DRAFT

Discussion Paper

Builder Arbitration Forum Review – 2012

Draft: January 23, 2012

BUILDER ARBITRATION FORUM REVIEW

1. EXECUTIVE SUMMARY

Tarion Warranty Corporation ("Tarion") has undertaken to review the rules of the Builder Arbitration Forum ("BAF"), Tarion's forum for builder challenges to Tarion's warranty and chargeability assessments. A review project is underway to collect feedback from key stakeholders on the efficacy of the BAF process, and to put forward proposals for change.

Some preliminary proposals for rule and process changes recommended for consideration by this draft internal discussion paper are as follows:

- Escalating appeals process.
- Restrict evidence to that available at conciliation.
- Different processes for warrantability vs. chargeability.
- End publication of BAF decisions.
- Fewer lawyers.
- Relax eligibility requirements.
- Add 4th exception to chargeability.
- Clarify onus of proof.
- Add a preamble to the Rules.
- Tarion to provide its case materials first.
- Expedited process.
- Reduce Costs.
- Improve Rules Forms, Website.
- Revise Arbitration selection.
- Add deposit and financial loss claims to BAF.
- Revise the Arbitrator's Tariff.
- Simplify arbitrators' decisions.
- Add a new deadline for invoice appeals.

2. BACKGROUND

BAF was created in 2003, in consultation with the new home building industry to establish a forum in which vendors and builders could challenge Tarion's decisions on warrantability and chargeability. It was conceived as a quicker, simpler and more inexpensive process compared to litigation. Since its creation, there have been complaints from a number of stakeholders and from the industry in particular, that BAF, although perhaps better than litigation, is not providing a satisfactory forum for challenging Tarion's assessments. It is felt that a review of BAF at this time is appropriate.

The review project is being led by the Law Department, with the assistance of a cross-departmental project committee. The project will take place over two phases. In Phase 1, the review looks at the original terms of reference and the rules and policies created around BAF. The review collects input from key stakeholders regarding their experiences with BAF, as well as their suggestions for improvement. An internal discussion paper will then be prepared for review by the Board of Directors which will summarize the work done in Phase 1 and outline any recommended changes to the forum.

This paper is a draft of the Phase 1 discussion paper and is intended to stimulate discussion around BAF review and to assist management in crystallizing proposals for change in advance of the formal consultation paper to be presented to the Board of Directors in June, 2011.

This draft discussion paper is the first collection of proposed reforms identified during the Phase 1 process. Included in this paper are the current leading suggestions for streamlining and improving the BAF process. Further discussion, consultation and research are expected to be necessary prior to decisions being taken on proposed process changes.

In Phase 2, the discussion paper, once approved or modified by the Board, will be circulated as a consultation paper for stakeholders' review and further input. After that further consultation process, Tarion management will bring forward any recommended changes to BAF for consideration by the Board, together with necessary steps for implementation, for example: regulatory changes (if necessary); changes to the BAF Procedural Rules (the "BAF Rules" or "Rules"); and changes to Builder Bulletins and any other internal resources.

As part of the review conducted in Phase 1, Tarion reached out to its stakeholders: the OHBA, BILD, the arbitrators on Tarion's BAF roster, counsel who have acted both for and against Tarion in BAF, and Tarion staff in the Claims, Licensing & Underwriting, Builder Relations and Law Departments, and requested their feedback. Stakeholders were asked to draw on their encounters with BAF matters and provide comments on ways in which the forum might be improved.

Note: BAF is available to both "vendors" and "builders". As the warranties are given by vendors and chargeability attaches only to vendors, BAF is used principally by vendors. For ease of reference, the term "builder" is used throughout and includes both vendors and "builders".

3. CONCERNS RAISED

Concerns raised by stakeholders can be summarized as follows:

Vendor/Builders

- There are too many barriers for BAF to be an effective avenue for vendor/builders to challenge Tarion's warranty and chargeability assessments, including:
    - a perception that a BAF challenge will hurt the relationship with Tarion;
    - BAF is too costly;
    - the process is too complex;
    - the perception that representation by a lawyer is necessary; and
    - the attendance at on-site inspection conciliation eligibility requirements should be removed.

- Reforms should recognize that usually the main issue is chargeability although proposed changes to MSD rules could lead to use of BAF to challenge more warranty assessments relating to MSD.

Tarion

- Builders do not understand the process well. They do not understand the rules for determining warrantability and even less so the rules for chargeability.

- There is already an informal escalation process for reviewing builder complaints regarding warranty assessments which could be formalized.

- Builders do not pay attention to repair periods leaving Tarion to make assessments without full information.

Arbitrators

- Concerns that fee structure is unfair to arbitrators.

- The roster of arbitrators is not fully and fairly used.

- Concerns that interim steps, (e.g., pre-hearings, motions) are underused, and could improve the process.

4. PRINCIPLES

Principles which will guide or influence this review of BAF and suggestions for changes include:

- A forum that affords builders an effective avenue for reviewing Tarion's warranty and chargeability assessments.

- This means, to the extent practicable, reducing barriers to use by:

    - keeping costs down;
    - timely resolution; and
    - keeping the process simple

- A forum that is fair to builders.

