INTRODUCTION

In carrying out research for this paper, it quickly became apparent that with such a broad topic, it would not be obvious where to begin the paper and even harder to determine where it should end. I felt my position was somewhat similar to the daughter of Danaus, in Greek mythology, who was forever doomed to draw water from a spring in an attempt to fill a bottomless urn.

All of us involved in property practice are fully aware of the multitude of problems and considerations that must be borne in mind when dealing with this subject on a day to day basis.

In keeping with the title of this Conference, I have tried to make the paper as practical as possible. I felt that an appropriate starting point would be where your clients are about to acquire a piece of property that is in the municipal approval process and to, at the same time, want some advice with respect to the various permits they will require to carry out construction.

After that point, I have tried to deal with those areas that seemed to cause the greatest problem for lawyers and clients, where properties under construction are being acquired and, in most cases, the solicitor has had little or no input into the drafting of the Agreement of Purchase & Sale.

In general terms, the paper deals with new construction as it relates to residential dwellings, and to the whole content of the paper, I apply the general caveat which is favoured by so many solicitors "I stand to be corrected".

PLANNING ACT AMMENDMENTS

On August 6, 1984, Sections 3(r), 88 to 103 and 120(4) of the Nova Scotia Planning Act were proclaimed. These sections deal with subdivision of land in Nova Scotia and "subdivision" now means the division of any area of land into two or more **parcels and includes** a resubdivision or a consolidation of two or more parcels. **Only** two Counties have retained the provision that a **subdivision takes** effect on the creation of the third lot from a larger parcel.

Solicitors should note however, that the Act does not apply to:

1. A divison of land resulting from a devise of real property by a testamentary instrument;

2. A division of land resulting from an expropriation;

3. A division of land resulting from an acquisition of real property by the Province;

4. A division of a cemetery into burial lots;

5. A division or acquistion by the municipality for the purpose of altering boundaries of an existing or creating a new public street where such purpose is expressly stated in the document;

6. A division of land resulting from a lease of real property for a term of 20 years or less;

7. A subdivision in respect of the creation of any parcel in excess of twenty five acres in area (In this case, an affidavit of the owner stating the the land created is in excess of 25 acres in his belief);

8. A division of land where there is no provincial subdivision regulations or subdivision by-law of a municipality in force in respect of. that land at the time of the division.

Therefore, in any of the above situations, the regulations and procedures with respect to subdivision do not have to be followed. However, whether a particular "Subdivision" falls under the exemption section is a question of interpretation.

Although the Act may not apply to the above eight situations, there are other considerations of which purchasers must be aware when acquiring newly approved lots or lots which come into being under the exemption section.

There is no guarantee, flowing from lot approval, that a building permit will be issued or that lots will be acceptable for the installation of an on site sewage disposal system. This is particularly true where lots have been created under the **exemption** section and where the requirements of other governmental departments may not have been considered.

The subdivision procedure makes every attempt to ensure that an approved plan of subdivision creates lots which will be acceptable building lots and which can sustain a sewage disposal system where necessary. Naturally, these questions are usually addressed at the time the applicant applies for subdivision approval. Therefore, any subdivision outside the parameters of the normal approval process may result in an inability to effectively use the land for residential building purposes.

The new scheme of the Act, with respect to subdivision, is to have one subdivision document in effect whether it be Provincial Subdivision Regulations or Municipal Subdivision By-laws. The Province will now have control which it did not have prior to the amendments.

Municipal Development officers administer the subdivision of land for Municipalities *which have* subdivision bylaws. Where no subdivision bylaws are in effect, Provincial Development officers administer Provincial Subdivision Regulations *which* are presently being prescribed for various Municipal Units. Attached is a memo from the Department of Municipal Affairs setting out what regulations are in effect in various municipal units. A list of Development Offices, their addresses and phone numbers follows (See Schedule "A").

For the property practitioner, there are two major practical changes contained within the aforementioned amendments. Firstly, the fourteen day appeal period following final approval, has been abolished. Secondly, the filing of plans at the appropriate Registry of Deeds will be done directly by the relevant Development Officer who is required to do so within thirty days after the plan is endorsed with his or her approval. The cost of filing the plan at the Registry of Deeds **will now become part of the** application fee.

The staff at the Registry of Deeds in Halifax have been instructed to only accept plans of subdivision from Development Officers or their couriers. They will not accept plans from owners of property or others who present a copy of the subdivision plan to the Registry. Any plan of subdivision dated prior to August 6, 1984, will be accepted from anyone wishing to register the plan.

From discussions with legal counsel at the Department of Municipal Affairs, it appears that approximately 1/3 of all new subdivision plans were being recorded at the Registry of Deeds. All plans will now be registered by the Development Officer and subdivision will be effective upon filing of the plan at the Registry of Deeds.

The Act also provides for tentative plan approval. Such approval lapses within two years if the lots are not shown on a final approved plan of subdivision.

There is a right of appeal to the Municipal Board contained within the amendments.

PERMITS

BUILDING PERMITS

Attached to this paper are letters from our local municipal authorities indicating the cost and information required to obtain building permits (See Schedule "B").

Halifax County allows the renewal of a building permit after the 12 month expiry period. The building permit will be renewed fairly easily if some work has been done on the property with respect to construction or the installation of a septic system. In the event municipal regulations or bylaws have changed prior to permit renewal, the building inspector will apply the old provisions if work has commenced. If no work has begun, he will have to apply any new provisions. There is a possibility that due to such amendments, the lot would no longer qualify for a building permit. There is a great deal of discretion in the building inspector whether to renew or not. If no work has been done, renewal is not automatic. In the event a building permit is renewed the cost for the County of Halifax is $10.00.

The building permits issued by the City of Halifax are valid for six months. The City will grant an extension rather than a renewal of the permit. If no work has been done, one extension may be granted but the City does not like to grant more than one extension unless construction is progressing. Reapplication may be necessary for owners of land whose building permits have lapsed and who have not commenced building. The cost would be the same as the initial application fee (based on the square footage of the proposed building).

In some of the aforementioned letters there is a reference to a sewer development charge. This is a charge levied over and above the normal trunk sewer charge although it is a type of trunk sewer charge. In the City of Halifax, it is due and payable by the owner of a new building or addition to a building prior to the issuance of a building permit. Payment may be deferred with interest until completion of construction, but must be paid prior to issuance of any occupancy permit. The charge is calculated based on the area of floor space for which the occupancy permit is granted. The proceeds of the charges are paid **into an account** called the Sewer Rehabilitation and Trunk Sewer account and is used for sewer rehabilitation and the City's share of the cost of trunk sewer construction. The charge is 30 **cents per square foot** of floor space. However, the minimum charge is $500.00 on any new building. In addition, the trunk sewer charge is $250.00. Such charges constitute a lien on the property, as any local improvement, and may be collected through forced sale of the property.

