

An Analysis of the Ontario Licence Appeal Tribunal's: Decisions, Prehearings and Orders relating to the Ontario New Home Warranty Plan Act: 2010, 2009, 2008, 2007 & 2006

Introduction

Canadians for Properly Built Homes (CPBH) continues to monitor the results from the Licence Appeal Tribunal (LAT), given homeowners' complaints about the services of Tarion Warranty Corporation (Tarion) and homeowners' dismal results at the LAT when homeowners decide to appeal Tarion's decisions. While the LAT hears cases related to other matters such as funeral homes and car dealers, this analysis is limited to home warranty on newly built homes provided by Tarion. Since 2006, CPBH has undertaken an analysis of some of the key aspects of the Decisions made by the LAT as well as Prehearings and Orders in relation to Tarion. The information used for this analysis of these Decisions was obtained from the LAT's web-site. This analysis does not include the results of other responsibilities of the LAT such as the adjournments, motions, dismissals, builder registration, etc., that were included on the LAT web-site. This analysis is presented in this report along with our key findings and conclusion.

Key Findings re 2010:

- There appears to be a recent, significant change in the LAT's mandate. The LAT's web-site previously said: *"The Tribunal is designed to give you a simple, timely and inexpensive way to settle disputes concerning compensation claims..."* CPBH has been raising concerns related to this for the past few years, as many reports regarding the LAT's functioning often describe LAT operations and processes as very complicated, legalistic, prolonged, and expensive (particularly if represented by lawyers and other technical experts). In the past year, the LAT web-site was changed, and it now says: *"The Tribunal's mandate is to provide a fair, impartial and efficient means to appeal decisions concerning compensation claims....."*
- Homeowners' overall success rates at the LAT in 2010 continue to be very poor (21.5%);
- Homeowners' success in relation to major structural deficiency claims continue to be largely futile. However, in 2010 there was one homeowner win related to a MSD;
- Homeowners' claims at the LAT continue to decline significantly;
- The vast majority of LAT hearings take place in Toronto;
- In 2010, 43% of the cases heard by the LAT were settled;
- In 2010, 28% of the settlements were confidential. This is the highest percentage of confidential settlements since CPBH started conducting these analyses;
- Some LAT chairs appear to rule more in favour of homeowners than other LAT chairs;
- Since 2008, the LAT has discontinued providing the homeowners' names on its web-site;
- Tarion always retains legal counsel for the LAT process. Homeowners are generally more successful when represented by legal counsel, however, the majority of homeowners still do not retain legal counsel.

Regarding Professional Counsel

2006 LAT Chair: *"....The risk applicants take in not seeking professional counsel is that they do not appreciate all the elements of the case that they have the onus of proving. It is not ones' fault, but their own. The same elements of the claim must be proved and the same onus met regardless of whether or not a party has counsel...."*

Note: In the above statement, "applicants" means "homeowners".

Conclusion: The 2010 results continue to be very disturbing for Ontario's homeowners.

The following questions should be investigated by the Ombudsman of Ontario, given that his office has jurisdiction over the LAT: Is the LAT functioning the way it was initially intended? For example, the LAT's web-site previously said: *"The Tribunal is designed to give you a simple, timely and inexpensive way to settle disputes concerning compensation claims..."* CPBH has been raising issues related to this for the past four years, as reports regarding the LAT's functioning often describe LAT operations and processes as very complicated, legalistic, prolonged, and expensive (particularly if represented by lawyers and other technical experts). In the past year, the LAT web-site was changed, and it now says: *"The Tribunal's mandate is to provide a fair, impartial and efficient means to appeal decisions concerning compensation claims....."* This appears to be a significant change for the LAT, i.e., from "simple, timely and inexpensive" to "fair, impartial and efficient". Who approved this change and why was this change made? Also:

- Why is it that when homeowners are not represented by a lawyer, their chances of success at the LAT diminish substantially?
- Is the LAT's functioning "fair, impartial and efficient"? For example, some homeowners complain that Tarion and the builder use the same lawyer at the LAT to fight the homeowner - is this fair? How efficient is the LAT? How is its efficiency measured?
- If homeowners generally need to have legal representation to be successful at the LAT, why should homeowners not by-pass the LAT and go through the regular court process?
- Have homeowners been bypassing the LAT and pursuing their issues through the regular legal process because they are finding that the LAT is not operating as intended, that is, it is too complicated, and/or too expensive to go through the LAT?
- Why do the vast majority of LAT hearings take place in Toronto? Are Ontario homeowners outside the Toronto area at a disadvantage because of this?
- Why do some LAT chairs appear to rule more in favour of the homeowners than other LAT chairs?
- Why is it virtually impossible for homeowners to win major structural deficiency (MSD) claims at the LAT? Why is the number of MSD claims decreasing?
- Why are there confidential settlements? Why is this secrecy necessary?
- Why did the LAT suddenly stop providing the homeowners' names on its web-site? Was this an appropriate decision on the part of the LAT? Regular law suits provide the names of the claimants and defendants. Why are the LAT hearings different in this regard?
- Why is the number of Decisions issued by the LAT continuing to drop significantly?

The following questions should be investigated by the Ministry of Consumer Services given that this Ministry has oversight of the Tarion Warranty Corporation:

- Why is Tarion always represented by a lawyer at the LAT? Is this a waste of Tarion resources? Why does Tarion often hire the big, expensive law firms to represent it at the LAT?
- Homeowners sometimes complain that Tarion and the builder use the same lawyer at the LAT to fight the homeowner. How often does this happen? Is this fair/appropriate?
- Why is Tarion waiting to settle with homeowners until at the LAT? Why aren't these settlements made with the homeowner before they have to appeal to the LAT?
- Are homeowners disadvantaged because Tarion can afford to hire this legal counsel, and homeowner often cannot afford legal counsel?
- Why are there confidential settlements? Why is this secrecy necessary?

Part A: Analysis related to Prehearings & Orders

This analysis primarily focuses on consumers' cases at the LAT. Other than the total number of cases, builder registration issues have not been included in this analysis. Settlements include cash offers and offers to do the work, as well as offers that may not have been accepted by the applicant (the homeowner).

It is interesting and important to note that the volume of cases, decisions, prehearings and orders and settlements have all declined significantly in the past five years.

Table 1: Overview of the Output of the LAT

| | 2010 | 2009 | 2008 | 2007 | 2006 |
|---------------------------------|---|---|--|---|---|
| Total No. of Cases Heard at LAT | 58 | 101 | 145 | 235 | 267 |
| # of Decisions | 16 | 16 | 20 | 29 | 54 |
| # of Prehearings & Orders | 46 | 46 | 85 | 147 | 136 |
| # of Settlements | 25 (7 – 28% of these Settlements Deemed Confidential) | 30 (4 – 13% of these Settlements Deemed Confidential) | 13 (1 – 8% of these settlements deemed confidential) | 40 (9 - 23% of these settlements deemed confidential) | 29 (3 – 10% of these settlements deemed confidential) |

Part B: Analysis related to Decisions:

Overall success of homeowners at the LAT

In 2010, 21 decisions were issued by the LAT. As in previous years, in 2010, homeowners continued to experience a very low rate of success (Table 2 summarizes these results).

Table 2: Success of homeowner claims at the LAT

| | 2010 | 2009 | 2008 | 2007 | 2006 |
|---|------------|-----------|------------|------------|------------|
| Total Decisions | 21 | 16 | 20 | 29 | 54 |
| Number of issues presented by homeowners | 78 | 49 | 85 | 108 | 241 |
| Success of homeowners based on total issues presented | 16 (21.5%) | 8 (16.3%) | 25 (29.4%) | 32 (29.6%) | 33 (13.7%) |

Location of LAT Hearings

All parties (homeowners and Tarion) must pay for their own travel and related costs related to the LAT. Once again, in 2010, the vast majority of the LAT hearings took place in Toronto (81%).

Some homeowners have complained to CPBH that the location of the hearing was a key factor in their decision not to pursue their claims at the LAT.

Table 3 provides these results of the analysis of the number of hearings by location.

