



**Canadians for Properly Built Homes' Response to the
Final Report of the Public Complaint Investigation
Re: Ferenc and Ferland v.
Tarion Warranty Corporation and Polmat Group Inc.
by Investigators George Thomson and Karen Cohl**

September 22, 2016

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

“Our main conclusion is that the Tribunal can do more to improve its capacity to manage complex cases and to support the many homeowners who appear without legal representation” (p. 3).

So reads the report from investigators George Thomson and Karen Cohl. For those of us familiar with the goings-on at Ontario’s Licence Appeal Tribunal, this conclusion was old news. What a disappointing main conclusion for this important investigation.

This report did make some statements seemingly critical of the adjudicator, Ms. Cassidy, such as:

“...We are concerned that Ms. Cassidy chose, at the hearing and in an order, to characterize what Mr. Ferland had said during the unrecorded segment and to note that his story had later changed. It is not within our scope to comment on her legal judgement about the necessity of including such statements. However, the effect was inflammatory to Mr. Ferland who had no way to verify what he had actually said since, as Ms. Cassidy knew, his statement had not been recorded. This was not helpful in calming the waters of a fractious hearing and it added to the complainants’ belief that Ms. Cassidy was biased against them. This added strain to the relationship between the complainants and the adjudicator and made a challenging hearing even more difficult to manage...” (p. 23).

But at the end of their investigation, the investigators found that the adjudicator did not breach SLASTO’s Code of Conduct, and concludes with a series of “ideas for the future”. Again, unfortunately, there was nothing new in “ideas for the future” section either, except for the comments on whether the LAT should continue its practice of recording hearings¹.

The Thomson Cohl report includes statements about the challenges facing self-represented parties, such as the power imbalance, frustration for lawyers and adjudicators, etc., which may be informative for those not familiar with the concept of self-represented litigants, but for those of us familiar with the situation, again adds nothing new. Further, as noted by Dr. Julie Macfarlane of the University of Windsor in her blog about this report,

“I agree that this is also difficult for the lawyers and adjudicators, but would make the obvious point that they have nothing material at stake, and thus a very different type of frustration than the self-represented homeowners”.

In the Ferenc/Ferland case, one of the disputed items concerns a serious issue with their floors (an Ontario Building Code violation according to their expert who testified at the LAT), which will cost more than \$150,000 to repair. The Thomson Cohl report failed to mention this significance of this one alleged construction defect – not only the cost to repair, but that the Ontario Building Code is focused on health

¹ The fact that the LAT is considering discontinuing its practice of recording hearings is alarming to many.

and safety. It is also important to note that the adjudicator, Ms. Cassidy, did not find in favour of Mr. Ferenc/Ferland on the matter of this alleged very serious floor issue. This family has two young children and continues to live in that home.

Our reading of this report strongly suggests that Mr. Thomson and Ms. Cohl did not go far enough in this investigation and in their conclusions. As one key example, it appears the investigators failed to connect the dots on a very significant issue of the need to start from the beginning in the event of being successful in their allegation of bias. As noted in the investigators' report:

"...Perhaps the best example of the complainants feeling they were caught in a foreign, impenetrable process came when they realized they were facing a dilemma: if they were successful in their allegation of bias, they would have to restart the hearing before another adjudicator after having already participated in many days of hearing..." p. 16.

But on page 29 of the investigators' report it says:

"...If concerns are raised about the bias of a panel member, that member could, if justified, step down from the case mid-way through without requiring the hearing to be re-started before a new adjudicator..."

To be clear, in an Order dated March 17, 2015, the adjudicator, Ms. Cassidy, advised that a new hearing would be required from the beginning:

"The Tribunal notes that any finding of a reasonable apprehension of bias would lead to the consequence of starting the hearing from the beginning before a new panel. The Tribunal acknowledges that the Appellants have expressed that is not an outcome that they would like" (p. 4).

Therefore, based on the investigators' statement on page 29 that a new hearing would not be required from the start, it appears that Ms. Cassidy misled Mr. Ferland and Dr. Ferenc concerning a very important consideration. Why did the investigators not include this in their report? Had Ms. Cassidy accurately informed Mr. Ferland and Dr. Ferenc, this could have taken this case in a very different direction and experienced a very different outcome.

