



# The Law Society of Manitoba

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## REAL ESTATE

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### **Chapter 7**

#### New Construction Transactions

May 2020

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# A. ACTING FOR THE PURCHASERS OF NEW HOUSES

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The duties of a solicitor acting on behalf of the purchaser of a newly built or under construction house differ in several respects from those of a solicitor acting on the purchase of an existing home.

## 1. The Contractor's Form of Agreement

**Note:** [Bill 70](#), *The Real Estate Services Act*, was given royal assent on November 5, 2015. To date, the new act has not yet been proclaimed and there is currently no target date for it to come into force. When proclaimed it will replace *The Real Estate Brokers Act* in its entirety, but it may be some time before that occurs.

[Section 21\(3\)](#) of *The Real Estate Brokers Act*, C.C.S.M. c. R20 provides that every offer obtained by a broker, authorized official or salesman, shall be on the printed form prescribed by the regulations. As well, the acceptance is required to be by way of the same standard and regulated form. [Section 21\(4\)](#) of the same *Act*, however, provides for an exception where the offer is an offer to purchase real estate on which a building is under construction. It also provides that the deposit, if any, shall be paid either to a registered real estate broker or to a member of the Law Society of Manitoba entitled to practice as a solicitor in the province.

Usually the broker or salesperson employs a construction contract drafted by the builder's solicitor. Many of the protections built into the required form under the *Act* will not form part of an individual contractor's form. Therefore, as a solicitor, you have to ensure that similar protections are inserted or included. This is, of course, difficult when the offer has already been accepted, unless you have had an opportunity to talk to your client first or the client has made the offer "subject to approval by the purchaser's solicitor." The exempting section in *The Real Estate Brokers Act*, which does not require use of the statutory form of offer to purchase, applies both to houses built by a contractor on land owned by the contractor and to houses built by a contractor on land owned by the client.

The sample contractor's agreement should be examined and compared to [The Real Estate Brokers Act](#) form in order to see if any of the provisions designed to protect the purchaser have been omitted by the contractor. Typically, the form prepared by the contractor's solicitor will provide more protection for the contractor and consequently less protection for the purchaser. Most contractors are not intentionally setting out to deprive the purchaser of their basic rights, but are simply trying to avoid some of the more stringent requirements imposed by *The Real Estate Brokers Act* form.

For example, a contractor's agreement may require overwhelming cooperation by the purchaser, including such things as an irrevocable direction that all advances from the mortgagee be paid directly to the contractor. The contract may also provide that the contractor will exercise every reasonable effort to complete, but not guarantee a completion date for the dwelling house. While contractor agreements are usually drafted this way and most contractors will not negotiate on this matter, you should discuss these issues with your client and at least ensure that your client is aware of them. In particular, caution your client about selling an existing house or giving notice to give up an apartment until a final possession date is absolutely firm. Many purchasers have had to move twice (with no legal recourse against the contractor) as a result of giving up their existing accommodations too early.

Another important issue is that the contract may state that the specifications are subject to change by the contractor (usually, though not always, such change must be of similar quality or value) at any time without notice. Contractors may be a little more willing to negotiate on this point and may agree to scale this down to a provision whereby the purchaser must approve any change, or at least that the purchaser must be notified of any change before it takes place, at which point, if the contract has an arbitration clause in it, the purchaser can seek arbitration if the purchaser has an objection.

A particularly dangerous situation arises when both the statutory offer form and the contractor's own form of agreement are used together. This seems to arise from the fact that some real estate agents are simply more comfortable completing the statutory form they are more familiar with while seeking to incorporate the "new construction" elements by simply attaching the contractor's agreement as a schedule. It may come as no surprise that the two forms of agreement are often in conflict. Unless such conflict is reconciled at the outset, serious problems can occur. One of the most frequent of such problems arises due to the discrepancy in payment of the monies due on possession. The statutory offer form allows for delayed payment of mortgage monies, however, most contractor agreements do not. This has led to contentious and delayed closings because the purchaser and the purchaser's solicitor, relying on the statutory offer provisions, assume they can close based on tendering only the "cash to mortgage," but the contractor, and its solicitor, require tender of all monies (i.e. including the mortgage monies) in order to grant possession and hand over keys. Purchasers with moving trucks waiting, furniture deliveries coming, and excitement levels now curtailed, will wonder why their solicitor failed to account for this eventuality.

