COMMENTS AND CONSIDERATIONS FOR THE CAREFUL PREPARATION OF AGREEMENTS OF PURCHASE AND SALE FOR RESIDENTIAL HOMES

"There is probably no better example of slavish adherence to precedent by lawyers, brokers, sales agents and members of the public than their prevailing attitude toward the use of the standard form of Agreement of Purchase and Sale of real estate."1

Proceeding on the assumption that P. Theodore Matlow, the author of the above quotation, is correct, and with the assurance that my colleague, Brian Crocker, will in his paper point out the weaknesses of the standard Agreement, I plan to approach my topic within the bounds of the standard Agreement.

At pageE-44 is a photocopy of the standard Agreement of Purchase and Sale used by the overwhelming majority of real estate agents and lawyers in Nova Scotia. Mr. Crocker and Mr. Matlow, in their papers, point out to us many of the dangers of over reliance on the standard form. In spite of the weaknesses and dangers of the standard form, it has served us well in the past and likely will be much utilized in the future. Thus, this paper will use this much maligned document as a standard of reference.

The purpose of this paper is to stimulate greater thought and awareness in the preparation of the Agreement which hopefully will result in more useful contract. Throughout the paper there are suggested precedents and procedures--they are there for your consideration and not your reliance, as they are most certainly not the "be all and end all". To place any great reliance on this paper without first giving it the accompanying thought which is required may be disastrously unwise. Thus, under the Hedley Byrne principle, I disclaim any resulting liability.

The purchase of a home is the largest transaction in most people's lives and is quite often the only contact the public has with a lawyer. We owe an obligation to these peoples and to our profession to see that proper care is taken during every step of the transaction. Many of the problems associated with the real estate transaction could be avoided if greater care and consideration was given by the client, the real estate agent and the lawyer to the preliminary documentation, the Agreement.

Some lawyers appear to take great pleasure in criticizing and re-drafting Agreements prepared by real estate agents. To a large extent, it is a matter of the pot calling the kettle black. We should all examine our drafting and documentation before being so free with our criticism. Having practiced almost exclusively in real estate conveyancing, I am firmly of the opinion that we all give insufficient consideration to the contract. Too often in the rush of our busy practice, we do not take time to find out exactly what the clients want, but rather, we consider the contract just another simple deal.

Consider carefully the following five situations where clients and lawyers have .found themselves in awkward situations due to poorly prepared Agreements of Purchase and Sale:

Situation One

Mr. A., a very astute businessman, instructs lawyer to prepare a contract in which he will be ass ming a first and second mortgage. It is a terrific deal, and he cannot wait until all of the details regarding the mortgages being assumed can be collected. Client wants an extremely simple contract and instructs that the paragraph relating to the assumption of the mortgage read as follows:

"Subject to the Purchaser being able to assume two mortgages with ABC Limited."

At time of closing, the mortgages are determined to have an interest rate six percent higher than the client thought. A law suit ensues, the client is forced to purchase, endless legal fees are paid.

Situation Two

The Vendor, Mrs. B., arrives at office with an Agreement of Purchase and Sale drafted but unsigned. Mrs. B. advises that she agreeable to everything in the Agreement but wants a

clause added to the contract relating to vacant possession. The amendment is made, the contract signed. At time of closing, Vendor is required to pay a large mortgage payout penalty when the Purchaser refinanced through a different company and is required to pay almost $5,000.00 in betterment charges since there is nothing in the contract requiring the Purchaser to assume the betterment charges. Angry client wants to know why her lawyer didn't warn her about these problems.

Situation Three

A regular client experienced in real estate transactions instructs lawyer to prepare an Agreement of Purchase and Sale for a large rooming house. In due course, the contract is prepared covering all the items from financing to zoning. As the closing date gets closer, it is clear that the lawyer failed to inquire of his client if any chattels were to be included in the purchase price. Client had negotiated on the assumption that he would be receiving numerous stoves, fridges, dryers, beds, etc. as part of the purchase price, and made his offer on that basis, but no mention of this was made in the Agreement. Did the lawyer assume his client knew "too" much?

Situation Four

The Vendor brings the Agreement to the lawyer with instructions to counter it for an increase in purchase price, **and two or three other** changes. The counter offer is prepared and following the lawyer's advice, the Vendor signs the counter offer. On closing date the Vendor's solicitor is embarrassed when he realizes that he failed to increase the purchase price in the counter offer.

Situation Five

The Vendor's solicitor prepares an Agreement of Purchase and Sale in which a clause is inserted for the protection of the Purchaser making the Agreement subject to financing. The clause goes.on to set a deeming date which if passed without notice to the Vendor will deem financing to be arranged. **Prior to this date**, the Purchaser notifies the Vendor that financing has not yet been arranged. Since there is nothing in the contract which allows the Vendor to declare the **Agreement at an** end if financing is not arranged by a set date, the Vendor is held to the contract for several months while his property is held off the market. Finally, shortly before closing date, the Vendor is notified that financing cannot be arranged and the Purchaser is withdrawing from the contract. The Vendor's solicitor is faced with the embarrassing question of why he failed to put an escape hatch into the contract which would allow the Vendor to bring the contract to an end if financing was not arranged by a set date.

The above five situations illustrate quite clearly that poor contracts are usually the result of carelessness or a lack of thought rather than of expertise. It is clear that it does not take the wisdom of Solomon to avoid the above problems. Four rules should be followed in preparing all contracts, and if followed, most of the problems should be avoided:

1. NEVER ASSUME YOUR CLIENT KNOWS EXACTLY WHAT HE IS DOING. Even though your client's instructions may be clear to you, take time to question, probe, and discuss the transaction. It may be your client has not given proper thought to his instructions.

2. DON'T RUSH TO THE POINT OF CARELESSNESS. The old saying of "Haste makes waste" is never truer than in the drafting of contracts. Consider a check list, see page E-39.

3. DON'T BE A SLAVE TO PRECEDENTS. It is better to spend your time trying to draft a paragraph which clearly states what the intentions of all parties are rather than waste your time in the pursuit of a perfect precedent.

4. DON'T TRY TO WRITE A TEXT BOOK. When preparing the con

tract, always remember that your client's primary desire is either to buy or to sell, and it is your duty to assist. Your client's wishes will be frustrated if an overly legalist approach is not tempered with common sense. Your ninety-nine page offer of purchase might be excellent filler for a law review, but it will likely scare away the Vendor. There is a place for a lengthy Agreement covering every possibility, but there is also a place for the short form where the client takes certain calculated risks. If the Vendor and Purchaser have haggled long and hard over price, carpet, closing date, etc., etc., I would question the wisdom of adding endless paragraphs to the contract which will only add fuel to the fire. Whose interests are being well served if the Purchaser has told the Vendor to "stuff" his offer. This common sense approach is of par ticular importance when considering offers prepared by real estate agents or other lawyers which may not approach your level of so called perfection. To fail to amend the document to protect your client on vital issues would be foolhardy, but to carve up an Agreement or to counter for minor items and minor drafting changes can also be foolhardy. To add to, or to delete, or to counter a signed offer of purchase for cosmetic reasons can have a drastic result if the Purchaser refuses to accept the counter. If you sus pect your counter or repair job will frustrate a binding contract, discuss the risks with your client and consider not making the changes.

"A bird in the hand is worth ten in the bush."

WHAT DOES THE CLIENT EXPECT FROM A LAWYER

When a client presents himself at our office and requests us to prepare an offer, a counter offer, etc., what is it he really wants? Undoubtedly, he wants to leave our office with those three or four pages of legal gobblygoo. There are at least three additional items which most clients are looking to receive from the lawyer:

1. Advice - Your client wants general advice on how he can make the best deal and how he can be protected. Most people are involved in a house transaction only once or twice in a lifetime while many lawyers are involved in thousands of house transactions. Thus, a clients looks to the lawyer for general advice which often goes beyond the bounds of legal advice.

2. Hand holding - Many people during a real estate transac tion are much like the expectant father waiting outside the delivery room at a maternity hospital. These people need someone to hold their hand and quite often just someone to talk to who appreciates their anxieties.

3. Knowledge - Most clients know little or nothing about the mechanics of the real estate transaction. It is not enough that the preliminary documentation be perfectly drafted; the client should know how this document fits into the transaction and why the various paragraphs were placed in the contract.

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Duplication of the above paragraph heading is certain to get your attention. The balance of my paper deals in detail with many of the items which recur commonly in the standard Agreement. There are endless suggestions, precedents, and a goodly number of opinions which may or may not have any basis. Several years ago, I prepared a rather thick volume of materials for the Bar Admission Course. I received a few telephone calls and letters indicating that certain items were not quite correct. Should you find errors in these materials, you are to assume that the writer, being a rather cunning chap, has

placed them there to keep you, the reader, on your toes. The materials were not prepared to be used as a source of precedents or as an instruction manuel. The paper has been prepared to stimulate greater consideration of the Agreement.

Should anyone attempt to incorporate all my advice, precedents, and instructions in preparing the offer to purchase, your client will undoubtedly grow old waiting for the contract, and you the lawyer will find the process so time consuming that you will have to limit your practice strictly to "drafting contracts".

PARTIES

When preparing the contract, proper consideration should be given to who the parties of the contract will be and their capacity. An excellent discussion of the topic is set forth at page E45 to E47 and is taken from Mr. Donald H. Lamont's book, Real Estate Conveyancing. 2 Mr. Lamont's outline was prepared before Matrimonial Property legislation was introduced in Ontario. Thus, although his references to dower may now be superfluous, the Matrimonial Property legislation makes it more critical than ever to add the Vendor's spouse as a party to the contract if it appears the property is a matrimonial home. If in doubt as to whether or not the property is a matrimonial home, add the spouse for safety sake.

When representing the Vendor, there are also good reasons to have both spouses shown as Purchasers if the Purchaser is married. Some of these reasons are:

1. In the event the Purchasers default under the contract, it is always better to have two people to sue rather than one.

2. If there is a Vendor take back mortgage, both spouses will have to sign the mortgage to covenant to make payment.

3. If the Agreement is subject to the Purchaser obtaining financing both spouses will be required to use their best efforts to obtain the financing. The "subject to financing" clause in the contract has always been the reluctant Purchaser's best ticket out of the contract. If only one of the spouses has signed the contract only one of the spouses is legally bound to seek the mortgage. Thus the reluctant Purchaser can often frustrate financing by having his or her spouse not cooperate in the application. If the application is based soley upon one income rather than the income of both the spouses, quite often the mortgage application will be rejected.

