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## Interim Report of the Project Committee on New Home Warranties

### I. Introduction

The Project Committee on New Home Warranties was formed to continue a project that had begun under the auspices of the Law Reform Commission of British Columbia on new home warranties and related issues arising from defects in new housing. This area became a matter of public concern during the 1990s when the problem of water penetration in new multi-unit dwelling complexes in the lower mainland began to assume epidemic proportions and the inadequacy of existing legal protection for purchasers of new housing units became painfully apparent. The Law Reform Commission of British Columbia had undertaken work in the area at the invitation of the Court of Appeal for British Columbia expressed in *Strata Plan NW2294 Oak Tree Construction Inc.*<sup>1</sup> When the Law Reform Commission ceased work on the project in light of its pending demise, the Commission and its consultant, Dr. R. Gosse, Q.C. had carried out extensive research and compiled a large volume of material on statutory protection of purchasers of new housing and new home warranty schemes in many jurisdictions in North America, the U.K., and the Commonwealth.

The Board of the British Columbia Law Institute concluded that a continuation of the Project on New Home Warranties should form part of the initial program of the Institute, albeit with a possibly narrower focus than that originally envisioned for the Commission's project. The Institute developed a project description focusing solely on consumer protection.<sup>2</sup> The project description made reference to the development of statutory warranties, disclosure requirements, and the problem of "shell companies," i.e., the Builder/Vendor Company found to be non-existent or insolvent when purchasers of defective housing sought recourse against it.

The Project Committee was created in the summer of 1997. Its membership was selected to reflect various interests concerned with a resolution to the problem of defective new housing. It includes an architect, legal practitioners who customarily represent the residential construction industry and condominium owners, a retired member of the Court of Appeal for British Columbia, a legal academic specializing in real estate law, the Executive Director of the Institute, and a former member of the Law Reform Commission engaged as Reporter to the Project Committee.

#### (a) *Initial Steps*

An organizational meeting of the Project Committee was held on 17 September 1997. The Committee considered the scope of the project and agreed on certain priorities for consideration. It was agreed that large commercial construction was excluded from the project virtually by definition but that light commercial construction might have to be included in a protective regime because of the prevalence of mixed-use developments. The Committee resolved that the following would be examined in addition to basic statutory protections for purchasers of new housing:

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1. [1994] 8 W.W.R. 49, 93 B.C.L.R. (2d) 50 (C.A.).
  2. The project description appears as Appendix A.

- means of sustaining an efficient warranty fund
- builder insolvency and shell companies
- disclosure mechanisms
- effective enforcement of remedial measures
- adaptability of existing consumer protection legislation to problems connected with defective new housing

The last of these elements received early attention as the Committee decided to examine the feasibility of extending the *Trade Practice Act* to new home purchases.

Materials analysing the implications of the extension of the *Trade Practice Act* were considered at the second meeting of the Committee on 16 October 1997. It was evident from the Committee's deliberations that very complex issues emerged from any possible extension of the *Trade Practice Act*. Moreover, there was considerable division in the Committee as to the desirability of such an extension. The Committee therefore deferred further discussion on this issue.

*(b) Committee's Draft of a "Sale of New Homes Act"*

A draft *Sale of New Homes Act*, prepared by Committee member Martin Taylor, Q.C., was also considered at the October 16, 1997 meeting. This prototype draft became the foundation for the Committee's later recommendations to the Ministry of Municipal Affairs and Housing and the Barrett Commission. Its main features were as follows:

- A warranty would be implied into the sale of every new residential unit that:
  - (a) it is reasonably fit for habitation;
  - (b) it has been constructed with materials of good quality and that are reasonably fit for the purpose;
  - (c) it has been designed and built with ordinary competence, skill and care;
- These statutory implied warranties would be deemed to have been agreed to for valuable consideration and be binding on the vendor, builder, and every other person directly involved in the development, promotion and sale of the new home with the exception of a licensed real estate agent, solicitor, or notary acting solely in that capacity;
- Rescission of the sale would be allowed for breach of a statutory implied warranty if a purchaser brought action within one year following the date of completion of the dwelling;
- An action for damages for breach of an implied warranty could not be brought after three years of the date of completion;
- The statutory implied warranties could not be excluded by contract;

- A “new home” would be defined as a building constructed for residential use sold within one year from the date of completion (the date of issuance of a municipal occupancy permit).

