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Simultaneous Proceedings, Recent Decisions, Unworkable Timelines and New Hope for Builders

As counsel for builders who frequently encounter difficulties with the Tarion Warranty Corporation ("Tarion") regarding registration requirements or compliance with aftersale service deadlines, a number of problems have come to light regarding the actions of Tarion which may be prejudicial to builders.

The following discusses several current concerns faced by builders in dealing with Tarion.

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Simultaneous Proceedings

The first concern is the growing incidence whereby Tarion attacks builders on several fronts simultaneously, in an effort to overwhelm the builders with legal proceedings, which in turn discourages builders from continuing to build and sell homes, or arbitrarily limits or qualifies their ability in that regard..

In circumstances where a homeowner has complained to Tarion regarding building deficiencies and Tarion has carried out a conciliation and found items to be warranted Tarion can simultaneously:

(a) propose to revoke the builder's registration for having a record of breaches of warranty;
(b) sue the builder for breaches of warranty, in the amount Tarion paid to the homeowner as a cash settlement, plus administrative fees and GST; and
(c) invite the builders to arbitrate, to avoid revocation.

I act for many builders who are faced with a multiplicity of proceedings before the Licence Appeal Tribunal, the Builder Arbitration Forum and the Superior Court, at the same time on the same facts. Tarion's purpose appears to be to inundate the builder with so many legal proceedings, that through a war of attrition, the builder cannot sustain its building operations, and defend all the legal proceedings.

Under such circumstances the builder feels forced to make a deal with Tarion, such as paying a warranty claim it does not believe is valid in an amount it does not believe it owes!

These actions on the part of Tarion could be construed as an abuse of process, because Tarion is utilizing several different legal forums to bring the builder to its knees as the builder attempts to defend itself on numerous fronts.

Another example is where builders who apply to the Builder's Arbitration Forum ("BAF") to challenge a breach of warranty decision by Tarion on a warranty assessment report, simultaneously find themselves faced with publication on Tarion's website that they are in breach of warranty, or where Tarion proposes to revoke the builder and sue him, even though the arbitration proceedings are supposed to prevent either of these other activities from happening. Once a builder has requested an arbitration, he is supposed to be protected from other legal actions until after the arbitration is concluded. Indeed, Tarion is not supposed to take any proceedings to sue or revoke while an arbitration is in progress!

Even if deficiencies go to arbitration, Tarion will at times continue to behave as if their breach of warranty decision is final, by settling with the owner and invoicing the builder, before the arbitration even considers the claim. This undermines the whole concept of independent arbitration of warranty disputes.

The Enrollment Conundrum

One of the more common situations a builder may face is where a builder and a developer contract to build homes where the developer owns the land and the builder constructs the homes on such land

Typically on closing, title of the completed home is transferred from the developer to a third party purchaser even though the purchase agreements may be executed between the builders and the purchasers. In every instance where Tarion has discovered such a situation, it charges the developer for selling without being registered and with failing to enroll the homes. This is preposterous. The transfer of title by the developer after the home has been completed by the registered builder, who has already enrolled the home, is irrelevant and should not concern Tarion because the builder is registered, has enrolled the homes and has assumed responsibility for the warranty!

In the same situation, if the developer enrolls the home rather than the actual registered builders, then the builder is charged with building or selling without enrolling the home!

In other words, Tarion has a registered builder and an enrolled home, but charges any entity that owns the land and transfers title because it also is not registered! It proposes two registrations and two enrollments for the home built and sold by one registrant, who has enrolled the home!

In circumstances where the builder is applying for registration while this activity is going on i.e. obtaining the building permits and commencing construction and making sales, then both the builder and the developer may be charged with building and selling without being registered and with failing to enroll! This is ridiculous. Eventually the homes are constructed and enrolled and a warranty provided. It should not matter to Tarion who takes out the building permit or transfers title as long as the ultimate registrant enrolls the home and provides the warranty!

The Compliance Option

Alternatively, Tarion may decide to take no action under such circumstances, and has done so in the past! Instead of prosecuting the builder or the developer, or proposing to revoke the builder, it can simply notify the builder or the developer that there is non compliance with enrollment requirements and that the appropriate entity should enroll the homes or get registered, without a penalty!