MUNICIPAL DEVELOPMENT PERMITS

Municipal Development Permits may be required under land use bylaws made in accordance with the Planning Act S.N.S. 1983 C.9. They are required to regulate or prohibit certain activities including building structures, fences, altering level of land by excavation or filling in of land. In Halifax, the Development Permit itself states "The above Development conforms to the City of Halifax Zoning Bylaw and is therefore a permitted Development."

In the City of Dartmouth, the application for a building permit includes the application for a development permit. When a building inspector receives an application for a building permit, he sends a copy to the Development Officer who ensures the proposed construction or alteration conforms to the zoning bylaw and any planning matters.

Halifax County also includes in the applicaton for a Building Permit the necessary information for a Development Permit. In some rural areas where planning strategies differ, development permits may not be required. Any requirements as to Development permits would be found in a zoning bylaw or land use bylaw in a particular area.

Attached is a sample Development Permit from the City of Halifax as well as a list of items which require a Building Permit and/or a Development Permit for the City of Halifax (See Schedule "C").

SEPTIC PERMITS

A permit must be obtained before a septic tank and field can be placed on an unserviced lot. The application is termed "an application for approval to install an on-site sewage disposal system". The forms can be obtained from the Building Inspection Office of your local Municipality.

The Department of Health is involved before subdivision, when application is made to have lots approved. The whole subdivision is assessed for the number of disposal systems that the subdivision can reasonably bear. In some cases, a fewer number of lots than requested may be allowed because of the soil conditions of the land.

However, once the lots are approved, the Department of Health becomes involved once again when an individual has purchased a lot and wishes to install an on-site sewage disposal system. This application is usually made at the same time that a building permit is applied for.

The Health Inspector will then assess and usually carry out further tests on the particular lot. Once the lot has been tested, approval may be given to install the system.

Once the system has been placed in the ground and all connections have been made, the Inspector returns to the lot for final approval. The system is never covered over with soil **until final approval** has been given.

Final approval is given in writing by the Health **Inspector**, **but** in practice, the systems are covered over once verbal approval has been received. The reason is that usually a backhoe or other heavy machinery is waiting on the lot to back-fill the site and at $60.00 to $70.00 per hour the wait can be quite expensive.

The fee to obtain a permit to install a septic system is included in the building permit cost which varies from County to County. In Halifax County, the cost for a building permit is now $3.00 to $4.00 per $1,000.00 of construction. To obtain a permit to put a system in without a building permit is $6.00 to $8.00.

The time frame required from application to installation varies. In most cases, it depends upon the applicant who is responsible for providing the holes required for percolation tests. Health Inspectors may be backed up with requests, but on average, approval will be given approximately ten days to two weeks after the application is submitted providing the weather cooperates.

Attached to the paper is a sample application form and a sample permit together with a copy of the final inspection report (See Schedule "D").

I would also suggest that you obtain copies of brochures from the Atlantic Health Unit which contain a great deal of valuable information and at the same time pick up a copy of regulations respecting the subdivision of land which is to be serviced by an On-Site Sewage Disposal System.

For those solicitors practicing in the local areas, the senior officer at the Atlantic Health Unit is Mr. Bernie Hanlon, 1500 Bedford Highway, (835-7181). You may also **wish to refer your** questions to Joe Heffler or Bob Gough at the County of **Halifax**, (477-5641).

WELL DRILLING

The installation of wells in Nova Scotia is governed by the Well Drilling Act and its Regulations.

A permit is not required to dig a well, however, any person who installs a well must be licensed under the Act. The Department of Health is only involved to the extent of specifying the distance of the well from the property's septic system or abutting owners septic systems. When a permit to install an on-site sewage disposal system is given, the Health Inspector takes into account the location of septic systems and recommends the position of the well.

Well testing, for quality for water, is done on a demand basis for which the Atlantic Health Unit charges. There is no requirement of quantity or quality of water in any particular well. Most people want to make sure their well water is safe to drink and they take on the initiative themselves.

I would note that if Canada Mortgage & Housing Corporation is involved as a mortgage lender or mortgage insurer, it may have specific requirements as to quantity of water and, as do most lenders, will want confirmation as to the quality of water.

There are two publications to which I would refer you. The first of which is distributed by the Department of Health and is a brochure which describes the method of obtaining **water samples** and the procedures for having that water tested. **There is also a** very helpful book distributed by the **Department of Environment** entitled "Before You Construct A Water Well". **This is a very** useful booklet for any of your clients who are about to engage the services of a well drilling contractor.

OCCUPANCY PERMITS

An occupancy permit is required for every structure in the City and County of Halifax. However, where owners change but the use of a building remains the same, a new occupancy permit is not required. Where the change of ownership involves a commercial building, a new occupany permit is usually obtained because the new owner wants the permit in his own name.

An occupancy permit is required for any change in use of the building. The cost of a straight occupancy permit is $25.00 for the City of Halifax. When an application for a building permit is made to construct or alter a building, the application for an occupancy permit is automatic and is included in the cost of the building permit.

In Dartmouth, occupancy permits are required for residential buildings only, they are not required for commercial buildings.

In Bedford, a zoning bylaw came into effect in late 1982 which deemed all structures to have occupancy permits. From that date forward, any new building or change in use of a building must have an occupancy permit or the use must be a legal non-conforming use.

Inspections are performed by the Building Inspector of the relevant municipality. Inspections may also be made by the fire marshall, electrical inspector, planning authorities and other governmental bodies depending upon the structure and the use to be made of the building. For example, the Department of Health will be involved if the use of the building involves food preparation.

The time to obtain an occupancy permit depends on the circumstances. If a new structure is being built, it would take much longer than if a simple change in use takes place.

Mr. Ken Meisner of the City of Halifax Building Inspection Division is in charge of issuing occupancy permits. He stated in an interview that many lawyers are not aware that occupancy permits are required. Some lawyers are aware of the requirement and request confirmation that an occupany permit has been issued when acting for a purchaser. However, of those that request the information, few give the closing date. That date is required so that he will know how much time he has to respond. Depending on the circumstances, it may take as long as two weeks to determine the relevant information. In addition, he requires knowledge of the specific use of the property. Since occupancy permits are based on the use and size of a building, a simple reference to residential is not sufficient. In other words, the more particular we can be, the.easier his job will be.

Some lawyers include a legal description along with the request for the information. A legal description will not assist the building inspector to determine the occupancy of the building.

