

Registrar Bulletin - No. 03

Seven Year Warranty Framework - Major Structural Defects

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This Registrar Bulletin replaces and supersedes Builder Bulletin 24 (Revised), issued June, 2012.

What This Guideline is All About

This Bulletin describes the post 2012 major structural defect warranty, including the corresponding claims process and details of builder accountability.

The word “builder” when used in this Bulletin, includes both a vendor and a builder, as applicable.

Transition Rules

The post 2012 MSD definition and builder accountability rules set out in this bulletin apply to:

- all condominium units and corresponding common elements in a condominium project where the first arm’s length purchase agreement for a home in the condominium project was signed on or after July 1, 2012; and
- in the case of homes that are not in a condominium project, to any such home where the parties signed the purchase agreement or the construction contract on or after July 1, 2012.

Please Note

If there is any conflict or inconsistency between the terms of this Bulletin and the provisions of the ONHWP Act or regulations, then the provisions of the ONHWP Act and regulations shall prevail.

Table of Contents

| | |
|---|---|
| Builder Accountability..... | 2 |
| Changes to the Definition of MSD..... | 3 |
| MSD Claims Process..... | 5 |
| Schedule A – Examples of Co-Share Calculations..... | 7 |
| Schedule B – 3-7 Years MSD Claims Process..... | 8 |

Builder Accountability

Years 3-7 – Co-share Option

Builders have full responsibility for MSD claims made in years 1-2 from the warranty start date.

Responsibility for MSD claims made between years 3 and 7 is as follows.

For MSD claims first made¹ in the years 3 to 7 of the seven year warranty period, builders must elect to either: (i) take full responsibility for the resolution of the MSD claim(s); or (ii) reimburse Tarion an amount referred to as “co-share payment” calculated as follows:

- Freehold and Condominium Dwelling Units – the least of:
 - Tarion’s cost of resolving the MSD claim(s);
 - 5% of the sale price of the home or unit; and
 - \$300,000 [\$400,000 for Freehold Homes (i.e as per paragraphs (a) and b) of the definition of “homes” in section 1 of the ONHWP Act) if the purchase agreement or construction contract was entered into on or after July1,2023]
- Common Elements – the least of:
 - Tarion’s cost of resolving the MSD claim(s);
 - 5% of the aggregate sale price of all of the units in the condominium project; and
 - \$750,000

The co-share payment is calculated on a per project basis (for condominium common element claims) and otherwise on a per home basis. Thus, for example, if there are multiple MSD claims relating to a home, when calculating

¹ If a valid MSD claim relates to a claim first made [to the builder or Tarion] in years 1 or 2 of the warranty period, the builder will have full responsibility.

“Tarion’s cost of resolving the MSD claim(s),” Tarion will aggregate the cost of resolving all valid MSD claims relating to the home.

The co-share payment will also be subject to any other applicable liability caps under the ONHWP Act. Some examples are set out in Schedule “A”.

Website Disclosure

All MSD warranty claims that are not fully resolved by the builder will be reported on the Tarion website. Furthermore, the impacts on licensing decisions, licence revocation, and licensing terms and conditions would also continue to apply.

Industry Wide Problem

If there are MSD claims which are beyond the builder’s control and the matter is an industry wide issue, the Tarion Board of Directors has indicated it will consider such circumstances on a case-by-case basis and in its sole discretion such claims may be determined not to be subject to co-payment or disclosure requirements. Homeowners will not be prejudiced; rather, Tarion would cover such cost. Such circumstances will be rare, the determination will be discretionary, and will be made on a case-by-case basis.

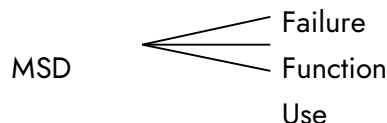
Changes in Groundwater Table

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 below and is not otherwise subject to an exception. Without affecting homeowners’ 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 which was not reasonably foreseeable. Tarion will cover such costs.

Changes to the Definition of MSD

The Three Tests – Failure, Function and Use

Three Tests for MSD: the seven-year MSD warranty encompasses two structural tests (failure, function) and the “use test.” These are described below.



Failure Test: The first type of MSD warranty or “test” for coverage is whether there are:

- defects in work or materials² that result in failure of a structural load-bearing element of a building.

