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### Patent and Latent Defects

You finally relax in your old armchair after an exhausting move to your new home. Just as you start channel surfing you hear a plop, then another plop from the ceiling above. You reassure yourself that the roof is in good condition as your agent wisely insisted on a thorough home inspection. After some investigation, the plumber tells you that the shower floor upstairs must have a small leak.

To figure out what the problem is, he will need to rip out half of your living room ceiling and potentially part of your new marble tiled bathroom.

What can you do now? You took all of the precautions. You call the inspector and complain. The inspector politely reminds you that the inspection is limited to what can be discovered with a visual inspection in readily accessible areas. Since there was no evidence of moisture when the house was inspected, they cannot be responsible or expected to inspect inside walls and under floors, so tough luck. But are you out of luck?

The legal term for your problem is a 'latent defect', as can be distinguished from a 'patent defect'. Patent defects are discoverable upon examination, for example a roof leak, a foundation crack, or bat infestation in the attic.

These defects follow the age-old law of *caveat emptor*, or *buyer beware*. When you purchase a property, you undertake some risk, and if the defect is evident and discoverable, you may be out of luck. The only exception is if the vendor has given a specific warranty in the agreement of purchase and sale.

The agreement of purchase and sale usually includes standard clauses relating to warranties and defects. The most common are clause 12 stating that as a purchaser you have had the opportunity to inspect the property, and that the agreement is binding. Clause 21 provides limited protection to the purchaser against urea formaldehyde foam insulation (UFFI), and clause 24 states that there are no warranties or agreements except those contained in the offer.

These clauses in combination mean that the purchaser takes the property as it is found. Therefore, in the case of a patent defect, unless

you have an expressly stated warranty, you are out of luck.

Latent defects however, are another matter.

This is an exception to the caveat emptor rule, and is an area of law that can have some surprising results. A latent defect is by definition something that is not easily discoverable. With latent defects the courts will award monetary damages. Patent defects that have been covered up by the vendor, will often be interpreted as latent defects by the courts, in order to award some kind of relief. Whether a defect is classified as a patent defect or latent defect is up to the judge, and the outcome sometimes surprising.

In a 1995 case<sup>1</sup> although the purchaser had some indication of a defect at the time of purchase, the patent defect was classified as a latent defect. The court held that since the full scope of the defect's effect was not discoverable at the time of the agreement, the full impact of the defect was not completely and accurately disclosed to the purchaser.

Similarly in a 1999 case<sup>2</sup>, the purchasers noticed a small water leak during inspection, which turned out to be a more serious structural defect, which was only realized after closing. The court, nonetheless, held that the true extent of the defect could not have been seen through an ordinary inspection of the property, and therefore classified the defect as a latent defect.

Whether a court views a defect as patent or latent will determine if it will award a remedy after the purchase.

This may leave you wondering what the role and responsibilities of the home inspector are. The home inspector assumes some responsibility in finding the patent defects, at least as much as his disclaimer allows. However with latent defects, the home inspector is off the hook.

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It is important to stress however that a professional home inspection will dramatically reduce the risk and surprises. An inspection is still your best bet in avoiding problems, but does not eliminate all your risk. If you do encounter a

problem after closing, be sure to call your lawyer. In certain circumstances, there is a grey area between a patent defect and a latent defect and you may have a legal remedy.

**For more information about this or any other real estate law related topics please do not hesitate to contact John Poletes at 416-482-1902, or e-mail him at [john.poletes@bellnet.ca](mailto:john.poletes@bellnet.ca)**

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<sup>1</sup> *Jaremko v. Shipp Corp.* (1995), 47 R.P.R. (2d) 229 (Ont. Gen. Div.) Affd [1996] O.J. 2155 (Ontario Court of Appeal)

<sup>2</sup> *Thomas v. Blackwell*, [1999] S.J. No. 769, (Saskatchewan Court of Queen's Bench),