Table 3: Decisions: By Location

| Location of hearing | 2010 Number of hearings | 2009 Number of hearings | 2008 Number of hearings | 2007 Number of hearings | 2006 Number of hearings |
|---------------------|-------------------------|-------------------------|---|-------------------------|-------------------------|
| Belleville | - | - | - | 1 (3.5%) | - |
| Hamilton | 1 (4.75%) | - | - | - | - |
| Kingston | - | 1 (6.25%) | 1 (5%) | - | - |
| London | - | 1 (6.25%) | - | - | 1 (1.5%) |
| Ottawa | 1 (4.75%) | 1 (6.25%) | - | 2 (7%) | 7 (13%) |
| Sudbury | 1 (4.75%) | 1 (6.25%) | - | 1 (3.5%) | - |
| Toronto | 17 (81%) | 12 (75%) | 17 (85%) | 23 (79%) | 43 (80%) |
| Windsor | - | - | 1 (5%) | 2 (7%) | 1 (1.5%) |
| Telephone | - | - | 1 (5%) Telephone hearing for a Windsor homeowner | - | 2 (4%) |
| Unknown | 1 (4.75%) | | | | |
| Total | 21 (100%) | 16 (100%) | 20 (100%) | 29 (100%) | 54 (100%) |

Success of major structural deficiency claims

In 2010, one homeowner pursued a major structural deficiency (MSD) and won! No homeowners had success in their MSD claims in 2009 or 2008. In five years, of the 41 MSD claims, two have now been successful – one in 2010, and one in 2007. These analyses indicate a 95% failure rate for homeowners pursuing MSD claims at the LAT over the five year period.

On Jan. 28, 2008, Toronto Star columnist Bob Aaron wrote about a significant case involving an MSD claim in which the homeowners were unsuccessful at the LAT, but then decided to pursue their claim at Divisional court. However, according to Aaron’s Toronto Star column: “*....Suddenly, about a week before the court hearing – and nine years after the house was purchased – the case was quietly settled and disappeared from the court docket. When I tried to find out how it had been resolved, I was told by all parties the settlement was subject to a "will not disclose" agreement....*”. The headline of Aaron’s column was **“Is secrecy a major structural defect in buyer protection”**. For the full article, as well as the LAT’s web-site information concerning this case, go to: <http://www.aaron.ca/columns/2008-01-26.htm> Aaron’s column raises important issues about how both Tarion and the LAT have dealt with homeowner claims.

It is important to note the reduction in major structural deficiency claims from 2006 to 2010.

Tables 4a, 4b, 4c, 4d & 4e provide details related to major structural deficiency claims in these five years.

Table 4a: LAT – Summary of Major Structural Claims in 2010

| Month | No. of Items | LAT Chair | Accepted by the LAT? |
|-------|--------------|-----------|----------------------|
| Sept. | 1 | Selby | Yes |
| Total | 1 | | 1 (100%) |

Table 4b: LAT – Summary of Major Structural Claims in 2009

| Month | No. of Items | LAT Chair | Accepted by the LAT? |
|-------|--------------|-----------|----------------------|
| Nov | 1 | Sproule | No |
| Total | 1 | | 0 (0%) |

Table 4c: LAT – Summary of Major Structural Claims in 2008

| Month | No. of Items | LAT Chair | Accepted by the LAT? |
|-------|--------------|-----------|----------------------|
| April | 1 | Sanford | No |
| July | 1 | Flude | No |
| Dec | 2 | Selby | No |
| Total | 4 | | 0 (0%) |

Table 4d: LAT - Summary of Major Structural Claims in 2007

| Month | No. of Items | LAT Chair | Accepted by the LAT? |
|-------|--------------|-----------|----------------------|
| June | 10 | Sherman | No |
| June | 2 | Koprowski | 1 item- yes |
| Total | 12 | | 1 (8%) |

