



**A Report Related to the Licence Appeal Tribunal and Tarion
(as Tarion administers the Ontario New Home Warranty Plan Act)**

**2006 – 2015
Ten Year Analysis**

Issued June 28, 2016

(Revised Sept. 19, 2016 - removed tinyurls due to ON Government e-mail restrictions)

Please submit questions/comments to: info@canadiansforproperlybulthomes.com .

Founded in 2004, Canadians for Properly Built Homes (CPBH) is a national, not for profit corporation dedicated to healthy, safe, durable, energy efficient residential housing for Canadians, and is the only organization of its kind in Canada. Working for consumer awareness and protection, CPBH is run by a volunteer Board of Directors and is supported by a volunteer Advisory Council of industry experts and other key stakeholders. CPBH earned "partner" status with the Canadian Consumer Information Gateway (Industry Canada).

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i. In Memory of Consumer Advocate Dr. Earl Shuman

Apr. 5, 1951 – May 6, 2016

June 6, 2016 Hansard Transcript of the Ontario Legislature:

“Mr. Jim McDonell: I rise today to pay homage to a staunch advocate for transparency and consumer rights who passed away on Friday, May 6. Dr. Earl Shuman, as did many Ontarians, invested in the purchase of a new home. His investment, however, gave rise to claims with Tarion Warranty Corp, the monopoly provider for new home warranties in Ontario.

Throughout the years, Dr. Shuman advocated for things many Ontarians take for granted. He demanded that the laws related to building new homes be respected. He sought to have those laws enforced. He fought to ensure consumers could be confident that their family’s largest purchase was secure and would serve them well throughout the years.

Dr. Shuman’s efforts also highlight the spirit that makes our province a great place to live and settle. He used his experience with Tarion and the Licence Appeal Tribunal to help other homeowners facing the same struggle.

I am confident this House will agree, Speaker, that the spirit of diligence, perseverance and aiding others is an inspiration to Ontarians from all walks of life. Dr. Shuman’s tireless advocacy for transparency, dependability, accountability and consumer protection should inspire us all to do better by consumers in Ontario and to always keep their interest at heart.

Dr. Earl Shuman, thank you, and may you rest in peace.”

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March 18, 2015 – Video of Dr. Earl Shuman at the Licence Appeal Tribunal with homeowner Jeffrey Ferland regarding the alleged “cover up” at the LAT concerning missing transcripts: <https://www.youtube.com/watch?v=pldPI8ay4v4> .

For more on the Ferland/Ferenc appeal, please see Appendix 2, Case Study in this report. An official, independent investigation into this matter continues. We expect that this investigation was probably called as a result of MPP Hillier’s question of the Attorney General in the Ontario Legislature.

ii. Dr. Aleksandra Ferenc’s Victim Impact Statement for the LAT

March 29, 2015 *“...I’d rather be living my life and spending time with our seven month old daughter rather than attending the LAT for over 20 days...a large part of Tarion’s work is fighting homeowners at the LAT and in other courts. This is what Tarion chooses to do...We suspect that Tarion has spent well over \$100,000 fighting us rather than fixing the violations of our contract and of the Ontario Building Code...”*

- Dr. Aleksandra Ferenc, homeowner appealing Tarion decision at the LAT

Video link: <https://www.youtube.com/watch?v=3fAZ7aKxC1w> .

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iii. Barbara Captijn’s Personal Appeal to SLASTO Chair Linda Lamoureux

April 23, 2015 *“...Inhumane...bullied by the [LAT] Chair...met by wall of silence...no place in our justice system...suffering...”*

- Barbara Captijn, Consumer Advocate and Blogger

Video link: <https://www.youtube.com/watch?v=4FCirWTxrCE>

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iv. MPP Randy Hillier in the Ontario Legislature regarding Missing Transcripts at the LAT

Oct. 22, 2015 *“...year of prolonged silence...transcripts of testimony and evidence are essential and they must be available or access to justice is denied...”*

- MPP Randy Hillier, PC Critic for the Attorney General

Video link: <https://www.youtube.com/watch?v=acMcuYNS208>

Note: Shortly after MPP Hillier raised this question in the Ontario Legislature, yet another family advised that their LAT transcripts were not available either.

For more on the Ferland/Ferenc appeal, please see Appendix 2, Case Study, in this report. An official, independent investigation into this matter continues. We expect that this investigation was probably called as a result of MPP Hillier’s question of the Attorney General in the Ontario Legislature.

Introduction

For the past 10 years, Canadians for Properly Built Homes (CPBH) has monitored the results from the Licence Appeal Tribunal (LAT), given homeowners' complaints about the Tarion Warranty Corporation (Tarion), homeowners' dismal results at the LAT when homeowners appeal Tarion's decisions, and homeowners' complaints about LAT processes¹.

Key Highlights for the 10-year period from 2006- 2015

Significant Decline in Number of Homeowner Appeals - The number of homeowner appeals has dropped significantly over the 10-year period (from a high of 267 in 2006 to 25 in 2015). Many consumers have advised CPBH that they refuse to go to the LAT, and are addressing their construction defects in other ways, e.g., regular court, fixing the construction defects themselves, and "patching and running". A letter from Frank Denton (Assistant Deputy Minister of Government and Consumer Services) to Tarion's President Howard Bogach dated Oct. 7, 2014 also referenced the issue of homeowners unwilling to go to the LAT. ADM Denton's letter said: *"...A less litigious and adversarial process would also address concerns the ministry has heard from homeowners that they are dissuaded from pursuing LAT appeals because the existing processes are not transparent, and are complicated, time-consuming, costly, and unbalanced..."*. Please refer to Appendix 1 for more information.

Homeowners Lose in Overwhelming Numbers at the LAT, for cases that proceed to the Decision Stage - Over the past decade, on average, homeowners lost 83% of the total items appealed at the LAT. The years 2015, 2014, and 2011 were particularly disastrous for consumers as they lost 91%, 93% and 94% respectively. Please refer to Appendix 1 for more information.