- The process should also be fair to Tarion and not be an undue burden from a financial or operational standpoint.

5. PRELIMINARY COMMENTS ABOUT DISPUTE RESOLUTION

It is in everyone's interest to create a forum which allows builders to fairly and effectively challenge Tarion's assessments with respect to warrantability and chargeability.

One possibility is to have reasonable people sit down, present their case and resolve their differences. This can often work particularly in circumstances where each party is operating with the same information – once they are "on the same page" as to the factual background, they are more likely to agree on the conclusions which flow from the circumstances.

However, there are many circumstances where parties, even with the same information, will come to different conclusions, and the only fair way to resolve the differences is to have an independent third party listen to both sides and make a decision that is binding on both parties. This is what is done in civil litigation and in arbitration.

Civil litigation is considered to be too costly and complex as it is a long, drawn-out process that involves pleadings, discovery, pre-hearings, mandatory mediation and only then, perhaps years later, a trial.

The goal of arbitration is to find a simpler process for such third party adjudication. There are however some realities that make any kind of third party dispute resolution inherently costly and to some extent, complex:

- unlike civil litigation, someone has to pay for the judges' (arbitrators') time and expertise;

- unlike civil litigation, someone has to pay for the hearing facilities; and

- the complexity of the process is to a large extent driven by the complexity of the issues at stake. Simple, factual matters can be addressed fairly simply. Factual matters that are layered with conclusions based on expertise in construction matters and building law become more complex. When the issues relate not only to factual matters and construction expertise <u>but also</u> to statutory and Builder Bulletin interpretations and where the consequences of the result are significant (i.e., whether a conciliation will be deemed chargeable) the steps necessary to properly address such issues become even more complex.

The current Builder Arbitration Forum which is described in a flowchart attached as Schedule "A", on its face, is fairly straightforward. There is no requirement for detailed pleadings, there is no requirement for discoveries, there is no requirement for pre-hearings, and unless the parties so choose, no need for lawyers to attend. It has been suggested that the BAF proceedings need to be "simple – like LAT." In fact, the Licence Appeal Tribunal ("LAT") proceedings are at least as complex, if not more so than BAF. There are many more rules and formalities, and there are mandatory pre-hearings.

Consider the process shown on Schedule "A". It should be finished within 84 days. Some describe this period as too short, others complain that they do not have enough time. In all events in practice, it is almost never finished within that time period. The usual drivers for lengthening the proceedings are:

- Finding hearing dates that work for all parties.

- Arranging new inspections and/or obtaining expert reports, exchange and review of those reports.

- The length of the hearing itself (e.g., it is very common for builders to insist that a hearing will only be a day yet bring four witnesses. If the hearing goes beyond the scheduled time, it may take weeks if not months to find additional hearing dates).

- It can take weeks, even months, before a written decision is received.

It is also important to recognize that when a decision, (i.e., that of an arbitrator) is final and binding, both parties will want to know they have been afforded what is called "natural justice" – generally the idea that they have been given a fair opportunity to present their case, respond to the other person's case and the arbitrator has acted in a fair and impartial manner. This means there must be certain steps and formalities in the process which some may describe as "barriers" or too cumbersome, but are necessary to ensure the parties receive natural justice.

In the end, there is always room for improvement and Tarion is confident that there are several things that can be done to make BAF a more effective forum for builders.

6. SUGGESTIONS FOR CHANGES TO BAF

The following are some proposals for change which are worthy of consideration and further discussion.

6.1 Escalating Process

The Ontario Home Builders' Association ("OHBA") in its feedback during Phase 1 of the review, suggested that Tarion consider a formal structure in which there would be several levels of appeal ultimately concluding with the arbitration process.

It is important to understand that an informal escalation process already exists. Upon receipt of a Warranty Assessment Report (WAR), it is common for the builder to contact the Field Claim Representative's (FCR) manager to discuss the WAR. If dissatisfied, some builders will ask to speak to more senior staff. Upon receipt of a BAF appeal, a quasi-formal review or triage process occurs. Specifically, the FCR and his/her manager review the file to confirm that Tarion is confident in its position and to identify any areas where there may be questions or misunderstandings. In addition, if it is felt that a meeting with representatives from Tarion's Claims department may resolve or narrow the differences, a meeting with the builder is arranged. Sometimes builders do not want to meet. The meetings typically do result in issues being resolved without proceeding to arbitration. Of the 243 BAF appeals launched since inception, only 20 (less than 10%) went to a full hearing. At the very least, such meetings help to focus the issues which thereafter may go to arbitration.

The proposal put forward by the OHBA is as follows:

1. The first step will be the builder calling a meeting with the FCR's manager to dispute/discuss the warranty and/or chargeability assessment.

2. A second level of appeal would involve a meeting with senior management staff, for example, Builder Relations and Claims.

3. If the matter cannot be resolved, then the matter would proceed to arbitration.

Management's initial reaction is that the informal process has worked well. Concern has been raised that a formal three step process will add complexity. For example, it is arguable that the proposed formal three step process may in fact be more cumbersome and in the end cost both parties more (in executive/staff time and legal costs) than the current system. Creating a formal three step process will probably require additional human resources for both, the Claims and Builder Relations departments. It could also lead to more frivolous appeals because the first two steps have no consequence for the builder, yet Tarion would be obliged to commit resources to multiple meetings when the appeals clearly lack merit.