For contractors who do not have their own customized form of agreement (usually small builders who are just getting into the business or who do a small number of builds each year) the Manitoba Real Estate Association has two generic prescribed forms of agreement – one for a substantially completed home and one for a home to be constructed. Real estate agents are directed to use these forms in conjunction with the statutory form of offer to purchase mandated under [The Real Estate Brokers Act](#). If such a schedule is attached to a standard form offer to purchase, you should review same carefully with your client. Similar problems can arise as described in the preceding paragraph. These schedules are generic and there can be instances when they also conflict with the standard form offer that is attached or when

they do not otherwise reflect the true intention of one or both of the parties. For example, the generic schedule states that the builder is a member of either the [New Home Warranty Program of Manitoba](#) or the [National Home Warranty Program](#). More often than not, this is not the case. Many builders who resort to this generic form of agreement, being new or small volume builders, are not members of any warranty program. Some builders are members of warranty programs other than the two identified in the schedule. If this serious potential problem is not identified at the outset, trouble may follow.

Indeed, the matter of a warranty is especially important with new construction. Many consumers, and even some professionals including real estate agents, mortgage professionals and lawyers, do not appreciate the difference between a warranty provided by the contractor and a warranty provided by a recognized third party warranty program. A warranty provided by a contractor will only be as good as the contractor's willingness and ability to stand behind it. What if the contractor goes out of business a week after the purchaser receives possession? While it is true that third party warranty companies are merely private companies that can also go bankrupt or cease business, there is considerable more industry faith in such third party warranty companies than in, say, "Joe's Smalltime Building Inc". Mortgage lenders recognize the difference in risk as do mortgage default insurers (Canada Mortgage and Housing Corporation (CMHC), Genworth Financial and Canada Guaranty). Generally, if the down payment is low enough that mortgage default insurance is required, the mortgage insurers will require the dwelling to be covered by a recognized third party warranty. Even in cases where no default insurance is required, the lender may still require such warranty coverage.

Most construction contracts provide for a warranty of some kind. But if the contractor is not a member of a third party warranty program, or is not prepared to pay the several thousand dollars to obtain "one-off" coverage for a particular dwelling, then the only warranty contemplated in the construction contract, if any, may be the builder's own warranty. While lenders at the mortgage centre level know the difference between a builder's warranty and a third party warranty, many mortgage professionals at the branch or brokerage level do not. Therefore it is not unusual for a purchaser to be approved for financing based on a contract that provides for only the builder's own warranty, only to have it discovered later, often mere days or even hours prior to closing, that the lender's mortgage instructions require third party warranty coverage. This is not a problem that can be solved easily, quickly or cheaply. When it happens, the recriminations invariably fly fast and furious. The lawyer who detects this problem at the outset will save the client, and themselves, a great deal of trouble.

It should be noted that [Bill 5, The New Home Warranty Act](#), had been enacted and three times delayed from becoming law. It has now been scrapped. Further details can be found in the CPD materials [2019 Hot Topics in Real Estate](#) available through [CPDOnline](#).

## 2. *The Builders' Liens Act* Holdback

One of the more glaring omissions in some contractors' forms is the requirement imposed by *The Builders' Liens Act*, C.C.S.M. c. B91 (ss. 24 and 25) to deduct 7.5% of each payment and to retain same as a holdback for at least 40 days following the issuance of a certificate of substantial performance under section 46, the completion of the work or the abandonment of the work, whichever applies. Many construction contracts provide only that the contractor will indemnify the purchaser from any liens or rights of lien (see paragraph 8 of the sample contractor's agreement). Such indemnification is only as good as the financial strength of the contractor or the willingness or ability of the contractor to make good on the indemnity. In fact, the agreement may negate any holdback whatsoever (other than that for unfinished work as determined by the mortgagee in cases of mortgage assumptions, in those circumstances where that applies as explained further below). If the purchaser does anything to attempt to impose a further holdback for any reason, then certain penalties may be imposed by the contractor, or, most often, the contractor may simply refuse to close.

