

Buying and Selling Residential Condos.

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1. Introduction

When a person buys either a new condominium that is nothing more than a developer's pictorial with a far-off closing date, or an existing 'bricks and mortar' re-sale condominium with an immediate closing date, many distinct legal issues arise which await the unknowing or unwary. That said, one absolute remains; for the vast majority of Canadians a home purchase represents their single largest lifetime expenditure.

Although prevalent and increasingly common place, the legal issues that orbit either a new or re-sale condominium purchase are profoundly different than those that encircle the 'traditional' Canadian home purchase. Homes located on a leafy mature street of detached residences share many legal similarities with their condominium cousins. But the similarities soon give way to striking differences which lie in wait for purchasers, real estate agents, lawyers, lenders, insurers and property managers who rely on the traditional Canadian home model as their legal yardstick.

In keeping with this conference, condominium life may be made universally easier if purchasers shield themselves with condominium professionals, who have direct knowledge and experience in the field of condominium buying and selling. All too often a buyer's principal safeguards, being their real estate agent and lawyer, are selected solely on price. If a condominium buyer wishes to purchase in both an informed and protected fashion, he or she must first seek and satisfy themselves that they have retained knowledgeable and experienced condominium professionals. To overlook this important first step may not trip the unwary, but risking the purchase of a lifetime with the least expensive condominium professional only stacks further odds against the buyer without the luster of a potential jackpot.

This article shall identify the major legal concepts that await a potential condominium buyer as they seek out a new home and the professionals to help them realize such, so that a buyer may avoid swimming with the sharks and enjoy their new home dancing with the dolphins.

2. New Condominium Purchases

New condominiums have a variety of unique legal issues, arising from the fact that a large number of agreements of purchase and sale for new condominiums are concluded long before construction begins. These unique attributes include the developer's covenants pursuant to Ontario's *Condominium Act, 1998*, S.O. 1998, c.19, ("the Act"), disclosure

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statements, the agreement of purchase and sale, rescission periods, deposits, interim occupancy, and Ontario's New Home Warranty Program, now called Tarion.

a) *The Developer's Covenants and Duties*

By virtue of the Act, in any agreement of purchase and sale for a proposed unit, a developer is deemed to have a variety of covenants and duties in the purchaser's favour. Units are considered 'proposed' until the developer registers the condominium's declaration and description with the appropriate Land Registry Office, thereby bringing the condominium legally to life.

Section 78 of the Act deems three (3) specific covenants to be read into any agreement of purchase and sale of a proposed unit, namely:

- a) The developer shall sell the remaining units without delay (except units intended to be leased);
- b) The developer shall deliver a unit's deed to the purchaser without delay; and
- c) The developer shall hold monies in trust collected from the purchaser on behalf of the condominium corporation.

Section 79 also imposes a duty on a developer who has entered into an agreement of purchase and sale of a proposed unit to both complete the building as required by the agreement and register without delay a corresponding declaration and description.

These covenants and duties are primarily aimed at tackling the reluctance developers sometimes encounter in completing condominium developments in a timely fashion. Should a developer breach these covenants, a purchaser's remedy lies with the Ontario Superior Court of Justice via a s.134 compliance order. A developer may also attempt to escape its obligations to complete the development via a section 79 court application, in which case a court will consider if events and circumstances beyond the developer's control have prevented the completion and registration of the condominium, amounting to a frustration of the contract.

Often a condominium will be registered while the developer is still selling units. As a result, units will no longer be defined as 'proposed' and the protections afforded to purchasers via sections 78 and 79 of the Act vanish. A careful purchaser of a new, but not a proposed unit, should insist that such protections are written into their agreement of purchase and sale with the developer. That said, if the condominium has been duly brought to life it may be presumed that the developer does not have a reluctance to complete the project.

b) Disclosure Statement, Rescission Periods, Material Changes & Penalties

i) Disclosure Statement

Pursuant to section 72 of the Act, a purchaser is not bound by an agreement of purchase and sale for a new unit until a current disclosure statement has been delivered to the purchaser. This escape right, however, vanishes once the purchaser accepts title to the unit.

