of the ONHWPA clarify that, assuming other conditions are met, the vendor of a new home who is responsible for warranty coverage will continue to be the vendor even if the home is actually sold or transferred by another person.

This matter is referred to in s.48 of the NHCLA which provides that:

- “For purposes of this Act, a person, who at any time is licensed as a vendor and who acts as the vendor of a new home to which a warranty described in ss.13 (1) of the Ontario New Home Warranties Plan Act or in ss.47 (1) of the Protection for Owners and Purchasers of New Homes Act, 2017 applies, continues to be the vendor of the home even if another person sells or transfers, as prescribed, the



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home to an owner or completes a transaction to sell or transfer, as prescribed, the home to an owner.”

It is also referred to in s.15.1 of the ONHWPA, which speaks to the liability of the vendor. This section provides that:

**15.1** For the purposes of sections 13 and 14, a person shall be deemed to be a vendor of a home if the following conditions apply, even if another person sells the home to an owner or completes a transaction to sell the home to an owner:

1. The person at any time has registered as a vendor under this Act with respect to the home or at any time has been licensed as a vendor under the New Home Construction Licensing Act, 2017 with respect to the home.
2. The Registrar has confirmed that the home qualifies for enrolment in the plan or that the home has been enrolled in the plan, or the builder of the home has complied with section 12, as it read before it was repealed, as the case may be.
3. The builder of the home has substantially completed the construction of the home.

The above provisions address the problem faced in the case of an insolvency where a home may be transferred by a court appointed receiver, who is acting as an officer of the court in selling the home on behalf of the creditors. The court appointed receiver is not required to be licensed as a vendor, and the insolvent vendor remains the vendor for purposes of warranty coverage. See further, the discussion under the section titled [“Sale or transfer by receiver or trustee of licensed vendor.”](#)

## Acting as vendor without being licensed under the NHCLA

Both the NHCLA and the ONHWPA describe a vendor as a person who sells or transfers a home as defined in those two acts. A person who fails to apply for or receive a licence may still meet the definition of vendor if they sell or transfer a home as defined.

Regardless of whether a person is licensed as a vendor under the NHCLA, they are the person who, under the ONHWPA, warrants to an owner:

- a) That the home,
  - i. Is constructed in a workmanlike manner and is free from defects in material
  - ii. Is fit for habitation, and
  - iii. Is constructed in accordance with the OBC
- b) That the home is free of major structural defects as defined by the regulations; and
- c) Such other warranties as might be provided for in the regulations (There are several other warranties in the regulations and other protections in the ONHWPA such as deposit protection, financial loss protection for contract homes, and delay compensation)



Acting as a vendor without the necessary licence when a licence is required is an offence under both the NHCLA and the ONHWPA.

Acting as a vendor without being licensed does not relieve the person of the obligation to warranty to the owner that the home is constructed in a workmanlike manner and free from defects in materials, is fit for habitation, and any other warranties that may be provided for in the regulations under the ONHWPA.

If Tarion is required to respond to a warranty claim, a vendor, even though unlicensed, is liable for the amounts paid out under the warranty by Tarion.

## **Sale or transfer by receiver or trustee of licensed vendor**

Circumstances may arise where a new home is sold by a receiver or trustee. This might happen if a vendor or builder is involved in bankruptcy or insolvency proceedings. In some circumstances, a private receiver or trustee will be appointed, and it is the private receiver or trustee who then completes the sale with the purchaser. Unlike a court appointed receiver, a private receiver or trustee is generally expected to be licensed as a vendor. Given that licensing as a vendor may be required, parties are encouraged to contact the HCRA Registrar.

## **Sale under power of sale or foreclosure following default of vendor**

If a mortgage is in default, the lender may give notice to the borrower, in this case the vendor, that the mortgaged property will be sold under power of sale. The borrower has an opportunity to bring the mortgage into good standing. If unable to bring the mortgage into good standing, the property is sold. Proceeds are used to pay the mortgage and other encumbrances and the costs of sale.

The power of sale transaction is regulated under separate legislation. The lender is not acting as a vendor within the meaning of the NHCLA or the ONHWPA.

Though a private power of sale transaction is regulated under separate legislation, the lender is acting as a vendor within the meaning of the NHCLA and the ONHWPA and would need to be licensed, if the other applicable definitions of “home”, “builder” and “owner” are met.

Licensing may not be required where a court official is involved in the power of sale transaction or the transaction is court supervised.

Given that licensing as a vendor may be required, parties are encouraged to contact the NHCLA Registrar of licensing.



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Although used less frequently, if a mortgage is in default, the lender can foreclose on the property – move to take title to the property and become the owner, with no obligation to sell the property. The borrower, in this case the vendor, has some rights to seek a judicial sale of the property and has an opportunity to bring the mortgage into good standing. The foreclosure process requires the lender to sue the borrower. The result of a successful foreclosure process is that title to the property is transferred to the lender.

As with power of sale proceedings, though foreclosure proceedings are regulated under separate legislation, the lender is nonetheless acting as a vendor within the meaning of the NHCLA and the ONHWPA and must be licensed if the lender subsequently sells the property and if the other applicable definitions of “home”, “builder” and “owner” are met. The home may have already been enrolled by the vendor who went into default. If the home were not complete and required additional work and materials before an occupancy permit is issued, the lender, now the vendor, would need to engage a licensed builder to complete the work.

If the dwelling in question does not meet the definition of home – for example, has not been completed to the point of occupancy being permitted – licensing as a vendor may not be required.