

CAPTIJN: New Ontario regulation creates more pitfalls for consumers

How can there be a system of checks and balances, if everything is secret?

Author of the article:

Barbara Captijn

Publishing date:

Sep 11, 2021 • September 11, 2021 • 3 minute read •



B.Captijn is a Consumer Advocate @reformtarion. PHOTO BY SUPPLIED /Barbara Captijn

In this case, there is.

The Ontario government recently passed Regulation 242/21 to the New Home Warranties Plan Act, which says new home buyers with a dispute with their builder or warranty administrator, Tarion, can use independent mediation to try to resolve it.

This seems like a ray of hope for consumers who found the License Appeal Tribunal too legalistic and complex. Most lost their cases at this tribunal when up against two opposing lawyers, Tarion's and the builder's. For many years, there's been a push for a more consumer-friendly dispute resolution forum.

Is independent mediation a step forward? Based on what I've seen in the last six months, in the role of a friend accompanying self-represented homeowners to these sessions, it's not.

Mediation is confidential, so all parties are bound to say nothing about what goes on, whether they experience procedural injustices or not. For example, if the homeowner's representative or friend is dismissed by the opposing lawyer, leaving him isolated, he can't easily complain about

this, since the session is secret. And complain to whom? Often a non-disclosure agreement (NDA) is added too, to compound the secrecy.

Who's verifying if this forum is more problem-solving, or fair, as promised?

In a recent arbitration, which is described as a facts-and-law forum with a judge-like adjudicator, a homeowner was told by an opposing lawyer she couldn't pass notes or communicate with her chosen friend during the session. Lawyers do this all the time, and he promptly proceeded to do just that himself. Different rules for different parties? This adds to the existing imbalances in power and knowledge, leaving consumers feeling they've been taken advantage of.

There seems to be no independent body to oversee these sessions. How can there be a system of checks and balances, if everything is secret? Due to unfamiliarity with procedures, and feeling intimidated by the process, consumers often don't realize what's happened until it's too late, and there's no recourse.

The new regulation 241 says the parties and mediator "may agree on the manner in which the mediation is to be conducted", (section 6 (1), and may "take into account any requests by the parties", (sections 6 (2)). This gives a lot of latitude to lawyers to influence the rules to suit their client, and achieve their desired outcome.

Section 6 (4) says the mediator may (a) "communicate with the parties... separately". This is also a slippery slope, more likely to benefit large corporations like Tarion, since they are paying the mediator, and are represented by lawyers who speak the same language as the adjudicator. If there's communication behind the homeowner's back, and his life savings in his home are at stake, this seems unfair.

Another consequence of these disputes moving to mediation is that there will be less information on builder track records to publish on the Ontario Builder Directory, administered by the Home Construction Regulatory Authority, (HCRA). Recent advice from this agency to consumers is – research your builder, it's location location, location, and builder. Soon there will be much less information to research, which is not in the public interest.

What are some possible solutions? If one side is represented by lawyers, then all sides should be, and this included in the overall costs. Or, there could be an independent body for complaints about procedural unfairness. Or, lawyers could earn professional development credits helping consumers in these disputes, (if you can find lawyers in this field who don't already act for builders, lobby groups, or Tarion.)

I've written to the Attorney General about this apparent gap in oversight, and also to the head of the Law Society. Still waiting for a response from the former, but the latter responded on Aug. 24 that she needed "a proper analysis and evidentiary foundation" and was not in a position to comment. What evidence or analysis will there ever be, if everyone is sworn to secrecy?

This new regulation looks great for the big guys, not the little guy, and not a win for access to justice.