

Registrar Bulletin 08

Builder Arbitration Forum

Effective Date: February 1, 2021

This Bulletin replaces and supersedes Builder Bulletin 41, issued February 3, 2003. The word “builder” when used in this Bulletin includes both a vendor and a builder as defined by the *Ontario New Home Warranties Plan Act*.

Transition Rules

For appeals by builders of findings contained in a Warranty Assessment Report for conciliations requested prior to February 1, 2021, the Procedural Rules (2003) will apply. Similarly, Builder Bulletin 41 will be applicable to those proceedings.

For appeals by builders of findings contained in a Warranty Assessment Report for conciliations requested on or after February 1, 2021, the BAF Rules (2021) will apply. Similarly, this Registrar’s Bulletin 08 will be applicable to those proceedings.

What this Bulletin is About

This Bulletin is about the Builder Arbitration Forum. A builder who disagrees with Tarion’s assessment of whether warranty claims are or are not warranted or whether a conciliation is chargeable, can dispute Tarion’s assessment at the Builder Arbitration Forum (BAF). BAF is structured to be a fast, fair and affordable way to have Tarion’s warranty and chargeability assessments reviewed. An arbitrator will conduct a confidential hearing and, after listening to both sides, will reach a final and binding decision. The arbitration framework and processes are governed by the recently amended BAF Rules available at tarion.com.

What is new about this bulletin?

This bulletin replaces the former Builder Bulletin 41. In all material respects the content has not changed.

The Rationale for BAF

If a homeowner disagrees with Tarion’s warranty assessment as set out in a Warranty Assessment Report, the homeowner may request a formal Decision Letter and thereafter has the right to request a hearing before the Licence Appeal Tribunal (“LAT”). A builder may and often is an added party to such proceedings.

However, if a warranty assessment or a chargeability assessment is adverse to the builder, there is no recourse for a builder to LAT. The ability to challenge Tarion’s warranty assessments or chargeability assessments at BAF allows a builder to dispute those assessments in simpler, less costly forum.

Issues That May be Challenged at BAF

Subject to the eligibility requirements discussed later in this Bulletin, a builder may raise the following issues in arbitration with respect to a Warranty Assessment Report:

- (i) whether an alleged defect or deficiency relating to work and materials in a Warranty Assessment Report is or is not warranted;
- (ii) whether a conciliation is or is not properly a “chargeable conciliation”; and
- (iii) whether Tarion should be ordered to reimburse the builder where a builder has made a repair or paid compensation under protest.

At Tarion’s discretion, a builder may also challenge Tarion’s determination on a deposit refund claim, a delay compensation claim, or a financial loss claim, as well as any assessment of a chargeable conciliation in connection with each.

BAF and a Notice of Proposal

A builder who fails to meet its warranty obligations may face a Notice of Proposal by Tarion (“NOP”) to : revoke a qualification for enrolment; refuse an application for qualification for enrolment; and/or refuse an application for enrolment. If a builder decides to challenge a Warranty Assessment Report by using BAF, an NOP **cannot** be issued on the basis of a matter which is being decided in the Arbitration, as long as the builder remains a licensee in good standing.¹

An NOP *can* be issued during the arbitration process for an unrelated matter. Should that occur, the Arbitration will be suspended until the issue has been decided by the LAT.²

- **If LAT upholds the NOP**, the builder *cannot* return to arbitration.
- **If LAT dismisses the NOP**, the builder can ask to resume arbitration. To do so, the builder must deliver a written request to Tarion within 10 days of LAT’s decision. Otherwise, the arbitration will be considered abandoned.

An NOP *can* be issued at the conclusion of the arbitration process if Tarion’s assessments are upheld and the builder fails to comply with the arbitration decision.

¹ “Licensee in good standing” means the builder is:

- in full compliance with: the *New Home Construction Licensing Act, 2017* (NHCLA), the *Ontario New Home Warranties Plan Act* and regulations, Registrar’s Bulletins, and any agreement between Tarion and the builder;
- is up to date in filing of applications for renewal of licence under NHCLA , including all supporting documents;
- is up to date in the payment of all fees owed to Tarion and Home Construction Regulatory Authority (HCRA);
- is in compliance with any security requirements;
- is in compliance with any other conditions of existing approvals to qualify for enrolment and/or enrolment;
- is in compliance with all vendor and builder agreements; and
- is up to date in paying any and all invoices issued by Tarion to the Builder for reimbursement or indemnification for items which have been found to be a breach of warranty and for which the Builder has not filed an appeal.

² No suspension will occur where the arbitration hearing has taken place but the arbitrator’s written decision has not yet been delivered.