When representing the Vendor, it is important to know something about your Purchaser. In the used **car business**, **there is** a term used for persons who look but never buy--"tire kickers". The same is true with house selling. Recently in Halifax, a non-provincial company made offers on dozens of properties and succeeded in tying these properties up for months on end and failed to purchase any of the properties. There are also the regular array of paupers who sign contracts they clearly cannot afford. Add to this the nuisance Purchasers, who appear more interested in negotiating than in buying. These time wasters can usually be spotted by their offers which are filled with escape clauses and tiny deposits. If you are suspicious that you may have a questionable Purchaser, a few well placed phone calls can quite often identify these people. A fully informed Vendor, realizing that he or she is dealing with such a person, should amend the contract by upping the deposit, closing the escape hatches and bringing the closing date forward. If the Vendor is going to hold the mortgage, it goes without saying that the Purchaser requires a great deal more investigation.

Although there are many other considerations regarding parties, one last area I wish to consider is the Co-Operative Housing and the Self Help programs. There are many programs in Nova Scotia, most of which are administered by the Nova Scotia Housing Commission and Canada Mortgage and Housing Corporation. In most of these situations, either the Nova Scotia Housing Commission or Canada Mortgage and Housing Corporation must approve the transaction either by approving the Agreement in certain circumstances, or by signing a consent on the deed. If you are faced with a party to the contract which is a co-operative housing group, contact either the Nova Scotia Housing Commission or Canada Mortgage and Housing Corporation (whichever is appropriate) and find out from them what procedures are

necessary to be followed and what are the time limitations. If your Vendor is a co-operative housing group, you will likely be advised that the consent of all the shareholders will be required. Thus, it would be unwise to call for a closing in a week's time if certain of the shareholders are not in the area and the Housing Commission or Canada Mortgage and Housing Corporation cannot process the documentation in such a short time.

Mr. Lamont, in his article, points out the importance of ascertaining who the registered owners of the property are prior to preparing the Agreement. He suggests a search at the Registry of Deeds in certain circumstances. You may also wish to contact the assessor's office to see who they show as the assessed owners.

See page E52 for a photocopy of an article prepared by C. Alicia Forgie, "Parties to the Agreement of Purchase and Sale".

DESCRIPTION OF PROPERTY

In this section, one should be reminded that the paper is limited to residential property, which usually does not include raw land of questionable acreage. If the property involves a large tract of land, a more detailed consideration is required than is set forth in this paper. Should you wish to pursue further study of that area, I would recommend an article entitled "Description of the Property" by Mr. Donald J. Donahue, Q.C.;3 an article with the same name by Mr. D. G. Milne, Q.C.; 4 and page 40 - 45 of Mr. Donald H. Lamont's book, Real Estate Conveyancing. 5

Depending on whether you are representing the Vendor or the Purchaser, you will have different considerations. These considerations will usually focus upon the following:

1.The identity or location -- 9 Hillside Avenue;
2.The quantity of land -- 130 feet by 100 feet;
3.What is the property subject to -- right-of-ways, easements, building restrictions, shared driveways, etc.?

The standard Agreement provides only a small space to **identify the property**, and the property is usually identified only by civic number. In most cases, this is likely sufficient, but it leads to an annual handful of cases where the Purchaser refuses to close pleading misrepresentation as to lot size, etc. If you are careful, some of these problems can be avoided with the following considerations. If you are representing the Vendor, it is in the Vendor's interest to set forth clearly what he is selling. The best way to find out what the Vendor is selling is to examine the Vendor's title documents, his deed, the survey certificate, and hisn certificate of title. Upon perusing these documents, you can add a more detailed description of the property to the contract, as follows:

"Civic number 16 Downs Avenue, Halifax, having One Hundred and Twenty Feet (120') street frontage (more or less) and being Two Hundred and Seventy feet (270') (more or less) deep. The property is subject to an easement in favour of the Maritime Telephone and Telegraph Company over the rear Ten feet (10') of the lot and is subject to building restrictions attached as Schedule "A".

Perfection would be to attach the actual legal description, details of the easements, a photocopy of the subdivision plan, etc. Perfection will seldom be achieved. If you are acting for the Vendor, always put in the words "more or less" if you are setting forth the lot size and are in any doubt as to the exact lot size.

When acting for the Purchaser, many of the same considerations apply, but certain additional items should be considered. Mr. Milne, in his 1960 Special Lectures, 6 writes:

"Now from the purchaser's side of the transaction, we may look at the description rather differently and I suggest that we should not be content with what is barely sufficient to identify the property. We should direct our efforts to what is both necessary and desirable to make the description abundantly clear. Consider these points:

1. State the street address, but add the dimensions of frontage and depth.

2. Avoid using "as per deed". If you have seen the deed, it is easy to be specific.

3. If the street number is uncertain or non-existent, state the location of the property with reference to something known, as for instance, the limit of an intersecting street.

4. Be cautious about stating lot and plan numbers or using a metes and bounds description from a deed unless you can check it with a survey or the subdivision plan; for without such an enquiry you really cannot know whether the lot on the plan is the whole property your client intends to buy or, for that matter, any part of it. It also fails to meet the situation of the part fenced but not described.

S. If the parcel is rectangular, or nearly so, state that it is, or, if it is of irregular shape, state all the dimensions and, if a survey plan to illustrate the description is available, attach it for that purpose.

6. If the parcel extends to another street, or to a public lane, or to railway lands, or anything of the sort that may be material to the client's use of the property, state that in the description.

7. State that the lands include a private driveway, if that is the case, and set out its size and location on the parcel.

8. If rights of way or easements are to be acquired, include them specifically.

9. Avoid using "more or less" if specific quantities are desired as a basis either of price or intended use.

10. State the services represented to be connected or available. In McCallum v. Dean and Dean, [1956] O.W.N. 873, the Court of Appeal held that caveat emptor applies to a sale of land and that the purchaser in that instance was not entitled to assume that the house was connected to a municipal sewer.

11. Include all the privileges, permissions and rights enjoyed by the vendor in connection with signs, canopies, areas and the like."

From the Purchaser's point of view, be cautious as to when you use "more or less" in your Agreement. The purpose of adding "more or less" is to protect the Vendor from minor discrepancies. The Court's interpretation will depend upon the circumstances of each case. There are numerous judicial interpretations, but I feel the safest interpretation is set forth in Murphy v. Horn (1929) 64 O.L.R. 354 by Ramey J.:

"I think the words "more or less" are not to be construed as the equivalent of "as estimated" or "as supposed" but are to be construed to mean "about the specified number of acres" and is designed to cover such small errors as sometime occur in surveys." i A more liberal interpretation is set forth in Wilson Lumber Co. v. Simpson (1910), 22 O.L.R. 452:

"The words "more or less", added to the statement of depth, control that statement, so that neither party can be entitled to relief on account of a deficiency or a surplus unless in a case of so great a difference as will naturally raise the presumption of fraud or gross mistake in the very essence of the contract."

One may think that in residential transactions a discrepancy of a foot or two is unimportant. If your client is buying the lot with the idea of.adding on a room, a garage, or subdividing off part of the property, exact size can be crucial. A one foot discrepancy may mean your lot cannot be subdivided or a carport added. Thus, when exact dimensions are important to the Purchaser, avoid using the words "more or less" and be very specific as to the lot size.

If your client intends to subdivide the lot or to build onto the house, it may not be sufficient to ensure that the lot is an exact size. You may wish to go one step further and to obtain a location certificate to make certain the building is placed on the . lot so that the building's location will not impede the subdivision or the addition. You may find the building is located too close to the proposed dividing line to allow for the subdivision or too close to the sideline to allow for a carport to be added.

Any lawyer, who has practiced any length of time, has experienced the problem of the Purchaser who finds out before the closing or after the closing that the fence, shrubs, part or all of the driveway, etc., is over the boundary line. A proper survey prepared prior to the closing will alert the Purchaser to these problems, but the Purchaser may still be required to purchase the **property if these items** were not represented as being part of the property. Your Purchaser may have jumped to the conclusion that the cherry tree was on his lot. This conclusion may have been reached without any help from anyone other than his own stupidity. The Purchaser can be afforded more protection by putting a clause in the contract such as the following:

"The property includes the entire paved driveway, and the entire area enclosed by the white picket fence."

If the survey shows that the fence is two feet over the line, an escape hatch is likely provided by the above to the Purchaser.

If you are representing the Purchaser, carefully consider the matter of access. City properties as well as rural periodically have access problems. The mere fact that your property abuts a public street is not a guarantee of access. The terrain may be such that only a mountain climber could gain entrance directly from the street. If the property does not have direct access to a public street without crossing the property of a third party, consider putting a clause in the contract to ensure good title "to" and "to the use of" the right-of-way.

THE DEPOSIT

The deposit in the Atlantic Provinces appears to be one of the most neglected parts of the Offer of Purchase and Sale. $500.00 or $1,000.00 appears to be the standard for this part of the world, **which** amazes clients coming from other parts of Canada or the United States. My discussions with lawyers, clients and real estate agents from other parts of North America lead me to believe that most other areas require minimum a five to six percent deposit.

The primary purpose of the deposit is to show that the Purchaser means business. A $500.00 deposit on a $100,000.00 home is a trifle and not an indication of the Purchaser's good intentions. Let us examine some of the considerations for deposits.

The Amount of the Deposit:

A lawyer has an obligation to his Vendor client to explain the adequacy of the deposit. A few guidelines on the amount of the deposit are:

1. It should be sufficient to show that the Purchaser is serious.

2. It should be sufficient to reimburse the Vendor for all fore seeable damages if the sale aborts.

3. The longer the time limit from the Agreement date to the closing date should indicate a higher deposit.
4. Avery attractive offer in excess of fair market value calls for a higher deposit.
5. **An out-of-province Purchaser whose** financial assets are ques tionable calls for a higher deposit.
6. A property which can be resold easily for a similar or higher

price need not command a high deposit.

It is my opinion that the reason for deposits in the Atlantic Provinces being so small an amount is primarily the result of real estate agents' and lawyers' lark of effort in protecting the interests of their clients. From my own experience with lawyers, myself included, and from discussions with real estate agents, I am of the firm belief that the initiative in setting the amount of the deposit comes primarily from the real estate agent and the lawyer. In most circumstances, if the agent or the lawyer suggested a doubling or tripling of the deposit, they would meet with no resistance. One cannot expect the Purchaser's solicitor to campaign for a higher deposit. The real estate agent and the Vendor's solicitor definitely have a duty to the Vendor to assure an adequate deposit is collected.