For greater clarity, a definition of “structural load-bearing element” of a building has been added which includes the term “load-bearing” from the Ontario Building Code (OBC).

“Structural load-bearing element” means a structural portion or component of a building that is subject to or designed to carry loads, excluding wind or earthquake loads, in addition to the weight of all permanent structural and non-structural components of the building.”

This is a fairly stringent test in that it contemplates actual structural failure.

Materially and adversely affect its load-bearing function – Test: This second MSD test refers to any defect in work or materials that materially and adversely affects the ability of a structural load-bearing element of the building to carry, bear and resist applicable structural loads for the usual and ordinary service life of the element.

In discussions with certain engineering experts, there was general agreement that when you look at the function of a building element, you have to consider what it is designed for and/or expected to do. Indeed, many parts of the OBC are now performance-based. The opening language of Part 4 of the OBC (Section 4.1.1.3(1)) reads as follows:

Buildings and their structural members and connections including formwork and falsework shall be designed to have sufficient structural capacity and structural integrity to safely and effectively resist all loads, effects of loads, and influences that may reasonably be expected, having regard to the expected service life of buildings, and shall in any case satisfy the requirements of this Section.

Accordingly, the revised definition looks at a “structural load-bearing element” and its function. In this context it means the ability to carry, bear and resist applicable structural loads for the usual and ordinary service life of such element of the building.

Use Test: The “use test” described earlier in this Bulletin, has been in the MSD definition since 1976.

² The full phrase is “any defect in work or materials in respect of a building, including a crack, distortion or displacement of a structural load-bearing element of the building” – these are examples and are not an exhaustive list.

The new language reads as follows:

“Any defect in work and material that materially and adversely affects the use of a significant portion of the building for usual and ordinary purposes of a residential dwelling and having regard to any specific use provision set out in the purchase agreement for the home.”

The revised language of the use test is clearer and reiterates that the warranty is only triggered if a significant portion of the home is materially and adversely affected.

Tarion has always considered the test to be an objective test. The new language makes this clearer. The use test references the “usual and ordinary purposes of a residential dwelling” and, if applicable, any specific provisions regarding proposed uses set out in the purchase agreement.

MSD Exclusions

Exclusions: If the defect meets one or more of the three MSD tests, the item may still not be warranted if certain exclusions apply. In general terms, the MSD warranty does not extend to defects in work or materials:

- in respect of elevating devices apart from the surrounding structure of the building housing the device.
- in respect of heating and cooling appliances (as opposed to systems), appliances such as a furnace, air conditioner, chiller and heat recovery ventilator or heat pumps.
- resulting from dampness not arising from failure of a structural load-bearing element of the building.
- resulting from acts or omissions of an owner, tenant, licensee or invitee.
- resulting from acts of civil or military authorities or acts of war, riot, insurrection, or civil commotion.
- resulting from a flood not caused by the builder.
- Captured by section 13(2) of the *ONHWP Act exclusions* [reproduced below for ease of reference]:
 - (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.

Interpretation: Tarion will publish an MSD Interpretation Guideline that will set out how it interprets and applies the MSD definition. This Guideline will be published on the Tarion Website and made available to stakeholders.

MSD Claims Process

Set out below is a brief summary of the revised process for seven-year warranty claims.

Claims in years 1 & 2

- There is no change in the way 1st and 2nd year MSD claims are administered. Defects raised in the first two years will continue to be reported on the First and Second Year Claim Form and addressed in accordance with the then existing Customer Service Standard (processes and timelines).

Claims from years 3 to 7

- To be eligible for coverage an MSD claim must properly be made to Tarion in writing before the end of year 7.
- There is no limit on the number of claims which may be made by an owner³ in the period.
- Once an MSD claim form is received, subject to Tarion's right to extend or abridge timelines, there will be a 90 day period during which the owner and the builder will have an opportunity to resolve the problem without triggering further steps in the claim process.
- If the claim is not resolved and the owner wishes to continue the claim process with Tarion, the owner must contact Tarion to request a conciliation.

³ "Owner" means the purchaser of a freehold dwelling, condominium unit or other new home qualifying dwelling unit. "Owner" for the purposes of making warranty claims for condominium common elements means the condominium corporation and for a contracted home, "owner" means the owner of the land and party to the construction contract.