Virtually Impossible for Homeowners to Win Major Structural Defect Appeals at the LAT - In the 10-year period, 60 Major Structural Defects have been appealed at the LAT. In 2007, a homeowner won one and in 2010 another homeowner won one. All other 58 attempts were defeated. This results in a 97% failure rate at the LAT for consumers concerning major structural defects over the 10 years. Please refer to Appendix 1 for more information.

Most Homeowners are Self-Represented - Homeowners usually do not have legal representation but Tarion always has legal representation. Please refer to Appendix 1 for more information.

¹ While the LAT hears cases related to other matters such as funeral homes and car dealers, this analysis is limited to appeals of Tarion decisions, in relation to Tarion's administration of the Ontario New Home Warranty Plan Act (ONHWP).

LAT's Orders Not Always Followed - Throughout the decade, a number of consumers have complained that even though they “won” at the LAT, the LAT's orders were not followed. This is one of the key shortcomings of the legislation relating to the LAT. But the case found at this link is particularly interesting: <http://canlii.ca/t/gf0qn> . Highlights of this decision:

- In November 2012, Tarion was ordered by the LAT to fix a water leak in areas around living room balcony doors and a master bedroom door. But, as the problem was not fixed, the consumer returned to the LAT for help. Tarion argued the LAT no longer has jurisdiction after the order was made. The LAT agreed, and the motion was dismissed.

What is the point in consumers taking their disputes with Tarion to the LAT, if Tarion does not respect the LAT's order?

SLASTO/LAT Officials Acknowledge Operational Problems at the LAT - In December 2014, in a meeting with CPBH representatives, the SLASTO Executive Chair (Ms. Linda Lamoureux) and other officials of SLASTO/LAT acknowledged a number of serious operational problems at the LAT. Ms. Lamoureux said she would need 12-18 months to fix these issues. The operational issues acknowledged by Ms. Lamoureux and the other SLASTO/LAT officials in this meeting included:

- The LAT needs to better inform consumers of what to expect at the LAT and how to prepare.
- Training is required for the LAT's adjudicators, particularly given the nature of self-represented parties.
- LAT performance measurements and standards need to be developed. The LAT has started to measure its efficiency and effectiveness but this requires further effort.
- The LAT needs to become more transparent to the public in relation to its performance, e.g., against performance standards.
- The LAT has resource issues, e.g., a “terrible” website, and insufficient information technology and related systems.

Following this meeting, in a letter dated Dec. 19, 2014 to Ms. Lamoureux (and copied to a number of government officials), CPBH strongly questioned whether these issues could be properly addressed in 12-18 months, and raised serious concerns about Ontario's homeowners continuing to face a legal system that clearly is not functioning properly:

“.....We remain very concerned that there are consumers caught up in this LAT system that is currently less than adequate for consumers. It appears that it is not fair – or appropriate - for consumers to proceed to the LAT, given what we have heard directly from many consumers, what our annual analysis has revealed, and most recently, these serious shortcomings acknowledged by SLASTO/the LAT at the December 9, 2014 meeting....”

CPBH also advised Ms. Lamoureux that it appears that in addition to these operational problems acknowledged by SLASTO/LAT, an organizational culture shift is required for the LAT, and that research clearly shows that an organizational culture shift takes significantly longer than 12-18 months. CPBH received no response to these concerns – from anyone at SLASTO/LAT or from the numerous officials copied on the correspondence.

In a follow up meeting in November 2015, Ms. Lamoureux told CPBH representatives that her December, 2014 estimated timeline to fix these problems had been “ambitious”. However, Ms. Lamoureux was not prepared to make any further time commitments as to when these issues will be fully addressed; instead she said they regard their efforts as “continuous improvement”. Ms. Lamoureux did not provide any specific information on what progress had been made to fix the operational problems in the previous year. The lack of urgency related to fixing these serious operational problems is very troubling. Again, it is important to remember that homeowners are using what some refer to as a “very broken LAT” while SLASTO continues to try to fix these problems. CPBH continues to be concerned that these operational issues may be negatively impacting consumers’ success rates at the LAT.

In November 2015, an independent official investigation was called into one family’s case at the LAT in which there is alleged bullying by the LAT adjudicator, missing transcripts, and the replacement of the same LAT adjudicator before the case was completed. We expect that this investigation was probably called due to MPP Hillier’s question of the Attorney General in the Ontario Legislature in Oct. 2015. The investigation of this matter has not yet concluded. Please refer to Appendix 2 for additional information including a Case Study.

Revised Rules of Practice and Procedure for the LAT introduced April, 1, 2016 are Regressive and May Further Dissuade Homeowners from Proceeding to the LAT – CPBH was invited to respond to the LAT’s proposed Rules of Practice and Procedure for the LAT, and CPBH submitted the response before the deadline. However, CPBH’s submission was not acknowledged, and despite repeated communication attempts with Ms. Linda Lamoureux and her staff, there has been no response – not even an acknowledgement that the CPBH submission was received. Appendix 3 provides CPBH’s submission dated January 16, 2016 to Ms. Lamoureux, outlining CPBH’s concerns with the proposed Rules of Practice and Procedure for the LAT. However, it appears that CPBH’s submission related to this proposal was ignored. Key issues identified by CPBH include a continued “one size fits all” set of Rules of Practice and Procedure for the LAT², the possibility of dismissal without a hearing, and the removal of a cap on costs. (Previously the cap on costs was \$1,000 per day.) Please refer to Appendix 4 for CPBH’s detailed submission. It is important to note that these new rules of practice and procedure for the LAT may well further dissuade homeowners from proceeding to the LAT.

² Newly built home appeals are typically much more complicated than other cases heard at the LAT.

CPBH's June 2016 Position

Sadly, since our 2014 analysis, it appears that access to justice problems at the LAT for consumers appealing Tarion's decisions are worsening for Ontario's purchasers of newly built homes – not improving. Many who are aware of this situation agree that:

- SLASTO's approach to trying to fix these problems, while continuing to accept and hear cases, is not only unfair to consumers, it is further damaging the credibility of the LAT and the Province of Ontario.
- The ongoing decline of cases at the LAT since 2006 is likely because the majority of consumers have lost faith in the LAT as a means to resolve their disputes with Tarion.
- The new Rules of Practice and Procedure for the LAT that were implemented April 1, 2016 are regressive for Ontario's consumers appealing Tarion's decisions and may well dissuade homeowners further from proceeding to the LAT.