BAF and the Impact on the Homeowner

An arbitration under BAF is between the builder and Tarion. It will have *no impact* on the homeowner's rights for repairs or compensation. If items have been found to be warranted in the Warranty Assessment Report, the homeowner can still expect repairs or compensation, even if the builder decides to challenge the report using BAF. This can occur in one of two ways:

- **Tarion can arrange for repairs or can compensate the homeowner.** The homeowner will not have to wait until the arbitration is completed for this to happen.
- **The builder can make the repairs “under protest” and let the arbitrator decide if the items were warranted.**

If the builder decides to make the repairs “under protest” and to seek reimbursement through arbitration, the builder must:

- Confirm in writing to the homeowner the repairs were done in a workmanlike manner and materials are free from defects and such warranty extends for at least one year from the date of completion; and
- Provide proof of the cost of labour and materials and show that these costs are reasonable.

The arbitrator will decide if the items that were repaired – whether by Tarion, or by the builder “under protest”, were properly assessed as warranted in the report. If the builder is successful in overturning Tarion's assessment (assessed by Tarion as warranted and found not to be warranted) and were repaired by the builder under protest, Tarion will reimburse the builder for the costs of such repairs. Repairing warranted items “under protest” after a conciliation has no bearing on whether the conciliation is chargeable.

The Criteria for Using BAF

BAF is available to any builder in respect of construction defect matters who:

- has complied with all reasonable requests made by Tarion for information or documentation;
- has notified Tarion prior to the conciliation in writing of any issue that the builder believes would negate the conciliation from being “chargeable,” for example, if the builder was unreasonably denied access to the home to make repairs;
- is not the subject of a pending NOP for an unrelated matter; and
- is a registrant in good standing throughout the arbitration process.³

³ See “Licensee in good standing” definition at footnote 1 at Page 3.

The Arbitration Package

If a builder opts for arbitration, it will need to submit a completed Arbitration Package to Tarion's Administrative Appeals Coordinator. The Arbitration Package can be found online at tarion.com. The package submitted by the builder must contain the required forms and documents that a builder will use for the BAF process including:

- **A Request to Arbitrate form.** This form notifies Tarion that the builder intends to challenge a Warranty Assessment Report and/or Tarion's assessment of whether the conciliation is chargeable. The builder must complete all parts of the form in writing and submit it to Tarion by the date noted on the Warranty Assessment Report or any other date specified by Tarion. The builder must pay a non-refundable fee of \$750 to help defray the administration costs of BAF.
- **An Arbitration Agreement.** This is the agreement that the builder and Tarion must sign for the arbitration hearing to take place. By signing it, the builder agrees to pay a deposit for the estimated costs of the arbitrator; follow the BAF Rules; comply with the arbitrator's decision; and, if unsuccessful, pay the balance of the arbitrator's costs immediately after the arbitration hearing. This agreement is submitted along with the Request to Arbitrate.
- **A signed Arbitrator Nomination form.** The list of arbitrators eligible for the builder to select can be found in Tarion's Roster of Arbitrators. This is discussed in greater detail in the next section. The Builder's Arbitrator Nomination form must include the names of 3 proposed arbitrators along with their signatures confirming their availability to act in the arbitration.

The Roster of Arbitrators

Tarion, with the assistance of the OHBA, appoints a roster of independent arbitrators for BAF. An individual who wants to be included on the Roster of Arbitrators must apply for the position. To be selected, the candidate must have some minimum qualifications and, preferably, exceed this minimum. At the very least the candidate must:

- know and understand the *Ontario New Home Warranties Plan Act*;
- have arbitration training and experience;
- be involved in the new home construction industry; and
- provide the appropriate references.

Selecting an Arbitrator for a BAF Hearing

A builder who opts for and is eligible for arbitration is required to select three names from the Roster of Arbitrators. The builder must inform these individuals in writing that they have been chosen. They, in turn, must confirm to the builder in writing that they are available to be an arbitrator within the time periods applicable to the arbitration hearing and that there is no conflict of interest that would disqualify them. If someone is not available or has a conflict of interest, the builder must contact another person on the roster.

Once the builder has written confirmation from three individuals on the Roster, the information must be submitted along with the Request to Arbitrate to Tarion. Then Tarion will select one of the nominated individuals to be the arbitrator for the arbitration hearing.

The Arbitration Process

The arbitration process is set in motion by the Request to Arbitrate (together with other documents) delivered within 28 days following issuance of the Warranty Assessment Report. If a builder decides to challenge the report, he or she can expect the entire process to usually be completed in 84 days from the date the report is issued. In unusual cases, where the issues are particularly complicated, additional time may be required.

