

**TARION WARRANTY CORPORATION  
BUILDER ARBITRATION FORUM**

**BAF RULES  
(Effective: October 31, 2013)**

**1. APPLICATION AND PURPOSE**

These BAF Rules are intended to promote fairness, timeliness and affordability of the Builder Arbitration Forum (“BAF”). The BAF Rules are meant to facilitate access to the Builder Arbitration Forum, promote consistency of process and avoid unnecessary length and delay of proceedings. The Arbitrations conducted under these BAF Rules will not affect the rights or interests of homeowners who are entitled to receive a benefit under the statutory warranties.

The purpose of these BAF Rules is to provide a fair, accessible and understandable process for Builders to challenge certain decisions of Tarion Warranty Corporation. It is a voluntary contractual process governed by the BAF Rules and the Arbitration Agreement. Arbitrations under these BAF Rules are strictly confined to the issues referred to in section 2 below, with due regard to Tarion’s dual mandate to protect Ontario’s new home buyers and to regulate the home building industry. Issues raised in the Arbitration must be determined within the context and confines of the Ontario New Home Warranties Plan Act and its regulations, and the Builder Bulletins published by Tarion.

**2. ISSUES THAT MAY BE APPEALED**

- a) A Builder may raise the following issues in the arbitration in respect of a Warranty Assessment Report:
- i) whether an alleged defect or deficiency referred to in a Warranty Assessment Report is or is not warranted;
  - ii) whether Tarion should be ordered to reimburse a Builder under Rule 2.1;
  - iii) whether a conciliation is or is not properly a “chargeable conciliation”;

If a builder appeals to BAF, Tarion may request that the Arbitrator order the Builder to indemnify Tarion for reasonable amounts invoiced in respect of repairs done or payments made by Tarion to resolve one or more of the items found to be warranted and appealed in the Arbitration.

- b) At the sole discretion of Tarion, a Builder may raise the following issues in the arbitration in respect of a Warranty Assessment Report:
- i) whether a Deposit Refund Claim is or is not warranted; or
  - ii) whether a Delay Compensation Claim is or is not warranted; or
  - iii) whether a Financial Loss Claim is or is not warranted.

## **2.1 Repair or Compensation under Protest**

The Builder may, at his option: repair an item; or resolve a claim by payment to the Owner or Tarion under protest and without prejudice to his rights to arbitrate eligible issues in the BAF forum.

If the Arbitrator finds that any items determined to be warranted by Tarion and repaired or resolved by the Builder under protest, are not warranted, then the Arbitrator may, in respect of such unwarranted items, order Tarion to reimburse the Builder for: the Builder's reasonable repair costs in respect of an alleged defect or a reasonable amount paid to resolve a claim provided:

- a) The Builder performs the repairs or resolves the claim within the time period prescribed by the Customer Service Standard; and
- b) Where repairs are done under protest:
  - i) The Builder provides a written warranty to the Owner that the repairs are done in a workmanlike manner and are free of defects in materials, for a period of one year from the completion of the repairs or the balance of the applicable warranty period under the ONHWP Act, whichever is longer; and
  - ii) The Builder demonstrates actual and reasonable out-of-pocket expenses for labour and materials as the result of the repair. The Builder may also add a mark-up of up to 15% for administration and overhead to its actual out-of-pocket expenses, provided that Tarion may object to the mark-up if it is above the market rate or not actually incurred.

## **3. ELIGIBILITY**

A Builder is eligible to commence an Arbitration if the Builder meets all of the following conditions:

- a) The Builder is in Good Standing at the time an appeal is delivered and throughout the duration of the Arbitration;
- b) The Builder is not the subject of a Notice of Proposal under the ONHWP Act; and
- c) The Builder must have complied in all material respects with all reasonable requests made by Tarion for information and/or documentation.

### **3.1 Tarion to Determine Eligibility**

Tarion has the sole discretion to determine whether a Builder is eligible to commence an arbitration. Tarion's determination is not subject to review by the Arbitrator.

### **3.2 If Builder is Not Eligible**

If Tarion determines that the Builder is not eligible to commence an arbitration under Rule 3, Tarion shall give written notice to the Builder that he is not eligible within 7 days of delivery of

the Builder's Application Package to Tarion. Tarion's notice shall specify the reasons why the Builder is not eligible.

If Tarion's notice states that the Builder is not eligible because he is not in Good Standing, it shall also state that the Builder has 7 days to comply with the specified requirements in order to be considered in Good Standing. If the Builder complies with the notice, Tarion shall deliver Tarion's Notice of Response within 14 days of the compliance and the Arbitration will proceed.

If the Builder fails to comply with Tarion's notice, the Arbitration is deemed not to commence and Tarion will notify the Builder and refund the administration fee.

If Tarion's notice states that the Builder is not eligible for any reason under Rule 3 other than lack of Good Standing, the Arbitration will be deemed not to have commenced.

#### **4. HOW TO FILE AN APPEAL**

As noted in Rule 23.3(c), notices and materials under this Rule 4 may only be delivered in person or by courier.

##### **4.1 Builder's Application Package**

To commence an arbitration challenging one or more assessments by Tarion, a Builder must deliver a fully completed and executed Application Package to Tarion by the date specified in the Warranty Assessment Report (or covering letter) which must include:

- a) a completed Request to Arbitrate (using Form 1 in the Appendix)
- b) a signed Arbitration Agreement (using Form 2 in the Appendix)
- c) a copy of the Warranty Assessment Report that the Builder seeks to arbitrate;
- d) the names of 3 persons from the roster of Arbitrators nominated by the Builder for appointment by Tarion under Rule 7 accompanied by a Nominee Confirmation (Form 3 in the Appendix) signed by each of the 3 persons nominated by the Builder as set out in Rule 7; and
- e) the administration fee of \$750 plus applicable taxes by way of: a certified cheque or money order payable to Tarion Warranty Corporation; or other electronic transfer of funds method approved by Tarion.

