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ADR for Land Use and Construction Disputes

Land use disputes in Ontario have traditionally been resolved through lengthy hearings by a provincial tribunal - now the Ontario Land Tribunal (OLT), previously known as the Ontario Municipal Board (OMB). Construction disputes have typically been heard by courts, a process which can be time-consuming and expensive, and disrupt the completion of large projects. However, in the past few years, alternate dispute resolution (ADR) has emerged as process to resolve these conflicts more quickly and economically. Following is a brief overview of ADR techniques now available to resolve land use and construction disputes in Ontario.

1. Ontario Land Tribunal (OLT)

The OLT uses mediation as an alternative to resolving disputes concerning official plans, zoning by-laws, and severance and minor variances outside of the City of Toronto. Mediation may be directed if the OLT determines that the issue or proceeding is suitable for mediation, and two or more parties to the hearing agree to participate. A mediation may be conducted by a mediator chosen by the parties, or proposed by the Tribunal. A Tribunal Member who conducts a mediation in which one or more of the issues have not been resolved may not preside at any hearing event of those unresolved issues. The process is confidential, and positions of the parties may not be disclosed if the mediation is not successful. One other advantage of ADR in major land use disputes is the potential for maintaining good relations between parties located in close proximity to each other for a long period after the dispute has been mediated.

2. Toronto Local Appeal Body (TLAB)

TLAB also uses mediation as an alternative to a hearing to resolve disputes concerning consents to sever and minor variances in the City of Toronto. Mediation may be directed by TLAB if it is satisfied there is good reason to believe one or more issue may be resolved through mediation. Mediation is conducted by a TLAB member, who typically does not preside over a hearing if the mediation is not successful. Information and documents provided during the mediation are confidential. Mediation is used less frequently at TLAB than at the OLT, since hearings are typically scheduled for a day or two, rather than weeks.

3. Ontario Dispute Adjudication of Construction Contracts (ODACC)

Any party to a construction contract can now refer a dispute concerning the value of goods or services and payment for them to adjudication. The adjudicator may be chosen by the parties, or selected by ODACC. The adjudicator then determines the process and fee in consultation with the Claimant and Respondent. The *Construction Act* requires the adjudicator to issue a determination within 30 days of receiving the documents that the Claimant intends to rely on for the adjudication. Costs are generally paid equally by the parties, but the adjudicator may require

costs to be paid by a party acting frivolously or vexatiously. The determination is subject to judicial review. However, the Divisional Court has generally upheld ODACC determinations.¹

4. Tarion Warranty Corporation (Tarion)

Tarion is responsible for administering warranties from builders to homeowners for new homes, including condominium units, in Ontario. As of July 1, 2021, Tarion is authorized to make available one or more voluntary dispute resolution processes. It may proceed by mediation to determine if there has been a breach of a warranty (as an alternative to an application for a hearing before the Licence Appeal Tribunal); by conciliation at the request of an owner; or by arbitration. Every agreement between Tarion and a home builder is deemed to contain a compulsory arbitration clause. Typically Tarion proceeds by mediation and conciliation if requested to do so by a homeowner, and by arbitration to determine whether Tarion or a builder pays the cost of remediation if a breach of warranty is found. Mediation is conducted by a neutral third party appointed jointly by Tarion and the homeowner. Tarion is responsible for paying at least half the costs of mediation, or the amount posted on its website. An arbitration is conducted by an independent arbitrator chosen jointly by the builder and Tarion from arbitrators on a Builder Arbitration Forum (BAF) roster. Arbitration costs are typically paid by the losing party, or split if success is divided. An arbitration award may be set aside for procedural errors set out in S. 46 of the *Arbitration Act*.

