

Effective: February 1, 2021

Last Updated: February 1, 2021

COMMON DEFINITION OF “BUILDER”

General Background

The Home Construction Regulatory Authority (HCRA) is the regulator with responsibility to license builders and vendors of new homes under the New Home Construction Licensing Act, 2017 (NHCLA). Tarion Warranty Corporation (Tarion) is the administrator of the warranty plan and is the financial backstop for warranty obligations of vendors under the Ontario New Home Warranties Plan Act (ONHWPA).

This advisory sets out the interpretation of the word “builder” as used in both the NHCLA and the ONHWPA. It is intended to be read in conjunction with the guidelines for “home”, “vendor” and “owner”.

For purposes of this advisory, “licensing” refers to a builder or vendor licence under the NHCLA and “warranty coverage” refers to warranty protection under the ONHWPA, including deposit protection.

Legislation – Act and Regulation

The word “builder” is defined in s.1 of the NHCLA as follows:

- “builder” has the same meaning as “builder” as defined in s.1 of the Ontario New Home Warranties Plan Act.

The definition of “builder” in s.1 of the ONHWPA is as follows:

- “builder” means,
 - (a) except in relation to a residential condominium conversion project, a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home, whether for the purpose of sale by the person or under a contract with a vendor or owner, or
 - (b) in relation to a residential condominium conversion project, a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home in the project, whether for the purpose of sale by the person or under a contract with a vendor or owner;

This bulletin provides information on who is a builder for purposes of the NHCLA and the ONHWPA.



ADVISORY

The definition of “builder” matters under both the NHCLA and ONHWPA for several reasons including:

- Under the NHCLA, a person who proposes to build a new home must be licensed by the HCRA.
- A person cannot enter into a construction contract for a contract home unless and until the home is enrolled by the ONHWPA.
- The “builder” of a contract home is deemed to provide the statutory warranties and thus establishing that there is a builder is critical to eligibility for statutory warranty coverage.
- To be licensed as a builder under the NHCLA, a person must meet competency requirements. It is worth noting that builders who fail to meet the competency requirement and do not qualify for a licence, cannot act or hold themselves out as a builder, nor can they offer to construct a new home or construct a new home.

The competency requirements for builder licensing purposes are set out in the NHCLA regulation under Section 5 O. Reg. 631/20. These core competency requirements are:

1. Business Planning and Management
2. Financial Planning and Management
3. Project Management and Supervision
4. Legal Issues in Housing
5. Customer Service and Requirements imposed by the warranty authority
6. Building Codes in Ontario
7. Construction Technology

Quick Reference Guide – Who is a “Builder”?

In connection with the construction of a residential dwelling that meets the definition of “home” a builder generally, is the person who:

- Undertakes, manages, or arranges for the coordination of trades and suppliers
- Undertakes, manages, or arranges for the necessary supplies and materials
- Undertakes, manages, or arranges for the completion of services infrastructure and hookup utilities
- Retains, manages the retention of or arranges for the retention of trades including in respect of tools and heavy machinery
- Develops, helps to develop, manages the monitoring of or arranges for the monitoring of the construction project schedule
- Completes, manages, or arranges for the sequencing of supplies of materials, work of various trades in accordance with the project schedule
- Develops, helps to develop, manages the monitoring of or arranges for the monitoring of the construction budget and payment of suppliers and trades
- Monitors, manages the monitoring of or arranges for the monitoring of suppliers and trades
- Monitors, manages the monitoring of or arranges for the monitoring of project scopes of work, work performance, and substantial completion of work



ADVISORY

- Monitors, manages the monitoring of or arranges for the monitoring of supervisors and the hiring and management of any project staff
- Coordinates, manages the coordination of or arranges for the coordination of all the contributors to the construction of the home including designers, architects, and engineers
- Obtains, manages the obtaining of or arranges for the obtaining of building and other permits and for the necessary municipal, other governmental, and utility inspections

A person will be considered to have undertaken the performance of the work and supply of all the materials necessary to construct a completed home for purposes of meeting the definition of “builder” regardless of whether the performance and supply is satisfied entirely by that person or a combination of having been undertaken directly by that person, managed by that person, or arranged for by that person.

Whether a person is a “builder” for purposes of the NHCLA and the ONHWPA does not depend on the title given to that person. In some cases, the person will be referred to as the builder, and in others may be referred to as the contractor, general contractor, or project manager.

