Public Complaint Investigation
Re: Ferenc and Ferland v. Tarion Warranty Corporation and Polmat Group Inc.

FINAL REPORT

August 3, 2016

To: Linda Lamoureux
Executive Chair
Safety, Licensing Appeals and Standards Tribunals Ontario (SLASTO)

By: George Thomson and Karen Cohl
Investigators

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1. Overview

This is the report of our investigation of a complaint about the conduct of an adjudicator and the management of audio recordings during an appeal to the Licence Appeal Tribunal (LAT). LAT is part of a cluster of tribunals known as the Safety, Licensing Appeals and Standards Tribunals Ontario (SLASTO).

The complainants – Dr. Aleksandra Ferenc and Mr. Jeffrey Ferland – are homeowners who launched the appeal and represented themselves during the hearing. Their appeal related to decisions made by Tarion Warranty Corporation (Tarion), the organization responsible for administering the *Ontario New Home Warranties Plan Act*.

We have made findings and drawn conclusions throughout this report to help the Tribunal to learn from what turned out to be an acrimonious and lengthy process.

Conduct of the Adjudicator

The conduct of the presiding adjudicator, Patricia Cassidy, must be viewed in the context of an atypical and challenging case. In hindsight, there were things she could have done to maintain control of a hearing that had spun out of control. There were times when she missed an opportunity, added fuel to the fire, or failed to conceal her frustration about how long the appeal was taking and the complainants' failure to accept her guidance, directions and rulings. At the same time, we noted many instances where she made best efforts to move the hearing along and to provide explanations to assist the complainants, using techniques that had proven effective with self-represented parties in other cases.

We used the SLASTO Code of Conduct as a guide in assessing Ms. Cassidy's conduct. On balance, we did not find her pattern of behaviour, or any individual incident, to be a breach of the standards in the Code or to constitute bullying or abusive behaviour as asserted by Dr. Ferenc and Mr. Ferland. 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.

Unrecorded Portion of the Hearing

A contentious portion of the hearing was not recorded because Ms. Cassidy forgot to restart the recording device after the lunch recess on November 27, 2014. 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 before and after each break. LAT personnel, including Ms. Cassidy, became aware of the error almost immediately but failed to communicate promptly, transparently and consistently about it to the parties. This contributed to Dr. Ferenc and Mr. Ferland's suspicions and lack of confidence in the process.

During the hearing and in the background section of an order issued on December 8, 2014, Ms. Cassidy gave her recollection of something that Mr. Ferland had said during the unrecorded segment and noted that his story had later changed. It is not within our scope to comment on her legal judgement about the necessity of including such things in a formal, written order. We can say, however, that 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.

Ideas for the Future

In Part 6 of this report we consider ideas for the future, including ideas suggested by people we interviewed during the investigation. We recognize that there could be some risk in implementing policy changes on the basis of what was in many respects an atypical case. Nonetheless, we encourage the Tribunal to carefully consider our recommendations about working with self-represented parties, managing complex cases, and the recording of hearings. Above all, we believe there is a need to revisit the process for homeowner appeals to ensure it meets one of the fundamental goals of administrative tribunals: providing a fair and accessible alternative to formal and expensive court processes.

Conclusion

Dr. Ferenc and Mr. Ferland's appeal was a difficult process for all involved. The more we investigated, the more we appreciated the toll it had taken on many of the participants. We hope that what we have learned from this case will contribute to positive changes that reduce the risk of such a lengthy and acrimonious hearing occurring in the future.

1.1 Summary of recommendations

Working with Self-Represented Parties

It is common for homeowners to be self-represented in appeals of Tarion decisions that disallowed their claims. We recommend that SLASTO:

1. Place a high priority on skills-based training for adjudicators and staff involved in homeowner appeals to learn about and practise the skills required to manage cases involving self-represented parties. The training should include skills for dealing with the power imbalance when one or more parties are represented by lawyers and others are not. It should draw on work of the National Judicial Institute and the Society of Ontario Adjudicators and Regulators.
2. Expand efforts to develop practical, understandable and accessible materials for self-represented parties to prepare and present their cases before the Tribunal. The materials should be available in both digital and hardcopy formats. In developing the materials, it would be helpful to consult with the Canadian Self-Represented Litigants Project led by the Faculty of Law at the University of Windsor.
3. Develop templates, model opening remarks, checklists and other materials for adjudicators to ensure they are well prepared to assist self-represented parties.

Managing Complex Cases

Homeowner appeals come with varying degrees of complexity. The Tribunal needs to be better prepared to manage complex cases and the challenges that they bring. During the investigation, we learned that LAT leadership and the Executive Chair of SLASTO have considered ways to improve the

management of homeowner appeals, although many of the strategies have not been formally implemented. We recommend that SLASTO:

4. Review the process for homeowner appeals and implement strategies to address all stages of the process, including clear roles for managers, staff and adjudicators. The plan should include:
    - Early identification of complex cases and strategies to manage them effectively, without compromising the independence of adjudicators who may ultimately preside over the hearings;
    - Dedicated staff and multi-member panels for complex cases;
    - A focus on settling cases through pre-hearing conferences and, where settlement is not possible, finding creative and acceptable ways to limit the length of the hearing; and
    - Changes that will make hearings less formal and legalistic.

Recording of LAT Hearings

We have been advised that SLASTO management is considering stopping its practice of recording hearings for tribunals with no statutory requirement to record them. They believe it would be sufficient for parties to make their own audio or video recording, if desired, as long as the parties obtain an adjudicator's approval and abide by conditions the adjudicator sets. While this would resolve the problem of adjudicators failing to record the full hearing, care must be taken to ensure that the policy achieves its objective without introducing new problems. We are concerned, for example, that the policy as currently envisaged could place an undue burden on parties wishing to make their own recordings. We recommend that SLASTO:

5. Consult with stakeholders before implementing changes in recording practices.
6. Review the experience of other tribunals that do not record hearings, especially tribunals resolving disputes with high-stakes personal impact on self-represented persons.
7. Ensure that the process for requesting and making recordings is not overly legalistic or onerous for the parties.
8. Establish as a principle that requests from a party to record hearings will typically be granted. Structure the discretion of adjudicators by developing a standard order, along with criteria for departing from the standard.

2. The Investigation

2.1 Background

Dr. Aleksandra Ferenc and her husband, Mr. Jeffrey Ferland, filed an appeal to LAT. The purpose of the appeal was to dispute decisions made by Tarion about the new home they had purchased from Polmat Group Inc. Based on their experience at LAT, Dr. Ferenc and Mr. Ferland formally complained under

SLASTO's Public Complaints Policy. SLASTO retained us (George Thomson and Karen Cohl) to conduct an independent investigation of the complaint and to provide a report to SLASTO's Executive Chair, Linda Lamoureux.

Although the complaint was first made on January 29, 2015, we were advised by SLASTO that our investigation could not begin until Dr. Ferenc and Mr. Ferland's appeal ended. That occurred on March 1, 2016 with a final decision denying all parties' requests for costs. This report concludes our investigation.

2.2 Scope

Following our review of materials provided by the two complainants, and a preliminary discussion with them, we identified three issues for the investigation:

1. **The conduct of the Adjudicator; specifically, did her conduct meet the standards set out in the SLASTO Code of Conduct?**
   Dr. Ferenc and Mr. Ferland allege that Ms. Cassidy, the presiding adjudicator, did not show due respect for them, given their situation as self-represented parties, with both of the other parties represented by counsel. More specifically, the complainants assert that she exhibited bullying or abusive behaviour during the hearing, did not provide adequate explanations and guidance, and demonstrated preferential treatment toward the parties represented by lawyers. They assert that this was traumatic for them in light of the issues at stake and the length of the process.

2. **Management of the recordings of the hearing; specifically, why were some portions of the hearing not recorded or made available to the complainants?**
   Dr. Ferenc and Mr. Ferland allege that the recording of a significant part of the hearing, to which Ms. Cassidy made reference in one of her decisions, has not been made available and the reasons for that have not been adequately explained. More specifically, they question the role of the adjudicator, tribunal staff and LAT leadership in creating a situation in which there is no recording or transcript of this part of the hearing. This includes questions about whether the recording process met LAT procedural standards and whether the adjudicator and LAT staff responded appropriately once it became known to them that portions of the proceedings had not been recorded.

3. **In light of the findings in relation to the first two issues, what recommendations should be made to SLASTO for the management and conduct of future proceedings before LAT?**
   Specifically, should there be changes in the way the Tribunal deals with such matters as the recording of proceedings and the management of cases involving self-represented parties in Tarion appeals?

The Public Complaints Policy is intended to address complaints about the quality of service related to SLASTO practices or the conduct of its members or staff. It is not an opportunity to deal with dissatisfaction with the outcome of a tribunal's decision. Accordingly, our investigation could not

consider the appropriateness or legality of Ms. Cassidy's rulings, decisions and orders, whether she was biased in law, or the conduct of anyone who is not a member or staff of the Tribunal.