Payment of the Deposit:
The usual method is by cash or certified cheque. If the Agreement calls for a certified cheque, the Vendor's agent or the Vendor's lawyer, who accepts an uncertified cheque without advising his client, may be liable in negligence should the deposit cheque fail to clear. Often, the Agreement is concluded at night or at a time when the Purchaser is unable to obtain a certified cheque. It may also be that the Purchaser can only muster a small deposit on the date of the offer. Rather than frustrate the Agreement by demanding a larger deposit or a certified cheque, the contract could be amended to provide that if the Vendor accepts the offer, the deposit will be increased to a more realistic figure by delivering a certified cheque for an additional amount within forty-eight hours of the Vendor's acceptance.
There may be resistance from the Purchaser to place a large deposit in trust if the closing date is a considerable time in the future. This can be remedied by setting forth in the contract that the deposit will be invested in an interest-bearing account.

Who Holds the Deposit:
It goes without saying that it shouldn't be the Purchaser's solicitor unless you are acting for the Purchaser. When no real estate company is involved, it is usually the Vendor's solicitor.
Certain authors and lawyers like to have the Vendor's solicitor hold the deposit even when there is a real estate company involved.
With all due respect to these people, I do not share this opinion.
Where possible, the real estate company should hold the deposit even though it may lead to a battle if the deal goes sour and the real estate company claims it has earned the commission. I have two reasons for favouring the real estate company:
Firstly, I have been called upon on numerous occasions
real estate brokers as to the disposition of the deposit where the deal has gone sour. Usually, both sides of the transaction are demanding the deposit. The real estate company is threatened with dire consequences if it releases the deposit to the other side. In most cases, the facts are not clear, and the real estate company is in a dilemma. This is a dilemma I as a lawyer do not need, and I am quite happy to leave this problem to the real estate companies.

Secondly, if the Vendor's lawyer holds the deposit and a dispute arises over its disposition, the **Vendor's law firm** may find itself joined in a law suit. If the Purchaser decides to join the Vendor's firm as a party to the action, ethically the Vendor's solicitor cannot act for the Vendor as the lawyer is now directly involved. Thus, in addition to the solicitor being a party, he has also lost the legal fees associated with representing the Vendor in the action.

Irrespective of anything set forth above, the amount of the deposit must always be viewed with basic common sense. It is

better to consummate a deal with a $1.00 deposit than to frustrate a perfectly good deal for a $5,000.00 deposit. Similarly, I would treat much of the academic argument relating to relief from forfeiture with less than half a thought. The deposit which you are holding may in fact be larger than any court would allow you to keep, should the Purchaser fail to complete. But as long as you have the deposit in the Vendor's solicitor's trust account, the Vendor is in the driver's seat.

For an excellent discussion of deposits, I would refer you to an article by John D. Honsberger, page 71, Special Lectures, 1960, Law Society of Upper Canada.

I cannot leave this topic without reiterating the importance of an adequate deposit. Several times a year I am retained by a Purchaser who instructs me to throw up a smoke screen of shallow legal arguments, claims of misrepresentation, and a legion of other legal road blocks so that he can exit from a legally binding contract. When one discusses with his Purchaser that should the matter go to court he will undoubtedly be found liable for breach of contract, your Purchaser will quite often decide to take the chance if all he is going to be faced with is the possibility of court action and the loss of his small deposit. Most Purchasers will gamble with a possible court action since few Vendors want to face the astronomical legal fees, court costs, endless delays and questionable success which characterize law suits. Thus, a reneging Purchaser will quite often forfeit his deposit and gamble that the Vendor will not sue. If the same Purchaser had to face the possibility of losing a substantial deposit, the Purchaser would not be as willing to use legal trickery to exit from a contract. Real estate agents and Vendor's solicitors should remember that when a Vendor walks away from a fallen contract empty handed, it is usually very difficult to collect real estate commissions or legal fees.

THE CLOSING DATE

There a number of considerations when choosing a closing date. Use your best efforts to steer the client away from the "peak days" of the year. The last day of each month is usually the most hectic closing day of the month, so avoid this day with a passion. If your client intends to move into the premises on closing date, also remember that moving companies also have peak days. If you choose the 30th of June for your closing, don't be surprised if your client cannot arrange for a mover on that day. When choosing a closing date, glance at the calendar to make sure that it is not a Saturday, Sunday or a holiday.

If your Purchaser is employed at a job where he cannot take time off of work, try to arrange the closing on a Friday to allow him the weekend to move. To arrange his closing for a Monday would saddle him with the carrying costs on the house during the week while the house rains empty waiting for him to move on the weekend. If your Purchaser is buying a property containing an apartment for which he wishes to give a notice to vacate to the tenant, arrange your closing date so that he can use the required notice period to his best advantage. For example, if the property is rented from month to month with rent payable on the lst day of each month, it would be much wiser to close on the last day of the prior month so that he can give a clear month's notice, rather than close early in the new month and have to wait 27 or 28 days before giving his notice.

A certain number of clients will want to set the closing **date approximately two** days after the Agreement is signed. In only **a small percentage of these cases is** there a valid reason for having a rush closing. You should remember that the title search may present problems, that the mortgage company may want more than 24 hours to approve the mortgage, and that the lawyer on the other side may have more than one file to deal with. Rush closings usually lead to shortcuts in searches, location certificates and inability to get tax certificates. These shortcuts usually lead to errors. Avery wise senior solicitor once advised me that when he is approached by a client who wishes to buy a property on extremely short notice, he usually discourages the client by advising the client **that he will** have to double his fee to cover the added inconvenience. The thought of paying a lawyer an additional legal fee is usually enough to persuade even the most hasty clients.

A final consideration on choosing your closing date is to find out where all the parties

are going to be between now and closing date. To set a closing for the following Tuesday when one of the co-owners will not be home from the drilling rig until the following Thursday is not wise.

See article entitled "Date of Closing" prepared by E. John Freyseng, photocopied at page E52

CHECK THE ARITHMETIC

If you are representing a Purchaser, he may be on a shoe string budget, and before allowing him to commit himself to the Agreement, it is important to check the arithmetic in the Agreement firstly, and secondly, the total cost for house and closing expenses. Before your Purchaser signs the offer, he should know approximately how much money he is going to need to complete the transaction. This will avoid the last-minute scramble for second mortgage financing.

If you are representing the Vendor, make sure his financial expectations from the Agreement are going to be met following the closing. The purchase price may be $50,000.00, but the Vendor may be approaching the Agreement from the point of view of having $8,000.00 left after the closing. If he was aware prior to signing the Agreement that he is only going to have approximately $4,000.00 left over following the closing, perhaps he could not accept the offer. Also quiz the Vendor to make certain that there is sufficient cash available to cover the adjustments for a first and second mortgage, betterment charges, taxes, real estate commission, and legal fees. It is not sufficient to ask the client what mortgages he has on the property; your client may not remember that the loan he received last year from the bank is secured by a collateral mortgage on the house. A little detective work is required and perhaps a call to the Vendor's bank or credit union.

If there is a counteroffer involved, the arithmetic will have to be re-examined before the Purchaser can sign. If the purchase price has been increased in the counteroffer, a corresponding increase should be reflected in the amount of mortgage being sought. Similarly, the Purchaser should be advised that legal fees, deed transfer tax, etc. will also be increased.

CONDITIONS--A NIGHTMARE

It is a rare Agreement which does not contain at least one conditional clause--it may be a financing clause, sale of the Purchaser's property, etc. Until the condition has, been met, the contract is very much in a state of limbo. The subject is too broad to deal with properly in this paper _BUT too important to skip over. To prepare contracts containing conditional clauses without a first hand knowledge of the case law on the subject would be foolhardy to say the least. I would strongly urge everyone to read some if not all of the following cases and articles:

Texts and Articles

(a) Chapter 4 - "Real Estate Law", by Reiter & Risk, published b_v Edmond Montgomery Limited.

(b) p. 55-58, Real Estate Conveyancing by Donald H. L. Lamont, Q.C., published by the Law Society of Upper Canada (reproduced at page E48)

(c) Conditional Contracts for the Sale of Land in Canada, G. J.i

Davies, 55 Canadian Bar Review 289 (1977) (reproduced at page E56)

(d) **Contract**: Waiver of Conditions Precedent, K. Webb, 8 Ottawa Law Review 82 (1976) (reproduced at page E75)

(e) p. 629-630, The Law of Vendor and Purchaser, di Castri, The Carswell Company Limited (reproduced below)

(f) C.S. Barrett, Unilateral Waiver of Contractual Conditions Precedent 3 Dalhousie L.J. 595 (1976) (reproduced at page E80)

(g) Some Thoughts on the Drafting of Conditions in Contracts for the Sale of Land, Gwilym J. Davies, XV Alberta Law Review 422 (1967) (reproduced at page E85)

Cases

(a) Turney et al v. Zhilka (1959) S.C.R. 578

(b) Beauchamp et al v. Beachamp et al 32 D.L.R. (3d) 693 (C.A. Ont.)

(c) Barnett v. Harrison (1976) 2 S.C.R. 531

(d) McCauley v. McVey (1979) 9 R.P.R. 35

Once one has read the above cases and articles, you will soon realize that the law relating to condition precedents in contracts for the sale of real estate in Canada is in a very unsatisfactory state. The Supreme Court of Canada appears to be suffering from tunnel vision in its adherence to precedents irrespective of fairness and the clear intention of the parties. This is one area where common sense will run counter to legal logic, and regretfully legal logic will most likely win. The best summary of the topic is set forth in The Law of Vendor and Purchaser (referred to above) at page 629.

"The cases to date are difficult to reconcile, but from the following summary emerges one stark salient fact: unperformed conditions precedent and specific performance are mutually exclusive. The avoidance of uncertain litigation is best achieved by inserting in the contract, in express and detailed language, a power to waive which manifests clearly the intentions and rights of the parties; the following propositions should be kept in mind:

(1) where the contractual obligations, on both sides, depend upon an external, future and uncertain event, e.g., the amendment of a zoning by-law, the happening of which depends entirely upon the will of a third party, you have a true condition prer.edent.

Until the event in fact occurs: (i) there is no right to performance on either side; (ii) there can be no breach of contract; and (iii) there can be no waiver, as waiver, as a minimum, presupposes the existence of a right which is to be relinquished. Unlike a condition subsequent, where rights are vested, subject to being defeated by the default of one of the parties, in the case of an unfulfilled condition precedent there is no vesting of rights, and thus, there can be no waiver. To permit the unilateral waiver of a condition precedent would, in effect, allow one party, without the consent of the other, to re-write the contract.

