

FAIRNESS FOR BUILDERS

As counsel for new home builders, I deal with issues associated with building and selling new homes/condominiums in the Province of Ontario, including the requirement that builders must register and enroll all new homes with the Tarion Warranty Corporation ("Tarion"). In addition, builders must comply with the builder's statutory warranties under the *Ontario New Homes Warranties Plan Act* ("the Act"). Lastly, builders must comply with numerous Bulletins published by Tarion.

Currently there are several issues raised by builders for whom I act which deal with Tarion's increased regulation of the activities of registrants and its ever growing tendency to circumvent its obligations to provide fair and reasonable access to the Licence Appeal Tribunal and to the Builder's Arbitration Forum, or to deal fairly with builders regarding reasonable terms and conditions of registration.

Tarion's obligation is to ensure that registered builders are able to construct new homes to a reasonable standard, and manage after after-sales service, without making the procedure so onerous and difficult that it prevents builders from being able to carry on business or to readily meet their obligations to comply.

The following issues currently concern many registered builders in the Province of Ontario.

REGISTRATION REQUIREMENTS FOR BUILDERS

If a person either builds or sells a new home in Ontario and has not registered with Tarion or enrolled the home, Tarion can and will charge such person with building or selling a new home without being registered, and for failing to enroll the home with Tarion.

The person so charged has two alternatives.

He or she can plead guilty to failing to register or enroll the home, and pay a heavy fine, without enrolling the home or registering. The fine is designed to discourage such people from selling the home without registration and enrollment.

If the same person registers and enrolls the home, the fine will be minimal. However, by registering, the person has contracted with Tarion to honour warranty obligations for seven years.

In either instance, Tarion is pursuing the wrong entity.

In such circumstances, Tarion should pursue the builder to obtain registration and enrolment, rather than the person on whose land the home was built.

For example, in circumstances where the person selling the home is an officer and director of the builder, i.e. they are the same entity, Tarion will accept the registration of the builder, payment of the enrollment fee and allow the vendor to be nominally registered for \$600.00. No one is charged, and the builder provides the warranty upon registration. It should be the same if the builder and vendor are different persons.

If the vendor and the builder are different entities and the vendor is not really in the business of selling homes, the vendor should not be required to register. By forcing these people to register, Tarion is pursuing the easiest target for registration, rather than the builder who built the home.

PREVIOUS RECORD OF A CORPORATE ENTITY

When determining the terms and conditions of registration, Tarion looks to the financial background of the corporate entity, and in particular the prior behavior of the company's officers and directors, to see if their actions comply with the law and with honesty and integrity.

Where a corporation is applying for registration and its officers and directors were officers and directors of a prior registrant, Tarion will look to the activities of those officers and directors of prior registrants to determine what terms and conditions should pertain to the current application for registration.

If they were officers and directors of a prior registrant with a clean record, then normal terms and conditions of registration for the current applicant will ensue.

If, however, the registrant has a previous claims history, then Tarion may impose additional security terms against such new entities because of the prior record of the officers and directors.

However, if the officers and directors of a current applicant were never officers and directors of a prior registrant, then whatever they did in respect of past activities should not be used against the current registrant.

For example, if someone is found guilty of driving under the influence, and then subsequently, makes application as an officer and director of a corporate entity, for registration, that prior conviction should not be used to prevent the current registrant from being registered. The DUI is not a relevant activity, and even though it may seem to be a non-compliance with the law, it is not relevant to the current application to build and sell new homes.

To the extent that Tarion does refuse registration based on prior activities, not related to construction, it should not be permitted to do so. If this is permitted then activities and criteria that have nothing to do with an applicant's ability to build are being used to deny such registration.

In my opinion, Tarion's authority does not *extend* to any such considerations, and neither does the jurisdiction of the Licence Appeal Tribunal.