CPBH's position remains as was stated in our 2013 report: *"...it is clear that Premier Wynne needs to take immediate action to replace the LAT for homeowners' disputes with Tarion -- with a fair, balanced, effective, efficient and cost efficient means for Ontario homeowners to resolve these disputes. This is in keeping with the October 2013 report from the Action Committee on Access to Justice in Civil and Family Matters."* Here is a link to that report:

http://www.fcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf. (A related article in the Toronto Star published October 9, 2013 said: *"...The report calls for an effort to reduce the financial and procedural barriers that frustrate people and deny justice, particularly to the growing number who try to represent themselves...."*. This certainly applies to Ontario's consumers who decide that they have to take legal action against Tarion to get what they paid for in relation to the largest purchase most consumers make: a home.)

Also, as previously stated, for those consumers who are interested, there needs to be an independent review of all of those consumers' cases lost at the LAT in previous years, as consumers may have lost due to these serious operational issues now acknowledged by Ms. Lamoureux and the SLASTO/LAT officials.

It is both very surprising and disturbing that officials such as the Ombudsman of Ontario, the Auditor General of Ontario, the Attorney General of Ontario, the numerous Ministers over the years responsible for consumer protection and Premiers McGuinty and Wynne have not done anything related to these issues over the past decade. Consumers have also advised that both the offices of the Ombudsman of Ontario and the Auditor General of Ontario³ have not taken meaningful action when they complained to these offices. In the case of the office of the

³ The Auditor General of Ontario and the Ombudsman of Ontario both have had jurisdiction over the LAT throughout the past decade. Media reports in 2014 said that these two officials were in a turf war. For example, on Dec. 4, 2014, the Toronto Star ran an article with the following headline: *"Ontario ombudsman accuses auditor general of 'perilous' power play"*.

Ombudsman of Ontario, some consumers have complained to CPBH about poor treatment by this office. These responses to consumers have also served to dissuade consumers from taking their concerns/complaints to these offices.

This lack of appropriate response from all of these officials strongly suggests that the entire system of consumer protection for Ontario's purchasers of newly built homes is highly ineffective. This is obviously a very serious concern, particularly when one considers that the purchase of a home is the largest purchase most consumers make, and considering the ongoing media reporting about serious issues with the quality of housing and the Tarion Warranty Corporation. Please refer to Appendix 4 for a summary of the responses to CPBH's 2014 report.

Consumers who have not been able to get their issues resolved have other options available to them including: living with the construction defects, going to regular court, paying for the repairs themselves, and/or "patching and running" – an illegal activity whereby the homeowner sells the home to another person without disclosing the construction defects. But this longstanding situation with the LAT is clearly unacceptable.

Summary of related CPBH recommendations:

The Government of Ontario should:

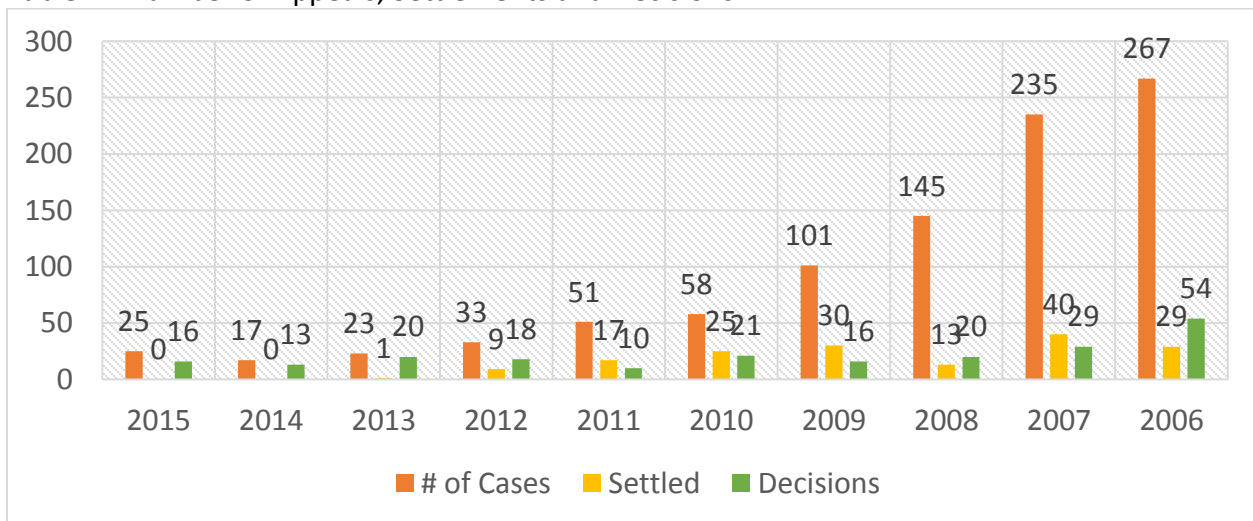
1. Immediately replace the LAT for homeowners' disputes with Tarion -- with a fair, balanced, effective, efficient and cost efficient means for Ontario homeowners to resolve these disputes.
2. Offer all consumers who have lost at the LAT an independent review of their case.
3. Determine why neither the Ombudsman of Ontario nor the Auditor General of Ontario have taken steps to investigate and report on these serious issues at the LAT given that they were made aware of them by consumers and CPBH.