In some cases requests are made to confirm that the present occupancy conforms with the zoning bylaw. In this case, a location certificate would help to answer that question. Architectural drawings may be required to answer questions. For example, where parking is underground in a building, a plot plan or location certificate would not show the number of parking spaces. Rather, a floor plan or architectural drawing of the building may assist him in answering the inquiries.

BLASTING PERMITS

A Permit is required for construction blasting in the City of Halifax. An application in the City of Halifax costs $10.00 and can be obtained at the Building Inspection Offices. The applicant must submit a copy of the insurance policy or confirmation of insurance coverage on the insurer's letterhead. The minimum coverage acceptable in the City of Halifax is $100,000.00 with a maximum of $500.00 deductible on each claim. Without such coverage, a permit will not be issued.

In the County of Halifax and in the Town of Bedford, the minimum insurance coverage acceptable is $1,000,000.00 with a maximum $500.00 deductible on each claim.

The City of Dartmouth does not have any provisions regarding blasting.

Once a permit is obtained, the permit holder can blast at any time between the hours of 8:00 a.m. and 6:00 p.m.

A "pre-blast" survey will likely be required by any insurer and may also be required by the relevant municipal authority. The survey is an analysis done on homes which abut, or are near to the proposed blasting site. Any cracks in the walls or foundations are noted on the survey prior to the blasting and, where necessary, photographs are taken. Naturally, this will normally preclude fictitious claims being made with respect to blast damage on adjoining properties.

Any person doing blasting must hold a valid blaster's certificate which is required by Regulation 102(2) of the Construction Safety Regulations made pursuant to the Construction Safety Act, R.S.N.S. 1967 C. 52 as amended. To obtain this certificate, the individual must submit to an examination and pay the $15.00 examination fee.

MECHANICS' LIEN ACT

There is probably no other area, in the new construction field, which causes more argument, concern, frustration and misunderstanding as the attempts of vendors, purchasers and their respective lawyers to come to a satisfactory arrangement **with respect to this subject**.

The problems covered by this topic appear to divide into approximately six areas:

1. The purchaser as an owner;
2. Calculation of a holdback;
3. When does the time period start running;
4. Waivers, statutory declarations and indemnities;
5. Mortgage lenders;
6. Extent of purchaser's liability.

THE PURCHASER AS AN OWNER

This first area is probably the one that causes the most confusion to property lawyers and basically involves making a determination as to when a purchaser under an Agreement of Purchase & Sale becomes an "owner" under the definition contained in Section 1(d) of the Act.

When reading the-definition, bear in mind that we are not talking in the strict sense of "legal" owner. We are trying to determine whether the purchaser falls under what the case law has determined as a "statutory owner".

Naturally, we are involved with purchasers who enter into Agreements of Purchase & Sale at all stages of construction. This might include the purchaser who enters into an agreement prior to any construction having been commenced to the purchaser who signs his or her agreement when there is nothing left to be done other than carpeting.

In the first example, there is probably no doubt that your "owner" will require a holdback, and in the second instance, probably not. The question for conveyancers is to try and determine where the cut off point exists; that is, when can you safely accept a deed and feel confident that the registration of that deed will defeat subsequent lien claims.

When I find myself in this situation, my first concern becomes at what point, during construction, did my purchaser enter into the Agreement of Purchase & Sale and secondly, what input or control did that purchaser have as to the course of construction after the agreement was signed. The majority of cases would appear to give the greatest consideration to the first question, i.e. when the contract was signed as opposed to considering the input of the perspective purchaser.

For example, you are representing a purchaser who is buying a home under construction from a contractor on lands presently owned by that contractor. If the agreement is entered into at the beginning of construction, it would appear that a holdback is a necessity irrespective of the fact that the contractor may simply be building his standard home and has given your purchaser no greater input into construction than picking light fixtures and flooring for the house. On the other hand, if the agreement was entered into, by the purchaser, after the home was fully completed, **then the cases would** agree that the registration of the purchaser's deed, prior to any liens being filed, would defeat any subsequent claims as long as the deed was registered without notice of those liens. In other words, you are dealing with a situation where you have a bona fide purchaser for value without notice.

As mentioned, the critical area comes where the home is 95$ or 96$ completed when your purchaser enters the situation and at this point, do you require a holdback?

The case most often used to support the proposition that **no holdback** is required where there are only a few things left to be done when the agreement is entered into, is Sterling Lumber vs. Jones 29 D.L.R. 288. The wording of that case indicates that when the purchaser entered into the Agreement of Purchase & Sale "there were still some little things to make the construction complete". I am very wary of just how far you can extend the one line of that case and would tend to limit it to exactly "some little things".

My feeling is that even if the house is 95$ completed when the Agreement of Purchase & Sale is entered into and the purchaser lists four or five things to be done, he has bought himself within the definition of owner under the Act and will be required to have a holdback. On the other hand, if the purchaser enters that same agreement and merely stipulates that he will buy the property when it is 100$ completed, he may or may not be defined as an owner.

This is such a dangerous area that a prudent solicitor would be advised to proceed on the assumption that the purchaser is an owner within the meaning of the Act.

CALCULATION OF A HOLDBACK

There does not appear to be any case law which provides an adequate guideline for determining the amount of the holdback when you are dealing only with an Agreement of Purchase & Sale and not with a standard construction contract. Section 12 (2) of our Act, **provides** that the holdback is to be 10% of the value of the work, such **value** to be calculated on the basis of the contract price. **The contract** in mind is not the sale contract in respect of the completed building, but the construction contract.

If there is no construction contract, then the value of the work is to be calculated on the basis of the "actual value of the work, service, or materials". In Northern Electric Company v. Metropolitan Projects et al (1977), 1 *R.P.R.* 268 (ICS.) (Co. Ct.) O'Hearn

C.C.J., at p. 274, stated that "actual value" is the market value of the work, which, he admits is a largely unworkable test to apply.

I think that you must assume that the price obtained for the improved land, less the value of the land in its unapproved state, is the only way a figure can be obtained for the value of the improvements, at least in any market where the seller is **not selling** at a loss. I am afraid that the courts have not given **any greater** guidelines.

The question is further compounded by a purchaser who signs an Agreement of Purchase & Sale when the house is half finished. In that situation, should you base your holdback on the amount of work remaining to be done, or on the full value of the improvements that have been put into the property?

Again, it would appear there is no definite answer when you consider the various cases on this subject, but the safe answer would appear to be that the holdback should be based on the full contract price. As indicated, the cases appear to be of little help in determining this question and the nearest answer came from one decision where the judge stated that "the amount to be held back will vary from case to case". To allocate your holdback, I think you **must inquire as to who** could possibly file a lien against the property on or after the closing date. Any possible **claimant who is within his time** period or can shelter their lien, should be **considered**.

