



**A Review of
Tarion's Video and Audio Recording Policy**

Conducted by the Ombudsperson Office

April 5, 2019

Ombudsperson Policy Review

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Introduction

As a result of a homeowner complaint, the Office of the Ombudsperson conducted a review of Tarion's Video and Audio Recording Policy (Appendix A), which states that homeowners are not permitted to record inspections. Our review looked at the issues surrounding inspection recording from many different perspectives. Although we found, for the reasons laid out in this report, that it is fair for Tarion to not allow recording, we also believe Tarion should consider the information contained in this report and review their position. Whatever direction they choose going forward, Tarion needs to provide a clear policy framework that outlines their position.

The Complaint

A homeowner, Mr. M. contacted the Ombuds Office in July 2018 with a complaint about Tarion's Video and Audio Recording Policy.

Mr. M had an inspection scheduled, which he wanted to record. Tarion's existing policy prevented him from doing so and he believed that this policy was unfair and a violation of his rights. He believed that Tarion could not legally prevent him from recording events taking place within his own home. He told us that he felt that the purpose of the policy was to "protect and serve Tarion's interests and not the home owner's" and he believed that the policy interfered with his ability to gather evidence that could support a potential legal action.

This is not the first time a homeowner has expressed dissatisfaction with Video and Audio Recording Policy to our office, but it is the first time a homeowner has submitted a formal complaint about it. Based on Mr. M's articulate and considered written complaint, and the discussions with him on the phone, we conducted a brief initial review of the policy. As a result, we identified some concerns with the policy and determined that a full policy review was in order. We informed Mr. M that we would be conducting a review of the policy, but that it would not be completed in time to affect his pending inspection. The review was for the purpose of determining whether Tarion's policy is fair, both in the case of this complainant and for homeowners in general.

This report outlines the results of that review and offers recommendations to Tarion regarding the Video and Audio Recording Policy.

Methodology

The investigation took place over the course of eight months and consisted of:

- Review of the relevant legislation;
- Discussion with the complainant;
- Interviews with Tarion staff from the Human Resources and Legal departments;

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- Interviews with Tarion staff from all levels of the Warranty Services department;
- Discussion with Tarion's Consumer Advisory Council;
- Interviews with individual members of the Consumer Advisory Council, who are homeowners;
- Research on the practices of insurance companies;
- Research into the practices of home warranty organizations in other jurisdictions; and,
- Interviews with representative home warranty organizations in other jurisdictions.

Because builder concerns do not currently fall within the mandate of the Ombuds Office, builders were not engaged in this review.

As the information from other jurisdictions did not directly impact our findings, it has not been included in the body of this report. However, as a point of interest on how other warranty providers in Canada are dealing with this issue, we have included this information as Appendix B.

The Issue

The key issue our review examined was: Is Tarion's current policy on video and audio recording of inspections fair to homeowners?

We approached this question from several different angles and considered many different aspects of the issue. The first determination to be made was whether Tarion has the authority to prevent homeowners from recording inspections.

Authority

Criminal Code

The *Criminal Code* R.S.C. 1985, c. C-46, (Section 184) prohibits the interception of private communications except where a party to the conversation has consented to the interception. In other words, anyone can legally record a conversation that they are a participant in, whether or not the other participants are aware of the recording. We interpret this to mean that any homeowner can legally record a home inspection (conversation) if they are participating in it. Tarion cannot deny them the right to do so.

However, anyone, including Tarion staff, has the right to refuse to participate in a conversation unless under a legal obligation to do so. We interpret this to mean that Tarion staff are within their rights to refuse to conduct an inspection that they know is being recorded.

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Ontario New Home Warranties Plan Act

Tarion is charged with administering the *Ontario New Home Warranties Plan Act*. This includes assessing the warrantability of items listed on claim forms. Tarion's refusal to participate in an inspection would be problematic if denial of an inspection meant that the homeowner lost access to warranty rights. However, there are other possible means of assessing items besides inspection. These include desk assessments, still photography and virtual inspections, among others.

The Ontario New Home Warranties Plan Act states that Tarion must provide a conciliation if the builder does not repair items within the builder repair period. Most often, this takes the form of an inspection, but there is no requirement for inspection in the legislation. So long as Tarion can offer appropriate conciliation in another form, an inspection is not a requirement of the legislation.