Appendix 1 – Analysis of Data Obtained Regarding Homeowners’ Appeals

Key Statistics for 2015

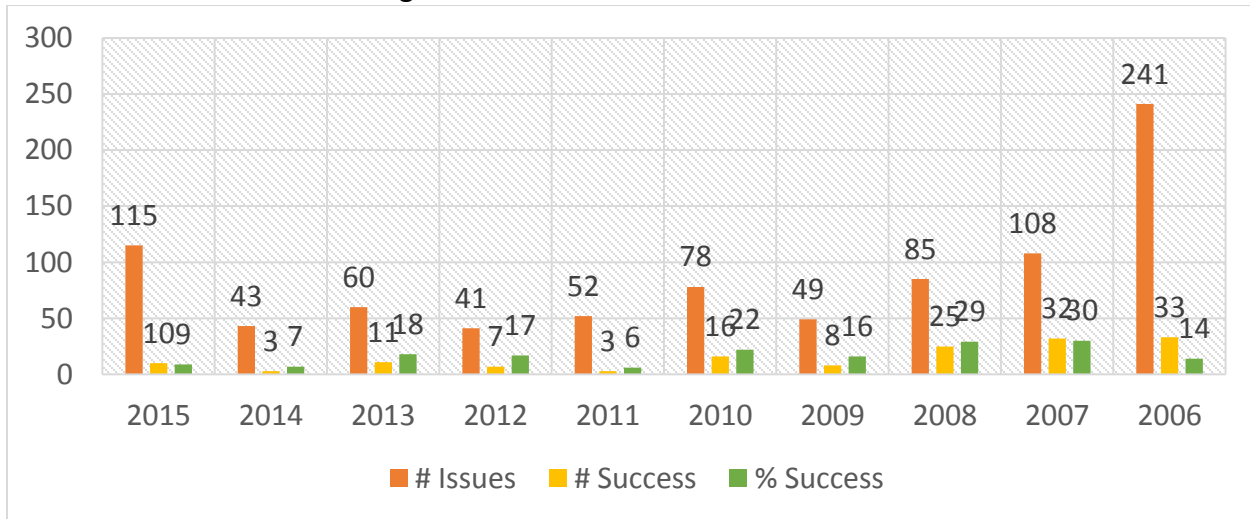
- Total number of cases heard at the LAT – 25
- Total number of decisions – 16
- Homeowner success:
 - Based on total issues presented for cases that were issued decisions – 9% -- a **91% consumer failure rate**
 - For major structural defect claims – 0% -- a **100% failure rate**
- Legal representation in hearings for:
 - Tarion – 100%
 - Homeowners – 6% (one homeowner out of the 16)

Table 1 - Number of Appeals, Settlements and Decisions



The most striking feature of Table 1 is the significant decline in the number of appeals in the ten-year period. Many consumers have advised CPBH that they refuse to go to the LAT, and are addressing their construction defects in other ways, e.g., regular court, fixing the construction defects themselves, and “patching and running”. A letter from Frank Denton (Assistant Deputy Minister of Government and Consumer Services) to Tarion’s President Howard Bogach dated October 7, 2014 also referenced the issue of homeowners unwilling to go to the LAT. ADM Denton’s letter said: “...A less litigious and adversarial process would also address concerns the ministry has heard from homeowners that they are dissuaded from pursuing LAT appeals because the existing processes are not transparent, and are complicated, time-consuming, costly, and unbalanced...”.

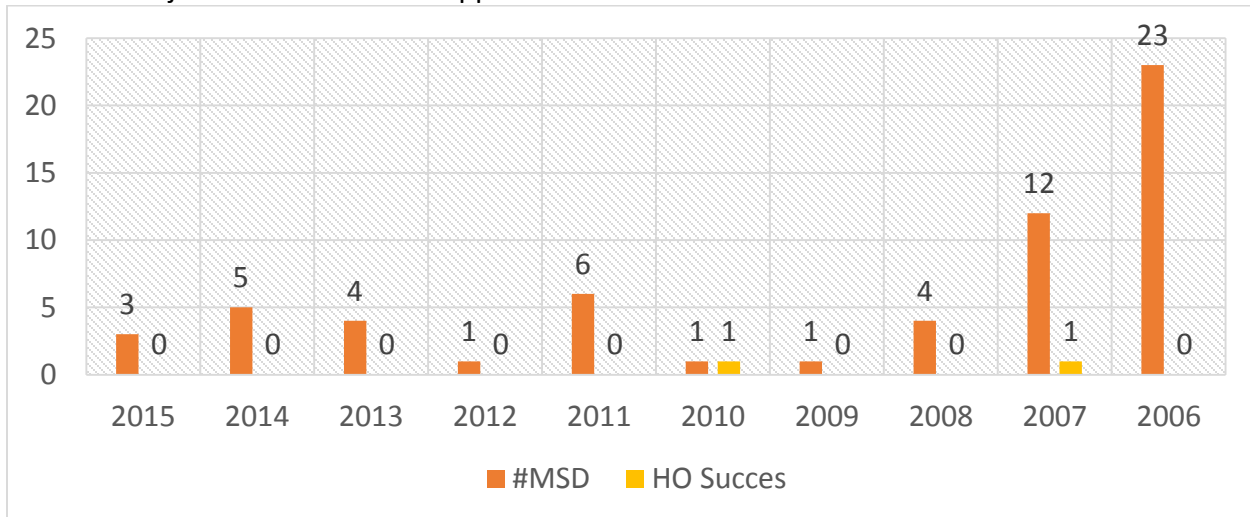
Table 2 - Total Number of Issues Appealed, Homeowner Success by Number of Items, Homeowner Success Percentage



Over the past decade, on average, homeowners lost 83% of the total items appealed at the LAT for those cases that proceeded to the decision stage. Table 2 shows that 2015, 2014, and 2011 were particularly disastrous for consumers as they lost 91%, 93% and 94% respectively.

