NEW HOME DEFICIENCIES & UNAUTHORIZED ALTERATIONS: WHEN DO THEY ENTITLE THE PURCHASER TO REFUSE TO CLOSE

by

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The author also wishes to highly commend two excellent articles on this topic, one written by the Honourable Justice Paul Perell entitled "Refusing to Close a Real Estate Transaction" published in 2003 in the Real Property Reports at 7 R.P.R. (4th) 230, and the other written by Mark Karoly LLM entitled "When are New Home and Condominium Deficiencies Sufficiently Egregious to Enable a Purchaser to Refuse to Close", published for the Law Society's 2002 Six Minute Real Estate Lawyer program.

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Introduction

For lawyers acting for new home builders, one of the most difficult challenges that may be encountered is determining when outstanding building deficiencies, omitted or incomplete items, or unauthorized changes to the design, layout or materials used to complete the new home, will entitle the purchaser to refuse to close the transaction. This determination is especially critical in a declining housing market, because the justifiable termination of the transaction by the purchaser is the most draconian of outcomes, insofar as builders and their lenders are concerned, since any re-selling of the home by the builder in an effort to cut its losses will likely transpire only at a reduced selling price.

Fundamental Breach v. Minor Breach

The purchaser's entitlement to refuse to close will, in turn, depend on the nature and significance of the particular deficiencies, omissions or unauthorized changes involving the home, and whether the builder's default as a consequence thereof is judicially considered as either:

a) a breach of a fundamental term, promise or covenant in the governing contract that deprives the innocent party of substantially the whole benefit of what was bargained for, or a significant portion thereof ... historically, the courts classified the foregoing as a breach of a condition (as opposed to a breach of a warranty), and in modern jurisprudence it is often referred to as **a fundamental breach**[1];

or alternatively

[1]See Fridman's "The Law of Contract", fifth edition, published by Thomson/Carswell at pages 587 and 588

b) a breach of a minor contractual term, promise or covenant that is ancillary, incidental or inconsequential to the main purpose of the contract ... historically the courts classified the foregoing as a breach of a warranty (as opposed to a breach of a condition), and in modern jurisprudence it is often referred to as **a minor or immaterial breach**.

Contemporary cases in Ontario frequently do not employ the old classification language of condition versus warranty, when analyzing (or referring to) the breach of a contractual term or provision, but rather focus on discerning whether the contract breach is minor or fundamental in nature and scope. In the context of the sale of a new home, a fundamental breach committed by the builder entitles the innocent purchaser to immediately elect to terminate the agreement of purchase and sale, and thereupon be fully discharged from performing any further obligations under the contract, and to obtain a full refund of all deposit monies that have been paid to date, while retaining the right to pursue a claim in damages. However, a minor breach does not obviate, reduce or limit the purchaser's obligation to complete the transaction, nor does it discharge the purchaser from performing his or her outstanding obligations under the contract, but rather only entitles the innocent purchaser to claim damages against the builder after closing.

Equitable Rescission for Misrepresentation

Canadian courts also possess an equitable jurisdiction that empowers them to grant such relief as may be deemed fair and equitable under the circumstances, and that bestows upon the judiciary a discretionary power to allow the innocent purchaser to "rescind" or set aside the contract, if any material or significant representation regarding the subject matter of the contract which induced such party to enter into the agreement of purchase and sale (and upon which such party has reasonably relied) is ultimately proven to be false, deceptive or misleading, regardless of whether the misrepresentation was made innocently or with a fraudulent intent. The effect of rescission is to

return each of the parties to their pre-contract positions. The misrepresentation need not relate to a specific promise, covenant or term that is ultimately set out in the executed contract, as long as it can be proven that the misleading statement or misrepresentation induced the innocent party to enter into the contract, and was a material representation that was reasonably relied upon by such party. It is also worth mentioning that if the purchaser is claiming rescission of the contract based on an innocent misrepresentation, then the purchaser must raise his or her objection prior to closing, whereas a fraudulent misrepresentation will support a claim for rescission both before and after the completion of the purchase and sale transaction.[2]

The Common Ingredients Between the Applicable Legal and Equitable Remedies

The legal principles regarding a fundamental breach of contract, are separate and distinct from the equitable principles governing the remedy of rescission founded on an innocent or fraudulent misrepresentation. Nevertheless, they share two common ingredients, namely:

a) the materiality, significance or fundamental nature of:

   i) the contractual term or provision that is breached; or

   ii) the representation which is ultimately proven to be false or misleading, and which was relied upon by the innocent party; and

b) the entitlement of the innocent purchaser to be discharged from having to carry out his or her outstanding obligations under the contract, because of the other party's fundamental breach or material misrepresentation.

New home deficiencies and/or unauthorized alterations to the design, layout or materials used to complete the home have, on various occasions, been judicially considered to constitute a

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[2]See page 6 of Justice Perell's article "Refusing to Close a Real Estate Transaction" published at 7 R.P.R. (4th) 230

fundamental breach of contract, or alternatively (and in some cases, interchangeably) a material misrepresentation, entitling the innocent purchaser to rescind or terminate the contract, and recover all deposit monies that were previously paid to the builder. One would think that over the years, in the aftermath of several real estate recessions or downturns in the market, the courts in Ontario would have clearly delineated when a particular breach or misrepresentation involving the sale of a new home will be considered minor, or conversely fundamental, or would have set clear guidelines to assist counsel and their clients to easily discern when a new home deficiency or unauthorized alteration entitles the purchaser to rescission and damages, or only damages after closing. However, the judicial rulings in this area of the law are critically dependent upon the specific facts of each case. More often than not, the demarcation line between a minor breach and a fundamental breach has often been blurred by the equities prevailing in the particular situation, which are invariably shaped by the credibility of the parties giving testimony, and their ability to evoke sympathy or scorn (as the case may be) from the court.