(2) However, the parties, by appropriate language in the contract, may expressly reserve to themselves the power to waive the condition. Such a power takes the condition outside the realm of a true condition precedent. If there is more than one condition it is important to ensure, in reserving the power to waive, that the reservation applies to all conditions. A provision giving the purchaser alternative rights or options is an effe r tive device. Further, the parties may expressly contract that the rule in Turney v. Zhilka is not to apply.

(3) A condition precedent must not be confused with a stipulation or a term in a contract the nonfulfilment of which would render the contract incomplete and unenforceable, but which is for the benefit of the purchaser and severable, and which he may waive in order to obtain a decree of specific performance.

(4) Where a power to waive is given by the contract it must be exercised strictly in accordance with its terms, with particular reference to any time period, and also, communicated to the other party.

(S) It appears a condition precedent may be waived by conduct, e.g., where a purchaser is prepared to waive the condition and the vendor forwards a draft deed. There is a

distinction between the waiver and the satisfaction of the condition.

(6) It would appear that where performance by a purchaser of a condition precedent is actively prevented by the vendor, he cannot set up the nonperformance as a defence to an action for specific performance.

Likewise, where a contract provides that it will be void upon the happening or non-happening of a certain event, the party upon whom the obligation to bring about or to prevent such event rests, is not permitted to take advantage of his own default in the performance of such obligation so as to avoid the contract, whether or not such default constitutes a breach of contract.

(7) The parties may, of course, subsequent to the contract, agree to waive the condition; and, in effect, re-write the contract."

In light of the above cases, articles, etc., consider the following factual situation:

The Vendor is selling to P. a **bungalow with a** basement apartment. The contract contains the following clause. "This contract is conditional upon the monthly rent of $183.00 being approved by the Rent Review Commission." The Vendor uses his best efforts to get the rent approved but fails. The Purchaser advises the Vendor that he will waive the condition and complete the transaction. The Vendor, who has now realized that the sale price was a give-away, advises that the clause is a true condition precedent and cannot be waived. Thus the contract according to the Vendor is at an end.

The Vendor's position in the above factual situation may be unfair, immoral, etc., but is it incorrect in law? Only a court can decide the issue which could have quite easily been solved had the solicitor or real estate agent been more careful in drafting the contract. How could this situation have been avoided? When preparing conditional clauses, we should always ask two questions. Firstly, for whose benefit is the clause being inserted into the contract? And secondly, whether it can be waived. Had the clause clearly shown that the condition was put in for the Purchaser's benefit, and that the Purchaser had the right to waive the clause, there would have been no problem. When considering conditional clauses, consider adding a clause such as one of the following:

"This condition is solely for the benefit of the Purchaser and may be waived by the Purchaser at any time." (You may wish to add how the waiver is to be communicated.)

"This condition is for the benefit of both the Purchaser and the Vendor and may not be waived."

Now that we realize that we are in a mine field of potential problems, let us proceed and examine some of the areas which require conditional clauses.

<u>THE PURCHASER MUST ARRANGE FINANCING</u>

For the Vendor's protection, consider the following:

(a) The clause may have to be drafted to force the Purchaser to seek his mortgage from the Vendor's mortgage company so that the Vendor will avoid the payout penalty, etc.

(b) The time limit set for the arranging of the mortgage by the Purchaser should not be unduly long so that the Vendor's property will not be kept off the market for a great period of time if the mortgage cannot be arranged.

(c) The clause should clearly illustrate what happens should the mortgage not be able to be arranged.

The first two points need no great elaboration, but the last is a problem which is ignored by most. To illustrate this problem, consider the following situation:

The Vendor agrees to sell to Purchaser and the contract contains the following clause: "Subject to the Purchaser arranging mortgage financing. In the event the Purchaser fails to notify the Vendor's solicitor in writing within ten days of the acceptance of this offer of his inability to obtain mortgage financing, this condition will be deemed to have been waived by the Purchaser, and that contract shall be valid and binding." On the ninth day, the Vendor's solicitor is notified that the Purchaser has not yet been able to arrange mortgage financing.

One might jump to the conclusion that the Vendor can now declare the contract to be at an end, but in light of the cases, this may be wishful thinking. There is nothing in the contract indicating that the Vendor has any right to declare the contract at an end. Your Vendor may be extremely upset when he is advised that his property will remain in limbo until closing date while the Purchaser attempts to arrange financing. The problem could have been avoided by adding the following:

"In the event that the Purchaser notifies the Vendor of his inability to secure mortgage financing, either party to this contract shall be at liberty to declare the contract null and void."

When considering a mortgage financing clause from the Purchaser's point of view, several different considerations come up:

(a) Try to give as much time as possible to the client to arrange financing.

(b) Avoid limiting the source of the financing to a specific company.

(c) Avoid the use of the phrase "at prevailing interest rates" since rates may go higher than your client is prepared to accept. Be specific on the rate or at least put a ceiling on the rate.

(d) If the clause is solely for the Purchaser's benefit, avoid using phrases such as "This offer is conditional upon..." or "This offer is subject to..." since the courts will most likely then interpret the clause strictly as a true condition precedent.

A sample clause for consideration is as follows:

"This contract may be terminated by the Purchaser if the Purchaser is unable to obtain mortgage financing in the amount of $55,000.00 with interest not to exceed 14 1/2 percent. Provided that the Purchaser must notify the Vendor's solicitor in writing within ten days of the Vendor's acceptance of this offer of the Purchaser's inability to obtain mortgage financing, and if no such notification is made, this condition shall be deemed to have been waived by the Purchaser, and the contract shall be valid and binding."

The lawyer for the Vendor may want to add to this paragraph and put in a sentence to indicate that he can declare the Agreement at an end in the event that he receives notification that the Purchaser has been unsuccessful in arranging financing as of that date.

If the Purchaser's mortgage must be secured with the Vendor's mortgage company, a number of additional considerations enter the picture. The clause must be re-drafted to indicate that it is being inserted for the benefit of both parties. The "deeming" provisions do not afford the Vendor a great deal of protection. Irrespective of the deeming provisions, one cannot force the mortgage lender to approve the Purchaser for a mortgage.

"The contract is conditional upon the Purchaser obtaining a mortgage from ABC Trust Company for Twenty-Five Thousand Dollars ($25,000.00) with interest not to exceed Fourteen and One Half Percent (14 1/2Y). The Purchaser must notify the Vendor's solicitor in writing by the day of , 1982, **as to whether or** not the mortgage has been arranged. In the event that the mortgage has not been arranged, either party may declare the Agreement terminated. If no notice is received by the Vendor's solicitor, the Vendor may declare the

Agreement terminated."

ASSUMING THE VENDOR'S MORTGAGE

Most of the same considerations apply here as did in the section relating to arranging a mortgage. If the Vendor is not being released from the convenants to pay under the mortgage, perhaps you should advise your Vendor of his or her possible future liabilities in the event that the Purchasers default to make payment. You may wish to include a clause such as the following:

"The purchaser covenants with the vendor to assume the existing mortgage in favour of ABC Trust Company and to pay the principal and interest secured by the mortgage as the same falls due, and to observe and comply with all the terms of the mortgage and to indemnify and save harmless the vendor from and against any claims whatsoever with respect thereto, together with all costs, charges and expenses to which the vendor be put by reason of any default by the purchaser or any successor in title."

Before the contract is prepared it is important that the financial terms of the mortgage being assumed by clearly ascertained. Avoid relying on real estate listings and the client for this information, since it may be incorrect or outdated. You should get your information from the Mortgagee directly and attempt to get it in writing. The basic information is:

(a) The approximate balance.
(b) Is there is tax account, if so, how much is in it?
(c) What are the payments and do they include principal and interest or principal and interest and taxes?
(d) What is the maturity date?
(e) Can it be assumed, and if so, do you need to make an application?
(f) If an application is required, what is required to make the application and how long will approval take?
(g) What is the interest rate?

When preparing the mortgage assumption clause for your Agreement, give consideration to whether or not the principal balance may be subject to a substantial change between now and closing date. This may happen if the mortgage does not have a separate tax account and prior to closing the mortgage company pays the taxes. The mortgage balance should always be identified as "approximately" and you may wish to show it as follows:

...approximate principal balance of $37,800.00 on today's date."

Even though you use the word "approximately", I would also avoid showing the principal balance in anything smaller than to the nearest hundred dollars. "Approximately", when placed before a figure such as $39,723.57 may only allow for a very small **fluctuation. An example clause would** be as follows:

"The Purchaser agrees to assume an existing first mortgage with the Royal Trust Company in the approximate amount of $37,800.00 with monthly payments of principal interest and taxes of $582.93 maturing October 15, 1984. If after the Purchaser has used his best efforts to obtain the Mortgagee's approval for the assumption, the Purchaser has not been approved to assume the mortgage by the Mortgagee, the Purchaser may declare the Agreement null and void, and the Purchaser's deposit will be returned forthwith. It will be deemed that the Purchaser can assume the mortgage unless the Vendor's solicitor is notified to the contrary in writing by the 14th day of April, 1982. If the Vendor's solicitor is so notified, the Vendor at his option, may declare the Agreement null and void."

The above clause has a weakness one should consider when using such a clause. The "deeming" provision in this clause does not provide a great deal of protection to the Vendor if the Purchaser has not been approved to assume the mortgage. If the Vendor's mortgage company is not going to allow the assumption, the Vendor can do all the "deeming" he or she wishes, but the transaction cannot go forward. You may, to give greater protection to the Vendor, wish to re-draft the clause to a fashion similar to the

clause on page E16 where the Purchaser is seeking financing with the Vendor's Mortgagee.

VENDOR TAKE-BACK MORTGAGE

When considering a Vendor take-back mortgage there are a number of considerations, not the least of which will be an additional legal fee for the all the bother you will be put to before the transaction is concluded. Aside from an increased legal fee, some of the considerations are:

1. Discuss with your Vendor his security position in the event of a default.

2. If the Purchaser is a corporation, make sure to include in the Agreement something requiring personal guarantees from the company's principals.

3. If your Purchaser is an individual, your Vendor may wish to carry out a credit check to see if this person is a good risk. I would refer you to Sections 9, 10, and 11 of the Consumer Reporting Act, S.N.S. 1973 Chapter 4 for the requirements relating to obtain ing credit reports. You may wish to include a paragraph such as the following:

"The Purchaser authorizes the Vendor or the Vendor's agent to obtain a consumer report containing credit and personal information on the Purchaser and to authorize a consumer reporting agency to furnish a consumer report to the Vendor. The Vendor may terminate this Agreement by giving notice in writing to the Purchaser or the Purchaser's solicitor that the consumer report does not meet with the Vendor's satisfaction. Should the Purchaser or the Purchaser's solicitor not receive such notice within ten days of a the Vendor's acceptance of this offer, it will be deemed that the consumer report is satisfactory."