2.3 Methodology

Interviews

We conducted confidential interviews with the complainants, the presiding adjudicator, a Tarion representative, LAT officials with direct knowledge of the case, and members of the public who observed some of the hearings. In total we interviewed 18 individuals. Interview participants were assured that we would not attribute comments to them unless they asked or agreed for that to occur. The interviews were held in person, with the exception of one person who preferred to answer the questions in writing. Later in the investigation we conducted follow-up interviews with the complainants and the presiding adjudicator, which were conducted by telephone.

We were impressed by how helpful, cooperative and forthcoming people were in their interviews. We recognize that this was a difficult experience for many of them as it required them to relive what had been a painful process.

Review of Materials

We reviewed materials relating to the LAT hearing that were relevant to the complaint; a written submission and other items that the complainants gave us; and relevant policies regarding adjudicator conduct, self-represented litigants, and audio recordings. We also reviewed selected literature on best practices from other tribunals and jurisdictions. We would like to acknowledge the excellent assistance provided by Kathryn Chung, legal counsel with SLASTO, who conducted research at our request and served as our main point of contact with the organization. We are also grateful to LAT staff, the complainants, and others who provided us with data and documents from their files. These materials were of great assistance to the investigation.

Review of Audio Recordings and Transcripts

Because there were 26 days of hearing, it was not feasible to listen to the audio recordings in their entirety. Instead we reviewed selected portions of recordings and available transcripts that were referred to us by the complainants and others to the extent that this could be managed within the time available for the investigation. However, we did listen to many hours of the hearing spread over the full process. In total, we listened to or read transcripts from 15 days of hearing, in whole or in part.

Analysis

We analysed information obtained from all of the above sources in order to make findings, develop recommendations, and prepare this report.

3. The Appeal

3.1 Chronology

We offer the following brief chronology of Dr. Ferenc and Mr. Ferland's appeal to LAT as a frame of reference for issues discussed later in this report. This is not intended to be a comprehensive summary of the case but it should give the reader a sense of some of the key events and timelines.

Dec 20, **2013**	Tarion issues a decision letter dealing with multiple claims regarding Dr. Ferenc and Mr. Ferland's home which was built by Polmat Group Inc.

Prior to the Hearing (8 months)

Jan 10, **2014**	Dr. Ferenc and Mr. Ferland file an appeal of Tarion's decision to LAT under the *Ontario New Homes Warranties Plan Act*.
Feb 21	A prehearing is held before LAT adjudicator Terrence Sweeney, at which all parties (Dr. Ferenc and Mr. Ferland, Tarion, and the builder) are represented by counsel.
Feb 26	Mr. Sweeney's pre-hearing order is issued. It says that a second pre-hearing is necessary to narrow the issues.
March 25	Mr. Sweeney presides over a motion regarding flooring and scratch coat. The motion is withdrawn so no order is issued.
May 14	A second pre-hearing is held before LAT adjudicator D. Gregory Flude. Dr. Ferenc and Mr. Ferland are self-represented here and for the remainder of the proceedings.
May 21	Mr. Flude's pre-hearing order is issued. It requires Tarion to issue a decision letter relating to the substitution of selected tiled flooring. Three days of hearing are set for Sept 3, 4 and 5.
May 28	As required by Mr. Flude's order, Tarion issues its second decision letter to deal with the flooring, which becomes part of the appeal.
July 14	LAT adjudicator Patricia McQuaid issues an order on Dr. Ferenc and Mr. Ferland's motion to resolve the flooring item before the hearing, to exclude certain reports, and to produce further documents. The order adjourns the motion to the start of the hearing, set to begin on Sept 3.
Aug 29	Presiding member Patricia Cassidy hears a motion via teleconference to deal with Tarion's motion to adjourn the start of hearing/preliminary motions from Sept 3 to Sept 5.

Sept 2	Ms. Cassidy issues an order granting the adjournment and requiring Tarion to pay costs to Dr. Ferenc and Mr. Ferland.
Sept 5	Ms. Cassidy hears preliminary motions.
Sept 9	Ms. Cassidy issues an order on six preliminary motions.

Hearing (26 hearing days over 8 months[1])

Sept 23, 25	Preliminary motions are concluded. Hearing begins on the merits of the appeal relating to the outstanding claims.
Sept 30	Ms. Cassidy issues an order on two further preliminary motions.
Oct 8, 20, 21, 22, 23	The hearing continues.
Nov 24	A mediation session is held with LAT adjudicator Kenneth Koprowski but the case does not settle.
Nov 26, 27, 28	The hearing continues. On November 27, a portion of the hearing is not recorded.
Dec 8	Ms. Cassidy issues her first decision regarding bias in response to the complainants' statements about feeling bullied in the hearing room.
Jan 8, **2015**	The hearing continues. Dr. Ferenc and Mr. Ferland rest their case.
March 17	Ms. Cassidy issues her second decision regarding bias in response to a motion by Dr. Ferenc and Mr. Ferland.
March 18, 19, 23, 24, 25	The hearing continues. Tarion calls its first witness on March 18.
Apr 1, 2, 7	The hearing continues.
April 8	Ms. Cassidy issues her third decision regarding bias in response to a motion by Dr. Ferenc and Mr. Ferland. This order includes costs against them. Ms. Cassidy also issues an order rejecting costs against Tarion.
April 9, 10, 13, 14	The hearing continues. On April 10, Ms. Cassidy issues an order regarding the use of recordings and transcripts.
May 6, 7, 8	The hearing continues to its conclusion.

Decisions on Merits and Costs (9 months)

June – Sept	The parties await Ms. Cassidy's decision on the appeal.

[1] The 26 days of hearing do not include the day of mediation with Mr. Koprowski on November 24, 2014.

Sept 17	Ms. Cassidy issues her reasons for decision and order on the merits of the appeal. Dr. Ferenc and Mr. Ferland are awarded $3,500 + HST for a window that was not installed as provided in the contract. No award is made for breach of warranty for substitution of tile as the floor built was found not to be inferior to the floor requested. The decision does not address costs.
Nov 27	The parties learn that Ms. Cassidy has withdrawn from the case and will not be dealing with their requests for costs.
Dec 10	The parties learn that another adjudicator, Katie Osborne, has been assigned to adjudicate their requests for costs.
Jan 22, **2016**	Ms. Osborne dismisses Dr. Ferenc and Mr. Ferland's request to delay the costs proceeding until after the completion of our investigation of their complaint.
March 1	Ms. Osborne issues an order denying all parties' requests for costs.

3.2 An atypical case

Before dealing with the specifics of the complaint, it is important to note that this was a unique Tarion appeal due to many features, such as the:

- volume of issues raised, motions filed, and documents submitted;
- length of time to complete the appeal;
- issues that were raised multiple times;
- number of LAT personnel involved;
- level of frustration and acrimony;
- high profile of the case; and
- competing perspectives.

Volume

The volume of claims, motions and documents was unusually high in this appeal. Here are just two examples: Tarion's two decision letters addressed 140 claims, approximately two thirds of which were the subject of the appeal. The parties brought over a dozen motions that had to be addressed before a hearing on the merits of the appeal could begin.

Length of Time

Appeals of Tarion decisions often conclude after one day of hearing. More complex appeals may require three days or more. A ten-day hearing would be considered exceptionally long. By contrast, Dr. Ferenc and Mr. Ferland's case involved 26 days of hearings over an eight month period. This was in addition to two pre-hearing conferences, various preliminary motions, a day of attempted mediation, and a post-hearing process to determine costs. The decision on the merits was released four months after the hearing concluded, and the costs order was released several months later. By all accounts, the time required for this Tarion appeal far exceeded that of any other.

Repeating Issues

A review of the materials and selected recordings demonstrates the extent to which issues were raised multiple times, covering ground addressed earlier in the hearing. On three separate occasions, Dr. Ferenc and Mr. Ferland alleged bias on the part of Ms. Cassidy, the presiding member, requiring her to issue three separate orders on that topic. There were almost daily discussions about whether issues raised were relevant, a witness was qualified to speak to a particular matter, or questioning covered ground that had already been canvassed with that witness.

Number of LAT Personnel Involved

Typically there are two LAT members involved in an appeal: one to conduct the pre-hearing conference and another to conduct the hearing. The complainant's appeal involved six members.

6 LAT Members	
Terrance Sweeney:	• 1st pre-hearing conference • subsequent pre-hearing motion
D. Gregory Flude:	• 2nd pre-hearing conference
Patricia McQuaid:	• pre-hearing motion
Patricia Cassidy:	• pre-hearing motion • preliminary motions • hearing and decision on merits
Kenneth Koprowski:	• mediation attempt
Katie Osborne:	• decision on costs

Typically, appeals in Toronto are heard by local adjudicators. In this case, the presiding adjudicator was brought in from Sudbury since experienced Toronto members had already been used for pre-hearings and motions. The appeal also involved multiple administrative staff brought in at various times to manage the file, deal with issues that arose, and address the many questions and concerns raised by Dr. Ferenc and Mr. Ferland by phone, email and in person.