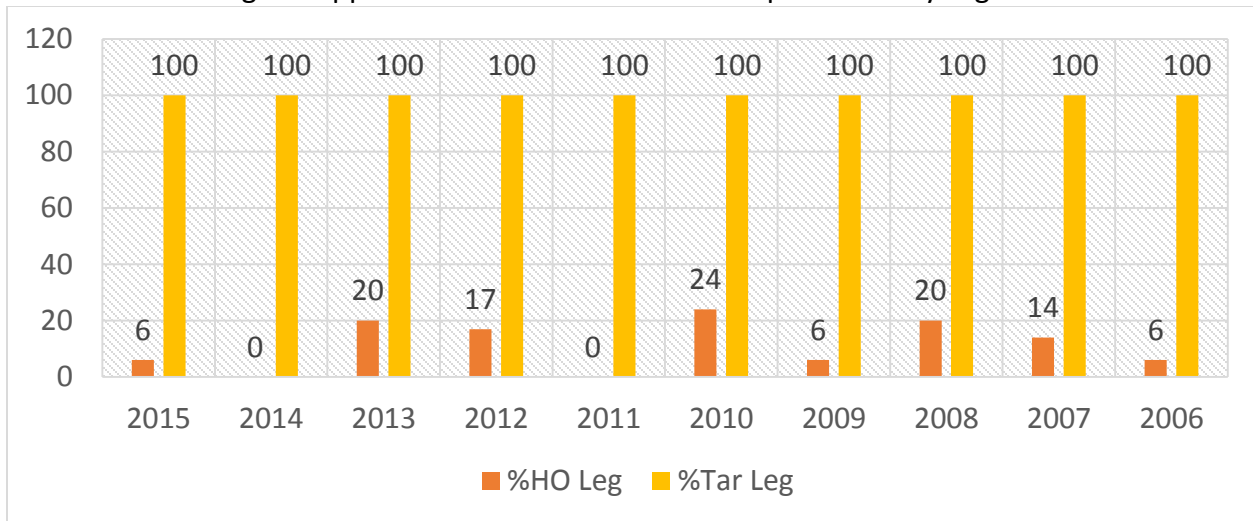
Homeowners had the most success in 2007 and 2008 (approximately 30% success rate). In 2015, consumers lost 91% of the issues they appealed at the LAT. The year 2015 had the highest number of issues presented by homeowners since 2006.

Table 3 - Major Structural Defect Appeals



In the 10-year period, 60 Major Structural Defect claims have been appealed at the LAT. In 2007, a homeowner won one, in 2010 another homeowner won one. All other 58 attempts were defeated. This results in a 97% failure rate at the LAT for consumers concerning major structural defects over the 10 years.

Table 4 - Percentage of Appeals Homeowner and Tarion represented by Legal Counsel



As shown in Table 4, usually the homeowner is not represented by legal counsel, but Tarion always is. As noted by an LAT Chair in 2006: “...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 this quote “applicants” means “homeowners”.

Table 5 - Percentage of Appeals Homeowner and Tarion represented by Technical Support

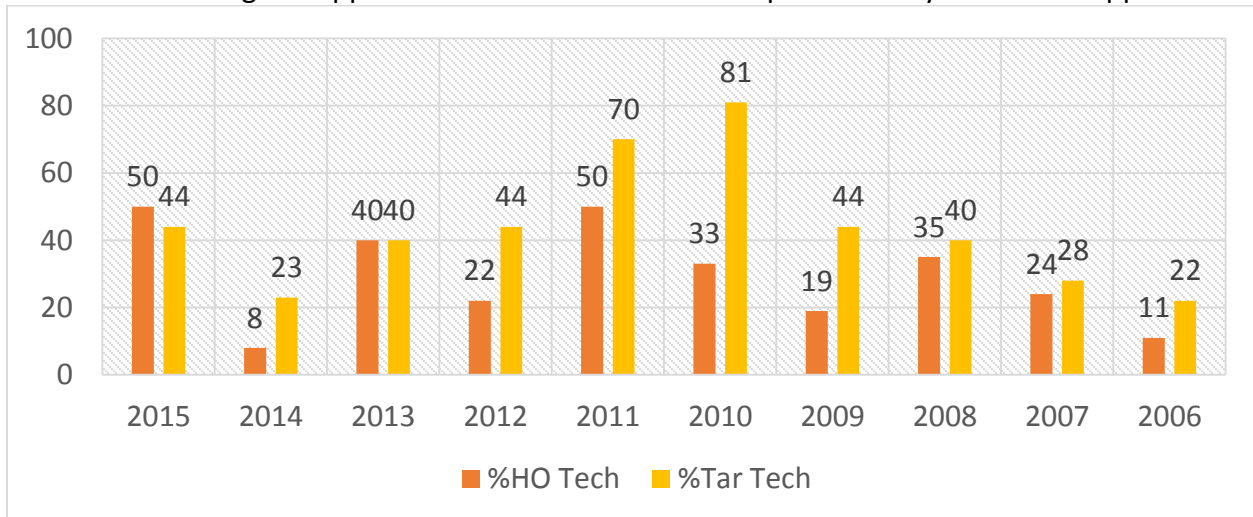


Table 5 shows that homeowners are more likely to have technical support than legal representation at the LAT hearings. But, except for 2013 and 2015, Tarion had more technical representation at the hearings than homeowners. In 2013, homeowners and Tarion both involved technical support at the hearings 40% of the time. In 2015, for the first time, homeowners were represented by technical support at the hearings more than Tarion.

Appendix 2- Operational Problems with the LAT

CPBH has been raising concerns about operational problems at the LAT since 2006 but it was difficult to get any attention on these issues. In the fall of 2014, Ms. Linda Lamoureux, the new Executive Chair of the Safety, Licensing and Standards Tribunals Ontario contacted CPBH and invited CPBH representatives for a meeting. This invitation was appreciated, and CPBH quickly accepted.

On December 9, 2014, representatives from CPBH met with Ms. Lamoureux (the SLASTO Executive Chair) and other officials from SLASTO/LAT. They acknowledged a number of serious operating issues at the LAT and Ms. Lamoureux said she would need 12-18 months to fix these issues. The issues identified by Ms. Lamoureux and the other SLASTO/LAT officials in this meeting included:

- The LAT needs to better inform consumers of what to expect at the LAT and how to prepare.
- Training is required for the LAT's adjudicators, particularly given the nature of self-represented parties.
- LAT performance measurements and standards need to be developed. The LAT has started to measure its efficiency and effectiveness but this requires further effort.
- The LAT needs to become more transparent to the public in relation to its performance, e.g., against performance standards.
- The LAT has resource issues, e.g., a "terrible" website, and insufficient information technology and related systems.