4. Never allow a Vendor to agree to give a second or this mortgage without knowing exactly the amount of the encumbrances prior to your mortgage. The contract should be drafted carefully so that the Vendor is agreeing to give a second mortgage clearly on the understanding that the first mortgage does not exceed $40,000.00, etc.

5. Be as specific as possible on the teems to be included in your mortgage when preparing the contract. You may wish to attach a sample of the mortgage document to your Agreement of Purchase and Sale to avoid a later dispute.

6. It is not an unimportant part of the contract to put something in to specify that the Purchaser will pay the Vendor's additional legal fees relating to the mortgage.

7. If the Vendor take-back mortgage has a decent rate, your Purchaser may want to explore the possibility of ensuring that a clause is placed in the second mortgage which will allow the **Purchaser to refinance** the first mortgage at a later date. Sample **clauses are** as follows:

"The second mortgage shall contain a clause permitting the purchaser (mortgagor) to renew or replace the first mortgage on maturity provided that any excess of principal of new first mortgage over amount of principal owing at maturity shall be applied to reduce the principal owing on the second mortgage, and providing further that the vendor (second mortgagee) shall execute at the expense of the purchaser (mortgagor) any necessary postponement agreement as will be necessary to give effect to this privilege.

or

The vendor agrees that the purchaser may replace the present first mortgage or may renew the same on the, maturity thereof (at any time,) provided that such new first mortgage shall not be for a principal amount in excess of the principal then owing on the present first mortgage (unless the excess amount is paid to the vendor in reduction of the principal owing on the second mortgage), and the interest rate of thenew first mortgage or renewal shall not exceed the rate then prevailing for conventional lending insti tutions. The vendor further agrees that such new first mortgage or renewal shall rank in priority to the second mortgage and that a term of the second mortgage shall so provide."

7A. When considering the above clauses you may want to put a ceiling on the interest rate for the potential new first mortgage. "Prevailing" rate at the time may be too high and as such may place the second mortgagee in jeopardy.

8. If your Vendor is planning to sell his mortgage, you may wish to contact the company which will be buying the mortgage priorto entering into the contract. Many companies which buy mortgages require certain clauses to go into their mortgage documentation. If your Vendor is entering into the contract on the assumption that he can sell the mortgage, make certain the mortgage document is prepared in such a way that it is saleable.

9. You may wish to consider placing in the Agreement a clause requiring the Purchaser's solicitor to provide a limited Certificate of Title to the Vendor on closing. It would be unreasonable to expect the Purchaser's solicitor to provide a certification of good title, but it is reasonable to request a limited certificate to the effect that there are no judgements against the Purchaser, the insurance is in place, arrange for the postdated cheques, etc.

When considering the Vendor take-back mortgage, discuss everything carefully with the Vendor prior to the Agreement being entered into. Don't put yourself in the position of having to answer the Vendor's most embarrassing question--"Why didn't you tell me?"

PUT UP OR SHUT UP

Although financing clauses are usually the most common conditional clauses in a contract, there are numerous other items which are the source of conditional clauses. The purchase may be conditional upon the Purchaser receiving funds from his uncle's estate, the Purchaser being able to sell his present property, the Purchaser being transferred from one job to another, etc. Irrespective of what the reason for the condition is, the Vendor's solicitor should never allow his client to get caught in a contract which has the effect of taking the client's property off the market where there exists a very limited commitment from the Purchaser.

Aside from the financing clause, the most common conditional clause is that relating to the sale of the Purchaser's present property. Only a fool would allow his client to accept a contract containing the following, "Subject to the Purchaser being able to sell his property at 18 Johnson Crescent." A clause similar to the following should be inserted to allow the Vendor to continue to show his property to potential purchasers:

"This Agreement of Purchase and Sale is conditional upon the Purchaser selling the property, now owned by , and situate, lying and being in the of and known municipally as on or before 6 p.m. of the day of, 19_, failing which this Agreement of Purchase and Sale shall become null and void and the deposit shall be returned without interest and the Vendor and the Agent shall not be liable for any cost or damage whatsoever. Always provided that the Purchaser shall have the privilege to waive the condition.

Provided further that the Vendor may continue to offer the within premises for sale, and if a satisfactory offer is obtained, the Vendor shall notify the Purchaser or the Purchaser's solicitors in writing thereof either by prepaid mail, wire, or by personal service, whichever method is most expedient, and the Purchaser shall be required within 48 hours from 6 p.m. of date of receipt of said notice (Sundays and legal holidays included except where the delivery of notice would be required on a Sunday or holiday, such delivery may then be executed before 11:55 a.m. on the day following such Sunday or holiday) to waive the said condition, by delivering notice in writing to this effect to

the Vendor either by prepaid mail, wire, or by personal service, whichever method is most expedient, otherwise the Vendor shall be at liberty to accept the new offer and this contract shall become null and void and the deposit shall be returned without interest and the Vendor shall not be liable for any cost or damages whatsoever."

'The above clause is known in the trade as "The 48 hour clause".

Another clause which you might want to consider is the following:

"1. This Agreement of Purchase and Sale is subject to the sale and closing of the Purchaser's property at 14 Chickadeedoo Drive, Halifax, Nova Scotia, by January 30, 1982.

2.The Vendor reserves the right to continue to offer his property for sale, and should the Vendor receive another acceptable offer which:
(1)contains a higher purchase price the Vendor shall allow the Purchaser 48 hours to either (a) meet the new offer in price and at the same time delete Clause "1" or (b) declare this Agreement null and void, in which case the deposit shall be returned to the Purchaser immediately;

(2)contains a lower purchase price the Vendor shall allow the Purchaser 48 hours to either (a) delete Clause "1" making this Agreement firm and binding under the terms and conditions described herein or (b) declare this Agreement null and void, in which case the deposit shall be returned to the Purchaser immediately;

3.The Purchaser reserves the right to delete Clause "1" making this Agreement firm and binding under the terms and conditions described herein, provided there is not an outstanding offer from a third party at the time."

DANGLING CONDITIONAL CLAUSES

The "Idi Amin Prize for Excellence in Drafting" is reserved for those persons who feel compelled to put "dangling" conditional clauses in the contract, What is a "dangling" conditional clause? It is a clause which makes the contract subject to certain events happening or not happening but is so vague it usually guarantees trouble. Two examples:

1. Subject to water test
2. Subject to the basment being completed

The two "gems" which appear above are guaranteed to cause trouble in the majority of contracts. The water test clause leaves **unanswered**: (a) who does the test; (b) what type of test; (c) when the test is to be done; (d) what happens after the test; (e) etc., etc., etc. The basement clause leaves unanswered how the basement is to be finished. The Vendor may be happy with gyprock, indooroutdoor carpeting and K-Mart special paint. The Purchaser, on the other hand, sees expensive wall paper, plush carpets, stippled ceilings and a built-in mahogany bar.

When considering such conditional clauses, review the following rules:

(a) Put a time limit for the items to be completed.
(b) Be specific as to what is to be done.
(c) Identify who is to perform the task.
(d) Avoid phrases such as "to the satisfaction of".
(e) Clearly state what rights the parties have if the items are not completed.
(f) If the clause is for the protection or the benefit of one party, clearly indicate this.

See photocopy of an article by Donald J. Donahoe, Q.C., **entitled "Terms** of Payment of Purchase Price" reproduced at page E54 . This article covers many of the items reviewed in the last **few pages**.

VIEWING THE PROPERTY

The Purchaser under a standard form of Agreement of Purchase and Sale has no inherent right to inspect the property prior to closing unless the Agreement has been amended to provide for it. The following clause should allow the Purchaser this option:

"The Vendor agrees to allow the Purchaser to inspect the property within 24 hours prior to the closing date."

Usually, the inspection will take place while the Vendor is busy moving out of the property. With boxes cluttered throughout the premises, the Purchaser cannot see if the premises have been damaged, etc. You may wish to put in a clause requiring for inspection once the property vacant. Such a clause is as follows:

"The Vendor agrees to allow the Purchaser to inspect the property immediately before the closing and that the property will be vacant. The Vendor agrees that nothing further will be removed from the property or altered in the property after the Purchaser's inspection."

Your Purchaser might like to have the right to inspect the property periodically from the date the Agreement is signed until closing date. These inspections are usually not to check up on the Vendor, but rather to choose paint colours, measure for drapes, carpets, etc. The following clause might be used:

"That the Purchaser shall have the right to inspect the premises during daylight hours until the closing of the within transaction, upon providing the Vendors 24 hours prior notice of his intention to inspect."

APPROVAL OF THE PURCHASER'S SPOUSE

Often, the Purchaser will want to put an escape clause into the contract to allow his or her spouse to approve the premises prior to the contract becoming binding. A clause such as the following may cover this situation:

i "This agreement is subject to the Purchaser's wife viewing the property and the property being to the wife's satisfaction. The property will be deemed to be to the wife's satisfaction unless the Vendor or the Vendor's agent is notified in writing before midnight on the 1st day of March, 1982, to the contrary. Should the property not meet with the wife's satisfaction, the Agreement shall become null and void and the deposit returned."

CONTRACT SUBJECT TO SOLICITOR'S APPROVAL

Often times if you are not dealing with a solicitor on the other side, the Vendor or the Purchaser on the other side will want an opportunity to have his solicitor review the contract. A clause such as the following might be satisfactory:

"This Agreement is subject to the Vendor's solicitor reviewing the contract and the contract meeting with the Vendor's solicitor's satisfaction. The contract will be deemed to be to the Vendors solieitor'S

The above are just a few of the problems which flow from oil tanks. Unless the standard form Agreement of Purchase and Sale is amended, there is nothing in it at present to entitle the Vendor for compensation for the oil in the tank. With two hundred gallons of oil now costing approximately $250.00, perhaps consideration should be given to writing this adjustment into the contract. If from day one the Vendor is aware that there will be no adjustment, the Vendor can put a stop order on the automatic delivery or have the tank pumped. Similarly, the Purchaser, if aware that a fuel oil adjustment will be required, can budget for this extra expense. The Vendor's solicitor can obtain proof of a full tank to provide the Purchaser's solicitor, if the contract calls for it. Such proof will prevent time wasted over empty tanks.

If there is to be an adjustment and the parties wish it to be put into the Agreement, the following are a few suggestions:

1.Adjust on a full tank only, to avoid any argument over how full is apartially full tank.

