

**TARION WARRANTY CORPORATION
INDEPENDENT END-TO-END DISPUTE RESOLUTION REVIEW
2015**

Submitted to:

TARION WARRANTY CORPORATION
5160 Yonge Street, 12th Floor
Toronto, Canada, M2N 6L9

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Submitted by:

GENEVIEVE A. CHORNENKI
LL.B., LL.M.(ADR), C. Med., C. Arb.
Conflict Management Services since 1989

124 Merton Street, Suite 300
Toronto, Canada, M4S 2Z2
Telephone: 416-975.9898

E-mail: gac@chornenki.com
www.genevievechornenki.com
www.estatemediationgroup.ca



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1. Executive Summary

Tarion is a private, not-for-profit corporation that has been given a public interest, consumer protection mandate by the Ontario legislature. Its mandate includes the resolution of disputes about the statutory warranty coverage for a newly constructed house or condominium unit. If the homeowner and builder are unable to resolve the issues between them, alone or with Tarion's help, then Tarion has the authority to make an assessment and issue a binding decision about whether the warranty claim is valid and what constitutes appropriate compensation or repair.

Although Tarion has reviewed and revised the handling of statutory warranty claims over the years, this is the first time that Tarion has used a dispute resolution lens to evaluate its processes. It decided to commission an end-to-end process review by an independent dispute resolution expert in response to homeowner complaints about the handling of warranty claims, particularly from homeowners who had appealed Tarion's warranty decisions to the Licence Appeal Tribunal.

The writer is an experienced dispute resolution practitioner who was chosen to conduct the independent review and write a report. The purpose of the review was to better understand Tarion's dispute resolution processes — particularly from the homeowner's vantage point — and to recommend improvements, if necessary.

This review involved a thorough examination of how Tarion handles statutory warranty claims from the filing of a claim form through to an appeal. Extensive research was undertaken, such a review of Tarion's records, assessments, and decisions, and conversations with individuals who have had experience with Tarion at different stages of its warranty claims handling process. Throughout the review, the reviewer applied relevant standards developed by Canadian courts and the International Organization for Standards plus her own dispute resolution knowledge and experience.

The upshot of this review is that although there is no intentional or systemic bias at Tarion to stream contested warranty claims to appeal at the Licence Appeal Tribunal, the design and operation of Tarion's dispute resolution function does not reflect best practices in a current consumer protection context. Corrective action is strongly recommended because the issues identified in this report can and do detract from Tarion's crucial role as an impartial dispute resolver.



The following pages examine various aspects of Tarion's dispute resolution process — what its personnel are trained (or not trained) to do; what homeowners are told about the process; how long resolution takes; and what kind of outcome Tarion produces — and convey candidly yet constructively what the issues are and why.

The review also recommends a number of practical, straightforward, and fundamental things that Tarion — an open, values-based organization with a commitment to continual improvement — can do at the corporate and operational level to address the concerns. The footnotes that appear throughout the document supplement the recommendations by pointing to other models, precedents, or examples that can inform Tarion's dispute resolution activities.

None of the recommendations involves making Tarion more judicial or inaccessible. They include comprehensive dispute resolution training of warranty services personnel; earlier and more frequent use of credible, independent expertise to support balanced investigations; key design adjustments; simplified and consolidated reference materials; and more non-adversarial problem solving. The report also offers ways that Tarion can address how it is perceived at the Licence Appeal Tribunal.

Tarion commissioned a report that it intends to make public and gave the reviewer full, unfettered access to its records, without knowing what the report would contain. In the result, the report does identify some lapses and design issues, but all of its findings and recommendations are intended help Tarion better integrate its public interest, consumer protection role with its role as an impartial dispute resolver so that everyone can have confidence in Tarion.

2. Reviewer's Mandate

From time to time Tarion Warranty Corporation ("Tarion") receives complaints that the mechanisms for challenging its new home warranty assessments are unfair to homebuyers who want accessible, non-adversarial ways to resolve warranty disputes. To inform its response to such complaints, Tarion decided to conduct an end-to-end review of its dispute resolution processes for warranty claims, with guidance, input and, oversight from an external expert. On January 21, 2015, I was retained as the independent expert to conduct the review. I am an experienced dispute resolution practitioner who offers only non-partisan services. I am not a consumer or homeowner



advocate nor do I have any affiliation with the building industry. The stated objective of my review was to better understand Tarion's dispute resolution processes and to recommend improvements, if warranted. I was to approach this review from a homeowner's perspective in relation to the statutory warranty for new freehold homes and condominium units, not common elements. Details of my mandate are at Appendix 1, and a summary of my credentials is at Appendix 2.

Although there have been other reviews at Tarion in the past, to my knowledge this is the first comprehensive review which assess Tarion's practices and procedures through the lens of *dispute resolution*. As a result, the handling of statutory warranty claims has been evaluated through a new lens, resulting in findings and recommendations that may not have been considered before. Readers should understand, however, that this review is limited to Tarion's dispute resolution functions and is not directed at its governance, regulatory function, or finances.

Details of my research are at Appendix 3. This research includes reviewing relevant Tarion records for at least 50 statutory warranty claims, most of which were assessed in 2014 and 2015. This represents about 6 percent of claims that reach the assessment level or above¹ in a year. My research also includes in-person, telephone, email, or other written communication (single instance or multiple contacts) from about 50 different homeowners who had experience with Tarion's claims handling processes.

In conducting this review, I brought no preconceived notions about Tarion or its dispute resolution activities, for prior to this engagement I had only a vague, general awareness of what it was. I began by examining objective, written material from Tarion's records and applied my professional knowledge and experience to determine whether Tarion was following best practices in dispute resolution. I supplemented this with interviews or questions of relevant management personnel. Thereafter, I looked to feedback from homeowners, which, in general, was consistent with my professional conclusions.

During the review, I periodically reported to a steering committee composed of senior managers and the chair of the consumer committee of the board of directors who monitored my progress and offered suggestions or feedback. Nonetheless, it was I who decided how to implement the

¹ See Table 1 for the stages of Tarion's dispute resolution process for statutory warranty claims and footnote 12 for my base data.



mandate, such as who I would contact or what I would review. I received unfettered access to any internal material that I requested from Tarion such as privileged and confidential information from the legal department's files, and any follow up question was promptly answered.

3. Standards Applied

There is no single, authoritative, or objective standard that applies to Tarion's dispute resolution activities, so in conducting this review I paid attention to several sources of guidance including

- i. Standards that Canadian courts (including the Supreme Court of Canada) are evolving for administrative tribunals, adjudicators, and other dispute resolution practitioners and programs;
- ii. Principles developed by the International Organization for Standards ("ISO"), specifically ISO 10003, 1st edition 2007-12-01 *Quality management — Customer satisfaction — Guidelines for dispute resolution external to organizations*.² Of the eleven standards that the ISO identifies for effective and efficient dispute resolution, I considered the most pertinent to be
 - i. Accessibility — The process should be easy to find and use
 - ii. Fairness — The organization must act impartially and objectively, and decisions should be fair and independent
 - iii. Competence — Personnel should have the attributes, skill, training and experience necessary to discharge their dispute resolution responsibilities
 - iv. Timeliness — Disputes should be resolved as expeditiously as possible given the nature of the dispute and the process used
 - v. Transparency — Sufficient information about the dispute resolution process should be disclosed to participants and the public; and
 - vi. Continual Improvement — The efficiency and effectiveness of the dispute resolution process should be continually improved through preventive and corrective actions and innovative improvements; and

² The ISO's guidelines are subject to copyright protection and, independent of this review, Tarion has its own licensed version.



- iii. My own knowledge and experience gained as an independent dispute resolution practitioner since 1989, having conducted various non-partisan mandates on a fee for service or volunteer basis — mediation, arbitration, med-arb, independent third party reviews, facilitation, ombuds work, independent complaint handling, credentialing assessments, dispute resolution process consulting, and curriculum development, mentoring, and training. I also have 20 years of experience as an external, independent consultant to a cross-Canada consumer dispute resolution program for automobile defect and warranty claims that has some features in common with Tarion.

4. Background —Tarion and Its Dispute Resolution Processes

For readers who may not have a working knowledge of Tarion or its existing dispute resolution processes — and because I encountered some confusion about Tarion’s dispute resolution role — a little background is in order.

In 1976, the Ontario new *Home Warranties Plan Act* (the “Act”) initiated mandatory, universal statutory warranties for new homes built in Ontario. It also created an out-of-court regime for the resolution of disputes about warranty coverage. Neither the warranty coverage nor the out-of-court option was available to homeowners before that.

Tarion is a private, not-for-profit corporation³ that administers the Act and has a public interest, consumer protection mandate. Under the Act, vendors and builders of new homes in Ontario (“builders”) are deemed to give new homebuyers a number of specified warranties that would not otherwise be available to homeowners. Tarion’s responsibility is to resolve disputes about the warranty coverage that a homeowner and builder are unable to resolve on their own by determining whether the warranty claim is valid and by arranging for a repair or paying compensation out of a guarantee fund if the builder does not fulfill its obligation.

Tarion’s dispute resolution duties are set out in the Act, which gives Tarion the power to “conciliate”

³ Tarion receives no government funding and is financed entirely by fees collected from the building industry. It is governed by board of directors with members drawn from different stakeholder groups. See <http://www.tarion.com/About-Tarion/Pages/Board-of-Directors.aspx> (Retrieved August 4, 2015.)



if a homeowner asks it to do so.⁴ That power is expanded in Tarion's corporate by-laws that have the force of regulations to the Act.

Under the Act, "conciliation" has a specific legal meaning⁵ that differs from the dictionary definition⁶ or one that most dispute resolution practitioners associate with "conciliation", namely a non-binding process where an outsider — who may offer suggestions or recommendations — helps people reach *their own* solution. By contrast, Tarion's conciliation is a process of adjudication — a binding process where Tarion investigates and decides *for* the people involved whether the warranty claim is valid and what constitutes appropriate compensation or repair.⁷ Before adjudicating, Tarion tries to help the homeowner and builder reach a mutually satisfactory resolution without the need for a Tarion decision.

If Tarion decides a warranty claim against a homeowner, the Act gives the homeowner the right to appeal the decision to an independent provincial tribunal called the Licence Appeal Tribunal, known by the acronym *LAT*. Unless a decision is successfully appealed at LAT (or in the case of a builder, successfully challenged in a private arbitration with Tarion), it is legally binding on both the homeowner and the builder.

In practice, Tarion's dispute resolution process occurs in stages, and homeowner warranty claims move up a ladder to increasingly authoritative rungs with progressively more intervention by Tarion.

A homeowner initiates the claims process⁸ by submitting a statutory warranty claim form to Tarion. That form serves as formal notice to the builder who then has 120 days to repair or resolve the homeowner's concerns. During this period, the builder is given the opportunity to work with the homeowner to resolve any deficiencies, and Tarion does not get involved unless (i) it is an

⁴ See section 17(1) of the New Home Warranties Plan Act, RSO 1990, c. 0.31 <http://www.canlii.org/en/on/laws/stat/rso-1990-c-031/latest/rso-1990-c-031.html> (Retrieved August 4, 2015.)

⁵ See sections 1 and 5, R.R.O. 1990, Reg 892. <http://www.canlii.org/en/on/laws/regu/rro-1990-reg-892/latest/rro-1990-reg-892.html> (Retrieved August 4, 2015.)

⁶ The Canadian Oxford Dictionary, 2nd edition, defines the verb "conciliate" as "attempt to settle an esp. labour dispute by hearing all disputants and recommending solutions."

⁷ See footnote 4, section 1 that defines conciliation as "a process whereby the Corporation [Tarion] **determines** whether a disputed item listed on a notice of claim given to the Corporation under this Regulation...is covered by a warranty and whether repairs or compensation are required [*Emphasis added.*]"

⁸ For freehold homes and condominium units. The process for common element claims is different.



emergency situation; (ii) a health and safety issue is alleged; or (iii) the parties ask for early intervention.⁹ Once the 120-day repair period has elapsed, if items are not resolved to the homeowner's satisfaction, the homeowner can request a conciliation inspection. At this stage, Tarion actively facilitates communication between the parties¹⁰ and works to achieve a mutually satisfactory resolution through a process known as *Work the File*.

The request for a conciliation inspection triggers an additional 30-day repair period for the builder. Should the homeowner's concerns remain outstanding after that, Tarion convenes the conciliation inspection with both the homeowner and the builder and attends at the home to inspect the item(s) in issue and hear from both parties.

After the conciliation inspection and such other enquiries as Tarion considers necessary or appropriate, it assesses (adjudicates) whether the warranty claim is valid and/or what constitutes appropriate compensation or repair. It notifies the homeowner and builder in writing by means of a "warranty assessment report" that contains Tarion's conclusions regarding the warranty claim(s), after which the builder has 30 more days to resolve the issue(s) to the homeowner's satisfaction. Should there be a dispute about whether a warrantable item has been adequately repaired, Tarion will re-attend and conduct a further inspection to determine whether the builder has fulfilled its obligation.

