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# Registration, Prosecutions and Remedies

## **Registration Provisions and Inspection Criteria**

Tarion has expanded its role as a Warranty Program primarily concerned with monitoring after sales service to a Warranty Program which now uses its power to register or revoke builders, by requiring pre-completion and pre-claim inspections, and imposing its own construction standards on builders as a condition of registration. This leads to interference with builders construction activities long before the warranty arises.

Pre-completion and pre-claim investigations can now include single family dwellings and low rise townhouse condominiums as part of Tarion's registration and renewal process. Tarion can even procure from builders agreements to provide pre-completion reports for homes being built by builders selected at random.

This pre-completion activity on the part of Tarion may well exceed its mandate over builders under the legislation. For example, I have represented builders who are required as a term of registration to meet Tarion's construction criteria regardless of the technical competence of the builders or the construction standards of the industry!

Although Tarion itself has no specific construction expertise, in that it is not in the business of building homes, it may require builders to provide construction progress reports, so it can spot check construction of homes as they are being built. Many builders have to pay for these spot check inspection and progress reports at significant cost. There appears to be no valid reason for such extension of Tarion's authority. The warranty does not arise until completion of construction, and subsequent possession by an owner.

If a builder refuses to allow such spot checks or to provide construction progress reports it may face revocation proceedings. In such circumstances the builder should consider resisting the threat of revocation, because it is questionable whether Tarion has the authority to impose construction standards upon a builder during the construction phase.

Because of its ever expanding activities, Tarion determines what builders build, when they build, how many homes they can build, the finances required to construct, the quality of construction and the extent of after sales service.

This ability to dictate the terms of a builders business occurs at the registration and renewal stage. On an annual basis, Tarion can impose any terms of registration it wishes using the following criteria:

- The ratio of complaints to possessions of any applicant or registrant;
- Whether a conciliation was requested by a homeowner;
- Whether a conciliation gave rise to a breach of warranty;

- The track record of related companies with respect to complaints;
- The track record of expired companies as it relates to current registered companies;
- The finances of a registrant, and related companies;
- The financial history of guarantors; and
- The history of legal proceedings of the registrant or related entities.

For example, current registered builders may face revocation proceedings based upon the activity of expired or related entities, in which the principals of the current registrants may have been involved, which fact is often irrelevant to the builder's current capacity to build.

I know of instances where Tarion has registered a builder's umbrella group and then later, when an expired builder in the group is requested to pay a claim with which it disagrees, Tarion has threatened to revoke every current registrant in the group in circumstances where such current registrants are not in breach of any warranty obligations!

Tarion, in effect, uses the threat of revocation as a debt collection mechanism when it has paid claims on breaches of warranty without ever having to prove the validity of the breach and without having to wait until revocation proceedings finish to determine if there was a valid warranty breach.

This is unacceptable in light of the existence of the Arbitration Forum established by Tarion which supposedly guarantees that a breach of warranty claim should not be the subject matter of revocation proceedings!

On the other hand, I have dealt with situations where as soon as a builder decides to use the arbitration forum to resolve a disputed breach of warranty decision, Tarion then proposes to revoke the builder thereby forcing the builder to appeal to LAT, which defeats the arbitration process!

Even though builders can challenge a breach of warranty finding through a request for arbitration, this may not stop the publication of the builders breach of warranty on Tarion's website before it has been determined by an arbitrator whether or not the breach of warranty decision is correct.

A disputed breach of warranty ruling by Tarion should not give rise to revocation proceedings. To the extent that Tarion threatens revocation for breach of warranty, it is using LAT as a hammer to obtain collection of a debt from the builder. The debt is the amount Tarion has invoiced the builder for Tarion's unilateral finding of breach of warranty. In effect, Tarion makes a breach of warranty finding and the builder is guilty until proven innocent!

## **Unnecessary Prosecutions**

Builders must be registered with Tarion and enroll each home built. However many prosecutions for failure to register or enroll are unnecessary due to an unreasonable lag-time between the date registration is applied for and the actual date of registration. The charges are laid not because there has been a breach of the *Act* or the regulations with respect to enrollment or registration, but because builders make applications for registration and advise Tarion that they have commenced construction and seek enrolment. However it may be months before their application is processed. In circumstances where an application has been made but the

registration is pending, builders should never be charged with failing to enroll or with building without being registered. When such builders finally obtain registration and enroll the homes, any charges of failing to register or enroll are no longer true. These charges ought to be withdrawn to avoid unnecessary prosecution and the erroneous imposition of fines by the Provincial Courts. Better still, the charges should never be laid in the first place.

There are situations where builders who own properties, may transfer lots from one related company to another in order to avoid the implications of the *Planning Act*; however Tarion charges the builder with allegations of building or selling without being registered, when in fact the lots, although owned by different related companies, are being built by a single construction entity. If either the owner of the land or the construction entity is registered no charges for failing to register are warranted.

In such circumstances there is no reason for any charges to be laid. Such charges indicate a misplaced fascination on the part of Tarion with the detail of land transfer rather than the reality of what is actually occurring. As long as there is a registrant land owner or builder, no breach of the Act is occurring.

