

**MAJOR STRUCTURAL DEFECT WARRANTY  
INTERPRETATION GUIDELINE**

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TARION WARRANTY CORPORATION

**July 1, 2014**

## APPLICATION

This guideline<sup>1</sup> explains how Tarion will assess major structural defect (“MSD”) claims for:

- All freehold homes where the parties signed the purchase agreement or the construction contract on or after July 1, 2012.
- All condominium units and corresponding common elements in a condominium project where the first purchase agreement for a home in the condominium project was signed on or after July 1, 2012.

The guideline does not have the force of law and is not a substitute for the law. The guideline reflects how Tarion will interpret cases and is meant to provide certainty to readers as to how Tarion will assess claims. The effect of this guideline may be changed by formal policy changes, legislative amendments, or tribunal and court decisions that occur after the date on which it was published.

## KEY CONCEPTS

The coverage for MSD claims applies to a “building” and in most cases will focus on defects that relate to a “structural load-bearing element”. These terms are described generally as follows:

- a) “building” means the principal residential structure including, in the case of condominiums, common element facilities located within the building. Accordingly, a “building” includes a house and a condominium building, but excludes free standing structures that are not part of the building, such as fences, swimming pools and retaining walls that do not contribute to the buildings’ structural integrity.
- b) “structural load-bearing element” means an element of a building that carries, resists, transfers or distributes vertical or lateral loads in addition to its own weight. This would include both dead loads (some or all of the permanent structural and non-structural components of a building) as well as live loads (e.g., people, furniture, snow, wind, and seismic). It also includes resisting lateral loads such as soil against a basement foundation wall.

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<sup>1</sup> Please note, if there is any conflict or inconsistency between this guideline and the *Ontario New Home Warranties Plan Act* (the “ONHWP Act”) or Builder Bulletin 24, the provisions of the ONHWP Act or Builder Bulletin 24, as applicable, shall prevail.

The defined term is used to distinguish between parts of a building that are primarily structural – such as foundation walls and floor joists – and parts that are non-structural – such as mechanical equipment or roof shingles. A list of building elements that may be “structural load-bearing” includes:

- footings
- foundation walls
- pads
- piles
- braces
- plates
- teleposts
- beams
- joists
- load-bearing floor slab
- structural walls
- rafters
- roof trusses
- columns

## THE MAJOR STRUCTURAL DEFECT TESTS

An MSD is, generally speaking, a defect in work or materials that meets one or more of three tests: failure, function or use. These tests are described in the following sections.

### FAILURE TEST

A defect in work or materials will be considered an MSD if the defect has resulted in the failure of a structural load-bearing element of a building. Actual failure is required to satisfy this test.

Failure of a part of a building that is not a structural load-bearing element would not be covered, regardless of how significant the defect is. For example, a basement floor slab that is not connected to the structure of the building is not load-bearing, so it would not be an MSD under the *failure test* even if it has failed (however, under certain circumstances, it may be an MSD under the *use test*).

If there is a dispute as to whether a specific building component is a structural load-bearing element, this may be determined by obtaining an expert opinion.

### FUNCTION TEST

A defect in work or materials will be considered an MSD if the defect materially and adversely affects the load-bearing function of a structural load-bearing element.

Actual or imminent failure of the structural load-bearing element is not required to satisfy the function test. The test will be met if the element’s load-bearing function has been materially compromised.

### **What is a load-bearing function?**

The load-bearing function of a building element is the ability of that element to carry, resist, transfer or distribute applicable loads for the usual and ordinary service life of the element.

### **What is a material and adverse effect?**

Not every defect that adversely affects the load-bearing function of a building element is covered by the MSD warranty. The adverse effect must be material, meaning there is either: (i) a present compromise in load-bearing strength; or (ii) a defect that affects the ordinary service life of the structural element.

The intention is to limit MSD coverage to defects that significantly undermine the structural load-bearing function of the element.

### ***Compromise in load-bearing capacity and service life***

An expert opinion may be obtained in cases where there is a dispute as to the expected or actual capacity of a structural load-bearing element.

If there is a dispute as to the ordinary service life of a structural load-bearing element and/or whether the service life has been compromised, this may also be determined by obtaining an expert opinion.

## **USE TEST**

A defect in work or materials will be considered an MSD if it materially and adversely affects the use of a significant portion of the building for usual and ordinary purposes of a residential dwelling (subject to any specific use provisions set out in the purchase agreement for the home).