If the homeowner disagrees with Tarion's assessment and wishes to challenge it before LAT, Tarion converts the warranty assessment report into a "decision letter" that the homeowner uses as the basis of an appeal. On appeal, the contested issue is litigated anew in a forum where Tarion, the homeowner, and the builder each present evidence and argument to the tribunal, which renders a decision after considering the evidence and arguments of all parties.

The basic stages of Tarion's dispute resolution process are depicted as a ladder in Table 1, below. A Tarion staff person called a "warranty services representative" leads the process on rungs three to six. At the time of writing this report, there are 20 warranty services representatives, organized

⁹ "Early Intervention" is a new initiative that Tarion is piloting. See Appendix D of Builder Bulletin 20, Effective July 15, 2015 <http://www.tarion.com/New-Home-Builders/Policies-and-Guidelines/Builder%20Bulletins/BB20%20June%201%202015.pdf> (Retrieved August 17, 2015.)

¹⁰ In this report, the "parties" are the homeowner and the builder who have a warranty issue or dispute between them. Tarion is the decision maker, *not* a party.



into four geographic teams with their respective managers — one team each for London and Ottawa, and two for the Greater Toronto Area. In the event of a homeowner appeal to LAT, it is legal counsel and not the warranty services representative who represents Tarion before the tribunal.

TABLE 1 — TARION’S BASIC DISPUTE RESOLUTION LADDER FOR HOMEOWNER WARRANTY CLAIMS (FREEHOLD HOMES & CONDOMINIUM UNITS)

↑	RUNG 7 APPEAL STAGE — LAT Hearing
↑	RUNG 6 FINAL DECISION STAGE — Decision Letter
↑	RUNG 5 ASSESSMENT STAGE — Warranty Assessment Report
↑	RUNG 4 INVESTIGATION STAGE — Conciliation Inspection
↑	RUNG 3 FACILITATION STAGE — 120-day Builder Repair Period
↑	RUNG 2 INTAKE STAGE AT TARION — Homeowner Statutory Warranty Claim Form
↑	RUNG 1 DIRECT, VOLUNTARY RESOLUTION WITHOUT TARION — 365,392 New Homes Under Warranty in 2014

In practice, very few warranty claims reach the upper rungs of the ladder, as they are resolved amicably by homeowners and builders, or are not pursued further by the homeowner for whatever reason.

Tarion’s data¹¹ indicate that in 2014, there were 365,392 homes under warranty. That year, Tarion received 56,312 warranty claim forms.¹² Only 797 (1.4 per cent) of these proceeded to the investigation stage with a conciliation inspection. One hundred and fifty (0.3 per cent) required decision letters, and 103 (0.2 per cent) were appealed to LAT.

Although the percentages at the upper rungs are small, these contested claims command attention, as they are the primary source of complaints and public criticisms of Tarion’s dispute resolution capabilities. The genesis of this review is in homeowner concerns about the process at

¹¹ See the *Tarion Annual Report 2014* at <http://www.tarion.com/AnnualReport/2014/> (Retrieved August 4, 2015.)

¹² As per the 2014 annual report, for 30-day, 1-year and 2-year forms.



these rungs, and my review recommends changes there to reinforce Tarion's role as an impartial dispute resolver that adopts contemporary dispute resolution practices.

Apart from attracting complaints, the upper rungs place a higher demand on Tarion's dispute resolution resources than lower rungs because they involve active, unresolved warranty claims and require an authoritative intervention by Tarion that is in keeping with its public interest, consumer protection mandate. As the sole, legal provider of binding dispute resolution for contested statutory warranty claims, Tarion stands between the homeowner and the builder and is relied on for an impartial resolution. One homeowner summed up the situation well: "Tarion's real value is realized only when there is a disagreement between the builder and the purchaser. We never had any serious disagreement with [our builder] who responded quickly to any concerns we expressed."

Another reason to focus on upper rung cases is that they are professionally demanding and call sophisticated competencies into play. They tend to have a strong emotional component in addition to a technical one. At the heart of the conciliation process is the homeowner's home — their personal living space and most likely the biggest financial investment that they have made. The issues of concern are encountered in the household daily. By the time the conciliation inspection takes place, the homeowner and the builder have already used — or used up — their best efforts at settlement over an extended period of time, and either or both are understandably frustrated, even angry. Upper rung cases must recognize this reality. As one Tarion executive observed, "There are no longer any 'easy' conciliation inspections at Tarion."

5. Tarion as a Dispute Resolution Organization

Tarion is a large, complex corporation that is almost forty years old. Its original legislation dates from 1976, which is long before alternative dispute resolution — resolution outside the courtroom — was widely accepted, developed, or understood in Ontario. Over the years, Tarion has evolved and adapted its dispute resolution function, and this review manifests the next phase of adaptation.

What kind of organization is Tarion at this time? I chose to form my own impression.

As I browsed Tarion's website (often returning multiple times in an hour), read its external communications and reports, studied its warranty assessments and decision letters, reviewed



internal records, and learned homeowner concerns, I formed an impression of Tarion. It is open, values-based, and committed to continual improvement — all good things in relation to dispute resolution.

Tarion's openness manifested itself in several ways. For the purposes of this review, it was willing to give me unfettered access to internal information without knowing what my findings or conclusions might be. As the review progressed, the steering committee was generally receptive to my findings. With Tarion's knowledge and at its suggestion, I also had unrestricted access to the Ministry of Government and Consumer Services/Consumer Protection Ontario, without a corresponding duty to report back to Tarion.

As I got deeper into the review, I was impressed with the breadth and depth of information that Tarion elicits and analyses — formally and informally — in order to understand homeowner's experiences and needs. A recent example was a 2014 mini-survey conducted of homeowners who had just received warranty assessment reports. I was able to read unedited homeowner comments and relate them to the reports that prompted the comments. Also, several years ago, Tarion commissioned a review of the current literature related to the act of listening and then surveyed homeowners to understand which of the many factors identified in the literature were most relevant to them in the handling of their warranty claims.

As to Tarion's values, these are codified in the *Code of Conduct* that is founded on six principles — honesty and integrity, accountability, confidentiality, conflict of interest, compliance, and environment — and in *The Tarion Way*, a customer-service initiative implemented in 2010 and founded on five principles — teamwork, logical, listening, fairness, and caring. Although the eleven principles are not sufficient insofar as Tarion's dispute resolution function is concerned, they are completely compatible with it.

Tarion has incorporated some of the eleven principles into guidelines and training for warranty services representatives. One example is Tarion's *Work the File* initiative, a process intended to "help improve customer service interactions and communications and encourage the early resolution of warranty claims," among other things. Another example is an "Effective Email Workshop" conducted in 2014 about best practices to achieve balanced communications that are "clear, concise, respectful, informative, sincere and professional."



Overall — and even though exceptions came to my attention — I observed a customer-service oriented culture at Tarion that works to understand and serve its constituents better. For instance, in recognition of the multi-cultural nature of Ontario society, Tarion ensured that warranty services representatives who routinely enter people’s private living space received training in cultural diversity and sensitivity.

Several individuals inside and outside Tarion explained that the current emphasis on customer service results from a conscious transition away from an insurance company orientation that prevailed in the past. If so, this is an important — and necessary — progression: There may be similarities between insurance claims adjusting and investigating a statutory warranty claim, but Tarion is not a private insurance company with a profit motive. It is a dispute resolution body with a legislated, consumer protection mandate to decide contested statutory warranty claims as between homeowners and builders. Insofar as those claims are concerned, Tarion should devote adequate resources to resolving them and occupy itself with impartiality and the correctness of its assessments.

At a corporate level, Tarion is also committed to continual improvement, a dispute resolution design standard that requires a dispute resolution organization to be alert to opportunities to improve its process and the experience of its users. One example is its “early intervention” initiative introduced this year and designed to bring about non-adversarial resolution at the earliest possible date.¹³ More generally, as my review progressed I noted many things at Tarion in an ongoing process of refinement — external documents describing the conciliation process, internal guidelines for warranty services representatives, the website, and more. Some of the dispute resolution issues or concern that I identified — such as bringing appropriate expertise to a conciliation inspection — were already being addressed at the operational level.

All of the foregoing is positive and consistent with Tarion’s dispute resolution mandate but, as I will explain in this report, there are additional steps that Tarion must take to strengthen its dispute resolution role in a contemporary consumer protection context. To some extent, this will involve a change of emphasis. It would not, I wish to stress, involve disrupting its operations or dismantling what Tarion has developed to date.

¹³ See footnote 10.



Tarion’s sense of itself as a customer-service company is currently more pronounced than its sense of itself as an impartial dispute resolver, particularly one with a mandate to ultimately adjudicate contested warranty claims. While Tarion identifies as “Protecting Ontario’s New Home Buyers” and takes steps to publicize the conciliation process, it does not explicitly affirm itself as an impartial body with the resources and authority to intervene when homeowners and builders are at an impasse over a contested warranty claim. It seems to me to be more at ease with the less authoritative role of facilitator, stating in its 2014 annual report that “We work hard to find solutions to homeowner issues, and we act as a facilitator to resolve claims.”

There is nothing whatsoever wrong with Tarion facilitating voluntary, informed settlements. That is a constructive and necessary activity — large numbers of warranty claims never go beyond the facilitation stage on the dispute resolution ladder, and settlements tend to produce satisfied users. But voluntary settlements are not where the issues, concerns, or criticisms arise. They arise at the conciliation inspection rung and above, where the rights and responsibilities of the parties are being decided and where the expectations of the parties and the stakes are high.

Several practical implications flow from Tarion’s emphasis on customer service over impartial dispute resolver. For instance, aspects of its process — such as the homeowner’s participatory rights at a conciliation inspection — are underdeveloped or understated to such an extent that some homeowners are confused, frustrated, or cynical. Performance standards that are specific to Tarion’s dispute resolution function have not been developed in the way that they have in other dispute resolution organizations. For instance, the federal Commissioner for Complaints for Telecommunications Services, a not-for-profit corporation funded by participating service providers, developed performance standards¹⁴ modeled on the ISO’s guiding principles described earlier in this report. And importantly, Tarion has not formulated a robust answer to the question that is central to almost all of the process complaints and public criticisms about its handling of contested warranty claims — How is Tarion’s public interest, consumer protection role to be integrated with its role as an independent dispute resolver so that it is perceived as neither ally nor enemy of either party?

¹⁴ See <https://www.ctcs-cprst.ca/about/performance-standards> (Retrieved July 21, 2015.)



Having taken the initiative to review its claims handling process through a dispute resolution lens, I recommend that Tarion continue its dispute resolution development at a corporate level in several practical ways. First, Tarion can develop and publish performance standards modeled on relevant ISO's dispute resolution standards, which highlight and specifically address Tarion's dispute resolution function and clarify its guiding principles. Second, Tarion can engage in a process to determine the meaning of "consumer protection" and the "public interest" in relation to its claims handling function, and it can use the answers that it develops to inform dispute resolution at the operational level. The board of directors has already begun a review of Tarion's public interest mandate,¹⁵ and this initiative could be expanded to include public interest and consumer protection in relation to statutory warranty claims.¹⁶ Third, Tarion can make an overt commitment to adopt best practices in dispute resolution — many of which are described in this report — and set up a system that includes a knowledgeable dispute resolution professional to monitor implementation and quality control.

RECOMMENDATION ONE

That Tarion take steps at the corporate level to strengthen its role as an impartial dispute resolution body in a contemporary consumer protection context by:

- i. Developing and publishing performance standards modeled on relevant ISO's dispute resolution standards, which highlight and specifically address Tarion's dispute resolution function and clarify its guiding principles;
- ii. Engaging in a process to determine the meaning of "consumer protection" and the "public interest" in relation to its claims handling function, whether as part of the Public Interest

¹⁵ The relevant subcommittee of the board of directors is to be known as the Public Interest Mandate Review Subcommittee.

¹⁶ Questions about the "public interest" and "consumer protection" implicate the use of Tarion's resources during the conciliation process, such as the retention of third party experts discussed in more detail in section 8.



Mandate Review Subcommittee or otherwise, and using the answers that it develops to inform its dispute resolution at the operational level; and

- iii. Making an overt commitment to adopt best practices in dispute resolution and setting up a system that includes a knowledgeable dispute resolution professional to monitor implementation and quality control.

6. The Role and Function of Warranty Services Representatives

At the operational level, warranty services representatives play a critical role. They are Tarion's primary dispute resolution practitioners and the public face of Tarion for the parties from rungs three to six of the dispute resolution ladder. Theirs is a sophisticated and challenging job, given the technical and emotional components of a contested warranty claim. The parties place high expectations on them to render a correct decision.

Other factors add to the challenge of the warranty services representative's role.