5. Mediation, Conciliation, Adjudication and Arbitration Compared

- Mediation is a confidential process in which a neutral third party who seeks to facilitate settlement between the parties, but does not make a decision if the parties cannot agree.
- Conciliation in the context of this article is a process where Tarion assesses the items on a homeowner's warranty form and decides whether they are covered under the warranty set out in the *Ontario New Home Warranties Plan Act (ONHWP)*. The inspection is conducted by a Tarion Warranty Services Representative, who is supposed to be an impartial decision maker.
- Adjudication is a process authorized by the *Construction Act*. An impartial adjudicator reviews the position of the Claimant and Respondent, and prepares a written determination deciding if the Claimant is entitled to all or part of the relief it is seeking. The timelines for issuing a determination are set out in legislation, and can only be varied with the consent of the parties.
- Arbitration is a process authorized by the *ONHWP* by which a builder can seek reimbursement for the cost of repairs assessed by Tarion for a breach of warranty. An arbitration hearing is more formal than a mediation or conciliation, but may be similar to

¹ See *Pasqualino v. MGW-Homes Design Inc.*, 2022 ONSC 5632 and *SOTA Dental Studio Inc. v. Andrid Group Ltd.*, 2022 ONSC 2254

a custom adjudication hearing. An arbitration decision typically takes longer than an adjudication determination.

Following find a Comparison Chart showing the ADR process for land use and construction disputes in Ontario:

Comparison Chart: Alternate Dispute Resolution for Ontario

Land Use and Construction Disputes

	Ontario Land Tribunal (OLT)	Toronto Local Appeal Body (TLAB)	Ontario Dispute Adjudication of Construction Contracts (ODACC)	Tarion Warranty Corporation (Tarion)
Nature of Dispute	Appeal of official plan, zoning or minor variance/severance (except Toronto)	Appeal of minor variance and consent to sever applications in Toronto	Value of services or materials provided under a construction contract	1-Dispute re breach of new home warranty 2-If breach found, does Tarion or builder pay?
ADR Process	Mediation (voluntary)	Mediation (voluntary);	Adjudication (voluntary)	1-Mediation 2-Arbitration (compulsory)
Authority	OLT Act; OLT Rules; Planning Act; Statutory Powers Procedure Act	City of Toronto Act, 1997; TLAB Rules or Practice and Procedure	Construction Act Part II.2	Ontario New Home Warranty Plan Act; O. Reg. 242/21; BAF Registrar Bulletin 08; BAF Rules
Choice of Decision-Maker	Mediator may be chosen by parties, or assigned by OLT to mediator (after June 2023)	Mediator is TLAB member	Adjudicator is chosen by parties, or assigned by ODACC, from list certified by ODACC	1-Mediator chosen by Tarion and homeowner 2-Arbitrator chosen by builder and Tarion from Tarion roster
Timeline	Determined by mediator with consent of parties	Determined by TLAB	Construction Act requires determination within 30 days of receiving material from Claimant	1-Set by mediator in consultation with parties 2-Set by arbitrator; decision to be awarded within 30 days of hearing

ADR Product	Agreement if successful; may be attached to OLT Decision	Agreement if successful; may be attached to TLAB Decision	Determination prepared by adjudicator and issued by ODACC	1. Agreement if successful 2. Decision prepared by arbitrator and issued by Tarion within 30 days of hearing
Cost of ADR	Paid equally by the parties; mediator may encourage contribution by one party to another;	Paid equally by the parties	Paid equally by the parties; adjudicator can require costs to be paid by a party acting frivolously or vexatiously	1-Tarion pays at least ½ or amount on website, whichever is greater 2- Losing party pays unless success divided
IF Dispute is <u>not</u> resolved by ADR	Oral or written hearing by OLT	Oral or written hearing by TLAB	Arbitration (if required by the construction contract) or litigation	1-Licence Appeal Tribunal hearing 2-No alternative to arbitration

Ron Kanter is a Panel Member of TLAB, a Certified Adjudicator for ODACC, and an Arbitrator on the Builder Arbitration Forum Roster.

The material above is not intended to provide legal advice. If you have any questions concerning ADR for land use or construction disputes, please contact Ron Kanter at:

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