Exclusionary Clauses - Will They Prevail Over a Fundamental Breach?

At this juncture, it is important to consider the efficacy of exclusion clauses that are generally found in most standard form sale contracts that are used by new home builders in Ontario. An exclusion clause is a contractual provision which attempts to avoid or exclude the vendor's liability for a particular breach or default, or to limit and circumscribe the quantum and/or type of damages to which the vendor may be exposed or accountable. There was a time when the courts had invariably held that a fundamental breach would never be trumped or thwarted by an exclusion clause, no matter how well drafted, because a fundamental breach was considered repugnant to the essence or

underlying purpose of the contract.[3] However, ever since the decision of the Supreme Court of Canada in *Syncrude Canada Ltd. v. Hunter Engineering Co. [1989] 1 SCR 426,* which was subsequently refined by the Ontario Court of Appeal in *Shelanu Inc. v. Print Three Franchising Corp. (2003) 64 O.R. (3d) 533,* the courts in Ontario have generally held that whether a fundamental breach prevents the defaulting party from relying on an exclusion clause is simply a matter of construction or contract interpretation, rather than a strict rule of law, unless the enforcement of the exclusion clause would, in the particular circumstances before the court, be unconscionable, unfair, unreasonable or otherwise contrary to public policy. In other words, when construing or enforcing an exclusion clause, the first of two issues to be addressed by the court is whether, as a matter of construction, the precise wording of the exclusion clause covers the alleged material alteration or breach in question, keeping in mind that clear words are necessary for the exclusion clause to apply, because any ambiguity will be read and construed *contra proferentem*, namely against the party (ie. the builder) who drafted same. The second issue that must be resolved by the court is whether the enforcement of the exclusion clause is (or would be) contrary to the reasonable expectations and understanding of both parties, such that the enforcement of the clause at the time of the breach would be unfair and unreasonable under the circumstances. Moreover, if the court concludes that the builder's breach of contract is fundamental because it deprives the innocent purchaser of substantially the whole benefit of the contract, or a significant portion thereof, then the court may also likely consider it unconscionable, unfair or unreasonable to uphold or sustain the contract and correspondingly compel the purchaser to continue to perform his or her outstanding obligations (and

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[3]See Fridman's "The Law of Contract", fifth edition, published by Thomson/Carswell at pages 594 and 595

to thereby relegate the purchaser to a claim in damages only, after closing), despite the existence of the exclusion clause.

The Prevailing Case Law on Deficiencies/Alterations and the Purchaser's Refusal to Close

Schedule "A" attached hereto is an outline of all the reported cases in Ontario (plus several cases from British Columbia) that I could find involving new home deficiencies or unapproved alterations, that were decided during (or in the aftermath of) the last major real estate recession in this province (enduring from approximately 1989 to 1995), and that allowed the purchaser to successfully rescind or terminate the agreement of purchase and sale. The cases are listed in chronological order for ease of reference purposes. Perhaps the most damaging case for builders is the decision of Justice Fedak in *Keen v. Alterra Developments Ltd.,* where the builder's addition of two more steps leading to the porch, at the front entry of the house (as well as the construction of several steps inside the garage, leading directly into the home, and which correspondingly reduced the interior width of the garage by approximately 3 feet) was considered to constitute a fundamental breach of contract, or a material misrepresentation that entitled to the purchasers to the remedy of rescission, and to a refund of all deposit monies that were paid to the builder. The court made particular note of the fact that the builder knew, prior to excavation, that the extra steps would be required in order to complete the house, but nevertheless failed to bring this fact to the attention of the purchasers. The builder was not entitled to rely on the exclusion clause contained in its contract, which purported to give the vendor the unilateral right to make minor or necessary changes in the plans, siting and specifications of the home, including the right to make alterations to the plans and specifications by reason of municipal requirements, presumably because the court believed that it would not be fair or

reasonable to do so under the circumstances. This case is particularly troublesome to builders for three distinct reasons:

a) firstly, because the court failed to apply or endorse an objective test to determine whether the breach (namely the four steps instead of the two steps) was fundamental in nature to the use and enjoyment of the home, and simply accepted the purchasers' subjective considerations of what was important or fundamental to them;

b) secondly, because the court ignored the builder's argument that the purchasers' refusal to complete the transaction was motivated primarily (if not exclusively) by the declining real estate market (and the corresponding realization that the purchasers overpaid for their home), rather than by the additional two steps leading to the porch and the stairs within the garage, as evidenced by the fact that after the termination of the contract, the purchasers subsequently bought another home which had more than a two step front entry; and

c) thirdly, because the trial decision was affirmed (without any extensive reasons or analysis) by the Ontario Court of Appeal, which simply confirmed that there was sufficient evidence before the trial judge to support his finding of a fundamental breach committed by the vendor/builder, and with which the appellate court was not prepared to interfere.