The draft *Sale of New Homes Act* was not publicly circulated, as it was treated as a working document and opinion was not uniform within the Committee with respect to all of its provisions. It has nevertheless influenced the Committee’s work to date and is partly reflected in the legislation that emerged in the spring of 1998, discussed below in this Interim Report.

In the period between first and second meetings of the Committee, the provincial government had announced a legislative initiative for the spring of 1998 to deal with the “leaky condo” problem. Officials in the Ministry of Municipal Affairs and Housing and Ministry of Attorney General were aware of the Committee’s activities and the Committee was invited to participate in a stakeholder consultation process connected with this initiative. The Committee recognized that further deliberation should be deferred until the outlines of the government’s strategy in addressing the overall problem emerged from these consultations.

## **II. The Committee’s Participation in the First Phase of the BC Government’s Stakeholders’ Consultation Process**

In December 1997, the Ministry of Municipal Affairs and Housing issued a discussion paper entitled “Improving Quality and Accountability in Residential Construction.” The paper was actually a summary of proposals that had been made inside and outside government to address issues of purchaser remedies, statutory warranties, third party warranty standards, builder registration and qualifications. The Ministry simply sought comment on the various proposals made without advancing any specific policies.

Representatives of the Committee attended stakeholder meetings in early January 1998 and the full Committee met on 26 January 1998 to discuss the process that was unfolding and how the Committee could influence it to increase the likelihood of a satisfactory result. It was noted at that meeting that the government viewed statutory warranty protection favourably and that the Ministry of Municipal Affairs and Housing regarded the assistance that the Committee could provide as valuable in relation to the content of that legislation. Concern was expressed that there seemed to be a lack of focus on regulatory structures as a complement to warranty legislation. The Committee resolved at that point to divide its efforts between refining the proposal for a statutory implied warranty and urging the inclusion of a workable regulatory structure in the government’s legislative scheme. A meeting was scheduled for February 1998 to revisit the Committee’s draft of *Sale of New Homes Act*. This meeting was destined to be pre-empted by the government’s internal timetable.

(a) *The Accelerated Pace of the Government's Legislative Initiative and the Committee's Response*

Shortly after the January 1998 meeting, the Committee learned that Government was working to a very short deadline for the preparation of draft legislation. The Committee hurriedly attempted to reach a consensus on distinct issues emerging from its own draft Act in order to influence the legislation that was under development. The Reporter distilled comments from each member of the Committee on the draft Act into a memorandum delineating areas where there was agreement in principle, areas in which consensus was unlikely, and areas in which consensus was achievable. A conference call was convened on 10 February 1998 with this memorandum as a focus. Consensus was reached on the contents of a submission to be made to the Ministry of Municipal Affairs and Housing on the minimum content the Committee thought necessary in any legislative scheme directed at new home warranties. This would be styled an "interim submission" to emphasize that the Committee's work was incomplete and final positions had not yet emerged on certain important issues.

(b) *The Committee's Interim Submission to the Ministry of Municipal Affairs and Housing*

A brief was quickly finalized by the Chair of the Committee, Professor Waldron and the Reporter and submitted to the Ministry of Municipal Affairs and Housing in February 1998 under the title "Interim Submission on Statutory Protection of Purchasers of New Housing." This document emphasized that its focus was on the minimum legislative protection all purchasers of new housing should have. It noted that the Committee had not yet fully considered all the necessary or desirable elements of an integrated solution to the problem of latent defects in new housing or previously occupied housing, such as an insurance or compensation fund, builder registration and qualifications, and standards for third party warranty schemes. Nor had the Committee reached a consensus regarding a rescission remedy or the extension of liability to officers and directors and others associated with builder companies in order to overcome the problem of shell companies.

The submission made the following recommendations for the content of the legislation:

- Providing purchasers of dwellings, whether completed or in the course of construction, with a statutory tri-partite warranty that the residential unit
  - (a) is reasonably fit for habitation;
  - (b) has been constructed from materials of good quality and reasonably fit for the purpose;
  - (c) has been designed and constructed with ordinary competence, skill and care.
- Survival of the tri-partite warranty after completion of the sale despite any language to the contrary in the agreement of purchase and sale.
- Five-year duration for the statutory warranty to take account of the interval within which major water penetration problems tend to appear.

- Commencement of a statutory warranty at the date of registration of a residential unit in a new home warranty program, if a registry exists; otherwise, the warranty should commence on the date of issue of a municipal occupancy permit or, failing this, the date of substantial completion of the residential unit.
- Extension of the protection of the tri-partite statutory warranty to all purchasers of the residential unit within the five year period in which it would run, with liability for breach resting only with the original vendor.
- No distinctions between classes of residential purchasers, e.g. purchasers of residential construction for rental would be protected to the same extent as those purchasing for owner occupation.
- Non-exclusivity of the statutory warranty so that the statutory warranty would co-exist with any more comprehensive protection that might be available under an insurance or compensation scheme.