The use test has two elements: (i) a material and adverse effect on *use* as a residential dwelling; and (ii) that affects a *significant portion* of the home.

### **What is use as a residential dwelling?**

A defect in work or materials that materially and adversely affects the use of the building *for the normal purposes of a residential dwelling* will satisfy the use test.

Unlike the failure and function tests, this test is not restricted to load-bearing issues. For example, severe mould or water penetration could materially and adversely affect use and meet this test.

Interference with a homeowner's specific desired use that is not a normal purpose of a residential dwelling, such as a commercial use or a use related to a specific hobby, would not meet the test unless that specific use had been set out in the purchase agreement.

### **What is a significant portion of the building?**

The material adverse effect on the home must also affect a "significant portion of a building," which can be determined by the size or percentage of available area of the home. It can also be determined by loss of functionality (e.g., if an important living space within the home is unusable, this may meet the test, whereas an unusable exterior balcony or unfinished storage space would not meet the test).

In this case, Tarion must determine whether a reasonable person would consider the portion of the building that is affected to be significant. Tarion's guideline for determining a significant portion of a building under this test is either: (i) an adverse impact that affects at least 25% of the total liveable area of the home (including unfinished basement); or (ii) an impact that entirely deprives the homeowner of the use of an area of the building that is required for residential occupancy.

### ***Examples of when the entire home is affected:***

- The presence of toxic mould contamination throughout the home that renders the entire home uninhabitable
- A home that is unsafe (danger of electric shock) due to excessive water around electrical fixtures, junction boxes or fuse panels as a result of a builder defect

### ***Examples of portions of the home that may be considered significant due to their function:***

- The kitchen, which is essential for food preparation and cooking, is not useable
- The sanitation system, essential for moving sanitary waste out of the building, is not functioning properly
- Stairs to the second floor, which is essential for access to and from second floor, are not usable
- The entire basement is unusable, where the basement is 25% or more of the total living space of the home.

***Examples of what may not be considered a significant portion of a home and not covered by the MSD warranty:***

- One bedroom (where there is more than one)
- One bathroom (where there is more than one)
- A den, a closet, an attic, and family room
- Exterior landscaping and fences
- The driveway and walkways
- Balconies, decks and exterior unenclosed porches
- The garage
- A pool or hot tub
- Structures not attached to the home (e.g., garden shed)
- Condominium common elements and amenities such as parking areas and recreation facilities

**WHAT ARE THE LIMITS AND EXCLUSIONS TO THE MAJOR STRUCTURAL DEFECT WARRANTY?**

**THE WARRANTY LIMITS**

The maximum statutory warranty coverage available for new homes and condominium units is \$300,000.

The maximum coverage for condominium common elements is \$50,000 times the number of units, up to a maximum of \$2.5 million.

The maximum coverage for damage caused by mould or other environmentally harmful substances is \$15,000.

The maximum coverage for costs relating to sewage disposal systems is \$25,000.

These are upper limits and in some cases the residual limit may be lower if prior warranty claims have been paid out on the home. For example, if \$100,000 has already been paid in relation to an earlier claim on a home, the remaining cap would be \$200,000, which is the \$300,000 cap less the \$100,000 claim already paid.

## THE EXCLUSIONS

### General exclusions

The following defects, damage and conditions are excluded from all of the statutory warranties, including the MSD warranty, by section 13(2) of the *Ontario New Home Warranties Plan Act*:

- (a) defects in materials, design and work supplied by the owner;
- (b) secondary damage caused by defects, such as property damage and personal injury;
- (c) normal wear and tear;
- (d) normal shrinkage of materials caused by drying after construction;
- (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
- (f) damage resulting from improper maintenance;
- (g) alterations, deletions or additions made by the owner;
- (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
- (i) damage resulting from an act of God;
- (j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
- (k) damage caused by municipal services or other utilities;
- (l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.

### Additional MSD exclusions

- **Elevating devices:** Defects in elevating devices, such as elevators, are not covered under the MSD warranty. These are mechanical devices for which homeowners have appropriate protection and recourse under installation and manufacturer's warranties and maintenance contracts.
- **Heating and cooling equipment, apparatus and systems:** Defects in heating and cooling systems are not covered under the MSD warranty. These systems are eligible for coverage under the one and two-year warranties, after which homeowners have protection and recourse under installation and manufacturer's warranties and maintenance contracts.
- **Defects resulting from dampness, where the dampness does not arise from the failure of a structural load-bearing element of the home:** Dampness itself will typically not be considered an MSD. But dampness that arises as a result of a

failure of a structural load-bearing element will have to be remedied as part of the remediation of the structural problem. Further, if a structural problem that meets the failure or function test has been caused by dampness (e.g., a structural member is rotting due to dampness). MSD coverage will still apply if the dampness is the result of a defect in work or materials supplied by the builder (e.g., dampness caused by defects in the damp proofing caused the structural member to rot). Tarion also distinguishes between “dampness” and “water penetration”, and this exclusion is limited only to dampness and not to situations where there is significant water ingress that meets the MSD use test.