**The date on which Tarion receives a full and completed Application Package from the Builder, will be considered the date on which the Arbitration has commenced.**

##### **4.2 Tarion's Response**

If the Builder is eligible under Rule 3 and has complied with Rule 4.1, Tarion shall deliver to the Builder a Notice of Response (using Form 4 in the Appendix) within 14 days of receipt of the Builder's Application Package.

#### **4.3 Notice of Appointment of Arbitrator and Acceptance of Appointment**

Along with the Notice of Response, Tarion shall also deliver an Appointment of Arbitrator and Acceptance of Appointment (using Form 5 in the Appendix) to the Arbitrator and the Builder.

#### **4.4 Builder's Deposit for the Arbitration**

Within 14 days of Tarion's Response, the Builder shall deliver to Tarion: payment in the amount specified in Tarion's Response as a deposit for the Arbitrator's Costs by way of certified cheque or money order payable to Tarion Warranty Corporation; or other electronic transfer of funds method approved by Tarion.

#### **4.5 Delivery of Tarion's Case Materials**

Within 14 days of receipt of the Builder's deposit for the Arbitrator's Costs, Tarion shall deliver one copy of its Case Materials to the Builder and one copy to the Arbitrator.

#### **4.6 Delivery of Builder's Case Materials**

Within 14 days of receipt of Tarion's Case Materials, the Builder shall deliver one copy of its Case Materials to Tarion and one copy to the Arbitrator.

#### **4.7 Delivery of Tarion's Response to Builder's Case Materials**

Within 14 days of receipt of the Builder's Case Materials, Tarion may, if it elects to do so, deliver one copy of its Response to the Builder's Case Materials to the Builder and the Arbitrator.

#### **4.8 Tarion to Schedule Arbitration**

Within 14 days of receipt of either the Builder's Case Materials or Tarion's Response to the Builder's Case Material, whichever is later, Tarion shall set down the dates for the Arbitration or pre-hearing where applicable. The dates and location of the Arbitration will be decided on consent of all parties and confirmed in writing by Tarion. If there is no consent, Tarion will arrange a teleconference with the Arbitrator and the Arbitrator shall set down the dates for the Arbitration or pre-hearing.

### **5. FAILURE TO COMPLETE ANY STEP IN RULE 4**

If a Builder fails to comply with Rule 4.1, the Arbitration shall be deemed not to have commenced, except as set out in rule 5.1. Tarion will notify the Builder in writing of the Builder's failure to comply after receipt of all or part of the Builder's Application Package.

#### **5.1 Dispute about Non-Compliance with Rule 4.1 and 4.6**

A Builder may dispute Tarion's notice under Rule 5 by delivering to Tarion within 7 days of delivery of Tarion's notice:

- a) a completed Form 6; and
- b) a deposit to cover the Arbitrator's Costs to hear the request, in accordance with the Tariff.

## **5.2 Arbitrator's Ruling on Compliance**

Within 7 days of receipt of the documents set out in 5.1, the Arbitrator shall issue an order or decision, after reviewing the documents and, if the Arbitrator deems necessary, hold a teleconference with the parties. The Arbitrator shall:

- a) decide whether the Builder has complied with Rule 4.1;
- b) if the Builder has not complied with Rule 4.1, decide whether to terminate the arbitration or to extend the time for compliance, on such terms as are just, having regard to whether it is in the interest of justice to do so, after considering the following factors;
  - i) whether the Builder intended to arbitrate within the time limit;
  - ii) the seriousness of the non-compliance;
  - iii) the Builder's reasons for non-compliance;
  - iv) whether there is any prejudice to Tarion as a result of the Builder's non-compliance;
  - v) whether there is a substantial issue to be arbitrated; and
  - vi) whether the Builder has a reasonable chance of success; and
- c) decide which party shall pay the Arbitrator's Costs under the order, including the amount and time for payment.

The Arbitrator's order or decision shall be final and binding on the parties as if it was a final decision under Rule **[16.4]**.

## **6. CASE MATERIALS AND ADMISSIBLE EVIDENCE**

### **6.1 Required Contents of Case Materials**

Each party's Case Materials shall include:

- a) a table of contents;
- b) a copy of the party's Notice of Arbitration or Response;
- c) a written argument;
- d) copies of all documents that the party intends to rely on at the hearing;
- e) a list of the party's witnesses; and
- f) if a party intends to call an expert witness or rely on an expert report, a copy of the report, together with the expert's qualifications.

## **6.2 Admissibility of Evidence**

a) The only documentation and information that is admissible in the Arbitration is that which was produced and provided to Tarion prior to or at the conciliation inspection, or if the conciliation was a desk assessment, by the date specified in writing by Tarion.

Unless provided as noted above, any other evidence shall not be admitted into the arbitration if, by due diligence, it could have been discovered and disclosed prior to or at the time of the conciliation inspection or desk assessment.

For greater clarity, if a Builder wishes to rely upon any limitation or exception (e.g., denied access) in connection with the determination of chargeability, the Builder must, prior to or at the conciliation, so advise Tarion, and provide the evidence the Builder wishes to rely upon in connection with such limitation or exception.

b) A party may bring a Motion to admit additional evidence if it can establish that it exercised due diligence as described in this Rule and that the evidence if believed, when taken with the other facts considered at the inspection, would likely have affected Tarion's determination.