For example, if the foundation was installed months ago, there is no way that the foundation people or their subsidiaries can now file a lien or be sheltered. I don't think the purchaser would be required to have a holdback, but if on the other hand, the foundation was completely done before the purchaser entered into the picture, but the foundation contractor is still within his lien, I think you have to have a holdback.

In considering the holdback, remember to hold back 10$ of each advance or draw to your builder as it is not safe to simply hold back 10$ on the very final draw or payment.

WHEN DOES THE TIME PERIOD START RUNNING

Section 12 (2) of the Act requires the person primarily liable upon any contract under which a lien may arise to retain for a period of 45 days "after the contract is substantially performed" a holdback of 10% of the value of the work done. At the end of the 45 day period the holdback may be reduced to 2 1/2% of the value of the work, which is to be retained until all required work is performed completely. Payment at the end of the 45 days of the 7 1/28 discharges all liens in respect thereof; s. 12(6).

Thus, the Act makes "substantial performance" of the contract the event from which the time period for retaining the holdback is calculated. S. 12(1) defines "substantial performance" according to two criteria:

(a)when the work or improvement is ready for use or is being used for the purpose intended; and

(b.)when the work to be done under the contract is capable of completion or correction at a cost of not more than two and one-half percent of the contract price.

The "contract" in question is the contract under which the lien claim arises, i.e. the subcontract if the lien claimant is a subcontractor - Mahaney_et _al. v. W. & B. Construction Ltd. (1978), 4 RPRS (NSSC, AD). The actual calculation of the cost of completion under s. 12(1)(b) can be tricky. An example of how this was done in an Ontario case, using a slightly different definition, can be found in Bird Construction Co. Ltd. v. Ownix Developments Ltd. et al. (1980), 15 R.P.R. 239 (Ont. Div. Ct.).

It has been made clear by our courts that attempts by claimants to keep their liens alive by doing trivial or covert repair work will not succeed: McLanders Contractors _Limited v. Eastern Flying Services Limited (1982), SS NSR (2d) 449 (Co.Ct.); Bathurst Plumbing & Heating (1967) Ltd. v. Pro Air Systems (1972) Inc. et al. (unreported, March 10, 1976, N.S.Co. Ct.j.

One fault in our Act which does not seem to have been addressed by our Courts is the failure to have the "substantial performance" definition apply not only to the holdback provisions in S.12, but also to the lien expiry provisions in S.23. The time limits for filing liens in S.23 are calculated from the date of **"completion"** of the work or service, and not from the date of substantial completion.
Thus, it is arguable that a lien claimant is entitled to file his claim for lien 45 days after total completion of his work, and not after substantial completion. If this argument holds, then the owner may have already paid out the holdback, since he need retain it only for 45 days after substantial completion. The problems created by this apparent incongruity in time limits are well presented in two articles: Bristow, David I., "Substantial Completion of Contracts Under the Mechanics' Lien Act 1968-69 Ontario" (1972), 20 Chitty's L.J. 124 and Scott, Douglas S., "Recent Developments in Substantial Completion under the Mechanics' Lien Act of Ontario" (1974), 22 Chitty's L.J. 131. Although later case law in Ontario has cleared up the problems cited by these authors, they haven't even been raised here in Nova Scotia. Indeed, in Design Products Limited v. Five Fishermen Limited et al. (1982), 54 N.S.R. (2d) 547 (Co.Ct.) Anderson C.C.J. assumed that the substantial performance criteria applied to S.23.

WAIVERS, STATUTORY DECLARATIONS AND INDEMNITIES

What I am going to deal with under this subheading is the practice of including, in an Agreement of Purchase & Sale, a clause **whereby** the Purchaser foregoes the mechanics' lien holdback in **lieu of which** he will receive from the contractor either waivers of liens, statutory declarations that lien claimants have been paid or indemnities. The clause may call for the provision of one, or a combination, of the foregoing. It might be worth stating initially that I do not feel there is anything legally wrong or incorrect with this approach. There is a question that is sometimes raised as to whether or not one can contract out of. the Act. In general terms, I would suggest that you can. This approach is frequently taken by solicitors representing contractors as a method of avoiding any holdback.

When discussing this subject with a purchaser, prior to the signing of an Agreement of Purchase & Sale, I think it is incumbant on you to give a full explanation that to forego a holdback gives the purchaser no protection and that the only way of obtaining 100$ protection is a holdback for the full statutory period. By accepting statutory declarations, etc., your purchaser should be aware that the percentage of protection lies somewhere between the two extremes mentioned above.

With respect to statutory declarations, I would suggest that these do little or nothing other than possibly give some purchasers peace of mind. I do not suggest that the "peace of mind" is well founded.

The standard declaration usually says little more than all people entitled to lien claims have or will be paid from the proceeds of sale. That, in my mind, provides no protection to the purchaser at all.

The second step is frequently for the contractor to offer an indemnity for claims should in fact liens appear after the **closing** date.

I would note that there is sometimes a practice to include indemnities within the statutory declaration, and I would suggest that an indemnity offered and accepted in this form has little or no validity. If you are in a position of taking an indemnity, I think it should be done as a separate agreement, with consideration, and attached to the aforementioned statutory declaration.

Irrespective of whether or not you are taking an indemnity from the contractor (vendor), it appears to me that the contractor is merely agreeing to indemnify you for something that he or it is already.

(a) Explore who the waivers of lien are going to be coming from remembering all subtrades and suppliers. If your purchaser is expected to close without a holdback, then it is not unrealistic for you to ask for waivers from all possible lien claimant.

(b) Check with the Registry of Deeds for the past few years to see if the company or the individual contractor has had lien problems prior to the time.

(c) Check with the Registry of Joint Stock Companies to see how long the company has been in business. If you cross reference this with a search at the Registry showing no liens have been filed but that the company has been in active business, this might give you some consolation.

(d) If the contractor has advised you as to who his main suppliers are, I would call their accounts department and see if they had any problems with the individual contractor or company paying their accounts.

(e) I would ask the vendor's purchaser directly what he or she knows about his client and whether they feel that they are a risk to deal with. I find most solicitors are usually quite candid and open when asked this.