6.2 New Evidence Submitted After Conciliation

BAF was intended to be an "instant replay" review of Tarion's warranty and chargeability assessments, by an independent party. Instead the review takes place months later, and both builders and Tarion end up giving new evidence.

It isn't always a review of Tarion's assessment which was based on the original information available to Tarion, during the actual warranty process. Instead, it becomes a bigger production with new tests, and new experts challenging or supporting the original assessment. Some have suggested that in an ideal world, the review would take place one week after the WAR is released. Scheduling realities make that impossible, but is there any reason why the review should not mimic that idea?

In our view, builders should do one or a combination of two things during the 120 day repair period: (i) resolve valid claim items; and/or (ii) explain to Tarion and the homeowner why items are not warranted (or if access is being denied, provide evidence of such denial). In that way, Tarion can make an informed assessment at the outset. It is neither appropriate nor fair to challenge Tarion's assessments with information not provided to Tarion prior to the conciliation inspection.

Probably the most effective change that could be made to the BAF process would be to limit the evidence that may be put forward at the arbitration hearing (or any stage of review) to only that information which was originally provided to Tarion in advance of the applicable conciliation. Under this proposed change, both Tarion and the builder would be prevented from providing any information or material at BAF – whether expert reports, fact evidence, or otherwise – which was not provided to Tarion prior to the conciliation (subject to permitted "fresh evidence" discussed below).

This approach has pros and cons but in our view, on balance, the pros greatly outweigh the cons.

Pros

- It encourages builders to address homeowner concerns during the 120 day repair period.

- It is consistent with the existing rules for challenging chargeability which state that the builder may only "rely on the grounds or reasons raised in the written notice prior to the conciliation." In short, this rule already exists for chargeability – it makes sense to conform to the rules for warrantability.

- Tarion will have better information when determining the warranty assessment in the first instance. This should reduce the number of BAF challenges as Tarion FCRs will have the "full story" when warranty assessments are made.

- The critical time for warranty coverage assessment is the conciliation inspection. Tarion is called upon to make a judgment – are the claim items warranted? Tarion reports its assessment in a WAR and must abide by that decision vis-à-vis the homeowner. Tarion, if necessary, has to pay the homeowner based on its assessment.

The only question is, should the builder pay? Tarion had a time limit within which to make the assessment. Should the builder escape liability by providing fresh evidence he did not provide to Tarion at the critical time of decision?

- Tarion will be in a better position to "go first" in presenting case materials (as requested in the OHBA feedback).

- It will almost certainly result in shorter and less costly BAF hearings, as the parties must rely upon the "record" as it existed on the conciliation date and cannot draw in all sorts of new information and conduct new tests all in an effort to "backfill" or support their position after the fact.

- Over time, this requirement should result in builders being more attuned to scheduling repair access within the prescribed 120 day repair period.

- It re-enforces that builders are on the front line of warranty coverage issues and must pay attention to such issues during the repair period.

- As there would be no need to do new inspections and tests, there would be less new evidence and the BAF timeline could almost certainly be reduced.

- BAF is not intended to affect homeowners. However, too often new evidence is brought in and requires calling homeowners in as witnesses. Attendance by homeowners is a burden to them and cross-examination (sometimes quite aggressively by builders and/or their counsel) is upsetting. It also extends the length of the hearing. If the record is compiled before the conciliation, homeowners should not have to be involved in the hearing.

- Both the builder and Tarion should save money. There will be no need to do more tests and inspections, and no need to hire new experts after the conciliation. The issues and available information will already have been gathered prior to the conciliation. Hearings will be shorter.

- A simpler hearing record means it is more likely both parties will be comfortable without lawyers.

Cons

- Arguably it forces both parties to be unnecessarily vigilant prior to the conciliation inspection. ***Tarion Comment:*** This is not a compelling argument, in our view. The builder should be at its most vigilant when the homeowner's warranty claim is being considered.

- Relying solely on the record prior to the conciliation may lead to seemingly unfair results if there is evidence revealed later which would lead to different conclusions. ***Tarion Comment:*** This argument has weight only if the evidence that is revealed later could not have been revealed earlier by a diligent builder. In our view, the rule should be that the BAF hearing should proceed based on the record that was before Tarion when it prepared the WAR, except in limited circumstances where a strict "**fresh evidence**" test is met, akin to the fresh evidence test applied by appeal courts, i.e., the evidence must not have been capable of being discovered by reasonable diligence beforehand, the evidence must be sufficiently probative that it could affect the result, etc.

- To the extent the arbitration ruling results in an order for payment, it may seem unfair to make such order without the benefit of "fresh evidence." ***Tarion Comment:*** The unfairness argument is also muted somewhat by the fact that the builder is not forced to go to BAF – he will have his day in court should Tarion pursue collection.

Other considerations for implementing such a new proposal include:

- It would be necessary to change the Rules and educate builders that failure to explain themselves during the repair period will limit the basis on which they can challenge Tarion's assessments.

