

Tarion Overhaul of Major Structural Defect Procedures

Tarion has introduced significant changes to the major structural defect claims process. These changes will affect all condominium projects where the first arm's length agreement of purchase and sale was signed **after July 1, 2012**. All of the changes are currently reflected in [Regulation 992 to the Ontario New Home Warranties Plan Act](#), and summarized in [Builder Bulletin 24 \(revised\)](#).

After consulting with the condominium industry for the past several years, Tarion has expanded the definition of "major structural defect" ("MSD") to provide further direction to owners, builders and condominium corporations as to which deficiencies do in fact constitute a MSD.

The definition of MSD in the Regulations now refers to three separate "tests."

The "**failure**" test looks at whether the defects in work or materials would result in "failure of a structural load-bearing element of a building." Tarion describes this as a "fairly stringent test that contemplates actual structural failure."

The "**function**" test looks at a structural load-bearing element and its function. Accordingly, any defect in work or materials that materially and adversely affects the ability of each structural load-bearing element of the building to carry, bear and resist applicable structural loads for the usual and ordinary service life of such element will be a MSD.

The "**use**" test was referenced in the previous definition of MSD, although the current language has been revised. In order to constitute a MSD, the "use test" requires that a "significant portion of the home (or common elements) is materially or adversely affected." The use test is an objective standard which looks at the usual and ordinary purposes of a residential dwelling. Accordingly, in the condominium context, if a load bearing related deficiency significantly affects the use of a common element lobby, then presumably Tarion would constitute this as a MSD.

As was the case under the previous procedure, an MSD claim has to be advanced by a condominium corporation within 7 years of registration. The major difference is that if the deficiency does constitute a MSD under the new definition, the builder now has an opportunity to either take full responsibility for the MSD, or reimburse Tarion an amount referred to as a "co-share payment."

Builders will continue to have full responsibility for any MSD claims made in years 1-2 following registration. However, for MSD claims made between years 3 and 7, builders are now required to elect to either:

- a) take full responsibility for the MSD; or
- b) re-imburse Tarion for a "co-share payment." For condominium common elements, the co-share payment is the **least** of i) Tarion's cost of resolving the MSD, ii) 5% of the aggregate sale

price of all of all of the units, and iii) \$750,000.00. These payments would also be subject to any liability caps that are provided in the *Act*.

Another significant change is that if an MSD claim is beyond the builder's control, and constitutes an "industry wide issue," then Tarion's board of directors would review this issue on a case by case basis.

Under the new regime, Tarion has also clarified which types of deficiencies are excluded from MSD coverage (even if the deficiency would otherwise fit within one of the three "tests" set out above). The exclusions relate mainly to defects in design, work and materials. MSD coverage will not, for example, pertain to defects in work or materials related to heating or cooling appliances such as furnace, air conditioner or heat pumps.

It will be interesting to see how these changes affect condominium corporations, and whether the "three test" definition will give rise to more MSD claims being approved by Tarion. It will also be interesting to see whether builders are more likely to assume full responsibility for a MSD (as was the case before), or agree to a co-share payment, with the belief that they may potentially limit their financial exposure. As we see more MSD claims being brought under the new procedure, we will follow up with our assessment of how the new process appears to be working.

It should be stressed, however, that since this new process only applies to agreements entered into after July 1, 2012, it could be years before new home owners see the effect of these changes. For example, if on August 1, 2012, a purchaser enters into an agreement of purchase and sale for a condominium unit in a building that has not yet commenced construction, it could be another 3-4 years before registration of the Declaration and creation of the condominium corporation. Once registration occurs, there would be a seven year period for any MSD claims to be advanced by the condominium corporation.