We concluded that Tarion cannot prevent a homeowner from video or audio taping an inspection, but that they can refuse to hold an inspection that they know will be taped. So long as Tarion provides another effective means of assessment, they are within their rights to do so.

Fairness

However, what is authorized and what is fair is not always the same thing. The issue of fairness needs to be looked at in context and the competing needs of the parties considered. Therefore, we looked at a) why Tarion doesn't allow recording and b) why a homeowner might want to record.

Tarion objectives

Under Bill 168, an amendment to Ontario's *Occupational Health and Safety Act*, Tarion has a responsibility to assess the risks of, and to protect employees from, workplace harassment. Tarion's Video and Audio Recording policy was instituted in 2010 as a means of preventing harassment of staff. It resulted from the experience of a Tarion Warranty Services Representative who was recorded while performing their job functions, with the recording later posted on social media along with derogatory commentary.

Based on this experience, Tarion determined that there is a risk of employees being harassed through recording and online posting and the policy is intended to prevent such harassment.

We find that Tarion's legal obligation to protect staff from harassment is a valid reason for restricting recording. For the recording restrictions to be considered unfair, there would need to be both an equally compelling argument for allowing recording and a way to protect staff from the threat of harassment if recorded.

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Complainant objectives

Mr. M's main reason for challenging the policy was that he felt it infringed on his and other homeowner's rights. This issue has been discussed in the section of this report on authority, above. Another reason was to obtain evidence for potential legal action. Mr. M felt that if he, or another homeowner, proceeded to a License Appeal Tribunal hearing or civil case, the recording would provide evidence for the claims. Homeowners may assume that they have an inherent right to present video recordings in any proceeding and that, as a "true representation" of what took place, they would be given considerable weight.

However, in any proceeding it is the judge or the adjudicator who will determine what evidence is admissible. In making this determination they will examine:

- whether it is relevant to the dispute;
- whether it has been obtained in circumstances that infringed upon any fundamental rights, for example, the rights of privacy; and,
- whether the integrity and reliability of the recording can be verified.

In general, a homeowner may assume that video recording will provide an objective representation of events, which would be extremely valuable for a proceeding. However, many things can influence the objectivity of a recording, even unintentionally. The camera angle, the length of time it remains on an object, the camera's distance from the object, lighting, etc. can all affect how the viewer experiences what has been recorded. Any adjudicator will take this into account in determining relevance and reliability.

Parties in a proceeding do not have an inherent right to present recordings as evidence. The admissibility of evidence is ruled on a case by case basis, at the discretion of the judge or adjudicator.

Does a homeowner's desire for evidence place Tarion under a fairness obligation to allow recording based on a chance that the issues may proceed to the License Appeal Tribunal and the recordings may be determined by the adjudicator to be admissible? Tarion does have a fairness duty to provide the homeowner with information on all the determinants used in making an assessment, including the inspection. Tarion currently does this in written form. Tarion provides homeowners with a written description of the inspection in the Warranty Assessment Report, which outlines each claim item, a description of the inspector's observations and the reasons the item was or was not warranted.

I can understand a homeowner's desire to record the inspection as a more detailed record of what took place, and I would consider the ban on recording a fairness issue if there were no other means of outlining what took place at the inspection, but I believe that the Warranty Assessment Report satisfies Tarion's fairness duty to provide adequate information about the inspection to the homeowner.

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Fairness findings

Having considered that Tarion has the authority to refuse to conduct an inspection so long as they provide other means of assessment, and balancing Tarion's need to protect staff against a homeowner's desire to gather potential evidence, I find that it is fair for Tarion to not allow recording of inspections.

Recommendations:

Although we find that it is fair for Tarion to deny recording, we do believe it is in the best interests of both Tarion and homeowners that Tarion review their current policy and consider amending or changing their position. Given the prevalence of recording technology and the wide acceptance of the practice of recording in today's society, this issue will only intensify going forward.

The remainder of this report outlines several issues that are not addressed in the current policy and that we believe should be taken into consideration. We offer no individual recommendation on how each of the issues should be dealt with. That is for Tarion to decide. However, attention should be paid to each issue.