- This proposal will require additional consideration and fine tuning. For example: the restriction would not apply to production of receipts for the cost of work and materials relating to repairs that are under protest. (Such receipts may not be received until after the conciliation inspection.) There may be room for new evidence where both parties agree e.g., where both parties wish to jointly arrange for an expert to be retained to opine upon a particular issue (although re-opening the forum to "dueling experts" should be avoided). The rules will also have to dovetail with new Customer Service Standards (CSS) for Major Structural Defects (MSD).

With the introduction of this proposal it would make sense for Tarion to adopt the OHBA suggestion (regarding who files case materials first) since Tarion should be in possession of all materials to go before the arbitrator. Tarion can compile a package which outlines its position and that of the builder. The builder then only needs to respond to the Tarion compilation.

Tarion should consider this proposal to restrict evidence on warranty coverage (and as exists now on chargeability) to only those documents or materials that the builder can show have been provided to Tarion prior to the conciliation inspection (with "fresh evidence" exception discussed above).

6.3 Tarion to Provide its Case Materials First

The OHBA has suggested that it would be helpful to builders if Tarion were to provide its submissions first.

In an appeal process, it is typical for the appellant to point out why it is challenging a decision. That said, to the extent that this suggestion will help reduce a "barrier to entry" – this is a change that, depending on how the reform package evolves, Tarion would consider recommending.

Pre-conditions to such a change might include:

- adoption of the proposal to limit evidence to what is available at the conciliation inspection (so Tarion can essentially gather the available material and prepare a comprehensive package that the builder need only respond to);

- if there is a staged process, Tarion is not obliged to prepare Case Materials until the arbitration step; and

- Tarion may want to have a right to provide a written reply after the builder responds.

6.4 An Expedited Process

It has been suggested on different occasions that there should be a BAF "fast track" process. There does not seem to be any consensus on determining eligibility to fast track a BAF case and what a "fast track" process might look like. Indeed, it is worth remembering that BAF itself was designed to be a quick, inexpensive, expedient process. While BAF is often quicker and less expensive than civil court proceedings or even LAT appeals, Tarion recognizes there could be improvement in efficiency gains.

There are a number of good reasons why a "fast track" process is worth considering – the questions are: what issues should be eligible for this process, and what steps should be skipped from the regular process?

To get a feel for the steps in a typical arbitration, please see the BAF flow chart of existing steps attached as Schedule "A". A shortened process may not be ideal to deal with complex issues, typically difficult legal issues on hotly disputed facts such as chargeability and MSD assessments, or determining the value of completed repairs. However, simply dealing with one or two warranty items could lend itself to an expedited process or a challenge where the only issue is the value of the repair work done. What might this "fast track" process look like?

Arbitration in Writing

It could be an arbitration in writing. Both sides could submit a written statement of their position with supporting materials (e.g., photos, emails). There would be no hearing, the arbitrator would review the materials and render a decision. This option could work when dealing with simple matters. This would not work where there are disputes about the veracity of evidence (e.g., disputes as how and when a photo was taken or challenges to the credibility of witness statements). This model may work in limited circumstances but if the issues are that simple, the matter could probably be settled before the hearing anyway.

Hearings in writing are currently permitted by the Rules. To Tarion's knowledge, no builder has ever elected this option. It may be that builders are simply not aware of this option and that more education is needed. To the extent an expedited process is sought to deal with a perceived likely increase in MSD challenges, then arbitrations in writing could be an appropriate option.

Time Limits

Another idea is to have time limits at BAF hearings perhaps linked to the number of WAR items or dollar value. However, the complexity of a case is not always determined by dollar value and builders may object to time limits on their submissions on serious issues such as chargeability.

No Written Submissions

Builders have suggested they find the requirement of written submissions as a barrier to the use of the BAF process.

If an escalating process is adopted, then perhaps the pre-arbitration meetings could be conducted without written submissions. If the matter proceeds to the arbitration level, in Tarion's view, written submissions are very important for these reasons:

- Any dispute resolution forum needs a mechanism to outline and focus the issues. Litigation has pleadings, discoveries and pre-hearings for this purpose. BAF has only the written submissions to serve this purpose.

- Written submissions force both parties to:

    - focus on the issues; and
    - set out the materials they wish to rely upon.

  Without this step, the actual hearing process would take longer. (The issues will not have been defined beforehand; neither party will know the case it has to meet.)

Also, if the parties want the arbitrator to be informed and therefore more effective, the arbitrator needs to have some understanding of the issues and each of the parties' positions prior to entering the hearing room.

- Written submissions need not be lengthy, e.g., "Tarion should not have found item x warranted because…"

Written submissions would not be necessary for any pre-arbitration meetings but it is recommended they be retained as an important step leading to the arbitration hearing.

An expedited model would work much better if the restricted evidence proposal is adopted, and better still if arbitration decisions remain between the parties.

Further study and consideration of possible models will be necessary.

6.5 Differentiate Appeals for Warrantability vs. Chargeability

Another idea is to recognize there are differences between assessments relating to warrantability and those relating to chargeability.

For example, an expedited arbitration (and perhaps the two or three step processes described earlier) may be appropriate for reviewing decisions as to whether or not there is in fact a defect in workmanship and materials – i.e., warranty assessments.

