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The following topics are covered in this publication:

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The Definition of "Builder"

Tarion is particularly focused on ensuring that all builders of new homes are registered and the homes enrolled in the Plan. To that end, Tarion has been diligent in prosecuting any builder it thinks has not enrolled a home or has not registered with Tarion. However, the only test for the requirement of registration and enrollment of any home by a builder, is that the home be new, not previously occupied and built for sale to a new home buyer.

In the recent case of *Tarion Warranty Corporation v. Boros* (May 13, 2011), the Court of Appeal determined that not all builders of new homes need to register or enroll. It all depends on the initial intention of the builder. In particular, if the initial intention of the builder when the building permit was taken out was to occupy the home, which intention subsequently changed, then the fact that the home was sold to a purchaser thereafter, when the builder later decided to sell the home, did not mean the builder was required to register or enroll the home.

Therefore, if the initial intention of a builder is to build the home for occupancy, or rental, or for any other purpose that is not for the purpose of sale at the time the building permit is taken out, then that builder need not register, and correspondingly, need not enroll the home or homes with Tarion, should the builder subsequently change his mind, and offers the home or project for sale.

In addition, the Court of Appeal adopted the statements of counsel for Tarion at the trial and appeal levels to the effect that such homes, if completed and sold to third party purchasers, will still be entitled to warranty coverage from Tarion, even if there exists no builder or vendor, as defined in the Act.

There have been builders who were charged with building without registration or enrollment, and who argued that their initial intention changed after they obtained the building permit, from intending to occupy to intending to sell, and in those instances the charges were either dropped at the pre-trial stage or they were subsequently acquitted at trial.

However, In the Boros case, a similar acquittal was taken to the Court of Appeal by Tarion and the Court of Appeal stated that if all such builders were supposed to be registered and to enroll homes, despite no initial intention to sell, then the legislation would simply have said that "anyone who completes a home for sale" must be registered and enrolled. Without that wording in the legislation, the intention of the builder at the beginning is all important in determining the question of registration and enrollment.
Tarion sought leave to appeal the Boros decision to the Supreme Court of Canada, but was denied. Tarion may fear that the Court of Appeal's decision means builders, who obtain building permits to build homes for rental purposes, for occupancy purposes or for investment purposes and then change their minds and sell the homes, need not register or enroll such homes. Tarion may also fear that the decision means that Tarion itself guarantees coverage to the ultimate purchaser even where there is no defined "vendor" or "builder". Tarion may be the author of its own procedures. For example, Tarion increasingly acts as if Tarion provides the warranty coverage itself. It often acts unilaterally not only to provide warranty coverage, but to leave registered builders and vendors out of the claims process when owners make claims for deficiencies to Tarion. Tarion often settles disputes without adequate input, or the agreement of the builder.

Tarion Assumes Warranty Coverage

It appears Tarion has lost the capacity to distinguish between the warranties provided by vendors and builders under the Act and warranties that may be guaranteed by Tarion in circumstances where the builder is unable and/or unwilling to honor such warranties. Tarion, frequently, intercedes and cash settles claims even where the registrant is prepared to remedy deficiencies. Tarion cannot override provisions of the Act regarding notice to the builder or interfere with the builders repair rights, unless a finding is made against the builder that the builder is unable and/or unwilling to repair or the builder is bankrupt or insolvent.

Nowadays, Tarion increasingly acts as if the warranty is their warranty and protection is guaranteed by them no matter what the status of the builder may be or its intention regarding repairing deficiencies and mitigating its damages.

This thought process is very evident in a number of cases where Tarion has tried to unilaterally process claims made by owners of new homes, either before or after conciliation, without adequate input from or notice to the builder. When the process is completed and settlement is made to the owner by Tarion, it then invoices the registrant for the whole cost of the claim it settled, under threat that it will revoke the registrant and notify Equifax if the registrant does not pay the invoice in full which in turn destroys the builder's credit rating. In addition, Tarion threatens to sue the builder for the invoice amount which includes an administrative fee of 15% plus HST.

In a recent case, Tarion sued for the settlement amount, but offered to abandon the claim when faced with the argument by the builder that it had been unlawfully left out of the settlement process. The builder had not been advised of the conciliation, had been told it need do nothing while funds were still owed to it by the owner. Out of the blue, the builder was invoiced from Tarion for $125,000 to be paid under threat of revocation and credit disruption.

