

WAIVER OF INDEMNITY FROM BUILDERS

WHAT THIS BULLETIN IS ABOUT

Tarion Warranty Corporation (“Tarion”) is entitled to recover from builders¹ amounts paid out of the Guarantee Fund in respect of warranted claims made by homeowners. In certain circumstances where a claim has been originally deemed “not warranted” by Tarion but the Licence Appeal Tribunal (“LAT”) reverses Tarion’s finding and holds that the item is warranted, the Registrar has the discretion to waive Tarion’s statutory and contractual rights of indemnity against a builder. This Bulletin sets out the guidelines under which Tarion’s Registrar shall exercise his or her discretion in such cases.

BACKGROUND

Builders are obligated, under the *Ontario New Home Warranties Plan Act* (the “Act”) and under their Vendor and Builder Agreements with Tarion, to indemnify Tarion for losses resulting from the builder’s breach of warranty. This indemnification obligation includes situations where Tarion initially determines that a homeowner claim is “not warranted”, but its decision is reversed by LAT on appeal by the homeowner.

On January 24, 2002, the Board of Directors of Tarion approved a pilot project to test a formal framework under which Tarion would exercise its discretion to waive, in certain circumstances, its right to recover from a builder where LAT overturned Tarion’s ruling in favour of the builder. The pilot project was subject to certain conditions: it applied to claims related primarily to workmanship; builders had to be in good standing with Tarion, cooperate with Tarion and provide full disclosure during the conciliation and appeals process. Recovery would not be waived where the builder’s conduct in the conciliation and appeal process was not fully co-operative, and for common elements claims, the waiver was capped at \$20,000 for claims relating to a condominium’s common elements.

The pilot project applied to conciliations conducted between May 1, 2002 and April 30, 2003. On April 8, 2004, the Board decided to make the framework a permanent policy by amending the Regulations under the Act and creating this Builder Bulletin.

¹ In this Bulletin “**builder**” refers to a builder or vendor as defined in the *Ontario New Home Warranties Plan Act*.

GUIDELINES FOR EXERCISE OF REGISTRAR'S DISCRETION

The Registrar shall exercise his or her discretion to grant a waiver of indemnity if (a) the builder meets the criteria set out in this Bulletin and if (b) the item or condition in issue also meets the criteria set out in this Bulletin:

A) A builder is eligible for the application of the Registrar's discretion to waive indemnity when:

1. The builder, as well as any associated builder², is in full compliance with the Act and its Regulations, Builder Bulletins and any agreement between Tarion and the builder from the date of the conciliation that gave rise to the LAT decision to the later of the date of the LAT decision overturning Tarion's ruling and the decision of the court on appeal of the LAT decision, if appealed.
2. The conciliation that led to the LAT appeal was designated as "non-chargeable"³ by Tarion.
3. The LAT decision is not attributable in whole or in part to the builder's conduct towards the homeowner (for example, conduct such as a lack of communication, misrepresentation or other unreasonable activity).
4. The builder has fully and completely co-operated with Tarion throughout the conciliation and appeal process and has participated in the conciliation and appeal process as required by Tarion. For example, the builder must have:
 - provided full disclosure to Tarion of all information and documents relevant to determining whether the contested item should be warranted. The disclosure obligation begins before conciliation and continues throughout the appeal process, including the LAT hearing itself.
 - attended the conciliation inspection (or cooperated with the desk assessment) that gave rise to the LAT appeal. If unable to attend for reasons beyond his or her control, the builder must have given advance written notice to Tarion, with an explanation of why attendance was not possible, the builder's position on each of the items to be conciliated, and all reasonable supporting documentation and information.

² An "associated builder" is a builder that has a common controlling principal. A controlling principal is a person or combination of persons that either alone or together have a direct or indirect controlling interest in a builder such that the person or persons can be characterized as the operating or controlling mind of the builder.