Chargeability, on the other hand, uses the warranty assessment as a starting point and continues. Determining chargeability involves not just assessing facts and construction expertise but consideration of the legal definition of chargeability and the exceptions to chargeability. Chargeability is a builder conduct issue and arguably could be addressed in a different way. Tarion could, for example, stream warrantability assessments to BAF but remove chargeability. Instead, chargeability appeals could be routed to a representative committee which could meet quarterly and deal with any appeals to chargeability which have arisen in the previous quarter. The committee could be made up of representatives from Tarion and the industry. They could meet in Tarion's offices and thus save considerable money otherwise payable to arbitrators and for the use of hearing rooms.

This proposed committee would also gain expertise in the rules for chargeability. One downside is that issues relating to a single home would end up at two different forums, thus duplicating efforts. Again, such a model will be much more effective if all of the information provided, was that which was available before the conciliation took place.

6.6 Reducing Costs

The feedback from OHBA and other stakeholders has suggested that BAF is simply too costly, which makes the process inaccessible to builders. So, what are the major cost drivers?

- A $750 (plus HST) non-refundable administration fee:

    - Tarion agrees with OHBA that the $750 fee should be refundable if all of Tarion's assessments are shown to be incorrect (or Tarion reverses its assessments).

    - The idea of a lesser fee for small builders, may even be considered. For discussion purposes, perhaps amount could be reduced to $250 for small builders.

    - Tarion disagrees with the OHBA's suggestion that the fee should not be paid until the third stage if a multi-stage process is initiated. Some amount should be paid in order to initiate an appeal.

    - Alternatively, maybe builders should be required to pay a more substantial fee but only if they lose – i.e., as a dis-incentive to launching weak BAF challenges, the builder is required to pay say a $2,000 fee, plus the arbitrator's costs.

- The arbitrator's per diem for his time and expertise:

    - It is important to note that the arbitrator's costs will continue to rise, with time. Thus, to reduce this cost, the goal should be to avoid a hearing, and/or reduce the complexity and length of hearings, (i.e., reduce hearing record and focus on issues) that do proceed.

- The cost of the hearing room:

    - For hearing rooms, Tarion will be looking for alternative, less expensive space – perhaps in Tarion's offices or in nearby facilities.

- The cost of a lawyer (if used):

    - As mentioned previously, legal counsel is optional. It would be up to the builder to decide if they want to have legal counsel present.

- The opportunity cost of executive and staff time:

    - Both builders and Tarion have costs associated with staff involvement in the BAF process. The best way to avoid these costs is to avoid BAF or to shorten proceedings.

Another idea is to provide that only the refundable administration fee is payable at the outset – thus reducing barriers to access.

However, with respect to arbitration (arbitrator's fees and hearing room fees), the payment of those amounts could be postponed to a time immediately before the hearing. Alternatively, as suggested by the OHBA, Tarion could fund all such costs initially. If Tarion agrees to this suggestion, it could be tested on a pilot basis first. If, Tarion ends up having trouble collecting such amounts from builders during the pilot period, the up-front payment may have to be re-instituted.

6.7 Non-Publication of BAF Decisions

As is typical for arbitration proceedings, BAF proceedings are private and confidential. The proceedings are not open to the public but only to the parties and their representatives. As a rule, the hearings are not recorded and there is no mechanism to appeal the decision. The decisions are not considered precedents.

There is, however, one exception to the Rules that permits Tarion to publish the award without identification of the builder. Tarion has elected in the past to publish the decisions - in the hopes of providing guidance to registrants, even though decisions are not precedents. However, it is now felt that the decisions do not provide much guidance for future cases as they are so fact specific. Indeed, publication of decisions may do more harm than good. Knowing that the decisions will be published, leads both parties to "put their best foot forward" and probably results in more protracted proceedings. It certainly causes arbitrators to write much longer decisions. (It is noteworthy that arbitrators are asking for more money, in part to compensate them for the cost of writing decisions.) Thus, as a step toward shortening the proceedings and reducing costs, we recommend that BAF decisions be kept between the two parties and not be published. Other reasons include:

- Arbitration by its nature is intended to be a private dispute resolution mechanism. A private settlement allows for quicker, cheaper resolution.

- As a practical matter, the decisions are for the most part fact driven and thus do not provide any true guidance for the next case.

- Published decisions will be called upon selectively to support the position of one side or the other. Much time and effort is spent showing why a decision is different or should be distinguished. The proceedings become more legalistic, more likely requiring lawyers.

- Non-publication means that neither party will have to review all the "BAF case law" – a savings in time and money. It makes it more likely that both parties can appear without lawyers.

6.8 Simplify Arbitrator's Decision

It is taking longer to receive decisions from the arbitrators and the decisions are getting lengthier and more complex. The arbitrators, in turn, are asking for higher fees to compensate them for the act of preparing the decisions.

This trend should be turned around. Tarion would like to see shorter, simpler and more understandable decisions.