This makes sense because it should not matter to Tarion from whom title to a home is taken by a purchaser, whether it be the builder or the developer, as long as the builder is registered and as long as the homes in question have been enrolled whether it be by the builder or the developer!

The enrollment fee is Tarion's insurance premium. It should make no difference to Tarion whether the enrollment fee comes from the landowner or the builder as long as the builder (as registrant) is prepared to honour the warranty obligations under its vender/builder agreement with Tarion and under the provisions of the Act!

To embark on a process of proposals to revoke registration or to prosecute developers and builders, because one entity owns the land and is servicing the land for subsequent construction by another entity, which is common practice in the development and building industry, is totally unnecessary and fails to comprehend the nature of the building industry or the function of Tarion in monitoring registrants and protecting the public!

Late Enrollment

While there may be numerous prosecutions against the builders pursued by Tarion, where a builder has failed to enroll or where a builder has enrolled a home later than required, Tarion can on the same facts also propose to revoke the builder and force it to appeal the proposal to the Licence Appeal Tribunal!

This means that although the builder has registered, and although Tarion has received the enrollment fee, it is pursuing the builder by way of prosecution in Provincial Court and trying to revoke it, by revocation proceedings!

Under such circumstances, Tarion is in effect requiring the builder to defend the enrollment issue twice with the chance of being penalized twice for the same occurrence! Late enrollment fee payments should give rise to nothing more than a modest surcharge, not two sets of legal proceedings over a fee payment which has already been made!

If a builder is prosecuted and pleads guilty to failure to enroll in the appropriate time period, Tarion can use that conviction in support of a notice of proposal that the failure to enroll on time amounts to non-compliance with a term and condition of registration! In such circumstances I recommend to builders to attempt to stay the prosecution, pending the conclusion of the LAT proceedings, so that one proceeding does not determine the other. The best remedy would be to stay the prosecution permanently as an abuse of process!

Therefore, where there exists simultaneous prosecution and LAT proceedings on the same facts I recommend that the builder bring a motion at the beginning of the prosecution to have the prosecution stayed pending the disposition of the LAT hearing.

Arbitration Proceedings

The right of a builder to arbitrate a breach of warranty assessment, leads to a number of problems:

(a) Firstly, the builder arbitration process is expensive. I have acted for many builders who have halted the arbitration proceedings halfway through because Tarion has often turned the hearings into full blown trials that may take days to complete. Tarion boasts almost unlimited financial resources and can afford to tie the builder up with such proceedings, endlessly. For example, in one instance, Tarion in its warranty assessment report found an item to be warranted and the builder appealed to the Builders Arbitration Forum (BAF), then Tarion reversed its decision and proclaimed the items not warranted; subsequently Tarion changed its mind again and advised the builder it was in breach of

warranty! It then invoiced the builder and was set to sue the builder for breach of warranty and revoke it for the same breach, in circumstances where the BAF proceedings were supposed to protect the builder from both! The threatened lawsuit by Tarion forced this small builder to settle by payment of funds to Tarion for an item it believed was not a breach of warranty and had nothing to do with the construction of the home!

(b) Yet another recent arbitration decision determined that there exists a difference between a warranty assessment report that will result in a chargeable conciliation with a corresponding negative impact on the builder's reputation and status on Tarion's website, and a decision letter to an owner, even though the two documents deal with the same issues, and may say the same thing! Similarly, I have dealt with a situation where the warranty assessment report and the decision letter on the same deficiency came to opposite conclusions! In other words, the builder appealed a warranty assessment report where Tarion said there was a breach of warranty to the builder arbitration forum, and thereafter Tarion in a "decision letter" to the owner advised the owner the matter was not warranted. The arbitrator rules that the evidence and the reasons in the decision letter were not able to be used by the builder in the BAF proceedings! Such arbitrators are of course selected by Tarion!

(c) More and more often the BAF proceedings can become a trap for builders because they are so expensive that builders who want to challenge warranty items they are often prevented from doing so because the costs are prohibitive. This means that the right of appeal to BAF maybe an illusion and therefore builders have no real rights of appeal at all! For example, if a builder goes to LAT there is no deposit cost. If he arbitrates it can cost $2,500.00 a day, which must be paid up front as a deposit!