Arrangements for Construction of Residential Dwellings Requiring a Licensed Builder

A person carrying out the tasks necessary to complete a residential dwelling that meets the definition of “home” must be a licensed builder and remains a builder whether the person intends to:

- construct the home on land owned by the builder, for the purpose of selling the completed home
- construct the home under a contract with the owner of the land on which it is to be built
- construct the home under a contract with a vendor
- construct the home that does not qualify for the owner-builder exemption from licensing

Where a person is constructing a home on their own behalf, on land that they own, for their personal use and occupation, they may be considered an owner who is acting as their own builder for purposes of constructing the home. These individuals are sometimes referred to as an “owner-builder”. The NHCLA does not consider an “owner-builder” to be a “builder” and accordingly, an “owner builder” does not need to be licensed as a builder.



Contract Home

With a contract home there is no agreement of purchase and sale. Rather, this is where an owner of land contracts with a builder for the construction of a home on the land. Determining whether a person is acting as a builder such as to require licensing, in a contract home situation, will depend on consideration of all the circumstances. ONHWPA amendments have introduced new requirements for builders who are seeking to contract with an owner of land to construct a home on the land. A new ss.10.2 provides that no builder shall offer to enter into a contract with an owner of land for the construction of a home on the land or offer to start construction, unless they are first licensed as a builder under the NHCLA.

A new ss.10.2 (1) of the ONHWPA prohibits a builder from offering to enter into a contract with an owner of land, for the construction of a home on the land, unless they are licensed under the NHCLA and meet any other prescribed requirements. This subsection would not prevent a licensed builder, who meets other prescribed requirements, if any, from giving a quote to an owner.

Assessing When a Contractor is a “Builder” When Constructing a Home Under Contract with the Owner

General Principles

Whether a contractor is a builder for purposes of the NHCLA and the ONHWPA is determined by considering whether the contractor has sufficient control of the construction of the home, including control over the work and of materials supplied to construct the home, and the degree to which the contractor is responsible for the essential elements of the home.

If the owner does not have a contractor who meets the definition of builder, the construction may qualify as owner-built. In that event, enrolment of the home is not necessary and statutory warranty coverage would not apply.

A builder is responsible for everything the builder has agreed to do. Once the home is enrolled in the warranty plan, the builder, who is considered to be a vendor for warranty purposes, remains responsible for the statutory warranty even though a contract may change, or responsibilities of who does what changes. However, if the contract changes are such that the builder is effectively no longer in control of the construction, warranty coverage may be jeopardized.

Under ss.13 (2) of the ONHWPA, there are exclusions from warranty coverage. Exemptions include defects in materials, design and work supplied by the owner and alterations, deletions and additions made by the owner. These matters may be addressed in the initial contract or in a subsequent amendment to the contract.



ADVISORY

Determining Whether the Contractor has Necessary Degree of Control of the Construction to Meet the Definition of Builder

Assessing who has control over the construction of a home requires consideration of:

- The proposed contract between the owner and the contractor and any subsequent contractual undertakings or arrangements between the owner and the contractor;
- The work performed and materials supplied that were under the control of the contractor and the work performed and materials that were under the control of the owner during construction; and
- The nature, value and quantity of any work or materials controlled by the owner with reference to their significance in respect of the total construction

Evidence in respect of a range of factors set out in the chart following is to be gathered and each proposed contract home assessed on a case-by-case basis.

No one factor is determinative. The following three sections identify criteria relevant to a determination of whether the person constructing the home is a builder for purposes of the NHCLA and the ONHWPA or whether it is in fact an owner of land building the home for their own personal use. The criteria to be considered include responsibilities and control in the contractual arrangement, what work is ultimately done by the builder in the construction of the home, and the significance of work or materials supplied by an owner. These are reviewed in more detail in the table that follows.

Understanding the nature of the contractual arrangement will be important in determinations around the definition of builder. For example, different considerations will arise depending on whether the construction contract is a fixed-price contract or a design-build contract.

In the event that a dispute arises as to whether the person involved in the construction is a builder for purposes of any warranty liability, evidence will be obtained from both the owner and the person involved in the construction of the home. Independent third-party corroboration may be required.