As mentioned earlier, if decisions remain as between the parties, there is less need for the arbitrator to go into extended detail on all of the law and all of the evidence. Instead arbitrators can provide shorter, more to the point reasons for arriving at decisions. Tarion will propose a standard form template for a BAF arbitrator to use in drafting its decisions. This template may include:

- A schedule that sets out any necessary recitation of law or at least cross-references applicable law and applicable Builder Bulletins.

- A simple format broken out into two sections:

    - The first section would deal with warranty coverage questions. There would be a place for listing the warranted item; a statement as to whether it is warranted or not; and then explanation if it is not warranted. Direction would be given to keep the reasons simple and straightforward, perhaps even suggesting a word limit. It would not be necessary for the arbitrator to go through the evidence in detail.

    - The second section would relate to chargeability. If there remains even one warranted item as at the conciliation date, then chargeability follows unless the builder can demonstrate that one of a set list of exclusions applies. The arbitrator would then refer to the applicable exceptions and his findings as to whether or not the builder had demonstrated if the exception applies.

These changes should mean three things: (i) the decisions can be delivered more quickly; (ii) at less cost; and (iii) be more easily understood by non-lawyers.

6.9 Representation by Counsel

Currently under the BAF Rules the starting position is that neither party will be represented by legal counsel; the general perception being that lawyers make the proceedings more complex and costly. Arbitrators will tell you the opposite is often the case: lawyers help focus the issues and the arbitrator will not have to spend time explaining and guiding the parties through the process.

Unrepresented parties are as likely or more likely to draw out the length of the proceedings because of their lack of knowledge of the process and tendency to focus on tangential or irrelevant matters. This has certainly been Tarion's experience at homeowner LAT proceedings.

Tarion's experience has also been that builders typically want legal representation, especially when contesting chargeability. Most cases that go to hearing involve chargeability which of necessity means the BAF proceedings will be more complex. Both parties are compelled to address the interplay between the ONHWP Act, the Regulations, the Ontario Building Code, the BAF Rules, Builder Bulletins and existing case law.

Since chargeability will undoubtedly remain the main driver for builder appeals, prohibiting or significantly restricting the use of counsel at BAF would not be effective. Prohibiting representation will almost certainly lead to unwanted legal challenges by builders, including the possibility of constitutional challenges and assertions of denial of natural justice.

The existing default position is that there will be no lawyers. A party must seek leave from the arbitrator to have legal representation. In Tarion's view this is fair for addressing this issue. The Rules could be changed to state that if the builder so insists, neither party will have legal counsel. Such a change from Tarion's perspective should only be coupled with a change regarding non-publication of decisions. Tarion would also have to consider staffing issues. There would have to be enough non-legal staff comfortable with representing Tarion at such proceedings.

6.10 Improve the Rules, Forms, Website

There is much that can be done to improve the BAF Rules, Forms and Tarion website pages regarding BAF.

The BAF Rules need to be simplified, use more plain language and generally be made more user-friendly. The same is true for the Forms. There are multiple forms which may seem daunting. They can be reduced in number, use more plain language and generally be made more user- friendly.

Tarion website pages for BAF similarly need to be revised to make them more user-friendly.

6.11 Selecting an Arbitrator

At present, there is a roster of 24 arbitrators chosen with industry input – five in Ottawa, two in Windsor and the rest in the GTA.

The current process is cumbersome for builders. It involves the builder nominating three, the builder writing to each of them, Tarion following up, and then Tarion ultimately choosing one from among the three. This process results in the roster not being used to its full potential.

One suggestion is to simply rotate the arbitrators. For the Ottawa area, we would rotate the five arbitrators, for southern Ontario, there are two and for the GTA (where almost all the BAF proceedings take place), there would be a rolling roster of 17. It is a simple solution and neither party gets the opportunity to select – you take the next person in line. This seems simple and fair. It is fairer to arbitrators and ensures their regular involvement will keep them "up to speed" with the process and relevant issues.

Another "roster" question is whether the quicker route in some instances is for Tarion and the builder to agree upon a "special arbitrator" (someone not necessarily on the roster), who would be an expert in the specific field related to the warranted item in question. To ensure this does not lengthen proceedings, there would have to be a stipulated period of time in which both parties would agree upon the special arbitrator. If both sides do not agree, the process would revert to the usual roster selection process.

It has been suggested that the ability to choose an arbitrator is a key consideration for builders and simple rotation of arbitrators would be of concern to them. Although the current selection process for arbitrators is cumbersome, it provides the ability to nominate arbitrators with skill sets appropriate to the issue. Tarion will welcome further input from the industry on this issue.

6.12 Deposit Refund/Financial Loss Claims Should Also Go To BAF

Since its inception, BAF has not formally had jurisdiction to include builder challenges to Tarion decisions on s. 14(1) deposit refund claims, or s. 14(2) financial loss claims. Builders may dispute all other types of warranty claims, including delayed closing claims.

There is little, if any, practical distinction between delayed closing claims and deposit refund/financial loss claims (except that delayed closing claims may result in a "chargeable" conciliation, whereas deposit refund/financial loss claims at present do not).

A review of the BAF Rules and historical materials related to the creation of BAF does not reveal a cogent rationale for excluding deposit refund/financial loss claims from the BAF process.