Frustration and Acrimony

After listening to recordings from the hearing and interviewing individuals involved in the case, it is clear that there were unusually high levels of frustration among many of the participants. In an order that Ms. Cassidy made on April 9, 2015 regarding access to and use of recordings, she observed that "this has

been a long and acrimonious proceeding." This may be the one point on which all participants would agree.

The length of the case, the gaps between hearing dates, and the realization that the case was becoming the subject of discussion and criticism outside the hearing room exacerbated already strained relationships. All of the parties, including the adjudicator, demonstrated their unhappiness as the case dragged on, worn down by a hearing that seemed to go on forever. Not long after the hearing began, the builder abruptly left the hearing room, venting his frustration and evident distress.

The recording of the first time Ms. Cassidy interacted with the parties – a teleconference on August 29, 2014 – shows that the problems in this case were evident from the start. A summary of our observations from that recording is attached as an appendix to this report.

High Profile / Videos

Dr. Ferenc and Mr. Ferland created a series of videos about their experience in the appeal and made them available on the internet. LAT officials with whom we spoke could not recall another case in which parties took this approach. The videos resulted in the appeal becoming a high profile case among consumers with concerns about the Tarion program and the LAT appeal process. The filming also had an impact on LAT operations. Because the filming took place on LAT premises, some staff would wait until the filming was done before leaving the building so they would not inadvertently be filmed.

Competing Perspectives

Dr. Ferenc and Mr. Ferland came to the appeal with many complaints about the construction of their home, a strong belief that Tarion and the builder had not treated them fairly, an unwavering commitment to their positions, and a willingness to invest whatever time it took to demonstrate the merits of their case. From their perspective, the LAT process, the lawyers' familiarity with the process and rules of evidence, and the adjudicator's reaction to their objections and lengthy testimony and cross-examination, were all impediments that reflected an unfair adjudicator and a process that was stacked against them.

For the adjudicator and the lawyers, Dr. Ferenc and Mr. Ferland's behaviour represented an unwillingness to accept rulings from the adjudicator and her attempts to expedite the process. For them the problem became apparent early on when the complainants repeatedly objected to Ms. Cassidy's decision about whether subpoenaed witnesses had to appear for preliminary motions[2] and when she made a routine order to exclude witnesses from observing the hearing until after their evidence had been completed.[3]

[2] Motion heard by teleconference, Aug 29, 2014
[3] Hearing of preliminary motions, Sept 5, 2014

3.3 A typical case

We do not mean to suggest that the appeal was atypical in all respects. It was typical in the sense that it involved self-represented homeowners for whom the experience took an emotional toll. It was also typical in that the hearing was legalistic and adversarial, though perhaps more so than usual.

Self-Represented Homeowners

Approximately one-fifth of appeals of Tarion decisions go to a full hearing, with the remainder resolved or withdrawn through other means. Of cases that go to a hearing, the homeowners often represent themselves while Tarion, and in some cases the builders, are represented by lawyers, as was the case in this appeal. This creates a power imbalance that affects self-represented parties' perception of the fairness of the proceeding. It can also cause frustration for lawyers and adjudicators when a self-represented party does not easily adapt to the protocols expected of parties in a formal, legalistic proceeding.

Emotional Context

Many people we interviewed spoke about the highly emotional context for Tarion appeals. In particular, such cases take a personal toll on appellants who are dissatisfied with work that relates to their home, which is often the largest and most personal expenditure they will ever make.

Legalistic, Adversarial Proceedings

Homeowner appeals of Tarion decisions, once they reach the hearing stage, tend to be legalistic and adversarial and this appeal was no exception. There were many formal motions and submissions, extensive cross-examination of witnesses, objections to evidence and testimony, references to case law, and rulings on legal and technical issues. Interestingly, both the lawyers and the self-represented parties eventually adapted to what became a highly adversarial process. Dr. Ferenc and Mr. Ferland learned to use the kinds of objections raised by counsel but had only a partial knowledge of when those objections were appropriate. In our view, they adapted to the adversarial environment in ways that often made it more adversarial.

We were struck by how far, at least in this case, the adjudicative process in administrative tribunals appears to have moved away from the informal, accessible process it was intended to provide. This was perhaps inevitable due to the features that made this a unique case. We come away from the investigation with the view that much more needs to be done to return to the goal of achieving resolution through less formal, adversarial and court-like processes.

4. Conduct of the Adjudicator

4.1 Code of Conduct

In assessing the conduct of the presiding adjudicator, we have been guided by standards set out in SLASTO's Code of Conduct.[4] The introduction to the Code states:

> *This Code of Conduct sets out the standards of conduct governing the professional and ethical responsibilities of Members of the Safety, Licensing Appeals and Standards Tribunals Ontario…..This Code of Conduct addresses the principles of good conduct, collegial responsibility and personal conduct. Members are responsible for applying an appropriate standard of conduct and acting in an ethical and professional manner.*

The Code in essence performs two roles. As with principles that exist for judges, it is designed to assist adjudicators with the difficult ethical and professional issues that confront them. It also helps the public to know the behaviour they should expect from adjudicators. As such, the Code serves as an accountability framework for members by providing a set of standards against which their conduct can be assessed. It is in this sense that the Code is relevant to our investigation.

We have excerpted four standards as those against which the complaints about Ms. Cassidy's conduct can be assessed. We have numbered the standards and added headings for ease of reference.

Standards Of Adjudicator Conduct

EXCERPTS FROM SLASTO CODE OF CONDUCT

Dignity and respect

1. Members should treat each person with dignity and respect and in a manner that builds trust.

Guidance to self-represented parties

2. Members should conduct dispute resolution proceedings and investigations such that those who interact with the tribunals understand procedures and practices and can participate equally, whether or not they are represented.

Fairness

3. Members should treat those who appear before the tribunals and/or participate in any tribunal process fairly, without discrimination or favouritism.

Timely Proceedings

4. Members should take all reasonable steps to ensure that proceedings are concluded in a timely manner, avoiding unnecessary delays and cancellations of proceedings.

[4] SLASTO is required by section 7 of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* to have a code of conduct in place for members of its tribunals.

When would a person's conduct justify a finding that the Code has been violated? All adjudicators (and judges) will demonstrate their fallibility and at times say or do something that could be seen as failing to meet a standard. In a case as lengthy as this one, the likelihood is that much greater.

A single, isolated incident (such as an illegal act or exploiting one's position as a member) may be enough to support a finding that the Code has been breached. Further, a person's pattern of behaviour as a whole may collectively amount to misconduct. In our investigation, we considered whether any individual act on its own – or the adjudicator's pattern of behaviour as a whole – fell below the standards or represented a deliberate disregard for them.

On balance, we did not find Ms. Cassidy's behaviour to be a breach of the standards in the Code or to constitute bullying or abusive behaviour as asserted by Dr. Ferenc and Mr. Ferland. This becomes even clearer when you take into account the length of the proceedings and the fact that Ms. Cassidy faced the daunting task of managing a complex matter with exceptionally determined appellants.

In reaching this conclusion, we considered the specific allegations made by Dr. Ferenc and Mr. Ferland, in relation to the relevant standards in the Code of Conduct. We turn to those now.

4.2 Standard #1: Dignity and respect

If Ms. Cassidy exhibited behaviour that could be characterized as bullying or abusive, as asserted by the complainants, her conduct would not comply with Standard #1 which requires tribunal members to treat each person with dignity and respect. A common feature of bullies is that they are habitually cruel to others who are weaker. Bullying can be physical (using physical force to get what you want), verbal (name calling or other verbal attacks), or social (excluding, ignoring or spreading rumours about someone).

The complainants raised the allegation of bullying on November 27, 2014 during a long period of cross-examination of Mr. Ferland. We carefully reviewed the recording of that day's proceedings and compared it to the day before. Mr. Ferland was a careful witness who resisted answering even straightforward questions until he was sure of what was being asked and often why it was being asked. Both Tarion counsel and the adjudicator found this approach to be frustrating. On the 26th Ms. Cassidy patiently tried many times to explain to Mr. Ferland his obligation to answer counsel's questions.

She was more forceful and direct in her approach on the following day in an apparent attempt to speed up the process. She was much firmer and openly demonstrated her frustration at how long it was taking to deal with what seemed to be minor matters. We heard nothing, however, that would put her in the category of a bully or abuser. When she imposed rulings on the parties, she was exercising her duty as a statutory decision maker. For the most part, she was trying to maintain control of a difficult hearing with appellants who frequently challenged her decisions and seemed unwilling to follow her directions as the presiding member.

After listening to other days of evidence and hearing from persons who attended portions of the hearing, we did find that there were occasions throughout the hearing when Ms. Cassidy appeared to have lost her patience, raised her voice or demonstrated her unhappiness in non-verbal ways. While not condoning this behaviour, we do not believe it amounts to a breach of the standard.

We have tried to understand the impact of the adjudicator's actions from Dr. Ferenc and Mr. Ferland's perspective. We can certainly understand how the process was intimidating for them as self-represented parties. They had the legal burden of proof in a highly technical matter and were facing the expert legal teams of Tarion and the builder, both of whom took formal, legalistic and sometimes aggressive approaches. 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.