A disclosure statement is a comprehensive and often dense compilation of documents and statements aimed at providing detailed information pertaining to the condominium to the purchaser. This information is intended to run the gambit of the 'who, what and where' of the condominium so that a purchaser may make an informed purchase. In contrast to traditional Canadian home-ownership, many duties, prohibitions and responsibilities arise from condominium ownership, which are beyond the immediate control of a unit owner. The disclosure statement is designed, in part, to provide an early signal of the nature, restrictions and direction the condominium intends to take, to the purchasers.

The disclosure statement represents the single most important tool in the purchaser's favour of a new or proposed condominium unit. As a result, disclosure statements must receive careful attention if they are going to serve their intended purpose. In 2001, Ontario's Court of Appeal ruled that if purchasers fail to proceed with professional advice as to the precise meaning of such documents, including the disclosure statement, the courts shall not protect them.¹

A disclosure statement must specify the date the statement was made, include a table of contents, and provide some thirty-three (33) statements and documents, all pursuant to section 72 of the Act. To highlight, key mandatory contents include:

- a) A fixed form table of contents;
- b) The name, address and mailing particulars of the developer;
- c) A description of the development, including the type and number of units, buildings and amenities;
- d) Whether the *Ontario New Home Warranties Plan Act* (aka. Tarion) applies to the development;

¹ *Peel Condominium Corporation No. 505 v. Cam-Valley Homes Ltd.* (2001), 41 R.P.R. (3d) 231 (Ont. C.A.).

- e) The portion of the units the developer intends to market to investors, and a statement of the portion of units that the declarant intends to lease;
- f) A schedule of the proposed commencement and completion dates of amenities;
- g) A copy of the proposed description, by-laws and rules and insurance trust agreement for the condominium;
- h) A highly detailed and prescribed budget statement for the one year period following the registration of the condominium; and
- i) A statement of fees or charges which the corporation must pay to the developer or to anyone else.

Furthermore, the budget statement must contain eleven (11) prescribed sections, including, to highlight:

- a) The common expenses of the corporation;
- b) Particulars of the type, frequency and level of services to be provided;
- c) A statement of the projected monthly common expense contribution for each unit;
- d) A statement of the portion of the common expenses to be paid into a reserve fund; and
- e) A summary of the most recent reserve fund study, if any.

Finally, additional disclosure requirements are required by the applicable regulations, including, to highlight:

- a) The location of visitor parking, if any;
- b) The developer's best efforts to disclose the intended use of adjoining lands; and,
- c) Whether a part of the common elements may be used for purposes not related to residential activities.

From a practical point of view, all elements of the disclosure statement should be carefully reviewed by competent legal counsel. That said, particular attention should be focused on the declaration, by-laws, rules, the management agreement and the insurance trust agreement. Together, they shall have a fundamental impact on the lifestyle, permissions and restrictions a unit owner may enjoy, both within their unit and upon the common elements. Key questions that should be asked are:

- a) Are there pet, satellite dish, or barbeque restrictions?
- b) Will utilities be communally shared or separately metered?
- c) Will there be shared facilities, including with nearby developments?
- d) What are the obligations imposed upon both the corporation and the unit owner as found in the declaration, for such things as maintenance and/or repair of units? Who is responsible for cutting the grass, shoveling the snow, or landscaping the gardens?
- e) How will parking spaces and storage lockers be dealt with? Will parking and/or locker spaces be actual units which will be added to the deed, will they form part of the condominium's common elements to be allocated by the board of directors, or will they be an exclusive common element area which may only be used by a certain unit, pursuant to the declaration?
- f) What does an examination of the declarations schedules reveal, namely the proportion of common expenses the unit owner will be responsible for paying, and what, if any, exclusive use common areas will the unit enjoy?
- g) What does a careful review of the description and plan of the proposed or current condominium reveal? The condominium professional should confirm the boundary and precise location of the unit.
- h) Are the services proposed in keeping with the needs of a unit owner?

