

Project Simplify and the Right of Appeal

The Ontario New Home Warranty Program (ONHWP) has recently advertised that it proposes to implement “Project Simplify” to make it easier to process claims, determine in advance what is or is not a warranted item and permit builders to appeal breach of warranty decisions. Although these comprise three distinct areas, I propose to deal only with the right of appeal. My “Project Simplify” paper addresses the following questions, the full text of which can be separately requested.

1. Why should builders be able to appeal?

Rights of appeal for builders accord with the rules of natural justice and common law rights of fairness including entitlement to a hearing when a builder’s financial or building status is affected. However I do not believe a new appeal mechanism is required.

2. What exists now by way of a builders’ right of appeal?

What exists now without Project Simplify is a right of appeal if there is a proposal to revoke or refuse to renew a builder. However, such a right of appeal must be initiated by appealing an ONHWP proposal; such proposals involve the entire history of the builder, not just a specific breach of warranty or deposit refund disagreement. By the time these hearings occur a builders rating and status have already been adversely affected by ONHWP’s decisions. I believe that the current legislation should be used to process these appeals without registration being the issue.

3. Is a new appeal mechanism required, or can the current appeal mechanism to the License Appeal Tribunal (LAT), be used?

I believe a builder has always been affected by an adverse breach of warranty decision and that consequently the License Appeal Tribunal which has been handling breach of warranty claims for 25 years is uniquely positioned to deal with these questions. They deal with them when a homeowner appeals an ONHWP ruling. It should be the same for builders.

4. How will the Project Simplify appeal mechanism actually work?

ONHWP proposes to create an appeal process separate from the License Appeal Tribunal (LAT) which will allow builders to appeal adverse breach of warranty decisions to a panel of arbitrators having builder expertise. If implemented this should be a summary procedure wherein the builders rating and status should not be affected until after the appeal is complete. As it now stands, decisions by ONHWP automatically affect a builders status and rating. I also believe, the right of appeal being suggested by ONHWP, already exists under s.16 of the Act although ONHWP and LAT disagree.

5. What process for appeal makes the most sense and what actually needs to be changed?

For appeals limited to these types of disputes, a summary process should be adopted at LAT wherein the evidence and argument are limited to one or two days, so that only specific disagreements are appealed and resolved. This would cut the length of hearings for builders to a bare minimum and thereby save money. These time limitations could be made to LAT’s own rules of procedure.

6. How extensive is the proposed Project Simplify right of appeal and what is not covered by it?

The proposed new appeal right under Project Simplify only proposes to cover breach of warranty disputes. It should cover all deposit refund, substitution, breach of contract and cost of completion decisions, where a builder disagrees with ONHWP’s decision. Again, I believe all such appeals can be handled for no cost by LAT. ONHWP’s proposed procedure would mean the builder would pay the costs of an arbitration hearing.

7. Does the current appeal process differ from a homeowner's right of appeal and if so, why?
Currently there is a difference between a builder and home owner's appeal rights. To date, ONHWP has argued that no builder has the same right of appeal as a homeowner. A homeowner can appeal an adverse breach of warranty decision of ONHWP while a builder cannot. However, ONHWP now appears to recognize the builders right of appeal and therefore is discussing creating a new right of appeal for builders under Project Simplify. To me this is unnecessary as I believe the right of appeal for the builder is found in the Act at s.16.
8. How has the lack of an appeal right impacted on builders?
The absence of a right of appeal on specific issues short of deregistration impacts adversely on any builder. Builders currently have no way to challenge a decision with which they disagree. Therefore, ONHWP tells the builder he must undertake repairs or cash settle. If he doesn't, ONHWP invoices the builder. His rating can be affected and he owes money to ONHWP before he can challenge the decision. Builders must be given the right of appeal through LAT, now.
9. What are the builder's rights of appeal whether "Project Simplify" is invoked or not?
Whether Project Simplify's right of appeal mechanism is ever implemented or not, builders can argue there is a conceded right of appeal. I believe that right of appeal is found in the Act. Regarding the current position of builders they should request that ONHWP provide a written decision with a right of appeal. If ONHWP does not grant the right of appeal to LAT the builder can by Notice of Motion seek an order requiring that a right of appeal be granted, or asking for a stay of the effect of an adverse decision until a proposal to revoke is provided which proposal is limited to the dispute in question.
10. Should builders exercise their right of appeal in spite of discussions about Project Simplify?
Absolutely. Whether or not Project Simplify is implemented the right of appeal still exists and builders should seek advice on how to utilize such a right.

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