2. Specify exactly the amount of the adjustment; this allows the Purchaser to budget and the lawyers to prepare their adjustments;

3. Require the Vendor to provide proof that the oil tank is full--a recent fill slip. This would avoid the problem of holding back funds as security for a full tank. Most oil companies, if requested, will have their drivers mark on the fill slip that thetank has been topped up.

A sample clause for the contract:

"The Vendor agrees that on closing date the Two Hundred gallon fuel tank will be completely filled, and the Vendor will at time of closing provide to the Purchaser's solicitor a delivery fill slip indicating that the tank has been topped. The Purchaser agrees to pay in addition to the purchase price $245.00 for the oil to the Vendor."

When considering the fuel oil, one should always bear in mind that to introduce this element into the contract might frustrate the deal. If you are representing the Vendor and the negotiations are less than friendly, the Purchaser might consider the introduction of such a clause to be nit-picking and suggest to the Vendor where the house and oil tank can be deposited.

To insert a fuel oil compensation clause in the contract is definitely to the Vendor's advantage, and thus as the Purchaser's solicitor, you may decide such a clause is not in the Purchaser's interest. Thus, if you consider the drafting of the contract to be a contest to see which party can take the advantage, then undoubtedly, the Purchaser will be legally smart to avoid putting the clause into the contract. I personally do not consider the preparing of the contract to be a contest by one party to take an advantage, but rather, an effort by both parties to put on paper the details of the sale in as fair a manner as possible so that an advantage will not be taken by one party or the either. Thus, if your Purchaser does not wish to make an oil adjustment, I would suggest that it be written into the contract. If your Purchaser does not want to write into the contract anything about oil and you know he has no intention of paying for an oil adjustment, I would suggest that the Purchaser's solicitor should make this fact known to the Vendor's solicitor as soon as possible.

If you are representing the Vendor and do not want to bring into the discussion "oil tank", the Vendor can always be protected from a Purchaser who is unwilling to pay for the oil in the tank by having the tank pumped.

FIXTURES AND CHATTELS

Fixtures are a great source of pre- and post-closing disputes in residential conveyancing. The imagination of the Vendors appears to limitless in their quest to remove fixtures. You have the Vendor with the green thumb who will remove his prize rose bushes; the artistic type who will remove his wall paper; the Madame Benoit type will remove the rangehood and the garborator; the academic type will take his nailed-down, glued-on, bolted-in book cases; and those suffering from hemorrhoids will take their toilet seat. Should lawyers be given the wisdom of Solomon, they could still only prevent a small portion of the disputes relating to fixtures.

The disputes relating to fixtures result from two sources; firstly, the uninformed Vendor who removes a fixture, and secondly, the argument over whether the item is a chattel or a fixture, and thus, whether or not it can be removed. Many of the problems relate from an uninformed Vendor and can be laid directly at the doorstep of the Vendor's solicitor. If the Vendor's solicitor had properly advised the Vendor at the time the contract was drawn up and/or at the time the Vendor was vacating the premises, many of the problems could be avoided. As to the second source of the problem, the **dispute over whether or** not the item is a chattel or a fixture, there is no easy solution. The best definition of a fixture I can find is: "An article which, by its annexation to the land, has lost its chattel nature and has become, in the eyes of the law, part and parcel of the realty; and although a

person by virtue of his right of removal, may be entitled to sever the article from the land and restore it to its original nature as a chattel, nevertheless, until severance, the article remains a fixture and constitutes part of the freehold."

Di Castri has given us a test for determining what is or is not a fixture:

"In determining whether or not a particular chattel has become a fixture and part of the soil by being placed thereon in circumstances which give rise to the legal implication that this was done with the intention of making it a permanent addition to the realty, the Court must have regard to:

1. The degree of annexation, if any;
2. The relationship of the parties interested in the land and the annexation;
3. The nature of the property added; and
4. The use to which it was to be put as showing the object of the annexation." 8

The following are a few considerations for the preparation of the contract:

1. Before you can allow your client to sign t"rye contract,'

give the client a quick lesson in the law of fixtures. Without some basic knowledge of what a fixture is, your client will be hard pressed to properly instruct you on the preparation of the contract.

2. If you are representing the Vendor, reinforce in the Vendor's mind that the fixtures must remain unless it is clearly written in the contract that they are to be excluded from the sale.
To assist your client, I would suggest you run over a list of the most common fixtures so that they know what is to remain. The easiest way to do this is to imagine each type of room found in a house and to go through the items which lead to problems. You might start in the basement, go the kitchen, bedrooms, bathroom, garage, and outside of the house. At pageE431 have prepared a list of common items which Vendors might unthinkingly remove from the property.

3. After having gone over with your Vendor all the items and receiving from them an indication that the items will remain, you should go one step further in your inquiry. Inquire as to items of sentimental value which are fixtures. The client in your office may have forgotten that the chandelier in the dining room was a twenty fifth anniversary gift or that the bookcase in the den was handmade by good old Uncle Henry. If the items are of sentimental value and your Vendor wishes to remove them, undoubtedly the Purchaser will wish something substituted in their place. Perhaps a clause such as\ the following in the contract would cover this situation:

"The chandelier presently hanging in the dining room shall be removed by the Vendor prior to the closing, and in its place, the Vendor shall substitute a chandelier of a value of not less than $175.00. The Vendor shall repair any damage caused by the substitution of the chandelier."

It may be that the Purchaser will want the fixture removed but not a substitution made. I would suggest the following clause for the contract:

"The chandelier presently hanging in the dining room is not included in the purchase price and may be removed by the Vendor prior to the date of closing. The Vendor will repair forthwith any damage caused by the removal or will reimburse the Purchaser on the date of closing for the cost of repairing the damage. If the chandelier is not removed prior to the closing date, the Vendor shall be deemed to have waived all right and title to the chandelier."

4. Often in Agreements we see a clause such as the following:
"All light fixtures, carpets, curtain rods and drapery tracks are included." It is likely redundant to put this clause in the contract, since if the land is being sold, all

fixtures pass to the Purchaser on transfer of title. The clause may also be dangerous, since it may imply to the uninformed Vendor that any articles not so listed can be removed. If after discussion with your Purchaser there are certain items which perhaps should be listed to avoid any dispute, I would suggest a clause which clearly sets forth that by so listing you are not excluding other fixtures. The following is a sample clause:

"The purchase price shall include all improvements, fixtures and equipment now attached to and/or forming part of the said land and premises, including, without limiting, the following: the wall-to-wall carpeting, antique hanging lamps in the hallway, and built-in dishwasher."

5. If the purchase price is to include certain chattels, they should be carefully listed. Depending on the value of the chattels, you may wish to require a Bill of Sale at time of closing. For example:

"The purchase price shall include chattels and personal property, clear of encumbrance, as set forth in Schedule "A" attached hereto. The listing thereof shall not thereby exclude from the purchase any fixtures. The Vendor at time of closing will provide to the Purchaser a Bill of Sale indicating the Vendor is the absolute owner of the chattels and has good title free of encumbrance."

If the chattels which are being transferred under the **contract are** items of considerable value, such as a washer, dryer, fridge or stove, I would suggest that your Purchaser might wish to make further inquiries about these items before increasing his purchase price to accommodate them. If the items are still under warranty, this would have a direct relation to the value of the chattels. The dishwasher may look in mint condition, but some inquiry should be made as to its track record in regard to breakdowns, etc. If your Purchaser is going to want the operational manuels for these items, it should be brought up before the Vendor has vacated the property and moved with all his materials to Timbuctoo. You may wish to encourage your Purchaser to inspect the chattels in detail, see them in operation, or even put a paragraph in the contract whereby the Vendor would warrant that the chattels have been operational for X number of years without breakdown.

6. Although it is unlikely in a simple house transaction that you will want to break down the purchase price between the chattels and the real property, if there is an allocation of the purchase price, please bear in mind that the allocation of the purchase price to the chattels should be kept realistic. The Purchaser will be required to put a sales tax on that portion of the purchase price allocated to the chattels.

BETTERMENT CHARGES

There is likely no area of the Agreement with as many potential headaches as in the area of "betterment charges." A property lawyer has not really earned his spurs in the business until he or she has been burned financially by betterment charges. Clause 6 of the standard form Agreement reads as follows:

"Interest, rentals, insurance premiums, taxes, rates and assessments are to be adjusted to the date of closing. The cost of municipal improvements, (including but without limiting the generality of the phrase "municipal improvements," betterment charges and capital charges for utility or municipal services) completed as of the date of this Agreement, whether billed or not, are to be paid by the Vendor on or before the closing date."

How can such a simple clause lead to so much trouble?-mainly due to carelessness. There are two situations where trouble can arise. Firstly, if the property has already been billed for the charges, and secondly, where the work is complete but not yet billed. If the work has been billed, there will be no problem if the Vendor follows the standard clause number 6 and pays out the cost of the betterment charges at the time of closing. But what if
the Purchaser agrees to assume the charges? From the Vendor's point of view, if the Purchaser wishes to assume the charges, clause 6 can very easily be amended by changing the following portion of the last sentence of clause 6 "...are to be paid by the Vendor on or before the closing date." to "...are to be assumed by the Purchaser."

As the Purchaser's lawyer, the above amendment should flash large danger signs. This clause is extremely general and does not identify the amount of the charges being assumed. Your Purchaser may be under the assumption that he is assuming a $1,200.00 lien which may turn out to be a $7,200.00 lien. You may decide that the above amendment is safe if you confirm with the tax office the details prior to executing the Agreement. Even if the tax office confirms the information, I would strongly recommend against using such a clause since the tax office does periodically make mistakes, and it is so easy to be exact. I would suggest clause 6 could be amended to protect the interest of the Purchaser as follows:

"Interest, rentals, insurance premiums, taxes, rates and assessments are to be adjusted to the date of closing. The cost of municipal improvements, (including but without limiting the generality of the phrase "municipal improvements", betterment charges and capital charges for utility or municipal services) completed as of the date of this Agreement, whether billed or not, are to be paid by the Vendor on or before the closing

date, with the exception of the trunk sewer instalment charge of $6,700.00, which the Purchaser agrees to assume. The Vendor agrees that any past due installments or interest are the Vendor's responsibility and must be adjusted at the time of closing. Both parties agree to adjust the present year's annual installment."