*(c) Further Consultation*

In early March 1998, the Ministry of Municipal Affairs and Housing requested further comment from the Committee on specific issues. Unfortunately, the time constraints imposed by the Ministry left no opportunity for the Committee to meet as a group and instead comments had to be submitted by individual members. The comments were nevertheless substantial and the Ministry expressed gratitude for the attention which the members had given to this request.

The result of the Government's consultation process was expected to be the introduction of a Bill in the spring session of 1998 based on those consultations. This did not occur immediately and, instead, the government initiative took a quite different and more politically charged turn.

### **III. The Barrett Commission and the Committee's Involvement in its Process**

In the early spring of 1998, a new Minister took on the housing portfolio and expressed dissatisfaction with the nature of the consultation that had been carried out by the Ministry up to that time. The first phase of consultation was perceived to have been too heavily weighted towards building industry participation, with insufficient representation of condominium owners. On 17 April 1998, the Honourable Jenny Kwan, the new Minister of Municipal Affairs and Housing announced the appointment of a Commission headed by the former Premier Barrett to engage in much broader public consultation and recommend a legislative solution to the "leaky condo" crisis. Much publicity attended the creation of the Barrett Commission and concern was expressed within the Project Committee that it could be swept up by the politics surrounding the issue, which might be damaging to the perception of objectivity which it must retain in order to fulfill its purpose. If the Project Committee was to have a significant influence on the course of events, however, it was evident that putting its views to the Commission was unavoidable.

Within a few days after the creation of the Barrett Commission, the Committee was invited to make a submission to the Inquiry. This invitation was made through the Barrett Commission's legal counsel and was accepted by Mr. Close after consultation with the Chair and two other members of the Committee who could be contacted in the short time available. A written submission was quickly prepared based on the interim submission previously provided to the Ministry of Municipal Affairs and Housing in February 1998 and incorporated some of the subsequent discussion of the Committee.

The submission to the Barrett Commission,<sup>3</sup> entitled "*Submission to the Commission of Inquiry into the Quality of Condominium Construction in British Columbia*" noted three anomalies in the current law concerning the purchase of new housing:

1. The lack of any implied warranty of quality in a purchase of a completed newly constructed dwelling, in contrast with the statutory protection of purchasers of small items of personal property under the implied warranties of quality and fitness in the *Sale of Goods Act*, which had persisted for more than a century;
2. The fact that buyers of homes under construction are protected by implied warranties of quality, which creates an unfair distinction between different classes of home purchasers without any satisfactory foundation;
3. The fact that purchaser of new housing may be forced to waive any warranty protection under the standard form contracts of purchase and sale used by most residential developers, while a consumer purchaser of goods cannot be forced to give up the protection of the statutory warranties under the *Sale of Goods Act*.

The submission urged that any new legislation dealing with the protection of buyers of new housing should contain these features:

1. Every agreement of purchase and sale of a new residential unit should be deemed to contain the following terms:
  - (a) The new home is reasonably fit for habitation;
  - (b) The new home has been constructed from materials which are of good quality and reasonably fit for the purpose;
  - (c) The new home has been designed and constructed with ordinary competence, skill and care.
2. These terms should apply whether or not construction is complete at the time of the sale.
3. It should not be possible for the purchaser to waive the protection of implied terms.
4. An action by a purchaser based on the implied terms should be subject to the normal six-year limitation period applicable to actions for breach of contract.

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3. The Submission Narrative is set out in Appendix B.



5. The implied warranties should benefit not only the original purchaser but any subsequent purchaser as long as:
  - (a) An action is brought within the six-year limitation period;
  - (b) The vendor is liable to only one action based on the same breach;
  - (c) No liability is imposed on the original or an intervening purchaser.

The submission characterized these basic protections as a “home purchaser’s bill of rights.”