Interestingly, in this appeal the complainants were not the only persons to feel that they had been the victims of bullying behaviour, and the complainants felt that they had been bullied by others in addition to the adjudicator. On November 27, 2014, Mr. Ferland mentioned that he and his wife felt bullied by legal counsel. For their part, the respondent (Tarion), as noted in the costs order by adjudicator Katie Osborne, felt that the complainants' conduct included "bullying and threatening of the respondent's witnesses". Further, certain LAT staff members felt intimidated or harassed by one or both of the complainants. We raise this only to illustrate how frayed relationships became in a difficult hearing and how there is no single person on whom to lay the blame.

4.3 Standard #2: Guidance to self-represented parties

Did Ms. Cassidy provide adequate explanations and guidance to the self-represented parties, as required in Standard #2? In the audio recordings and transcripts that we reviewed, we found many instances of Ms. Cassidy providing detailed explanations and guidance to Dr. Ferenc and Mr. Ferland. Accordingly, we believe that her conduct did not fall short of this standard. At the same time, the Tribunal can do more to help self-represented parties and to support adjudicators in their important task of guiding and assisting them in homeowner appeals. We return to this later in this report.

4.4 Standard #3: Fairness

Did Ms. Cassidy demonstrate preferential treatment toward the parties represented by lawyers, as asserted by Dr. Ferenc and Mr. Ferland, and therefore show favouritism within the meaning of Standard #3?

When one party is represented and others are not, it is reasonable to expect that lawyers for the represented parties are better able to raise valid objections and rely on the rules that apply to tribunal hearings. That occurred in this case. We can therefore understand why Dr. Ferenc and Mr. Ferland would feel that the process was stacked against them and one where the lawyers had an unfair advantage. We noted several points where Ms. Cassidy was frustrated by the complainants' tendency to repeat objections to evidence, even after they had been denied. The question is whether this is a sign of

favouritism or simply a perception that can arise when self-represented parties are attempting to adapt to a process that is both complex and confusing.

From the recordings one can sense the power imbalance and the complainants' frustration when their attempts to use grounds for objecting to evidence, that worked well for the lawyers, were unsuccessful because of an inability to fully understand the evidentiary rules. We cannot conclude, however, that there was favouritism toward the represented parties in breach of standard #3.

Prior to the first in-person hearing in September 2014, Tribunal staff mentioned to Ms. Cassidy that they had experienced some difficulties with the complainants. We raise this not because we found any evidence that this affected the way she approached the hearing. However, we will be recommending that the Tribunal implement a process for managing cases that appear to be complex or challenging. It will be important that this be done in a way that does not raise the possibility that an adjudicator assigned to the case will prejudge an issue or a party.

4.5 Standard #4: Timely proceedings

Most LAT hearings for appeals of Tarion decisions take about one day. A three-day hearing is considered to be long and a ten-day hearing is exceptionally long. The 26 days of hearing in the complainants' appeal is well beyond anything LAT has experienced. Dr. Ferenc and Mr. Ferland assert that the length of the process contributed to the trauma they experienced. This raises the question of whether Ms. Cassidy took reasonable steps to ensure that the hearing was concluded in a timely manner in keeping with Standard #4.

Based on our review of recordings and transcripts, it was evident that the challenges that made this an exceptionally long hearing were present from the beginning of the hearing. Initially, Ms. Cassidy tried various techniques to try to manage the process and limit the length of time it would take to complete it. This included setting multiple hearing dates early on, making adjourned dates peremptory (mandatory), and trying to restrict testimony and cross-examination to what was relevant and not repetitive. At one point, she adjourned the hearing so that the parties could engage in mediation in an attempt to resolve the matter. Mediation took place on November 24, 2014, with another adjudicator, but was unsuccessful.

The steps that Ms. Cassidy took had served her well in other cases involving self-represented parties, whether at the Tribunal or as a judge in Small Claims Court, but they did not work in this appeal. It is difficult to say with assurance what other strategies might have worked to complete this case more quickly. As one example, Ms. Cassidy missed an early opportunity to set clear ground rules for the hearing and to establish her expectations of all parties. In opening remarks, she could have explained that parties would be given the opportunity to vigorously put forward their views up until the time that the adjudicator made a ruling or provided direction on an issue. By allowing Dr. Ferenc and Mr. Ferland to challenge her rulings repeatedly, she created the impression that this was something they were entitled to do.

On the afternoon of November 27, 2014, relationships that were strained from the start grew worse and a pattern of dysfunctional behaviour continued to the end of the hearing. The lawyers pressed Mr. Ferland at length to agree with points they saw as obvious and suggested that his failure to agree would greatly lengthen the hearing. The complainants, feeling they were the victims of aggressive behaviour by the other parties, expressed their determination to fight back. As Dr. Ferenc said that day, "We're not going to wear kid gloves if other people aren't wearing kid gloves." For her part, Ms. Cassidy was now facing allegations of bias. While unhappy with how the case was unfolding, and visibly frustrated, she seemed increasingly to convey a sense that there was not much that could be done to shorten the case in light of the dynamics that had developed.

The responsibility for expediting an appeal does not rest solely on the adjudicator who presides over the hearing. There was little evidence that the pre-hearings and preliminary motions before other adjudicators had done much to focus the parties, narrow the issues or create an environment that allowed whatever adjustments were required to make this a shorter proceeding.

In the final costs decision, adjudicator Katie Osborne noted that "the conduct of the Appellants contributed to the difficulties and the length of the hearing."[5] In some respects this is understandable. As noted in a report of the Ombudsman of Saskatchewan entitled *Practice Essentials for Administrative Tribunals*, "Keep in mind that self-represented parties in particular may cause process delays because they may not fully understand what they are required to do."[6] Our investigation revealed the challenges in a hearing when the adjudicator and lawyers are legally trained and comfortable with the formal tribunal process, while other parties are self-represented and reluctant to accept procedures or rulings that limit their ability to present their case.

In summary, this case took much too long. There were many reasons for this and we are unable to say with assurance that there were other approaches that could have appreciably shortened it, given all of the factors that made it a unique proceeding. In light of Ms. Cassidy's best efforts to expedite the hearing, we do not find that she breached Standard #4 in respect of timely proceedings.

4.6 Conclusion: Adjudicator conduct

We do not find any of Ms. Cassidy's actions, or her overall conduct, to have breached the SLASTO Code of Conduct. She was faced with a uniquely challenging appeal and a process that was difficult to control, in part because of dysfunctional relationships that developed among the participants. There were times when she failed to conceal her frustration about how long the appeal was taking and with Dr. Ferenc and Mr. Ferland's failure to accept her guidance, directions and rulings. That is evident at some of the more difficult moments in the hearing, which she herself sincerely regrets. She also missed opportunities early on to set and reinforce expectations on the parties. At the same time, she made best efforts to move the case along and to explain the process to the self-represented parties.

[5] At paragraph 41
[6] At page 25

5. Unrecorded Portion of the Hearing – November 27, 2014

5.1 Sequence of events

Dr. Ferenc and Mr. Ferland alleged that the recording of a significant point in the hearing, just after the noon recess on November 27, 2014, was not available and the reasons for that have not been adequately explained. In fact, no recording was made of that portion of the hearing.[7] Here is our best sense of what happened after the hearing broke for lunch that day, and the approximate timing.

12:09: Hearing breaks for lunch.

12:45: Mr. Ferland tells a case management officer that he needs to speak with Associate Chair Gary Yee because he and his wife are feeling bullied by the adjudicator and opposing counsel. The acting operations manager consults with Mr. Yee and advises Mr. Ferland that it would be inappropriate for Mr. Yee to speak with him during the conduct of the hearing. He also advises Mr. Ferland that the request for a staff observer to audit the member's conduct in the hearing room will not be granted.

1:34: The adjudicator and counsel are in the hearing room but Dr. Ferenc and Mr. Ferland's whereabouts are unknown. A recess begins because they are not present.

Sometime between 1:36 and 2:10: Dr. Ferenc and Mr. Ferland return to the hearing room. Mr. Ferland explains what transpired during the lunch break. His explanation creates the impression in the adjudicator's mind that Mr. Ferland had spoken about the bullying concerns with the Associate Chair during the lunch break. The adjudicator leaves the hearing room and learns that Mr. Ferland's request to speak with the Associate Chair had not been granted. It occurs to her that she may not have restarted the recording before Mr. Ferland made his remarks in the hearing room after lunch.

2:10: The acting operations manager enters the hearing room and checks the computer that controls the recording. He realizes that the recording device was not operating during Mr. Ferland's remarks. He privately advises the adjudicator and other LAT personnel that this is the case.

2:20: The hearing and recording resume.

4:38: The hearing and recording end for the day.

[7] It appears that there may have been one or more other portions of the hearing that were not recorded. We have singled out the portion after the lunch break on November 27, 2014 because of the seriousness of the subject matter and the repercussions for the participants.