The underlined section may be superfluous since any past due installments, present year's installments **or interest would**, **in** my opinion, have to be adjusted under the terms of the first portion of paragraph 6. Betterment charges are taxes and arrears, interest, and this year's installments would have to be **adjusted in the same** fashion as the taxes would be. Even though the underlined portion may be superflous, I would add it to avoid any argument. On numerous occasions, I have spent endless hours arguing with solicitors who strongly believe that if the Purchaser agrees to assume a $6,700.00 lien, it is irrelevant that it is grossly in arrears. To avoid wasting time in such an argument and to facing the possibility of having a client assuming betterment charges which may be for the large part immediately due, consider adding the underlined portion. For those who wish to argue that betterment charges are not taxes, I would refer you to the case of Petrofina Canada Ltd. v. Markland Developments Limited (1977) 3 R. P. R. 35.

Two other considerations in relation to betterment charges which have already been billed are, firstly, the Purchaser should be advised that if he is seeking a mortgage, certain mortgage companies may require the betterment charges which he is assuming to be paid out before they will advance mortgage funds. This would particularly be so where the mortgage being advanced is a high ratio mortgage. Secondly, the Vendor's solicitor should be ready to deal with a rather "flaky" argument from certain Purchaser's lawyers that betterment charges are assumed like mortgages, i.e. their principal amount is to be deducted from the purchase price rather than in addition to the purchase price. (If the purchase price is $50,000.00, and there is a $1,500.00 lien being assumed, $1,500.00 is subtracted off the purchase price and the Vendor received $48,500.00.) I would consider this position to be without merit, but if you are concerned, you might put in the following sentence in your contract:

"The trunk sewer installment charge being assumed by the Purchaser is in addition to the purchase price."

Another area relating to betterment charges which I wish to examine is where the work is completed but the bill has not yet been issued. If your Purchaser is agreeing to assume this future charge, go cautiously. Most likely you will not be able to receive from anyone in the muncipality a confirmation in writing as to the exact amount of the future bill. Thus, you may want to amend the contract to provide for a holdback at time of closing as security in the event that the bill exceeds a certain limit, or you may want to add a paragraph to the Agreement providing for a readjustment following closing if the bill exceeds a certain amount.

The above considerations will be of absolutely no value to you if when you are reviewing your client's contract or preparing it, you fail to inquire about betterment charges. This is particularly crucial to the Vendor who brings the contract to you for your perusal.

Should you fail to question the Vendor about the betterment charges, and at time of closing the Vendor is required to pay out $5,000.00 worth of betterment charges, I would suggest that the Vendor may have cause to be upset with you. If you are representing the Purchaser, the contract is already drafted favourably on behalf of the Purchaser. Thus to forget to discuss the matter with the Purchaser may in fact be in the Purchaser's benefit. IN A NUTSHELL, IF YOU ARE REPRESENTING THE VENDOR, DON'T FORGET TO DISCUSS BETTERMENT CHARGES. A last cord of caution I would have relating to betterment charges relates to any information regarding the betterment charges which you tell your client prior to executing the Agreement. Most likely, you do not have a tax certificate, and the information you are giving to your client has been received over the telephone. There is a good possibility that this information may be incorrect. To avoid facing the wrath of a Purchaser years down the way who discovers an error in this information, point out clearly to your client that you cannot guarantee this information to be cor**rect, and** if he is at all concerned over the details, perhaps he should go to the tax collector's office and perhaps the engineering office and get the exact details of the betterment charges.

THE APARTMENT

A great many of the residences which are the center or our Agreements of Purchase and Sale contain a basement or an attic apartment. With the high cost of living, apartments in residential homes will become more and more common. When the premises contain an apartment, a number of questions immediately come to mind:

1.Is the property zoned to allow for an apartment?

2.Has an occupancy permit ever been issued to allow the apartment?

3.Is the rent registered?

4.What is the rental information?

Before considering each of the these individually, a word of caution is necessary regarding the first three items. If we were to counsel our Purchaser not to buy a property with an illegal apartment, or an apartment where the rents are not registered, I would question how wise this advise might be. If in the City of Halifax, the authorities closed all the illegal apartments, thousands of people would be sleeping on the streets. Similarly, it would appear that an extremely large number of householders, who have apartments, ignore the Rent Review legislation. The obligation we have to our client is that we fully explain the law and the possible consequences to them of purchasing such a property. We have no duty to our client to scare them to death with endless horror stories when we know full well that they will not likely have any unpleasant consequences from the purchase.

In regard to zoning and occupancy permits, if you are representing the Vendor of a property with an illegal apartment, you have an obligation to draw to the Vendor's attention certain problems the Vendor may have.

The case of Danforth Heights Ltd. v. McDermid Brothers, (1923) 4 D.L.R. 757, sets forth clearly that:

"Where land is bought, to the knowledge of both parties to the contract, for a specific purpose, and it turns out it cannot be used for such a purpose, there is a plain failure of consideration."

I

Lebel, J. in the case of Lash and Moneta Builders and Construction Company v. Miller et al, (1956) O.W.N. 758 (High Ct.) states:

"Caveat emptor is definitely not the rule here, as it never was where the exercise of the Court's equitable jurisdiction was invoked in land cases. The Defendants bargained **for two additional apart**ments that could be leased or rented as such. The Plaintiffs knew this.

What the Defendants received was something so different as to be useless for their purposes, at least so long as the present by-law effects their lands."

The law as set forth in the above two cases has not always been followed as the Purchaser found out in the case of Hauck v. Dixon (1975), 10 O. R. (2d) 605 (High Ct. Ont.) In this case, the Purchaser of a triplex found out after the closing that zoning permitted only a duplex. The action against the Vendor for damages failed since the Court held that the Vendor had given no warranty that the triplex use was lawful.

Keeping the above cases in mind, it is clear that should your Vendor wish to sell a residential home containing an illegal apartment, he may have serious difficulties if he fails to disclose this to the Purchaser. Should he fail to disclose it to the Purchaser, there is a good chance that the Purchaser's solicitor will ascertain prior to the closing that the apartment is illegal and may counsel his client to refuse to close, or failing this, following the closing, the Purchaser may sue the Vendor once he discovers that the apartment is illegal. The practice of many lawyers when representing the Vendor of an illegal apartment is to have the Purchaser sign an acknowledgement that he has been advised prior to the signing of the Agreement that the property is not properly zoned or the rents are not registered, etc.

If you are representing the Purchaser who is buying a house with an apartment, you will undoubtedly want to incorporate into the contract a clause somewhat similar to the following:

"It is understood that the Purchaser wishes to use the premises for the purposes of a self-contained family residence on the main floor and second floor and a two-bedroom rental unit in the basement. The Purchaser shall have 15 days from the date of acceptance of this offer to satisfy himself that there are no government, municipal or registered by-laws, regulations, ordinances, or restrictions preventing the proposed use; and if the Purchaser is not so satisfied, he may notify the Vendor in writing within the said period that he will not complete the purchase, and in that event, and if the Purchaser produces to the Vendor a copy of such by-law, regulation, ordinance, or restriction preventing the proposed use, this contract shall be null and void and the deposit shall be returned to the Purchaser without interest."

In regard to protecting one's client in light of the Rent Review legislation, a similar process should be followed as to pro**tecting the client for** zoning. Should the property not be regis**tered with the Rent Review** Commission, the Vendor should obtain an acknowledgement from the Purchaser that he is aware of this fact. The Purchaser will want, prior to closing, confirmation of the rents and that they are registered. The onus for obtaining the rental information should be put upon the Vendor since the Rent Review Commission will not deal with the Purchaser without the consent of the Vendor. I would suggest a paragraph such as the following:

"The Vendor represents and warrants to the Purchaser, *which* representations and warranties are relied upon by the Purchaser and without which representations and warranties the Purchaser would not have executed the .'agreement, as follows: The basement apartment is rented on a month to month basis to Mrs. Sady Jones, the monthly rental is $380.00, the rent is approved by the Rent Review Commission, there is no written lease, the tenant pays her own electricity, water, telephone, and heat."

"The Vendor agrees to deliver to the Purchaser, prior to closing, confirmation in writing from the Rent Review Commission that the approved rent is as shown above."

When preparing a clause such as the above for insertion into a contract, bear in mind that the approved rents may be higher than the rents that are actually being charged. Do not allow your client to jump to the conclusion that the approved rent is the same as the rent that is being charged.

When the Purchaser arrives in your office to have the offer prepared and there is a rental unit, the following are a few

of the questions that should cone to mind:

1. What is the rent?
2. How is it paid?
3. Is there any security deposit, and if so, how much?
4. Is the lease written, and if so, what are the terms

Is. the rent registered with the Rent Review Commission?
6. What furnishings are provided by the landlord?
In addition to the rent, what utilities are paid by the tenant?
Who is the tenant and what is their history? By this I mean, how do they pay, are they noisy, etc.

I am not suggesting that it is the lawyer's job to ascertain all this information, but before the contract is drawn up, the Purchaser may want to find out the information, and in particular, some information about the tenant. Most purchasers could not be overjoyed to be landlords to "Hell's Angels" and most lawyers would not went to be faced with the task of giving them their notice to quit the premises.

In almost every case where you are acting for the Purchaser buying a house with a small apartment, you will find that usually a stove and fridge are included. Be sure to put something in your Agreement indicating that the chattels are also being sold. You will also want to amend paragraph number 2 in the standard form Agreement of Purchase and Sale which calls for vacant possession. This clause should be amended to indicate that the apartment will be sold subject to tenancy.

HOT WATER HEATERS AND FURNACES

When representing the Vendor, always inquire prior to the Agreement whether or not they own their hot water heater and furnace. As amazing as it may appear, many homeowners do not know whether or not they own their furnaces and hot water heaters. Don't be satisfied with a simple question to your client such as, "Do you own your furnace?" Go beyond this question to inquire if they pay any monthly or annual fees to their oil company. If they do, most likely their hot water heat or furnace is not owned. On numerous occasions I have had clients dumbfounded with amazement when they found out they did not own their furnace or hot water heater. Should the ownership not be discovered until the Agreement has been signed, the Vendor may have a costly awakening on closing day.

If the hot water heater or furnace is not owned, a clause must be put in the Agreement indicating that the Purchaser is aware of the fact and that he will assume the monthly liability, etc.

If you are representing the Purchaser, make sure you have your Purchaser check out the details of the rental or lease contract prior to signing a contract where he agrees to assume liability.

For years I operated under the premise that the rental or lease contract could be assumed by the **Purchasers without any diffi**culty. I was recently involved in a transaction where the oil company refused to allow the Purchaser to assume the hot water heater contract. This led to a great deal of difficulty and could have been avoided had anyone thought to call the oil company prior to the contract being entered into to see if the agreement could be assumed.