While sections 31 and 32 of *The Builders' Liens Act* suggest that a purchaser may have priority over unregistered lien claimants, section 24(1) imposes a holdback obligation on the part of the person primarily liable for payment under the contract. Most purchase agreements refer to completing the construction of a dwelling house according to certain specifications, which may impose upon the purchaser an obligation of that kind. The safe course for a purchaser is to insist on the required holdback of 7.5% and also to insist on the contractor issuing a certificate of substantial completion as prescribed by the Act.

Including the clause providing for the 7.5% holdback in the construction contract is one of the most important duties of a solicitor, especially when dealing with contractors without a track record. On the other, when dealing with large contractors with bargaining power, the solicitor's ability to require a builders' liens holdback may be very limited, as those contractors may refuse to agree to any such holdback provisions. The good news is that those contractors are generally much less likely to have problems with builders' liens.

The following paragraph, from a contract for a custom built home, is an example of such a holdback clause. The paragraph states as follows:

*The purchaser covenants to pay to the contractor's solicitor in trust, the required statutory holdback under The Builders' Liens Act on any installment of the contract price as it becomes due. The purchaser covenants that the only trust condition attaching to the payment of the holdback to the contractor's solicitor will be that the contractor's solicitor hold the holdback payment in trust until the expiration of the statutory lien period after the receipt of the certificate of substantial completion. The contractor shall be entitled to any interest earned on the statutory holdback.*

### 3. Installment Payments

When a home is being custom built for the purchaser, payment to the contractor is often made in installments. An example of such installments is as follows (keeping in mind that many contractors now require more than a 10% deposit, or more frequent installment payments):

- 10% as a deposit
- 40% immediately after completion of the roof
- 25% immediately after completion of the drywall
- the balance on the date of occupancy

The danger in such installment payments is that, for example, at the time the roof is completed, the purchaser will have paid 50% of the total contract price, sometimes without a holdback under *The Builders' Liens Act*. If the project is abandoned, or the contractor goes bankrupt before 50% of the work is complete, the purchaser will be exposed to builders' liens for any unpaid outstanding accounts with suppliers or sub-contractors, and, in addition, will still need to pay to complete the house. This will likely be more than the cost to complete under the agreement with the contractor, meaning that the purchaser will now be out of pocket more than 100% of the expected cost of the build.

One form of protection is, of course, *The Builders' Liens Act* holdback. Another is to engage a qualified appraiser who will be able to advise as to the percentage of completion. More importantly, once the purchaser commits to a payment schedule, the purchaser is bound whether the schedule is reasonable or not, or whether it fits with the mortgage lender's own schedule or the mortgage insurer's (CMHC, Genworth Financial or Canada Guaranty) schedule for mortgage advances. Therefore, the appraiser should be consulted before the building contract is finalized to advise whether the payment schedule is reasonable and whether it will "fit" with the lender or insurer's schedules.

### 4. Ensuring Compliance with Plans and Specifications

With respect to the house being built according to plans, designs and specifications, a great deal of reliance is placed on the contractor, unless the purchaser is willing to hire an architect or engineer to review and comment on specifications.

It may be advisable to send the client to an architect or engineer for such a review, as the contractor will charge the client for any item not set forth in the specifications. The more thorough the plans and specifications, the less chance of additional costs being incurred by the client.

Normally, where there is a mortgage, the mortgage company or mortgage default insurer provides certain inspections. Clients and their solicitors should not be led to assume that such inspections will ensure that the builder has built according to the plans and specifications. Lender inspections are designed to simply confirm that the project has reached a certain stage of construction to support release of further mortgage proceeds. A client who wishes to ensure that the builder complies with the contract as to plans and

specifications should engage professional assistance to do so, keeping in mind that some builder contracts restrict access to purchasers or other third parties during the build.

## **5. Acting on Closing**

There can be a big difference between acting on the closing of a new construction transaction and acting on the closing of a transaction involving the purchase of a used property. Some aspects may be similar and while the required searches are perhaps less problematic in the case of a new building, as there should not normally be such matters as outstanding work orders, tax arrears, judgments, etc., other matters should be covered in a similar way to a used property transaction.