5.2 How did LAT officials respond to the unrecorded portion?

Complainants Discover the Problem

Although LAT officials, including Ms. Cassidy, knew almost immediately that a portion of the hearing was not recorded, the parties were not promptly advised. The complainants found out about the problem only after formally requesting a copy of the recording from November 27. The request was made because Mr. Ferland was bothered by Ms. Cassidy's characterization – in an order issued on December 8, 2014 – of what he had said during the unrecorded segment. He wanted to listen to the recording to verify what he had actually said. Upon obtaining the recording, Mr. Ferland realized that the relevant portion of the hearing was not there.

When the hearing resumed on January 8, 2015, Mr. Ferland raised the recording issue, as indicated in the transcript excerpt below.

> MR. FERLAND: I have requested the recordings from November 27, 2014, from the LAT. And I have noticed that there are…three times during the day on November 27 where the proceeding wasn't recorded….I know there was an issue we talked about, about whether I spoke personally to Mr. Yee or whether I had said I had….Well, anyways, it was bothering me a little bit when I got the ruling, and so I decided to get the tapes just to get some resolution for it, and when I did listen to the tapes, I noticed that whole section, we came back after the noon recess, was missing, and it didn't allow me to get that resolution.

Adjudicator's Response

In response to the above comment that Mr. Ferland made on January 8, 2015, Ms. Cassidy explained that the relevant portion of the hearing was unrecorded due to human error.

> MS. CASSIDY: Well, that is unfortunate and I can tell you that I am as disappointed as you. I can also tell you that I am not a trained court reporter. It is not something I have ever undertaken to do. And in most of my history, there is an independent person who is in control of the gadgets. I have a technical training in law, among other things. It is not my first profession. But being a court reporter has never been on my radar. Due to fiscal constraints that I have no control over, I am now told that it is my job to ensure that things are recorded. So, as often as not, I leave these proceedings and I don't pause the recording, and the recording goes on and on and on. And often, when I do pause the recording, I fail to start it up again when I come in. Now, I am trying very hard to do that, but I don't see that as my primary job. I do wish that there was a complete recording. Nobody wants that more than I, believe me.
>
> MR. FERLAND: I am glad to hear you say that.
>
> MS. CASSIDY: But, be that as it may, if there are sections that are missing, that is very unfortunate, but there is nothing I can do. I can't go back and record it.

In her order of March 17, 2015, Ms. Cassidy again provided an explanation for the lack of recording. This time, however, her explanation is somewhat different from the one she provided on January 8, 2015. Instead of saying the problem was human error she provided a more technical explanation to the effect that the hearing had not yet formally started. This explanation appears in the excerpt below from her order.

> It is, indeed, very unfortunate that there is not a complete recording of this proceeding to date. On November 27, 2014, immediately upon return from the lunch recess, the Appellant, J.F. referred to communications with the Associate Chair over the lunch break. The hearing had not formally resumed before he made that statement, and as such, the recording had not yet been started by the Presiding Member which is why the Appellant's statement was not recorded. Regardless of the exact words used by the Appellant, his statement raised sufficient concerns that the Tribunal immediately recessed, and then returned to deal with the possible bias concerns that were raised. Despite the Appellant's continuing concerns over this gap in the recording, he has not provided any basis for the Tribunal to consider this matter further.

In our view, Ms. Cassidy's original explanation was a more genuinely articulated reason for the unrecorded portion of the hearing, although the latter explanation may be technically accurate. Providing a subsequent and different explanation added to the complainants' mistrust in the Tribunal.

Responses from LAT Staff

Around 2:10 pm on November 27, 2014, the complainants noticed the acting operations manager enter the hearing room and use the computer that controlled the recordings. According to the acting operations manager's notes from February 26, 2015, Mr. Ferland repeatedly asked him what he did when he went into the room to look at the computer. He responded each time by saying that a response would be forthcoming, leaving Mr. Ferland to question whether he was covering up the truth. In a letter sent to the complainants on February 13, 2015, the LAT registrar stated that he could not address concerns regarding "any gaps or incompletions" regarding the November recordings "because the hearing in this matter is still ongoing."

It would have been better for LAT officials to have to have responded promptly and matter-of-factly to such inquiries.

Climate of Suspicion

During the first day of the hearing on September 23, 2014, Mr. Ferland referred to another Tarion appeal he knew about in which a complete audio recording was not available. Later, when learning that recordings were unavailable for portions of their appeal, the complainants suspected that "missing recordings" were a common occurrence, whether through deliberate action or inadvertence. Transparency by LAT officials, as soon as the recording error came to their attention, could have helped to dispel that notion.

5.3 Difference of opinion about what was said

We are concerned about the way in which Ms. Cassidy used Mr. Ferland's unrecorded statements. With the knowledge that this portion of the hearing was unrecorded, she summarized her recollection of what Mr. Ferland had said and included that recollection as background context in her order of December 8, 2014. Mr. Ferland disputed the way in which the adjudicator characterised what he had said. He was especially troubled by the assertion that he first said he had spoken to the Associate Chair and later acknowledged that this was not the case.

Mr. Ferland requested the recording from November 27, 2014 to confirm what he had said after the lunch break. He felt that his credibility had been undermined by an assertion that he had made a false statement and then recanted. To make matters worse, this assertion appeared in a formal order of the Tribunal.

According to the transcript, here is what Ms. Cassidy said on November 27, 2014:

> MS. CASSIDY: Okay, Mr. Ferland, I understood you to say that you had spoken with the chair, Gary Yee.
> MR. FERLAND: He was advised of it.
> MS. CASSIDY: Well, that's very different than what you said. I understood you to say that you had spoken with him, and that created a huge concern for me about bias, the fact that one party would have spoken to the chair and the other parties were not present, and consequently, I spoke with Mr. Yee, and he has confirmed for me that he has not spoken to you, has never spoken to you, that there have been no private or hidden conversations excluding the other parties. I just needed that to be stated on the record, given what was said prior to me recessing last. [emphasis added]

According to the transcript, here is what Ms. Cassidy said on November 28, 2014:

> MS. CASSIDY: Following the noon recess yesterday, Mr. Ferland advised that he had spoken to associate chair Gary Yee and in so doing he called into question the integrity of Mr. Yee as well as the entire process. I had no alternative at that point but to recess the hearing and satisfy myself and the other parties that Mr. Yee had not met privately with the appellants, nor held any private conversations with them. When I returned to the hearing room and put that on record, Mr. Ferland acknowledged that he had not, in fact, met with Mr. Yee and proceeded to attempt to explain his earlier comment. [emphasis added]

Here is the relevant text from Ms. Cassidy's order of December 8, 2014:

> Following the noon recess on Thursday November 27, 2014, prior to the continuation of his cross-examination, the Appellant J. F. advised the hearing that he had spoken to the Associate Chair of the Licence Appeal Tribunal over the noon recess and advised him that the Appellants

> felt they were being bullied. In so doing, the integrity of the Associate Chair, the entire Tribunal and its process was called into question. Consequently, the hearing was recessed. Upon resumption, the Presiding Member informed the parties, on the record, that she had satisfied herself that the Associate Chair had not had any meetings or conversations with either of the Appellants. The Appellant J.F. then acknowledged that neither he nor his spouse had actually met with or spoken with the Associate Chair, but that he had spoken to a Tribunal staff member and understood the Associate Chair had been advised by the staff member of his concerns. [emphasis added]

Without a recording, we will never know for certain exactly what Mr. Ferland said during the portion of the hearing when the recording device was not running. It is fair to conclude that Mr. Ferland wanted to speak with the Associate Chair, and had in fact filed a handwritten request to that effect on November 21, 2014, but that has no bearing on what Mr. Ferland said several days later.

The LAT officials to whom Ms. Cassidy spoke immediately afterwards recall her saying that Mr. Ferland had just said that he had spoken to Mr. Yee. So clearly this was what Ms. Cassidy had understood, even if it is not what Mr. Ferland had said or meant. We question, however, why she thought it necessary to indicate on the record a statement that would obviously upset one of the parties and which she knew could not be verified on a recording. While she was justifiably concerned to think that the Associate Chair had communicated with a party about a case in progress, that concern was alleviated within minutes after it arose.

The adjudicator's reliance on her view of what was said during the unrecorded portion of the hearing added "fuel to the fire" of an already difficult relationship, as discussed earlier in this report.

5.4 Conclusion: Unrecorded portion of the hearing

The post-lunch portion of the hearing on November 27, 2014 was not recorded because Ms. Cassidy forgot to restart the recording device after the recess. The failure to restart the recording device immediately after the break – especially when the proceeding had taken an unexpected and upsetting turn – was a human error that can be expected to occur from time to time in a system that requires the adjudicator to stop and start the recording several times during the course of the hearing. The lack of prompt and consistent responses from LAT officials was more serious than the original error and, unfortunately, contributed to the complainants' suspicions and lack of confidence in the process.

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.

6. Ideas for the future

Our investigation revealed areas for improvement in homeowner appeals in the following areas:

1. How LAT members and officials work with self-represented parties
2. Strategies to avoid lengthy hearings in complex cases and to promote early resolution
3. Recording of appeal hearings

In this part, we describe our understanding of LAT policies and practices in these three areas and consider ideas for the future, including those suggested by persons whom we interviewed during the investigation. We recognize that there could be some risk in implementing policy changes on the basis of what was in many respects an atypical case. Nonetheless, we encourage SLASTO to carefully consider the recommendations we have made about working with self-represented parties, the management of complex cases, and the recording of appeal hearings. Beyond that, we believe there is a need to revisit the appeal process as a whole to ensure it meets one of the fundamental goals of administrative tribunals: to provide a fair and accessible alternative to the more formal, legalistic and expensive Court process.