Schedule "B" attached hereto is an outline of all the reported Ontario cases that I could find (including a case from British Columbia) which involved new home deficiencies or unapproved alterations that did <u>not</u> justify or validate the purchaser's refusal to close the transaction. These cases have been listed in chronological order for ease of reference purposes. Perhaps the most encouraging and supportive case for builders is the decision of Justice Lederman in *Three D Developments (Kingwood) Ltd. v. Gogos,* where the purchaser had complained about a litany of deficiencies and incomplete items that had existed as at the early afternoon of the closing date, including the fact that there was no running water, only temporary power had been connected, the furnace was not yet fully installed and operable, the kitchen island was not in place, the desk for a phone had not yet been installed, there were no screens on any windows, the garage doors had not yet been installed, the concrete garage floor had not yet been poured (nor had the garage been insulated), and there were no steps leading to the back door of the house, nor any steps from the side door leading into the

garage. To make matters appear even worse, there was considerable construction debris strewn all around the house. The evidence adduced at trial confirmed that when the building inspector viewed the home in the morning of the closing date, to determine whether the home was fit for occupancy, the home did not pass inspection. However, the inspector returned in the afternoon at approximately 4:00 p.m. on the closing date, and by that time the water had been properly hooked up and was functioning, and tradesmen were installing the main duct work for the heating system, and only another few more hours of work were required to fully complete the installation of the furnace. The building inspector deemed the home fit for occupancy. Although there was still a number of matters that remained to be completed within the interior of the home, the court concluded that taken collectively, and when viewed on an objective basis, these outstanding items were relatively minor in nature, and did not affect the purchaser's ability to reasonably occupy and enjoy the premises. Even though some of the work which was required to permit lawful occupancy (namely the installation of the furnace) was completed on the closing date but sometime after the registry office had closed, the court apparently took judicial notice of the fact that the closing transpired in July, at a time when heat from the furnace would not likely be required. After applying an objective standard to the outstanding deficiencies, the court concluded that the home could have been reasonably occupied, despite some measure of inconvenience, and that the purchasers were therefore not justified in refusing to complete the transaction.

Personal Observations Gleaned from the Case Law

As one will see from reviewing the prevailing case law, it is often difficult to predict how the court will view any particular deficiency, omission or alteration, in terms of its materiality or significance,

and the corresponding entitlement of the purchaser to refuse to close as a consequence thereof. However, in my respectful opinion, the following considerations are important and relevant in determining whether a court will sanction the purchaser's refusal to complete the transaction:

1. The real test of whether a new home, with all of its alleged deficiencies, meets the standard of reasonable occupancy, is not a subjective one (even though the courts have, on occasion, been obviously influenced or persuaded by the purely subjective considerations of the aggrieved purchaser). Rather, the issue of whether the purchaser can reasonably occupy the home, despite the alleged deficiencies, should be considered or construed on an objective basis, and in light of the specific terms of the governing contract.

2. Reasonable occupancy may mean more than basic safe shelter evidenced by the municipality's approval to lawfully occupy the home, issued in accordance with the Ontario Building Code. In the aftermath of the *Three D* case referred to in Schedule "B" to this paper, the determination of whether the new home can reasonably be occupied necessitates the consideration of various factors, such as the nature of the defects and their implications on the purchaser's living environment, the potential duration of the inconvenience, the degree or level to which the deficiencies impair or restrict the reasonable use and enjoyment of the home, and the extent to which the alleged deficiencies (either individually or collectively) fall below the level of occupancy that one would reasonably expect.

3. On the presumption that the court will not find the builder's reliance upon the exclusion clause in its standard form contract to be unconscionable, unfair or unreasonable under the circumstances (having due regard to the specific deficiencies or unauthorized alterations being alleged), such a clause should be drafted as broadly and as detailed as possible, with

specific references to the types of finishes, fixtures and/or features that the builder may likely (or conceivably) wish to unilaterally alter at any time prior to closing, inasmuch as such clauses will be strictly and narrowly construed, and they will correspondingly be required to address the specific alteration about which the purchaser is complaining. If the vendor wants to be able to make (or contemplates having to make) any extensive or significant alterations to the design, materials, plans and/or specifications of the home, then this potential for fundamental changes should be expressly stipulated and incorporated within the exclusion clause, in an effort to obviate the court's inference or conclusion that the exclusion clause was not intended to apply to fundamental changes, as was held in the two most recent cases of *Danko* and *Brooker* outlined in Schedule "A" annexed hereto. Moreover, the exclusion clause should not be buried in the fine print, but rather should be prominently outlined in the contract, with a heading and in bold typeface, in order to ensure that the purchaser's attention will be reasonably drawn to the clause, such that the purchaser must be taken to have known about it, and correspondingly agreed to it.

4. Leaving aside the decision in the *Alterra* case referred to in Schedule "A" to this paper, the underlying motive and good faith of the purchaser is ordinarily very important to the judiciary, in determining whether the purchaser has legitimate grounds to refuse to close the transaction. Market conditions, and specifically the declining price or value of the home after the date that the agreement of purchase and sale has been entered into, are totally extraneous and illegitimate considerations, insofar as the court is concerned, and they should not play any part in the purchaser's decision to refuse to close. Accordingly, a purchaser that is motivated to resile from the transaction primarily because of the declining value of the

acquired property will, more likely than not, be unsuccessful in refusing to complete the transaction because of outstanding deficiencies alleged with respect to the home, assuming that the purchaser's true motivation can be positively confirmed by the evidence adduced before the court.

5. Despite the prevailing debate amongst legal scholars and academics as to whether or not there is a distinct free-standing duty of good faith regarding the execution or fulfillment of a contract that is formally recognized by the common law in Ontario, it is nevertheless clear to me that a very common (if not overriding) theme which runs through a myriad of contract cases, including a whole host of real estate cases, is the principle that each of the parties to the contract has a duty or responsibility to act reasonably, fairly, honestly and in good faith regarding the performance and/or fulfillment of their respective contractual obligations [which principle was articulated by the Supreme Court of Canada in *Freedman v. Mason [1958] S.C.R. 483*, and was subsequently honed and refined by a number of Ontario Court of Appeal decisions, such as *Greenberg v. Meffert (1985) 37 R.P.R. 74, LeMesurier v. Andrus (1986) 38 R.P.R. 183*, and *Shelanu Inc. v. Print Three Franchising Corp. (2003) 64 O.R. (3d) 533,* and was also recently re-confirmed by the Supreme Court of Canada in *Martel Building Ltd. v. Canada [2000]* 2 S.C.R. 860]. As was noted by Madame Justice Weiler on behalf of the unanimous appellate court in the *Shelanu* case, the duty of good faith regarding contractual performance does not preclude either party from acting in its own self-interest, but it nevertheless does require that each party, insofar as their decisions and actions are concerned, ought to have reasonable regard for the legitimate rights and interests of the other party to the contract. Conversely, contractual rights, including any unilateral discretions