Here are some of the important differences. You may need to ask the contractor to provide copies of the relevant permits which the contractor has obtained with respect to the occupancy of the house as these may be required for financing. The construction contract should contain a clause providing that shortly before the closing of the purchase of the new home, the purchaser and contractor will meet for a final inspection to note such things as seasonal deficiencies, unfinished work, or discrepancies where the work has not been properly completed or completed in accordance with the purchaser's expectations based on the contract and on general legal requirements (e.g. building codes, provincial legislation, common law, etc.). There is usually a final inspection document signed by both the contractor's representative and the purchaser, which forms the basis for a continuing contract for this work to be performed.

A mortgagee may hold back enough funds for the completion of this work if the mortgage is a builder's mortgage being assumed by the purchaser and the building contract allows for that. Otherwise, any action by the mortgage lender, or attempts to have a mortgage lender hold back mortgage proceeds until work is completed will generally violate the standard building contract and will put the purchaser in breach (and without keys or possession) unless the purchaser funds the shortfall directly. A dispute may arise as a result of the purchaser's solicitor's attempts to impose upon the contractor's solicitor the trust condition that monies are to be held back (unless the building contract allows for such holdback) or the trust condition that all of the seasonal deficiencies and unfinished work are to be done. These are not proper conditions of trust if the contract has not allowed for such terms or conditions, and the purchaser will only have a continuation of the original contract between contractor and purchaser to rely on. Any lawsuit ensuing would be as a result of an alleged failure of the contractor's promise to "provide all the materials and carry out and complete the work necessary to construct the house in conformity with the plans and specifications in a good and workmanlike manner." The only trust conditions which should be imposed are generally those as are normally imposed upon the solicitor for the vendor, unless the building contract allows otherwise or common practice dictates. This is not to say that the purchaser's solicitor is not at liberty to try to negotiate trust conditions with the contractor's solicitor that might improve a badly drafted or unfair contract. Unfortunately, most times, the contractor will see no reason to renegotiate the transaction to terms that are more favorable to the buyer and less favorable to the contractor.



The cash to close is calculated in the normal way, with the exception that, in most cases, extras are included in the statement of adjustments. A common problem is that many buyers fail to account for often substantial amounts of extras, sometimes assuming, for no good reason, that they are “automatically added” to the mortgage. Consequently, last minute scrambles can occur whereby buyers need to re-apply for a higher mortgage, or come up with more cash, or both. Be aware that substantial adjustments for a decline of, or a complete loss of, a GST rebate that was originally factored into the contract may occur when extras are added that push the contract price beyond the threshold upon which the rebate was originally calculated.

In cases where the building contract allows for it, in the event a mortgage advance takes place after closing, interest will be calculated from the date of possession as in a normal transaction, however, usually at a higher rate as specified in the building contract. Any balance to be paid will have to be paid in cash by the purchaser if there is a shortfall in the mortgage advance due to the extra imposition of interest or in the event the mortgagee deducts interest on monies advanced prior to the interest adjustment date.

Probably the biggest difference in closing new construction files compared to used property files is that many custom building contracts (though usually not tract or “spec” home contracts) allow for an early transfer of title, long before possession. This has serious consequences. First, the purchaser’s lawyer must be careful not to dilly-dally and must get title registered early, before the build commences, in order to ensure that land transfer tax is paid only on the value of the unimproved property. The difference in land transfer tax between a vacant lot and a completed custom building will be thousands of dollars and if the lawyer messes that up, the purchaser will expect the lawyer to make up that difference. Further, the early transfer means that the purchaser is financing the build with the purchaser’s own mortgage draws (or cash). Since any mortgage typically will be registered long before possession, the normal provision found in used property contracts allowing for a delay in payment of mortgage proceeds due to a delay in registering the mortgage at Land Titles will not apply. Therefore, in most cases, the lawyer will need to take all steps necessary to ensure that a final mortgage advance is available and the entire balance of monies owing to the contractor can be paid before the purchaser can obtain keys and possession. This can be tricky as lenders will have various requirements (which can vary from lender to lender) as a pre-condition to a final advance, including a final appraisal, provision of building and/or occupancy permits when applicable, etc. Novice lawyers may come to grief if they treat this process the same as closing a used property transaction and great care is required to ensure that the lawyer, the mortgage broker or specialist, the lender and the purchaser all know exactly what will be required, and who will be responsible for doing what, before a final mortgage advance can be made.