I have argued that in many such instances, if the issue is one of breach of warranty, it should not be a matter of threatening the registration of the builder, but at best it should be characterized as a legal dispute, where the registrant can defend by asserting it was never given any opportunity to remediate or mitigate its damages. In such circumstances, Tarion has frequently agreed to withdraw registration proceedings in favour of a lawsuit. In most instances, such litigation settles for a fraction of what Tarion paid out to the homeowners' and the registrants' registration is not affected.

There is an additional aspect to Tarion's unilateral actions. In many situations, Tarion's handling of the file has been detrimental to the registrant's reputation and has ignored the builder's rights and obligations under the legislation. In a number of instances, lawsuits have now been commenced against Tarion for negligence and breach of contract (the vendor and builder agreements) and for ignoring the provisions of the Act and Regulations that provide to the registrant the opportunity to deal with deficiency claims without the interference of Tarion, and to mitigate their damages.

Tarion should not be permitted to step in and stand in the shoes of any registrant who is prepared to deal with homeowners in remedying complaints. To the extent that Tarion does so, it overrides the provisions of the Act and the Regulations which provide primary responsibility to the vendor or the builder for dealing with homeowners. In a recent case, Tarion took over dealing with the claim made by a Condominium Corporation claiming construction deficiencies to the common elements. It ignored the vendor's proposed repair proposals and made its own settlement offer. The Condominium Corporation rejected both. What was left was a vendor whose name has been tarnished by Tarion. Tarion is now faced with a Condominium Corporation that refuses to settle with Tarion and the inability of the vendor to repair the deficiencies and thereafter, provide a one-year warranty as prescribed under the legislation.

If Tarion had advised the Condominium Corporation at the beginning that the vendor was entitled to remedy the deficiencies, then such deficiencies would have been remedied long ago with a guarantee of the work for a one year period. Instead, the Condominium Corporation has sued Tarion, the vendor and numerous others and in turn, Tarion has sued the vendor and builder and a number of other Defendants. In addition, the Condominium Corporation has appealed Tarion's settlement proposal to the Licence Appeal Tribunal and Tarion has added the vendor to that proceeding, all in circumstances where the vendor was prepared to resolve the initial claim, had a plan, and was ready to repair.

Tarion's interference with process whereby a builder obtains a building permit, builds a home and sells it to a third party purchaser and thereafter, repairs legitimate deficiencies by way of after sales service, has compromised such process to the detriment of the registrant. In addition, the process has become so complicated and expensive that many builders are discouraged from building because the terms and conditions of the registration imposed by Tarion have become so onerous. Where a single warranted item results in a chargeable conciliation, it affects the builder's reputation indefinitely. The result pushes smaller builders out of the market, particularly in difficult economic times.

For all such small builders and vendors the remedy is to resist Tarion either at the arbitration level, or challenge Tarion's terms and conditions of registration or renewal, rather than simply give in to Tarion's threats. Should Tarion settle a claim, then invoice and sue a registrant the registrant should not be penalized just because there exists a valid deficiency dispute. There may

not only be a defence, but a damage claim may exist against Tarion for destroying the builder's reputation where the builder could not repair because Tarion overrode the builder's rights and shut it out of the process.

Security

The issue of security has become a critical one for most builders for the following reasons:

Firstly, Tarion has raised the limits of coverage to $300,000 per home for deficiencies, and to $40,000 on deposit refund claims from the previous limit of $150,000 for deficiencies, and $20,000 for deposit refund claims. The rationale is that most claims do not come close to $300,000 and most deposits are not $40,000, therefore, increasing the limits without increasing the enrollment fee or Tarion's risk. However, Tarion has covered any possibility of any increased risk, by raising the security requirements in an arbitrary fashion such that builders who originally paid no security may frequently now pay $5,000 per home when they enroll the home, and those who were required to pay $5,000 or $10,000 in security, are now frequently finding that they have to pay double that for each enrolled home in order that their registration is continued or renewed on an annual basis. This leaves ordinary builders paying so much security to Tarion, which security is now held for two years, that many builders cannot continue to build. I am currently involved in negotiating reductions in such security requirements for several builders on the basis that increasing such security requirements is not reasonable. Any increase in security imposed by Tarion must pass the test of reasonableness, before it can be increased, especially, in circumstances where even without the security; the enrolment fees cover the risk.