ABSENCE OF DUE PROCESS

It is becoming increasingly apparent that Tarion uses various sections of the regulations *in combination* to deny due process to many registered builders, despite provisions providing for rights of appeal, to the Licence Appeal Tribunal and to the Builders Arbitration Forum ("BAF") in the legislation. For example, a builder who is "unable and unwilling to perform its warranty obligations" for any reason is deemed by Tarion to be a builder not "in good standing" and as such cannot seek to arbitrate a dispute even if the owner will not let the builder repair. Therefore, an owner, who prefers a cash settlement, can simply advise Tarion they cannot deal with the builder, and the builder is deemed "unable and unwilling" to comply with warranty obligations and has no status to proceed to BAF.

Furthermore, Tarion, when it decides a builder is unable and unwilling, can go ahead and settle the claim, invoice the builder, and deduct the amount of the settlement from any builder security it holds, all without the ability of the builder to seek arbitration or appeal to the Licence Appeal Tribunal and thereby challenge the actions of Tarion.

These actions on the part of Tarion have reduced a builders' access to due process in a fundamental way. Tarion purports to steamroll over builders' rights and deny them a forum to challenge Tarion's unilateral actions. The builder appears to have no recourse to defend itself.

If a builder can no longer challenge a Warranty Assessment Report through arbitration, then the whole conciliation process, whereby a builder is given notice before the conciliation, and further time after to repair the item, becomes meaningless.

All registered builders go to considerable lengths to obtain registration, enroll homes and build them. Tarion's actions permit homeowners to deal directly with Tarion, so they can obtain a cash settlement, no matter what the equities may be. If this is the direction Tarion appears to be taking on a more and more frequent basis, then Tarion has stopped making any effort to appear even handed between builders and homeowners; builders need to stand up/for their rights as follows:

Builders can sue Tarion for transferring money from builders' security; they can bring proceedings to compel Tarion to provide a proposal to revoke, so the builder can appeal to LAT. A builder can bring an Application for Judicial Review to require Tarion to comply with its mandate under *The Act* to permit access to both LAT and to BAF, and to provide reasonable terms and conditions of registration. Builders can apply directly to both LAT and BAF to require a hearing if such builders are being blocked by Tarion.

Builders have an obligation to defend their status and livelihood against Tarion's often strong-armed administration of the Act.

TARION INSPECTORS

Tarion employs a number of inspectors who investigate the sale of new homes in the province of Ontario to determine whether or not all new homes have been enrolled by a vendor pursuant to the Act and Regulations.

Tarion can obtain on demand a copy of every building permit for new homes in Ontario from the local Municipal Building Department. Tarion reviews these building permits to determine what homes are being constructed and sold under what Tarion believes is warranty coverage.

Tarion investigators can contact individuals and have them attend a meeting at Tarion's head office. The meetings are taped and if the information is useful, Tarion will rely upon it to lay charges, and such evidence may be used in any subsequent proceedings.

In none of these circumstances is the individual shown the transcript, or given the right to challenge or explain it. No offer is made to have the individual sign-off on the accuracy of the transcript. There is no independent transcriber present.

There is no provision in the Act and Regulations conferring such authority on an investigator to act in such a fashion and there appears to be no protection for these individuals from Tarion's actions.

To me this is an intrusion on the rights of builders, and offends their right to due process.

My practice is to object to any and all such transcripts obtained this way. However, the best practice in my opinion and the advice I give is that any person summoned to Tarion for a discussion or a meeting, should never agree to be taped nor should they be alone in the meeting room with Tarion representatives.

It is necessary for builders, vendors and anyone dealing with Tarion to remain vigilant and ensure their best interests are protected.

CONCLUSIONS

Tarion has clearly extended its control over builders both large and small in the province of Ontario and has thereby severely curtailed a builders' right under the Act and Regulations to challenge Tarion's decisions. Tarion has become virtually unopposed in determinations regarding terms of registration or what constitutes valid breaches of warranty in what should be an open and easily available access to LAT or BAF which are suppose to protect builders from arbitrary, unilateral decisions of Tarion.

Builders are not a sufficiently aware of their own ability to challenge Tarion's decision making authority. They should stand up to Tarion at every opportunity to prevent being deprived of their rights and their livelihood as builders.

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