expressly reserved in the agreement of purchase and sale for the benefit of one of the parties thereto, that are exercised in a capricious or arbitrary manner and/or with a wilful or reckless disregard for the rights, interests and entitlements of the other contracting party, will not be judicially countenanced. In this vein, evidence of the builder's willingness to try and correct the deficiencies as soon as reasonably possible after the purchaser has complained about same, or alternatively to offer some tangible abatement, credit, extra or upgrade in recognition of the purchaser's legitimate injury, detriment or inconvenience attributable to any such deficiencies or unauthorized alterations, will often play an important part in affirming the court's view that the builder acted reasonably, honestly and in good faith under the circumstances (as opposed to being considered unreasonable, intransigent and unfair), and may also have the potential for indirectly or subconsciously raising the bar of materiality that the purchaser must ultimately prove to the court in connection with any alleged breach or misrepresentation.

6. The principle of good faith contract performance also incorporates a time component, which requires a party to the contract to respond reasonably promptly to a request from (or to the plight or predicament of) the other party to the contract, and to correspondingly make a decision (and/or take any required remedial action) within a reasonable period of time, including the obligation to pay any amount that is clearly owed to the other party in a timely manner [see the Ontario Court of Appeal decisions in both the *Shelanu* case and in *702535 Ontario Inc. v. Non-Marine Underwriters of Lloyd's London England (2000) 184 D.L.R. (4th) 687*]. Accordingly, if at the time that the contract is entered into (or at any subsequent time prior to closing), the builder knows or learns about a potentially significant modification that

is required to be implemented or undertaken with respect to the home (whether because of on-site conditions involving the topography of the building site or the grading and/or draining patterns related thereto, or for any other legitimate reason), but nevertheless neglects to inform the purchaser about such alteration, and correspondingly fails to make any attempt to assuage or resolve the purchaser's concerns arising therefrom prior to closing, then the courts are far more likely to be inclined to find in favour of the aggrieved purchaser, and to grant rescission in order to relieve the purchaser from the obligation to close, rather than force the purchaser to live with the material alteration and pursue a claim in damages post closing.

7. Irrespective of what the contract may provide, and regardless of whether a municipal occupancy approval has been obtained, in a declining housing market a builder should endeavour to avoid forcing an unwilling purchaser to close the transaction before the home has really been substantially completed. Accordingly, if more time is needed to rectify significant outstanding deficiencies, then serious consideration should be given to extending the closing date, if at all possible, in an effort to ensure that the least amount of inconvenience and disruption is endured by the purchaser as a consequence of the deficiencies. A purchaser who rejects the builder's request for a reasonably short extension of the closing date in order to allow the builder more time to rectify the outstanding deficiencies, may well have a harder time convincing the court of the purchaser's *bona fides* and corresponding entitlement to terminate the transaction solely because of such deficiencies, in the absence of clear and cogent evidence that underscores why any such requested extension would be unreasonable or inequitable under the circumstances.

Conclusion

The particular facts of each case, and the prevailing equities in connection therewith, are critically important to the court's ultimate ruling with respect to the purchaser's entitlement to rescind the contract because of a material misrepresentation, or to terminate the agreement based on a fundamental breach of contract committed by the builder. It is hoped that the foregoing guidelines will provide some assistance in predicting the outcome of any given case. The risk to the purchaser of refusing to close because of an outstanding deficiency or unauthorized alteration is very high, particularly if the court fails to find a fundamental breach or material misrepresentation, with the benefit of its 20/20 judicial hindsight. However, the risk to the builder who refuses to acknowledge or address the purchaser's legitimate concerns regarding an outstanding deficiency, omission or unauthorized alteration prior to closing, and who simply takes a hard-nosed position by drawing a line in the sand and daring the purchaser to refuse to close, may be equally significant, and in a sharply-declining housing market, the wrong decision by the builder and its legal counsel may ultimately turn out to be financially fatal.

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SCHEDULE "A"

CASES ENTITLING THE PURCHASER TO TERMINATE

1. In ***Kates v. Camrost York Development Corp.*** *(1991) 17 R.P.R. (2d) 113 (Ont. Gen. Div.)*, the purchaser of a condominium dwelling unit refused to complete the transaction because the wrong ceramic tiles had been installed throughout a substantial portion of the suite, and this error was discovered at the pre-delivery inspection shortly before closing. The builder refused the purchaser's request to postpone the closing date, in order to afford its trades or contractors sufficient time to replace the tiles, without unduly inconveniencing the purchaser. The court confirmed that the replacement of the ceramic tiles, after the purchaser has commenced to occupy the suite, would constitute a major undertaking involving the removal of the kitchen cabinets and possibly other fixtures, thereby causing substantial interference with the purchaser's use and enjoyment of the dwelling unit. Consequently, the court held that the unit was not substantially complete as of the closing date, and upheld the purchaser's refusal to close the transaction.