The following table shows the sequence of events in the arbitration process - what happens and when it will happen:

| TIME PERIOD | ACTION TAKEN BY TARION | ACTION TAKEN BY THE BUILDER |
|--|---|--|
| | Tarion issues a Warranty Assessment Report and covering letter setting out the items found warranted and whether the conciliation is chargeable to the builder. Tarion notifies the builder of the right to challenge the Report using BAF. | |
| Within 28 days of the issuance of the Warranty Assessment Report | | <p>The builder decides to challenge the Warranty Assessment Report. The builder delivers to Tarion in writing a Request to Arbitrate containing:</p> <ul style="list-style-type: none"> • the builder's address, phone number and fax number; • a copy of the Warranty Assessment Report that the builder wants to challenge; • the reason(s) the report is being challenged; • a signed copy of the Arbitration Agreement; • the names of three people on the Roster of Arbitrators and their written confirmation that they are available for the arbitration hearing and have no conflict of interest that would disqualify them; and • a certified cheque or money order for \$750 payable to Tarion Warranty Corporation as a non-refundable administration fee. |

| TIME PERIOD | ACTION TAKEN BY TARION | ACTION TAKEN BY THE BUILDER |
|---|--|---|
| <p>Within 14 days of receiving the Request to Arbitrate</p> | <p>Tarion delivers a Notice of Response to the builder containing:</p> <ul style="list-style-type: none"> • the name of the person Tarion has selected to be the arbitrator; • the amount the builder must pay as a deposit for the arbitrator's fees and disbursements, based on the standard fee for a one day hearing⁴; and • an Arbitration Agreement | |
| <p>Within 14 days of receiving the Notice of Response</p> | | <p>The builder delivers to Tarion:</p> <ul style="list-style-type: none"> • a certified cheque or money order payable to Tarion Warranty Corporation as the deposit for the arbitrator's fees and disbursements as specified in the Notice of Response |
| <p>Within 14 days of receiving the deposit for the Arbitrator's Fees</p> | <p>Tarion delivers to the builder and the arbitrator:</p> <ul style="list-style-type: none"> • Tarion's Case Materials. | |
| <p>Within 14 days of receiving Tarion's Case Materials</p> | | <p>The builder delivers to Tarion and the arbitrator</p> <ul style="list-style-type: none"> • a copy of the builder's Case Materials. The Case Materials should include: a table of contents; a written statement of the issues and the builder's position; written statements from any witnesses; exhibits; and any expert reports. • If applicable, it should also contain written proof of the costs of repairs done "under protest." |

⁴ If, after reading the Case Material, the arbitrator decides that the case is too complicated to be resolved in one day, the arbitrator will estimate the number of additional days required. The builder's deposit "in trust to Tarion" will be increased to cover the additional days, again based on the standard fee.

| TIME PERIOD | ACTION TAKEN BY TARION | ACTION TAKEN BY THE BUILDER |
|---|--|--|
| Within 14 days of receiving Builder's Case Materials | <p>With the agreement of both parties, Tarion will confirm the dates of the arbitration or prehearing, where applicable.</p> <p>Tarion may also deliver to the builder and the arbitrator a response to the builder's Case Materials (optional).</p> | |
| ACTION TAKEN BY ARBITRATOR | | |
| Within 30 days after the hearing | | The arbitrator must deliver his / her decision on the arbitration. |

The Costs of Arbitration and Who Pays Them

There are three costs associated with an arbitration under BAF.

1. **The Administration Fee:** The builder pays this fee of \$750 to help offset Tarion's administrative costs of BAF. If the arbitrator finds the builder's case to be valid in all respects, then this fee will be refunded.
2. **The costs of preparing for and attending BAF:** Tarion and the builder are each responsible for their own costs, including legal fees, witness fees and transportation.
3. **The Arbitrator's Fees and Disbursements:** The arbitrator's costs are based on the Arbitrators' Fee and Disbursement Tariff, which will be posted online at www.tarion.com and included in the Arbitration Package. The basic rule is that the losing party pays the arbitrator's costs. If success is divided, then the costs will be assessed by the arbitrator. Examples of how costs will be allocated are shown in the following table:

| SITUATION | WHO PAYS? |
|--|--|
| The arbitrator decides that the builder's case is completely valid in all respects | Tarion will pay the arbitrator's costs and will return the deposit to the builder. |
| The arbitrator decides that Tarion's case is valid in all respects. | <p>The builder's deposit is used to pay the arbitrator's costs:</p> <ul style="list-style-type: none"> • If the deposit is <i>less</i> than the amount required, the builder will have to pay the difference immediately. • If the deposit is <i>more</i> than the amount required, Tarion will refund the balance to the builder without interest or penalty. |
| The arbitrator decides that each side has valid positions. | <p>The arbitrator decides how the costs should be divided. The builder's amount will be deducted from the deposit paid.</p> <ul style="list-style-type: none"> • If the deposit is <i>less</i> than the amount the builder is required to pay, the builder will have to pay the difference immediately. • If the deposit is <i>more</i> than the amount required, Tarion will refund the balance to the builder without interest or penalty. |
| Tarion and the builder agree to settle before an arbitration hearing takes place. | The arbitrator's costs, if any, are split between the builder and Tarion unless the terms of the settlement call for something different. |
| The builder terminates or abandons the arbitration process. | <p>If the arbitration is terminated or dismissed due to the builder's failure to comply with the BAF rules or as a result of an interim decision, the builder's deposit will be used to pay for the arbitrator's costs.</p> <p>If any amount from the deposit is left over after the arbitrator has received payment for their costs, the balance of the deposit and/or the fee will be returned to the builder without interest.</p> |
| A party requests an adjournment. | When a request for adjournment is made fewer than 7 days before the start of the arbitration, the requesting party must pay the arbitrator's costs. |