³ Please refer to Builder Bulletin 42 (Revised) for a definition of "conciliation", "chargeable conciliation" and exceptions to chargeability.

- cooperated with Tarion's counsel in preparation for the LAT proceeding, by providing information and documents as requested and by assisting in securing the attendance of sub-trades, real estate agents or other persons associated with the builder who might be required to testify.
- attended and participated in the LAT proceedings and complied with the LAT rules, once the builder is added as a party to the LAT proceedings.

B) An item or condition is eligible for the application of the Registrar's discretion to waive indemnity when:

1. Either,
 - (i) the item or condition was determined by Tarion to be "not warranted" or,
 - (ii) the item or condition was determined by Tarion to be "warranted", but the claim is denied by Tarion on the grounds that the homeowner refused access to the builder to do the repairs because the homeowner disagreed with the method proposed by the builder and approved by Tarion. If LAT accepts the homeowner's repair method over the builder's repair method, the amount of the waiver will be the difference between the repair method ordered by LAT and the builder's repair method, if any; and
2. The item or condition was found to be warranted by LAT (and LAT's decision in this regard is upheld by Divisional Court if there is a further appeal); and
3. LAT rules that the item or condition falls under one of the following warranties:
 - One year warranty for work and materials and fitness for habitation;
 - One year warranty for constructing in accordance with the *Ontario Building Code* ("OBC");
 - Two year warranty that construction is free from violations of the OBC affecting health and safety;
 - Two year warranty against water penetration in the basement, foundation or building envelope;
 - Two year warranty against defects in the electrical, plumbing, and heating delivery and distribution systems; exterior cladding; and
 - Major structural defect warranty.

An item or condition is not eligible for the application of the Registrar's discretion to waive indemnity when:

1. The item does not meet all of the requirements in (B) above; or
2. Additional information is disclosed to Tarion after conciliation which materially impacts the determination of warranty coverage⁴; or
3. The item involves the substitution warranty, the delayed closing and occupancy warranty, disputes about compliance with the statutory definitions of "vendor", "builder" "owner" and "home", and compliance with statutory notice requirements and warranty periods; or
4. The item involves a claim for deposit protection or damages arising from the builder's failure to perform a construction contract; or
5. The item involves a dispute related to a holdback or other monies owed or allegedly owed by the homeowner to the builder; or
6. The application of the waiver to the item in issue will result in a material and adverse impact on the Guarantee Fund administered by Tarion.

CONDOMINIUM COMMON ELEMENTS

An item or condition in a decision dealing with condominium common elements shall be eligible for the application of the Registrar's discretion to waive indemnity if it meets all the requirements as set out in this Bulletin, subject to an aggregate maximum waiver of \$20,000 for claims relating to the condominium's common elements.

NOTIFICATION TO BUILDER OF TARION'S DETERMINATION TO GRANT OR NOT TO GRANT WAIVER

After receipt of a LAT decision to which this Bulletin applies, the Registrar shall determine, using the guidelines set out in this Bulletin, whether or not to waive Tarion's right to indemnity and will notify the builder in writing of the decision. The waiver will not be finalized until all applicable appeal periods have expired, and the application of the waiver will be conditional upon the builder's continued compliance with this Bulletin's requirements throughout any appeals.

⁴ This exclusion applies, for example, where a defect that was reported and ruled by Tarion to be not warranted based on workmanship, is later shown to be warranted based on an OBC violation that was not apparent at the time of the conciliation; or where a latent defect is ruled by Tarion to be not warranted, but is later shown to be a valid warranty claim based upon an acceptable expert report not available at the time of the conciliation.

If the waiver is not granted, the builder will be required to comply with the LAT decision. If the builder fails to comply, Tarion will compensate the homeowner according to LAT's order, or perform the repairs, and invoice the builder.

If the waiver is granted, Tarion will proceed directly to comply with the LAT decision by arranging for repairs or otherwise compensating the homeowner. The builder will not be invoiced for any amounts to which the waiver of indemnity applies.