On Nov. 23, 2015, representatives from CPBH met with Ms. Lamoureux and other SLASTO/LAT officials for a follow up meeting, and CPBH was advised that:

- Ms. Lamoureux's time estimate provided on December 9, 2014 of 12-18 months to make the necessary changes at the LAT turned out to be "ambitious".
- They are making progress on some of the initiatives they have underway to address the problems with the LAT's operations.
- Ms. Lamoureux was not prepared to make any further time commitments as to when these issues will be fully addressed; instead they regard their efforts as "continuous improvement".

CPBH remains very concerned with the lack of urgency from SLASTO related to these operational matters, particularly given that appeals continue to be heard while these serious operational issues continue. As one example, please refer to the following Case Study.

A Case Study: One family's LAT experience in 2014, 2015 and ongoing in 2016

The following was reported in our 2014 analysis: *"For a number of reasons, most consumers will not publicly reveal what they are experiencing at the LAT, but, two consumers, Dr. Ferenc and Mr. Ferland, are recording some of their journey at the LAT on a Facebook site found at this link: <https://www.facebook.com/maketarionaccountable> . Mr. Ferland's and Dr. Ferenc's Facebook site reported additional serious concerns about what is going on at the LAT. Here are some of the serious allegations that Mr. Ferland and Dr. Ferenc include on their FaceBook site:*

- *Allegations of bullying by the LAT adjudicator: Who rules on these allegations of bullying? The same adjudicator, who found herself not to be a bully.*
- *Missing tapes of this alleged bullying, which the same adjudicator referred to as "unfortunate".*
- *Allegations of the adjudicator's inconsistent treatment of Tarion and the consumers at the LAT hearings, e.g., hearsay evidence allowed by the adjudicator for Tarion, but hearsay evidence not allowed by the adjudicator for Mr. Ferland and Dr. Ferenc.*
- *During 20 days of these LAT hearings thus far, and this is continuing to drag on. One of the reasons this lengthy case is continuing is because Tarion's lawyers/witnesses have not been available, while Dr. Ferenc and Mr. Ferland have made themselves available every day.*

*CPBH tried to find out if the tapes are indeed missing (e.g., as CPBH considered ordering a copy of the tapes). CPBH wrote to the LAT COO, Mr. Tom McDermott, and after the **third** request, Mr. McDermott responded that he could not provide any information as the case is currently underway.*

Other consumers have attended as observers and agreed that it is very clear that Mr. Ferland and Dr. Ferenc are not getting a fair hearing. One consumer who has observed some of what has allegedly gone on in these hearings has filed a related legal affidavit."

Update on this Case Study

In October 2015, PC Critic for the Attorney General, MPP Randy Hillier, raised the matter of the missing transcript in the Ontario Legislature. Here is a link with the related video from the Ontario Legislature: <https://www.youtube.com/watch?v=acMcuYNS208> . Shortly after that Question by MPP Hillier in the Ontario Legislature, someone (e.g., the Attorney General/SLASTO/the LAT) decided to commission an official, independent investigation into this matter.

Further, the LAT adjudicator (Ms. Cassidy) was replaced by another adjudicator before the case was concluded. This replacement of an LAT adjudicator before a case ended appears to be an unprecedented move by the LAT.

CPBH recently asked the investigator, Mr. George Thompson, when his report is expected, and on June 11, 2016, he responded as follows: "...We are trying to complete our work and our report

within the next month, although we have had to look at additional information that may have an impact on that timeline....". Meanwhile, this family continues to wait.

Appendix 3 – CPBH’s response regarding proposed new LAT Rules

January 15, 2016

Ms. Linda P. Lamoureux
Executive Chair
Safety, Licensing Appeals and Standards Tribunals Ontario
20 Dundas Street West, Suite 530
Toronto, ON M5G 2C2

Subject: Your request for input related to the Proposed Revised Rules of Practice and Procedure for the Licence Appeal Tribunal

Dear Ms. Lamoureux:

Thank you for the opportunity to comment on the proposed Rules of Practice and Procedure related to the LAT. Canadians for Properly Built Homes (CPBH) is pleased to provide you with our comments. Please note that CPBH’s comments are strictly in relation to appeals at the LAT concerning the ONHWP Act and the Tarion Warranty Corporation – with a primary concern toward self-represented parties.

Your cover letter said: *“I am writing to inform you that LAT is proposing to revise its Rules of Practice and Procedure to provide for greater accessibility and simplicity and to accommodate some upcoming changes in relation to its mandate.”* Unfortunately, our overall assessment is that many of the changes you have proposed will not provide greater accessibility and/or simplicity for homeowners appealing Tarion’s decisions at the LAT – or facilitate greater access to justice. Appendix 1 provides specific examples.

Further, we note that many of the issues that CPBH raised with you in our 2014 and 2015 meetings are still outstanding, and are not addressed in this document. As well, some additional matters have been identified since we last met with you. Appendix 2 summarizes these matters.

For a number of years, CPBH has communicated our position that the LAT is not an appropriate venue to hear appeals related to the Tarion Warranty Corporation’s decisions. Over the past decade, homeowners appealing Tarion’s decisions at the LAT have lost on average more than 90% of the time, and our annual analyses have raised questions and concerns about numerous LAT practices and procedures. Many of these problems were acknowledged by you/your staff in our Dec. 2014 meeting with you. For your convenience, here is the link to our most recent analysis: <http://www.canadiansforproperlybuilt homes.com/html/whatsnew/2015/march/2014LATanalysisFinal.pdf> .

As noted by the Canada Mortgage and Housing Corporation, new home construction is a very complex service involving thousands of different component parts by a large number of

workers on and off site. As well, with advancements in technology, new home construction is becoming more complex. Appeals related to Tarion are very different LAT cases than a liquor licence or other legislation that the LAT addresses. The purchase of a home is the largest purchase most consumers make, and newly built homes with serious construction defects can - and have - bankrupt Ontario families.

It is disappointing to see that you are proposing a continued “one size fits all” set of Rules of Practice and Procedure for the LAT. Some have suggested that a specialized tribunal such as the Human Rights Tribunal is required for the complex matters involving new home construction and appeals of Tarion’s decisions. We recognize that establishing such a specialized Tribunal is probably not within your authority, but we understand that you do have the authority to create specialized Rules of Practice and Procedure for the various bodies involved, where appropriate, such as appeals relating to Tarion and the ONHWP Act – and we urge you to immediately do this.