Another "elephant in the room" question is why Mr. Thomson and Ms. Cohl did not report on is whether SLASTO/LAT acted appropriately throughout this prolonged case. As noted in the CPBH analyses that were provided to the investigators well before the submission of their final report, CPBH has been raising serious issues about LAT processes for a decade, and with Ms. Lamoureux (the Executive Chair of SLASTO) since a meeting in Dec. 2014. Mr. Ferland and Ms. Ferenc were asking the LAT and SLASTO for help throughout this grueling process. As noted in the report's appendix "Observations from Initial Teleconference":

"The initial conference call can be seen as a microcosm of what went wrong from the start."

Understandably, Mr. Ferland and Dr. Ferenc have responded to this report (in part) as follows:

“The SLASTO investigation and report about our case does not answer many important questions about the serious issues that arose in our case. This includes the bullying we experienced from the adjudicator and the missing recordings. We are pursuing that a proper investigation and report is done and appropriate action is taken. We are taking this request back to the Auditor General and to the Ombudsman of Ontario.”

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We offer Appendix 1 – Other Questions/Concerns regarding the Investigative Process and the Report and Appendix 2 – Questions/Concerns regarding the Selection of the Investigators and related Contractual Documents.

CPBH is requesting that the Office of the Ombudsman of Ontario and the Auditor General of Ontario seriously consider the concerns and questions we have raised in our response to the investigative report. CPBH has already provided the documents accessed via the Freedom of Information request to both the Office of the Ombudsman of Ontario and the Office of the Auditor General of Ontario.

In closing, we wish to commend Mr. Ferland and Dr. Ferenc for their courage, tenacity and perseverance. They have been through a terrible ordeal and very grueling process to date and, unfortunately, they have much more to endure. No homeowners should have to go through this. All they want is to receive what they paid for.

We also wish to acknowledge the remarkable support provided in this case by consumer advocate Barbara Captijn. As an example, Ms. Captijn sat through 12 days of these hearings, and continues to be involved to try to make sure that this family, and other families receive what they paid for.

Appendix 1 – Other Questions/Concerns regarding the investigative process and the report

- Ontario Building Code (OBC) violation – As noted already, a very significant issue in this case is the Ontario Building Code. It is important to note that the OBC is focused on health and safety matters. Mr. Ferland and Dr. Ferenc had an OBC expert testify that, in his opinion, their home did not meet the requirements of the OBC concerning their floors. Mr. Ferland advised that the cost to fix this one issue is estimated at more than \$150,000 to repair. Why was it not clearly stated in this report the importance of this disputed issue to provide important context to this case? We were unable to find any references to OBC violations in this report. Instead, we found mention of floor scratches, and floor tiles, which seemed to trivialize the importance of the case.
- Testimony of the OBC expert - A related point concerns the section entitled “Competing Perspectives” on page 10: “...Dr. Ferenc and Mr. Ferland came to the appeal with many complaints about the construction of their home...” As noted, Dr. Ferenc and Mr. Ferland also came to the appeal with an expert who testified about what he believes is a serious building code violation (as noted in the previous paragraph). Why did this report not reference this expert? This is a key point that should have been included in this report.
- Dignity and Respect – page 14 says “...certain LAT staff members felt intimidated or harassed by one or both of the complainants..” Why evidence was gathered by the investigators related to this? Was this evidence provided to Dr. Ferenc and Mr. Ferland? If not, why not?
- Prior concerns about missing recordings/transcripts - In a May 12, 2016 e-mail to Mr. Thomson (and copied to Ms. Cohl and others), CPBH President Dr. Karen Somerville advised that numerous times over the years consumers have complained about missing recordings/transcripts at the LAT. (Mr. Thomson confirmed receipt of this May 12, 2016 e-mail.) However, the issue of other missing recordings over the years is not mentioned in the investigators’ report. Instead, the investigators seemed to excuse the missing recording in this case, e.g., “*This was a human error that can be expected to occur – and does occur – in a system that requires adjudicators to stop and start the recording...*” (p. 1 Overview). Why did the investigators not disclose in their report that missing recordings have been the subject of previous complaints and criticisms of the LAT?
- Another attempt to obtain the missing recording/transcript in the Ferenc Ferland case - In the May 12, 2016 e-mail to Mr. Thomson (and copied to Ms. Cohl), CPBH President Dr. Karen Somerville also advised that CPBH had tried to obtain a copy of the recording in question early in 2015, but “after considerable effort on our part, the LAT finally confirmed that the recording(s) is/are indeed missing). Why was this not disclosed in the investigators’ report?
- Selection of those interviewed - It appears that these investigators were primarily interested in hearing from members of the legal community and LAT employees. After reading their report, CPBH President Dr. Karen Somerville asked for a breakdown of the stakeholders interviewed, and Ms. Cohl provided the following list:

- ② Complainants and individuals referred by the complainants (6)
- ② Staff involved in case (5)
- ② Adjudicators involved in case (4)
- ② SLASTO Executive Office (2)
- ② Respondent (1)

Why did these investigators not express any interest in meeting with anyone from CPBH, given CPBH's involvement in raising concerns over the past decade regarding problems with LAT processes², and given CPBH President Dr. Karen Somerville's attempts to obtain a copy of these missing recordings?

- Sworn affidavit by consumer advocate Barbara Captijn – Ms. Captijn attended this hearing 12 days, and submitted a sworn affidavit about what she had witnessed. Although the investigators confirmed reviewing that sworn affidavit in an e-mail after the report was issued, this sworn affidavit was not mentioned in the investigators' report. Why is that? Also, we also understand that in the interview with Ms. Captijn, neither investigator asked Ms. Captijn anything about the contents of this sworn affidavit. Why is that?

² Attached is a link to the most recent CPBH analysis - for the past 10 years:
<http://www.canadiansforproperlybuilthomes.com/html/whatsnew/2016/june/June28-Final10yrLATaysis.pdf>
This was sent to Mr. Thomson and Ms. Cohl and acknowledged by Ms. Cohl as having been received and reviewed as part of their investigation.

Appendix 2 – Questions/Concerns regarding the Selection of the Investigators and related Contractual Documents

- Experience and training of the investigators –
 - Why were experienced, trained investigators, e.g., from the office of the Ombudsman of Ontario, not used for this investigation? While the CVs of the investigators were not included in the report, CPBH requested and received copies of their CVs. According to these CVs: Both investigators are members of the legal profession and neither investigator has had any prior experience or training as investigators.
 - Were these two investigators sufficiently experienced to handle this investigation?
 - Did these two investigators have sufficient and appropriate investigator training prior to undertaking this assignment? If yes, what was this training and when was this training taken?

- Independence
 - Is it appropriate for two lawyers, hired by an organization that is part of the legal establishment, to investigate another lawyer and the same organization that hired them?
 - A Nov. 27, 2015 letter to Mr. Thomson obtained via a FOI request noted SLASTO's offer to provide Mr. Thomson with an office, and services of legal counsel to support any research or assistance. Is this appropriate in an independent investigation?

- Composition of the Investigative team
 - At the outset of this investigation, there was a suggestion made to Ms. Lamoureux (SLASTO's Executive Chair) by consumer advocate Barbara Captijn that a consumer be part of the investigation team to provide some balance, but that this suggestion was not responded to, or even acknowledged by SLASTO. Why was that?

- Selection of Investigators and Contracting Process
 - Documents provided as a result of an access to information request reveal that Mr. Thomson was retained on a sole sourced contract. Was a sole-sourced contract justified in this situation?
 - Documents obtained via FOI show that Mr. Thomson resides in Ganonoque, and his travel expenses were covered by SLASTO. Were there no qualified lawyers in Toronto that could have been used to avoid the travel costs?
 - Documents obtained via FOI show that Mr. Thomson (and it seems Ms. Cohl who was subcontracted by Mr. Thomson) were paid at a rate of \$2200 per day. Is this an appropriate fee for this sort of work?
 - Was Ms. Cohl retained on a sole sourced basis as well, and if yes, was that justified in this situation?
 - From the documents revealed through the FOI process, it appears that there was no contract issued, just letters/e-mails that refers to a retainer. Is it appropriate that there was no contract, if this is indeed the case?