

# Newsletter

Builder Issues with Tarion

November 2015

## THE RIGHT TO APPEAL WARRANTY DECISIONS

### INTRODUCTION

The most topical issue which builders face in dealing with Tarion these days regarding their registration and ongoing status with Tarion, concerns Tarion's efforts to circumvent the statutory procedures that afford to registrants the right to appeal Tarion's warranty decisions to the Builders Arbitration Forum ("BAF").

### BACKGROUND

Generally all registered builders must renew their registration on an annual basis and remain in good standing, during such registration period.

Tarion is constantly monitoring the activities of all registered builders while builders strive to ensure that they can operate effectively within the statutory scheme.

When a builder becomes a registrant, such registrant must demonstrate technical competence, financial ability and willingness to undertake after sales service.

Commensurate with their responsibilities, the "Ontario New Home Warranties Plan Act" (the Act) provides to registrants certain rights to protect them from arbitrary or unilateral action on the part of Tarion.

For example the Act requires Tarion to issue a "Notice of Proposal" if it seeks to revoke the registration of a builder, which can be appealed by the builder to the Licence Appeal Tribunal. In addition, the Act grants to owners and condominium corporations the right to appeal an adverse warranty decision to the Licence Appeal Tribunal.

However, no such corresponding right regarding adverse warranty decisions made by Tarion lies with the builder, except through The Builders Arbitration Forum (BAF), established pursuant to Bulletin 41.

### BUILDERS ARBITRATION FORUM

BAF was created to provide a venue for builders who disagree with Tarion's Warranty Assessment Reports, to appeal adverse decisions to this forum, and to have disputes as to warranted items determined by an arbitrator, rather than having every dispute regarding warranty coverage become the subject matter of a hearing before the Licence Appeal Tribunal involving the builders registration.

The scheme of the legislation is such that Tarion cannot act unilaterally, either to deny registration or find a builder in breach of warranty, without providing the right of appeal to the Licence Appeal Tribunal ("LAT") in the case of registration, or to BAF in the case of an adverse breach of warranty decision.

However, Tarion is now using a procedure whereby it can successfully prevent a builder from appealing an adverse Warranty Assessment Report to the Builders Arbitration Forum by determining, unilaterally, that a builder is "unable and unwilling" to perform its warranty obligations, which decision is determined exclusively by Tarion in the absence of a hearing, with no right of appeal.

In order for a builder to appeal a Warranty Assessment Report to the Builders Arbitration Forum, it must be a member in good standing. If there had been a breach of warranty finding or failure to pay warranty claims, where Tarion has found the builder "unable and unwilling", then such builder does not have the right to appeal to BAF. The builder cannot challenge the finding of being designated "unable and unwilling", and therefore has no right to challenge findings of breach of warranty or question cash settlements, paid by Tarion to the owners which Tarion then invoices to the builder.

The procedure for determining that a builder is unable and unwilling has come under **criticism from the Ontario Ombudsman's Office**; it has released a report to Tarion in which it is highly critical of the way in which those decisions are made by Tarion, including the arbitrary nature of such decisions made in the absence of the builder, which determination cannot be appealed.

This end run around the statutory regulations for providing appeal rights to the builder exceeds the jurisdiction of Tarion and amounts to a denial of natural justice. Tarion utilizes a section in the regulations to avoid having to defend its decisions against builders who wish to challenge these adverse warranty decisions.

Tarion has advised that it is looking at its procedures regarding finding builders "unable and unwilling", to see if they warrant any change, in light of the Ombudsman's statement. Whether or not Tarion actually changes its procedures, so that the designation of unable and unwilling does not preclude a right to appeal to BAF remains to be seen.

Unless builders have every opportunity to appeal Warranty Assessment Reports to the Builders Arbitration Forum, then Tarion answers to no one for these decisions and the builder has no recourse against Tarion's unilateral actions. Under these circumstances, the BAF process becomes meaningless.

This offends the statutory scheme and the procedures that have been implemented to ensure procedural fairness to all builders in the Province of Ontario, commensurate with the statutory responsibilities they have as registrants.