As reflected in our annual analysis, and discussed in our meetings with you, the number of cases related to Tarion appeals has declined significantly in the past decade. Many homeowners have communicated that they will not take their cases to the LAT given the well-recognized problems with the LAT’s processes. As you know, this serious issue was highlighted in an Oct. 7, 2014 letter from Mr. Frank Denton (Assistant Deputy Minister of the Ministry of Government and Consumer Services) to Tarion that said: *“...A less litigious and adversarial process would also address concerns the ministry has heard from homeowners that they are dissuaded from pursuing LAT appeals because the existing processes are not transparent, and are complicated, time-consuming, costly, and unbalanced...”*.

Unfortunately, our assessment is that your proposed revised rules of practice and procedure for the LAT will do little or nothing to address these issues, or increase access to justice for homeowners if they decide that they want or need to appeal Tarion’s decisions at the LAT. Indeed, we anticipate that if implemented as proposed, the result will be further decline homeowner participation at the LAT, e.g., Section 3 that proposes dismissal without a hearing and Section 19 that proposes to remove the cost limit.

We look forward to your response.

Yours truly,



Dr. Karen Somerville, PhD in Management
President

Cc:

Premier Kathleen Wynne

Attorney General Madeleine Meilleur

Minister David Orazietti, Ministry of Government and Consumer Services

MPP Randy Hillier, PC Critic for the Attorney General

MPP Jagmeet Singh, NDP Critic for the Ministry of Government and Consumer Services, and
NDP Critic for the Attorney General

MPP Jim McDonnell, PC Critic for the Ministry of Government and Consumer Services

Ms. Bonnie Lysyk, Auditor General of Ontario

Ms. Barbara Finlay, Acting Ombudsman of Ontario

Mr. Frank Denton, ADM, Ministry of Government and Consumer Services

Dr. Julie McFarlane, Faculty of Law, University of Windsor

Ms. Mary McAllister-Diks, Director, Canadians for Properly Built Homes

Founded in 2004, Canadians for Properly Built Homes (CPBH) is a national, not for profit corporation dedicated to healthy, safe, durable, energy efficient residential housing for Canadians, and is the only organization of its kind in Canada. Working for consumer awareness and protection, CPBH is run by a volunteer Board of Directors and is supported by a volunteer Advisory Council of industry experts and other key stakeholders. CPBH earned "partner" status with the Canadian Consumer Information Gateway (Industry Canada).

Appendix 1 - Proposed Revised Rules of Practice and Procedure for the LAT

Key Concerns	Comments
<p>Dismissal without a hearing – Sections 3.4 (a) and (c), 3.5, 3.6</p> <p>As discussed with you in our meetings, and in this cover letter:</p> <ul style="list-style-type: none"> - new home construction is a very complex matter; - the majority of homeowners appearing at the LAT are self-represented, attempting to successfully maneuver a highly legalistic LAT; and - the purchase of a home is the largest purchase most consumers make. <p>Homeowners need - and deserve - to have their day in court if they choose, and their appeals should not be dismissed without a hearing. We regard this proposal as highly regressive and inappropriate.</p>	<p>As discussed in our meetings with you, the LAT needs to improve the information it provides to homeowners (e.g., improving its web-site to ensure that homeowners have the information they need before they appear before the LAT). This would help to ensure that homeowners submit an appropriate case to the LAT.</p>
<p>Disclosure – Section 9.2</p> <p>In the case of expert witnesses, to require the homeowner to provide a brief description of each witness’ anticipated testimony will likely result in increased expert costs for the homeowner and/or potential errors (and further confusion) if the homeowner tries to describes the issue. As noted previously, home building is a complex matter.</p>	<p>Most homeowners are unable to afford hiring expert witnesses.</p> <p>This requirement will increase costs for the homeowners hiring experts.</p>
<p>Expert Witnesses (Identification and Disclosure) – Section 10.2</p> <p>Same issue as Section 9.2</p>	<p>Same comment as Section 9.2</p>
<p>Hearing or Case Conference may be Oral or Written – Section 12.1</p> <p>Telephone must be included.</p>	<p>The ability to participate via the telephone is an essential option, particularly for homeowners living in rural parts of Ontario.</p>

<p>Audio and Video Recording may be Permitted – Section 13.2</p> <p>This should be permitted, particularly given that numerous cases have experienced problems with missing LAT recordings.</p> <p>There should be no restrictions on homeowners’ use of such recordings. The LAT is a public forum.</p>	<p>There have been numerous complaints about missing LAT recordings, including two separate cases reported to CPBH (and government officials) in 2015.</p>
<p>Confidentiality of Case Conference Settlement Discussions – Section 14.5</p> <p>There should be an LAT mediator involved in these settlement discussions.</p>	<p>The parties should not be left on their own to try to settle – they had plenty of time to do this before the LAT process. The role of the mediator should be to try to mediate a settlement and ensure a fair process.</p>
<p>Case conference not public – Section 14.6</p> <p>If the case conference is not for settlement discussions, then it should be public.</p>	
<p>Reconsideration of a Tribunal Decision – Section 18</p> <p>Much of this section leaves the distinct impression that the LAT/SLASTO lack confidence in the LAT’s adjudicators, staff, and/or its processes.</p> <p>If this section is approved, it looks like the Executive Chair of SLASTO will become the LAT’s Appeal Court, resulting in another layer of bureaucracy, potentially additional costs for homeowners appearing at the LAT, and additional costs for the Ontario taxpayers. If an appeal court is necessary, it should be labeled as such, and appropriately staffed and operated.</p>	<p>The focus of SLASTO should be on ensuring a fair, efficient LAT from the outset so that appeals are minimal.</p>
<p>Costs – Section 19</p>	<p>As you know, Tarion is always represented by legal counsel – sometimes both internal and external counsel. As well, the builder</p>