First, there is typically an information and/or resource differential between homeowners and builders. Builders know or have the means to know details about the construction of the homeowner's particular home. They bring general industry knowledge and experience in the construction process. Builders are or ought to be more familiar with the applicable laws and related inspection processes for new construction. And they have more ready access to relevant expertise such as tradespeople or design professionals. The warranty services representative must recognize and manage this differential while at the same time conducting an even-handed process and a balanced investigation.

Second, the warranty services representative may also encounter the same builder, builder's representative, tradesperson, or contractor from one conciliation inspection to the next. He or she must take care that any acquired familiarity does not introduce into the process a bias or perception of bias in favour of a repeat participant.



Discharging the warranty services representative's responsibilities in the conciliation process takes a persistent kind of self-awareness: seeing oneself as an adjudicator at all stages of the process, even if performing administrative tasks.

To maintain the parties' confidence at conciliation all the way through to a reasoned decision, the warranty services representative must consistently comport himself or herself like an impartial adjudicator. At every stage, the representative must be — and be seen to be — non-partisan, even handed, and open minded, lest the conciliation process be compromised.

When examining Tarion's records and later when speaking to homeowners, I came across lapses that were not consistent with the high standards required of warranty services representatives as adjudicators. These included engaging in familiar behaviours with the builder's representative before or after a conciliation inspection — something that they are trained *not* to do; unilaterally corresponding with the builder about the merits of the claim or the motivations of the homeowner before a conciliation inspection; engaging in meetings with builders and/or municipal authorities where the homeowner is not present; and giving undue or inexplicable attention to the builder's presentation or submissions during the conciliation process. Homeowners also described specific behaviours that they did not perceive as even-handed or impartial during an inspection at their homes and that negatively impacted their impression of Tarion.¹⁷

Such behaviours are not of academic or theoretical interest only. They have serious, practical consequences whether they are well intentioned, innocent, or misinformed. They can *and have* caused homeowners to lose confidence in Tarion and its conciliation process, to doubt its good faith, and to regard all of Tarion's subsequent actions with mistrust. Some homeowners told me as much.

There are two main factors that account for the inappropriate behaviours that I observed at the operational level, both of which can be remedied. One is a design flaw in the dispute resolution process — the unacknowledged combination of facilitation and adjudication — that impacts the design standard of fairness. The other is a lack of training — about the requirements of each

¹⁷ Additional examples have been provided to senior management for the purpose of illustration and future training.



process and the implications of combining them — that impacts the design standard of competence.

The architecture of Tarion’s current process was designed about 14 years ago in an initiative called “Project Simplify.” It has periodically been revised or enhanced in an effort to make the process more responsive to the needs of the parties. In the current design, the warranty services representative wears multiple dispute resolution hats during the conciliation process.

In the builder repair period that takes place before a conciliation inspection can be arranged, the warranty services representative performs what Tarion calls facilitation, and essentially acts like a mediator. In accordance with Tarion’s *Work the File* module, he or she is to be in touch with both the homeowner and the builder no later than two weeks after a conciliation inspection has been scheduled. *Work the File* considers it good practice for the representative to contact the owner first in order to get a sense of the situation in advance of speaking to the builder, and the representative is, among other things, encouraged to build rapport with the homeowner, to determine ways to resolve the issues between the homeowner and builder such as an agreement, and to determine the builder’s willingness and ability to reach resolution.

The warranty services representative’s facilitation efforts in *Work the File* may lead to a complete settlement between the builder and the homeowner, in which case a conciliation inspection is not required and everyone — Tarion, the homeowner, and the builder — saves time, money, and emotional effort. However, as the *Work the File* module notes, “It’s also quite possible that an agreement couldn’t be made or the inspection couldn’t be cancelled and the inspection takes place as scheduled.” What then?

Then there follows a change from a facilitative process into an adjudicative one, from a non-binding into a binding process with the same warranty services representative continuing his or her leadership role.

The problem is twofold: (i) this transition is not acknowledged; and (ii) the behaviours required during *Work the File* — acceptable behaviours for mediators — are incompatible with adjudication.

Adjudicators do not have telephone conversations with one party to a dispute to the exclusion of the other, nor do they try to find out what might motivate one or both parties to settle unless the parties knowingly give them permission to do so. They do not solicit background or contextual



information independently from one party at a time; information is exchanged by all. Adjudicators avoid behaviours like these because they impair the integrity — or the appearance of integrity — of the adjudication process where the adjudicator stands between the parties, runs an even-handed process, and ultimately makes a decision — in this case a warranty assessment — for or against one of the parties. In adjudication, everything, including any correspondence that might conceivably flow between the adjudicator and one of the parties, must be communicated to both parties. In Tarion's case this would mean making *all* communications to and from the parties available to everyone. Even if this were to be done, however, there is still a problem with transitioning from *Work the File* into the conciliation inspection that ultimately leads to a binding decision.

As Tarion's process is currently designed, the transition from facilitation to adjudication takes place without notice to the parties. They have not been forewarned or asked for permission. *Work the File* encourages a more casual environment, characterized by informality, accessibility, and engagement, but when the process switches to a conciliation inspection, these must yield to the structure, distance, and detachment that adjudication requires. For builders, who are likely to be conversant with the process, the transition is anticipated if the claim cannot be resolved. For homeowners, who are typically new to the process, the transition may be unexpected or confusing; from their perspective the person who was previously positioned as helper or teacher now becomes the judge.

Using the same individual to conduct both facilitation and adjudication has the advantage of efficiency and continuity, but making a transition from one process to the other is fraught with difficulty. The parties must know when they are in what process and what is expected of them at each point. Many seasoned dispute resolution practitioners decline mandates that move from facilitation to adjudication, known in the dispute resolution field as med-arb, to avoid managing the risk that they will no longer be — or be seen to be — impartial when adjudicating.

To avoid the risk of compromising the conciliation process, Tarion has two basic options. One option is to separate the functions such that

- i. The warranty services representative who conducts a conciliation inspection and makes a warranty assessment is not permitted or required to engage in behaviours that undermine



the role of impartial adjudicator, such as corresponding separately with the parties or trying to help them settle the issues; and

- ii. An individual other than the one who assesses the warranty claim performs administrative, educational, and facilitative functions.

The other option is for Tarion to retain the current model but introduce modifications to minimize the risks. These would include:

- i. A written and oral explanation in advance of the hybrid process so that the parties understand that there will be a facilitative (mediation) process, followed by an adjudicative (decision-making) process — and possibly also an investigative (enquiry) process in which the warranty services representative obtains further information and expertise relevant to the matters at issue;
- ii. A clear and explicit declaration of how and when information from each process will be used, especially what information the warranty services representative will or will not use from the facilitation stage in the adjudication stage;
- iii. Notice to homeowners and builders at the very beginning of the process that if settlement cannot be achieved, the warranty services representative will be the one who adjudicates issues that are unresolved;
- iv. A clear and explicit demarcation between processes, so that both the warranty services representative and the parties are aware of what process they in at each point and what is required of them; and
- v. Training to warranty services representatives in how to manage the transition from a facilitative to an adjudicative process.

RECOMMENDATION TWO

That Tarion revise its current design for the conciliation process by means of the following options:

Option 1 — Separating out the functions currently performed by a single warranty services representative such that



- i. The warranty services representative who conducts a conciliation inspection and makes a warranty assessment is not permitted or required to engage in behaviours that are incompatible with adjudication such as corresponding separately with the parties or trying to help them settle the issues; and
- ii. An individual other than the one who assesses the warranty claim performs administrative, educational, and facilitative functions.

Option 2 — Retaining the current model but introducing modifications to minimize the risks, including:

- i. A written and oral explanation in advance of the hybrid process so that the parties understand that there will be a facilitative (mediation) process, followed by an adjudicative (decision-making) process, and possibly also an investigative (enquiry) process in which the warranty services representative obtains further information and expertise relevant to the matters at issue;
- ii. A clear and explicit declaration of how and when information from each process will be used, especially what information the warranty services representative will or will not use from the facilitation stage in the adjudication stage;
- iii. Notice to homeowners and builders at the very beginning of the process that if settlement cannot be achieved, the warranty services representative will be the one who adjudicates issues that are unresolved;
- iv. A clear and explicit demarcation between processes, so that both the warranty services representative and the parties are aware of what process they are in at each point and what is required of them; and



- v. Training to warranty services representatives in how to manage the transition from a facilitative to an adjudicative process.

The second factor that accounts for behaviours that potentially undermine Tarion and its conciliation process is training.

During the review, I called for and reviewed the training given to warranty services over the last several years. This included a variety of courses that were germane to the work of the department, including the email and diversity training previously mentioned, but did not extend to basic dispute resolution competencies, specifically the habits of mind, behaviours, and principles of an impartial practitioner. In the next section I will be making a comprehensive training recommendation that will include these competencies.

I also reviewed the current job descriptions for warranty services representatives and their managers. Although these included technical/industry knowledge and people skills such as teamwork, oral and written communications, and negotiation experience, there was no mention of dispute resolution training or experience. By this I mean training for non-partisan practitioners as opposed to training for negotiators, advocates, or representatives who have no obligation of impartiality.

RECOMMENDATION THREE

That Tarion integrate into the credentials for warranty services representatives and managers training and experience in dispute resolution for non-partisan practitioners.

7. Fairness and Competence — Further Support for Warranty Services

In addition to knowing how to comport themselves as neutral dispute resolution practitioners, there is a constellation of competencies that warranty services representatives must master for the



conciliation process. Gaps in these competencies accounted for some of the homeowner dissatisfaction that I encountered in my review.

At a basic level, the warranty services representative who conducts a conciliation must understand evidentiary concepts like *weight*, *inference*, and *admission against interest*, plus the distinction between *submissions* or *logical arguments* and *evidence*. He or she must know how to assess, analyze, and synthesize the totality of information in order to reach a sound conclusion. This does not mean turning conciliation into a courtroom with arcane rules; it means making and substantiating evidence-based decisions.

The warranty services representative must know how to assess the reliability of information in the conciliation, such as when one party produces evidence that challenges a report or opinion relied on by the other party. The representative must also know how to draw factual conclusions: What deduction is reasonable when one cause for certain symptoms has been eliminated but other likely causes have not been considered? What conclusion is apt for an intermittent condition when its frequency, duration, or periodicity have not been looked into? What happens if a document is ambiguous and each party reads something different into it? These are the sorts of evidentiary questions that present themselves in the conciliation process. Having a working knowledge of evidentiary concepts — as opposed to a static checklist of do's and don'ts — will help the warranty services representative to answer them when they arise in the context of any particular assessment.

The pre-delivery inspection form is another area where the warranty service representative must apply evidentiary principles. This form is a record created when the homeowner and builder inspect a newly constructed house or condominium unit before the homeowner takes occupancy. By design, Tarion does not attend the inspection or play a supervisory role. It is the builder who leads the homeowner through the process, completes the form with the homeowner, and gives him or her a copy. Tarion's reference materials¹⁸ convey that the form is a "formal record" of the condition of the home at that point in time, to be used "as a reference for future warranty service requests." In other words, it is *one* piece of evidence to be considered in relation to other evidence in the context of any particular assessment. Nonetheless, sometimes the warranty services

¹⁸ See Builder Bulletin No. 42 <http://www.tarion.com/New-Home-Builders/Policies-and-Guidelines/Builderpercent20Bulletins/BuilderBulletin42CSSMar1009FINAL.pdf> (Retrieved August 4, 2015.)



representative used the form as if it were conclusive and based a denial of warrantability on it. One decision letter stated “Tarion could not determine who caused or when the irregularity happened [and] the owner has not established that the damage was caused by the vendor,” even though Tarion’s records indicate that the homeowner offered an alternative train of logic and pointed to supporting evidence. If the homeowner’s submissions were not compelling, the decision letter did not explain why.

In some instances, the warranty services representative correctly defers making an assessment pending additional information. Here the representative is supported by organizational policy, as Tarion has developed an *Under Investigation* module. The module recognizes that assessments should not be made when relevant information — the result of a test or investigation, for instance — is not available on account of weather conditions. The module places responsibility on the warranty services representative — not the homeowner — to keep track of the file and to obtain the missing information when conditions are right in the future. Only then is an assessment to be made.

In his 2014 annual report, Tarion’s ombudsperson cited examples of premature decisions that do not comply with *Under Investigation*. I encountered some instances of non-compliance too. In one case, the representative assessed a claim as not warranted in clear contravention of the module because “there is no reason to suspect a problem” with the system in question. This signals a misunderstanding of the whole purpose of the module as well as some fundamental confusion about evidence-based decision making.

I was concerned to know whether an underlying structural feature might be contributing to premature decisions, so I enquired about key performance indicators and evaluation criteria. No such structural influence was apparent to me. For example, warranty services representatives are not evaluated or compensated on the basis of settlement or file closing rates. They *are* required to adhere to timelines — seven business days to issue a warranty assessment report after an inspection has been coded as completed, barring exceptional circumstances — but deadlines for decisions are common in public and private dispute resolution and do not displace fair process.