(f) If I am going to accept an indemnity agreement, I want it as broad as possible covering all costs including any possible legal costs that may be incurred by the purchaser **in removing a** lien. I think the indemnity should also be signed not only by the individual contractor or company officer but, where necessary, by their spouses. As you are aware, many small contractors have all of their personal assets in their wife's name to avoid financial problems. I do not think it is unrealistic to expect that spouse to sign the indemnity if the contractor is expecting you to close without a holdback. If the contractor is not willing to accept this arrangement, then I would certainly have cause for concern.

MORTGAGE LENDERS

It use to be the practice of many mortgage companies to retain a holdback for the mechanics' lien period though I think, in most cases, that is not the present practice with the exception of a few lenders.

I think it is clearly established that so long as the mortgage is registered and the funds advanced before any lien is registered or the mortgagee gets notice of the lien, then the mortgage advance takes priority over that lien.

I think there is an exception to that proposition if, in fact, the mortgagee comes within the definition of "statutory owner", in which case, the mortgage advance may be second in priority to any lien even though the lien was registered after the mortgage advance.

In order to have this situation happen, you must bring, as I indicated, the mortgage within the owner definition and this will only usually occur where the mortgagee and the mortgagor are in a joint venture, if the mortgagee has entered into a long term lease agreement for the property, if the mortgagee has a buy-back agreement for the lands, if the mortgagee has entered into arrangements with the mortgagor on the sale of the property or is a mortgagee in possession. I would only worry about these exceptional cases where the mortgagee is acting in a capacity quite beyond the normal role of a mortgagee that we are familiar with.

There is still some concern with the odd lender that insists on having a mechanics' lien holdback held by the lender itself.
The problem that arises is that the lender will frequently wish to
base the 10% holdback on the full sale price in the Agreement of Purchase & Sale rather than calculating the holdback as mentioned previously in this paper.
Needless to say, if I am representing a purchaser, I am quite happy with that situation, but if I am representing a contractor, I will simply refuse to close until the holdback is calculated on the appropriate sum.
I am also wary of the lender that designates an amount of holdback for "liens and deficiencies". In some cases, this may reduce the amount kept for these two areas, but it may also result in a large sum being held at the end of a lien period, for trivial matters which may be in dispute between the purchaser and contractor.

EXTENT OF PURCHASER'S LIABILITY

The purchaser, if he is subject to the holdback provisions, will not incur liability beyond the amount of the holdback so long as the provisions of the Act are adhered to.

If written notice of a lien is received, an amount equal to that claimed in the notice must be held back in addition to the 10$. If, after receiving such notice, payment is made to the contractor, such payment is made at the peril of being required to pay all or some of the moneys again to the lien claimants up to the amount of the holdback plus the amount in the notice.

DEFICIENCY HOLDBACKS AND EXTRAS

It would seem that no other area, with the possible exception of mechanics' liens, causes more discussion at the closing of a new construction transaction than the matter of deficency holdbacks. Basically, what you are trying to achieve is a dollar allocation for that work which has yet to be completed at the time of closing or has not been completed to the purchaser's satisfaction.

Also, it is usually at this time that arguments, if they are going to arise, will start with respect to things that the purchaser believes should be completed and that the contractor is saying are not part of the contract.

In general terms, the calculation of deficienty holdback should be a fairly straight forward matter. This is rarely the case.

Needless to say, the purchaser's lawyer wants a holdback that will certainly cover the costs of doing the work together with some added "bonus" for inducing the contractor to return to complete the work. On the other hand, the contractor is usually only interested in dealing with holdback amounts that reflect what he is allocating within his own building costs. The solution usually lies somewhere' in between.

From the purchaser's point of view, bear in mind that irrespective of the price the contractor has allocated in his own specs to do that job, this will not reflect the cost of obtaining a new third party contractor to come in and complete the work should your contractor fail to do so.

The easiest approach and my suggestion to clients is to have the contractor and purchaser meet together with the relevant real estate agent the evening before or the day of the closing. I ask them to prepare a written list to be signed by both parties indicating the deficiencies and the dollar price to be allocated to each individual job with an agreement that as each job is completed, the amount allocated can be released. With this method, I try to avoid a proliferation of phone calls between clients, lawyers, and real estate people and hopefully the two lawyers are left with an agreed list and price to be held back. It also allows for individual amounts to be released and avoids the situation whereby a purchaser's lawyer has a $2,000.00 deficiency holdback with nothing more to be done than some touch up painting. I leave it to yourselves to decide who keeps the holdback amounts.

Hopefully, this arrangement will also avoid the purchaser who starts to "nit pick" after the closing and adds to the deficiency list. You should agree at the closing that after the work listed on the deficienty list is completed, the holdback funds will be released.

In calculating your allowances, I think you have to bear in mind that there are certain authorities, Such as the Department of Housing, that will already be imposing an obligation on the contractor's lawyer to holdback money for such matters as landscaping. I think this amount should be taken into account between lawyers when calculating holdbacks.

The above matters can be totally complicated by the mortgage lender who itself is withholding for deficiencies.

Needless to say, the mortgage lender is usually quite generous in its holdbacks for the mere fact of self-protection and their holdback amounts frequently do not reflect, in any

way, the cost of getting the job done. From a practical point of view there is little you can do about this situation, and the general practice is for the mortgage companies holdback to simply be off **set between the lawyers** against the purchase price at closing. I don't think there is much you can do about this arrangement and most lawyers seem fairly happy to deal with the matter on that basis.

The problem that the mortgage .londer does cause is where an inspector goes out and carries out his mortgage inspection the day before the closing and there are a number of things to be completed before funds will be advanced.

You will all be aware of the rush that contractors put on in the last 48 hours prior to closing. You will find yourself in the situation on the morning of closing where the mortgage inspector has been out the day before and has not authorized the mortgage advance whereas the contractor has been working all night and is now claiming that the unit is 100% completed. The mortgage lender now tells you that they won't be able to get an inspector out until the next day.

Again, a practical problem arises because I feel the contractor is justified in looking for a closing that day as there is no obligation on the contractor to have the house 100$ completed two or three days before the closing to comply with a mortgage inspection.

The, only thing I have ever been able to do in that situation is to 'badger the mortgage company to get an inspector out that day or hopefully, you've had an inspector who realizes that deficiencies will be cleared before the closing and has therefore worded his report as such so that the mortgage lender feels comfortable in advancing funds.

If you are left to calculate a holdback amount , then my only suggestion is that you must have through investigation or experience, some understanding and feel for what labour and materials cost . Get some idea of what a range hood, a door, or new pane of glass is worth. There seems little sense in starting a discussion about deficiency holdbacks when your first remark is "I have no idea what something like this would cost".

