

# **An Analysis of the Ontario Licence Appeal Tribunal's: Decisions, Prehearings and Orders relating to the Ontario New Home Warranty Plan Act: 2006 – 2012**

## **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.

## **Key Findings for 2012:**

- Homeowners' overall success rates at the LAT continue to be very poor – only a 17% success rate;
- Homeowners' success at the LAT in relation to major structural deficiency claims continues to be largely futile;
- The vast majority of LAT hearings take place in Toronto;
- 27% of the cases heard by the LAT were settled;
- Some LAT chairs appear to rule more in favour of homeowners than other LAT chairs;
- 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 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 2012 results continue to be very poor for Ontario's homeowners.

**The following question 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 says: *"The Tribunal is designed to give you a simple, timely and inexpensive way to settle disputes concerning compensation claims..."*

- New home construction has become more complicated in the past 30 years. Is the LAT an appropriate venue to hear these disputes?
- Why is it that when homeowners are not represented by a lawyer, their chances of success at the LAT are typically reduced?
- 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, 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 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 technical experts, and homeowners often cannot afford to retain the services of these professionals?

## 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 seven years.

Table 1: Overview of the Output of the LAT

	2012	2011	2010	2009	2008	2007	2006
Total No. of Cases Heard at LAT	33	51	58	101	145	235	267
# of Decisions	18	10	21	16	20	29	54
# of Prehearings & Orders	15	39	30	46	85	147	136
# of Settlements	9	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 2012, 18 decisions were issued by the LAT. As in previous years, in 2012, homeowners continued to experience a very low rate of success (Table 2 summarizes these results).

Table 2: Success of homeowner claims at the LAT

	2012	2011	2010	2009	2008	2007	2006
Total Decisions	18	10	21	16	20	29	54
Number of issues presented by homeowners	41	52	78	49	85	108	241
Success of homeowners based on total issues presented	7 (17.1%)	3 (5.8%)	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 2012, the vast majority (68%) of the LAT hearings took place in Toronto.

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	2012 # of hearings	2011 # of hearings	2010 # of hearings	2009 # of hearings	2008 # of hearings	2007 # of hearings	2006 # of hearings
Belleville	1 (5%)	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	2(10%)	-	1 (4.75%)	1 (6.25%)	-	2 (7%)	7 (13%)
Peterborough	1(5%)	-	-	-	-	-	-
Sault St Marie	1(5%)	-	-	-	-	-	-
Sudbury	-	-	1 (4.75%)	1 (6.25%)	-	1 (3.5%)	-
Toronto	12(68%)	6 (60%)	17 (81%)	12 (75%)	17 (85%)	23 (79%)	43 (80%)
Windsor	-	-	-	-	1 (5%)	2 (7%)	1 (1.5%)
Telephone	1(5%)	-	-	-	1 (5%)	-	2 (4%)
Unknown	-	-	1 (4.75%)				
Total	18 (100%)	10 (100%)	21 (100%)	16 (100%)	20 (100%)	29 (100%)	54 (100%)

## Success of Major Structural Deficiency Claims

In six years of analysis, there have been 42 major structural deficiency (MSD) claims. Two of these claims have 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 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 2012, i.e., from 23 to 1. Tables 4a to 4g provide details related to major structural deficiency claims from 2006 to 2012.

Table 4a: Summary of Major Structural Claims in 2012

Month	No. of Items	LAT Chair	Accepted by the LAT?
Nov.	1	Dann	No

Table 4b: 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

Table 4c: Summary of Major Structural Claims in 2010

Month	No. of Items	LAT Chair	Accepted by the LAT?
Sept.	1	Selby	Yes

Table 4d: Summary of Major Structural Claims in 2009

Month	No. of Items	LAT Chair	Accepted by the LAT?
Nov	1	Sproule	No

Table 4e: 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

Table 4f: 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 4g: 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 usually higher when represented by a lawyer.