# B. FORMS

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## 1. Sample Contractor’s Purchase Agreement

### CONTRACTOR’S PURCHASE AGREEMENT

THIS AGREEMENT made in duplicate this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_

BETWEEN:

\_\_\_\_\_  
(the “Contractor”)

and

\_\_\_\_\_  
(the “Purchaser”)

WHEREAS the Contractor is the owner of a certain parcel of land situated in the City of Winnipeg, in Manitoba, commonly known as:

\_\_\_\_\_  
and more particularly described as follows:

\_\_\_\_\_  
(the “Property”)

AND WHEREAS the Contractor has property, right, or licence in and to certain plans, designs, and specifications (the “Designs”);

AND WHEREAS the Purchaser wants to purchase the Property from the Contractor and have the Contractor construct on that property a single-family dwelling according to

certain plans and specifications based on the Contractor's Designs and necessary amendments thereto;

THIS AGREEMENT WITNESSES THAT the Contractor and the Purchaser for the consideration hereinafter set out, covenant, undertake, and agree each with the other as follows:

1. The preamble and recitals constitute an integral part of the Agreement.

2. CONTRACTOR'S OBLIGATIONS

The Contractor, in consideration of the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) (the "Purchase Price") and other good and valuable consideration, payment to be made as set forth, covenants and agrees to:

- (a) transfer the Property to the Purchaser and to erect and construct in good and workmanlike manner within the limits of the Property, a dwelling to be substantially in accord with the plans and specifications identified by the signatures of the Contractor and the Purchaser and annexed as Schedule "A" and "B" respectively (the "Dwelling"); and
- (b) provide, at its own proper costs and charges, all manner of labour, material, apparatus, scaffolding, utensils, cartage of every description, and other things whatsoever to ensure due performance of its work, all of which are included in the contract price.

3. TRANSFER

(a) The Contractor covenants and agrees:

- (i) to transfer the Property to the Purchaser free and clear from all liens and encumbrances excepting:

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and those liens and encumbrances as may be placed by the Purchaser.

(ii) to furnish to the Purchaser upon receipt of the deposit pursuant to clauses 4(a) and 4(b) and the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) pursuant to clause 4(c), a registrable Transfer of Land and other necessary documents pertaining to the property which upon registration will be sufficient to vest title in the Purchaser.

b) The Purchaser covenants and agrees to forthwith register at his/her cost the Transfer of Land in the Winnipeg Land Titles Office.

#### 4. MANNER OF PAYMENT

The Purchaser promises and agrees to pay to the Contractor the Purchase Price for all work, materials, and for the Transfer of Land in the manner hereinafter set forth:

(a) The sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) a deposit, the receipt of which sum is acknowledged by the Contractor. The sum less \_\_\_\_\_ Dollars (\$\_\_\_\_\_) is to be refunded to the Purchaser unless agreement as to the contents of Schedule "A" and "B" hereto is reached within Thirty (30) days of the execution of this Agreement.

(b) The sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) as a further deposit, on or before the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

(c) The sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) on or prior to the day of \_\_\_\_\_, 20\_\_ plus or minus adjustments, which sum represents full payment for the land only.

(d) The date of adjustments respecting the transfer of the property shall be the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

(e) The sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) within seven (7) days after receipt by the Purchaser's solicitor of notice of close in of the Dwelling; provided that the building has been deemed to be at least forty percent (40%) completed by a qualified appraiser and subject to the requisite holdback pursuant to *The Builders' Liens Act* of Manitoba.

- (f) The sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) within seven (7) days after receipt by the Purchaser's solicitor of notice of drywall completion; provided that the building has been deemed to be at least seventy percent (70%) completed by a qualified appraiser and subject to the requisite holdback pursuant to *The Builders' Liens Act* of Manitoba.
- (g) The balance of the Purchase Price plus or minus adjustments at the date of possession (as hereinafter set out) subject to the requisite holdbacks according to *The Builders' Liens Act* of Manitoba. Adjustments shall include adjustments for contract extras, taxes, interest, water rates, fire insurance premiums, and all other items related to the dwelling to be completed on the possession date.
- (h) The Purchaser shall pay the Contractor interest at the rate of two percent (2%) over the \_\_\_\_\_ prime rate on any monies not paid under this Agreement and on any holdbacks according to *The Builders' Liens Act* in excess of forty (40) days. No interest shall be payable on any holdback held back in excess of forty (40) days where any Builders' Lien remains registered against the Property.
- (i) All appraisals and inspections in connection with the percentage of completion of the Dwelling shall be at the cost of the Purchaser.

