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## ONHWP has obligation to publish claims on Web site

### *Concrete steps centre of dispute*

A Superior Court judge in Toronto has ruled that the Ontario New Home Warranty Program (ONHWP) has the right to publish notice of a warranty claim payment on its Web site, even where the builder disputes responsibility for the construction defect.

Back in 1996 and 1997, Portal Gate Developments built a 38-unit townhouse condominium complex in Richmond Hill. Portal Gate was a subsidiary of Georgian Homes, which today is the umbrella name for nine different housing projects.

The external concrete stairs for each townhouse in Portal Gate were installed by a subtrade in the winter of 1997-98. After the project was registered, it became York Region Condominium Corporation 908 (YRCC 908).

In the winter of 1999, owners of the townhouses started to complain to Portal Gate and the Ontario New Home Warranty Program about deterioration of the concrete stairs. A conciliation and inspection by ONHWP determined in the fall of 2000 that some aspects of the deterioration were warranted items under the program, and notified Portal Gate to carry out repairs.

More inspections, reports and negotiations took place over the next year, and Portal Gate continued to dispute its liability for the repairs. Eventually, ONHWP gave Portal Gate a final notice to do the repair work by the end of January, 2002.

The dispute between the developer and ONHWP at this point revolved around the appropriate repair method, with the condominium corporation and ONHWP insisting on one method, and the developer proposing an alternative.

By February, 2003, ONHWP decided that Portal Gate had had an "ample opportunity" to resolve the issue, and offered YRCC 908 a cash settlement for full replacement of all the front entrance stairs and exposed landings. The money was paid and repair work commenced despite the developer's objections.

Under the ONHWP legislation, once the program makes a payment out of the guarantee fund, ONHWP becomes entitled to full repayment from the builder of the sum paid to the homeowners in this case \$119,767.78.

Following payment, Portal Gate objected to ONHWP publishing notice of the claims payment on its Web site and notifying credit agencies, such as Equifax, of the debt.

Today, on the ONHWP Web site, The Georgian Group, Portal Gate's parent company, shows almost 600 homes built through 2001, with no claims a perfect nine-year record. But for the year 2002, the Web site shows one paid claim in the amount of \$124,767.88, which includes costs.

The Web site (<http://www.newhome.on.ca>) shows this amount as being paid from ONHWP's guarantee fund to the homeowners "when the builder was unable or unwilling to honour their warranty obligations," a note on the Web site states.

Portal Gate is no longer registered as a builder, but its parent company, Georgian Homes, is listed on the ONHWP Web site. Georgian's listing shows the Portal claim payment against the umbrella company. (Go to the Web site and click on the red "Find a Builder" button on the top banner and enter the name Georgian in the appropriate box. Then click on "Umbrella" under "Registration Number" for Georgian Homes on the chart.)

Anyone searching Portal Gate on the ONHWP Web site today would be unable to find any registration or paid claim without knowing the parent company. The Web site does not list builders that are no longer registered, despite their claims history.

Last summer, Georgian Homes asked the Superior Court for an injunction requiring ONHWP to remove the reference to the alleged breach of warranty and to refrain from notifying credit reporting agencies of the debt owed by Georgian to ONHWP for the warranty claim. Georgian claims it was not in breach of warranty and did not have an adequate opportunity to remedy the stair problems; those two issues have not been decided and are still before the courts.

ONHWP's position was that once a claims payment was made, it had a statutory obligation to provide that information to the public. Georgian argued that premature publication, before final determination of whether there was in fact a breach of warranty, would harm its reputation beyond repair.

Justice Gloria Epstein dismissed Georgian's request for an injunction. She ruled that ONHWP had an obligation to the public interest to publish the claims information, and that harm could result if notice of the claim was not published.

While I think the court's decision was correct, it seems to me that the judge failed to consider the argument that ONHWP has a Charter right to free speech, and can publish anything it wishes on its Web site unless it is clearly untrue. The \$124,767.88 payment on a warranty claim was factual, and in my view ONHWP had every right to publish that fact.

After the Superior Court decision, Portal Gate launched and later abandoned an appeal, according to ONHWP.

The courts have now confirmed that when ONHWP makes a claims payment out of its warranty fund, it has a right to publish notice of the payment on its Web site whether or not the builder disputes the claim.