Construction contract allocation of responsibilities and indicia of whether builder has control of the construction of the home

Owner-built Home	Builder Constructed Home
Owner to apply for and obtain building permit(s) and other required permits	Contractor to apply for and obtain building permit(s) and other required permits



ADVISORY

Owner-built Home	Builder Constructed Home
Contractor undertakes to oversee, manage, direct, advise on specified services contracted for by the owner	Contractor undertakes the performance of all the work and supply of all materials necessary to construct a home
Owner to choose and contract with trades and suppliers or Contractor contracts with trades and suppliers but only as agent for owner and as approved by owner	Contractor to choose and contract with trades and suppliers on own behalf and without contractual obligation for final approval by owner
Owner to pay trades and suppliers directly or Contractor to pay trades and suppliers on owner's behalf out of funds advanced by the owner as disbursements incurred	Contractor to pay trades and suppliers directly out of funds paid to the Contractor by the owner as part of the overall contract price or payment schedule
Owner has right to pre-approve quotations from trades and suppliers or Contractor to provide interim cost projections	Owner has no right to pre-approve quotations from trades and suppliers or receive cost projections
Owner has right to pre-approve material purchases, equipment rental, and contracts	Owner has no right to pre-approve material purchases, equipment rental, and contracts
Contract provides that Contractor is not responsible for work and materials of specified trades or suppliers where it is the owner who has responsibility for contracting with those trades or suppliers	Contractor expressly or impliedly accepts responsibility for work and materials of trades and suppliers notwithstanding that owner has contracted with the trades or suppliers
Owner has right to review work / make changes in work, materials, and design	Owner has no right review work / make changes in work, materials, and design
Contractor required to consult owner before deciding on changes in work, materials, and design	Contractor not required to consult owner before deciding on changes in work, materials, and design



ADVISORY

Owner-built Home	Builder Constructed Home
The contract provides that the statutory warranties under the Ontario New Home Warranties Plan Act (Plan) do not apply	The contract provides that the proposed home will be enrolled for warranty coverage in the Plan and the Contractor has sought and obtained confirmation from Tarion regarding eligibility for enrolment in the Plan for the proposed home

The above considerations and indicia need to be considered in their entirety and no one factor is necessarily determinative.

What was actually done and impact on whether Builder or Owner has assumed control of the construction of the home

Owner-built Home	Builder Constructed Home
Owner applies for and obtains building permit(s) and other required permits	Contractor applies for and obtains building permit(s) and other required permits
Contractor not licensed as a builder under the New Home Construction Licensing Act (NHCLA) / home not enrolled in the warranty plan under the Ontario New Home Warranties Plan Act (Plan) / no Certificate of Completion (CCP) and Possession / no Warranty Certificate (WC) (referred to as CCP/WC) completed and submitted to Tarion	Contractor is a licensed builder under the NHCLA / home enrolled in the Plan / Certificate of Completion (CCP) and Possession / Warranty Certificate (WC) (referred to as CCP/WC) completed and submitted to Tarion
Owner chose, contracted with, fired trades and suppliers or Contractor consulted owner when hiring, firing trades	Contractor chose, hired, fired trades and suppliers without consultation with Owner
Owner reviewed and approved quotes from trades and suppliers or Owner required interim cost projections	Contractor did not consult owner on quotes from trades and suppliers and not required to provide interim cost projections
Owner approved material purchases, equipment rental, and contracts	Owner did not approve material purchases, equipment rental, or contracts



ADVISORY

Owner-built Home	Builder Constructed Home
Owner paid trades and suppliers directly or Contractor paid trades and suppliers on owner's behalf	Contractor paid trades and suppliers directly
Owner supplied work and/or materials	Owner did not supply work or materials
Owner on site regularly	Owner not on site regularly
Owner supervised or instructed trades	Owner did not supervise or instruct trades
Trades and suppliers understood they were under contract with the owner	Trades and suppliers understood they were under contract with the Contractor
Owner reviewed work / made changes in work, materials, and design	Owner did not review work / did not make changes in work, materials, and design
Contractor consulted and confirmed with Owner changes in work, materials, and design	Contractor did not consult or confirm with owner changes in work, materials, and design
Owner arranged for and attended inspections by municipality and other regulators	Contractor arranged for and attended inspections by municipality and other regulators

The above considerations and indicia need to be considered in their entirety and no one factor is necessarily determinative.