ii) Rescission Period

The corresponding protection afforded to purchasers of new condominium units is the ten (10) day rescission or 'cooling off' period. Once a purchaser is in receipt of both a mutually signed agreement of purchase and sale and a disclosure statement, a ten (10) day cooling off period begins during which time the purchaser may cancel, in writing, the purchase agreement without reason and be entitled to a full refund of his or her deposit from the developer, with interest and without penalty. Disclosure statements must be

accompanied by excerpted copies of sections 73 and 74 of the Act which pertain to the purchaser's right to rescission. Purchasers cannot waive their right to the rescission period, despite any provision to the contrary in an agreement of purchase and sale. However, purchasers should be wary that their rescission right terminates upon receiving title or a deed to the unit.

iii) Material Change

The disclosure statement and rescission period are further modified by virtue of the 'material change' provisions of section 74 of the Act. Whenever there is a material change in the information contained in a disclosure statement delivered to a purchaser, the developer shall deliver a revised disclosure statement to the purchaser as soon as reasonably possible. The revised disclosure statement must clearly identify all material changes, with particulars. Once in receipt of the revised disclosure statement which includes a material change, the ten (10) day cooling off period restarts, allowing the purchaser once again to escape the agreement of purchase and sale, without penalty and with a deposit refund.

Unfortunately for purchasers, a material change is considered to be a high legal test by virtue of the Act. Section 74(2) of the Act has defined a material change to be a change that a reasonable purchaser, on an objective basis, would have regarded as sufficiently important that they would not have entered into the agreement up front, if they were aware of the fact. Therefore, only those material changes that strike to the heart of the agreement to such a degree that the average person would not have initially entered into the agreement afford the purchaser both a further ten (10) day cooling off period and the right to rescind the agreement. In addition, the burden to prove a material change rests with the purchaser. Furthermore, five (5) certain changes are statutorily prevented from being material changes, including;

- a) A change in the contents of the budget of the corporation if more than one (1) year has passed since the condominium has been registered;
- b) A substantial addition, alteration or improvement that the corporation intends to make to the common elements, after the condominium has been 'turned-over' from the developer to the condominium board;
- c) A change in the number of units the developer intends to lease;
- d) A change in the schedule completing the condominium's amenities;
- e) A change in the services provided by either the relevant municipality or Minister of Municipal Affairs and Housing.

iv) Penalties

Disclosure statements, given their importance, must be scrupulously followed by a developer. Pursuant to section 133 of the Act, a developer who provides a misleading disclosure statement, with respect to a material statement or information, either by deception or omission, may be sued by either the condominium corporation or a unit owner for any loss sustained. Furthermore, in keeping with section 137 of the Act, by failing to provide a proper disclosure statement, a corporation may be fined not more than \$100,000.00, and a person not more than \$25,000.00. Directors and officers of a corporation do not escape scrutiny and if they knowingly cause, authorize, permit, participate in, or acquiesce in such an action, they may also be found guilty of an offence.

c) Deposits

Once a purchaser provides a reservation or a deposit towards an agreement of purchase and sale for a proposed condominium unit, the developer must ensure that such funds are held in trust by either a prescribed class of persons or the developer's solicitor at a financial institution. This obligation does not apply to funds received with respect to the purchase of personal property that will not be permanently affixed to the land, being most appliances. Within ten (10) days, the transfer of such funds must be evidenced via a Form 4. Reservation money forwarded prior to an agreement of purchase and sale being concluded must be setoff against the cost of the unit, despite anything in the agreement to the contrary. The depositing of trust funds with the developer creates the duty of a trustee in the developer, triggering a fiduciary relationship, as the funds legally remain those of the purchaser. Furthermore, a purchaser is entitled to interest arising from such deposits until the day the unit is available for occupancy. A developer may continue to hold such interest after the date of occupancy, but interest then accrues in the purchaser's favour on a compounded basis, until a registerable deed is delivered to the unit owner.