In February 2015, LAT convened discussions with management, adjudicators and staff to discuss strategies for handling homeowner appeals of Tarion decisions. The ideas generated in the discussion have not been formally implemented. This was a valuable first step but we believe it is important that the Tribunal move to concrete action in the three areas for reform that were identified over a year ago:

1) Tarion appeals team – a dedicated team of members with increased training focused on conducting pre-hearings and hearings with unrepresented appellants;

2) Proactive case management – a comprehensive and proactive approach to case management, scheduling and early resolution that will ensure faster and more focused ways to resolve Tarion appeals, and to ensure hearing readiness for the few appeals that go to a full hearing; and

3) Information for appellants – a communications and information plan that will provide Tarion appellants with more useful and accessible information to assist them in preparing for a Tarion appeal and to ensure the same expectations for all participants in the process.

The Executive Chair of SLASTO – who serves as Chair of LAT and the other tribunals – has expressed a clear commitment to early resolution of cases and finding ways to better support self-represented parties.

6.1 Working with self-represented parties

Training for Adjudicators and Staff

Training is vital for adjudicators and staff working with self-represented parties in homeowner appeals.

SLASTO and LAT do not have written policies on dealing with self-represented parties. However, LAT adjudicators and staff are provided with general training on administrative law practice and procedure, including the issue of dealing with self-represented parties. In addition, SLASTO training to new members includes "Conducting a Proceeding" and "Active Adjudication" – both of which touch upon issues regarding self-represented parties. Some members also attend the annual Conference of the Society of Ontario Adjudicators and Regulators (SOAR), which often include sessions on working with self-represented parties.

SLASTO also holds bi-annual professional development sessions at which internal and external speakers are invited to speak. The session offered March 2-3, 2015, while the complainants' appeal was under way, included "Working with Self-Represented Parties" and "Proactive Hearings & Scenarios".

On June 3, 2015, LAT held training for its adjudicators and staff on Tarion appeals. Part of this training focused on: "How can we have a better experience for self-represented appellants?" and "What are some of the unique features of these types of appeals that may cause some of the emotions and concerns that we often see?"

These are valuable measures but they fall short of what is needed, given the large number of self-represented parties in homeowner appeals of Tarion decisions. We believe that greater emphasis should be placed on training that prepares LAT officials – and adjudicators in particular – for working with self-represented parties.

SOAR offers a variety of training opportunities for adjudicators in administrative tribunals, including a five-day program to obtain a Certificate in Adjudication.[8] In that program, adjudicators learn strategies for running hearings fairly and efficiently, working through real-life scenarios and problems. One of the topics is "self-represented parties: facilitating effective participation without crossing the line."

The challenge of presiding in cases with self-represented parties extends to court proceedings as well. The National Judicial Institute is a Canadian organization that has become a leader in the design and delivery of education for judges. It has developed a national program focused on managing cases with self-represented litigants in family, civil and criminal cases. The program includes a focus on:

a. The context in which individuals choose to represent themselves (financial circumstances, disagreement with counsel, inability to find counsel, etc.), and the trends on self-representation in Canadian courts;
b. The psychology of the self-represented litigant – the stresses they might be under and how that stress might manifest itself in court, the best ways for judges to reduce or manage that stress in general and for specific types of vulnerability;
c. The judge's duty to assist – the legal requirements and the limits on intervention;

[8] This is a joint program of the Society of Ontario Adjudicators and Regulators (SOAR) and Osgoode Professional Development. Source: SOAR website.

d. Ethical issues including withdrawing or disqualifying oneself as a judge; and
e. Best practices in managing cases with self-represented litigants.

This program is skills-based. That is to say, for almost all the sessions, the judges work through scenarios and role plays to practise the skills being taught during the presentations, and receive feedback from trained facilitators. As an official from the National Judicial Institute told us, "This is crucial, as many of the issues involving self-represented litigants do not concern 'black letter law'. Rather, they require judges to think about their demeanor, tone, and need for patience and empathy."[9] To that end, the program pays attention to the frustration that might be felt by judges who are used to having lawyers appear on every case, and provides techniques for judges to use in managing their own responses to these cases.

The National Judicial Institute also addresses self-represented litigants in education programs for new federally and provincially appointed judges.

We include the above descriptions to demonstrate the scope and nature of the education necessary to truly prepare adjudicators for appeals with self-represented homeowners. People with actual experience as self-represented parties should be part of the design and delivery of the educational programming. The National Self Represented Litigants Project at the University of Windsor and Professor Julie Macfarlane would be a good resource in that regard.

For most people who are considering or actually filing an appeal with LAT, their contact is primarily with LAT staff. As with other adjudicative bodies, that experience can be vitally important and can have a significant impact on the actions, decisions and satisfaction of self-represented appellants. Therefore the training and support that staff receive on this topic should also be a priority.

Materials for Adjudicators

Adjudicators need access to materials such as templates, checklists, and suggested ways of explaining important concepts. The National Judicial Institute has a "bench book" for judges, first developed by the Canadian Judicial Council, which explains the case law and ethical principles governing cases with self-represented litigants. The book provides judges with suggested plain language wording for explaining the process to unrepresented litigants. In addition, the Institute has a collection of online resources available at any time to Canadian judges, including videos of litigants explaining their experiences in representing themselves, templates, and guides to publicly-available resources for self-represented litigants.

Setting Expectations

The complainants' case highlights the role adjudicators need to play in setting expectations and providing support. At the start of a hearing, they need to clearly state how the matter will proceed, the order in which things will occur, the roles of the adjudicators, parties and counsel, and the basic conduct

[9] Kate Kehoe, Managing Senior Advisor, Education Resources, National Judicial Institute

expected of the parties. Mid-way through, if a case appears to be going off the rails, the adjudicator can step back and refer to the expectations set out at the beginning.

SOAR has published "A Manual for Ontario Adjudicators". The Manual says, "Ideally, the method of how a tribunal opens its hearing should be standardized. Each member should be provided with a check-list of matters to address at the beginning of a hearing." In the absence of a checklist, the manual suggests topics that the presiding member should cover at the beginning of the hearing. For example, the presiding member should describe the hearing process and ask if anyone has questions about the tribunal's procedure.

Materials for Self-Represented Parties

An equally important priority is work to educate and assist appellants who are managing Tarion appeals without legal assistance.

Homeowner stakeholders have expressed concerns that Tarion hearings can be inaccessible or overly legalistic for self-represented homeowners who have the burden of proof and find themselves in a "two-against-one situation" in which Tarion and the builder are represented by lawyers. This is exacerbated by a perceived low success rate for homeowner appeals. LAT is aware of these concerns and, in response, has updated its website and begun posting its decisions online to provide more resources to the public.

The people we interviewed had suggestions about would would help self-represented parties to have a clear idea about what they need to do and what they can expect from the appeal process. One person suggested that an online video of a mock hearing, an approach adopted by other tribunals, would be an effective tool. Another suggested that self-represented parties be given kits on how to manage their case (including how to address the adjudicator and when to speak) and the limits of what LAT can do for them. Someone else suggested that LAT replace its formal hearing room set up – including the adjudicator's dais – with a round table to create a more informal and less intimidating atmosphere.

The National Self Represented Litigants Project would be a valuable resource when considering what needs to be available for self-represented parties, based on experience with an ever-growing inventory of approaches used by courts and other tribunals.

The Adjudicative Process

It is hard to review such a lengthy proceeding without coming away with serious concern about how legalistic, court-like and adversarial the adjudicative process at LAT and many other tribunals has become. One of us is a former Provincial Court Judge and we both have worked extensively with judges and Canadian courts. We were surprised by the degree of formality and rigidity we observed in the process to resolve homeowner appeals, especially since the tribunal system was set up to avoid costly, adversarial and complex court procedures.

We have been told that SLASTO is looking at ways to make proceedings in its tribunals simpler, friendlier to self-represented parties, and more creative at all stages of the process, without damaging the fundamental principles that should guide all adjudicative processes. This is an important task that can help to restore the initial promise that lay behind the creation of an alternative system of justice.

Recommendations: Working with self-represented parties

We recommend that SLASTO:

1. Place a high priority on skills-based training for adjudicators and staff involved in homeowner appeals to learn about and practise the skills required to manage cases involving self-represented parties. The training should include skills for dealing with the power imbalance when one or more parties are represented by lawyers and others are not. It should draw on work of the National Judicial Institute and the Society of Ontario Adjudicators and Regulators.
2. Expand efforts to develop practical, understandable and accessible materials for self-represented parties to prepare and present their cases before the Tribunal. The materials should be available in both digital and hardcopy formats. In developing the materials, it would be helpful to consult with the Canadian Self-Represented Litigants Project led by the Faculty of Law at the University of Windsor.
3. Develop templates, model opening remarks, checklists and other materials for adjudicators to ensure they are well prepared to assist self-represented parties.