Significance of Work and Materials Supplied by Owner

An owner may undertake aspects of construction identified above such that the contractor did not control the quality of particular work or materials supplied by the owner. If this occurs, consideration must be given to the significance of the work or materials supplied by the owner in order to determine whether warranty coverage does not apply to that work or materials only, or whether it results in the statutory warranties under the ONHWPA not applying at all as the construction is no longer the builder's project but is now the owner's project.

The key is whether work or materials supplied by the owner are significant enough to result in the owner being in control. This will depend on the nature, value and quantity of the work or materials:

- Nature refers to the type or sort of work or materials supplied (e.g., an essential element or a finishing element).



ADVISORY

- Value refers to the monetary worth of the work or materials supplied, particularly in relation to the overall worth of the construction of the home.
- Quantity refers to the amount of work or materials supplied, usually expressed as a percentage of the overall construction of the home.

The nature, value and quantity of the work or materials supplied by the owner must each be considered to determine whether that work or materials is sufficiently significant that the contractor is no longer in control of the construction of the new home and the statutory warranty provisions of the ONHWPA are not engaged. For example:

- An owner may choose, hire, pay, supervise, and instruct all the trades and suppliers for the interior finishes of the home. But the contractor's control over the work and materials of the essential elements of the home, without those finishes, may be sufficient to result in the contractor continuing to meet the definition of "builder". The home would remain entitled to warranty coverage though the interior finishes supplied by the owner would be excluded from warranty coverage under s.13 (2) (a) of the ONHWPA which excludes from warranty coverage "defects in materials, design and work supplied by the owner".
- An owner may hire, pay, supervise, and instruct a trade to supply the work and materials for an essential element of the home. Owner control of a single essential element may not be sufficient to effectively remove control from the contractor who controlled all other aspects of the construction of the home. The home may remain entitled to warranty coverage and the essential element supplied by the owner excluded from warranty coverage under s.13 (2) (a).
- However, if the contractor is responsible for and has control over construction of all the essential elements of the home, that will be sufficient for the contractor to be a builder within the meaning of the NHCLA and the ONHWPA.
- The ONHWPA does not define "essential elements". Though not defined in the ONHWPA, the question of whether a contractor is a builder has been considered by the courts. In those cases, the courts have provided guidance on the meaning of the expression "essential elements" and while different construction forms may have different essential elements, typically essential elements will include the foundation, framing, electrical system, roughed in plumbing system, heating, ventilating and air conditioning systems ("HVAC"), and the building envelope.

Construction of home completed by more than one builder – when is the builder no longer the builder?

Situations may arise where construction of a new home is not completed by the first builder. Another builder may step in to complete the construction. This may occur, for example, if there is a bankruptcy or insolvency. The ONHWPA offers protection in the form of protection for financial loss (difference between amounts paid and value of work and materials supplied) but it does not include a guarantee of completion.



ADVISORY

As a practical matter, and where the situation is brought to the attention of the HCRA, the HCRA will engage with the parties to ensure necessary licensing is in place, and Tarion will engage with any new builder in assessing the extent to which the statutory warranty coverage will apply, and which builder will have responsibility for what aspects of the construction.

Tarion will consider matters such as how responsibility for the construction is assumed by the new builder and the degree of completion of the home at the time the new builder steps in. Tarion will typically engage with the parties, and if practicable assist with a view to the completion of the construction project.

Substantial performance of a contract to construct a home

Ss.14 (5) of the ONHWPA ties eligibility for compensation in a contract home situation to the contract having been substantially performed. What constitutes substantial performance for the purposes of the ONHWPA is defined by reference to ss.2 (1) of the [Construction Act](#). That subsection provides that a contract is substantially performed:

- a) when the improvement to be made under that contract or a substantial part thereof is ready for use or is being used for the purposes intended; and
- b) when the improvement to be made under that contract is capable of completion or, where there is a known defect, correction, at a cost of not more than:
 - i. 3 per cent of the first \$1,000,000 of the contract price
 - ii. 2 per cent of the next \$1,000,000 of the contract price, and
 - iii. 1 per cent of the balance of the contract price

If the contract is not substantially performed due to the builder's default then, rather than construction defect warranties, the protection for the owner will involve an assessment of the work done at the time work stopped. The amount, if any, that is payable to the owner out of the guarantee fund, will include consideration of the amount paid by the owner to the builder under the contract and of the value of the work and materials supplied to the owner under the contract.