We recommend that Tarion review their current policy in the light of our report, that they re-determine their position on the issue and that they revise the policy to clearly set out this re-determined position. Tarion's current policy is inadequate and going forward, Tarion will need a policy that is well crafted and transparent, and that takes into account the issues listed below. Once the policy is revised, we recommend that it be made easily accessible to the public.

We understand that it will take Tarion some time to review the policy and come to a decision on how to move forward. However, we recommend that one section be changed as soon as possible. The section in question states that a homeowner who insists on recording an inspection will "prejudice his/her warranty rights". This wording implies that the owner will automatically lose their warranty rights if recording is attempted. We recommend that this wording be changed To "may affect their warranty rights".

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Considerations for Tarion to take into account:

AODA Accommodation

There may be times when it is appropriate to allow recording for the purposes of accommodation under the *Accessibility for Ontarians with Disabilities Act*. If, for instance, a homeowner has a disability that makes it difficult for them to process information and needs a recording in order to review the inspection to ensure complete understanding. Or there may be a homeowner who makes use of a support person and that support person is unable to attend the inspection. A recording can be used by the support person to review the inspection with the homeowner afterward, to help them understand the assessment process.

Tarion has a legal obligation to provide reasonable accommodation when requested. If Tarion decides to continue to not allow recordings, the issue of how to provide accommodation will need to be addressed.

Transparency and Building Trust

While Tarion staff have been harassed through recording in the past, the desire of most homeowners to record is not rooted in nefarious intentions. It is possible that a homeowner may have simple memory concerns or insecurity about their understanding of home maintenance and building terminology. A recording may provide reassurance that they will be able to go over the process after, for a better understanding.

There could also be instances where a co-owner, partner or advisor is away and not able to be part of the inspection. A recording could allow the missing party to also observe what has taken place.

Recording technology is so readily available in cell phones and recording has become so common in every aspect of our lives, that a homeowner may assume that they will make a recording, in the same way that they would have taken written notes fifteen years ago.

In a general sense, our office observes that homeowners often feel at a disadvantage at an inspection. Unlike the inspector and builder, they are not familiar with the warranty process and having the option to record may provide them with some sense of control as well as an opportunity to review points that were made during the inspection. Denying homeowners the ability to record may feel obstructive, harsh and unreasonable to homeowners, whereas allowing recording could signal transparency. This could help foster open communication and a trusting relationship between Tarion and the homeowner.

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Impact on Tarion staff

As described, recording has resulted in harassment of Tarion staff in the past. If Tarion decides to allow recording, they will need to establish methods for protecting staff. Some possibilities are requiring that parties sign an agreement to not record faces or other personal identifiers and to not share recordings or post them on social media.

During our review, we came to understand that it is not only the danger of posting on social media that concerns staff. Some staff found the idea of being filmed at all intimidating and potentially harassing. They expressed extreme discomfort with the thought of filming being allowed. If the job description of the Warranty Services Representative is changed to include the possibility of being filmed, the needs of these employees will have to be taken into consideration.

Impact on the Inspection itself

Although the primary purpose of an inspection is to assess whether items are covered under the warranty, inspections can also present a unique opportunity for dispute resolution. Having the builder, homeowner and Tarion representative together in the room, looking at and discussing the items under assessment can sometimes result in an agreement that resolves the issue, whether or not it is deemed warranted.

However, the act of recording an inspection may put all participants on their guard and could impede a collegial atmosphere. Inspectors and builders may feel under scrutiny and lose their willingness to "go above and beyond" or look for creative solutions. The result could be a more stressful process and fewer resolution options for the homeowner. Tarion is in the best position to understand how often this type of dispute resolution takes place during an inspection and how much consideration it warrants.

Another consideration is that the recording process itself could divert attention from assessment. The inspection could become about what is filmed and how, rather than about the items being assessed. A need to ensure that each item is properly filmed could increase the length of an inspection.

Quality Control

There may be times when Tarion would benefit from recording. For instance, Tarion may want to record an inspection to provide a helpful reference point for the Warranty Services Representative. This recording could be called up during report writing stages and reviewed with other warranty services staff or managers, to assist when items in the Warranty Assessment Report are disputed.