Non-compliance with *Under Investigation* appears to be a matter of quality control such that further monitoring is in order at the operational level. That said, comprehensive dispute resolution training



could improve compliance, as a good grounding in foundational concepts will better equip personnel to independently and proactively apply the relevant principles to their work.

In addition to possessing a knowledge of evidence, the warranty services representative must be versed in fair process that requires, among other things, that the parties know and be given a chance to comment on information that informs or influences the decision maker. For example, the warranty services representative must understand when to invite rebuttal or commentary from the parties and know to refrain from unilaterally raising and deciding issues against one party without giving an opportunity for input. I did not always see this happening in the files that I reviewed.

Fair process also requires that homeowners have access to information that is not within their power or control when they need it to present their case in the conciliation process, especially if the onus is on them to do so, as discussed in the next section. During my review, I saw instances where, for the purpose of the conciliation, Tarion did not assist homeowners who sought its help to obtain relevant records that were in the builder's possession — such as records of repairs undertaken, documented service calls, or design drawings.

In furtherance of the design standard of fairness and consistent with fair process, Tarion should take steps to address any information differential in the conciliation process as between homeowners and builders. Both parties should be required to provide and exchange relevant information as determined by Tarion prior to the conciliation inspection so that they can represent their respective interests in the process. Under the Act, Tarion currently has the authority to require the production of drawings, specifications, or other information. It should advise the parties of this authority and make use of it when required during the conciliation process.

As a consumer protection organization, Tarion need not rely solely on the parties for information to support the conciliation process, but may obtain additional information for sound decision making, such as retaining a qualified professional with the expertise to assist in diagnosing the cause of reported symptoms. At the operational level, warranty services representatives have a general discretion to obtain external assistance during conciliation. Tarion's *Third Party Reports* module acknowledges that Tarion can retain an expert if additional information or clarification is required, or in the case of conflicting reports from the parties. This capability is important because the outcome of a conciliation can only be as good as the quality and breadth of the information that forms its foundation.



One of the issues that came to my attention during the review was about warranty services representatives attending conciliation inspections without bringing the necessary expertise. I am given to understand that Tarion has recognized the legitimacy of that concern and has taken steps to address it.

But more can and should be done in this area. Warranty services representatives should be instructed to make *more frequent* and *early* use of competent, credible, and qualified third party assistance — on a formal and informal basis — instead of putting the onus on the homeowner, relying on the builder, allowing the parties to become entrenched in their respective positions, or waiting until an appeal has been made to LAT.

Deciding not to retain or consult a third party at an early stage defers an expense, but may be false economy. Trustworthy third party assistance signals Tarion's impartiality, provides the foundation for a sound decision, contributes to the credibility of conciliation, and helps to maintain the parties' confidence. Coincidentally, it can also facilitate voluntary settlements.

One effective intervention that I learned about during my review was when the warranty services representative took the initiative to contact independent, external sources in order to better understand the cause of some reported symptoms and their potential solution. The enquiries yielded new information that let both parties make an informed decision about how to address the issue to their mutual satisfaction. In another instance, however, a third party ought to have been retained to investigate the structural movement reported by the homeowner, but was not. Instead, structural integrity was determined by relying on the certificate of the original designer.

RECOMMENDATION FOUR

That Tarion retain the services of one or more third party experts to develop and conduct comprehensive dispute resolution training for its warranty services representatives and managers that includes

- i. Understanding the fundamentals of adjudication including the behaviours, comportment, and habits of mind required of an impartial adjudicator;



- ii. Leading and managing a hybrid process with a facilitation, adjudication, and possibly an investigation component;
- iii. Transitioning from a facilitative process to an adjudicative process;
- iv. Applying evidentiary concepts and making evidence-based decisions; and
- v. Understanding the components of fair process and applying them to all aspects of the conciliation process.

Such training to be of an applied and practical nature with Tarion-based case studies and supervised practice opportunities.

RECOMMENDATION FIVE

That Tarion advise the parties of its authority to require the production of drawings, specifications, or other information, and make use of that authority when required during the conciliation process in order to address any information differentials as between homeowners and builders.

RECOMMENDATION SIX

That Tarion instruct its warranty services representatives to make more frequent and early use of their discretion to consult or retain third party assistance that is competent, credible, and qualified.

RECOMMENDATION SEVEN

That Tarion revisit and renew efforts to ensure compliance with its *Under Investigation* module.



8. Accessibility & Transparency — Do Homeowners Know What To Expect In The Conciliation Process?

The design standards of accessibility and transparency mean that a dispute resolution process is easy to find and to use, and that sufficient information about it is disclosed to users. This includes knowing at each stage — as a process moves from facilitation to adjudication — what is expected of the participants as well as of the person who leads the process. Who does what to whom, when, and with whose means?

Most homeowners are one-time or first-time users who need to be educated about their new home warranty and the conciliation process. In principle, Tarion understands this. It gives priority to its communications and homeowner materials, and commits resources to them. It continually maintains and develops easily reached, up-to date information as a matter of customer service. The new “Ask Tarion” feature on its website is a recent example: homeowners can ask a question about conciliation and receive a relevant response.

Nevertheless, I encountered confusion among homeowners about Tarion’s dispute resolution role in general and the conciliation process in particular. When the sources of the confusion are understood, there are ways to readily rectify it.

On Tarion’s website, there is a large — almost overwhelming — volume of resource material dispersed across many different documents. Some of the material is found under the menu for new homeowners, some under the menu for new homebuilders, and some under the menu for warranty protection.¹⁹ Information about a single topic — say, conciliation — is not necessarily the same from one document to another. On the whole, Tarion’s resources for builders tend to be more thorough and specific whereas those for homeowners are friendly but general or vague. And apart from any content differential, using the term “builder bulletin” on documents that concern the conciliation process, instead of a more inclusive term like “user bulletin”, suggests a relationship between the decision maker and one of the parties that is not in the interests of an impartial process.

¹⁹ For a visually simple website see the Guarantee Plan for New Residential Buildings in the province of Quebec at <http://www.garantie.gouv.qc.ca/en.html> (Retrieved August 11, 2015.)



Resource materials tend to be dense with words, including exceptions, qualifications, and Tarion-specific terminology or acronyms. Process information — *how* something happens in conciliation — is often mixed in with content information — *what* the warranty does or does not cover, for instance. As a result, it is not easy for homeowners with an excellent command of English — let alone those who might struggle with the language — to get an overview of how dispute resolution works at Tarion. Even I, as an experienced dispute resolution practitioner, am not confident that I have mastered the ins and outs of conciliation or located all of the relevant resource material.

There is no flow chart or simple image depicting the stages of the conciliation process such as Table 1, whereas many other dispute resolution programs offer their users an image accompanied by simple prose.²⁰ A somewhat complex depiction of Tarion’s process appears on page 11 of “Builder Bulletin No. 42”, but this is not included under the menu for new homebuyers and requires considerable effort to understand.

Table 2, below, documents seven of Tarion’s reference materials about the conciliation process that I retrieved from its website on July 15, 2015. I knew to look for two specific builder bulletins because they came to my attention during the review, but others may apply. Also, extracting relevant information took time and effort since content and process information were often located in the same document or reference.

²⁰ See for instance *The Complaints Process* at <https://www.ccts-cprst.ca/complaints/complaints-process> and *The Resolution Roadmap* at <http://saskatchewanhumanrights.ca/how-to-file-a-complaint/the-resolution-roadmap> or *TICO’s Role in Consumer Travel Complaints* at <http://www.tico.ca/consumer-info/complaints.html#complaintprocess> (All retrieved on August 4, 2015.)



TABLE 2 — TARION’S ONLINE CONCILIATION INFORMATION — JULY 15, 2015

WEBSITE MENU →→→	ASK TARION	NEW HOME BUYERS	NEW HOME BUILDERS	WARRANTY PROTECTION
INFORMATION RETRIEVED→→→	1. What is conciliation and how do I request one? 2. When and how do I make a warranty claim to Tarion 3. Short video (hyperlink) — Your Inspection: Tarion, Your Builder, and You.	4. The Guide to Your New Home Warranty See pages 6–9 (Roles and Responsibilities of Each Party) Page 20 (What’s Included in the Warranty: Proving Your Statutory Warranty Claim) Page 31 (What Happens After a Form is Submitted)	5. Builder Bulletin 42 6. Builder Bulletin 20 Page 14 “Checklist of Key Responsibilities” during the conciliation process Page 18 “Tarion’s Early Intervention Process”	7. How to Make a Warranty Claim for Homes

As extensive as Tarion’s reference material is, it does not clearly or comprehensively describe the key elements of dispute resolution at Tarion — who does what to whom, when, and with whose means. The materials are deficient as regards the participatory rights and obligations of the homeowner during the conciliation process: What is reasonable for a homeowner to expect of Tarion with its public interest, consumer protection mandate? To what extent must a homeowner safeguard his or her own interests?²¹ When and how is the homeowner supposed to inform or influence the decision making process? How is the homeowner to prepare?²² Tarion’s homeowner resources are also silent about the transition from *Work the File* to adjudication that was discussed in the previous section of this report, and do not alert homeowners to the nature or consequences of the transition.

²¹ Ideally, these are the kinds of questions that the Public Interest Review Subcommittee will answer when it considers Tarion and the public interest.

²² For one example of educational material available to homeowners and builders, see *Options For Resolving Residential Construction Disputes* developed by The Homeowner Protection Office Branch of BC Housing at <http://www.hpo.bc.ca/files/download/Bulletins/ADR.pdf> (Retrieved August 11, 2015.)



Tarion's key homeowner resources are *The Guide to Your New Home Warranty* and the video *Your Inspection: Tarion, Your Builder and You*. When studied in association with Tarion's motto "Protecting Ontario's New Home Buyers", these resources create the general impression that conciliation is a friendly, informal, low risk process. The materials generally communicate that Tarion conducts the conciliation inspection on the homeowner's behalf and takes the initiative using Tarion's means (not the homeowner's) to discover the cause of the problems that the homeowner points out.

When I asked a selection of homeowners what they thought they needed to do to "succeed" in Tarion's conciliation process, I received confused and mixed responses. The overall impression created by Tarion (and received) was that the homeowner had to produce certain documents before the conciliation inspection and that at the inspection the homeowner will direct Tarion's attention to self-evident problems and provide "feedback" to the representative. Homeowners did not appear to appreciate that a conciliation inspection is like a hearing where the homeowner must "make a case" in order win a favourable ruling from Tarion. These responsibilities only become apparent when an assessment report arrives indicating that a claim did not succeed for want of proof. During my review, I saw instances of this such as claims denied because a homeowner did not satisfy the warranty services representative that visible damage was caused by the builder or did not provide a specific reference to a set of published product standards. I also saw 2014 correspondence from Tarion's stating "the onus is always on the homeowner to prove the defect" and "the onus is on the homeowner to identify defects and [to] substantiate with supporting materials, if necessary, why it is indeed a defect."

Onus of proof is a shorthand way of referring to a duty that one party has to prove something in an adversarial decision-making process. For the uninitiated participant, that shorthand needs translation. My observation is that Tarion's homeowner resources do not convey to the homeowner before the process takes place how central the onus of proof is to the assessment, what an *onus of proof* actually is, when it applies, how much proof is enough if it does apply, and what practical steps the homeowner should take satisfy the onus. In fairness, *The Guide to Your New Home Warranty* states that Tarion's governing legislation places "responsibility on the homeowner to show that there is a warranted defect in the home" and that "In most cases, this is done simply by pointing out a problem or damage — a crack in a floor would be an example. Once the problem has been pointed out, Tarion will assess whether the problem is 'warranted.'" *The Guide*



recognizes that there are exceptions to the general rule, but gives no sense of their frequency and offers no concrete assistance or illustrations to guide homeowners in preparing.

The Guide directs homeowners to consult the warranty services representative for more guidance on the onus of proof, but requiring a user to initiate an enquiry with the decision maker during the process is not the most appropriate level of user support, even assuming that the decision maker is equipped to provide such guidance. It is Tarion as an organization and at the earliest possible stage, not its individual personnel during the process, that is best positioned to provide such information. I read a number of claims that were ruled ineligible because alleged deficiencies evinced by cracks — in foundations, brickwork, drywall, or caulking — were found to be “normal shrinkage.” How, I wondered, does the average homeowner distinguish normal shrinkage from abnormal shrinkage? Nothing is obvious to the uninformed who are the great majority of homeowners filing statutory warranty claims with Tarion. I used the “Ask Tarion” and the search function on the Tarion website to find guidance, but could not locate any examples or illustrations to assist me.

If Tarion were to publish concrete examples showing how a wide variety of contested warranty claims are assessed or if it were to post assessments and/or decision letters on its website²³ — as is the case with arbitration decisions made under Quebec’s Guarantee Plan for New Residential Buildings²⁴ — homeowners would be able to see for themselves the onus of proof in operation, to form a realistic picture of what is involved, and to decide whether to proceed with any particular issue. In addition to introducing an additional level of transparency, this could make the process more efficient for all concerned, as homeowners would be better equipped to assess their chances of success before including any particular issue on their statutory warranty claim form.