6.2 Managing complex cases

A Focus on Early Resolution

It is in everyone's interest to resolve cases early without the necessity of a hearing. This is a focus of case conferences (formerly called pre-hearings), where LAT adjudicators try to facilitate settlements among the parties.

Tarion receives thousands of complaint forms[10] each year, a small fraction of which result in appeals to LAT. Over the past several years, LAT received an average of 93 appeals per year from Tarion decisions. Approximately one fifth of the appeals proceeded to a full hearing and the remaining were resolved without a hearing. In some cases the appellants withdrew, presumably after an offer from Tarion or the builder. In other cases, there was a formal settlement.

Average Caseload Statistics *2011-12 to 2015-16 Fiscal Years*	
LAT Appeals Opened (all matters)	680 per year
Tarion Claims Opened	93 per year
Tarion Claims - Hearings Held (with Decision Issued)	18 per year

[10] Tarion's 2014 Annual report reveals average receipt of 26,000 30-day forms and 22,500 year-end forms per year over a four-year period.

We have not conducted an in-depth analysis of these statistics. The fact that a small number of Tarion claims are appealed to LAT, of which only one fifth go to a hearing, could be an indication of success in early resolution. Or it could be an indication that homeowners avoid appeals or choose to settle because they believe that a hearing will be difficult, painful and unlikely to produce what they would see as a fair outcome. This perception is reinforced by the fact that homeowners are not often successful once cases go to a hearing. Based on the case we investigated, we are concerned that the settlement process is not working as effectively as it could in producing amicable settlements or preparing cases well for hearing.

LAT management, case management officers, and adjudicators all have roles to play in ensuring that appeals are resolved within reasonable timelines. We have been advised that a SLASTO priority is to develop a more effective pre-hearing process that is easy to use, respects and supports the homeowner appellants and places major emphasis on finding solutions that are acceptable to the parties. We agree with this objective. The Tribunal can do more at the early stage of homeowner appeals to focus the hearing on the most important matters and to find less time-consuming ways to put the relevant evidence before the adjudicator.

Complex Cases

The appeal at issue in our investigation was complex in many respects, including the large number of claims. We received a few suggestions from interview respondents about how to manage complex Tarion appeals.

One suggestion was to appoint a panel of adjudicators (as opposed to a single adjudicator) to preside over Tarion hearings that involve a higher than average number of items or issues of greater complexity. This would bring to bear more expertise for managing the case and would enable the panel members to jointly strategize about how to manage difficult issues. 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.

Another suggestion was to assign a dedicated, skilled staff person to whom cases are assigned when flagged at the pre-hearing stage as complex or challenging. In addition, adjudicators assigned to case conferences in such cases would be specially selected because of their ability to facilitate early resolution and to assist the parties to find creative ways to limit the length of the hearing. It may be necessary for the Executive Chair to find ways to increase the number of full-time members to ensure LAT has the capacity to take on this role.

A third suggestion was, in cases projected to be lengthy, to set aside a number of consecutive hearing dates from the outset. It is difficult to accommodate the calendars of multiple individuals (seven in the complainants' case) when attempting to set additional hearing days.

Recommendations: Managing complex cases

We recommend that SLASTO:

4. Review the process for homeowner appeals and implement strategies to address all stages of the process, including clear roles for managers, staff and adjudicators. The plan should include:
    - Early identification of complex cases and strategies to manage them effectively, without compromising the independence of adjudicators who may ultimately preside over the hearings;
    - Dedicated staff and multi-member panels for complex cases;
    - A focus on settling cases through pre-hearing conferences and, where settlement is not possible, finding creative and acceptable ways to limit the length of the hearing; and
    - Changes that will make hearings less formal and legalistic.

6.3 Recording the hearings

LAT's Current Practice

Some tribunals are required by statute to record their hearings. LAT has no such requirement but has decided, as a matter of policy, to record its proceedings apart from pre-hearings and mediation sessions. The main reason for recording hearings is to ensure transcripts can be produced if a party launches an appeal or judicial review in the Divisional Court.

Recordings do not continue through breaks during a hearing day. If LAT is made aware that discussions in the hearing room during a break have been inadvertently recorded, it will delete that portion from the recording. Once a month, LAT case management officers remove recordings from the computers in the hearing rooms and store them on a hard drive which is locked away.

LAT makes its recordings available to the parties without charge. Anyone other than a party must make a freedom of information request in order to obtain a recording. Parties wanting an official transcript may have a certified court reporter request a copy of the recording on their behalf so that a transcript can be produced at the requesting party's expense.

For hearings in Toronto, LAT uses Liberty Court Recorder (a digital recording program) to make audio recording files. The case management officer (CMO) assigned to the file is responsible for setting up the recording. At the start of the hearing, the CMO will enter the room with the adjudicator and begin the recording. Any subsequent stopping or starting of the recording will be performed by the presiding adjudicator. Some adjudicators prefer to call in a CMO to perform this function, an option available only in Toronto. Adjudicators are provided with instruction sheets on how to record hearings using Liberty Court Reporter. In addition, signs are posted on member-access hearing room doors as a reminder to stop and start recordings during hearings.

LAT uses portable recorders for hearings held outside of its Toronto hearing rooms. Adjudicators conducting such hearings are provided with portable recorders which they are responsible for operating. They receive instruction sheets on how to record hearings using the portable recorders.

Issues

Our investigation demonstrated the problem of having a system that relies on the ability of adjudicators to remember to begin and end the recording at the appropriate times. We learned that the failure of an adjudicator to record portions of the hearing can become a major issue if the missing portion relates to an important part of the hearing. It can also create perceptions that the failure to record may have been deliberate. Stated broadly, LAT is perceived to be offering something that it is unable to provide: a complete audio record of the entire hearing.

Suggestions for Change

Interview respondents offered a variety of ideas about recordings. One suggestion was to make video recordings instead of audio recordings. The rationale is that adjudicators, parties and lawyers would be on better behaviour with the knowledge that their facial expressions, body language and gestures were being captured by video.

Another suggestion was to retain the current policy but instruct adjudicators to keep the recording device on all day. That would eliminate the risk of portions of the hearing being unrecorded because the adjudicator forgot to turn the device back on after a break. The problem is that parties may forget that they are being recorded during breaks and say things they would not want to be on the record.

Some people questioned why it is necessary for LAT to record its hearings at all, since there is no statutory requirement to do so. Others suggested that court reporters should be retained for cases where recordings are deemed to be necessary and that other cases could be recorded by the parties under conditions set by the Tribunal. SLASTO's current thinking about such matters is discussed in the section below.

6.4 Should LAT continue its practice of recording hearings?

We have been advised that SLASTO management is considering stopping its practice of recording hearings for tribunals where there is no statutory requirement to record them. They believe it would be sufficient for parties to make their own audio or video recording, if desired, as long as they obtain an adjudicator's approval and abide by conditions the adjudicator sets. SLASTO shared its initial thinking with us about how this would work. While this would resolve the existing problems when adjudicators fail to record the full hearing, there are also potential difficulties that should be carefully considered before a new policy is implemented.

The Statute

The *Licence Appeal Tribunal Act, 1999* does not requires LAT to record its hearings. The statute creates an expectation, however, that a recording will be made upon a party's request and payment of a fee.

Recording of evidence

6 (3) The Tribunal may make rules providing that the oral evidence given before the Tribunal at a hearing may be recorded if a party to the hearing so requests and pays the fee established by the Tribunal for that purpose.

The Rule

At the time of Dr. Ferenc and Mr. Ferland's appeal, LAT did not have a rule regarding party requests for recordings. Such a rule was put in place as of April 1, 2016.

13.2 AUDIO AND VIDEO RECORDING MAY BE PERMITTED

A party who wishes to record a hearing may do so if authorized by the Tribunal and subject to the party undertaking to comply with any restrictions on use of the recordings specified by the Tribunal. Requests for permission to make recordings must be made in writing to the Tribunal at least 14 days prior to a hearing, and the request must be copied to the other parties. The other parties may make submissions on the request in the time specified by the Tribunal. A recording made by a party does not become part of the Tribunal's record of the hearing. A party who makes a recording must provide a copy to all other parties and, upon request, to the Tribunal.

Rule 13.2 is consistent with section 6 (3) of the statute in that recordings can be made upon a party's request. The statute uses the passive tense "may be recorded", without specifying who will make the recording. The active voice in the rule, however, makes it clear that the requesting party (and not the tribunal) will be responsible for making the recording. There is no need for the requesting party to pay a fee because no fee has been established by the Tribunal and there is no reference to a fee in the rule. While not explicitly stated, the requesting party is expected to bear the cost, if any, of making the recording.

Rationale for the Proposed Change

We asked SLASTO officials about the reasons for possibly moving away from the traditional practice of recording hearings at LAT and certain other SLASTO tribunals. Their reasons, as we understand them, are as follows.