Table 4e: LAT - Summary of Major Structural Claims in 2006

| Month | No. of Items | LAT Chair | Accepted by the LAT? |
|-------|--------------|-----------|----------------------|
| Feb. | 1 | Sanford | No |
| Apr. | 1 | Sanford | No |
| May | 5 | Laurin | No |
| June | 1 | Sherman | No |
| June | 1 | Laurin | No |
| June | 1 | Koprowski | No |
| Aug. | 9 | Laurin | No |
| Aug. | 1 | Israel | No |
| Sept. | 1 | Israel | No |
| Sept. | 1 | Sproule | No |
| Dec. | 1 | Koprowski | No |

| | | | |
|-------|----|--|--|
| Total | 23 | | |
|-------|----|--|--|

Representation by Lawyers and Technical Support

Homeowners and Tarion can choose to be represented by legal counsel, and/or technical support (such as home inspectors and engineers) --- at their own expense. Table 5 provides a summary over the last five years. Table 6 displays homeowner success rate when represented by a lawyer. It is important to note that Tarion is always represented by a lawyer, while homeowners often represent themselves (Table 5). It is important to note that as shown in Table 6, homeowners' success rate is considerably higher when represented by a lawyer.

Table 5: Legal and Technical Representation/Reports at the LAT

| | Homeowner - 2010 | Tarion - 2010 | Homeowner - 2009 | Tarion - 2009 | Homeowner - 2008 | Tarion - 2008 | Homeowner - 2007 | Tarion - 2007 | Homeowner - 2006 | Tarion - 2006 |
|--|--------------------|---------------|----------------------|---------------|-------------------|---------------|-------------------|-------------------------|--------------------|--------------------|
| Represented at the hearing by Legal counsel | 5 (24%) Note 11 | 21 (100%) | 1 (6%) see Note 9 | 16 (100%) | 4 (20%) | 20 (100%) | 4 (14%) Note 1 | 29 (100%) | 3 (5.5%) Note 5 | 54 (100%) |
| Represented at the hearing by technical support | 7 (33%) Note 12 | 17 (81%) | 3 (19%) Note 10 | 7 (44%) | 7 (35%) Note 8 | 8 (40%) | 7 (24%) Note 2 | 8 (28%) (Note 3 & 4) | 6 (11%) Note 6 | 12 (22%) Note 7 |
| Provided a technical report(s) only (no representation in person at the hearing) | 8 (38%) | 0 | 3 (19%) | 1 (6%) | 5 (25%) | 3 (15%) | 5 (17%) | 0 | 3 (6%) | 0 |

Note 1: In addition, two homeowners (the applicants) were represented by agents.

Note 2: In addition, two homeowners (the applicants) were engineers.

Note 3: In addition to the Tarion (technical) representative

Note 4: In one case the Tarion (technical) representative was also an engineer

Note 5: In addition, one homeowner (the applicant) was a lawyer.

Note 6: In addition, two homeowners (the applicants) were engineers.

Note 7: In addition to the Tarion (technical) representative.

Note 8: In one case the homeowner was an electrical engineer.

Note 9: Homeowners father was a retired lawyer.

Note 10: One applicant was an engineer.

Note 11: Plus one agent

Note 12: One homeowner was a certified heating technician and one homeowner was a retired engineer

Table 6: Homeowner Success Rate When Represented by a Lawyer

| | 2010 | 2009 | 2008 | 2007 | 2006 |
|---|-------|--------|------|------|------|
| Overall homeowner success rate | 21.5% | 16.33% | 29% | 30% | 14% |
| Homeowner success rate of decisions in which the homeowners were represented by legal counsel | 50% | 0% | 89% | 43% | 12% |