2. In ***Keen v. Alterra Developments Ltd.*** *(1993) 35 R.P.R. (2d) 278 (Ont. Gen. Div.); affirmed (1997) O.J. No. 401, 1997 Carswell Ont. 175 (Ont.C.A.)*, the purchasers desired to purchase a french country style home, with one or two steps (at most) leading to the front door, and the builder's brochure depicted such a home having only one step leading to the front porch, and another step leading directly into the house. Unfortunately, due to changes in the grading and topography of the building site, the house was ultimately constructed with four steps to the porch, and it was necessary to build a stairwell inside the garage leading directly into the house (which thereby reduced the overall interior width of the garage by approximately 3 feet). The purchasers sought to terminate the transaction because of these unapproved alterations to their home. The court ruled that the purchasers were entitled to refuse to close on the grounds that such a change in the design or construction of the house constituted a breach of a fundamental term of the contract. The court made particular note of the fact that the builder knew, prior to excavation, that the extra steps would be required, but nevertheless

failed to bring this fact to the attention of the purchasers. The builder was not entitled to rely on the exclusion clause contained in its contract, which purported to give the vendor the unilateral right to make minor or necessary changes in the plans, siting and specifications of the home, including the right to make alterations to the plans and specifications by reason of municipal requirements, presumably because the court believed that it would not be fair or reasonable to do so under the circumstances. This case is particularly troublesome for three distinct reasons ... firstly, because the court failed to apply or endorse an objective test to determine whether the breach (namely the four steps instead of the two steps) was fundamental in nature to the use and enjoyment of the home, and simply accepted the purchasers' subjective considerations of what was important or fundamental to them ... secondly, because the court ignored the builder's argument that the purchasers' refusal to complete the transaction was motivated primarily (if not exclusively) by the declining real estate market (and the corresponding realization that the purchasers overpaid for their home), rather than by the additional two steps leading to the porch (and the stairs inside the garage), as evidenced by the fact that after the termination of the contract, the purchasers subsequently bought another home which had more than a two step front entry. The court simply accepted the purchasers' version that their motivation for not wanting to close related solely to the changes made to the front elevation of the home and to the interior of the garage... and thirdly, because the trial decision was affirmed (without any extensive analysis or reasons) by the Ontario Court of Appeal, which simply confirmed that there was sufficient evidence before the trial judge to support his finding of a fundamental breach committed by the vendor/builder.

3. In ***Coppard Farm Estates Inc. v. Gupta*** *(1994) 42 R.P.R. (2d) 302 (Ont. Gen. Div.),* the purchaser's new home was intended to have a main floor laundry room and a two car garage, neither of which was provided on closing. The court held that the two car garage was an essential requirement for the purchaser, and therefore the conveyance of a home built with only a 1 ½ car garage amounted to a failure to convey substantially what the purchaser had contracted to acquire, when viewed on an objective basis. The purchaser was therefore

entitled to repudiate the agreement of purchase and sale (and obtain a full refund of all deposit monies that had been paid, together with accumulated interest) as a result of the builder's fundamental breach of contract.

4. In ***Lau v. 1755 Holdings Ltd.*** *(1995) 46 R.P.R. (2d) 249 (B.C.S.C.); affirmed on appeal at (1996) 6 R.P.R. (3d) 152 (B.C.C.A.)*, the builder had completed the condominium's common areas, as well as the interiors of various suites, with changes implemented from the original building plans and the condominium's marketing brochures that had been shown to the purchasers at a formal sales presentation. For example, in contrast to the marketing brochures, the completed building did not feature a grand glass lobby with a granite floor, nor a tiled entrance foyer, and did not have luxurious private landscaped gardens, nor any glass guardrails on the building's balconies facing south (but rather the guardrails were constructed in concrete). The interiors of the suites did not have built-in book shelves in the living rooms, nor a window in the kitchen or in the east wall of the master bedroom, and did not have a hot water heating system, nor recessed lighting or quality plush carpeting, as depicted in the marketing brochures. In particular, the aggrieved purchasers found that their respective dwelling units contained either two or three less windows than they were expecting. The purchasers refused to proceed with their respective transactions, and sued the builder to recover their deposits. The trial court held that all of the changes which were made by the builder were not minor or trivial in nature, but rather collectively constituted a fundamental breach of contract that was not overcome by the exclusion clause in the builder's standard form of agreement of purchase and sale (ie. which specifically allowed the builder to make minor changes or modifications which were considered by the project architect to be desirable and reasonable). Accordingly, the purchasers in this case were justified in refusing to complete their respective transactions with the builder. The British Columbia Court of Appeal upheld the trial court's decision, because there was ample evidence to support the trial judge's finding that the units were not constructed substantially in accordance with the original plans, and that the changes were not minor in nature.

5. In ***Grinberg v. Law Development Group (Thornhill) Ltd.*** *(1996) 2 R.P.R. (3d) 209 (Ont. Gen. Div.)*, the marketing brochure for a condominium under construction depicted 23 windows in the purchased suite, and the number of windows in this particular unit was used as a significant selling point by the builder's sales agents. However, due to fire separation requirements imposed by the Ontario Building Code, the dwelling unit was ultimately constructed with 9 fewer windows, resulting in one side of the suite having no windows at all. This alteration had not been approved or authorized by the purchaser, despite being mandated by the Ontario Building Code for fire safety reasons. The evidence adduced at trial confirmed that at the time the agreement of purchase and sale was executed by both parties, the builder was well aware of the possibility that it might be required to reduce the number of windows in the suite, but regrettably the purchaser was not adequately informed of this potential reduction. The contract contained an exclusion clause which gave the vendor the unilateral right to make various alterations to the building plans and specifications, including modifications to the colours, materials, finishes, equipment and fixtures within the suite. However, the court held that the clause permitting such alterations was too general in nature, and did not specifically permit a change to the number of windows, let alone a fundamental change to the window count. The court concluded that the reduction in the number of windows was significant, on both a subjective and objective basis, and accordingly constituted a material misrepresentation that had induced the purchasers to enter into the agreement, and that could not be obviated or overcome by the exclusion clause. Moreover, the court distinguished the case before it from the earlier case of *Richards v. Law Development Group (Georgetown) Ltd. [1994] O.J. No. 2914 (Ont. Gen. Div.)*, which upheld the builder's exclusion clause in the face of the outstanding deficiencies so alleged, because the variations from the marketing materials in that case were of a relatively minor nature, and were considered not nearly as significant as constructing a dwelling unit with no windows along one entire side. The court also noted that the vendor was precluded from relying on the exclusion clause because it had failed to take adequate steps to bring such provisions to the purchasers' specific attention, contrary to the principle mandating prominent display or active disclosure of exclusion or exculpatory clauses, as articulated by the Ontario Court of