It would be also helpful for Tarion to clarify what an onus of proof means in a contemporary consumer protection context. Coming at this assignment with no prior experience of Tarion, I was expecting it to handle homeowner warranty claims in a way that would be familiar to most homeowners from their common experience as consumers: when accessing a warranty, it is

²³ Without identifying information in order to protect the parties’ privacy.

²⁴ In Quebec’s Guarantee Plan, homeowners and builders have access to mediation and arbitration with external service providers if one of them disagrees with the plan’s initial warranty assessment, and the public can search arbitration decisions by subject matter or by contractor’s name. See <http://www.garantie.gouv.qc.ca/en/house/what-recourse-is-available-after-your-claim-is-over/arbitration/arbitration-decisions.html> (Retrieved August 11, 2015.)



generally enough for a consumer to report credible symptoms within the scope of the warranty. He or she is not expected to go further and diagnose the cause of a problem, such as why the car doors spontaneously lock or why a kitchen appliance does not function.

This familiar experience is not the impression I got from Tarion's reference material. It may, however, be what Tarion is intending to convey. In discussion with Tarion over the course of this assignment, it clarified its belief that the homeowner has a reasonable onus to identify the *symptoms* of a defect, whereupon the onus is on the builder to identify the *cause*.

If the homeowners is only expected to report credible symptoms within the scope of the statutory new home warranty, after which Tarion (or the builder) will diagnose the cause of those symptoms, then this must be conveyed in a clear, straightforward way to homeowners as well as to Tarion staff. Where there are situations where a homeowner has a greater "onus of proof" — such as if he or she disagrees with Tarion's assessment *after* it has conducted a credible, balanced investigation — then those situations should also be identified clearly and transparently.

As things now stand, the handling of *onus of proof* at the corporate and operational levels is both confusing and inconsistent. I could not discern the principles that Tarion applies from one case to another, and I came across instances where a homeowner was required to prove causation even in circumstances where the symptoms were credible and clear.

Warranty services representatives are instructed to educate homeowners about the conciliation process as part of *Work the File*, making sure that as the conciliation inspection approaches a homeowner knows about fees, timing, and relevant standards such the Construction Performance Guidelines. Representatives advise homeowners to submit photographs to assist in the discussion about warrantability and that they have an "onus of proof to confirm items that cannot readily be viewed." They also refer homeowners to Tarion's conciliation inspection video. But efforts by individual personnel may be insufficient to correct the general impression that Tarion's homeowner resources convey. And they may not be timely enough; one homeowner complained that he only learned that he was supposed to "make a case," the day before the conciliation inspection was to occur.

The accessibility and transparency of Tarion's conciliation process will be improved with clearer, more practical process information that is made available to the parties before they enter the



process. Some homeowners talked about getting far into Tarion’s conciliation process before they really understood what they had taken on. Improved information will allow homeowners to participate on a more informed basis.

Another area of homeowner discontent is the pre-delivery inspection form that was discussed earlier in this report. Homeowners expressed concerns that they were rushed, stressed, overwhelmed, technically unprepared, and reliant on the builder when completing their pre-delivery inspection form. Some suggested that Tarion supervise the process. Others noted that work, such as finishes, were still ongoing in the home at the time that they took occupancy.

Importantly, from a process point of view, homeowners do not know how the warranty services representative will use the pre-delivery inspection form in the conciliation process, although the form itself indicates that it is a “formal record” that will be used as a “reference document” in the future.

Tarion’s written reference material and video do not adequately explain the practical implications of the pre-delivery inspection form or tell homeowners about their participatory rights in the conciliation process, such as being able to supplement the form with additional information and logical argumentation. More than one homeowner has been surprised to learn that a warranty claim is denied because an item had not been listed on the form. For instance, advising a homeowner in a decision that “you have not provided any document or information to establish when or how scratches occurred” is not the same thing as educating the homeowner in advance about how to represent his or her interests in the conciliation process.

Improved homeowner information about the pre-delivery inspection form and its relation to the conciliation process is required in order to ensure a fair, transparent, and accessible conciliation process.

RECOMMENDATION EIGHT

That Tarion review and revise its resource materials in relation to the conciliation process in order to:

- i. Isolate, consolidate and simplify *process* information (as



- distinct from *content* information), including a simple schematic of the stages of the process;
- ii. Better explain the participatory rights of the parties at all stages of the process, such as the opportunity for response or rebuttal, and how to obtain information that is in the possession of the other party;
 - iii. Improve homeowner information with respect to the pre-delivery inspection form so that homeowners understand how it is used in the conciliation process and that they may supplement its contents with additional information and logical argumentation;
 - iv. Clearly convey to the parties when the process transitions from a facilitative, non-binding one to an adjudicative, binding one, and what that difference means in terms of their participation and the role of the warranty services representative; and
 - v. Explain Tarion's investigative function (ability to obtain more information and retain or consult third parties) and describe how relevant information from that function will be made available to the parties in the conciliation process.

RECOMMENDATION NINE

That Tarion review how it currently communicates and applies the “onus of proof” to the conciliation process in order to

- (i) Clarify its meaning in a contemporary consumer protection context, i.e. that the homeowners is expected to report credible symptoms within the scope of the statutory new home warranty, after which Tarion (or the builder) will diagnose the cause of those symptoms;
- (ii) Develop explicit principles to guide its use including, if



advised, at different stages of the conciliation process;

(iii) Evolve consistent internal practices as to its application;

(iv) Create or revise resource materials so that homeowners understand what the onus means, when it applies to any particular stage of the conciliation process, how to prepare for the conciliation process, and how to discharge the onus of proof; and

(v) Publish concrete examples showing how a wide variety of contested warranty claims are assessed or post non-identifying assessments and/or decision letters on its website so that homeowners can see the onus of proof in operation, form a realistic picture of what is involved, and to decide whether to proceed with any particular issue.

RECOMMENDATION TEN

That Tarion eliminate any content differences or discrepancies between homeowners and builders in its resource material about the conciliation process, including its use of the less inclusive label “builder bulletin.”

9. Timeliness

The design standard of timeliness means that disputes are resolved as expeditiously as possible given the nature of the dispute and the process used. In this regard, there are two relevant areas at Tarion — the builder repair periods that are incorporated into the conciliation process, and the access points at which a homeowner can enter the process. I will explore these one at a time.

As discussed earlier, 150 days elapse from the time a homeowner files a warranty claim with Tarion until a conciliation inspection can take place in the home. This period consists of a 120-day builder repair period after a claim is filed and before a homeowner can request a conciliation



inspection — a structural feature that delays the movement of a contested warranty claim to the fourth rung of the ladder — and a further 30-day repair period after the homeowner asks for a conciliation inspection.

During this review, I became aware of significant homeowner dissatisfaction with respect to this lapse of time, which is sometimes extended to accommodate inspection and repair efforts by the builder. More than one homeowner has observed that a whole house could be constructed during the repair periods that precede a conciliation inspection. Homeowners want more timely resolution. They resent the stress of this interim period when their homes are typically furnished and occupied and they need to book time off work (sometimes repeatedly) for builder inspection and repair efforts. Some homeowners believe that the repair periods are an intentional design feature intended to pressure a homeowner to compromise or abandon a claim. One individual also observed that if the homeowner loses patience and makes repairs at his or her own expense, warranty coverage is lost.

Tarion is aware of the nature and strength of homeowner dissatisfaction in relation to the builder repair periods, and I am given to understand that this issue is being looked at as part of an ongoing process of review of the builders' customer service standard (Builder Bulletin 42). Whether by means of that review process or some other process, my recommendation is that the builder repair period be reduced to permit more timely access to a conciliation inspection and to better balance the needs of homeowners and builders.

The access points available to homeowners are also relevant to timeliness. For example, under the current design, there are only two windows during which a homeowner can submit a statutory warranty form in the first year of occupancy. The first window closes thirty days after the date of possession. If the homeowner misses that window, then the next one occurs in the period that is 30 days before the first-year anniversary of the date of possession.

From the homeowner's point of view, the first window is advantageous because it starts the process sooner and therefore leads to more timely resolution than the second one. But some homeowners explained that the first window is hard to meet because it comes at a disruptive time when the household is adjusting to a new home and all of the practical implications that this involves such as new schools, new acquaintances, and new household routines.



The consequence of missing the first window is that a homeowner is denied entry into the conciliation process for the resolution of contested items — some of which may have come to the homeowner’s attention as early as the pre-delivery inspection — and resolution is now deferred for at least the better part of a year.

More frequent and/or flexible opportunities to submit a claim form would increase access to Tarion’s dispute resolution process and improve the timeliness of its system.

RECOMMENDATION ELEVEN

That Tarion review and revise

- i. The builder repair periods incorporated into the conciliation process to provide more timely access to a conciliation inspection and to better balance the needs of homeowners and builders; and
- ii. The times during which a homeowner can file a warranty claim with Tarion in order to provide more frequent and flexible access to the conciliation process,

All with a view to improving the timeliness of dispute resolution at Tarion.

10. Improving Reasoned Decisions

The ultimate, practical result of the conciliation process is a reasoned, written decision somewhat like an arbitrator’s award or a judge’s ruling. On rung five of the dispute resolution ladder, a Tarion decision takes the form of a “warranty assessment report.” If the homeowner wishes to challenge the assessment at LAT, Tarion converts it into a “decision letter” at rung six — with essentially the same reasoning and results. Tarion’s internal guidelines remind the warranty services representative to write a reasoned decision for a broad audience because people other than the parties — judges, media, expert consultants, witnesses, and others — may be readers. I was one such external reader.



I read dozens of warranty assessment reports and/or decision letters, often relating them to the claim form that started the process or to a complaint that followed. I approached the decisions with no stake in the outcome, no relationship to the participants, and no emotional investment in the events. I did, however, read them as a dispute resolution practitioner who has written reasons — independently or as part of an assessment team — and who has taught others adjudication skills and reason writing.

In general, I found the warranty assessment reports and decision letters to be impersonal, and sometimes bureaucratic, characteristics that are not in keeping with a decision about someone's personal living space. One homeowner used the term "boilerplate." Decisions often made reference to sections of the Ontario Building Code or the Construction Performance Guidelines that I had to stop and look up without the benefit of knowing how the warranty services representative had interpreted the sections.

Whether in the form of an assessment report or a decision letter, the resolution of disputed issues was conveyed in summary form with minimal language. As a result, I often could not determine what conclusion was drawn about some of the initial observations included in a homeowner's statutory warranty claim such as "bare wood", "something protruding from the roof", or a "cracked" joist. Sometimes, I could not understand the reasons given. In some instances the decision stated only "This item was reviewed and there is no defect in work or materials that amounts to a breach of the one year warranty therefore this item is not warranted."

Some homeowners also had difficulty understanding Tarion's reasoning, and their concerns went beyond their disappointment at the result. They did not get the impression that they were listened to, did not understand why they lost, or did not see the decision as objective. Another frequent objection was the use of the term "minor" to describe an issue that the homeowner had been living with for an extended period of time.

Three factors account for the state of Tarion's assessment reports and decision letters.

As with neutral comportment, fair process, and evidentiary principles, warranty services representatives have not been trained in making and writing evidence-based decisions that convey good listening and provide cogent reasoning. The *Decision Letter* module does provide guidance as well as examples and illustrations, but there is no substitute for applied training and supervised



practice. One Canadian dispute resolution program that I am familiar with requires new or remediated adjudicators to participate in a supervised probation where decisions are reviewed by an outside consultant who must attest to their competence before the probation is successfully completed.

Assessment reports and decision letters are produced from templates — a perfectly appropriate way to promote efficiency and consistency — and representatives are instructed to state reasons “as briefly as possible” and to omit information “that did not form the basis of Tarion’s current position”, which could conceivably be information or argumentation that the warranty services representative did not find compelling. The result is the impersonal tone of a form letter and a lack of transparency about the train of logic that supports the outcome, especially the logic by which the warranty services representative rejected the homeowner’s submissions.

To some extent — but in addition to decision making training — understanding of how issues are assessed at Tarion could be improved by means of a joint communication to both parties from the representative, alerting them to the fact that an assessment report is on the way to them and offering a joint, explanatory telephone call once they have had an opportunity to digest the report, an adaptation of a practice adopted by some complaint-handling programs. Note that this customer-service gesture would not be for the purpose of receiving unilateral submissions or adjusting the assessment — that opportunity will be discussed in the next section — but to promote understanding of the original assessment.²⁵

The third factor that influences Tarion’s decisions is operating practices. As a general rule, assessment reports and decision letters are not customarily reviewed by another critical and trained set of eyes at Tarion before they are released. If this were to be done on a routine basis, it would help Tarion spot gaps in logic, counteract any bias that the original decision maker may unconsciously have introduced, recognize inadequate investigations and premature conclusions, adjust the tone, and counteract the “curse of knowledge” — the difficulty that any writer has imagining what it is like for someone not to know what the writer knows.²⁶

²⁵ But see Recommendation Sixteen (i) that uses this telephone call as the starting point for a post-inspection input process.