## 5. COMMENCEMENT AND COMPLETION

- (a) It is understood and agreed between the parties that the Contractor is not obligated to commence construction before the receipt of the sum set out in Clause 4(c) and shall commence construction of the Dwelling no later than five (5) business days after the receipt of that sum.
- (b) The Contractor covenants and agrees to complete the construction of the dwelling with all reasonable dispatch and agrees to have the same fully completed and ready for occupancy on or before the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ subject to delays occasioned by the Purchaser, Acts of God, strikes, lockouts, shortage of materials or skilled labour, inclement weather, or any other matter beyond the control of the Contractor; provided that the exterior finishing of the Dwelling shall only be affected when weather permits, whether that be before or after the occupancy date.

6. PERMITS, LICENCES, AND UTILITIES

- (a) The Contractor covenants and agrees with the Purchaser to observe and conform in all respects with the building regulations and zoning bylaws of the City of Winnipeg and to pay all sewer, water, and gas connections, building permits, and any and all licences or permits required to affect the construction of the building and effect service to the subject lands.
- (b) The Purchaser covenants and agrees to enter into contracts for the supply of electric power, water, and gas or to assume the cost of a full tank of oil as at the possession date.

7. SURVEY CERTIFICATES AND ZONING

- (a) At any time the Purchaser so requests and then for the additional sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) (which sum is payable at the time the request is made) the Contractor covenants and agrees to provide to the Purchaser within seven (7) days of closing of the Dwelling or within seven (7) days of the Purchaser's request (whichever is the later) a Survey Certificate issued by a qualified Manitoba Land Surveyor and a Zoning Memorandum issued by the City of Winnipeg evidencing conformity with all necessary zoning bylaws.
- (b) Upon the completion of the Dwelling, the Contractor covenants and agrees to provide a Final Survey Certificate issued by a qualified Manitoba Land Surveyor and a Zoning Memorandum from the City of Winnipeg evidencing conformity with all necessary zoning bylaws.

8. BUILDERS' LIENS

- (a) If at any time there shall be evidence of any Builders' Lien filed against the property which is chargeable to the Contractor, the Purchaser shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to indemnify him/her against such lien and the Contractor shall remove the lien at its own expense.

- (b) The Contractor agrees to indemnify and save harmless the Purchaser from all Builders' Liens arising from any work done or materials supplied in connection with the Contractor's construction of the Dwelling.

## 9. POSSESSION

- (a) The date of possession herein shall be the day the Contractor delivers possession to the Purchaser.
- (b) The Contractor agrees to deliver possession of the Dwelling to the Purchaser on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ in accordance with Clause 5(b), provided that the Purchase Price has been paid to the Contractor in the manner set forth.
- (c) If the Purchaser wants to take possession before the Dwelling is completed (of which the Contractor shall be the sole judge and whose decision thereon shall be final and binding), the Purchaser shall before taking possession submit to the Contractor a written list of all unfinished items including unfinished extras on the Dwelling and obtain the Contractor's approval of same (the Letter of Completion). The parties will then set a written value for each item contained in the Letter of Completion and the parties shall be bound by the Letter of Completion as to the completion of unfinished work. If the Purchaser shall make final payment under Clause 4(g) to the Contractor's solicitor, this final payment shall be subject only to the trust condition that the solicitor shall retain in the solicitor's trust account an amount equal to the total value of items set out in the Letter of Completion which remain incomplete from time to time. It is understood and agreed that as each item is completed to the satisfaction of the Purchaser, an amount equal to the value of that item as shown on the Letter of Completion may be paid to the Contractor by the Contractor's solicitor. The Purchaser agrees that full compliance with this provision is a prerequisite to the right of possession of the Dwelling. Interest received by the Contractor's solicitor on the holdback maintained according to the Letter of Completion shall accrue to the benefit of the Purchaser to be paid at the time the first payment out of the holdback fund is made by the solicitor.
- (d) The Contractor covenants and agrees to fully complete all of the items on the Letter of Completion within thirty (30) days of the date of possession, provided, however, that the Contractor shall not be responsible for any delay due to any acts of the Purchaser, Acts of God, inclement weather, strike, shortage of

materials or skilled labour, or any other matter beyond the control of the Contractor.

