

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

Introduction

The purchase of a home is the largest purchase most consumers make. The construction of a home is very complicated, typically involving more than 40 trades. Therefore, it is not surprising that there are frequently disputes involving new home construction. According to the Licence Appeal Tribunal (LAT) web-site: "The Tribunal is designed to give you a simple, timely and inexpensive way to settle disputes concerning compensation claims..."

Canadians for Properly Built Homes (CPBH) continues to monitor the results from the LAT, given homeowners' complaints about the services of the 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 source of the information used for this analysis 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.

Key Findings:

- Homeowners (applicants) typically do not encounter a Tribunal that is "*simple, timely and an inexpensive way to settle disputes concerning compensation claims...*" as purported on the LAT web-site. For example, the following is the response of Tribunal Vice-Chair Diamond "*As anticipated by the case law, at a minimum one would have expected the Applicant to tender evidence from a real estate expert providing an opinion as to the difference in value between the house as built and the house as designed. 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. The Applicant has failed to do so. As a result, his Application with respect to brickwork must also fail*" (File 3106, ONHWPA – Claim, 2006).
- The majority of homeowners are not represented by a lawyer;
- Homeowners overall success rates at the LAT in 2008 continue to be very poor;
- Homeowners' success at the LAT in relation to major structural deficiency claims continue to be largely futile;
- Homeowners are increasingly more successful when represented by legal counsel, however the majority of homeowners still do not retain legal counsel;
- Tarion always retains legal counsel;
- In 2007 and 2008, homeowners pursued their claims significantly less than in 2006;
- The vast majority of LAT hearings take place in Toronto;
- The number of confidential settlements declined significantly in 2008 from 2007;

- Some LAT chairs appear to rule more in favour of homeowners than other LAT chairs;
- In 2008, the LAT discontinued providing the homeowners' names on its web-site.

Conclusion:

The 2008 results continue to be disturbing and discouraging for many of Ontario's homeowners. This situation continues to be worthy of investigation by the Ontario Ombudsman as there are a number of serious issues raised in these CPBH analyses that use information provided by the LAT web-site.

It is important to recognize that Tarion and the Tribunal are very experienced in this process, however, most homeowners have no prior experience with the LAT or any other legal process. It is also important to recognize that Tarion and the LAT have sources of funding through their respective organizations, while the homeowners must pay for this process out of their pocket, often having to miss considerable time from their work to pursue this process. Key questions include:

- 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..."
 - If it is supposed to be simple and inexpensive, why is Tarion always represented by a lawyer?
 - 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 and inexpensive way to settle disputes misleading homeowners? For example is this statement encouraging homeowners not to have legal and technical representation, which then contributes 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?
 - Is the Tribunal process sufficiently timely?
 - Is the Tribunal sufficiently responsive to homeowners from the start of the process to the conclusion?
 - Have homeowners been bypassing the LAT and pursuing their issues through the regular legal process?
 - Why do the vast majority of hearings take place in Toronto? Are homeowners 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 claims at the LAT?
 - 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?
 - Given the complexity of many claims concerning a new home purchase, is it possible for any organization to provide a "simple, timely, and inexpensive way to settle disputes concerning compensation claims"?

- What changes are required to better balance the playing field to settle disputes concerning compensation claims?
- Should these disputes be left to the regular courts, rather than the LAT?
- Is there a more appropriate alternative than the LAT or regular courts to address these disputes?

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. The number of settlements includes cash offers and offers to do the work, as well as offers that may not have been accepted by the applicant (the consumer).

It is interesting to note that the volume of cases, decisions, prehearings and orders and settlements have all declined significantly in 2008 from 2007. Reasons for this decline include:

- Homeowners were satisfied with how Tarion dealt with their claims;
- Homeowners decided that they would not pursue their claims at the LAT.

Table 1: Overview of the Output of the LAT

	2008	2007	2006
Total No. of Cases Heard at LAT	145	235	267
# of Decisions	20	29	54
# of Prehearings & Orders	85	147	136
# of Settlements	13 (1 of these settlements deemed confidential)	40 (9 of these settlements deemed confidential)	29 (3 of these settlements deemed confidential)

Part B: Analysis related to Decisions:

Overall success of homeowners at the LAT

In 2008, 20 decisions were issued by the LAT compared to 29 decisions in 2007 and the 54 decisions in 2006. In 2008, homeowners continued to experience a low rate of success (29.4%). Table 1 summarizes these results.

Table 2: Success of homeowner claims at the LAT

	2008	2007	2006
Total Decisions	20	29	54
Number of issues presented by homeowners	85	108	241
Success of homeowners based on total issues presented	25 (29.4%)	32 (29.6%)	33 (13.69%)

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 2008, the vast majority of the LAT hearings took place in Toronto (85%).