Builders have regularly indicated their desire to pursue such claims at BAF. For some time, Tarion has consented to such matters going to arbitration depending on the particular circumstances of each case. The determination whether to allow such appeals to proceed has typically been made by consultation among the Vice-Presidents of Claims, L&U and Law, with each case decided on its own merits.

There would be numerous revisions required to the BAF Rules, BB39, BB41 and BB42R, and several BAF resource documents in order to extend BAF jurisdiction to deposit refund/financial loss claims. However, most of the changes would simply expand references to WARs to include Desk Assessment Reports, expand references to "repairs" to include "compensation", and specifically extend BAF jurisdiction to such claim issues.

Tarion recommends that the required changes be implemented to formally permit deposit refund/financial loss claim appeals to proceed in BAF. Consideration should also be given to making it clear that a finding of liability under a desk assessment for deposit claim or financial loss is also considered a "chargeable conciliation" (as it is with delayed closing claims).

6.13 Eligibility for BAF

The Rules at present contain several eligibility requirements. These are:

- the builder is in good standing throughout the arbitration process;
- the builder is not the subject of a Notice of Proposal;
- the builder must have attended at any on-site conciliation inspection;
- for a documentary review arbitration, the builder must have complied with all written requests for information from Tarion; and
- if the builder is disputing chargeability of the conciliation, he must have given written notice to Tarion, prior to the conciliation, of any facts that would entitle the builder to rely on the exception.

OHBA has suggested that the eligibility requirement that the builder have attended the on-site conciliation inspection, be deleted.

Tarion's preliminary view is that this is an appropriate suggestion. For example, there are situations where the relationship between the builder and the homeowner has deteriorated to such an extent that the builder has not been allowed on the homeowner's premises. In that circumstance the builder should not lose eligibility for BAF.

In general, if builders do not attend the on-site inspection, they are simply missing an opportunity to present their side of the case. From Tarion's standpoint, eligibility should not turn on whether the builder attended the on-site inspection. The more important point, as noted above, is that the builders should be able to demonstrate that they were engaged in dealing with the outstanding claims and provided evidence to support any disagreements they had with respect to warranty calls prior to the conciliation.

16.14 Add a Preamble

LAT and court decisions regularly describe the ONHWP Act as consumer protection legislation and accordingly, its interpretation should be broad and liberal, in keeping with the promotion of the consumer protection mandate (see s.64 of the *Legislation Act*, 2006). The same approach does not seem to be evident in BAF matters, though it should be.

Another issue is that builders have said they feel that a challenge through BAF gives them a "black mark" or otherwise hurts their relationship with Tarion. Tarion feels that this is an unfounded notion and should be dispelled.

As a result, Tarion suggests that in the BAF Rules and BB41, the following information should be reinforced:

- The purpose of the warranty program is consumer protection and Tarion's governing legislation and its builder bulletins should be given a broad and liberal interpretation which promotes the consumer protection mandate; and

- Builders are entitled to use the BAF process. Exercising such rights is not a matter that will be recorded or otherwise affect a builder's record or their relationship with Tarion. (An exception to this rule may be a right to make note of a builder who persistently wastes Tarion's time with numerous frivolous and vexatious challenges.)

6.15 Revisions to Arbitrator's Tariff

The BAF Arbitrator's Tariff was made effective alongside the BAF Rules on April 2, 2003, and has not been altered since.

Some issues that need to be addressed are as follows:

- The tariff provides limited compensation for arbitrators when a matter is resolved in advance of the hearing.

- The tariff does not compensate for preparation when a hearing is cancelled "last minute" – a common occurrence.

- The fees for pre-hearing matters are too low.

An informal comparison of industry standards indicates that the tariff is significantly below market. In order to ensure that we attract and retain serious, competent, dedicated arbitrators, our compensation structure must remain competitive. A more detailed study of current rates will be undertaken to identify the appropriate changes to both rates and heads of compensation.

6.16 Warranty Coverage and Chargeability Challenges Exclusive to BAF

It has been previously proposed that Tarion channel all warranty coverage and chargeability challenges to BAF – in connection with possible strategies to reduce costs and delays in Notice of Proposal (NOP) proceedings at LAT.

If implemented, this change would cut down the length of NOP hearings. Some lawyers opposite Tarion pursue a deliberate strategy of dragging out the NOP process by contesting every item in a WAR, leading to longer hearings in general, and lengthy and intensive cross-examinations in particular. If Tarion's decisions on warranty coverage and chargeability could not be disputed in an NOP, the issues open for challenge in the NOP would be significantly reduced.

However, consideration would have to be given to the increased caseload created for BAF. It is worth noting that BAF cases can be as or more expensive than NOP LAT cases, because of the cost of the arbitrator and hearing room.

In view of the foregoing, Tarion does not recommend the channeling of all warranty coverage and chargeability issues to BAF.

6.17 Additional Exception to Chargeability

By way of Special Announcement in June 2006, Tarion added the following exception to the chargeability of a conciliation:

> "The homeowner reported to Tarion that a warranted item was resolved when the homeowner scheduled the conciliation inspection [yet] the homeowner raised the item as unresolved at the conciliation inspection."

Since this exception to chargeability did not exist at the time of the creation of BAF, there is no reference to it in any historical material.