- (e) The Purchaser acknowledges and agrees that delivery to the Purchaser of the key to the Dwelling by the Contractor shall not be regarded or construed as a waiver of the Purchaser's obligations.

## 10. INSURANCE

- (a) The Contractor covenants and agrees to maintain and pay for fire insurance as the building and work progresses in the joint names of the Purchaser and the Contractor with any loss payable firstly to the Purchaser and the Contractor as their respective interests may appear, and it shall furnish duplicates of all such policies to the Purchaser.
- (b) The Purchaser irrevocably appoints the Contractor to be the Purchaser's attorney in the negotiations and settlement of any claims and receipt of any proceeds resulting therefrom that may be made under the policy and further agrees that all monies under the policy belong to the Contractor.
- (c) Immediately upon payment from the insurer, the Contractor shall repair the damage and complete the work and the Contractor shall be entitled to such extension of time as may be required for the adjustment of loss and performance of the work required to repair the damage.

## 11. CONTRACT EXTRAS

The Purchaser shall have the privilege of requesting changes to be made during construction, provided that no delays prejudicial to the Contractor (of which the Contractor shall be the sole judge and whose decision thereon shall be final and binding) shall occur in the course of construction as a consequence thereof. Any work done or materials supplied other than as shown in Schedules "A" and "B" (in this paragraph collectively referred to as the "Work") shall be considered extra. All changes, alterations, additions to, or deductions from the Work to be done by the Contractor shall be ordered by the Purchaser and confirmed by the Contractor in writing and the additional costs, unless otherwise agreed, shall be paid at the time of confirmation by the Purchaser.



12. MONIES FREE OF TRUST

All monies due hereunder, when paid shall be deemed to be received free and clear of all conditions, trust or otherwise, except those conditions expressly stated in writing and forming part of this Agreement.

13. SUBSTANTIAL COMPLETION

The Purchaser covenants and agrees that when the Contractor indicates that in his opinion the contract has been substantially performed, the Purchaser shall deliver to the Contractor a Certificate of Substantial Completion according to *The Builders' Liens Act* of Manitoba. Upon the date of possession and as a condition precedent to the possession of the Dwelling, the Purchaser shall deliver to the Contractor and to all those necessarily entitled to receive such Certificate of Substantial Completion according to *The Builders' Liens Act* of Manitoba.

14. INTEREST ON HOLDBACK

Any holdbacks deducted from any payment herein according to *The Builders' Liens Act* shall be placed in an interest-bearing account by the Purchaser's solicitor with interest accruing to the Contractor which interest shall be paid at the time that the holdback fund or any portion thereof is paid to the Contractor.

15. PURCHASER'S RESPONSIBILITY AFTER POSSESSION

After the date of possession, the Purchaser shall be responsible for the entire maintenance of the Dwelling and all costs, risks, and liability in connection therewith, except as provided in the Contractor's warranty.

16. ENTIRE CONTRACT

Time shall be of the essence, and it is agreed that there is no representation, warranty, collateral agreement, or condition affecting this Agreement other than those expressed herein, and in the Contractor's Standard Warranty Certificate which shall

be issued to the Purchaser substantially in the form attached as Schedule "C" on the date of possession.

17. ENUREMENT

The Agreement shall enure to the benefit and be binding upon the respective heirs, executors, administrators, successors, and permitted assigns of the parties.

IN WITNESS WHEREOF the parties have executed this Agreement at the City of Winnipeg, in the Province of Manitoba, the day and year first above written.

PER: \_\_\_\_\_

PER: \_\_\_\_\_

\_\_\_\_\_  
WITNESS

\_\_\_\_\_  
WITNESS

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PURCHASER'S SOLICITOR

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CONTRACTOR'S SOLICITOR