(d) Tarion appears not to extend the right of arbitration to a financial loss claim, while the arbitration rules contemplate such a claim as being applicable in such rules!

(e) Lastly, in a very recent case the builder was put to the expense of an arbitration in circumstances where the item being appealed as warranted by Tarion had been ruled as a non-warranted by Tarion in an identical assessment against the same builder a year earlier! The builder had to appeal the second decision to BAF in an effort to compel Tarion to follow its original decision! The cost of this pointless arbitration became so prohibitive that the builder could not maintain its arbitration and ended up agreeing to repair the item that Tarion itself had initially found not warranted a year earlier! Therefore Tarion forces builders to become involved in costly proceedings and then waits for the builders to give up. The appeal rights of the builder have become effectively non existent, in these circumstances. Builders are forced to concede, just to stop the cost of the proceedings.

My recommendation to builders who dispute breach of warranty assessment reports of or desk assessments, or financial loss claims Tarion, is to preserve their right to appeal to BAF, even though it can be expensive, because builders, properly represented, can use BAF to defend against wrongly determined breaches of warranty, which in turn can assist them when Tarion goes on to payout the claim and thereafter sues the builder for the amount of the payout. Also, if BAF is not used, Tarion, at a subsequent LAT hearing or lawsuit can and will accuse the builder

of not initially challenging the breach of warranty ruling and not utilizing his rights, because he did not believe there was a breach!

Collection Actions

Currently, Tarion is likely to sue builders and guarantors for breaches of warranty in circumstances where it has settled the claim with the homeowner, by way of a cash payment and invoiced the builder.

However, if there is a breach of warranty the builder has the right of appeal to BAF. If the builder fails to exercise the arbitration procedure, then Tarion will sue the builder for the monies it has paid out for breach of warranty. Tarion can also propose to revoke that builder for the same breach and the builder is faced with what BAF was designed to avoid i.e. registration proceedings before LAT coupled with a lawsuit. These simultaneous proceedings for the same activity amount to an abuse of process!

No lawsuit should be permitted until it has been determined whether or not there is an actual breach of warranty for which the builder owes money. The arbitration proceedings, designed to determine this, should not be so expensive so as to render them completely beyond the reach of builders. The builder should not be forced to pay the cost of the arbitration "up front", before it can exercise the right of arbitration. Tarion should pay the "deposit" or arbitration costs and invoice the builder if Tarion wins. This shifts the cost burden to Tarion being the entity most able to afford arbitration costs!

The "Related Companies" Dilemma

In situations where Tarion is suing the builder for breach of warranty, this can give rise to proceedings against related companies.

Tarion can propose to revoke the related companies that are registered and these related companies are thereby forced to file notices of appeal to LAT in order to continue to be registered and therefore continue to build!

Once the related companies have appealed, Tarion has then been known to argue that the proper venue for all such proceedings is not the Superior Court where it initially sued the company for breach of warranty, but rather the LAT proceedings, where it is pursuing the related companies!

In such circumstances, Tarion pursues a builder for breach of warranty in Superior Court and simultaneously proposes to revoke all of the related companies for the original builder's breach of warranty. This strategy forces the related companies to consider paying the funds that may be owing by the initial builder (as alleged in the lawsuit) so that the related companies will not be found in breach of warranty for the one builder's problem thereby exposing the related companies to revocation in the LAT proceedings!

One of the reasons this can happen is that the umbrella designation which looks good on paper and is recommended by Tarion can be a trap! Tarion can take one of the companies, if it is in breach of warranty and its registration has expired, and due to the existence of similar officers, directors and guarantors of related but currently registered companies, bring down these related companies by proposing to revoke them all for the transgressions of the one expired company! This eliminates the idea of limited liability wherein builders incorporate different companies for different projects!

Tarion says that an umbrella designation provides the benefits of the fact that the same builder group, building under a different companies can benefit from the previous good reputation of former companies and have that experience attributed to new companies under the umbrella.

The trouble is that if a problem with one company occurs it can envelop and destroy the rest of the companies!