The Arbitrator's Cost in respect of the motion shall in all cases be paid by the person seeking to admit new evidence.

## **6.3 Physical Requirement For Case Materials**

Case Materials must be contained in bound document books or loose-leaf binders, with numbered pages and tabs separating various sections and documents. Any legal authorities may be filed in separate books or binders.

## **7. APPOINTMENT OF ARBITRATORS**

### **7.1 Number of Arbitrators**

The Arbitration will be conducted by a single Arbitrator appointed under these Rules.

### **7.2 Nomination by Builder**

The Builder shall nominate 3 persons from the Roster, after obtaining written confirmation (using Form 3 in the Appendix) of the following:

- a) each nominee has no conflict of interest; and
- b) each nominee is available to conduct an arbitration within the time limits established by these Rules.

The Builder shall deliver a completed Form 3 for each of the Builder's 3 nominees at the time of delivery of the Builder's Application Package within the time set out in Rule 4.1.

### **7.3 Appointment by Tarion**

Tarion shall appoint one of the Builder's nominees as the Arbitrator and shall notify the Builder and the Arbitrator of the appointment, using Form 5 in the Appendix, within the time set out in Rules 4.2 and 4.3.

### **7.4 Communication with Nominees**

During the nomination process, the Builder may communicate with the Builder's nominees for the sole purpose of inquiring about their availability and requesting their written confirmation. However, the Builder shall not communicate with any of the nominees about any issues that have been or will be raised in the Arbitration.

### **7.5 Termination of Arbitrator**

Tarion shall and is hereby authorized to terminate the appointment of the Arbitrator if:

- a) the Arbitrator resigns, dies, is in a conflict of interest position, or otherwise becomes incapable of acting;
- b) the parties agree in writing that the appointment of the Arbitrator must be terminated, or
- c) it is discovered that the Builder has communicated with the Arbitrator about the issues in the arbitration process during the nomination process.

For subsections (a) and (b) of this Rule, the parties shall pay, in equal shares, the Arbitrator's Costs. For subsection (c) of this Rule, the Builder shall pay the Arbitrator's Costs.

Tarion may apply the Builder's deposit to satisfy the Builder's share of any Arbitrator's Costs.

### **7.6 Replacement of Terminated Arbitrator**

If an Arbitrator is terminated under Rule 7.5, Tarion shall appoint a new Arbitrator from the list of nominees submitted by the Builder under Rule 7.2 within 7 days of the termination of the Arbitrator.

In the event that the remaining nominees are no longer available to act as Arbitrator due to their schedule or a conflict of interest, the parties shall nominate and appoint another Arbitrator in the manner prescribed under Rule 7.2 and 7.3.

## **8. COSTS OF THE ARBITRATION**

### **8.1 Refund of Administration Fee**

If the Builder is successful on each and every issue raised in the arbitration (either as a result of Tarion changing its assessment or the Arbitrator overruling Tarion's assessment), then unless there is agreement otherwise, Tarion shall refund to the Builder the administration fee paid by the Builder under Rule 4.1. Otherwise the Administration Fee is not refundable.

## **8.2 Parties' Own Costs**

Parties must bear their own costs of preparation, presentation and attendance regardless of the outcome of the Arbitration.

## **8.3 Arbitrator's Costs**

The unsuccessful party shall pay the Arbitrator's Costs. If success is divided, having regard to the result, the Arbitrator will determine if and how to allocate the Arbitrator's Costs between the parties.

## **8.4 Refund of the Builder's Deposit for Arbitrator's Fees**

If the criteria set out in Rule 8.1 are met, then unless there is agreement otherwise, Tarion shall refund the Builder's deposit for Arbitrator's fees without interest or penalty without delay following delivery of the Decision or if applicable, refund the balance to the Builder.

## **8.5 Application of Builder's Deposit of Arbitrator's Fees to Costs**

- a) If the Builder is wholly or partially unsuccessful, Tarion is entitled to apply the Builder's deposit to satisfy the Arbitrator's Costs awarded against the Builder.
- b) If the Arbitrator's Costs awarded against the Builder are less than the deposit, Tarion shall either refund the balance from the deposit without interest or retain the balance and apply it as a credit against any amounts owing to Tarion by the Builder as a result of any award in the Arbitrator's Decision.
- c) If the Arbitrator's Costs exceed the deposit, the Builder shall pay any additional amount owing to the Arbitrator within 14 days of delivery of the award, failing which Tarion will pay the Arbitrator on the Builder's behalf. The Builder shall reimburse Tarion for such amounts without delay.

## **8.6 Costs of Adjournments**

Where a request for Adjournment is made less than 7 days prior to the start of an Arbitration, the party requesting the Adjournment shall pay the Arbitrator's Costs.

## **8.7 Costs of Abandoned or Dismissed Arbitrations**

If the Builder abandons the Arbitration or if the Arbitration is terminated due to the Builder's failure to comply with these BAF Rules or an interim award, or the Arbitration is terminated under section 19.2, Tarion shall apply the Builder's deposit for the Arbitrator fees toward payment of the Arbitrator's Costs and will refund any remaining deposit and/or fee to the Builder without interest.

# **9. SETTLEMENT OF THE ARBITRATION**

## **9.1 Making an Offer to Settle**

An offer to settle may be made at any time and by either Tarion or the Builder.

An offer to settle may be withdrawn in writing by the party who made the offer any time before it is accepted. Acceptance of an offer shall be made in writing prior to the offer's expiration or withdrawal.