The submission referred to the problem of “shell companies” resulting from the practice of creating a separate company to build a specific project which is then dissolved following completion of the project. This leaves purchasers with no solvent entity to pursue. The submission made the point that any rights conferred by legislation would be meaningless without effective enforcement. It noted that the Project Committee had not yet reached a consensus on a solution to this important aspect of the problems under investigation by the Barrett Commission and enumerated the potential solutions suggested by individual Project Committee members, including the extension of liability to principals of project-specific companies directly liable for construction defects, extension of liability to persons actively participating in the promotion of badly constructed residential units, and various forms of security such as bonds or partial holdbacks of the purchase price. The submission alluded to the possibility of amending the *Trade Practice Act* to extend to sales of real property, or the amendment of the *Real Estate Act* to require disclosure of the extent of warranties attached to any newly constructed residence or their absence prior to the conclusion of any sale. The submission noted, however, that the Committee had not reached any conclusion on the most desirable solution or set of solutions to the shell company problem.

The Committee also supported the creation of an effective new home warranty scheme, but firmly opposed any regime in which the new home warranty scheme would be a substitute for the implied statutory warranties. In this regard, the submission argued that a third party new home warranty and the statutory implied warranties would be complimentary forms of protection. The statutory warranty was likened to a safety mechanism which would serve to protect purchasers in the event of the failure of any third party warranty scheme, and also one that would become immediately effective while a third party warranty scheme was being put in place.

Mr. Close presented the Committee’s submission to the Barrett Commission on Wednesday, 29 April, 1998 and made oral representations along the lines of the written submission at that time. These appeared to be well received. Suggestions were made by the Barrett Commission that the Institute and the Project Committee could be asked to play a larger role in the process leading to a legislative solution.

*(a) The Project Committee’s Influence on the Barrett Commission’s Report*

The original deadline for the final report of the Barrett Commission, namely May 29, 1998, was subsequently extended to mid-June. In the course of that time, the Committee was invited to submit a draft of provisions implementing the content of the Committee’s submission of April 29, 1998. A draft entitled the *New Home (Implied Warranty) Act* was accordingly prepared by Mr. Close in consultation with the Chair of the Committee and the Reporter.

The final report of the Barrett Commission was issued on 17 June 1998. One chapter of the report was devoted to the failure of the legal structure to provide adequate protection to purchasers of new housing. The Barrett Commission's recommendation no. 67 set out in that chapter stated that a legislative solution should incorporate an implied warranty in the terms suggested in the Committee's submission of 29 April 1998. The Barrett Commission went further than the Project Committee, however, in recommending a limitation period of ten years for actions for breach of the implied warranty.

(b) *Legislation is Enacted*

The receipt of the Barrett Commission Report was quickly followed by the introduction of Bill 46, the *Homeowner Protection Act*. The Bill received royal assent on 30 July 1998. While it did not follow the recommendations of the Barrett Commission on basic statutory protection of new home purchases in every respect, it incorporated much of the substance of those recommendations, which as noted above reflected the submissions made to the Barrett Commission on behalf of the Committee.

Section 23 of the *Homeowner Protection Act* provides for a tri-partite statutory warranty with respect to habitability, quality and fitness of materials, and the exercise of ordinary competence, skill and care in the design and construction of a new home.<sup>4</sup> This warranty cannot be waived by contract and protects any owner of the home throughout the period in which it is in effect (ten years after the date for first occupancy or, in the case of common property and common facilities of a strata corporation, the date of deposit of the strata plan). A feature of the implied statutory warranty that is disappointing from the Committee's point of view is that the statutory warranty is not in effect if a new home is covered by home warranty insurance. The Committee had taken a strong position to the effect that statutory protection should coincide with any warranty protection offered by a third party warranty provider. This feature of the Act was also contrary to the recommendations of the Barrett Commission. In this respect, however, the new legislation sets up an arrangement similar to that of the United Kingdom where the *Defective Premises Act, 1972*<sup>5</sup> is taken out of play if a new dwelling is insured under the *National House Building Scheme 1979*.

The *Homeowner Protection Act* makes a number of other sweeping changes in the residential construction sector. The most important of these is the mandatory coverage for new homes under a home warranty insurance program. Section 22(1) prohibits the sale or offering for sale of a new home unless such coverage is present. Section 22(2) sets minimum standards for home warranty insurance: defects in materials and labour must be covered for a period of at least two years after commencement of the warranty, defects in the building envelope (including water penetration) must be covered for at least five years, and structural defects for ten years. Mandatory coverage does not apply to homes constructed by an "owner builder," i.e. an individual who builds or renovates a detached self-contained dwelling unit or prescribed building for personal use and has not renovated a dwelling unit or prescribed building within the previous 18 months. The statutory warranty under

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4. See Appendix C.

5. 1972, c.35.

section 23 will apply to the sale of a dwelling by an owner builder, but will be irrelevant in most other cases.