| SITUATION | WHO PAYS? |
|---|--|
| The builder is issued a Notice of Proposal (NOP) for an unrelated matter during the arbitration process and the NOP is accepted or upheld by LAT. | <p>The builder's deposit is used to pay the arbitrator's costs, if any.</p> <ul style="list-style-type: none"> • If the deposit is <i>less</i> than the amount required, the builder will have to pay the difference immediately. • If the deposit is <i>more</i> than the amount required, Tarion will refund the balance to the builder without interest or penalty once any appeal to the LAT of the NOP is completed and the arbitration is either completed or abandoned. |

The Costs of Arbitration When an Offer to Settle Has Been Made

If either Tarion or the builder made a written offer to settle the arbitration at least 7 days before the start of the arbitration and the offer is neither withdrawn nor expired before the start of the hearing, the following costs consequences will apply:

| SITUATION | WHO PAYS? |
|---|--|
| Tarion made an offer to settle and the builder either rejected it or the arbitration award is for an equal or lesser payment to the builder. | The builder will pay the arbitrator's costs. |
| Tarion made an offer to settle and the builder did not accept the offer until fewer than 7 days before the start of the arbitration. | The builder will pay the arbitrator's costs. |
| The builder made an offer to settle and either Tarion rejected it or the arbitration award is for an equal or greater payment to the builder. | Tarion will pay the arbitrator's costs. |
| If the builder has made an offer to settle that is not accepted by Tarion until less than 7 days prior to the start of the arbitration. | Tarion will pay the arbitrator's costs. |

Preparing for a BAF Hearing

An arbitration hearing is less formal than a court hearing. Nonetheless, it is a good idea for the builder to be well-prepared beforehand. The builder (principal, officer, director or employee of the builder) will present its own case at the arbitration hearing. The builder may also be represented by legal counsel. The builder should present its case in a clear and well-organized manner. To prepare for an arbitration hearing, the builder can do the following:

- **Read and become familiar with BAF Rules.** This will give you a good grounding in the arbitration process and an understanding of what actually happens during an arbitration hearing.
- **Consult a lawyer.** You do not have to consult one, but a lawyer can help you prepare your Case Materials and may provide a better understanding of the issues and laws involved. The lawyer can also present your case.
- **Know your own case.** If you have a clear grasp of the details of your case you will probably be able to present it more effectively.
- **Know Tarion's case.** You will receive a copy of Tarion's Case Materials 14 days before you need to issue your own Case Materials. If you are familiar with Tarion's material, you can be better prepared to rebut it during in your materials and at the arbitration hearing.

Issues That Can Be Determined at BAF

BAF hearings are held in private and open only to the builder (or the officer, director, employee or principal representing the builder); the Tarion staff member presenting Tarion's case; legal counsel for the builder and/or Tarion, witnesses; and any expert witnesses the arbitrator has decided should give evidence.

The hearing will generally be conducted in person but may be conducted virtually. Tarion will try to find a convenient forum, in some cases using boardrooms at Tarion offices in order to save costs.

During the hearing, each side will present its case and may call upon witnesses including experts to present evidence in support of their case. If the hearing is proving more complicated than expected, the arbitrator can decide to extend it. Should that occur, the arbitrator's fees and disbursements will be increased, based on the general standard one day fee, to cover the cost of the additional days.

After listening to the case presented by both parties, the arbitrator will determine:

- whether Tarion's assessment as to items that are warranted is correct;
- whether the conciliation is chargeable to the builder;
- whether the builder should be reimbursed for repairs done "under protest" in respect of items found not to be warranted and, if so, in what amount;
- the amount the builder must pay for item(s) the arbitrator has found to be warranted; and/or
- who should pay for the arbitrator's costs and in what amount.

The arbitrator's decision is final and binding. It cannot be appealed to any court or tribunal, and may only be open to judicial review under very limited circumstances as set out in the *Arbitration Act, 1991*.

In the event of a conflict between this Bulletin and the BAF Rules, the BAF Rules will prevail.

FOR MORE INFORMATION

For more information on this bulletin or for an Arbitration Package, please visit our web site at tarion.com, or contact the Tarion's Administrative Appeals Coordinator at baf@tarion.com.

Registrar

"Peter Balasubramanian"