## **Risk Assessment and Security**

I continue to believe it is unacceptable that almost all builders pay both security and enrollment fees to Tarion. Enrollment fees, now that Tarion considers itself to be an insurer rather than a surety, are the premiums paid by builders for the warranty protection provided by the Warranty Program.

That being the case, the requirement to provide security in addition to enrollment fees, is superfluous. If Tarion decides that there is a valid warranty claim, it pays the claim out of the guarantee fund. If security has been provided, Tarion then transfers the security to the guarantee fund and reimburses itself.. Therefore the enrolment fees paid do not reflect any claims experience. The enrolment fee should be tailored to Tarion's claims experience while the security requirements should be eliminated.

I have rarely reviewed a risk assessment prepared by Tarion that justifies the payment of security to Tarion as a financial rationale for registration!

Builders are frequently advised they have to pay \$5,000.00 or \$10,000.00 in security for every home that is enrolled, or they have to provide a guarantee or indemnity depending on the personal net worth statement provided by guarantors or indemnifiers, However builders rarely see the financial analysis undertaken by Tarion that justifies such determinations.

Builders should be aware of what this analysis is and how Tarion determines what security will be required of any builder. Tarion should be required to justify, on a financial or risk basis, why security should be imposed and how the amount is determined.

In many instances, the security being required by Tarion is excessive or unnecessary. Builders are at liberty to request, review and subsequently challenge all **risk assessments**.

There are very few instances where the builder has actually challenged Tarion on a risk assessment and I believe that builders should be less timid in requiring Tarion to disclose its analysis and decision making process thereby making Tarion more transparent and more accountable to the builders for its decisions.

## **What are the Remedies?**

Although it is useful to identify problems that builders have with Tarion, the question still remains as to what builders can actually do about those problems.

Many builders believe they cannot possibly succeed if they resist Tarion and so in many instances Tarion's decisions are unchallenged. Consequently Tarion believes that builders agree with all their policies!

There are essentially three venues available to builders to challenge Tarion's decisions.

### **1. The Licence Appeal Tribunal (LAT)**

All builders who are currently registered have a powerful weapon in their arsenal, which is the fact of their existing registration

Tarion cannot take away a builder's registration without proposing to revoke or refusing to renew such registration. If Tarion proposes to revoke a builder's registration, the builder can challenge such proposal by filing an appeal to LAT.

LAT is not in the business of revoking every builder that appears before it. Even if a builder is found by LAT to be in breach of warranty or has some other registration discrepancy, LAT will most likely impose terms of continued registration rather than revoke the builder. Breaches of warranty or breaches of terms and conditions of registration will not result in the revocation of a builder unless such breaches are numerous and the builder has made no effort to carry out its warranty or registration obligations.

Most builders do not realize that they may have a real defence to the imposition of Tarion's terms and conditions of registration, or that they may have a good defence to a breach of warranty claim, and that they can often prevail before LAT if they prepare their case in a capable manner.

### **2. The Law Suit**

Builders can challenge Tarion's warranty decisions by applying to Court for a declaration that they are not in breach of warranty.

They should not be afraid to resist Tarion when they honestly disagree with Tarion's decisions.

Tarion has stated that if a builder does **not** appeal a proposal to revoke and allows its registration to expire, Tarion can sue the builder and get immediate judgment for breach of warranty or money owed on the basis of issue estoppel, because the builder did not defend the proposal to revoke. This is erroneous legal thinking because issue estoppel does not apply in such circumstances!

If a builder is registered, Tarion will not sue if there is a disputed claim; rather it will propose to revoke so that it can force the builder to pay by threat of revocation proceedings.

Indeed if a builder launches an action to obtain a declaration that there is no breach of warranty, or that the breach of warranty decision is wrong, Tarion has in the past attempted to block such lawsuits and transfer the proceedings to LAT with which it feels more comfortable. However, it has no legal right to do this and no attempt by Tarion to force such a result on a builder has ever succeeded!

The quickest remedy for builders in resisting demands or actions taken by Tarion with which they disagree, is to proceed against Tarion by way of an action under the Simplified Rules. The action could be to obtain an injunction, or a declaration against Tarion for actions taken by it to try and revoke or refuse to register a builder or if Tarion invoices a builder for a breach of warranty claim with which the builder disagrees. Under the Simplified Rules, there exists a streamlined procedure whereby the issue can be set-down for trial after an exchange of pleadings and documents. Alternatively, the builder can move for Summary Judgment without the need for cross-examination.

If an action is set-down for trial, there are no discoveries, and the trial usually takes a day or two to complete.

### **3. Arbitration Proceedings**

Although arbitration is costly and time consuming, if it is used, it should guarantee that the builder avoids registration proceedings for breach of warranty.

Builders can ask for counsel at an arbitration and if successful, their reputation remains clear and they have no chargeable conciliation, and no breach of warranty. If they fail, they can pay Tarion before Tarion pays the claimant and this avoids publication of a claim payment on Tarion's website.

I believe builders should never be subject to publication of a chargeable conciliation or a claim payment until a finding of breach of warranty has been confirmed in a court proceeding, LAT proceeding or arbitration.

## **Conclusion**

Builders should not just react to the decisions of Tarion; they should be proactive when they disagree with Tarion's actions or decisions; builders should be prepared to challenge Tarion when they believe Tarion is wrong or is exceeding its mandate.