The Act introduces compulsory licensing for residential builders and for some trades and occupations. It will not be permissible for builders to construct and sell new dwellings without being licensed under Part 5 of the Act. Part 10 of the Act contemplates alternate dispute resolution of residential construction disputes, including those concerning home warranty insurance. It provides for mediation and arbitration procedures to be implemented by regulation. It also contemplates that such regulations may provide for compulsory mediation.<sup>6</sup>

The administration of a Builder Licensing Scheme and the Reconstruction Program is entrusted to the Homeowner Protection Office established by the Act. The Office is also authorized to carry out research and education respecting residential construction.

#### **IV. Future Action By the Committee in the Wake of the *Homeowner Protection Act***

With the enactment of the *Homeowner Protection Act*, the Committee was faced with a decision as to whether it should treat its function as having been overtaken by events or whether it was still positioned to assist in evolving a solution to the problem of defective new housing in British Columbia. While at first glance it would appear that the *Homeowner Protection Act* addressed many, if not most, of the areas to which the Committee would have ultimately directed its attention, certain elements that the Committee recognized as part of a satisfactory legislative scheme were not addressed. It was noted that a vast degree of detail was left to regulations which had not yet been seen or even drafted. There had been no attempt in the Act to address the problem of “shell companies” and insolvent builders other than through the mandatory home warranty feature of the Act.<sup>7</sup> The vagueness of the Act in describing how the various protections would operate was not lost on the media or the public.

The Committee saw the failure to allow statutory implied warranty protections to coexist with third party new home warranty schemes as a major defect requiring correction. Without this coexistence of statutory and contractual protection, the insolvency of a warranty provider could deprive homeowner of all protection whatsoever. The subsequent bankruptcy in the late spring of 1999 of the B.C. and Yukon New Home Warranty Program, the leading new home warranty provider in British Columbia to date, made that reality alarmingly clear.<sup>8</sup>

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6. Another feature of the Act was the Reconstruction Program established under Part 9 to assist “eligible homeowners” to repair poorly constructed dwellings and contemplated its funding through annual assessments paid by residential builders as part of a license fee. The Reconstruction Program would largely be implemented by regulation - s. 32(2)(m).
  7. As to Shell companies, *see* the penultimate paragraph of the introductory note to this Report by Gregory K. Steele, the Institute Chair.
  8. In 1999 the Barrett Commission was reconstituted and requested to consider the reasons for the failure of the B.C. and Yukon New Home Warranty Program. As of April 2000 the Report had been only partially released. Significant portions of the Report have been withheld from the public at the request of law enforcement authorities.

The provincial government had extended the *Trade Practice Act* to real property transactions by an amended definition of “consumer transaction” in the same session in which the *Homeowner Protection Act* was passed,<sup>9</sup> apparently with little attention to the complexities this would produce in terms of the interaction of the *Trade Practice Act* with other legislation, including the *Real Estate Act*. There appeared to be considerable room for continuing the activities of the Committee. The question facing the Committee was whether the legislative initiative embodied in the *Homeowner Protection Act* should be allowed a sufficient time to function and reveal how well it filled the need that existed for a comprehensive solution.

The Committee met on November 13, 1998 to discuss the available alternatives. No member of the Committee was in favour of preparing a final report on what had been done to that point and then disbanding. None thought that the *Homeowner Protection Act* and extension of the *Trade Practice Act* to realty was an entirely satisfactory solution to the problem of defective new housing. The Committee resolved to remain in existence and to observe the operation of new legislation until it may be possible to reach some conclusion as to its effectiveness and to monitor developments in this area generally. One of these developments, which the Committee eagerly awaits, is the release of the complete version of the second Report of the Barrett Commission.

In the meantime, the Project Committee decided to submit an interim report to the Law Institute’s Board relating its activity to the point at which the *Homeowner Protection Act* was enacted and its influence on the course of events since it began its work. The Committee is to meet again at the call of the Chair.

## **V. Conclusion**

While the provincial government moved more quickly to put legislation in place than was originally expected when the New Home Warranties Project Committee began its work, the Committee has maintained its involvement in all phases of the public consultation that preceded the legislation and exerted a significant influence on certain aspects of the content of the new *Homeowner Protection Act*. The Committee has been consulted consistently by the Ministry of Municipal Affairs and Housing and by the Commission of Inquiry Into the Quality of Condominium Construction in British Columbia while that latter body was developing its initial Report. The terms of section 23 of the *Homeowner Protection Act* owe a great deal to the recommendations the Project Committee made to the Barrett Commission in April 1998. It is the perception of not only the members of New Home Warranties Project Committee but a large sector of the general public that much more needs to be done to adequately address the very serious problem of defective residential construction, and this Committee and the British Columbia Law Institute have a valuable role to play in arriving at a comprehensive solution.