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	2008 Number of hearings	2007 Number of hearings	2006 Number of hearings
Belleville	-	1 (3.5%)	-
Kingston	1 (5%)	-	-
London	-	-	1 (1.5%)
Ottawa	-	2 (7%)	7 (13%)
Sudbury	-	1 (3.5%)	-
Toronto	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%)
Total	20 (100%)	29 (100%)	54

Success of major structural deficiency claims

In 2008, there were only four issues pursued as major structural deficiency (MSD) items at the LAT. No homeowners had success in their MSD claims in 2008.

Of the 39 MSD claims in the period 2006 to 2008, only one was successful in 2007. These analyses indicate a 97.5% failure rate for homeowners pursuing MSD claims at the LAT over the three 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 MSD claims.

It is important to note the reduction in major structural deficiency claims from 2006 to 2008. Possible reasons for this reduction include:

- Homeowners experienced fewer major structural issues with their homes;
- Homeowners were satisfied with how Tarion dealt with their major structural issues;
- Homeowners decided that they would not pursue their major structural issues at the LAT.

Tables 4a, 4b and 4c provide details related to major structural deficiency claims in these three years.

Table 4a: 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
	4		0 (0%)

Table 4b: 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
	12		1 (8%)

Table 4c: 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
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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 related to the 20 Decisions in 2008, compared to 29 decisions in 2007 and the 54 decisions in 2006. Table 6 displays homeowner success rate when represented by a lawyer. The following are some key points that emerge from these two tables:

- Tarion is always represented by a lawyer, while homeowners often represent themselves (Table 5)
- Homeowners are increasingly appearing at the LAT with legal representation (Table 5)
- Homeowners and Tarion are increasingly appearing at the LAT with representation by technical support (Table 5)
- Homeowners have had more success in 2008 and 2007 compared to 2006 (Table 6)
- When represented by legal counsel, homeowners have increasingly had greater success during this three year period (Table 6). One explanation for this could be that homeowners are retaining more qualified lawyers to represent them at the LAT.

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

	Homeowner - 2008	Tarion - 2008	Homeowner - 2007	Tarion - 2007	Homeowner - 2006	Tarion - 2006
Represented at the hearing by legal counsel	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 (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)	5 (25%)	3 (15%)	5 (17%)	0	3 (5.5%)	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.

Table 6: Homeowner Success Rate When Represented by a Lawyer

	2008	2007	2006
Overall homeowner success rate	29% (20 cases)	30% (29 cases)	14% (54 cases)
Homeowner success rate of decisions in which the homeowners were represented by legal counsel	89% (4 cases)	43% (4 cases)	12% (5 cases)
Homeowner success rate of decisions in which the homeowners were <u>not</u> represented by legal counsel	12% (16 cases)	29% (25 cases)	14% (49 cases)

Note – Percentages do not add due to rounding

Prepared by  Canadians for Properly Built Homes

LAT Decisions related to the *Ontario New Home Warranties Plan Act*

Analysis for 2008, 2007 and 2006 - for the 12 month periods January to December

Decisions by LAT Chairs

An analysis of the success of homeowners' claims by each LAT Chair was also undertaken. Homeowner success rates by LAT Chairs' decisions in support of homeowners range from 0% to 100%. It is interesting to note that homeowners appear to have better chances of success with Chairs Garbe, Sanford, and Tanaka. These results are presented in Table 7.

Table 7: LAT - Summary of Homeowners' Success by Tribunal Chair

LAT Chair – Surname	2008 - # of Decisions	2008 – # of Issues considered	2008 # of issues allowed	2008 Home Owner Success %	2007 - # of Decisions	2007 - # of issues considered	2007 - # of issues allowed	2007 – Home Owner success %	2006 # of Decisions	2006 - # of issues considered	2006 - # of issues Allowed	2006 –Home Owner success %
Cassidy	1	1	0	0	1	11	0	0	-	-	-	-
D'Amours	1	4	1	25								
Dann	-	-	-	-	-	-	-	-	3	3	1	33
Diamond	-	-	-	-	-	-	-	-	3	62	9	15
Flude	2	2	0	0	4	12	5	42	4	31	5	16
Gahir	-	-	-	-	1	1	0	0	-	-	-	-
Garbe	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	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	13	1	8	1	2	0	0	-	-	-	-
Sanford	3	6	3	50	6	24	10	42	2	2	0	0
Selby	1	4	0	0								
Sherman	-	-	-	-	5	26	3	12	3	3	0	0
Sproule	2	2	2	100	-	-	-	-	2	35	0	0
Sweeney	1	5	0	0								
Tanaka	1	1	1	100	1	3	3	100	-	-	-	-
Wallace	-	-	-	-	2	4	1	25	5	32	4	13
Weary	3	11	1	9	2	14	7	50	5	9	2	22
Total	20	85	20	24	29	108	32	30	54	241	33	14