Enforcement

If Tarion decides to continue to not allow recording, one of the biggest challenges will be enforcement. Care will need to be taken to ensure that whatever form the policy takes, it can be enforced because a policy that is not enforceable is unfair.

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Since this policy was initially developed, there have been huge advances in recording technology. High quality phone cameras, with video capabilities are now standard, as are surveillance cameras and nanny cams. It can be difficult to spot cameras and even when they are identified, Tarion must rely on the homeowner's information as to whether they are operational. The potential for surreptitious recording is high.

If Tarion is to continue to not allow recording, they will need to consider how to enforce the policy and what the consequences will be for non-compliance. A policy that is not enforced equitably raises fairness issues.

Logistics

If Tarion is to allow recordings, they will need to consider some logistical issues.

Who will record?

Homeowner: If the homeowner records, they will likely be concentrating on capturing items that they consider serious or problematic. This could result in an incomplete or biased record. It would also mean that the homeowner owns and has control over the film.

Tarion: It may be impractical to expect the Tarion inspector to record. Even if it were possible for them to do so, it would be a distraction from their job of assessing the claim items. Tarion could bring in a second staff person to record, but this would have budget implications. Depending on how many inspections ended up being recorded the impact could be substantial. It is also possible that the homeowner would still want to record their own version of events.

Builder: If there is any animosity between the builder and the homeowner, it is unlikely that the homeowner would accept having the builder record. There is also no guarantee that a builder would be willing or able to do it.

Records Management

Tarion would need to decide whether to retain a copy of each recording. If so, they would need to determine where it would be stored and for how long. Depending on the number of inspections recorded, this could have implications for the records retention processes.

Protecting Staff

If recordings are to be allowed, Tarion will need to find ways to protect staff from harassment, either through the act of recording itself or through posting to social media. All parties could be asked to sign a confidentiality form agreeing not to include identifying features in any shot. This would be possible if the camera is hand held, but if the camera were a mounted surveillance camera it is unlikely that it would be possible to screen identifying features out. The parties could also be asked to sign an undertaking not to post the film on social media, but this would require that social media be monitored. It would also require consequences for those who don't comply and enforcement of the consequences for non-compliance.

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If recordings were allowed, Tarion would also need to come up with a protocol to care for staff who are not comfortable being recorded. Tarion could consider keeping a roster of staff who are comfortable with recording who could be switched with a staff person who is not, should the situation arise. However, this would create additional complexities within the scheduling system and might require homeowners to declare their intention to record at the time of scheduling an inspection. Depending on the amount of inspections being recorded, this could slow down scheduling operations significantly, creating undesirable delays that impact all homeowner.

Preventing alteration

If Tarion decide to allow recording, they will need to put protocols in place to ensure that the images are not altered. One way to do this could be to require a copy of any recording be shared with all parties immediately upon completion of the inspection.

Publishing the Policy

Whatever decision Tarion makes about recording, they must inform homeowners about it. Homeowners cannot be expected to adhere to a policy that they don't know exists, or that they can't access. Not publishing the policy, or not ensuring that it is easily accessible to homeowners could lead to situations in which homeowners will assume that they will be recording the inspection only to find out, at the time of the inspection, that it is not allowed, or that there are parameters around the recording. This is not fair to either homeowners or Tarion staff.

The current policy is available on the website, but it is not easily found. It is housed in the "What if My Builder Does Not Resolve Warranty Items" section of the Homeowners portion of the website, as a side bar. If a homeowner is not already aware of it, they could very easily miss it altogether. Whatever decision Tarion reaches regarding this issue, they will need to find ways to ensure that homeowners are made aware of it early in the warranty process.

Format of the Policy

Once Tarion re-determines their position on the issue of recording inspections, they will need to revise or rewrite the policy, as the current policy lacks necessary.

Best practices for policy writing require that the new/revised policy include the following:

- A clear statement of the rationale for the policy;
- The policy written in clear, plain language;
- The consequences of non-compliance;
- How exceptions/accommodation requests will be addressed

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Conclusion

When our office began this review, we did not anticipate that it would involve so many competing issues. Our overall impression at the end of the process is that there is no right or wrong answer to the question of whether recording of inspections should be allowed. There are many factors in play, and it will be a complex decision for Tarion to make. I hope that our review will assist Tarion as they consider the policy.