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9. *Attorney General Statutes Amendment Act, 1998*, S.B.C. 1998, c. , s.16.

## Appendix A

### Project Description

The general law affords very little protection to the buyer of a newly built home which proves to be deficient in workmanship or materials. This was vigorously pointed out by the British Columbia Court of Appeal in its 1994 decision in *Strata Plan NW2294 v. Oaktree Construction Inc.*, (1993) B.C.L.R. (2d) 50. The deficiencies in the law were so great that they prompted Mr. Justice Lambert of that court to make a cry for statutory reform. After referring to the compulsory new home warranty legislation in force in Ontario, he observed:

Such a scheme for consumer protection in an area of considerable consumer vulnerability has not yet been introduced in the form of legislation in British Columbia. Accordingly, this court may be called upon to resolve some or all of the inconsistencies in this area, perhaps on a comprehensive basis, at any time. But because of the potential consequences to the home building industry of any comprehensive solution it may be that those inconsistencies may be more suitably resolved by legislation than by legal analysis. The balancing of legal and policy considerations required for either a judicial or a legislative solution to those problems may make the problems particularly suitable for consideration by the Law Reform Commission of British Columbia.

Those observations led the Law Reform Commission to add a project on new home warranties to its program.

The work of the BCLRC was complicated by several factors. The first was the sheer size of the project and the fact that it potentially involved empirical inquiries into non-legal issues in relation to building standards and practices. Moreover, at least three ministries of the provincial government expressed interest in doing something in this area as assisting the owners in the “leaky condo cases” was seen as politically attractive. The role of the BCLRC in relation to these other initiatives was never clarified to its satisfaction.

The BC Law Institute reviewed this project at its April (1997) program planning session. The Board members remain convinced that this is an area where reform measures are called for but that a BCLI project on this topic, employing limited resources, should have a somewhat different and narrower focus.

The BCLI project on new home warranties emphasizes the “consumer protection” aspect of this problem. Reform options to be pursued might include extending existing consumer protection legislation such as the *Trade Practice Act* to new home purchases, developing a “home-buyers bill of rights” that incorporates statutory warranties similar to those available to the buyers of personal property under the *Sale of Goods Act*, and whether relief should be available in all cases or only where the seller fails to make a full and fair disclosure that the buyer is not protected under the transaction. The study might also examine the problems associated with insolvent sellers.

## Appendix B

### Submission to the Barrett Commission

### Narrative

*Leaky Condos: The focus of this submission is not why or how things went wrong. Our concern is how the law should respond when things like this do go wrong.*

#### **The British Columbia Law Institute**

The British Columbia Law Institute was created early in 1997. Its mandate is to promote the improvement, clarification and simplification of the law and its adaptation to modern social needs.

The Institute is the effective successor to the Law Reform Commission of British Columbia which played a similar role for over 25 years before it ceased functioning last year. Further institutional information on the Institute, and the circumstances of its creation, can be found at **Tab 8**.

#### **New Home Warranties as a Law Reform Issue**

The project on new home warranties is one that the B.C. Law Institute “inherited” from the Law Reform Commission. The project has its roots in a 1994 decision of the British Columbia Court of Appeal - the *Oak Tree Construction* case. Further information concerning the case may be found in the material at **Tab 4**.

In the *Oak Tree Construction* case, the Court of Appeal considered the extent to which a purchaser of a newly constructed home is protected by the law. The court was not happy with the conclusions it reached and called for changes in the law. It urged that the Law Reform Commission examine and report on how the law could better protect home owners.

In response to this call, the Law Reform Commission added to its program a project on new home warranties. A profile of the Law Reform Commission project is set out at **Tab 4**.

The Commission worked on this project from 1994 to 1996. Active work ceased in the fall of 1996 when the Commission learned it was to be terminated as a government program. Some examples of the materials developed by the Law Reform Commission while the project was active are found at **Tabs 5 and 6**.

When the British Columbia Law Institute was created, its Board saw this project as an important item of unfinished business that should be brought to completion. The project on new home warranties was, therefore, one of three major projects that had been the focus of the Institute’s work during the past year.