²⁶ See Steven Pinker, *The Sense of Style: The Thinking Person’s Guide to Writing in the 21st Century* (New York: 2015) at page 59.



RECOMMENDATION TWELVE

That Tarion retain the services of one or more third party experts to develop and conduct training in decision writing for its warranty services representatives and managers, in order to improve its written decisions.

RECOMMENDATION THIRTEEN

That once the training in Recommendation Twelve has been completed, Tarion review its guidelines and templates for warranty assessment reports and decision letters in order to prepare more user-friendly decisions with more transparent and/or cogent reasoning.

RECOMMENDATION FOURTEEN

That Tarion introduce at the operational level a practice whereby all warranty assessment reports and decision letters are routinely reviewed by another set of critical, trained eyes before they are released in order to ensure quality decisions and reasoning.

RECOMMENDATION FIFTEEN

That as a matter of customer service and with a view to promoting understanding once the warranty services representative has made an assessment, Tarion introduce a joint communication to both parties from the representative, alerting them to the fact that an assessment report is on the way to them and offering a joint, explanatory telephone call once they have had an opportunity to digest the report, but not for the purpose of receiving unilateral submissions and adjusting the



decision.

11. Options for Non-adversarial Problem Solving

In the section on accessibility and transparency, I noted a general lack of clarity around a homeowner's ability to provide information that could inform or influence Tarion's warranty decisions. This lack of clarity persists at rungs four to six of the dispute resolution ladder. Senior management advises that Tarion is open to information from homeowners at all stages of its process, and I did see instances at all rungs of the ladder where homeowners raised process objections, offered additional information, or suggested a line of enquiry for Tarion to follow. However, I was unable to discern a consistent pattern or process for homeowners to use, such as who to contact, at which rung of the ladder, and what to expect. Nor could I always tell from the records or decisions whether or how the homeowner's input was taken into account.

Homeowner post-inspection submissions appear to be managed in an ad hoc manner with multiple access points at rungs four to six. A homeowner might take the initiative and contact the warranty services representative immediately after the conciliation inspection or after receipt of the warranty assessment report. The warranty services representative might invite additional information from the homeowner, after ruling that a particular issue is not warrantable. The homeowner might also make general contact with Tarion and be referred back to the representative, or he or she might make a formal complaint by means of the complaint function on Tarion's website. The homeowner might also contact Tarion's ombudsperson and, in some instances, take their concern outside such as to the Ministry of Government and Consumer Services/Consumer Protection Ontario. Whatever the modality, the homeowner's purpose was to influence Tarion's assessment and/or protest some aspect of Tarion's process such as the conduct of the investigation, the process of making a decision, or the reasons given. In the interests of transparency, a reliable, unified process should be developed and publicized.

At the post-conciliation inspection stage, Tarion has a number of options by which it can receive input and engage in non-adversarial problem solving.

One option is for Tarion to establish an intermediate input process in the nature of a review that gives a dissatisfied homeowner (or builder) a one-time opportunity to register process objections



and/or provide additional information to influence the assessment before a formal decision letter is issued. This would not be an internal appeal or a re-hearing on the merits (as Tarion had many years ago) but a final show-us-in-writing-how-we-are-wrong opportunity. Parties who take advantage of the invitation would have their input considered by an individual who did not make the original assessment so that the matter would be reviewed afresh. A party's input might or might not change Tarion's assessment — there can be no guarantees one-way or the other — and whether the input warrants a further conversation with the parties, creates the need for additional input from them, or requires additional information or clarification can be determined on a case-by-case basis. The intermediate input process would conclude with a written response acknowledging receipt of the concern or information and explaining why it did or did not change the assessment.

The appropriate place for this option is between the assessment stage (rung 5) and the decision stage (rung 6) of the dispute resolution ladder. In the interests of efficiency, this option can be combined with the courtesy call outlined in Recommendation Fifteen. That is to say, the warranty services representative can review the content of the assessment report with the parties in a telephone conversation to ensure their understanding, after which — in the same conversation — he or she can invite the parties to submit any process objections and/or additional information about the assessment to Tarion within a specific time frame and for consideration by an individual who did not make the initial assessment. For transparency's sake, this option needs to be formalized, publicized, and put into practice in a consistent way.

A second option to encourage non-adversarial problem solving, particularly at the upper rungs of the dispute resolution ladder, is for Tarion to make better use of the skills and principles associated with interest-based negotiation. By this I mean a process whereby the substantive, procedural, *and* emotional concerns of the parties — including those that homeowners have about the impact of outstanding issues on their living space, household, and domestic relationships — are acknowledged, understood, and taken into account so far as possible in the search for a mutually agreeable resolution. Throughout my review and notwithstanding Tarion's strong and longstanding emphasis on listening, I detected a recurring factual focus to its dispute resolution, an emphasis on the technical aspects of an issue and the details of the statutory warranty program. This emphasis tended to eclipse the less tangible, more elusive "people" aspects of a problem, such as the intense frustration of some homeowners or their perception that they are not being listened to. The focus was reflected, for instance, in the clinical approach conveyed by the legal department's



settlement correspondence with homeowners that tended to present settlement options without inviting a conversation or anticipating an iterative process of back-and-forth with the homeowner. I also received feedback from homeowners and others that at times Tarion comes across as insensitive to the position and experiences of homeowners.

In the interests of non-adversarial problem solving, I encourage Tarion to consider additional training in the practices and principles of interest-based negotiation, including the skill of listening to parties in conflict without adopting or endorsing the content of what either party says. Coincidentally, such training would provide additional support to Tarion personnel involved in early resolution, facilitation, or settlement initiatives at any rung of the ladder.

A third option is for Tarion to offer the parties a constructive conversation with the assistance of an external mediator as a means to ensure that every opportunity for a problem-solving conversation — what one homeowner called a “sit down” — has been exhausted. This could replace or precede the current practice of waiting for a pre-hearing by a tribunal member once a LAT appeal has been filed. There is precedent in Canada for the application of mediation in the context of new home warranty claim disputes, such as in the province of British Columbia, which has a mandatory mediation initiative,²⁷ or in the province of Quebec, where mediation is a voluntary option for the parties.²⁸ In determining when and under what terms and conditions to offer mediation, Tarion can make reference to the experience of these and the many other established mediation programs in Canada.²⁹

Table 3, below, shows where options one and three can be added to the dispute resolution ladder.

²⁷ See http://www.bclaws.ca/civix/document/id/complete/statreg/152_99 (Retrieved August 11, 2015.)

²⁸ See <http://www.garantie.gouv.qc.ca/en/condo/what-recourse-is-available-after-your-claim-is-over/mediation.html> (Retrieved August 11, 2014.)

²⁹ Such as the program administered by the Ministry of the Attorney General for the Ontario Mandatory Mediation Program in the Ontario Superior Court where roster mediators perform ½ day mediations according to a legislated tariff. <http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.asp> (Retrieved on July 30, 2015.)



TABLE 3 — NON-ADVERSARIAL DISPUTE RESOLUTION OPTIONS

RUNG 7	APPEAL STAGE — LAT Hearing
↑	OPTIONAL MEDIATION — External mediator
↑	RUNG 6
	FINAL DECISION STAGE — Decision Letter
↑	INTERNAL REVIEW STAGE — Process concerns & new information only
↑	RUNG 5
	ASSESSMENT STAGE — Warranty Assessment Report
↑	RUNG 4
	INVESTIGATION STAGE — Conciliation Inspection
↑	RUNG 3
	FACILITATION STAGE — 120-day Builder Repair Period
↑	RUNG 2
	INTAKE STAGE AT TARION — Homeowner Warranty Claim Form
↑	RUNG 1
	DIRECT, VOLUNTARY RESOLUTION WITHOUT TARION — 365,392 New Homes Under Warranty in 2014

RECOMMENDATION SIXTEEN

That in the interests of non-adversarial problem solving, Tarion

- i. Establish and publicize an intermediate input process in the nature of a review (not an appeal or re-hearing) that gives the parties a final opportunity to register process objections and/or file additional information before a formal decision letter is issued, with the parties' submissions to be considered by someone other than the warranty services representative who made the initial warranty assessment, such a process to conclude



with a written response acknowledging receipt of the concern or information and explaining why it did or did not change the assessment. In the interests of efficiency, this recommendation can be integrated with Recommendation Fifteen;

- ii. Make better use of interest-based negotiation and consider additional training for relevant personnel in interest-based practices and principles, including the skill of listening to parties in conflict without adopting or endorsing the content of what either party says; and
- iii. Determine when and under what terms and conditions it will offer parties a conversation with the assistance of an external mediator, making reference to the experience of other established mediation programs in Canada including those developed for the resolution of contested new home warranty claims.

12. Homeowner Appeals to the Licence Appeal Tribunal

Although only about 0.2 per cent of warranty claims end up in an appeal to LAT, Tarion's involvement has attracted public criticism and external complaints from homeowners, including complaints to the Ministry of Government and Consumer Services/Consumer Protection Ontario. In summary, the homeowner concerns are that Tarion makes deliberate use of LAT's adversarial process to disadvantage homeowners who lack the resources to hire experts and lawyers.

As part of my review, I was specifically asked to consider what Tarion can do to "level the playing field" for homeowners involved in LAT appeals so that they perceive themselves to have had fair access to justice. I was also asked to determine whether there is a deliberate or systemic bias at Tarion to stream contested warranty claims to LAT or to wait until a LAT hearing to settle with homeowners. I will address these questions one at a time.

But first, some background.



The homeowner, not Tarion or the builder, is the party with the right to initiate an appeal to LAT if he or she disagrees with Tarion’s decision on a contested warranty claim. At LAT, this is a true appeal by means of what is called a *hearing de novo* — the tribunal considers the merits of the case, and the claim is litigated anew. If LAT determines that Tarion’s original decision was not correct, LAT can substitute its own conclusion.

LAT conducts its appeal using a conventional adversarial format where each party advocates for a favourable ruling. There, the onus is very clearly on homeowner as the appellant to use his or her own resources in order to convince the tribunal — with facts, logical arguments, and relevant expertise — that the outstanding issues are defects within the scope of the new home warranties. If the appeal concerns the interpretation of the *New Home Warranties Plan Act* or regulations, the homeowner must convince the tribunal that his or her preferred interpretation should prevail.

At the appeal stage, Tarion has superior resources in terms of finances, LAT experience, and know-how. Throughout the appeal process, legal counsel typically represents Tarion. Separate legal counsel represents those builders who choose to be represented. But homeowners are typically— though not always — self-represented. From the homeowner’s perspective, the problem is cost. Some explained to me that they consulted legal counsel at the early stages of an appeal but were unable to afford ongoing representation through to the hearing stage of the appeal.

Tarion also has the resources to hire expert witnesses and often does so on its own behalf and for the assistance of the tribunal. The average homeowner does not have institutional resources, and some told of needing \$5,000 – \$10,000 “after-tax money” for an initial expert inspection and report, exclusive of any fees for court attendances.

Although on rungs three to six of the dispute resolution ladder Tarion is an impartial decision maker and not a party, its governing legislation identifies it as a party when there is an appeal to LAT so the proceedings are titled *Homeowner v. Tarion*, with Tarion being the respondent.

At Tarion’s request, the builder is also added as a party to the appeal and thereafter participates in the proceedings, with Tarion taking the lead. Although Tarion and the builder are distinct and separate parties, they do confer and cooperate in attempts to bring about settlement with the homeowner, and the tribunal member presiding at a LAT pre-hearing conference often asks to



meet privately with Tarion and the builder in the absence of the homeowner in order to determine the prospects and content of a settlement.

All of this creates an impression that, according to some homeowners, feels fundamentally wrong. They do not see Tarion and the builder as separate entities with distinct interests, but as common adversaries who are collectively trying to defeat them. In their view, the organization that they originally perceived as “friend” and that represented itself to them as “Protecting Ontario’s New Home Buyers” has turned against them and made an alliance with the opposite party. Some homeowners use the term “betrayal” to express the depth of their feelings on this point.

So, given the legal structure of homeowner appeals and the fact that LAT is an independent tribunal with responsibility for its own process, what are the sorts of things that Tarion can do to “level the playing field” in order that homeowners perceive themselves to have received fairer access to justice?

Tarion has a variety of accessible, practical options that it can consider, some of which begin at lower rungs of its dispute resolution ladder.

First, and long before an appeal is within anyone’s contemplation, Tarion must devote the necessary resources and make every reasonable effort to complete its adjudication mandate by the time a decision letter is issued, ensuring that it has (i) conducted a balanced investigation of all relevant issues; (ii) correctly understood the cause of the reported symptoms; (iii) taken such legal and other professional advice as is required; and (iv) rendered a sound, impartial, evidence-based decision. The result should be a decision that Tarion can be confident is correct such that no new investigations or experts are required at the appeal stage, save at the direction of the tribunal or in the event that the homeowner raises a new issue in the appeal. In the event that a new expert is required for those reasons, Tarion can promote the use of jointly-appointed experts or encourage opposing experts to confer in order to isolate points of agreement and disagreement for the assistance of the tribunal.