## **9.2 Cost Consequences**

If either Tarion or the Builder makes a written offer to settle pursuant to this Rule at least 7 days prior to the start of the Arbitration and it is not withdrawn and does not expire before the start of the hearing, the following cost consequences will apply:

- i) if Tarion has made an offer to settle the Arbitration that is rejected by the Builder and the amount of the arbitration award is for an equal or lesser payment to the Builder, then the Builder will pay the Arbitrator's Costs;
- ii) if Tarion has made an offer to settle the Arbitration that is not accepted by the Builder until less than 7 days prior to the start of the hearing, the Builder will pay the Arbitrator's Costs;
- iii) if the Builder has made an offer to settle the Arbitration that is rejected by Tarion and the amount of the arbitration award is for an equal or greater payment to the Builder, then Tarion will pay the Arbitrator's Costs;
- iv) if the Builder has made an offer to settle the Arbitration that is not accepted by Tarion until less than 7 days prior to the start of the hearing, Tarion will pay the costs of the Arbitration according to the Tariff.

If Tarion and the Builder agree to settle an Arbitration at any time other than as described above, the Arbitrator's Costs will be allocated equally between them unless the terms of the settlement provide otherwise, and Tarion will apply the Builder's deposit and/or fee to the Builder's share of the Arbitrator's Costs.

## **10. THE HEARING**

### **10.1 Hearings Shall Be In Person**

The hearing of the arbitration will be oral and in person except as provided for in Rule 11.

### **10.2 Conduct of the Hearing**

The hearing is intended to be informal in nature. The Arbitrator is not bound by strict rules of evidence or procedure as long as the hearing complies with the rules of natural justice and procedural fairness and is within the jurisdiction and powers of the Arbitrator as set out in Rules 15.1 and 15.2.

### **10.3 Arbitration to be Private and Confidential**

The hearing is open only to the Arbitrator and the parties and their lawyers and witnesses, unless the parties agree otherwise in writing. The Arbitrator, parties, lawyers and witnesses shall treat all communications, evidence, arguments, orders and the award as confidential except in the connection with a judicial challenge to, or enforcement of an order or award, or unless otherwise required by law. Nothing in this Rule precludes disclosure of such information

to a party's insurer, auditor, lawyer or other person with a direct financial interest in the arbitration.

#### **10.4 Oath or Affirmation**

Witnesses who testify shall do so under affirmation.

#### **10.5 Burden of Proof**

a) Tarion shall have the burden of establishing that its decision(s) under appeal concerning:

- i) whether a claimed item is warranted; or
- ii) the conciliation was chargeable,

was correct.

b) Tarion shall have the burden of establishing whether;

- i) the amount paid for a repair or to resolve a claim; or
- ii) any other assertion of Tarion,

was reasonable.

c) The Builder shall have the burden of establishing:

- i) whether it is eligible to rely on an exception to chargeability, such as denied access;
- ii) the amount of money they spent on a repair or resolution of a claim made under protest; or
- iii) any other assertion of the Builder,

was correct.

#### **10.6 Exhibits**

The Arbitrator shall:

- a) identify all exhibits received by him or her in the course of the Arbitration; and
- b) retain the exhibits and all other documents received by him or her in the course of proceedings until 60 days after the date of delivery of the Decision to the parties and then dispose of the exhibits and documents (and any recording referred to in Rule 10.7) (in a confidential manner, e.g., shredding) unless:
  - i) the Arbitrator is advised in writing that a judicial review of the Decision has been commenced, in which case the Arbitrator shall forward the exhibits and documents to the court as directed by the reviewing party; or
  - ii) a party provides written notice to the Arbitrator prior to the expiry of the 60-day period that he or she wishes to retrieve that party's exhibits and documents and at their own expense.

## **10.7 Recording of Hearing**

The hearing will not be recorded, other than by the Arbitrator for the purpose making a decision or order, unless the parties and the Arbitrator agree in writing otherwise.

## **10.8 Representation at the Hearing**

It is intended that the Arbitration be informal and as straightforward as possible. It is contemplated that both the Builder and Tarion may be represented by non-lawyers. However, either party or both of the Builder and Tarion may at their option be represented by a lawyer.

## **10.9 Failure to Attend Hearing**

If a party fails to attend a hearing or leaves prior to the conclusion of the hearing, the Arbitrator may proceed in the party's absence. In these circumstances, the Arbitrator may:

- a) consider the appeal abandoned and dismiss the appeal pursuant to Rule 12; or
- b) hear the attending party's evidence and render a Decision.

## **11. WRITTEN HEARINGS**

### **11.1 Option for a Written Hearing**

The hearing may be conducted in writing, rather than orally, if the parties and the Arbitrator agree in writing that it is appropriate to do so. The Arbitrator will notify the parties of any modifications to the BAF Rules required to facilitate the written hearing.

### **11.2 Additional Material for Written Hearings**

If the hearing is in writing pursuant to Rule 11.1, each party's Case Material shall in addition to the materials set out in Rule 6, also contain:

- a) a written statement from each witness in the form of a sworn affidavit, which must be typed with numbered paragraphs, signed, dated and sworn, setting out their occupation, qualifications and relationship to the tendering party or the dispute, and must attach any documents referred to in the statement; and
- b) a written argument, which must be typed with numbered paragraphs, and must attach any legal authorities referred to in the argument.

## **12. GROUNDS TO DISMISS AN ARBITRATION**

The Arbitrator may dismiss an appeal without a hearing if, on a motion, it finds:

- a) it is frivolous and/or vexatious and/or is commenced in bad faith; and/or
- b) it relates to matters that are outside the jurisdiction of the Arbitrator; and/or
- c) the party filing the appeal has abandoned the arbitration.