Builder Bulletin #28

I have stated many times that Bulletin #28 is a fiasco, however its provisions are the largest single determination of whether or not a builder can build homes in Ontario. This Bulletin is used by Tarion to determine the criteria required by a builder to obtain registration, and controls the number of homes a builder can build on an annual basis.

Bulletin 28 attempts to equate a builders financial strength with its technical competence! The two are not necessarily related. The existence of substantial equity on the part of a builder or its guarantors does not equate to technical ability or building competence on the part of such a builder.

Conversely, considerable technical ability is no guarantee of substantial equity.

The main criteria under the provisions of Bulletin 28 is the size of a builder's financial equity.

The financial calculations carried out by Tarion pursuant to the provisions of Bulletin 28 are not related to performance or the technical ability of the builder.

Bulletin 28 looks to the equity of a builder through a complicated financial calculation. The weaker the builders equity, the greater the requirement for the builder to provide security to Tarion before it can build homes!

Therefore the builders least able to provide the security are the ones most often obliged to provide it to Tarion! This makes it difficult for builders to get started and to grow. Such arbitrary security provisions hamper builders and distorts their economic reality. This provision and indeed all the provisions of Bulletin 28 should be scrapped, and replaced with a varying enrollment fee based upon a builders actual record of construction!

The more often the builder builds homes where Tarion has to pay for deficient construction, the higher the enrollment fees per home payable by that builder and vice versa! Or, if deficient

conditions exist, then the builder should pay a renewal surcharge or an enrollment surcharge it can not pass on to the consumer.

This would eliminate the need for security and penalize builders who fail to provide adequate after sale service and who try to pass on higher enrollment fees to homeowners) by way of increased home prices.

Publication of the increased or decreased enrollment fees paid by builders i.e. the premium paid by builders for Tarion "insurance" would provide to homeowners the information as to the quality or timeliness of aftersale service that individual builders provide, without the need for any security requirement and without the need for chargeable conciliation designations or the need for publication on the website of such chargeable conciliations, all of which information is either useless or misleading.

Tarion is no better equipped to determine what a warranted item is than a capable builder, yet Tarion can ruin the reputation of a builder by characterizing an owner complaint as a breach of warranty or a chargeable conciliation and thereafter publishing such information on its website to the public before that determination has been confirmed either by LAT or the Superior Court or by an arbitrator!

Officers, Directors and Companies

With respect to prosecutions, Tarion always charges both the company and its officers and directors of any alleged wrongdoing (its does the same with respect to Notices of Proposal wherein it pursues both the registrant and the officers and directors of such registrant).

This amounts to an abuse of process!

In a prosecution, after Tarion charges the company and the officers/directors it will negotiate dropping the charges against the company if the individual officer or director plead guilty and pays a fine. Tarion wants the individual to plead guilty so that the next time that individual, perhaps through another company, is charged with a minor offence it can use that individual's prior conviction to punish the individual and the subsequent company!

This procedure by Tarion pierces the corporate veil and subjects the individual and his or her future company to a far greater sentence on any subsequent prosecution than would occur if Tarion changed its policy to have the company plead guilty and withdrew the charges against officers and directors. It is an abuse of process wherein Tarion forces the builders to plead out its officers and directors in order to avoid costly prosecution procedures on minor items such as late enrollments etc. The same occurs with LAT proceedings; Tarion proceeds against the registrant and the officers and directors, even though the latter are not individual registrants. This forces both the company and the individuals to defend themselves, separately, against the charges and allegations in the Notice of Proposal!

The Notice Morass

There exists significant problems which can negatively impact builders through the release of two inconsistent decisions by LAT, being the Sinn case dated September 12, 2006 v. the Hribar case dated September 1, 2006.

- The Sinn Case
  In this case, LAT confirmed that a homeowner can file 30 day and year end claims with respect to construction deficiencies. These lists do not give rise to warranty rights unless the owner additionally and specifically provides further notice of a request for conciliation to Tarion! The regulation, which provides these time constraints actually reduces the owners right to perfect a claim for breach of warranty. Without the regulation, the complaint would be perfected when it was received by Tarion.

  Therefore, Tarion seeks to reduce the scope of the warranty by putting additional onuses on the owner. This supposedly helps builders.