Decisions by LAT Chairs

Table 7: LAT - Summary of Homeowner Success by Tribunal Chair

| LAT Chair – Surname | 2010- # of Decisions | 2010 – # of Issues | 2010 # of issues allowed | 2010 HO Success % | 2009- # of Decisions | 2009 – # of Issues | 2009 # of issues allowed | 2009 HO Success % | 2008 - # of Decisions | 2008 – # of Issues considered | 2008 # of issues allowed | 2008 HO Success % | 2007 - # of Decisions | 2007 - # of issues considered | 2007 - # of issues Allowed | 2007 – HO success % | 2006 # of Decisions | 2006 - # of issues considered | 2006 - # of issues Allowed | 2006 –HO success % |
|---------------------|----------------------|--------------------|--------------------------|-------------------|----------------------|--------------------|--------------------------|-------------------|-----------------------|-------------------------------|--------------------------|-------------------|-----------------------|-------------------------------|----------------------------|---------------------|---------------------|-------------------------------|----------------------------|--------------------|
| Blais | 1 | 1 | 0 | 0 | - | - | - | - | - | - | - | - | 1 | | | | | | | |
| Budweth-Mingay | 1 | 8 | 1 | 13 | - | - | - | - | - | - | - | | | | | | | | | |
| Cassidy | 1 | 1 | 0 | 0 | 1 | 1 | 0 | 0 | 1 | 1 | 0 | 0 | 1 | 11 | 0 | 0 | - | - | - | - |
| D’Amours | - | - | - | - | 1 | 1 | 0 | 0 | 1 | 4 | 1 | 25 | | | | | | | | |
| Dann | 1 | 3 | 1 | 33 | - | - | - | - | - | - | - | - | - | - | - | - | 3 | 3 | 1 | 33 |
| Diamond | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 3 | 62 | 9 | 15 |
| Flude | 2 | 9 | 4 | 44 | 1 | 17 | 3 | 18 | 2 | 2 | 0 | 0 | 4 | 12 | 5 | 42 | 4 | 31 | 5 | 16 |
| Gahir | - | - | - | - | - | - | - | - | - | - | - | - | 1 | 1 | 0 | 0 | - | - | - | - |
| Garbe | 2 | 2 | 1 | 50 | - | - | - | - | 1 | 12 | 11 | 92 | 1 | 2 | 2 | 100 | 1 | 1 | 1 | 100 |
| Israel | - | - | - | - | - | - | - | - | 1 | 5 | 0 | 0 | 3 | 6 | 0 | 0 | 10 | 17 | 2 | 12 |
| Koprowski | 1 | 4 | 2 | 50 | 1 | 3 | 0 | 0 | 1 | 2 | 0 | 0 | 2 | 3 | 1 | 33 | 7 | 9 | 2 | 22 |
| Laurin | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 5 | 19 | 0 | 0 |
| McIntosh | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 4 | 18 | 7 | 39 |
| Pannu | - | - | - | - | - | - | - | - | 1 | 17 | 0 | 0 | | | | | | | | |
| Proulx | - | - | - | - | 1 | 2 | 0 | 0 | 1 | 13 | 1 | 8 | 1 | 2 | 0 | 0 | - | - | - | - |
| Sanford | 1 | 1 | 0 | 0 | 1 | 3 | 3 | 100 | 3 | 6 | 3 | 50 | 6 | 24 | 10 | 42 | 2 | 2 | 0 | 0 |
| Selby | 5 | 16 | 2 | 13 | 2 | 2 | 0 | 0 | 1 | 4 | 0 | 0 | | | | | | | | |
| Sherman | - | - | - | - | - | - | - | - | - | - | - | - | 5 | 26 | 3 | 12 | 3 | 3 | 0 | 0 |
| Sproule | 1 | 1 | 1 | 100 | 3 | 4 | 2 | 50 | 2 | 2 | 2 | 100 | - | - | - | - | 2 | 35 | 0 | 0 |
| Sweeney | 2 | 2 | 0 | 0 | - | - | - | - | 1 | 5 | 0 | 0 | | | | | | | | |
| Tanaka | - | - | - | - | - | - | - | - | 1 | 1 | 1 | 100 | 1 | 3 | 3 | 100 | - | - | - | - |
| Wallace | 1 | 18 | 2 | 11 | 1 | 2 | 0 | 0 | - | - | - | - | 2 | 4 | 1 | 25 | 5 | 32 | 4 | 13 |
| Weary | 2 | 12 | 2 | 17 | 4 | 14 | 0 | 0 | 3 | 11 | 1 | 9 | 2 | 14 | 7 | 50 | 5 | 9 | 2 | 22 |
| Total | 21 | 78 | 16 | 21 | 16 | 49 | 8 | 16 | 20 | 85 | 20 | 24 | 29 | 108 | 32 | 30 | 54 | 241 | 33 | 14 |