## **13. MOTIONS**

### **13.1 Bringing a Motion**

A party bringing a Motion to be heard at a pre-hearing or the arbitration hearing must give no less than 7 days' notice to the other party and the Arbitrator. The responding party may file a response to the Motion no more than 6 days following delivery of the Notice of Motion.

### **13.2 Content of Notice of Motion**

The Notice of Motion under Rule 13.1 shall utilize Form 6 and set out in reasonable detail:

- a) the relief sought;
- b) the requesting party's reasons for requesting the order, including reference to any Rule; and
- c) describe and/or attach the evidence in support of the motion.

### **13.3 Mode of Delivery**

As noted in Rule 23.3, a Notice of Motion may only be delivered in person or by courier.

### **13.4 Proof of Notice**

The party bringing a Motion under this Rule must provide proof to the Arbitrator that the Notice requirements under Rule 13.1 have been complied with.

## **14. ADJOURNMENTS**

### **14.1 Adjourn on Consent**

The parties may agree to adjourn a pre-hearing, Motion or hearing on consent where the circumstances warrant.

### **14.2 Motions to Adjourn**

In the event that both parties do not consent to an Adjournment, a party may request an Adjournment by delivering a Notice of Motion for Adjournment to the other party and the Arbitrator.

In addition to the matter described in Rule 13, the request for Adjournment shall set out the reasons for the request and the alternate dates when the party and, where appropriate, its witnesses are available for the hearing.

A party wishing to oppose an Adjournment shall respond to the request setting out the reasons for opposing the request and their availability on the dates suggested by the party requesting the adjournment and alternative dates, if necessary.

If a party fails to respond to a properly delivered request for adjournment, the Arbitrator may proceed to deal with the request for adjournment and adjourn the arbitration to a date suggested by the requestor.

## **15. ARBITRATOR`S JURISDICTION AND POWERS**

### **15.1 Jurisdiction**

The Arbitrator only has jurisdiction to decide on issues that have been raised by the parties pursuant to Rule 2. In relation to those matters, the Arbitrator has the jurisdiction to:

- a) decide whether disputed items in the Warranty Assessment Report are or are not warranted;
- b) decide whether the conciliation or conciliations relating to the Warranty Assessment Report is chargeable or not chargeable;
- c) order the Builder to indemnify Tarion for reasonable amounts invoiced in respect of repairs done or payments made by Tarion to resolve one or more of the items found to be warranted and appealed in the Arbitration;
- d) decide whether the Builder is entitled to reimbursement for repairs or payments made by the Builder under protest under Rule 2.1, and whether the amount claimed by the Builder is reasonable or not reasonable;
- e) order Tarion to reimburse the Builder for amounts determined to be payable to Builder under Rule 2.1;
- f) order a party or parties to pay the Arbitrator's costs, and in what amount, in accordance with Rule 8 and the Tariff;
- g) decide whether an issue or matter raised in the arbitration is within the Arbitrator's jurisdiction, namely, whether the issue or matter falls within (a)-(f) of this Rule.

### **15.2 Procedural Powers**

In the course of the Arbitration, an Arbitrator may, in accordance with these BAF Rules and the Arbitration Agreement, determine all evidentiary and procedural issues regarding the conduct of the hearing and exercise all the powers that the Arbitrator considers necessary to make the arbitration as effective and as efficient as possible. Without limiting the foregoing, the Arbitrator may:

- a) set the date and time of the hearing and subject to Rule 4.8, the location of the hearing;
- b) adjourn pre-hearings, Motions or hearings to a specific date, place and time; on such terms as are just, including payment of any additional costs incurred by the Arbitrator as a result of the Adjournment;
- c) if necessary, conduct one or more pre-hearing conferences with the parties to clarify or narrow the issues in dispute, to review the procedure to be followed in the

arbitration, and to deal with any other matter that will assist the conduct of the arbitration;

- d) vary the amount of the Builder's deposit, with or without a pre-hearing conference, and set the time for additional payment or partial refund accordingly;
- e) make an interim order on any matter for which the Arbitrator may make a final order as set out in Rule 14.1;
- f) take the affirmation of the parties and witnesses;
- g) require a witness, other than a party or the party's representative, to absent themselves from the hearing during the testimony of another witness;
- h) order the taking of a view of the subject home (if the owner consents);
- i) waive or vary time limits or the strict requirement of these Rules except where these Rules expressly provide otherwise; and
- j) use telecommunications, including conference calls, facsimile transmission, (email (with attachments), for communication with and delivery of documents by or among the Arbitrator and the parties.
- k) at the written request of a party, issue a notice requiring a person to attend and give evidence at the hearing, for the requesting party to serve on the person in accordance with section 29 of the Arbitration Act, 1991, S.O. 1991, c. 17.

### **15.3 Applicable Principles and Law**

The Arbitrator shall comply with and apply the ONHWP Act and other laws of the Province of Ontario, as interpreted by the courts of Ontario. The Arbitrator shall apply the terms of Builder Bulletins recognizing that Builders are contractually obliged to comply with the terms of Builder Bulletins (either by virtue of a Vendor/Builder Agreement or otherwise as a term and condition of registration). The Arbitrator shall have due regard for the Construction Performance Guidelines established by Tarion under Builder Bulletin #40, and any other applicable Builder Bulletins. The Arbitrator may have due regard for but is not bound by previous decisions by the Licence Appeal Tribunal.