- The Hribar Case
  However, in the Hribar case, LAT stated that notice to a builder by homeowners in the appropriate time period is deemed to be notice to Tarion even if Tarion did not get the actual notice from the homeowner. This is because the builder is deemed to be the agent of Tarion. Anything the builder receives by way of notice of a complaint, Tarion is deemed to have received!

  In such a scenario, warranty periods may never end as long as an owner can establish he or she provided some notice to the builder complaining about a deficiency in the first year of possession even if the homeowner didn't notify Tarion!

Therefore, because of the existence of the numerous timelines provided to homeowners in the regulations, Tarion, has created the possibility of extending the warranty period indefinitely on the one hand while curbing the owners right to claim on the other, neither of which clarifies or assists the builder!

In response to this, Tarion has now taken to providing builders with further opportunities to repair deficiencies after the conciliation, to allow builders more time to repair unless the owner denies entry, and even if Tarion has stated that the time for the builder to repair has expired. This places the ability of a builder to perform warranty work in the hands of the owner who can deny access. Therefore a builder may be in breach of warranty because access is denied, which used to be a reason why a warranty could be denied!

For example if a builder fails to respond to a 30 day list or a year-end list and the owner requires a conciliation, the builder is given further time before the conciliation to repair, and further time after the conciliation to repair!

However, even if the builder does eventually undertake and complete repairs, it doesn't change anything with respect to the conciliation being found chargeable! Tarion's procedures have turned aftersale service into a full time business for builders, which even Tarion cannot

administer! If a builder corrects items of deficiency which makes the conciliation chargeable before being put in breach of warranty, then the chargeable designation should be removed. It serves no useful purpose and unjustly maligns a builder who has performed warranty work after a conciliation.

Lastly, with the new emphasis on Tarion designating that a builder may be found unwilling and unable to repair, Tarion has now restricted its initial attempt to extend repair times to builders!

The Unwilling and Unable Designation

Although Tarion can extend the dates upon which a builder can remedy a breach of warranty under a warranty assessment report, pursuant to Regulation 892 section 4.1(4), Tarion can unilaterally determine that a builder is unwilling and unable to perform its warranty obligations, in which case the time periods for such repair can be ignored and the builder for all intents and purposes is treated as revoked, without a hearing!

If a builder is deemed to be unwilling and unable to repair, it receives no further notice from Tarion. Tarion then settles the claim and invoices the builder often for items of deficiencies the builder never knew existed! This is nonsensical, but does provide to the builder a defence against a lawsuit by Tarion claiming indemnity against the builder, because the builder can argue he was given no notice of deficiencies prior to such deficiencies being determined and cash settled.

The fact that Tarion can unilaterally determine a builder "unwilling and unable" is perverse. Tarion cannot simultaneously give builders extended time to repair and simultaneously take this away by regulation! It means the time provisions for repairs offered to builders by Tarion are either meaningless or non existent! Furthermore, it means that the builder has no ability to comply with its warranty obligations or challenge the extent of such obligations. Tarion is all about making decisions, acting on them while obstructing the builders right to dispute the decision or even comply with them. Labeling a builder unable and unwilling is like Tarion obtaining an injunction preventing the builder from continuing to build or sell or repair warranty items, before any court action is taken by Tarion! It is judgment prior to trial!

Solutions to Unwilling and Unable Designation

No builder should accept the fact that because Tarion has determined there is a breach of warranty in a warranty assessment report that the chargeable designation means there now exists a breach of warranty. If the item is fixed or settled by the builder within 30 days following the assessment there is no longer a breach of warranty. If there is no longer a breach of warranty, then the chargeable designation for breach of warranty becomes meaningless!

By providing numerous time limits for builders to remedy deficiencies found by Tarion in assessment reports, Tarion acknowledges that it is inevitable that disputes will arise between owners/builders/Tarion as to what a real deficiency is. Therefore, if the item is deficient, and

therefore chargeable, but is subsequently repaired, then no adverse consequences should befall the builder.

It is not that the builder is refusing or failing to comply if an item isn't repaired before an assessment report. Rather, Tarion's procedures make it difficult if not impossible for the builder to comply. The difference between a chargeable and a non chargeable conciliation is determined only by the ability of a builder to deal with warranty claims in a specific period before a conciliation. If it takes longer than the time limits Tarion prescribes, for repairs to occur, the chargeable conciliation should be reversed as long as the work is done before the builder is put in breach.