<p>This is a deeply concerning proposal that we regard as another highly regressive step. There must be a limit to costs, such as currently is in place. Homeowners must have some estimate of the costs they could be facing at the outset.</p>	<p>is typically represented by counsel. But usually due to cost considerations, homeowners are usually without representation.</p> <p>If there is no limit to costs, we expect that this will be a significant deterrent to homeowners considering proceeding to the LAT.</p>
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Appendix 2 – Additional Related Matters

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| <p>a. In our Nov. 24, 2015 meeting with you, LAT/SLASTO representatives said the LAT needs to review Freedom of Information legislation in relation to providing transcripts/recordings to the public, even though the hearings themselves are public. This issue needs to be resolved and addressed in the Rules of Practice and Procedure for the LAT.</p> |
| <p>b. In our Nov. 24, 2015 meeting with you, CPBH raised the issue of the LAT’s decision of a few years ago to start to conceal claimants’ names on LAT Decisions available to the public. CPBH advised that a number of homeowners have indicated that one of the outcomes of this change by the LAT has been that homeowners are now further disadvantaged as they are no longer able to communicate with one another to better prepare for hearings, exchange information, etc. CPBH asked if the LAT would consider reversing this decision, and report the names similar to what happens in other Ontario courts. Your representative said that this will be considered by the LAT. This issue needs to be addressed in the Rules of Practice and Procedure for the LAT.</p> |
| <p>c. In both our 2014 and 2015 meetings with you, we discussed the need for LAT adjudicators to have additional training, particularly in relation to self-represented parties. But the current document is silent on this matter. This needs to be addressed in the Rules of Practice and Procedure for the LAT.</p> |
| <p>d. We have been advised that in a recent LAT hearing, when homeowners alleged that the LAT adjudicator bullied them, the same adjudicator ruled on whether she herself bullied the homeowners. Assuming that this is an accurate account, obviously this is an inappropriate practice. There needs to be another qualified party to hear these sorts of complaints regarding LAT adjudicators. This needs to be addressed in the Rules of Practice and Procedure for the LAT.</p> |

<p>e. In our Nov. 24, 2015 meeting with you, in relation to missing LAT recordings, SLASTO/LAT officials advised that you are awaiting investigator Mr. Thomson's report before making any operational changes to ensure that transcripts/recordings are available to claimants. Since that meeting, another family has come forth to complain that its LAT recordings were also missing at a recent LAT hearing. Clearly this is an urgent matter, which needs to be dealt with immediately, and included in the Rules of Practice and Procedure for the LAT.</p>
<p>f. In a report on the Tarion web-site found at this link: http://www.tarion.com/about/Documents/Report.pdf it says: "<i>Although Tarion and the builder are distinct and separate parties, they do confer and cooperate in attempts to bring about settlement with the homeowner, and the tribunal member presiding at a LAT pre-hearing often asks to meet privately with Tarion and the builder in the absence of the homeowner in order to determine the prospects and content of a settlement</i>" (p. 48-49). It appears highly inappropriate for the Tribunal member to invite and meet with the builder and Tarion, without the homeowner. This needs to be addressed by these Rules of Practice and Procedure for the LAT.</p> <p>Note: CPBH hears regularly that it appears to many homeowners who go to the LAT that LAT representatives and Tarion representatives are very "cozy" - part of the same "club" – and homeowners often feel as outsiders. This example may help to explain why some homeowners feel they are outsiders, as indeed, they have been left out.</p>
<p>g. CPBH hears regularly that the LAT does not consistently enforce its Rules of Practice and Procedure, and often gives Tarion preferential treatment. Consistent enforcement of the LAT's Practices and Procedures needs to be addressed in the Rules of Practice and Procedure for the LAT, including how homeowners can make a complaint while a hearing is underway.</p>
<p>h. The LAT needs to allow at least basic technological tools that would facilitate homeowners' communication with the LAT, e.g., LAT e-mail addresses clearly available to homeowners. This needs to be addressed in the Rules of Practice and Procedure for the LAT.</p>
<p>i. In our Dec. 2014 meeting with you, we discussed the need for the LAT to measure and communicate to the public basic LAT performance information, such as the length of time it takes to hear cases. This needs to be addressed in the Rules of Practice and Procedure for the LAT.</p>
<p>j. Currently Tarion controls if homeowners are allowed to go to the LAT, e.g., through its issuance of a Decision Letter. Numerous homeowners have wanted to appeal a Tarion decision at the LAT but were prevented from doing so as</p>

Tarion would not issue a Decision Letter to them, despite the homeowners' requests for the ability to go to the LAT. The LAT should accept homeowners who want to go to the LAT, whether Tarion has issued a Decision Letter or not. This needs to be addressed in the Rules of Practice and Procedure for the LAT.

Appendix 4- Response from key decision makers/stakeholders to CPBH

Over the past decade, CPBH has worked diligently to share its annual analysis with key decision makers, in hopes of leveling the playing field for Ontario's consumers appealing Tarion's decisions. However, over the years, there has been very little response – or even acknowledgement – from most of these key decision makers. The following is a summary of the responses received in 2015. As you will read, there is a glimmer of hope from the Auditor General of Ontario!

- From Premier Wynne – no response
- From former Minister of Gov't and Consumer Services Minister Oraziotti – no response
- From former Attorney General Meilleur – no response
- From Ombudsman of Ontario Marin/Findlay – The Ombudsman of Ontario has jurisdiction over the LAT. CPBH had been requesting a meeting with the former Ombudsman of Ontario (Marin) or the former Acting Auditor General (Findlay). Neither has been available, but on June 1, 2015, CPBH representatives met with Auditor General staff, and raised these LAT operational issues (as well as other issues). We continue to await this office's response regarding the LAT operational problems.
- From Auditor General Lysyk – The Auditor General of Ontario has jurisdiction over the LAT. In a letter dated May 4, 2015 from Ms. Lysyk, she said: *"...Thank you for taking the time to write to my Office on a number of occasions, and for sharing your supporting materials and recent report, A report Related to the Licence Appeal Tribunal and the Ontario New Home Warranty Plan Act 2006-2013...I understand that you have been in communication with one of my Directors, Vince Mazzone, on a number of past instances, and that you have provided him with information on both Tarion and the LAT. Vince and his team will be considering this material in determining the audits we will be conducting in the next two years."*