## **16. ARBITRATOR`S DECISION**

### **16.1 Delivery of the Decision**

In the case of an oral hearing, the Arbitrator shall deliver the Decision to each of the parties within 30 days of the conclusion of the hearing. In the case of a written hearing, the Arbitrator shall deliver the Decision within 30 days after delivery of the Builder's Case Material or Tarion's Reply, whichever is later.

### **16.2 Form and Content of the Decision**

The Decision shall be drafted using Form 7 in the Appendix and shall be dated and signed by the Arbitrator. The Decision shall:

- a) set out a brief summary of the evidence and the facts as found by the Arbitrator;
- b) set out the Arbitrator's conclusions and reasons as each of the applicable issues (within the Arbitration jurisdiction under Rule 15.1) and which are the subject of the Arbitration;
- c) contain a declaration that the Arbitrator has no conflict of interest with any party or witness; and
- d) contain a declaration that the Decision is final and binding on the parties.

### **16.3 Corrections and Amendments to Decision**

The Arbitrator may at a party's written request or on his or her own initiative within 30 days after delivering a Decision:

- a) correct typographical errors, errors of calculation and similar errors in the Decision;  
or
- b) amend the Decision so as to correct an injustice caused by a patent oversight on the part of the Arbitrator.

### **16.4 Finality of Decision**

The Arbitrator's Decision shall be final and binding on the parties and there shall be no right of appeal on questions of law, fact or mixed law and fact. However, the parties may apply to set aside a Decision on the grounds set out in section 46 of the *Arbitration Act, 1991*.

### **16.5 Enforcement of Decision**

If either party fails to comply with all or part of a Decision, the other party may enforce the Decision by court application. Tarion may enforce a Decision by court application or a Notice of Proposal, or both, and may invoke such processes simultaneously or consecutively, without the need to exhaust one remedy before the other.

## **17. TERMINATION OF ARBITRATION**

### **17.1 When Terminated**

An arbitration is terminated when:

- a) the Arbitrator issues a Decision;
- b) the Arbitrator terminates the Arbitration under Rule 17.2, 17.3 or 17.4; or
- c) Tarion terminates the arbitration under Rule 4 or 19.2.

### **17.2 Termination on Withdrawal by Builder**

Tarion may terminate the arbitration if:

- a) the Builder withdraws in writing from the arbitration; or
- b) the Builder abandons the appeal.

### **17.3 Termination for other Reasons**

Tarion shall terminate the arbitration if:

- a) the parties agree that the Arbitration should be terminated;
- b) the Arbitrator finds that the continuation of the arbitration has become unnecessary or impossible; or
- c) the arbitration is terminated or abandoned under Rule 17.

### **17.4 Non-Compliance – Builder**

If the Builder fails to substantially comply with any Rule or with an order or award, the Arbitrator and/or Tarion may, in its discretion, make an order terminating the Arbitration.

### **17.5 Non-Compliance – Tarion**

If Tarion fails to substantially comply with any Rule or with an interim order or award, the Arbitrator may, in his or her discretion, continue the arbitration, but shall not treat the non-compliance as an admission of the Builder's allegations.

## **18. ARBITRATOR IMMUNITY**

### **18.1 Arbitrator Immunity**

The Arbitrator shall not be liable to any party for any act or omission in connection with any arbitration conducted under the Rules.

### **18.2 Non-Compellability of Arbitrator**

The Arbitrator shall not be compelled to testify at, or produce his or her notes in any judicial, quasi-judicial, administrative or other legal proceeding.

## **19. PRIORITIES AND OTHER PROCEEDINGS**

### **19.1 Appeals by Owner to Licence Appeal Tribunal**

If any Owner requests a hearing before the Licence Appeal Tribunal ("LAT") under section 16 of the ONHWP Act, at any time before or during an Arbitration regarding any items raised in the Arbitration (hereinafter referred to as "LAT Item"), the following rules will apply:

- a) the Arbitration as it relates to the LAT item will be suspended until LAT issues its decision; the Arbitration will continue with respect to matters not related to the LAT Item;

- b) after LAT issues its decision, the Builder may recommence the Arbitration as it relates to the LAT Item by delivering a written notice to Tarion and the Arbitrator within 14 days after the issuance of the LAT decision. The LAT decision shall be binding on the Builder, Tarion, and the Arbitrator regarding any issues addressed in the LAT decision that are also raised in the Builder Arbitration Forum; or
- c) if the Owner withdraws his request for a hearing before LAT, or if LAT dismisses the request for hearing on consent or for delay or otherwise without deciding the merits of the LAT Item, the Builder may recommence the Arbitration as it relates to the LAT Item by delivering a written notice to Tarion and to the Arbitrator within 14 days of receiving notice of the Owner's withdrawal or the LAT dismissal.

## **19.2 Notice of Proposal While Arbitration is Pending**

If a Builder has commenced an Arbitration, then for so long as Arbitration is pending, Tarion will not issue a Notice of Proposal against the Builder under section 9(1) of the ONHWP Act based upon the same grounds that are the subject of the Arbitration. For clarity, Tarion may issue a Notice of Proposal against the Builder for any other grounds, at any time while an Arbitration is pending. If Tarion does so, the following rules will apply:

- a) the Arbitration is temporarily suspended until it is determined the period for appealing the Notice of Proposal has expired;
- b) if the Builder does not appeal the Notice of Proposal to LAT under section 9 of the ONHWP Act, the Arbitration will terminate 15 days following the issuance of a Final Notice of Refusal to Renew, Revocation or Suspension by Tarion's Registrar or
- c) if the Builder appeals the Notice of Proposal to LAT under section 9 of the ONHWP Act, then the Arbitration will be suspended until LAT issues its decision and:
  - i) if LAT directs the Registrar to refuse to renew the Builder's registration, to revoke the registration or to suspend the registration, and the Registrar does so, then the Arbitration will terminate upon issuance of a Final Notice by the Registrar;
  - ii) subject to subsection (iii), if LAT directs the Registrar to renew the Builder's registration or to refrain from revoking or suspending the registration, then the Builder may recommence the Arbitration by delivering a written notice of commencement to Tarion and to the Arbitrator within 10 days of the issuance of the LAT decision, failing which the Arbitration will be deemed to be abandoned;
  - iii) if LAT imposes terms and conditions of registration, the Builder must comply with the terms and conditions before recommencing the Arbitration;
  - iv) if the LAT proceeding is terminated on consent or for delay or otherwise without any decision by LAT on the merits and if the Registrar issues a Final Notice confirming the Notice of Proposal, then the Arbitration will terminate upon issuance of such Final Notice; and

- v) if at any time Tarion withdraws the Notice of Proposal, then the Builder may recommence the Arbitration by delivering a written notice of commencement to Tarion and to the Arbitrator within 10 days of Tarion's written Notice of Withdrawal; and
- d) if the Arbitration is terminated or abandoned under Rule 19(2) (a) or (b), payment of the Arbitrator's costs shall be in accordance with Rule 8.7; and
- e) if the Arbitration is recommenced under Rule 19.2, the original Arbitrator will retain jurisdiction and the proceeding shall continue with such modifications to the time periods as may be directed by the Arbitrator.

## **20. APPOINTMENT AND RELATED MATTERS**

### **20.1 Tarion Responsibilities**

Tarion shall have the responsibility for:

- a) appointing Arbitrators to the Roster;
- b) compiling and keeping current the Roster;
- c) monitoring and evaluating the performance of the Arbitrators named in the Roster; and
- d) creating and updating the Rules (including the forms and agreements in the Appendix), the Roster Agreement, the Tariff and other documents and agreements used in the Builder Arbitration Forum.

Tarion will apply the BAF Rules and the Roster Agreement for the purpose of such appointing, monitoring and evaluation.

### **20.2 Term of Roster Appointment**

Roster appointments are effective for one year, unless terminated earlier or renewed for a further term.

### **20.3 Renewal**

Tarion may renew or not renew an appointment for a further term or terms, at its discretion.

Tarion will consider the Arbitrator's compliance with the Roster Agreement and BAF Rules in exercising its discretion.

### **20.4 Termination**

Tarion may terminate a Roster appointment if the Arbitrator breaches the Roster Agreement or the BAF Rules.

## **21. OBLIGATIONS OF ARBITRATORS**

### **21.1 Compliance with Rules and Policies**

Arbitrators shall conduct themselves in a manner consistent with the principles of the Builder Arbitration Forum, including compliance with these BAF Rules, the Arbitration Agreement, the Roster Agreement and the Tariff.

### **21.2 Competence**

Arbitrators shall ensure that they are competent to conduct an Arbitration having regard to the nature of the dispute and if in doubt, should refuse the nomination or recuse themselves.

### **21.3 Timeliness**

Arbitrators shall not knowingly agree to provide arbitration services which cannot be delivered or completed in a timely manner, having regard for the timeliness prescribed in these BAF Rules.

## **22. CHANGES TO THE BAF RULES**

Tarion may, at its sole discretion, add to, amend, or delete anything contained in these BAF Rules. However, the BAF Rules that apply to any given Arbitration are the BAF Rules that were in force when the Request to Arbitrate was delivered.

## **23. GENERAL**

### **23.1 Language and Interpretation**

- a) The language for the Arbitration will be English unless the parties and the Arbitrator agree otherwise. Any party who requires an interpreter must arrange for an interpreter at their own cost.
- b) Words in the singular include the plural and words in the plural include the singular. Gender-specific terms include both sexes and include corporations.

### **23.2 Definitions**

In these BAF Rules, the following words will have the following definitions:

**“ONHWP Act”** means the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c.31 and the Regulations made thereunder as amended from time to time.

**“Adjournment”** means the rescheduling or continuance of an arbitration, pre-arbitration or motion to a later date.

**“Appeal”** means a written request for an arbitration of a decision under specified circumstances at the Builder Arbitration Forum pursuant to these rules.

**“Arbitration”** means a proceeding under the Builder Arbitration Forum.

**“Application Package”** has the same meaning as referred to in Rule 4.1.

**“Arbitrator”** means the person appointed to arbitrate the dispute under these Rules.

**“Arbitrator’s Costs”** means the Arbitrator’s fees and disbursements, calculated in accordance with the Builder Arbitration Forum Tariff.

**“BAF Rules”** means the within rules for the Tarion Builder Arbitration Forum.

**“Builder”** means a person who is a “vendor” or “builder” as defined in the ONHWP Act and who commences an Arbitration.

**“Builder Arbitration Forum”** means the forum for arbitration of disputes between a Builder and Tarion as provided for in these Rules.

**“Builder Bulletin”** means a Builder Bulletin issued by Tarion and posted on Tarion’s website.

**“Business Day”** means any day other than: Saturday; Sunday; New Year’s Day; Family Day; Good Friday; Easter Monday; Victoria Day; Canada Day; Civic Holiday; Labour Day; Thanksgiving Day; Remembrance Day; Christmas Day; Boxing Day; and any special holiday proclaimed by the Governor General or the Lieutenant Governor; and where New Year’s Day, Canada Day or Remembrance Day falls on a Saturday or Sunday, the following Monday is not a Business Day, and where Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday are not Business Days; and where Christmas Day falls on a Friday, the following Monday is not a Business Day.