A description of the Institute's project will be found at **Tab 3**. It will be noted that the Institute adopted a slightly different focus from that of the LRCBC.

To carry forward this project, the Institute created a special Committee composed of a mix of Institute Board members and of non-members having particular expertise or perspective. The work of the Committee is assisted by grants from the Real Estate Foundation of B.C and the Law Foundation of B.C.

A list of Committee members is set out at **Tab 7**. The Chair of the Committee is Professor Mary-Anne Waldron of the Faculty of Law, University of Victoria.

The Committee has been working since September 1997. For the past five months, its work has been driven by developments in Victoria.

When it became public that the Ministry of Housing intended to bring forward legislation on this topic for the 1998 session of the legislature, the Committee shifted its focus to providing meaningful input into the legislation that was being developed.

In particular, Committee representatives participated in the various stakeholder meetings constituted by the Ministry of Housing and made a formal submission to the Ministry in February. The latter is the "interim submission" found at **Tab 2**.

All the recent work of the Committee has been done in response to a series of very tight deadlines arising out of the Ministry's timetable.

As a result of this process, the advice the Committee has been able to give has not covered all of the issues that the Committee hoped to address in this project. The advice it was able to give would undoubtedly have profited from further debate and deliberation if time had permitted.

Nonetheless, the Committee was able to put forward a number of concrete suggestions on one particular issue and it is these suggestions that the Committee wishes to bring before this Commission.

These suggestions concern the need for statutory warranties - that is warranties that are implied by the law into every contract for the sale and purchase of a newly constructed residence.

### **Statutory Warranties**

Before setting out the Committee's suggestions, it is necessary to say something about the legal background against which the purchase of a new home operates.

The *Oak Tree Construction* case highlighted three anomalies in the current law.

*First Anomaly*

If I contract to buy a newly constructed home, the law will not imply into that contract a requirement that the home meet any standards as to quality, or even that it is fit for habitation.

In contrast, for over 100 years, an act of the legislature called the *Sale of Goods Act* has implied into contracts for the sale of personal property, requirements that certain quality standards be met and that the goods are reasonably fit for their intended purpose.

The shocking fact is that if I go to an appliance store to buy a microwave, the law will give me a greater measure of protection than it will provide if I buy a newly constructed home. That the law should yield such a result is unacceptable.

*Second Anomaly*

Where the construction of the new home is not completed at the time it is sold, the law will imply into the contract of sale certain requirements as to its quality. See **Tab 5** for an analysis of the law on this point.

Thus, some buyers of new homes receive protection and others will not, depending on whether construction was complete at the time of sale. This distinction is irrational and unsustainable.

*Third Anomaly*

Even where the buyer of a new home does have the benefit of implied warranties (i.e. where construction is not yet complete at the time of the sale) the law permits the buyer to waive these rights. In practice, this means that the seller will invariably include in the contract of sale a standard form clause whereby the buyer waives (gives up) these rights. (This was a feature of the contract in the *Oak Tree Construction* case.)

Again, this position contrasts with that which prevails for the sale of goods. When I purchase my microwave, any clause of the sale agreement which purports to deprive me of my rights is void. The *Sale of Goods Act* prohibits any waiver of the statutory warranties of quality (section 20.)

**The Committee's Proposals**

The Committee strongly urges that the first step toward creating an acceptable regime of buyer protection is to alter the general legal background against which any additional protective measures might operate. The anomalies referred to must be eliminated and the law should provide positive protection for home buyers analogous to the protection it confers on buyers of goods.

Specifically, the Committee recommends that any new legislation touching on buyer protection should contain the following features:



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- (1) Legislation should stipulate that every agreement for the purchase and sale of a new home is deemed to contain the following terms:
  - (a) the new home is reasonably fit for habitation,
  - (b) the new home has been constructed from materials which are of good quality and reasonably fit for the purpose, and
  - (c) the new home has been designed and constructed with ordinary competence, skill and care.
- (2) These terms should apply whether or not construction is complete at the time of the sale.
- (3) It should not be possible for the buyer to waive the protection of these implied terms.
- (4) Any action brought by a buyer based on the implied terms should be subject to the normal limitation period applicable to actions for breach of contract - 6 years.
- (5) The implied warranties should benefit not only the original buyer but any subsequent buyer so long as
  - (a) the action is brought within the 6 year limitation period,
  - (b) the seller is liable to only one action based on the same breach, and
  - (c) it does not impose liability on the original or an intervening purchaser.