RESIDENT PURSUANT TO THE INCOME TAX ACT

Section 116 (5) of The Income Tax Act states that a Purchaser may be liable to pay to the department a tax of up to Fifteen percent (15%) of the purchase price where the Purchaser is purchasing property from a non-resident. There is nothing in the **Act which requires** the Vendor to provide any proof of his residency and the onus of inquiry is put squarely on the Purchasers. Since the tax is large, something should be put in the contract to ensure the cooperation of the Vendor in clearing up any doubt as to the Vendor's residency. I would suggest one of the following two clauses:

"At time of closing, the Vendor shall deliver to the Purchaser a certificate issued by the Minister of National Revenue under the provisions of Section 116 of The Income Tax Act of Canada, or in the alternative, satisfactory evidence by way of statutory declaration certifying that the Vendor 3s not a nonresident within the meaning of the said Act. If the Vendor is unable to deliver the certificate or satisfactory evidence as aforesaid, then the Purchaser shall be entitled to withhold fifteen percent (15%) of the purchase price to be remitted forthwith by the Purchaser immediately after closing to the Minister of National Revenue on behalf of the Vendor."

or

"The Purchaser shall be credited towards the purchase price with the amount, if any, which it shall be necessary for the Purchser to pay to the Minister of National Revenue in order to satisfy the Purchaser's liability in respect of tax payable by the Vendor under the non-residency provisions of the Income Tax Act by reason of this sale. The Purchaser shall not claim such credit if the Vendor delivers on completion the prescribed certificate or has statutory declaration or affidavit that he is not then a non-resident of Canada."

HISTORIC BUILDING

With the escalation of gas prices, we are finding more and more suburbanites returning to the core of our towns and cities. The slums of 1962 are now becoming snob row of 1982. If your Purchaser is interested in purchasing an older building, bear in mind the provisions of the Heritage Property Art, S.N.S. 1980, 1

Chapter 8. This Act may seriously limit the use of the property and its resale value. Thus, for the Purchaser's protection, you may consider adding a clause to the contract such as the following:

"The Vendor warrants and represents that on the date of closing neither the real property nor any part thereof will have been designated as an historic site by anybody having jurisdiction, whether federal, provincial or municipal, and that no building on the real property has been designated by any such body as being of sufficient historical interest or otherwise that a demolition permit is not obtainable on demand for any such building."

If your Purchaser is buying an older building, the contract should be set up in such a way as to protect the Purchaser in the event that there are violations of the building by-laws, health and fire regulations, etc. Your Purchaser may not be exceed**ingly pleased to** be notified by the municipal authorities shortly **after the purchase**, that the former owner had been served notice of **various infractions** and had been ordered to make repairs. Since the **former owner** had not made the repairs, the duty to make the repairs now falls on the new Purchaser. To avoid any argument, I would suggest a clause such as the following be put in the contract:

"The Vendor covenants to convey the said premises free and clear from all violations, work orders, outstanding infractions or complaints filed or existing in any other municipal department of the City of Halifax and affecting the said premises."

You may want to discuss with your Purchaser putting a paragraph into the contract to allow the Purchaser to have the building checked by an engineer for structural soundness, the electrical system checked, the furnace, etc. For the Vendor's protection, you may want to put a clause into the contract indicating that the building is being sold "as is" and that the Vendor has not made any representations regarding the structure, the furnace, the electrical system, etc.

WELLS, WATER AND SEPTIC TANKS

When representing a Purchaser who is buying a property with their own water septic system, careful counsel should be given to your client. A few of the considerations are as follows:

Water Quality

Failure to advise your client of the necessity of a water test may well make you the defendant in a negligence suit. More often than not your potential Purchaser will arrive at your office with a piece of paper from an appropriate government office *which* indicates that the water is A-1. Don't place false confidence in this piece of paper. It was likely for a water test which was done some time in the past, and there is no proof that the test was actually on water taken from the well in question. Most of the water tests are done on water brought to the testing laboratories by people who have no connections with the laboratories. Thus, it is possible to take water from a well in Queens County, deliver it to the testing offices in Halifax and have them identify it as water taken from a well in Colchester County. The Purchaser is always well advised to personally obtain the water sample and deliver it to the lab for testing. The Purchaser's offer must be made subject to satisfactory water tests being carried out. A sample clause to consider is as follows:

"The Purchaser shall have fifteen days to satisfy himself that the well water meets the recommended health standards for bacteria and mineral content approved by the Government of Nova Scotia. If the Purchaser is not so satisfied, he may notify the Vendor in writing within the said period that he will not complete the purchase, and in that event, and if the Purchaser produces to the Vendor a copy of a lab report indicating that the water does not meet the minimum safety standards, the contract shall be null and void and the deposit shall be returned to the Purchaser without interest." r

Water Source

If the water comes from a dug well, undoubtedly the Purchaser can see the actual location of the well, but if it is a drilled well or an artisian well, undoubtedly there is nothing on the ground to indicate where or what type of well it is. You may wish to consider a clause in the contract to verify the source and its location.

Also, it may be a shared well, which is always a source of many problems. If there is a shared well, a few questions must be approached:

1. Where is it located, on whose property?
2. Is there is a well-sharing agreement?
3. If there is an agreement, is it adequate?
4. flow many parties share the supply?

If there is not a well-sharing agreement registered at the Registry of Deeds, I would seriously question the wisdom of allowing a Purchaser to make an offer without making an effort to see if the Vendor can come to an agreement with the well sharer prior to the closing. You may want to put a clause into the Agreement, making the contract subject to a satisfactory well-sharing agreement with the co-user being executed and registered at the Registry of Deeds. If the well is on your client's property, your client will most likely have the upper hand in any dispute over the water use. If the well is located on a neighbour's property, I would suggest that your client's water supply is in jeopardy. If the cell is located on the neighbour's property, remember that an extra title search will be necessary--a well agreement registered after a mortgage will be wiped out by a foreclosure unless the mortgage holder has consented to the well-sharing contract.

,i Water Quantity

It is of little consolation to your Purchaser to have the best water in Nova Scotia if the well is dried up on a regular basis. Prior to entering into the offer, you want to make certain inquiries and perhaps put certain warranties in the contract relating to the quantity of water. You may also want to provide in the contract for a clause similar to the clause used under the section on Water Quality to have a test carried out so that you can assure yourself of the gallonage. Don't put a great deal of support in a test for gallonage, since the success of the test may bear a direct relationship to the weather at the time.

Water Taste

The water may meet all the health standards and may be in great abundance, but it may taste terrible. I doubt if it is necessary to provide for a taste test in the contract, but I would suggest that your client would be most unwise if he didn't avail himself of the opportunity to a taste test prior to making the offer.

Pump and Water Conditioner

To avoid the probability of having to replace the pump shortly after purchase, you may want to have your Purchaser make inquiries as to the history of the pump. If the pump has operated without any great problems in recent years, you may want to put a clause warranting this in the contract. Since the cost of water conditioners and pumps may run into the thousands of dollars, you may want to counsel your client to have a qualified person carry out a test on the equipment.

Septic System

A number of years ago, I had a client who shortly after purchasing a property, fell into his septic tank when his lawn collapsed over the tank. Anew septic system is a rather costly proposition and will greatly disrupt the landscaping. So some

preliminary inquiry should be made about the system. I am advised "

that the Department of Health will carry out certain checks on your septic system and provide a rather limited report. Since the system is almost impossible to check unless you are an earth worm, you may wish to put in your contract a warranty from the Vendor relating to its age, that it has worked satisfactorily in the past, etc.

The following warranty clauses from the Vendor for inclusion in the contract might be useful to cover water quantity, septic system, etc.:

"The Vendor represents and warrants to the Purchaser, which representations and warranties are relied upon by the Purchaser and without which representations and warranties the Purchaser would not have executed this Agreement, as follows:

Since 1972 when the Vendors purchased the property, there has always been an adequate supply of water from the well.
2.
The water supply is from a drilled well located

in the back yard and marked by a cement marker.
3.
The pump and water conditioner were purchased new in 1978 and have operated without break down since that date.
4.
The septic system was installed by the Vendors in 1974 and has operated without problem since that date.

5. The Vendor is not aware of any problems with water quantity, water quality, the water pump and conditioner, or the septic system."

"The Vendor agrees that the representations and warranties above will not expire with or be terminated or extinguished by the closing of the transaction and that all such representations and warranties shall survive the closing of the transaction."

KEYS

There appears to be a growing number of lawyers who resist the handling of keys in a similar fashion to which they **would resist** the catching of a social disease. When they represent the Vendor, they have a complete aversion to requesting the keys for the property. The end result is that the real estate agent or the Purchaser's lawyer will waste endless hours chasing down the keys while the Purchaser smolders with displeasure in his lawyer's office. Whether or not it is the Vendor's lawyer's job to transfer the keys with the deed at time of closing I am not certain, but I am certain that it is a great discourtesy for the Vendor's solicitor to ignore the problem of keys. To deal with such a problem I feel it is important to begin inserting in our contracts a clause such as the following:

"The Vendor covenant and agrees to supply to the Purchaser on closing all keys to the premises."

You will note that I have underlined the wo rd _all. To receive one key from the Vendor's solicitor at time of closing and to be advised that the balance of the keys are with the real estate company is an imposition to the Purchaser's solicitor.

UREA FORMALDEHYDE

Because of the wide publicity given to the problem of urea formaldehyde insulation, most Purchasers are looking for some protection to assure that they do not buy a property with this insulation in the walls. I would suggest that each Purchaser before making an offer to buy a property could carry out an examination to see if there are any signs of the foam insulation. Unless your Purchaser bores endless holes throughout the walls of the house, one can never be assured whether or not the foam insulation is actually there. To a large extent, you must rely on the honesty of the Vendor. Once your Purchaser has made inquiries of the Vendor and has been told that the foam is not in the property, I would suggest that a warranty should be put into the contract whereby the Vendor warrants that the foam is not in the premises. Such a warranty clause will not do your Purchaser any great deal of good if foam is later discovered to be in the property only to find out your Vendor is now living in Uruguay or is a pauper.

Thus, in spite of how honest the Vendor appears, your Purchaser will be well advised to carry out a detailed inspection in search of the foam insulation.

CONCLUSION

It is commendable to strive toward the perfect contract. It is foolhardy to think that you will ever achieve it, as magical words will never make a contract perfect. There are so many variables that even a carefully drafted contract may look like a gallery of loop holes. Lawyers and real estate agents are frequently criticized unfairly for contracts which, in hindsight, turn out to be less than perfect. This criticism is quite valid when

the imperfections are based on carelessness and lack of care. Our clients are entitled to greater consideration.