There is also the question that if a house is not 1008 finished on closing can the purchaser refuse to complete? Again the cases deal with the phrase "substantial completion". The deficiency or deficiencies must be of such a nature or extent that the property cannot be used for its intended purpose or of such an extent that the point of fundamental breach becomes an issue. Nevertheless, a term in the contract indicating 100$ completion will be required probably means just that.

I would also remind you that where the lawyers and clients have agreed to a specified amount for a deficiency holdback and the contractor does not complete the work, the purchaser's claim may be limited to the amount of the holdback even though the cost of having a third party contractor complete the work exceeds the holdback amount. My brief reading of the law in this area would indicate that there are conflicting decisions going both ways. t It is also at this stage of the transaction that you may have disagreements between the builder and purchaser as to whether or not certain items were to be done. Frequently, the actual terms of the contract will be of little use in deciding this matter as the problem has usually arisen from verbal discussions held after the contract was executed.

If you have a contractor who is building homes of the same general style and price range over and over again, it is fairly easy to attach to an Agreement of Purchase and Sale a schedule containing your clients "standard building specs". In a sense this is probably just window dressing because the contractor is merely adding to the Agreement of Purchase and Sale the constructions specifications required by the National Building Code or local municipality. Nevertheless, I think it pleases purchasers to see that attachment and it does delineate exactly what standards and specifications the contractor is using.

I have found that this latter point maybe become quite important, particularly where. the purchaser is in the position that a high ratio mortgage is being placed on the property.

It would appear that the insurers of high ratio mortgages (MICC and CMHC) have certain standards and work that they expect to be done before they will insure a property. These

standards may not be contained in the National Building Code and, in fact, exceed National Building Code standards in certain cases. I would emphasize this point strongly as your client has usually constructed the house, as indicated, meeting all Code standards only to find at the closing that the insurer is refusing to pass the house until certain items have been completed which the Code does not call for. Frequently, the items that the insurer will require to be done involve a considerable amount of work as they **are items that in the normal course** of events would have to be done at the initial stages of construction, Your contractor is now in the **position of taking apart work** he has already done to complete the insurers requirements.

If, your contractor is the type that is building a number of standard homes for which he has a set price, I find it will facilitate matters if at the time of executing the Agreement of Purchase and Sale a schedule is also attached listing out any extras, over and above the "standard" home and allocating a price to them at that time.

Needless to say, you should emphasize with your client be they contractor or purchaser that if any additional work is agreed upon during the course of construction the work and **the price of that work** should be agreed upon in writing immediately.

I would also suggest that you discuss with contractor clients that they be very careful when they give verbal promises to do certain additional items and indicate to the purchaser that it will be done for free. The problem that usually arises is that the purchaser, with that understanding, will dogmatcally insist, on closing, that the work has to be completed as the contractor agreed to do it. On the other hand, your contractor is totally upset because he views himself as a good guy having agreed to do the additional work for free and now the purchaser is making such a fuss about it or, at this point, the contractor is saying I won't do it for free and I expect to be paid for it.

My suggestion is that you advise your contractor clients any form of additional work is be done over and above the Agreement of Purchase and Sale should be treated as an extra and charged accordingly.

Some of the above problems may be avoided if you add a schedule to your Agreement of Purchase and Sale specifing exactly what certain items are to consist of. I am thinking here of items that frequently do not get defined in an Agreement of Purchase and Sale and are usually given little thought.

Define what landscaping is to be done. For example, how far sodding will extend from the building and what areas will be rough graded. If you were dealing with sod, you might wish to state what quality of sod. All purchasers presume they are going to get cultivated nursery sod whereas numerous contractors use normal pasture sod.

In defining painting, it might be wise to put in whether one coat is being put on or two or three coats.

Define the size of driveways and walkways and indicate whether a driveway is simply to run to the boundary line of the property or is it to be continued outside to the street line or to existing street paving.

This latter schedule can also have a dual purpose in that it may define with greater clarity certain items that are usually not dealt with, and at the same time, allow your contractor to put in items that will not be included in the contract. In that manner, no doubt is left about them.

ALLOWANCES

I believe all of you will be familiar with clauses in Agreements of Purchase & Sale, for new construction, indicating that included within the purchase price will be an allowance in dollar figures, for flooring, lighting and cabinets.

Though this matter in itself is straight forward, questions frequently arise as to the handling of those allowances at the time of closing. The conventional method is for the contractor to direct the purchasers to his suppliers and the purchasers are allowed to

charge, to the contractor's account, flooring and lighting to the amount of the allowance.

That in itself is the easiest and cleanest way to handle the allowances, but frequently the matter does not fit as conveniently within that framework.
The situation will often arise where the purchaser may well exceed those allowances, and you should check carefully, particularly if you are acting for the contractor, what arrangements have been made with the supplier. Ideally, the supplier should have specific instructions as to the amount of the allowances and instructions that the contractor will not be liable for any amounts in excess of those allowances. That enables the supplier to deal directly with the purchaser for any amounts by which exceed that allowance. The contractor or solicitor then pays the allowance amount to the supplier at the time of closing.
Frequently, the purchaser will also be allowed to deal directly with his own suppliers and simply receive, from the contractor, a credit at closing for the amount of the allowance. Two problems can frequently arise. Insure that the purchaser is aware that the quoted allowance price, from a contractor, usually includes the cost of installation. It is not unusual for purchasers to go to their own suppliers and buy the products involved and then expect the contractor to make arrangements to have the carpeting and/or light fixtures installed at the contractor's cost.

The second problem that occurs will arise when the purchaser orders products that are not in stock and which are ultimately unavailable at closing. The contractor has proceeded with construction, not giving a second thought to these matters as it has been left in the hands of the purchaser.

What usually occurs is that you arrive at the closing date and, for example, flooring has not been completed and the purchaser's mortgage company is now refusing to advance any funds until that is done. That, of course, puts you in the impossible position of saying that it is the purchaser's fault on one hand because the goods are not available and yet on the other hand, knowing full well that the purchaser will not have sufficient cash, without his mortgage funds, to complete the purchase.

From a practical point of view, I would make sure that any contractors you act for and also purchasers for whom you act are fully aware of this problem as soon as possible. It is my suggestion that your contractors use the first scenario that I have suggested, whereby the purchaser is directed to deal with the contractor's suppliers where, if nothing else, the contractor will have some economic clout and can frequently get things done more quickly than John Doe who walks in off the street.

There are a couple of other problem areas that you should be aware of with respect to allowances; if you are not already so.

The general reference to a flooring allowance will usually include any allowances for tiling in the bathroom though tiling is rarely referred to in any Agreement of Purchase & Sale.

Frequently, you will see on listing cuts where real estate firms advise that the purchaser will have a choice of, for example, flooring from builders "samples". The real estate firm may, in fact, have samples for the purchaser's inspection.