In summary, my recommendations are:

Recommendation 1:

The Ombudsperson recommends that Tarion act as soon as possible to change the wording of the current policy to read "may affect their warranty rights".

Recommendation 2:

The Ombudsperson recommends that Tarion take the information provided in this report into account and review their position on allowing inspections to be recorded.

Recommendation 3:

The Ombudsperson recommends that after reviewing the policy, Tarion determine what their position will be on recording inspections going forward.

Recommendation 4:

The Ombudsperson recommends that once Tarion has determined their position on recording inspections, they write a new policy that:

- includes the rationale for the policy;
- uses plain language to present the policy;
- outlines the consequences of non-compliance with the policy; and,
- addresses the possibility of exceptions, including AODA accommodation.

Recommendation 5:

The Ombudsperson recommends that once Tarion has written their new policy, they ensure that it is easily accessible to the public.

Recommendation 6:

The Ombudsperson recommends that Tarion provide a plan to implement these recommendations to the Ombudsperson office within 30 days.

Tarion Management has accepted all recommendations resulting from this Policy Review and has provided the Ombudsperson Office with a plan that will see all recommendations implemented by September 30, 2019.

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Appendix A

Tarion's Video and Audio Recording Policy

Tarion Warranty Corporation ("Tarion") does not permit the video or audio recording of the conciliation or claim inspection process by builders or homeowners. Photographs, however, may be used to document any physical defects in a home which may eventually become the subject of an inspection.

The video or audio recording of a conciliation or claim inspection is not necessary for the inspection process to proceed properly and fairly. In Tarion's experience, video and audio recordings have only served to interfere with the process. A video or audio recording of the conciliation or claim inspection process is also not necessary or of assistance in making an assessment of any construction deficiencies. When the results of a conciliation or claim inspection are reviewed by the Licence Appeal Tribunal, the assessment is typically made based on live testimony and documentary evidence.

A homeowner who insists on making a video or audio recording of an inspection and refuses to allow an inspection to proceed without making a video or audio recording, will prejudice his/her warranty rights. Where a builder refuses to participate in an inspection without making a video or audio recording, the inspection will be conducted without the builder's participation. The builder may also prejudice, among other things, the builder's appeal rights before the Builder Arbitration Forum, and the builder's rights under the Waiver of Indemnity policy (Builder Bulletin 44).

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Appendix B

Other jurisdictions

As part of our review of the Video and Audio Recording Policy, the Ombuds Office contacted several other warranty providers and insurers in order to explore whether there is a standard on recording within the industry. We found that insurance companies were reluctant to share information about their internal policies. However, two companies that provide new home warranty coverage in the western provinces were willing to be interviewed. Both organizations were very interested in our review, as they have both been grappling with this issue of whether to allow recording of inspections. Neither of the companies currently have a formal policy on the subject.

One company indicated that, in the past, their own assessors have sometimes recorded inspections to help them in report writing and analysis. However, the company has stopped allowing this practice, due to homeowner privacy concerns. Their unofficial policy is to discourage recording by homeowners, and they will end an inspection if a third party, such as a TV station, arrives to record.

The other warranty company stated that their practice is to not allow recording. They find it hinders the inspection process and that their field staff are not comfortable being recorded. However, homeowners still ask to record and at times may record surreptitiously. The company's sense is that homeowners do this when relationships with the builder or warranty provider have broken down and there is lack of trust. This company will try to facilitate a resolution in a collaborative way, but, if this fails, will refer to their legislation. Under their provincial legislation, if a homeowner has made a claim, the warranty provider has a right to investigate and the homeowner, as claimant, must provide access for the investigation. This company categorizes a homeowner's insistence on recording as denying access, which can jeopardize a homeowner's warranty rights.

Both companies indicated that the issue of recording inspections is a concern for them. They have noted an increase in requests to record and an increased posting of recordings on social media. Both indicated that they are considering adopting a policy around the issue and are currently struggling to determine the parameters of the policy.