Tarion has created a situation where it encourages homeowners to make complaints, then provides extended time limits for the builder to repair, but still finds the breaches of warranty chargeable, even though it concedes that sometimes or often the builder can't fix the items in time to avoid such chargeability! Lastly, Tarion has taken to denying notice to builders for breaches of warranty where it finds the builder unable or unwilling, thereby denying the builder due process and any ability to defend the allegations!

This whole process creates an inaccurate picture of the abilities of builders to provide capable and timely after sale service.

New Hope For Registered Builders and Those Seeking Registration

The recent LAT decision of Tarion v. Riva Emporium Ltd., released April 16, 2007 gives renewed hope to all builders about the grounds Tarion employs to attempt to revoke builders or deny their registration renewal or prevent initial registration.

Previously, allegations of breach of warranty or failure to pay claims invoiced by Tarion were sufficient to justify revocation, but this case has reversed the trend by determining that Tarion cannot rely on its initial decision that there has been a breach of warranty or non compliance with a term or condition of registration, as proof that such is the case. The decision states that because there are other avenues for ascertaining breach of warranty (like suing by way of subrogation) such conclusions should not be made by the Tribunal against a builder to deny registration!

Therefore, the fact that a builder is accused of breaches of warranty and/or failing to pay a claim paid by Tarion and invoiced is insufficient to revoke a builder.

In the Riva case, LAT prescribed its own terms and conditions of continued registration for the builder, and stated in respect of Tarion's assertions as follows:

> "It was the task of Tarion to establish that the evidence before the Tribunal on the balance of probabilities proves Tarion's allegations as set out in the Notice of Proposal. The allegations were failure to supply adequate financial information; refusal to pay a claim amount Tarion stated was owing to it as regulator, the construction of a house while not registered, and failure to enroll such house under the Act."

In reference to inadequate financial information the Tribunal stated as follows:

> "There was no satisfactory answer to the fact that prior registrations of the Applicant had been accepted on virtually the same economic data. The Tribunal was satisfied that the information provided by the Applicant, albeit late, was adequate in keeping with the "may reasonably request" obligation ….Tarion cannot extend its requirements for financial information for purposes, ancillary to the negotiations process by s. 7(1)(c) such as enforcement of disputed claims"

In dealing with Tarion assertions that it had paid a $40,000.00 claim and was entitled to reimbursement, and that failure to be reimbursed were grounds for revocation, the Tribunal stated as follows:

> "The Tribunal is dealing in this regard with an attempt to enforce the payment of an obligation that must be considered inchoate until such time as the necessity for the payment in the first place has been adjudicated as having been necessary….the Tribunal has some difficulty allowing an untested assertion to stand as a basis for the exercise of the regulatory prerogative of refusing a statutory entitlement to registration. In these circumstances the legitimacy of the claim does not conform with the proper adjudication of that claim…Rights of subrogation have been granted to Tarion by way of s 13 of Reg'n S92…there may also have been an action available under the indemnity agreement between the Applicant and Tarion; …neither of these courses of action suggest recovery being available to Tarion pursuant to a bare demand to a registrant… The Tribunal finds itself in the position of being asked to make a finding of fact which does not serve the ends of the matter before it. It was the assumed validity of the owner's position under s. 14 to prompt administrative action against the Applicant that the Tribunal finds offensive and an unwarranted abridgement the Applicant's entitlement to registration."…Lastly, in regard to having pleaded guilty to a charge of failing to enroll or building while not registered, (this) was only added to support the breach of warranty claims and as such should be ignored, and that a guilty plea in and of itself did not conclude the issue!"

All of these conclusions suggest that Tarion's use of proposals to revoke in order to force builders to comply with demands for payments of invoices for alleged breaches of warranty with the threat of revocation, have been taken too far by Tarion and will not be tolerated by LAT in the future. This gives every builder a much better likelihood of successfully resisting proposals to revoke and being able at worst to obtain a ruling where their right to registration is maintained, and where reasonable terms are imposed by LAT or at best, when the proposal to revoke by Tarion will be rejected by LAT, as it was in the *Riva* case.
