

An Analysis of the Ontario Licence Appeal Tribunal's: Decisions, Prehearings and Orders relating to the Ontario New Home Warranty Plan Act: 2011, 2010, 2009, 2008, 2007 & 2006

Introduction:

This is the sixth year that Canadians for Properly Built Homes (CPBH) has monitored the results from the Licence Appeal Tribunal (LAT), given homeowners' results at the LAT when homeowners decide to appeal Tarion's decisions and homeowners' complaints about the processes used by the LAT. While the LAT hears cases related to other matters such as funeral homes and car dealers, this analysis is limited to appeals to the LAT of Decisions made by the Tarion Warranty Corporation.

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. In addition to an analysis, we also present our key findings and conclusion.

Key Findings:

- The homeowners' overall success rates at the LAT are dismal. The homeowner success rate in 2011 is the lowest since this analysis was started – less than 6%;
- Homeowners' success at the LAT in relation to major structural deficiency claims continue to be largely futile – 96% failure rate in six years;
- The number of homeowners' appeals to the LAT continue to decline;
- The LAT allows new evidence to be entered into the proceedings once the process commences;
- The majority of LAT hearings take place in Toronto;
- In 2011, 33% of the cases heard by the LAT were settled;
- In 2011, 35% of the settlements were confidential. This percentage continues to grow;
- Since 2008, the LAT 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 do not retain legal counsel. No homeowners in 2011 were represented by a lawyer.

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 no 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 2011 results continue to be very disturbing for Ontario's homeowners.

The following questions should be answered by the Ministry of Government Services or the Ombudsman of Ontario: Is the LAT functioning the way it was initially intended? Are LAT processes and procedures appropriate and fair to consumers?

For example, the LAT advised: *“The Tribunal is designed to give you a simple, timely and inexpensive way to settle disputes concerning compensation claims...”*.

- Why does the LAT allow new evidence to be entered once the process begins? Is this an appropriate process?
- 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 truly a *“simple, timely and inexpensive way to settle disputes”*?
- Is the LAT's web-site information that purports that the LAT is a simple, inexpensive way to settle disputes encouraging the homeowners not to have legal and technical representation, only then to contribute to homeowners' failure at the LAT?
- 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, too lengthy 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 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 stop providing the homeowners' names on its web-site in 2008? This decision makes it very difficult for homeowners to network and learn about this process. 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?
- 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:

- If the LAT process is “simple” and “inexpensive”, why is Tarion always represented by a lawyer?
- Why does Tarion often hire the big, expensive law firms to represent it at the LAT?
- 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 six years.

Table 1: Overview of the Output of the LAT

	2011	2010	2009	2008	2007	2006
Total No. of Cases Heard at LAT	51	58	101	145	235	267
# of Decisions	10	21	16	20	29	54
# of Prehearings & Orders	39	30	46	85	147	136
# of Settlements	17 (6 – 35% of these Settlements Deemed Confidential)	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 2011, only 10 decisions were issued by the LAT. As in previous years, in 2011, homeowners continued to experience a very low rate of success (Table 2 summarizes these results).

Table 2: Success of homeowner claims at the LAT

	2011	2010	2009	2008	2007	2006
Total Decisions	10	21	16	20	29	54
Number of issues presented by homeowners	52	78	49	85	108	241
Success of homeowners based on total issues presented	3 (5.76%)	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 2011, the vast majority of the LAT hearings took place in Toronto (60%).

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	2011 Number of hearings	2010 Number of hearings	2009 Number of hearings	2008 Number of hearings	2007 Number of hearings	2006 Number of hearings
Belleville	1 (10%)	-	-	-	1 (3.5%)	-
Hamilton	-	1 (4.75%)	-	-	-	-
Kingston	1 (10%)	-	1 (6.25%)	1 (5%)	-	-
London	2 (20%)	-	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	6 (60%)	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	10 (100%)	21 (100%)	16 (100%)	20 (100%)	29 (100%)	54 (100%)

Success of major structural deficiency claims

Since 2006, 47 major structural deficiency (MSD) appeals have been launched by homeowners and two have won - one in 2010, and one in 2007. These analyses indicate a 96% failure rate for homeowners pursuing MSD claims at the LAT over the six 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 2011.

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

Table 4a: LAT – Summary of Major Structural Claims in 2011

Month	No. of Items	LAT Chair	Accepted by the LAT?
Jan.	1	Garbe	No
Apr.	3	Sweeney	No
Sept.	1	Sproule	No
Oct.	1	Sweeney	No
Total	6		0 (0%)

Table 4b: 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 4c: 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 4d: 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 4e: 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 4f: 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 six 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 - 2011	Tarion - 2011	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	0 (0%)	10 (100%)	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	5 (50%)	7 (70%)	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)	1(10%) (Note 13)	0	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.
 Note 13: Technical report was a quote/estimate.

Table 6: Homeowner Success Rate When Represented by a Lawyer

	2011	2010	2009	2008	2007	2006
Overall homeowner success rate	5.76%	21.5%	16.33%	29%	30%	14%
Homeowner success rate of decisions in which the homeowners were represented by legal counsel	0% Note 1	50%	0%	89%	43%	12%

Note 1: No homeowners were represented by legal counsel in the 2011 decisions.

Decisions by LAT Chairs

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

LAT Chair – Surname	2011-#of Decisions	2011 -#of Issues	2011 # of Issues allow	2011 HO Success %	2010- # of Decisions	2010 – # of Issues considered	2010 # of issues	2010 HO Success %	2009- # of Decisions	2009 – # of Issues	2009 # of issues allowed	2009 HO Success %	2008 - # of Decisions	2008 – # of Issues	2008 # of issues allowed	2008 HO Success %	2007 -# of Decisions	2007 -# of issues	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	1	1	0	0	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	3	18	2	11	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	0	0	1	1	1	100	3	4	2	50	2	2	2	100	-	-	-	-	2	35	0	0
Sweeney	2	20	0	0	2	2	0	0	-	-	-	-	1	5	0	0								
Tanaka	-	-	-	-	-	-	-	-	-	-	-	-	1	1	1	100	1	3	3	100	-	-	-	-
Wallace	2	11	1	9	1	18	2	11	1	2	0	0	-	-	-	-	2	4	1	25	5	32	4	13
Weary	1	1	0	0	2	12	2	17	4	14	0	0	3	11	1	9	2	14	7	50	5	9	2	22
Total	10	52	3	6	21	78	16	21	16	49	8	16	20	85	20	24	29	108	32	30	54	241	33	14