Appeal in *Trigg v. MI Movers International Transport Services Ltd. (1991) 4 O.R. (3d) 562*. Accordingly, the purchasers in this case were fully entitled to refuse to close the transaction.

6. In ***Nathoo v. Diamond Robinson Management Ltd.*** *[1997] B.C.J. No. 1542,* the purchaser of a new condominium unit discovered various deficiencies and significant alterations to his dwelling unit, including the relocation of a hall closet and the reduction of useable bedroom space, and most notably the placement of the condominium's whirlpool directly in front of the purchaser's private or exclusive-use patio area, thereby deleteriously impacting on the purchaser's quiet enjoyment of his suite. The court concluded that these modifications were sufficiently significant to constitute a fundamental breach of the agreement, and thereby entitled the purchaser to repudiate the contract.

7. In ***Kingsgate Homes Ltd. v. Goliszek*** *(2001) Carswell Ont. 1056 (Ont. C.A.),* the Ontario Court of Appeal upheld the trial court's finding that the builder's change of the house elevation from a home with an attached garage at the side (as depicted in the marketing brochure that induced the execution of the contract), to a home with an attached garage at the front, constituted a material or fundamental change that entitled the purchasers to refuse to close the transaction.

8. In ***Lattavo v. 770373 Ontario Limited*** *(2004) 24 R.P.R. (4th) 114,* the purchasers acquired the corner lot from the builder, and their new home was intended to have a specific corner lot design and an impressive front entrance, with wide steps leading to a large landing in front of pillared double doors. Over the course of construction, difficulties arose relating to the steep grading of the lot, and with respect to conforming to the municipality's safety requirements, which necessitated design changes to lower the soil at the front base of the house, and to raise the sidewalk in front of the house. The vendor also implemented further changes by narrowing the steps leading to the entrance of the home, and placing them to the side of the house. The contract included a typical builder's exclusionary clause, giving the vendor the unilateral right to make broad changes or alterations to the design, plans and

specifications of the dwelling. The purchasers were extremely upset about the changes made to the design of the house, but instead of seeking rescission of the contract, they decided to complete the transaction as scheduled, and shortly after closing, sued the vendor for damages consequent upon the latter's breach of contract. The court ruled that the placement of steps to the side of a majestic entrance design was not only unsatisfactory from a practical perspective, but was also extremely displeasing from an aesthetic standpoint. The steep slope of the lot, which made it impossible to place a lawn chair in the backyard without having it tip over, was considered an intolerable deficiency. The court held that on an objective basis, all of the alterations and deficiencies complained of were so fundamental in nature, that the vendor's reliance upon the exclusion clause would be unconscionable and unreasonable under these circumstances, and therefore rendered the vendor's exclusion clause nugatory. Accordingly, the purchasers were awarded damages in an amount sufficient to enable them to make all reasonable adjustments to the property necessary to bring their home into reasonable conformity with what they had originally contracted to buy.

9. In ***Danko v. 792207 Ontario Ltd.*** *[2004] Carswell Ont. 1482 (Ont. C.A.),* the parties contracted for the construction of a new bungalow which contained a loft, for which the purchaser agreed to pay an additional $40,000, and to have a cathedral ceiling over the family room. The purchasers argued that the cathedral ceiling was a crucial feature of their new home, and within 6 weeks after first learning that the vendor did not complete the family room with the desired cathedral ceiling, the purchasers purported to rescind the contract. The Ontario Court of Appeal affirmed the trial judge's conclusion that given the particular design of the bungalow, the cathedral ceiling was an integral feature of the home, and fundamental to the contract. The court confirmed that the purchasers were entitled to have the house built in substantial conformity with their clear and contractually-agreed upon expectations. Accordingly, the failure to construct the cathedral ceiling constituted a fundamental breach of contract, that could not be overcome by the vendor's exclusion clause, inasmuch as the customary provision which purported to entitle the vendor to make unilateral changes to the building's plans and specifications was not to be construed as unlimited in scope, and did

not apply to fundamental changes. Therefore the purchasers were entitled to repudiate the contract.

10. In ***Brooker v. Silver*** *[2007] Carswell Ont. 7790,* the purchaser acquired an uncompleted condominium unit based on the builder's plans, which showed a sliding door separating the powder room from another room marked W/D and F.H.W. The purchaser understood this room to contain a stacked washer and dryer and a hot water heater, with the dwelling unit's furnace stacked on top. Of significance is the fact that a schedule to the agreement contained an express acknowledgment by the purchaser that the location of the furnace shall be determined by the architect, and may not be located as shown on the brochure, and that the purchaser shall be deemed to accept any such change. For reasons not outlined in the court decision (which was an appeal of a Small Claims Court ruling to the Divisional Court), the vendor moved the furnace into the front hall closet, and thereby consumed approximately half of the available closet space earmarked for the storage of clothes. The purchaser discovered this change on the pre-delivery inspection of the home, and when the vendor failed to relocate the furnace, the purchaser refused to complete the transaction. The subjective evidence of the purchaser was that the front hall closet was now rendered totally useless by the placement of the furnace, and that had he known of this change to the furnace's location, he would not have entered into the agreement of purchase and sale. The court also took note of the fact that in the course of attempting to resolve this problem, the purchaser attained the permission of the vendor to try and sell the unit to a third party, but two prospective purchasers immediately lost interest in acquiring the unit when they inspected the front hall closet and noted its unusual configuration with the furnace. The court concluded that this was sufficient objective evidence that the change in furnace location constituted a fundamental alteration. The court also held that the schedule to the contract, which contained the purchaser's express acknowledgment about the potential change in location of the furnace, could not be construed as unlimited in nature or scope, and did not apply to fundamental changes such as the one so disturbing to the purchaser, and accordingly the purchaser was entitled to refuse to close the transaction.