<u>Integrity of recordings</u>

SLASTO's main concern is the inability of its tribunals to guarantee the integrity of the recording process in light of limited staffing and problems that have arisen with adjudicators responsible for starting and stopping the recordings.

<u>Statutory intent</u>

The statute contemplates that recordings will be made when parties request them and that the parties will bear a financial cost. SLASTO officials question the need for tribunals to make recordings where

there is no obligation to do so. They propose to follow the path of other tribunals, such as the Human Rights Tribunal of Ontario, that do not normally record or transcribe their proceedings.

Use of recordings

In the vast majority of cases, no one requests or requires access to recordings made by SLASTO tribunals that do not have a statutory requirement to make them. SLASTO officials therefore find it difficult to justify the practice of recording all hearings, which can detract from the tribunals' capacity to dispense administrative justice in an efficient manner.

Digital age

In this digital age, it would be relatively simple for parties to record hearings on their own devices. Parties could choose to engage the services of a court reporter, although that would be costly.

Parties

Some parties might prefer to make their own recordings rather than relying on the tribunals to carry out that function. This would also avoid suspicions about a tribunal's motives or competence when recordings are incomplete.

Restrictions

The rule enables the tribunals to make restrictions on the use of recordings made by a party. This can help to ensure that recordings are used in an appropriate manner.

Freedom of Information and Protection of Privacy (FIPPA)

Although not a primary reason for the potential change in practice, SLASTO officials noted that FIPPA requests have been onerous for the affected tribunals to manage. The legislation has been interpreted to mean that tribunals cannot simply provide digital recordings to members of the public, even when the hearings were open to the public. Instead, a transcript must be made and carefully reviewed to redact anything that raises privacy concerns.

We have difficulty understanding why tribunals cannot provide recordings from public hearings to members of the public who request access to them. We hope that there is a way to avoid what seems to be a costly, unnecessary process to deal with such requests.

Downsides

We have identified several potential downsides of a policy in which the only recordings of hearings would be those made by parties under Rule 13.2.

Self-Represented Parties

Administrative tribunals are meant to be less formal and legalistic than the courts. If SLASTO stops its practice of recording hearings when not legally required to do so, Rule 13.2 will govern the recording process for parties who wish to make recordings. The way the rule is constructed, it can be expected to add legalistic features to a process which, at least in the case of LAT, is already highly legalistic in nature.

The rule requires a formal application by the requesting party, time limits, copies to parties (of both the request and the recordings), submissions from opposing parties, and the imposition of restrictions by the Tribunal. This legalistic approach would be particularly onerous on the party seeking to record and could disadvantage self-represented parties. The responsibility of the recording party may be even more onerous if the new approach goes further and expects the party to record the entire hearing and to stop and start the recording before and after breaks. We were told that this is being considered. It seems odd to place a requirement on self-represented parties that adjudicators have been unable to meet.

Appeals

Recordings would not be available to assist in an appeal, judicial review or public complaint arising from a hearing. As stated in the rule, a recording made by a party does not become part of the Tribunal's record of the hearing. Concerns have been raised about the impact on judicial reviews if there is more than one recording or if only certain portions of the tribunal hearing have been recorded.

Witnesses

Some witnesses might be unwilling to testify, or nervous about doing so, if their testimony was going to be audio or videotaped by an opposing party. Although the Tribunal can impose restrictions on how the recording could be used, there is no guarantee of compliance with the restrictions.

Restrictions

It is unclear what restrictions a tribunal might impose regarding the use of recordings made by the parties. There appears to be an open, unstructured discretion in the adjudicator to allow or not allow the recording and to set whatever conditions seem appropriate to that particular adjudicator. For example, an adjudicator could ask parties to refrain from distributing or broadcasting the recording on the internet. This could be controversial where parties desire a recording for that very purpose. On the other hand, it could be welcomed by opposing parties and witnesses who fear that portions of their testimony would be broadcast, perhaps out of context or with commentary by the recording party.

Recommendations: Recording

We recommend that SLASTO:

5. Consult with stakeholders before implementing changes in recording practices.
6. Review the experience of other tribunals that do not record hearings, especially tribunals resolving disputes with high-stakes personal impact on self-represented persons.
7. Ensure that the process for requesting and making recordings is not overly legalistic or onerous for the parties.

8. Establish as a principle that requests from a party to record hearings will typically be granted. Structure the discretion of adjudicators by developing a standard order, along with criteria for departing from the standard.

7. Conclusion

Dr. Ferenc and Mr. Ferland's appeal was a difficult process for all involved. At some point it passed a point of no return where all parties and the adjudicator were locked into a long and painful experience. The more we investigated, the more we could appreciate the toll the case had taken on the complainants, the other parties and their lawyers, the presiding adjudicator, and tribunal staff. In some senses the complaint process has been the final, unpleasant step in a case that all involved look back upon with painful memories. In spite of this, everyone we interviewed was cooperative and helpful and we are grateful for their participation. We hope that what we have learned from this case will contribute to positive changes that reduce the risk of such a lengthy and fractious hearing occurring in the future.

Appendix: Observations from Initial Teleconference

To illustrate the challenges in managing the hearing of the complainants' appeal, and their presence from the start, we offer a summary of our observations from the recording of a conference call that took place on August 29, 2014.

The purpose of the call was for Ms. Cassidy, the presiding member, to decide on a motion brought by Tarion to adjourn the start of the hearing from September 3 to September 5. The main reason for the adjournment request was that Tarion's lawyer had been recently retained and was not available for hearing dates previously set for September 3 and 4.

The call took just over an hour to complete. The complainants were self-represented, with Mr. Ferland attending the entire call and Dr. Ferenc arriving part-way through upon her return from a medical appointment with the couple's child. Tarion and the builder were represented by lawyers.

This conference call is notable in that it was the first occasion in which Ms. Cassidy interacted with Dr. Ferenc and Mr. Ferland and the lawyers. At the start of the call, the tone was civil and there was no sign of strain or impatience in Ms. Cassidy's voice. The atmosphere soon became fractious, however, due to patterns of behaviour that continued throughout what would become an exceptionally lengthy hearing. Especially in the latter half of the call, we observed frustration in all participants and many interruptions.

The initial conference call can be seen as a microcosm of what went wrong from the start. It also shows Ms. Cassidy's determination to manage the schedule to avoid delays. Here are some examples of things that transpired during that call.

Issue: Bias
A few minutes after the conference call began, Mr. Ferland raised a concern about bias if the same adjudicator were to preside over preliminary motions as well as the hearing. He repeated this concern several times during the call. Ms. Cassidy said that she could not respond without more specifics. She invited Dr. Ferenc and Mr. Ferland to raise this as an issue when the preliminary motions began the following week. The issue of bias would be raised three times during the hearing itself, resulting in three separate orders on the issue.

Issue: Adjournment
Approximately 20 minutes after the start of the call, Ms. Cassidy considered arguments that had been made in respect of the adjournment request. Around the 25-minute mark, she granted the adjournment to September 5 and awarded Dr. Ferenc and Mr. Ferland $500 in costs. Later on the call, Dr. Ferenc tried to argue, a few times, against the adjournment. Although Ms. Cassidy said she would not "rehash" what went on before Dr. Ferenc joined the call, she did in fact restate her decision and the reasons for it a few times, with obvious frustration.

Issue: Witnesses

Approximately 30 minutes into the call, Mr. Ferland asked for confirmation that the witnesses he had summoned for September 3, 4, and 5 were still required to be there on September 5. Much of the remaining time on the conference call was spent on this issue. September 5 was the date when the hearing into multiple motions would begin, including a motion from Tarion to quash summonses Dr. Ferenc and Mr. Ferland had served on Tarion's president/CEO and on the author of Tarion's decision letter.

Dr. Ferenc and Mr. Ferland kept making the case for requiring these witnesses to attend on September 5. In response, Ms. Cassidy kept explaining, with a rising voice, that there was no need for the witnesses to attend on the 5th, in part because witnesses do not generally appear on procedural motions and because the witnesses would have nothing to say about whether their summonses should be quashed. We counted over a dozen occasions when Ms. Cassidy repeated these points. The lawyers were mostly silent during the lengthy back-and-forth between the complainants and the adjudicator, except for two brief comments from Tarion's counsel.

This illustrates a pattern that developed in which Dr. Ferenc and Mr. Ferland, who felt strongly about the issues they raised, would continue to argue their points after Ms. Cassidy had decided upon an issue. She, in response, felt compelled to repeat her decisions and the reasons for them, multiple times, in a voice that betrayed her growing frustration.

Issue: Rules of Practice

We counted five times during the second half of the conference call when the complainants raised a concern that one of Tarion's motions had been filed too late according to the LAT Rules of Practice. Ms. Cassidy did not respond to that point and this added to Dr. Ferenc and Mr. Ferland' frustration.

Issue: Case management

When Ms. Cassidy granted Tarion's adjournment, she noted that attendance on September 5, 2014 was peremptory, i.e. not subject to challenge. She also provided her available dates for additional hearing days and asked the parties to consult their calendars and to come to the first day of hearing to confirm three dates in September, six in October, and one in November. This was a positive sign that she was serious about managing the schedule and avoiding delays.