A set of rules like this would create a “Home Buyers Bill of Rights.” They would provide the legal foundation on which other, more specific, protections would be built.

### **Outstanding Issues**

It is one thing to create rights, but it is another thing to make those rights meaningful.

A problem that arises frequently in residential construction is the developer who creates a numbered company to carry out a specific building project and once the project is complete, collapses the company leaving nothing but a shell with no assets. The shell shields from liability the individuals who have profited from the development.

In cases like these, when construction defects emerge at a later time, there is no solvent entity against which the buyer can assert rights.

The B.C. Law Institute’s Committee on New Home Warranties has grappled with this issue but matters have not yet reached the stage where any consensus on a solution has been reached.

Individual Committee members have brought forward a variety of suggestions for discussion.

- (1) extending liability beyond the initial seller by “lifting the corporate veil” to make the principals of numbered companies directly liable for shoddy construction.
- (2) extending liability on the statutory warranties to persons who actively participate in marketing shoddily constructed new homes, including those who lend their names to particular projects.
- (3) providing some form of substitute security such as a bond or holdback for the benefit of the purchaser.

The Committee has also considered extending the range of existing legislation to provide more complete protection to buyers.

- ! Amend the *Trade Practice Act* so it extends to the marketing of real property.
- ! Amend the *Real Estate Act* to expressly provide for the disclosure respecting the presence, absence or extent of warranties attached to a newly constructed residence.

These are all possibilities that merit further consideration but the Committee’s deliberations on them is, so far, inconclusive and further work is required before any consensus is likely.

### **A Compulsory Scheme of Third Party New Home Warranties**

The ultimate answer to many of these problems may be an effective new home warranty scheme in which all builders must participate.

The Committee supports the creation of such a scheme but is not, at this time, in a position to offer any advice concerning the specific features of such a scheme.

What must be made clear, however, is that a third party new home warranty scheme is not an alternative or substitute for the implied statutory warranties suggested above.

These are two different kinds of buyer protection devices whose functions are complimentary.

They complement each other in the same way as the manufacturer’s warranty on the microwave I purchase complements the implied warranties that arise under the *Sale of Goods Act*.

The implied warranty acts a safety net so if my microwave turns out to be a lemon and I cannot get any satisfaction on the manufacturer’s warranty, I can also pursue a remedy in Small Claims Court.

There is further reason for creating a group of statutory implied warranties that are distinct from any third party home warranty scheme. Statutory warranties can be implemented immediately and provide immediate protection.

Any third party new home warranty scheme will take time to develop and once developed, it may need to be implemented in phases. For example, it may be implemented first with respect to multi-unit construction and/or in certain geographic areas. Statutory warranties can provide meaningful protection while a more comprehensive and detailed scheme is put in place.

The Committee is anxious to have input into the content of a third party new home warranty scheme. However, if its advice is to be sought it must be given the time to do the job properly.

## Appendix C

### Homeowner Protection Act

S.B.C. 1998, c. 31, s. 23

#### Statutory protection

- 23.** (1) A residential builder and a vendor of a new home are both deemed to have agreed with the owner, to the extent of labour, materials and design supplied, used or arranged by the residential builder or vendor, that the new home
- (a) is reasonably fit for habitation,
  - (b) has been constructed from materials that are of good quality and reasonably fit for the purpose, and
  - (c) has been designed and constructed with ordinary competence, skill and care.
- (2) Any term of an agreement that purports to waive, exclude, limit or qualify the protection under subsection (1) is of no effect.
- (3) The protection under subsection (1) is for the benefit of whoever is the owner of the new home from time to time until the end of the period within which an action may be brought under subsection (5), and that owner is deemed
- (a) to have given good consideration for the benefit of the protection, and
  - (b) to be the only person entitled to recover damages for a breach of the protection.
- (4) Despite subsection (3), if the ownership of the new home changes during the course of an action for breach of the protection under subsection (1), the new owner is entitled to be substituted as plaintiff and to enforce all rights that the former owner could have enforced.
- (5) An action in respect of the protection under subsection (1) must be commenced within 10 years after the date of first occupancy of the new home or, in respect of common property, common facilities and other assets of a strata corporation, the date the strata plan is deposited in a land title office in accordance with the Condominium Act.
- (6) Nothing in this section
- (a) excludes, qualifies or limits any other term, express or implied,
  - (b) relieves any person of liability to which they would otherwise be subject, or
  - (c) subjects a municipality or regional district to any greater liability than if this section were not in force.
- (7) This section does not apply to a new home covered by home warranty insurance.