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

	Homeowner - 2012	Tarion- 2012	Homeowner - 2011	Tarion - 2011	Homeowner - 2010	Tarion - 2010	Homeowner - 2009	Tarion - 2009	Homeowner -2008	Tarion -2008	Homeowner - 2007	Tarion - 2007
Represented at the hearing by Legal counsel	3 (17%) (note 14)	18 (100%)	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%)
Represented at the hearing by technical support	4 (22%)	8 (44%)	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)
Provided a technical report(s) only (no representation in person at the hearing)	0	0	1 (10%) (Note 13)	0	8 (38%)	0	3 (19%)	1 (6%)	5 (25%)	3 (15%)	5 (17%)	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 actually a quote/estimate.

Note 14: One homeowner was a lawyer.

Table 6: Homeowner Success Rate When Represented by a Lawyer

	2012	2011	2010	2009	2008	2007	2006
Overall homeowner success rate	17%	5.76%	21.5%	16.33%	29%	30%	14%
Homeowner success rate of decisions in which the homeowners were represented by legal counsel	0%	n/a (note 1)	50%	0%	89%	43%	12%

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

Homeowner Success by LAT Chair Table 7 provides information regarding which LAT Chairs have ruled in favour of the homeowner.

Table 7: Summary of Homeowner Success by Tribunal Chair

LAT Chair – Surname	2012-# of Decisions	2012-# of Issues	2012# of Issues allow	2012 HO Success%	2011-#of Decisions	2011 - #of Issues	2011 # of Issues allow	2011 HO Success %	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 %
Blais	1	1	0	0	-	-	-	-	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	1	100	-	-	-	-	-	-	-	-	1	1	0	0	1	4	1	25	-	-	-	-
Dann	1	2	0	0	-	-	-	-	1	3	1	33	-	-	-	-	-	-	-	-	-	-	-	-
Diamond	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Flude	3	3	0	0	-	-	-	-	2	9	4	44	1	17	3	18	2	2	0	0	4	12	5	42
Gahir	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	1	0	0
Garbe	-	-	-	-	1	1	0	0	2	2	1	50	-	-	-	-	1	12	11	92	1	2	2	100
Israel	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	5	0	0	3	6	0	0
Kennelly	1	1	0	0	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Koprowski	-	-	-	-	3	18	2	11	1	4	2	50	1	3	0	0	1	2	0	0	2	3	1	33
Laurin	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
McCauley	1	8	0	0	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
McIntosh	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
McQuaid	1	1	0	0	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Pannu	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	17	0	0	-	-	-	-
Penner	1	3	0	0	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Proulx	-	-	-	-	-	-	-	-	-	-	-	-	1	2	0	0	1	13	1	8	1	2	0	0
Sanford	1	1	0	0	-	-	-	-	1	1	0	0	1	3	3	100	3	6	3	50	6	24	10	42
Selby	2	2	0	0	-	-	-	-	5	16	2	13	2	2	0	0	1	4	0	0	-	-	-	-
Sherman	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	5	26	3	12
Spencer	1	1	1	100	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Sproule	2	10	2	20	1	1	0	0	1	1	1	100	3	4	2	50	2	2	2	100	-	-	-	-
Sweeney	-	-	-	-	2	20	0	0	2	2	0	0	-	-	-	-	1	5	0	0	-	-	-	-
Tanaka	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	1	1	100	1	3	3	100
Wallace	2	7	3	43	2	11	1	9	1	18	2	11	1	2	0	0	-	-	-	-	2	4	1	25
Weary	-	-	-	-	1	1	0	0	2	12	2	17	4	14	0	0	3	11	1	9	2	14	7	50
Total	18	41	7	17	10	52	3	6	21	78	16	21	16	49	8	16	20	85	20	24	29	108	32	30



Other notes:

- The information used for this analysis of these Decisions was obtained from the LAT's web-site, as well as the CanLII 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.
- Effective in 2008, the LAT discontinued providing the homeowners' names on its web-site.