This fourth exception to chargeability has been communicated to Tarion's roster of arbitrators, and in practice the exception is available to builders in the appropriate circumstances. The Rules and Builder Bulletins should be updated to reflect the availability of the exception.

Tarion recommends this housekeeping change be implemented.

6.18 Different Appeal Period for Appeals limited to Cost of Repairs

Under the existing Rules, a builder must appeal a Warranty Assessment Report within 28 days following its issuance. There are circumstances, however, where a builder is not challenging the warranty assessment (or even chargeability), but rather the amount spent by Tarion to repair the problem. In these circumstances, the builder is invariably out of time to go to BAF, because the invoice for the work will not have been received until after the 28-day BAF appeal period has expired. As a result, the issue plays out two years later in a collection action.

Tarion should consider directing more of these invoice disputes to BAF rather than to collection litigation.

The advantages are:

- BAF arbitrators generally will be more attuned to the issues, whereas collections litigation involves judges who sometimes know little or nothing about Tarion and its legal and operational framework.

- There should be fewer collection actions.

- Dealing with invoice disputes sooner means that the issues should still be fresh in the parties' minds.

- It also means that the issue can be addressed through pre-hearing negotiations and, that the inevitable settlement negotiations will be pushed forward, (i.e., not take place 1-2 years until collection litigation nears trial).

A corresponding consequence is that appeals with respect to invoice amounts may increase the number of BAF appeals. As mentioned, this is a good thing as BAF in most cases is a better forum for such disputes.

To the extent that Tarion wishes to direct more invoice disputes to BAF, the way to facilitate this is to create a second deadline for filing a BAF appeal in circumstances where the only issue that the builder wishes to dispute is the amount spent by Tarion in connection with the repair. The second deadline could be 30 days following receipt of Tarion's invoice for the work.

6.19 Optional or Mandatory Pre-Hearings

It has been suggested, in particular by some arbitrators, that mandatory pre-hearings would be helpful in settling matters or narrowing the issues. Pre-hearings are already permitted. The question is, should they be mandatory?

In some instances, a pre-hearing can lead to early settlement or at least narrowing of issues. The most effective pre-hearings are in person which means scheduling issues and notable costs. It should be up to the parties to decide if the likely benefit of this extra step will outweigh the costs.

Tarion recommends pre-hearings remain optional.

6.20 Burden of Proof

Two years after the creation of BAF, a 2005 BAF decision stated that Tarion has the onus of showing that its warranty assessment is correct. Different arbitrators have approached this question in different ways. The BAF Rules do not speak directly to this issue and perhaps they should.

As a general rule in dispute resolution, where a regulatory body makes an assessment/decision, that assessment/decision is given deference and it falls to the person wishing to challenge that decision to show why the decision is incorrect. It can be said, Tarion is a quasi-judicial adjudicator when it makes warranty decisions. It might seem odd for Tarion itself (i.e., the adjudicator) to have to re-prove the evidence at a BAF hearing. With homeowner LAT matters, the onus is on the homeowner to show that Tarion's warranty assessment is incorrect. A fairly strong argument can be made that it should be no different for BAF – it is Tarion's ruling that is being appealed and the onus is on the appellant (builder) to show the ruling is wrong. If so, it should be clarified in the BAF Rules that the onus is on the builder.

However, perhaps the correct way to look at this is that the question: "Is the item warranted?" is the proposition that has to be demonstrated. In homeowner LAT, there is no assumption that a homeowner's claim is warranted. For homeowners making a claim, they have the onus of demonstrating that it is warranted. To the extent that Tarion has asserted something is warranted (triggering the builder's obligation), Tarion effectively steps in to the homeowner's shoes and arguably has the same obligation to demonstrate that it is warranted. Similarly, if the issue is the amount of money paid to make a particular repair, the onus would be on Tarion to demonstrate that the amount paid was reasonable in the circumstances. One exception, however, would be with respect to exceptions to chargeability. While it may be appropriate to require Tarion to show that there is at least one warranted item, to the extent that a builder wishes to rely upon an exception to chargeability the onus would be on the builder to prove that the exception applies.

Tarion Comment: This analysis is consistent with NOP hearings. That is to say, when Tarion makes a decision to revoke, the appeal by the builder does <u>not</u> place the onus on the builder to show Tarion's decision is wrong. Rather, Tarion is required to demonstrate that its decision is correct.

Clarifying the burden of proof as noted above, would dovetail with the idea of Tarion providing its case materials first. It might also result in a quicker hearing as Tarion would present its position and then the builder need only present evidence as to why it thinks Tarion's warranty assessment is incorrect and/or as to why an exception to chargeability may exist.

7. CONCLUSION

Several useful proposals for change to the BAF process have been identified, and are recommended for consideration. In particular, the proposed changes restricting evidence to that available at the conciliation, and moving to non-publication of BAF decisions, have the potential for meaningful change to the BAF process and renew the Forum as an effective resolution model. The potential for efficiency gains is significant, and some proposals have much to offer by way of process improvement. An improved BAF process will also be advantageous should proposed MSD policy changes result in more challenges to Tarion's MSD assessments.

SCHEDULE "A"

BUILDER ARBITRATION FORUM
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