Your purchaser should be aware that it is not unusual to have "samples" available for viewing which are not the standard quality flooring that a contractor will install. It may, in fact, be high grade carpeting that the contractor will consider an extra to the basic contract. Make sure that your purchaser is aware of this situation.

The final question that occasionally arises is the situation where the purchaser does not, in fact, spend the full amount of the allowance. For example, the flooring allowance is $3,000.00 and your purchaser only spends $2,800.00. Is the purchaser entitled to claim back, against the purchase price, a credit of $200.00 for that' portion of the allowance that he or she has not used.

It is my opinion that the purchaser is not allowed to claim back this credit for a partially used allowance. Particularly where the selection has been made through the

contractor's suppliers.

If the purchaser does not wish to use the **full allowance**, **then I** suggest the only method by which the question can be handled is by giving credit to the purchaser for the allowances and letting he or she make the best deal they can with suppliers bearing in mind the limitations that I have mentioned above.

GUARANTEES AND WARRANTIES FOR NEW CONSTRUCTION

The case law on the issue of. physical defects discovered by the purchaser after closing in an incompleted house vs a completed house begins with Miller v Canon Hill Estate [1931] 2KB113; [1931] All ER83. In that case, the Plaintiff agreed to purchase a house in the **course of erection** on a building estate. A year after the Plaintiff took possession the house was "in such a porous **condition that it was quite unfit** for human habitation." The court found an express warranty in the contract that the material and workmanship would render the house reasonably fit for habitation. However, the court went on and by way of obiter held that it would imply a warranty that the house was fit for habitation; Swift J. said:

"I think it was quite clear that if one buys an unfurnished house, there is no implication of law, and there is no habitation. That must be good sense because a man who buys an empty house may not necessarily need it as a dwelling house; he may be buying something which is almost in a state of ruin, knowing that he will have to restore it and pay a considerable.. amount of money for restoring it. He can always get an express warranty that an unfurnished house is fit for habitation ...The position is quite different when you contract with a builder or with the owners of a building estate in the course of development that they shall build a house for you or that you shall buy a house which is then in the course of erection by them. There the whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live. It is the very nature and essence of the transaction between the parties that he will have a house put up there which is fit for him to come into as a dwelling house. It is plain that in those circumstances there is an implication of law that the house shall be reasonably fit for the purpose for which it is required, that is for human dwelling".
This statement was followed by the Court Appeal in Perry v Sharron Development Co. Ltd. [1937] 4 All E.R. 390. There, the Plaintiff agreed to buy a house under construction. On completion, the Plaintiff took possession. Shortly thereafter he discovered that smoke leaked out of the flues, and that the house was generally subject to leaks and problems of dampness. The Plaintiff sued for breach of an implied condition that the work would be carried out in a proper, efficient and workmanlike manner. Sir Wilfred Green M.R. said at p. 391.
"It is, of course, well settled that a vendor of a completed house, in respect of which there is no work going on and work to be done, does not, in the absence of some express bargain, undertake any obligation with regard to the condition of that house. It is further well settled that, quite apart from obligations in contract, there is no obligation in tort lying upon him in respect of want of proper care in the construction or in the condition of the house which he is selling. Indeed, the reason for that is obvious. Every contract must, of course, be construed with reference to the subject matter with which it is dealing, and, where a contract for the sale and purchase of a house is dealing with a house which is, in the contemplation of both parties, and to the knowledgeable of both parties, supposed to be a completed house, there is no room for the implication of any term as to the doing of further work upon it. But it seems to me that, where the contract is a contract relating to a house which is still in the process of being completed, where vendors' workmen are still on the job, and particularly where the completion is not to take place until the house has **arrived at the contemplated condition** - namely, complete finish and readiness for occupation - there must be implied in that contract an undertaking that the house shall be in that condition."

Canadian jurisprudence has followed these English decisions. In Barak v Langtry [1954] 4DCR 135 (BCSC). Davey J. held at p. 143 "If the transaction was for the sale of an uncompleted house, certain warranties may be implied, but if the transaction was for the sale of a completed house, then no warranties as to past work will be implied, and the rule Caveat emptor prevails." However, in Canada, there appears to be some differences in the cases as to **what exactly** the implied warranty covers.

For example, in Barak v Langtry (Supra) the purchaser bought an uncompleted house. The agreement provided that part of the work to be completed would be part of the purchase price and that the remaining work would be in addition to the purchase price. The court found that there was a contract for the sale of a house in its then state which the vendor agreed to complete and make ready for habitation by stipulated work. The court held an implied warranty attached to the work the vendor undertook to do and that there was no implied warranty for the quality of work already done.

In Rawson et. al. v Hammer et. al. (1982), Alta. L. R. 22 (Alta. Q.B.), Legg J. held that the ' doctrine of Caveat emptor applies to a purchaser who acquires an incomplete house with the intention of completing it himself.

The Ontario Court of Appeal in Inderjeet Riar et. al. v Bowgray Investments Ltd6 (1977), 1RPR 46 has held that following the Miller case (Supra), "this implied warranty applies to work done and materials supplied before as well as after the contract was entered into." This appears to be more the general trend than the Barak case (Supra). In fact, it has been held in Croft v Prendergast [1949] 2 DLR 708 (Ont. C.A.) that even if a house is 99$ complete at the time of the agreement of purchase and sale, and physical defects are discovered after closing, the court will imply a warranty that the house be completed in a workmanlike manner. Hope J.A. held that the warranty would be of similar effect as that in Perry v Sharon Development Co. (Supra). In the Croft case, there were serious defects in the foundation that permitted water in considerable quantities to flood the basement of the house. All defects were due to bad workmanship, or the total omission of work that should have been done. There was an express clause providing that the house and grounds would be completed in a workmanlike manner. The court held that aside from the express warranty, the court would imply a warranty to the same effect.

In Preston v Lionel LeBlanc__an_d Sons Ltd. (1975), 11 N.B.R. (2d) 231 (N.B.S.C. App. Div.) Hughes, C.J.N.B. made this statement with respect to implied warranties:
well settled that where there is a contract with a builder for the
sale of a lot with a house in the course of errection which the builder is to complete before the sale is concluded, there is an implied warranty by the builder that the house shall be built in an efficient and workmanlike manner and of proper materials and that it shall be fit for human habitation."

A similar statement was made by Ruttan J. in Smith v Melancon, [1976] 4 WW R9 (B.C.S.C.) where he referred to Hancock v Brazier, [19661 1 W.L.R. 317.