- The request for conciliation must occur between the 91st day and the 120th day after the day Tarion received the claim.
- If a request for conciliation is not made then the claim is deemed to be withdrawn.
- An inspection or assessment will be scheduled where the homeowner requests a conciliation and a \$250 conciliation fee will apply to the owner (\$1000 if the claim relates to common elements). Except in exceptional circumstances, the builder will be invited to the conciliation.
- If the inspection or assessment occurs and the claim is found not be warranted the \$250/\$1000 fee will be kept by Tarion. If the claim is found to be warranted the fee will be returned to the owner.
- In the event the inspection or assessment occurs and the claim is found warranted and the conciliation determined to be chargeable,⁴ the builder will be charged a \$1000 conciliation fee (\$3000 if the claim relates to common elements).
- The length of time required for the inspection or assessment process will depend on the specific nature of the case. The owner will be required to provide reasonable access to the builder and Tarion to conduct the investigations needed to reasonably assess the claim.
- When Tarion has determined that it has sufficient information to determine the claim it will provide a Conciliation Assessment Report.
- The Conciliation Assessment Report will indicate whether each of the items in the claim is warranted or not, or may indicate one or more are “under investigation.”
- If the claim is warranted, the Conciliation Assessment Report will include Tarion’s recommendation for resolution of the claim along with a timeline (if practicable).
- At this stage the builder must elect how it will proceed in accordance with the terms of the co-share policy described under the heading “Builder Accountability” above. The builder may elect to take full responsibility for resolution of the claim, or co-share responsibility.
- Within 10 days from the date that Tarion issues the Conciliation Assessment Report, the builder shall enter into either:
 - a written agreement with the owner and Tarion in which the builder undertakes to resolve the valid MSD defect(s) directly with the owner either by way of repair or compensation; or,
 - a written co-share arrangement with Tarion which addresses each valid MSD claim item.
- Tarion will resolve the claim directly with the owner either by paying compensation or arranging performance of the required repair work if:

⁴ Chargeable conciliation is defined and the criteria and process for determination are set out in Registrar Bulletin 04 -How Chargeability is determined and Applied.

- the builder fails to enter one or either of the agreements noted immediately above;
 - the builder enters into an agreement with the owner and Tarion but fails to comply with it and the owner is not in any way responsible for the failure; or,
 - the builder enters into the co-share arrangement with Tarion.
- If Tarion has to resolve the claim directly with the owner – either because the builder has elected coshare responsibility or otherwise refuses to participate or take responsibility – the conciliation, subject to terms of RB04 will be chargeable and will be disclosed on the Home Construction Regulatory Authority's website.

The schematic of the Year 3-7 MSD claims process is included as Schedule "B".

Registrar

"Peter Balasubramanian"

Schedule "A" – Example Co-Share Calculations

Example 1 – Freehold Home

Freehold home with MSD deficiencies found to be warranted. Tarion's cost of resolution is or would be \$175,000. The sale price of the home is \$650,000.

The co-share amount would be \$32,500 (the least of \$175,000, \$300,000 (the limit based on pre-2023 purchase agreement) and $\$32,500 - \text{sale price} \times 5\%$).

Example 2 – Condominium Common Elements

Condominium with valid MSD claim relating to common elements. Cost to physically resolve the MSD common element claim would be \$3,000,000. Tarion's cost of resolution therefore is \$2,500,000 (based on existing cap). The aggregate sale price of all units in the project is \$1,375,000 (based on 100 units at \$275,000 each x 5%).

The co-share payment would be \$750,000 (the least of \$2,500,000 (the limit); \$1,375,000 and \$750,000).