- Damage resulting from acts or omissions of a homeowner, tenant, licensee or invitee.
- Damage resulting from acts of civil or military authorities or acts of war, riot, insurrection, or civil commotion.
- Damage resulting from a flood not caused by the builder.

### **Possible exclusions to builder responsibility**

There are two scenarios in which a claim may be covered by Tarion as an MSD but the builder may not be held responsible for it. This would not affect the homeowner’s warranty rights.

### **Industry-Wide Problems**

If there are MSD claims that are beyond the builder’s control and the matter is an industry-wide issue, the Tarion Board of Directors will consider the circumstances and may determine that the builder is not to be subject to co-payment or disclosure requirements. In this circumstance, which is anticipated to be rare, Tarion would cover the cost of any remediation to an affected home. Tarion’s Board of Directors maintains sole and absolute discretion and each claim will be considered on a case-by-case basis.

- ***Changes in Groundwater Table***

Damage resulting from a defect in work or materials triggered or exacerbated by a change in the groundwater table is intended to be covered by the MSD warranty if it otherwise meets one or more of the three MSD tests described in this guideline and is not otherwise subject to an exception. Without affecting the homeowner’s rights, builders will not be expected to contribute through the co-share scheme (nor be subject to website disclosure) if the damage is due to a change in water table level that was not reasonably foreseeable. Tarion will cover such costs.

## **EXPERT OPINIONS**

An expert opinion may be required in order to assess a claim under the MSD warranty since the issues are often complex and require expert observations and assessment. For example, an expert may be asked for an opinion on the following:

- whether an observed problem is caused by a defect in the builder's work or materials
- which building element(s) is affected
- whether the affected building element is a structural load-bearing element
- whether the ordinary service life of a structural load-bearing element has been compromised and, if so, to what extent
- whether the load-bearing function of a structural load-bearing element has been compromised and, if so, to what extent.

## **WHO IS AN EXPERT?**

An expert is a person who is independent and has a comprehensive and authoritative knowledge of or skill in a particular area or field.

Generally, a designated professional (e.g., professional engineer, architect) or an inspector certified by a professional association will be qualified to provide an expert opinion in their field.

When assessing a claim, Tarion will only consider an expert opinion regarding the particular home and claim. A generalized report (e.g. one found online) or a report regarding another home will not suffice.

## **WHO MUST RETAIN THE EXPERT?**

### **Homeowner**

The onus is on the homeowner to identify defects and substantiate with supporting materials, if necessary, why there is indeed a defect and to prove that the builder has breached the MSD warranty. In order to do so, the homeowner may have to provide both Tarion and the builder with an expert report establishing that there is an MSD that meets one of the tests set out in this guideline.

## **Builder**

In some cases, Tarion will require the builder to provide an expert report regarding the homeowner's MSD claim. For example:

- If it has been established that the load-bearing function of a building element has been adversely affected, Tarion may require the builder to obtain an expert opinion regarding the extent of the compromise to the element's load-bearing capacity and/or service life.
- If symptoms or visual evidence are strongly indicative of a likely MSD, Tarion may require the builder to obtain an expert opinion to determine whether there is an MSD that meets one of the tests.
- If the builder is required to repair an MSD, then Tarion may require that the builder retain an expert to develop a scope of repair and/or to oversee and sign off on the repair.

## **Tarion**

Generally, any experts required to prove or address an MSD claim will be retained by either the homeowner or the builder. But, in some cases, Tarion, at its sole discretion, will retain an expert. For example:

- Tarion may retain an expert to provide a peer review opinion in cases where both the homeowner and the builder have provided opposing expert opinions.
- If the builder has been deemed unwilling or unable to meet its warranty obligations, or is otherwise unable to address the claim, Tarion may retain an expert in situations where the builder might otherwise have been required to do so.
- If the builder has been asked to provide an expert opinion regarding a claim but has failed or refused to do so, Tarion may retain an expert to obtain the required opinion.