

Several issues that have arisen in the last year wherein Tarion appears to be adopting an increasingly adversarial stance towards builders in an effort to convince the public that this is being done in the public interest.

However, there have been some interesting developments where builders have succeeded in preventing Tarion from revoking their registration or convicting builders in circumstances where Tarion has previously been successful.

The following topics are covered in this newsletter:

- Increase in Fees
- Conflicting Policy on Registration
- How to Protect Your Registration Status Through Injunctions and Mandatory Orders
- Tarion's Unilateral Settlements with Purchasers and How to Defend Against Them
- Tarion Sues Builders and Guarantors for Claims Paid

## **Unilateral Increase in Fees**

As of May 1, 2009 Tarion has significantly increased registration and renewal fees and imposed a \$1,000 fee on all chargeable conciliations. Effective July 1, 2009, it has also raised the builder's exposure to \$300,000 and has made builders responsible for MSD claims which Tarion once handled. If the builder is responsible for MSD claims now, then Tarion's risk decreases. The fees should be lower. However, they have increased!

Tarion argues that economic times are tougher therefore there are fewer enrolments and therefore less money in the guarantee fund to pay claims on behalf of builders who are unable or unwilling to undertake after sales service.

However, the new \$1,000 conciliation charge is an unjustified penalty. It does not take much imagination to speculate as to how many conciliations will have no warranted items, if only one such item on an inspection allows Tarion to charge the builder \$1,000.

The reason there are so many conciliations is because Tarion has implemented a process of encouraging owners to make claims 30 days following closing, one year after closing, two years after closing and so forth.

Now Tarion realizes that the significant increase in homeowners requesting conciliations has backfired because, as Tarion admits, over 90% of all complaints made by homeowners to Tarion that are conciliated are complaints on non-warranted items. So it proposes to fine builders for a conciliation process Tarion has done everything to encourage!

## **The Conflicting Policy on Registration**

Tarion appears confused in the way it deals with prosecutions and registrations where construction has begun but registration may be incomplete. When this occurs, Tarion charges the builder with building without being registered and with failing to enroll. It then advises that if the builder pleads guilty to these charges, but registers and enrolls, then the fine will be reduced and the builder can build, because it is now registered. However, after pleading guilty and paying a fine to the Provincial Court, the builder then applies for or continues his registration application as part of the terms of the guilty plea; Tarion often rejects the application, either because the builder has been prosecuted or because the builder is deemed to be incapable of building on a technical basis!

Tarion has recently advised me that in such cases the home so constructed, because it is not built by a registered builder, will not be covered.

All of this could be resolved simply, by withdrawing such charges and having the builder register and enroll the home

Thus, any new homeowner could be protected and the builder would become a registrant which is what Tarion wants in the first place.

Tarion's current policy can lead to guilty pleas being made, penalties and fines being paid by builders but no coverage, no warranty protection and no registration, all of which are contrary to the Act which requires registration, enrolment and warranty coverage!

## **Builders Can Protect Their Registration Status Through Injunctions and Mandatory Orders**

Builders who lose their registration through a revocation hearing before the Licence Appeal Tribunal or through expiration may be able to retain their registration by applying for and obtaining a stay from the Superior Court, pending appeal or by applying to the Court for registration so they can continue to build, especially when there are homes that are under construction as of the date of the LAT decision or other loss of registration.

Builders should consider appealing unfavorable decisions from the Licence Appeal Tribunal if they have ongoing construction, because Tarion's policy is to publish on its website when a builder's registration is cancelled or expired. On that basis, no further construction can continue by the builder unless such registration is reinstated. Often the allegations that have led to the revocation are allegations of non-compliance with administrative details such as late enrolment fees or tardy security payments or late provision of CCPs, which are minor infractions and not worthy of revocation.

A further remedy exists for builders, where Tarion simply refuses to process an application for registration or renewal of registration or where through inadvertence, the registration expires. I act for builders faced with Tarion's refusal to process their applications or renewals, and in such cases the builder has the right to require Tarion to process the application and grant registration.

The builder can bring an application to the Superior Court seeking an order compelling Tarion to grant registration on reasonable terms and conditions.

It is no more legitimate for Tarion to refuse to process registrations or impose harsh terms of registration, than it is for Tarion to settle claims with owners without following its own procedures to allow builders to deal with claims in the normal course.

## **Defending Against Unilateral Tarion Settlements**

Tarion in an effort to pacify homeowners who complain about after sales service, has taken to settling many such claims with the homeowners even when it has initially rejected the claims, in order to avoid a LAT hearing with the owner and the adverse publicity of having refused a homeowner or condominium corporation's claim.

Tarion subsequently invoices the builder for the amount that Tarion has paid the homeowner or condominium corporation and then tries to revoke the builder for failing to pay the claim, in

circumstances where the builder had no say in the process whereby settlement with the homeowner and Tarion was reached.

I act for numerous builders who have been denied the right to deal with the consumer by Tarion, but then face revocation proceedings or a collection action from Tarion. In some instances the builders are now suing Tarion for negligence or breach of contract because Tarion has failed or refused to follow its own procedures, by denying the builder its right to repair any legitimate deficiency items under the warranty coverage provided by the builder. It is not a breach of warranty for a builder who is prepared to repair, but then is denied the right to repair by Tarion.

Builders should be unafraid to challenge these unilateral actions made by Tarion to placate the public at the expense of the builder.

## **Tarion Sues Builders and Guarantors For Claims Paid**

Tarion has embarked upon an aggressive policy whereby it sues builders for claims paid by Tarion on behalf of builders. Tarion's policy is to obtain some repayment on claims paid even though the enrolment fee and registration fee and renewals, all of which have now increased, are built into the amount forecast for such claims paid by Tarion.

Few builders, guarantors or indemnifiers understand that they have legitimate defences against such lawsuits both on the merits of the warranted items themselves and the amount paid by Tarion. Rarely is any deficiency actually repaired by Tarion. Tarion used to believe it was an insurance company and therefore cash settled with the owners. Although Tarion still cash settles with owners, it now asserts, in its latest newsletter, that it is only a surety and not an insurer.

If that is the case then Tarion should never cash settle a claim; it should ensure that the work or the deficiency is actually repaired. However, to the extent that Tarion cash settles, the builder has defences on the basis that the alleged deficiency is not a legitimate deficiency or that the amount paid is excessive.

## **Conclusion**

Although Tarion continues to make the registration and renewal processes even more complex, builders should be aware that they can successfully defend most unilateral action by Tarion, and that the Courts and the License Appeal Tribunal will frequently support the builders efforts and their primary right to build.

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