Second, Tarion can refine and/or adopt different ways of being a party at LAT, ways that affirm its position as a distinct participant and its role as the original decision maker. Examples include declining the tribunal’s invitation at a pre-hearing conference to meet with the builder and the tribunal member in the absence of the homeowner, or consistently maintaining a physical and



social distance from the builder, its counsel, and the builder's witnesses at proceedings before the tribunal.

Third, Tarion can develop, publish, and abide by a written protocol or statement of principles specifically addressed to self-represented homeowners in straightforward language that describes what homeowners can consistently expect of Tarion in LAT appeals in regards to (i) matters of information exchange, simplicity, timeliness, courtesy, cooperation, respect, case management, and general procedural assistance; (ii) the duties and accountability that Tarion has to the tribunal; and (iii) the nature of its relationship to the builder and how this will be demonstrated; and (iv) other relevant information.³⁰ Such a statement would be *Tarion's* commitment to self-represented parties, as opposed to a formulation of mutual responsibilities.

Fourth, wherever possible, Tarion can reduce its reliance on legal counsel, particularly external ones, in order to bring a less intimidating, more direct, person-to-person approach. For instance, instead of being represented by a lawyer at mediation, pre-hearing conferences, or other settlement conversations, Tarion can participate through a well-briefed corporate representative such as a senior executive who had no previous involvement in the case and can bring a fresh, problem-solving perspective.

And fifth, independent of any educational efforts undertaken by LAT, Tarion can develop and assemble resource materials and links that assist homeowners to understand the basics of adversarial process, what to expect in a hearing, and how to prepare. Some precedents for this already exist.³¹

³⁰ There are no readily available precedents for this and additional research is in order, but see http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf and <http://www.ccat-ctac.org/en/resources--opportunities/self--representative-parties--checklist> (Both retrieved August 19, 2015.)

³¹ See, for instance, *Is CAMVAP For Me?* http://www.camvap.ca/wp-content/uploads/Is_CAMVAP_For_Me_2013.pdf, *Getting Ready for CAMVAP* http://www.camvap.ca/wp-content/uploads/Getting_Ready_For_CAMVAP_2013.pdf and the resources prepared by the National Self-Represented Litigants Project that are found at <http://yourlegalrights.on.ca/organization/national-self-represented-litigants-project-nsrlp> (All retrieved on August 4, 2015.) See also https://www.cjc-ccm.gc.ca/english/resource_en.asp?selMenu=resource_alternatives_en.asp (Retrieved August 19, 2015.)



RECOMMENDATION SEVENTEEN

That Tarion develop options order that allow homeowners to perceive themselves to having received fairer access to justice at LAT, such as

- i. Devoting the necessary resources and making every reasonable effort to complete its adjudication mandate by the time a decision letter is issued, ensuring that it has (i) conducted a balanced investigation of all relevant issues; (ii) correctly understood the cause of the reported symptoms; (iii) taken such legal and other professional advice as is required; and (iv) rendered a sound, impartial, evidence-based decision, such that no new investigations or experts are commissioned at the appeal stage, save at the direction of the tribunal or in the event of a new issue arising on the appeal;
- ii. Promoting the use of jointly-appointed experts and encouraging opposing experts to confer in order to isolate points of agreement and disagreement for the assistance of the tribunal;
- iii. Refining and/or adopting different ways of being a party at LAT to affirm its position as a distinct participant and its role as the original decision maker, such as by declining the tribunal's invitation at a pre-hearing conference to meet with the builder and the tribunal member in the absence of the homeowner, or by consistently maintaining a physical and social distance from the builder, its counsel, and the builder's witnesses at the appeal hearing;
- iv. Developing, publishing, and abiding by a written protocol or statement of principles specifically addressed to self-represented homeowners in straightforward



- language that describes what homeowners can consistently expect of Tarion in the LAT appeal process in regards to (i) matters of information exchange, simplicity, timeliness, courtesy, cooperation, respect, case management, and general procedural assistance; (ii) the duties and accountability that Tarion has to the tribunal; and (iii) the nature of its relationship to the builder and how this will be demonstrated; and (iv) other relevant information;
- v. Reducing its reliance on legal counsel, particularly external ones, in order to bring a less intimidating, more direct, person-to-person approach, such as by being represented at mediation, pre-hearing conferences, or other settlement conversations by a well-briefed corporate representative, i.e. a senior executive who had no previous involvement in the case and can bring a fresh, problem-solving perspective; and
 - vi. Developing and assembling resource materials to assist homeowners to understand the basics of adversarial process, what to expect in a hearing, and how to prepare.

There remains the question of whether there is a deliberate or systemic bias at Tarion to stream contested warranty claims to LAT or to wait until a LAT hearing to settle with homeowners. This question is separate and apart from my professional critique of Tarion's dispute resolution process to this point and in no way changes what I have written thus far in my report.

To understand Tarion's handling of LAT appeals, I took a variety of steps including speaking on a confidential basis with a number of individuals who have experience at LAT and reading numerous LAT decisions. I also reviewed a random selection of files from Tarion's legal department for cases where LAT released decisions in 2012, 2013, and 2014, and these files included information such as settlement plans and litigation strategies. For some cases I also reviewed the corresponding



records from Tarion's warranty assessment services to obtain a more comprehensive picture of how the matter had been handled at lower rungs of the ladder.

When I analysed all of the information available to me in this review and applied my dispute resolution experience and knowledge, I was satisfied that there is no deliberate or systemic bias at Tarion to stream contested warranty claims to LAT or to wait until a LAT hearing to settle with homeowners. Upon examining privileged and confidential material in the legal department's files — files that I, not Tarion, identified — I observed ongoing and persistent attempts at settlement by Tarion at all stages of the LAT process — from receipt of a notice of appeal through to hearing — and this was so whether Tarion was represented by in-house counsel or external counsel.

I learned that when a homeowner initiates an appeal, a warranty services representative or manager who is familiar with the matter completes a LAT Appeal Recommendation Form. This form records Tarion's settlement efforts to date and contains a reasoned recommendation as to next steps such as whether to further investigate,³² attempt settlement, or proceed to a hearing. The form also contains an estimate of the monetary amount that might be required from the guarantee fund should the homeowner succeed on the appeal. But the recommendation from warranty services contained in this form does not govern how Tarion handles an appeal.

Tarion's in-house counsel who is assigned to the file uses the LAT Recommendation Form for general information and orientation and then considers the matter anew. Even if warranty services recommended continuing to hearing, I observed that counsel continued to consider whether and how a settlement might be achieved with the homeowner, and these efforts went on through any pre-hearings conducted by LAT right up until the actual hearing. In one instance, Tarion worked with the builder and the municipality to ensure that the homeowner's complaint was addressed, even though Tarion had no legal obligation to do so. I also saw multiple examples where Tarion had offered to settle with homeowners for amounts that exceeded what the homeowner ultimately recovered through LAT. What I read does not support any suggestion that the amounts offered were arbitrary or put forward in bad faith.

³² If Recommendations Six and Seventeen (i) are implemented, the instances of further investigation at the appeal stage should be minimal, as all necessary information and expertise should already have been taken into account.



In determining whether and how to approach settlement, I observed that Tarion takes into account a variety of factors on a case-by-case basis including an estimate of the chances of success, any new information or perspectives that arise as the matter progresses, how expert and lay witnesses will present at a hearing, the strengths and weaknesses of Tarion's case and the homeowner's case, Tarion's consumer protection mandate, and public perception. Based on my experience as a dispute resolution practitioner who has witnessed hundreds if not thousands of parties negotiate voluntary settlements, I found nothing exceptional or remarkable in this. The considerations used by Tarion are the kinds of considerations that both individual and institutional parties typically take into account when determining how flexible they can be about settlement.

13. Conclusion

In the foregoing pages I have tried to candidly but constructively convey what I learned in reviewing Tarion's warranty claims handling process as an independent dispute resolution practitioner with no previous experience of Tarion. I identified a number of concerns and explained — sometimes in great detail — why I consider each to be problematic or inconsistent with best practices. I have also recommended straightforward and fundamental things that Tarion can do at the corporate and operational level to address the concerns in a way that enhances or improves the mechanisms that are currently in place.

Tarion commissioned this report, giving me unfettered access to its records and encouraging me to speak with others outside of Tarion, without knowing what I would conclude or recommend. It was Tarion that identified the lens through which I was to conduct the review — a dispute resolution lens — and the vantage point that I was to take — the homeowner's vantage point. In retrospect, this was an insightful move on Tarion's part because it now has independent findings, professional explanations, and recommendations that may not previously have come to its attention. It now has the opportunity to strengthen its dispute resolution role in a contemporary consumer protection context.

I anticipate that Tarion will receive this report in the spirit of continual improvement and as the open and values-based organization that I experienced it to be. All of my findings and recommendations



are intended help Tarion to carry out its important dispute resolution function in a balanced, competent, and confidence inspiring way.

In closing, I thank Tarion for trusting me with this mandate and for its cooperation at all stages of my review.

Dated at Toronto, Canada this 20th day of August, 2015.



Genevieve A. Chornenki
Independent Reviewer



14. Appendix 1 — Consultant's Dispute Resolution Review Mandate

My initial mandate was described as follows:

You will work out a detailed project plan with our internal Steering Committee.

- You will carry out a review of how warranty claims are resolved in other jurisdictions and if applicable other Ontario Designated Administrative Authorities which administer compensation funds. Consider the strength and weaknesses of other models for dispute resolution (comparing available key statistical measures including volume, time to resolution, etc.). Contrast and compare other models against the Tarion model.
- You will conduct a detailed end-to-end review of homeowner (including condominium corporations) warranty claims processes outlining in detail:
 - o The steps involved.
 - o The persons involved.
 - o Policies and protocols.
 - o Technology involved.
 - o A review of how Tarion's decision letters are challenged at the Licence Appeal Tribunal or alternatively, in court.
 - o Identify challenges associated with homeowner warranty dispute resolution.
 - o Identify strengths and weaknesses of the current dispute resolution process – end-to-end.
- You will prepare a discussion paper (with assistance from Tarion) for review by the internal Steering Committee, the Consumer Committee and Board of Directors summarizing findings together with recommendations.
- You will submit the Discussion Paper to the Consumer Committee Meeting and subject to Consumer Committee input, submit to the Tarion Board thereafter.
- You will present the Discussion Paper at the Annual Public Meeting

As the review progressed, the steering committee clarified that my mandate included questions relating to the Licence Appeal Tribunal ("LAT") that sits in appeal of Tarion's warranty decisions, specifically (i) whether Tarion has a systemic bias towards streaming files to LAT where most homeowner represent themselves before the tribunal, and (ii) what Tarion can do to "level the playing field" for homeowners involved in LAT appeals so that they perceive themselves to have had fair access to justice.



15. Appendix 2 — Consultant's Professional Summary

Genevieve A. Chornenki has offered non-partisan dispute resolution services in many sectors since 1989. She serves as mediator and arbitrator, consults to dispute resolution programs, and teaches. She is a member of the Local Mediation Committee of the Ontario Mandatory Mediation Program and sits on the National Appeal and Audit Committee of the ADR Institute of Canada. In 1999, Genevieve received the first Award of Excellence in ADR from the Ontario Bar Association, and in 2000 an Excellence in Teaching Award from the University of Toronto where she taught "Conflict Resolution Analysis & Design."