Secondly, Tarion's propensity to pay a claim or settle a claim that the builder disagrees with or challenges, results in Tarion then immediately drawing on the security to repay itself.

I act for a number of builders who have sued Tarion for the refund for all or part of such security seized by Tarion, on the basis that the deficiencies could have been repaired by the builder for a fraction of the settlement cost, and that therefore such settlement is grossly inflated.

Tarion often adopts a policy whereby Tarion is quick to settle and pay such claims, because they know that whatever invoice they send to the builders, if not paid by the builders forthwith, can be seized from security held by Tarion, under threat of revocation procedures or communication of the debt to Equifax, thereby destroying the builders' credit rating indefinitely.

Tarion should not be permitted to retain the large amounts of security it demands as a common practice, nor use such security to pay itself if the security seized exceeds the cost of the repairs, had the builder done such repairs.

The security must be spent in a prudent fashion, because Tarion has a fiduciary obligation to either have the work done by a sub-contractor and the contractor paid from by the security, or allow the builder to undertake the repairs as mitigation of damages. The security is held in trust and cannot be seized or spent without a full accounting any more than a power of sale Mortgage can sell a home for an arbitrary amount, or ignore the fact it must get the best price for the owner.

Equifax

When Tarion sends out an invoice to a builder after it has settled a claim with the homeowner, it communicates the existence of the unpaid invoice to Equifax which detrimentally affects the credit rating of the builder indefinitely.

This is a powerful tool utilized by Tarion to persuade builders to pay all invoices sent to them by Tarion for whatever sums set out in the invoice, in order to avoid Tarion notifying Equifax.

Such contact to Equifax by Tarion is not found in the legislation. However, from a practical point of view, such communication has a significant negative financial impact on builders whether small, medium, or large.

Indeed, builders see in all Tarion's letters enclosing invoices to them that Tarion threatens the builder with the fact that Equifax will be notified unless the invoice is not paid in full forthwith.

This defeats the value of the builder's right to arbitrate.

The Builder's Arbitration Forum (BAF) was designed to avoid having the builder's registration challenged for disagreeing with a breach of warranty determination made by Tarion. However, if the invoice is not paid because the matter is being challenged at BAF, then the BAF proceedings do not prevent the black mark given to builder's credit rating by such communication to Equifax.

Tarion counts on this fact to extract quick payment from the registrants, relying on the fear of the builder being faced with a downgraded credit rating in these difficult economic times.

In my view, if a builder disagrees with an invoice or with a conciliation, Tarion should be notified by the builder that it proposes to either challenge the conciliation by way of arbitration, during which, no notification of Equifax should occur, or that the builder is not arbitrating, but challenges the quantity of the invoice, and therefore Equifax should not be notified until the dispute with respect to the amount has been resolved in either Court or other proceedings.

For Example, Tarion can institute an action under the Simplified Rules for claims up to $100,000 and Equifax should not be notified until that matter has been resolved, otherwise, Tarion has damaged the name of the builder by notifying Equifax before the builder has an opportunity to defend itself.

I am currently involved in a case where the builder settled with Tarion and Tarion failed to properly notify Equifax of the account having been fully settled and paid, and as a result, the builder's reputation and credit rating continued to be noted by Equifax as unacceptable and as a result, the builder lost numerous potential business deals thereafter.

In that particular case, Tarion was sued by the builder and Tarion has filed a third party claim against Equifax in an effort to try and shift the blame to Equifax.

Bulletin No. 42

With respect to Bulletin No. 42 which discusses *inter alia* the issue of access by the builder to correct deficiencies both before and after conciliation and the notice that must be provided to Tarion and to the homeowner about request for access, Tarion has always taken a very strict and technical approach to the notice requirements. It has said that unless there are three written requests for access prior to the conciliation and one request for access after conciliation, which requirements have been denied by the homeowners, then the issue of denial of access cannot be raised as a defence for not correcting deficiencies.

