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New Home Construction

I. Introduction

Like other legal transactions, the starting point is who owns what at the beginning and who should be the owner of what at the end. This may sound elementary, but your client's concerns are going to be as follows: (i) when do I get the keys/money; and (ii) is it the keys to what I expected or the right amount of money. Our job is to ensure our clients get what they expect.

This paper begins with a brief of the Law Society of Alberta Code of Professional Conduct and then provides a basic overview of how the purchase and sale of a new home differs from that of an existing or previously occupied home. The paper then continues to discuss a few significant points in more detail. I have included 2 checklists, one from the perspective of acting for the Purchaser, the other from the perspective of acting for the Builder. Both checklists are mostly from earlier presentations given for LESA by Robert P. Assaly Q.C., Roderick J. McLeod Q.C. and Deborah Coppock, all of whom have kindly consented to their use in these materials.

A summary of some of the differences is provided below. I have categorized them in part by whether they are applicable to the Purchase Agreement, the Construction Agreement (the difference to be discussed later in this paper), or both.

	Purchase Agreement	Construction Agreement
Implied Warranty of Fitness	No.	Yes.
GST	GST is collected by Builder, depending on when the interest is transferred.	Purchaser must apply for rebate on his/her own.
Construction Mortgage Registered Against	Builder or developer.	Purchaser.
Builders' Lien Holdback	No.	Yes.

II. An Aside on the Code

A. Generally

Although this is primarily a lawyer's concern and has likely already been discussed elsewhere, it is important to reiterate the effect of Chapter 6 of the Law Society of Alberta Code of

Professional Conduct (the “Code”)¹ because of the addition of new parties and the fact that many new home purchasers are not represented by counsel. Further, lawyers are responsible to ensure you are properly trained and supervised as they are ultimately responsible for your conduct,² it is important that when you act as a lawyer’s eyes and ears and deal directly with the client, you act within the obligations that bind your lawyer.

B. Representing Parties in a Conflict

Generally, it is best to avoid acting for more than one party in a real estate transaction. However, it is not absolutely prohibited as such a prohibition would interfere with the client’s right to choose counsel freely and may appear to generate unwarranted costs, hostility and complexity. It is common practice to act for at least two parties with conflicting interests. The relevant consideration will be Chapter 6 of the Code, which provides:

2. A lawyer must not act for more than one party in a conflict or potential conflict situation unless all such parties consent and it is in the best interests of the parties that the lawyer so act.
3. (a) Except with the consent of the client, a lawyer must not represent a person whose interests are directly adverse to the immediate interests of a current client.

This requirement is elaborated on in the Chapter 6 commentary, which makes clear that “directly adverse” means that an actual dispute exists,³ as opposed to a mere conflict. However, lawyers should be careful to exercise an abundance of caution where a “conflict”⁴ or “potential conflict”⁵ exists. Basically, whenever you are acting for more than one party, the Code becomes relevant and it becomes essential that at all times the following three things be complied with:

- 1) That a full and fair disclosure is made by the lawyer (to all parties together unless completely impractical) of the advantages and disadvantages of,

¹ The Law Society of Alberta, *Code of Professional Conduct*. www.lawsocietyalberta.com/files/Code.pdf

² *Code*, Chapter 2, Rule 4.

³ *R v. Neil*, [2002] 3 S.C.R. 631.

⁴ means the situation existing when the parties in question are prima facie differing in interest but there is no dispute among the parties in fact.

⁵ means a situation existing when the parties in question are prima facie aligned in interest and there is no dispute among the parties in fact, but the relationship or circumstances are such that there is a possibility of differences developing exists.