"It is quite clear from Lawrence v Cassil and Millar v Canon Hill Estates Ltd., [1931] 2 K.B. 113, that when a purchaser contracts to build it, there is a three fold implication: that he will supply good and proper materials; and that it will be reasonably fit for human habitation. Sometimes this implication, or some part of it may be excluded by an express provision."

It is submitted that these statements correctly reflect the current view of the courts, especially in light of the most recent Supreme Court of Canada decision on the issue of implied warranties for uncompleted houses. In Fraser - Reid v Droumstekas (1979), 9RPR 12, (SCC), the court said "The only real question for debate in the present case is whether the removal of the irrational distinction between completed and uncompleted houses is better left to **legislative intervention**." The court held it was. Dickson declined to follow the American legal trend abolishing such a distinction. It was recognized that the distinction was illogical, but that legal reform in this area was best left to Parliament.

However, the Fraser - Reid case opened up new avenues of liability. Fraser - Reid held that where there are express clauses in the agreement of purchase and sale or where

express statements are made with respect to the property, then the general rule that the acceptance of a deed is prima facie full. execution of the agreement to convey and preliminary agreements and understandings relating to the sale of land become merged in the conveyance, is not applicable. Independent convenants or collateral stipulations in an agreement of sale not intended by the parties to be incorporated in the conveyance. In other words, there is no presumption of merger, it totally depends upon the intention of the parties. The Court may now find that discussions between contracting parites may evolve into collateral stipulations and collateral warranties ancilliary to the contract which survive the closing. Such collateral warranties get around the illogical distinction of a completed vs incompleted house.

Since the Fraser - Reid case was decided, there have been a few cases which are beginning to develope the alternative liability of builders negligence. The Nunes Diamonds case, well known in contract law, precluded liability when a contractual relationship existed between the parties unless an "independent tort" could be found. If the problem was at all contemplated by the contract, the r party could not be held liable in negligence.

However, there appears to be a trend developing for builders negligence outside of the contract, and I would refer you to Hansen v Twin City Construction Company Ltd. and Stefanik, [1982] 4 WWR 261 (Alta. Q.B.) and Ordoz v. Nisson (1981), 31 BCLR 371 (BCSC). The case was Ordoz v Nisson (1981), 31 BCLR 371 (BCSC) where the vondor-builder sold a completed house to the Plaintiff-purchaser.

Defects became apparent and the builders efforts to repair the defects were unsatisfactory. The court held that the common law rule of caveat emptor applied because the house was a complete house when purchased. However, the builder was held liable in negligence for the defects. The Hansen case followed this case and held that the builder was liable in negligence due to the negligent installation of a fire place.

In conclusion, the current position of warranties in the law today is that the distinction between a complete and incomplete house remains, and the court refuses to set the distinction aside. It is better left to Parliament, it is said. However, there is a **developing** body of law with respect to alternative remedies which help to provide dissatisfied purchasers with some compensation for their losses.

NEW HOME CERTIFICATION PROGRAM

The New Home Certification Program was established by the Provincial chapters of HUDAC (Home Builders Association) for the purpose of protecting new home buyers form defects in the construction of their new home. It is a private non profit company incorporated in Nova Scotia and authorized to carry on business in New Brunswick, Newfoundland and Prince Edward Island.

Builder-Vendor

Builders, if approved by the program may enroll in the Program and such enrollment commits them to construct homes **in compliance with** set standards and to repair at their own expense, defects in material and workmanship which become **manifest during the twelve month period following** the date on which the purchaser takes . possession. Each home, as it is constructed is enrolled by the builder in the Program. Each home must be enrolled before the earliest of the issuance of the building permit or date of payment of the deposit by the purchaser.

Purchaser

A purchaser who buys a home covered by the Program has the assurance that:

1. The builder has constructed the home in compliance with set building standards.
2. The builder will repair defects in material and workmanshipwhich become manifest in the first twelve month period following the date of possession.

3. If the builder does not complete the above repairs, the Program will step in and complete them.
4. The Program ensures that major structural defects in construction which vitally affect the use of the home will be reapired or resolved to a maximum expenditure of Twenty Thousand Dollars ($20,000.00).
5. The Purchaser who purchases directly from a Builder (as opposed to purchasing through a real estate agent or compay) is guaranteed by the Program that his deposit (up to Five Thousand Dollars) ($5,000.00) is protected in case of loss due to the Builder going bankrupt or from insolvency or fraud.
6. There will be an unbiased body which will give assistance in resolving complaints and aiding in a conciliation procedure between the Purchaser and Builder.

AT CLOSING

On the date of closing, the Program forwards to the Builder a "Certificate of Possession" which is processed by the Program on enrollment of the new home under the Program. A Certificate of Possession is required to be filed with the Program in order that the home be covered by the warranty under the Program. The warranty starts on the date of possession. The Certificate of Possession sets out the address of the new home, the Builders name, the Purchasers name, the date of posession and lists all items left to be completed. The certificate is signed by both parties and sent to the Program which will issue a five year (5) warranty to the purchaser.

Defects discovered within One year

Any defects in material or workmanship which manifest themselves during the twelve month period following possession must be reqaired by the Builder at his own expense. To make such a claim, the Purchaser sends notice of the defect to the builder and a copy to the Program. If the builders fail to remedy the defect, the purchaser notifies the Programs which attempts to get the builder to fix the defect. The purchaser may then proceed with conciliation proceedings if the defect is not remedied. The purchaser agrees under the Program to take this route before proceeding with any legal action. To begin such proceedings costs the Purchaser a One Hundred Dollar fee ($100.00). This fee is retured if in the end any portion of his claim is allowed. A claim for conciliation must be submitted within sixty days (60) after the one year period of possession has ended. The conciliation proceeding is basically an arbitration where written reports may be submitted and oral presentation may be made. A decision is made in writng and presented to both parties. If a Builder defaults on the decision of the Program he will be reviewed for a consideration of termination of his registration.

Defects discovered Two to five year (2-5 after possession

The Program guarantees major structural defects which vitally **affect the** use of the home up to a cost of Twenty Thousand Dollars ($20,000.00). There are two criteria which must exist before a claim will be allowed.

1. Actual damage to "load bearing" portion of the home that affects its load bearing function.

2. Damage must vitally affect the use of the house for residential purposes.

There is a "major structural defect guide" which sets out examples in more detail and is available through the Program.

The procedure is for the purchaser-owner to apply to the program by submitting a report from a qualified acrhitect or engineer setting out that there is damage to load bearing elements in the home. If the Program allows the claim it will pay up to Twenty Thousand Dollars ($20,000.00) for repairs to the home plus the cost of the report.