Example 3 – Freehold Home, Multiple Claims

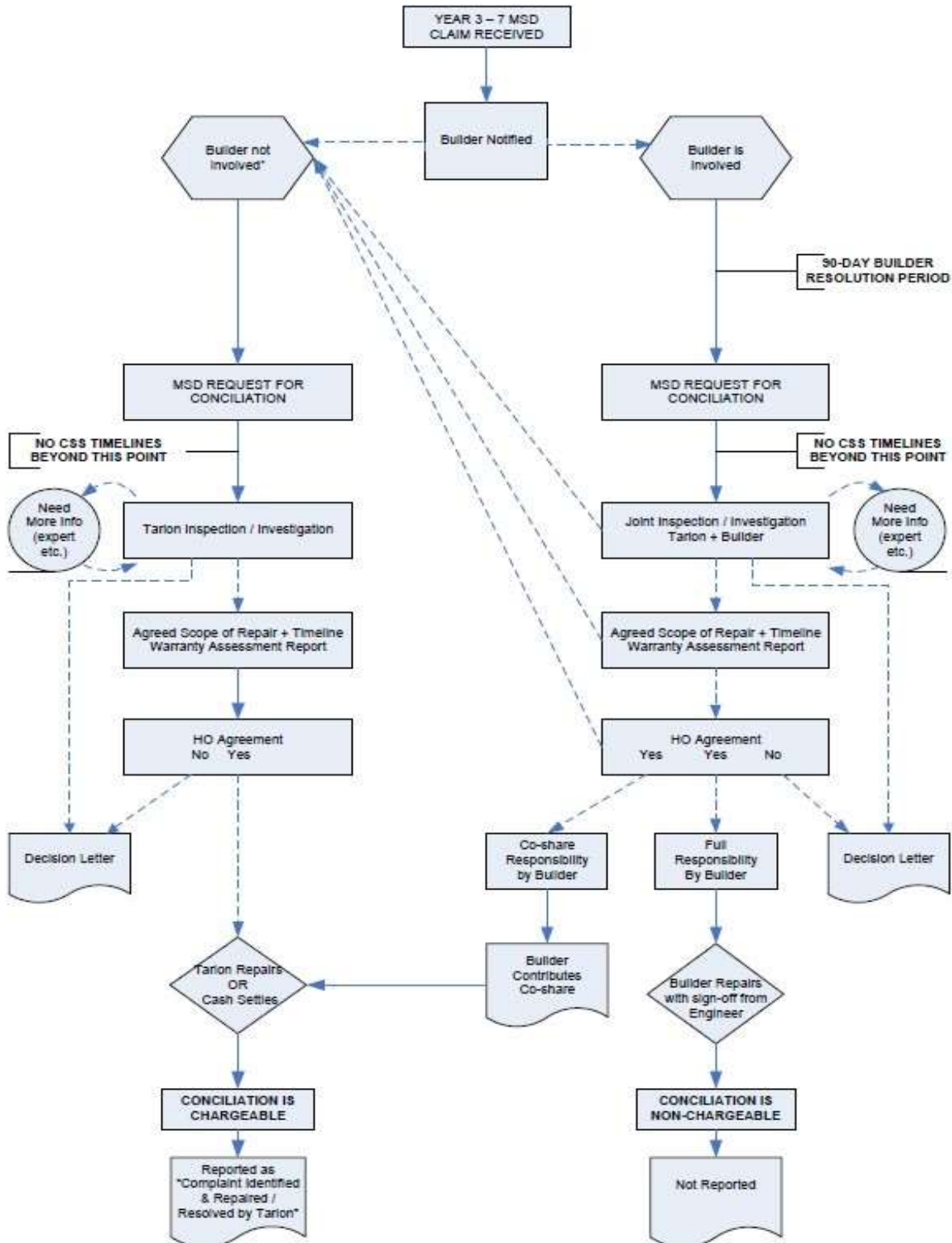
Freehold home with two separate sequential valid MSD claims.

- MSD Claim 1 – Tarion cost of resolution \$20,000
- MSD Claim 2 – Tarion cost of resolution \$40,000
- Sale price of home is \$650,000 (5% - \$32,500)

The builder pays \$20,000 for MSD Claim 1. (The builder fully resolves because co-share payment would be the same amount – the least of \$20,000 (cost of resolution), \$32,500 and \$300,000 – the limit.)

For MSD Claim 2, the builder elects for co-share payment. The amount would be \$12,500 (\$32,500 less \$20,000 already paid). If the builder elects a co-share arrangement, the maximum jeopardy in respect of any one home is the least of the cost of repair, \$300,000 (based on pre 2023 purchase agreement) and 5% of the sale price of the home – in this case, the maximum \$32,500).

**SCHEDULE "B"
3 – 7 MSD CLAIMS PROCESS SCHEMATIC**



*Builder is unable or unwilling to resolve or attempt to resolve the MSD claim