SCHEDULE "B"

CASES NOT ENTITLING THE PURCHASER TO TERMINATE

1. In ***Town-Wood Homes Ltd. v. Khanna*** *(1994) 39 R.P.R. (2d) 90 (Ont. Gen. Div.), and affirmed on appeal at (1997) Carswell Ont. 2720 (Ont. C.A.),* the purchaser refused to close because the vendor had built the house with a single door entrance, instead of a double door entry as required by the contract. Notwithstanding the provisions of the agreement of purchase and sale, the builder mistakenly believed that the relevant zoning would not permit the erection of a double door front entry, and thus proceeded to install a single front door. The builder sued the purchaser for damages for not closing, and the purchaser counter-claimed for the return of his deposit. The court looked at the degree of non-performance in relation to the contract as a whole, and when viewed on an objective basis, decided that the lack of a double door entry did not materially affect the purchaser's intended use and enjoyment of the home. The court also took judicial notice of the downward spiraling real estate market which transpired a few months after the purchaser had first acquired the home in the fall of 1988 (with property values continuing to descend at the time that the closing was scheduled in May of 1990), and concluded that market considerations had played a significant part in motivating the purchaser to resile from the contract. The court also noted that the house would have to be dismantled to accommodate the double door entrance after construction, because the garage would have to be completely de-constructed and moved. In the end, the court ruled that the vendor's breach was not fundamental, inasmuch as the purchaser received substantially what he bargained for, and accordingly the purchaser was not justified in refusing to close.

2. In ***Israel v. Townsgate I Ltd.*** *[1994] O.J. 3187, 1994 Carswell Ont. 2354 (Ont. Gen Div.),* the purchaser acquired a dwelling unit in a new condominium with a solarium, and before closing the purchaser discovered that the width of the solarium was only 4' 5", and therefore much smaller than what was represented in the unit's floor plan layout. The actual dimensions of the solarium were not disclosed on the plan attached to the agreement of purchase and sale, but the evidence adduced at trial confirmed that the builder had

represented to the purchaser that the solarium would be 7' 2" wide, and this representation induced the purchaser's execution of the contract. The purchaser contended that the reduced size of the solarium was inadequate for their plans to entertain their grandchildren. However, the court confirmed that this misrepresentation did not justify the purchaser's refusal to close, because the builder fulfilled its obligation to provide substantially what was bargained for, and by no measure could the dimensions of the solarium, on an objective basis, be considered to constitute a fundamental undermining of the bargain. Moreover, the court held that whether viewed on an objective or subjective basis, it could not be said that the representation regarding the size of the solarium was sufficiently material such that any deviation from same would entitle the purchaser to resile from the transaction altogether. It is important to note that the court specifically mentioned that the soft real estate market had likely been the motivating factor behind the purchaser's pursuit of rescission of the contract, and concluded that no reasonable purchaser would regard the information about the solarium to be so important or significant to the initial decision to acquire the dwelling unit that it would justify refusing to complete the transaction.

3. In ***Richards v. Law Development Group (Georgetown) Ltd.*** *[1994] O.J. No. 2914 (Ont. Gen. Div.),* the purchasers of a townhouse unit in a condominium project refused to close because, amongst other things, there were numerous deficiencies on closing, and unauthorized alterations had been made to the dwelling from the original plan. Contrary to the floor plan illustrating the proposed kitchen of the home, which depicted the stove and fridge on either side of the sink, the builder installed these appliances beside each other, because there would not be sufficient room for all of the kitchen cupboards if the fridge and stove were located as per the sales brochure. Moreover, the size of the kitchen drawers had changed, the electrical panel for the home was moved into the livingroom, and the hot water system was heated by electricity, rather than by gas as stipulated by the agreement, since gas would have required a chimney vent that would have encroached into an upper bedroom area. The court concluded that these alterations to the original plan were not material, and fell within the parameters of the exclusion clause in the contract, which permitted the builder to

unilaterally make various alterations or modifications to its building plans. Insofar as the outstanding deficiencies were concerned, municipal authorization to lawfully occupy the unit had been granted in accordance with the Ontario Building Code. The court was satisfied with the evidence adduced by the building inspector of the local municipality, who confirmed that in order to attain such occupancy approval, there can be no outstanding health or safety concerns with the home, and that water, a toilet facility, lighting and heating must be operable, provided however that during the months of July and August, heating may be waived as a requirement for occupancy so long as the hot water system is working. In light of the foregoing, the court concluded that the unit was substantially completed on closing, despite the deficiencies and unfinished items of construction. The court took specific note of the fact that the purchasers bought this unit on a pre-sale basis at a time when prices in the real estate market were slightly increasing, and then suddenly real estate values declined substantially at the time of closing. The court was of the view that this case was simply a situation where the purchasers, dissatisfied with their purchase, made every effort to get out of the contract, and therefore their motivation for refusing to close was impugned, resulting in the court's finding that the purchasers' termination of the contract was unwarranted.