1. Sector experience

- A wide variety of sectors and scenarios such as
 - Automotive
 - Complaints
 - Construction
 - Consumer protection
 - Contracts
 - Employment & workplace
 - Estates, wills & trusts
 - Financial services
 - Government
 - Partner & shareholder issues
 - Professional discipline
 - Professional negligence

2. Process experience

- A working knowledge of dispute resolution options for individuals, groups, and public & private bodies, such as
 - Interest-based negotiation
 - Mediation
 - Arbitration/Adjudication
 - Facilitation
 - Independent complaint handling
 - Contract ombuds services
- ADR Institute of Canada's practice designations — Chartered Mediator (1995) and Chartered Arbitrator (2009)

3. Program consulting

- Clients such as Aboriginal Affairs & Northern Development Canada, Canadian Radio-Television & Telecommunications

Commission, Copyright Board of Canada, Department of Justice Canada, Ontario Licence Appeal Tribunal, National Energy Board, and Ontario Power Generation

- Best practices research and development of program-specific supporting material such as FAQ's, feedback & survey instruments, information bulletins, intake guides, practice directions, standardized scripts, and templates
- 1,500–2,000 hours of applied dispute resolution training for, among others, judges from all court levels across Canada

4. Writing & radio

- *Bypass Court: A Dispute Resolution Handbook* LexisNexis Canada Inc. — 5th edition pending
- Periodic contributor to IDEAS, a radio documentary program on CBC Radio One, including *When Families Start Talking* (2012) and *The Trouble With Tolerance* (2007)

5. ADR firsts

- First cohort of the Masters of Law in Alternative Dispute Resolution at Osgoode Hall Law School (1996)
- Founding chair of the multi-disciplinary Alternative Dispute Resolution section of the Ontario Bar Association (1991–1994)
- Successful mediation of the first
 - Public-interest mediation of a doctor-patient complaint for an Ontario health-care regulator
 - Business dispute referred to mediation by a major Canadian financial institution
 - Professional negligence claims in the construction sector referred to mediation by a professional liability insurer
- Development of the first ADR position paper for the Department of Justice Canada — *Civil Litigation and ADR, A Reciprocal Relationship* (1994)
- Member of the inaugural board of directors of the Sport Dispute Resolution Centre of Canada (2004–2005)



16. Appendix 3 — Consultant's Research

In conducting this review I have done extensive research, and read, reviewed, and considered the following

- Information from conversations or correspondence with a variety of individuals internal and external to Tarion who have experience with its warranty claims mechanisms and processes at various stages, including homeowners who participated in the conciliation process and or appeals before the Licence Appeal Tribunal
- A selection of Tarion's warranty assessment reports, decision letters, and other internal records such as memos to file or email correspondence between warranty services representatives and homeowners or builders, all of which comprise a written record of how homeowner warranty claims are handled by Tarion
- A selection of LAT decisions in homeowner appeals released in 2012, 2013, and 2014 plus the corresponding records from Tarion's legal department that document how Tarion responded to and handled an appeal
- A summary of themes that consistently came up throughout Ontario at Tarion's 2014 "Meet the CEO" nights where homeowners in all stages of the warranty process were asked for feedback based on their experiences
- Tarion's extensive homeowner information in print and on the website plus extracts from the Construction Performance Guidelines and/or Ontario Building Code as these relate to the handling and resolution of homeowner warranty claims
- Tarion's internal warranty services guidelines and training materials for warranty services representatives such as the written modules for "Under Investigation", "Disclosure of Homeowner and Builder Communications," and *work the file*
- Tarion's published reports of homeowner surveys in 2012 and 2013 plus the background verbatim comments made by respondents to the 2013 and 2014 surveys and who self-identified as participants in Tarion's conciliation process



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- Verbatim comments and homeowner responses to a “mini-survey” conducted in 2014 of homeowners who participated in Tarion’s conciliation process, plus the warranty assessment reports and/or internal files that correspond to specific homeowner commentary in that survey
 - Complaints internal and external to Tarion about the handling or disposition of specific homeowner warranty claims
 - Public criticisms of Tarion available in print and social media
 - Tarion’s various annual reports including those issued by the Tarion ombudsperson and the 2014 annual public meeting
 - Tarion’s governing documents such as its accountability agreement with the province of Ontario, authorizing statute, and bylaws, plus a number of court decisions relating to Tarion’s mandate;
 - Other new home warranty programs across Canada
 - Dispute resolution models, program, or protocols in Canada including designated authorities, and complaint-handling systems as well as general dispute resolution practices, principles, and applicable legal standards.



17. Appendix 4 — Consolidated Recommendations

RECOMMENDATION ONE

That Tarion take steps at the corporate level to strengthen its role as an impartial dispute resolution body in a contemporary consumer protection context by:

- i. Developing and publishing performance standards modeled on relevant ISO's dispute resolution standards, which highlight and specifically address Tarion's dispute resolution function and clarify its guiding principles;
- ii. Engaging in a process to determine the meaning of "consumer protection" and the "public interest" in relation to its claims handling function, whether as part of the Public Interest Mandate Review Subcommittee or otherwise, and using the answers that it develops to inform its dispute resolution at the operational level; and
- iii. Making an overt commitment to adopt best practices in dispute resolution and setting up a system that includes a knowledgeable dispute resolution professional to monitor implementation and quality control.

RECOMMENDATION TWO

That Tarion revise its current design for the conciliation process by means of the following options:

Option 1 — Separating out the functions currently performed by a single warranty services representative such that

- iii. The warranty services representative who conducts a



conciliation inspection and makes a warranty assessment is not permitted or required to engage in behaviours that are incompatible with adjudication such as corresponding separately with the parties or trying to help them settle the issues; and

- iv. An individual other than the one who assesses the warranty claim performs administrative, educational, and facilitative functions.

Option 2 — Retaining the current model but introducing modifications to minimize the risks, including:

- vi. A written and oral explanation in advance of the hybrid process so that the parties understand that there will be a facilitative (mediation) process, followed by an adjudicative (decision-making) process, and possibly also an investigative (enquiry) process in which the warranty services representative obtains further information and expertise relevant to the matters at issue;
- vii. A clear and explicit declaration of how and when information from each process will be used, especially what information the warranty services representative will or will not use from the facilitation stage in the adjudication stage;
- viii. Notice to homeowners and builders at the very beginning of the process that if settlement cannot be achieved, the warranty services representative will be the one who adjudicates issues that are unresolved;
- ix. A clear and explicit demarcation between processes, so that both the warranty services representative and the parties are aware of what process they in at each point and what is required of them; and
- x. Training to warranty services representatives in how to manage



the transition from a facilitative to an adjudicative process.

RECOMMENDATION THREE

That Tarion integrate into the credentials for warranty services representatives and managers training and experience in dispute resolution for non-partisan practitioners.

RECOMMENDATION FOUR

That Tarion retain the services of one or more third party experts to develop and conduct comprehensive dispute resolution training for its warranty services representatives and managers that includes

- i. Understanding the fundamentals of adjudication including the behaviours, comportment, and habits of mind required of an impartial adjudicator;
- ii. Leading and managing a hybrid process with a facilitation, adjudication, and possibly an investigation component;
- iii. Transitioning from a facilitative process to an adjudicative process;
- iv. Applying evidentiary concepts and making evidence-based decisions; and
- v. Understanding the components of fair process and applying them to all aspects of the conciliation process.

Such training to be of an applied and practical nature with Tarion-based case studies and supervised practice opportunities.



RECOMMENDATION FIVE

That Tarion advise the parties of its authority to require the production of drawings, specifications, or other information, and make use of that authority when required during the conciliation process in order to address any information differentials as between homeowners and builders.

RECOMMENDATION SIX

That Tarion instruct its warranty services representatives to make more frequent and early use of their discretion to consult or retain third party assistance that is competent, credible, and qualified.

RECOMMENDATION SEVEN

That Tarion revisit and renew efforts to ensure compliance with its *Under Investigation* module.

RECOMMENDATION EIGHT

That Tarion review and revise its resource materials in relation to the conciliation process in order to:

- i. Isolate, consolidate and simplify *process* information (as distinct from *content* information), including a simple schematic of the stages of the process;
- ii. Better explain the participatory rights of the parties at all stages of the process, such as the opportunity for response or rebuttal, and how to obtain information that is in the possession of the other party;
- iii. Improve homeowner information with respect to the pre-



delivery inspection form so that homeowners understand how it is used in the conciliation process and that they may supplement its contents with additional information and logical argumentation;

- iv. Clearly convey to the parties when the process transitions from a facilitative, non-binding one to an adjudicative, binding one, and what that difference means in terms of their participation and the role of the warranty services representative; and
- v. Explain Tarion's investigative function (ability to obtain more information and retain or consult third parties) and describe how relevant information from that function will be made available to the parties in the conciliation process.

RECOMMENDATION NINE

That Tarion review how it currently communicates and applies the "onus of proof" to the conciliation process in order to

- (i) Clarify its meaning in a contemporary consumer protection context, i.e. that the homeowners is expected to report credible symptoms within the scope of the statutory new home warranty, after which Tarion (or the builder) will diagnose the cause of those symptoms;
- (ii) Develop explicit principles to guide its use including, if advised, at different stages of the conciliation process;
- (iii) Evolve consistent internal practices as to its application;
- (iv) Create or revise resource materials so that homeowners understand what the onus means, when it applies to any particular stage of the conciliation process, how to prepare for the conciliation process, and how to discharge the onus of



proof; and

(v) Publish concrete examples showing how a wide variety of contested warranty claims are assessed or post non-identifying assessments and/or decision letters on its website so that homeowners can see the onus of proof in operation, form a realistic picture of what is involved, and to decide whether to proceed with any particular issue.

RECOMMENDATION TEN

That Tarion eliminate any content differences or discrepancies between homeowners and builders in its resource material about the conciliation process, including its use of the less inclusive label “builder bulletin.”

RECOMMENDATION ELEVEN

That Tarion review and revise

- i. The builder repair periods incorporated into the conciliation process to provide more timely access to a conciliation inspection and to better balance the needs of homeowners and builders; and
- ii. The times during which a homeowner can file a warranty claim with Tarion in order to provide more frequent and flexible access to the conciliation process,

All with a view to improving the timeliness of dispute resolution at Tarion.



RECOMMENDATION TWELVE

That Tarion retain the services of one or more third party experts to develop and conduct training in decision writing for its warranty services representatives and managers, in order to improve its written decisions.

RECOMMENDATION THIRTEEN

That once the training in Recommendation Twelve has been completed, Tarion review its guidelines and templates for warranty assessment reports and decision letters in order to prepare more user-friendly decisions with more transparent and/or cogent reasoning.

RECOMMENDATION FOURTEEN

That Tarion introduce at the operational level a practice whereby all warranty assessment reports and decision letters are routinely reviewed by another set of critical, trained eyes before they are released in order to ensure quality decisions and reasoning.

RECOMMENDATION FIFTEEN

That as a matter of customer service and with a view to promoting understanding once the warranty services representative has made an assessment, Tarion introduce a joint communication to both parties from the representative, alerting them to the fact that an assessment report is on the way to them and offering a joint, explanatory telephone call once they have had an opportunity to digest the report, but not for the purpose of receiving unilateral submissions and adjusting the decision.



RECOMMENDATION SIXTEEN

That in the interests of non-adversarial problem solving, Tarion

- i. Establish and publicize an intermediate input process in the nature of a review (not an appeal or re-hearing) that gives the parties a final opportunity to register process objections and/or file additional information before a formal decision letter is issued, with the parties' submissions to be considered by someone other than the warranty services representative who made the initial warranty assessment, such a process to conclude with a written response acknowledging receipt of the concern or information and explaining why it did or did not change the assessment. In the interests of efficiency, this recommendation can be integrated with Recommendation Fifteen;
- ii. Make better use of interest-based negotiation and consider additional training for relevant personnel in interest-based practices and principles, including the skill of listening to parties in conflict without adopting or endorsing the content of what either party says; and
- iii. Determine when and under what terms and conditions it will offer parties a conversation with the assistance of an external mediator, making reference to the experience of other established mediation programs in Canada including those developed for the resolution of contested new home warranty claims.



RECOMMENDATION SEVENTEEN

That Tarion develop options order that allow homeowners to perceive themselves to having received fairer access to justice at LAT, such as

- i. Devoting the necessary resources and making every reasonable effort to complete its adjudication mandate by the time a decision letter is issued, ensuring that it has (i) conducted a balanced investigation of all relevant issues; (ii) correctly understood the cause of the reported symptoms; (iii) taken such legal and other professional advice as is required; and (iv) rendered a sound, impartial, evidence-based decision, such that no new investigations or experts are commissioned at the appeal stage, save at the direction of the tribunal or in the event of a new issue arising on the appeal;
- ii. Promoting the use of jointly-appointed experts and encouraging opposing experts to confer in order to isolate points of agreement and disagreement for the assistance of the tribunal;
- iii. Refining and/or adopting different ways of being a party at LAT to affirm its position as a distinct participant and its role as the original decision maker, such as by declining the tribunal's invitation at a pre-hearing conference to meet with the builder and the tribunal member in the absence of the homeowner, or by consistently maintaining a physical and social distance from the builder, its counsel, and the builder's witnesses at the appeal hearing;
- iv. Developing, publishing, and abiding by a written protocol or statement of principles specifically addressed to self-represented homeowners in straightforward



language that describes what homeowners can consistently expect of Tarion in the LAT appeal process in regards to (i) matters of information exchange, simplicity, timeliness, courtesy, cooperation, respect, case management, and general procedural assistance; (ii) the duties and accountability that Tarion has to the tribunal; and (iii) the nature of its relationship to the builder and how this will be demonstrated; and (iv) other relevant information;

- v. Reducing its reliance on legal counsel, particularly external ones, in order to bring a less intimidating, more direct, person-to-person approach, such as by being represented at mediation, pre-hearing conferences, or other settlement conversations by a well-briefed corporate representative, i.e. a senior executive who had no previous involvement in the case and can bring a fresh, problem-solving perspective; and
- vi. Developing and assembling resource materials to assist homeowners to understand the basics of adversarial process, what to expect in a hearing, and how to prepare.