In a recent Arbitration the builder made an initial written request for access prior to the conciliation and was told by the homeowner that access would be denied to him.

Tarion took the position that there were insufficient written requests for access made to the homeowner. The Arbitrator determined that once a builder is denied access after a request in writing, there is no point in asking for access, again, because the answer had been clear in the initial denial. The Arbitrator ruled that it is not necessary to make numerous efforts to gain access in a climate where access was never going to be allowed by the homeowner. Because of this ruling, all the claims that were found warranted in the conciliation were denied by the Arbitrator either because they were not warranty items or because the builder simply did not have an opportunity to repair them. This means that refusal to grant access voids the warranty.

It is not necessary to follow every line of Bulletin 42 to rely on the defence of denial of access in arbitration proceedings. In addition, the builder should not be shy in defending against breach of warranty claims found in the conciliations which he believes are wrong, because in my experience, Arbitrators are becoming less reluctant to blindly follow Tarion's position that all breaches of warranty under a conciliation should be upheld.

It is not for Tarion to interfere with warranty obligations and the rights of registrants to attempt to make repairs to valid deficiencies. Tarion is too quick to find breaches of warranty and impose chargeable conciliations which are so detrimental to builders.

In a recent case, the builder was in the process of doing remedial work with respect to certain deficiencies in a sub-division when Tarion attempted to exclude the builder from the site to complete the repairs. The builder threatened to sue Tarion if it continued to interfere.

This is the type of action by Tarion that defeats the purpose of the Act and the Regulations. It exposes builders to damages from the homeowners for not completing repairs they have begun, and can result in revocation proceedings by Tarion on the issue of failing to comply with breaches of warranty to Tarion's satisfaction. In addition, it ruins the reputation of the builder in the community and it gives rise to the possibility of Tarion cash settling with owners for large sums of money that are out of proportion to what the builder could repair for, thereby causing financial distress to the builder or the loss of its security.

Such actions by Tarion must be met with the refusal to allow Tarion to interfere, followed by action against Tarion for breach of contract, negligence, and non compliance with the Act.

The provisions of the Act and Regulations are not meant to interfere with contractual and other rights that builders have to mitigate their damages or deal directly with homeowners to effect

settlement or repair. Tarion's right to intercede is limited to obvious cases of builder insolvency or neglect and no other.

Arbitration

In a recent discussion paper dated January 23, 2012, Tarion is proposing to change the arbitration procedures in an effort to streamline the arbitration process. It wants to limit evidence available to builders appealing unfavourable warranty decisions on a conciliation to the evidence known to Tarion at the time of such conciliation. This is totally unacceptable. Tarion is often unprepared at a conciliation, does a cursory inspection, and labels deficiencies as breaches of warranty as it sees fit. At an arbitration, the builder is entitled to dispute the finding by relying on his own evidence. Tarion wants to prevent the introduction of such evidence. This negates the point of an appeal or arbitration and reinforces the fact that Tarion need not justify its decision based on all of the relevant evidence. It is not for the builder to anticipate what Tarion may find warranted. Tarion must defend its decision. All evidence must be available. Tarion's proposal to limit the evidence renders the arbitration process moot because the builder cannot adduce evidence to refute Tarion's decision. If Tarion is not sure of its decision, it should not be making it. If the evidence is limited to what Tarion knows, few arbitrations would be of any use to any builder.

Arbitrations are designed to move warranty disputes to another category, rather than have them proceed before the Licence Appeal Tribunal. Full evidence should be allowed because that is the essence of a hearing at first instance which occurs at an arbitration or before the Licence Appeal Tribunal.

Conclusion

Tarion counts on prevailing in most disputes with builders because of its size and its economic resources. However, in many instances, the builder's who challenge Tarion are frequently successful and should not be afraid to protect their reputation by standing up to Tarion.

I frequently hear from builders who say "if I take issue with Tarion, then I will be a marked builder"; however, that has not been my experience. All builders are entitled to a level playing field and Tarion has no mandate to treat one builder differently from another. It is bound by the decisions of Arbitrators, Judges, or Tribunal members in any contested proceedings and all most builders need is to ensure they obtain a level playing field in such proceedings to equalize the odds.

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