4. In ***Three D Developments (Kingswood) Ltd. v. Gogos*** *(1995) 45 R.P.R. (2d) 121 (Ont. Gen. Div.),* the purchasers refused to complete the transaction because of a number of deficiencies with respect to the home that were discovered on the date of closing, and also rejected the builder's request for a minor extension of the closing date in order to accommodate the rectification of such deficiencies. When the purchasers attended at the home in the early afternoon of the closing date, they noted that there was no running water, only temporary power had been connected, and that the furnace was not yet fully installed and operable. They also complained about cosmetic problems with the interior, such as the fact that the kitchen island was not in place, the desk for a phone had not yet been installed, and there were no screens on any windows. Moreover, the garage doors had not yet been installed, the concrete garage floor had not yet been poured (nor had the garage been insulated), and there were no steps leading to the back door of the house, nor any steps from the side door leading

into the garage. To make matters appear even worse, there was considerable construction debris strewn around the house. The evidence adduced at trial confirmed that when the building inspector viewed the home in the morning of the closing date, to determine whether the home was fit for occupancy, the home did not pass inspection. However, the inspector returned in the afternoon at approximately 4:00 p.m. on the closing date, and by that time the water had been properly hooked up and was functioning, and tradesmen were installing the main duct work for the heating system, and only another few more hours of work were required to fully complete the installation of the furnace. The building inspector deemed the home fit for occupancy. Although there was still a number of matters that remained to be completed within the interior of the home, the court concluded that taken collectively, these outstanding items were minor in nature, and did not affect the purchaser's ability to reasonably occupy and enjoy the premises. The court held that reasonable occupancy connotes more than basic safe shelter, and necessitates an examination of various factors, such as the nature of the defects and their implications, the potential duration of the inconvenience, and the degree or level to which the standard of deficiencies fall below the level of occupancy reasonably expected. The court also confirmed that the test of whether the interior of a dwelling meets the standard of reasonable occupancy should not be a subjective one, but rather should be considered or construed on an objective basis. In this case, the court ruled that the outstanding deficiencies did not render occupancy of the premises unreasonable, having due regard to their nature and the expected duration of the inconvenience. The court noted that had the purchasers resided in the home after closing, they would not have experienced any difference in making use of the temporary power, as opposed to full electrical power (whether for use of cooking and/or laundry facilities, or otherwise). Even though some of the work which was required to permit lawful occupancy (namely the installation of the furnace) was completed on the closing date but sometime after the registry office had closed, the court apparently took judicial notice of the fact that the closing transpired in July, at a time when heat from the furnace would not likely be required. The court went so far as to state that under the circumstances, the purchasers should have completed the transaction at any convenient time before midnight on the closing date

(presumably after the furnace had been installed and was operable), inasmuch as the home had been determined to be fit for occupancy by late afternoon, and the fact that the registry office would have been closed by that time made no difference, because the parties could have arranged for the exchange of documents and certified funds after registry office hours and before midnight (ie. pursuant to an escrow arrangement where the transfer would be registered the next day). After applying an objective standard to the outstanding deficiencies, the court concluded that the home could have been reasonably occupied, despite some measure of inconvenience, and that the purchasers were therefore not justified in refusing to complete the transaction.

5. In ***Jaremko v. Shipp Corp.*** *(1995) 47 R.P.R. (2d) 229 (Ont. Gen. Div.),* the purchaser of a ground floor dwelling unit in a new condominium project refused to close the transaction because she discovered, just before closing, that the bedroom window was located immediately next to the condominium's service lay-by driveway, and was accordingly concerned that sunlight would be blocked from entering her suite, and that noise and fumes from delivery trucks and other service vehicles temporarily parked and/or idling in the nearby lay-by would disturb the use and enjoyment of her dwelling unit. The court found that the builder had a legal obligation to expressly warn the purchaser about the location of the lay-by, because of the negative impact on the purchaser's quiet enjoyment caused by the noise and fumes emanating therefrom (and from the lack of sunlight entering her suite), and that same constituted a latent defect. However, the court was unwilling to allow the purchaser to rescind the contract, presumably because the problems engendered by the suite's proximity to the lay-by were not considered sufficiently significant to warrant such a remedy. Rather, the court awarded substantial damages to the purchaser as a result of the vendor/builder's non-disclosure of the latent defect.

6. In ***Sherritt v. 690624 Ontario Inc.*** *[2000] O.J. No. 2840, 2000 Carswell Ont. 2742 (Ont. S.C.J.),* the purchaser acquired a condominium dwelling unit in a former apartment building that was being converted into a condominium, following substantial renovations to the building's common areas, as well as extensive renovations to the interiors of the respective

suites. The purchaser refused to complete the purchase and sale transaction because of various alleged construction deficiencies and some outstanding work with respect to her suite (ie. new sinks, taps and cupboards were installed in the kitchen, although this work was not 100% complete on the closing date), and the purchaser was also concerned about the unfinished condition of the common areas. However, the outstanding deficiencies alleged were not, either individually or collectively, judicially considered to constitute a fundamental breach of contract, and therefore the purchaser was not justified in refusing to complete the transaction. Of particular interest was the court's willingness to allow the builder a reasonable time for completing the outstanding work ... a shorter period for completing outstanding work within the unit, and a longer period for work involving the common elements. The court confirmed that it made no sense, either logically or practically, to finish the common areas within a building if workers must thereafter continue to use the common areas to transport construction materials and equipment, or to remove debris from the building.

7. In ***Genesis Towers Ltd. v. Cheung*** *(2002) 4 R.P.R. (4th) 193 (B.C.C.A.),* the erection and location of columns that would hinder the placement of the purchaser's furniture did not constitute a fundamental breach of contract, and the purchaser was therefore not justified in refusing to complete the transaction.

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