**“Chargeability”** has the meaning given to it in Builder Bulletin 20.

**“Chargeable Conciliation”** has the meaning given to it in Builder Bulletin 20.

**“Conciliation”** means a process and may include an inspection, desk assessment, teleconference meeting or other gathering or exchange of information where Tarion attempts to resolve a dispute between an Owner and a Builder. The conciliation process may consist of a site visit, a single visit or a series of telephone meetings, a review of documentation, or a combination of these. (See also “conciliation” in Builder Bulletin 20.)

**“Conflict of Interest”** has the same definition as set out in the Roster Agreement between the Arbitrator and Tarion established under the Builder Arbitration Forum.

**“Customer Service Standard”** means the Customer Service Standard established by Tarion under the ONHWP Act and/or Builder Bulletins.

**“Decision”** means the Arbitrator’s decision, award or order in respect of the issues under appeal in the Arbitration.

**“Delay Compensation Claim”** means a claim made by an owner for compensation due to delay in closing or occupancy as contemplated by Regulation 165/08, as amended from time to time.

**“Good Standing”** means the Builder **(and its related and/or affiliated companies)** at the relevant time:

- is in full and timely compliance with the ONHWP Act, Builder Bulletins and any agreements between Tarion and the Builder;
- is up-to-date in filing of applications for renewal, including supporting documents;
- is up-to-date in paying all renewal fees and enrolment fees;
- is in compliance with any security requirements;
- is in compliance with any other terms and conditions of registration; 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 by Tarion to be a breach of warranty and for which the Builder has not filed an appeal.

**“Motion”** is a request by a party, at or prior to the commencement of an arbitration, for a remedy.

**“Owner”** has the meaning given to it in the ONHWP Act.

**“party”** means a person, including a corporation, specified as a party by or under the ONHWP Act, such as Tarion or the Builder.

**“related registrant”** means any registrant who or which has a common principal, director, officer, proprietor or partner with the Builder.

**“principal”** means a person who or a corporation which owns directly or indirectly, 10% or more of the shares or assets of a Builder.

**“Roster”** means the list of Arbitrators currently approved by Tarion that a builder may nominate under Rule 7 and are the only people eligible to act as Arbitrators in a BAF hearing.

**“Tariff”** means the cost of an arbitration, including the fees for the Arbitrator, as determined by Tarion.

**“Tarion”** means Tarion Warranty Corporation, being the corporation designated to administer the ONHWP Act.

**“statutory warranties”** means the statutory warranties available to an owner under the ONHWP Act in the circumstances.

**“Warranty Assessment Report”** means a written report in which Tarion provides its assessment of one or both of the following: (i) whether warranty claims by an Owner are or are not warranted; and/or (ii) whether a conciliation is or is not a “chargeable conciliation.”

Unless otherwise defined herein, other initially capitalized words shall have the meaning given to them in the ONHWP Act.

### **23.3 Time Periods, and How Notices Must Be Sent**

- a) Any written notice permitted or required under these BAF Rules may be given personally or sent by courier or registered mail to the other party and the Arbitrator at the address/contact numbers identified, or replacement address/contact numbers as provided

in paragraph (d) below. The parties may also agree in writing to receive notice by way of email or facsimile transmission. Notices may be sent to the solicitor for each party if necessary contact information is provided, but notices in all events must be sent to each party and the Arbitrator as applicable. If email notification is agreed to then the parties agree that notices may be sent by email to such addresses as agreed only, subject to paragraph (d) below.

- b) Written notice given by one of the means identified in paragraph (a) is deemed to be given and received: on the date of delivery or transmission, if given personally or sent by email or fax (or the next Business Day if the date of delivery or transmission is not a Business Day); on the second Business Day following the date of sending by courier; or on the fifth Business Day following the date of sending, if sent by registered mail. If a postal stoppage or interruption occurs, notices shall not be sent by registered mail, and any notice sent by registered mail within 5 Business Days prior to the commencement of the postal stoppage or interruption must be re-sent by another means in order to be effective. For purposes of this Rule 23.3, Business Day includes Remembrance Day, if it falls on a day other than Saturday or Sunday, and Easter Monday.
- c) Despite paragraphs (a) and (b) above, notices and materials under Rule 4 and Rule 13 may only be delivered in person or by courier.
- d) If either party wishes to receive written notice under this Addendum at an address/contact number other than those first identified to the other party, then the party shall send written notice of the change of address, fax number, or email address to the other party in accordance with paragraph (b) above.
- e) Time periods within which or following which any act is to be done shall be calculated by excluding the day of delivery or transmission and including the day on which the period ends.
- f) Time periods shall be calculated using calendar days including Business Days but subject to paragraphs (g) and (h) below.
- g) Where the time for delivering material under the BAF Rules expires on a day that is not a Business Day, the delivery may be made on the next Business Day.
- h) Prior notice periods that begin on a day that is not a Business Day shall begin on the next earlier Business Day, except that notices may be sent and/or received on Remembrance Day, if it falls on a day other than Saturday or Sunday, or Easter Monday.

#### **23.4 Extension and Abridgement of Time and Suspension of the Appeal**

Unless expressly stated otherwise, a time prescribed by these BAF Rules may be extended or abridged or the appeal suspended by the written consent of the parties.

#### **23.5 Communication between the Parties and the Arbitrator**

Any communication between the parties and the Arbitrator must occur in the presence of, or on written notice to the other party, except for administrative or other non-contentious matters.

## **23.6 Forms**

The forms referred to in these Rules are included in the Appendix. They form part of these Rules and may be amended from time to time.