d) Interim Occupancy Period

Pursuant to section 80 of the Act, an agreement of purchase and sale may permit interim occupancy of a proposed unit. Interim occupancy is legally defined as the occupancy of a proposed unit before the purchaser receives a deed to the unit. The majority of purchase and sale agreements demand an interim occupancy period, triggered when substantial completion occurs. When this event occurs, the purchaser will be required to pay to the developer a monthly occupancy fee, while the remaining balance of the purchase price shall not be due until the final closing date occurs. This is a result of the fact that lenders will not forward funds without the ability to register a mortgage against title, as no deed exists for the unit. That said, purchasers, despite any provision to the contrary in an agreement of purchase and sale, pursuant to a specified time frame, may elect to pay in full on assuming interim occupancy, thereby avoiding the incurring of interest.

Otherwise, once in occupation, the 'final closing date' shall be when the condominium has been registered, and a registerable deed has been provided by the developer to the unit

owner. A monthly occupancy fee can only include the following fees, namely;

- a) Interest calculated on a monthly basis on the unpaid balance of the purchase price;
- b) An amount which reasonably estimates the municipal taxes, on a monthly basis (subject to later adjustments between the purchaser and developer); and
- c) The projected monthly common expense contribution for the unit.

During the interim occupancy the developer has two (2) specific duties to the purchaser, being:

- a) The developer shall provide those services that the corporation will have a duty to provide to owners after registration of the declaration and description that creates the unit; and
- b) The developer shall repair and maintain the proposed property and the proposed unit in the same manner as the corporation will have a duty to repair after damage and maintain.

Furthermore, the developer has four 'rights' pursuant to the Act, which run during an occupancy period, including:

- a) The right of entry to a unit;
- b) The developer may withhold consent to an assignment of the right to occupy the propose unit;
- c) The developer may charge a reasonable fee for consenting to an assignment of the right to occupy the proposed unit; and
- d) The developer shall, within thirty (30) days of the registration of the declaration and description that creates the unit, notify the purchaser in writing of the date and instrument numbers of the registration, unless within that time the purchaser receives a deed to the unit that is in registerable form.

e) The Ontario New Home Warranties Act - TARION

The Ontario New Home Warranties Act, administered by TARION, provides further protections to purchasers of new condominium units. Any prospective purchaser of a condominium should first pay careful attention to the developer's disclosure statement to ensure that the condominium shall be covered by this statutory warranty. Generally, in Ontario, conversion condominiums and 'rent-to-owns' are not protected by this program.

If eligible the following coverages accrue to the purchaser and eventual unit owner, namely;

- a) **Deposit Protection**
The deposit made by the purchaser of a proposed unit shall be guaranteed up to \$20,000.00 until a registerable deed is granted to the unit owner.
- b) **Occupancy and Final Closing Date**
A confirmed occupancy date may be extended by a developer for up to 120 days. Likewise, a developer may also extend the final closing date up to a maximum of 120 days. Furthermore, subject to the consent of the purchaser, a further 120 days may be granted to the developer following which the agreement of purchase and sales terminates and the purchaser is entitled to the refund of all deposit monies with attending interest. Careful attention should be paid to the relevant agreement of purchase and sale to ensure that the developer is not trying to increase these statutory time periods.
- c) **Construction Warranties**
Various warranties include; that the unit is constructed in a workmanlike manner and shall be free from defective material, the unit is fit for habitation, is constructed in accordance to Ontario's *Building Code* and does not have major structural defects. Deficiencies must be reported within one (1) to (2) years, while major structural defects have a reporting period spanning seven (7) years.

Purchasers would also be well served to conduct their own background investigation of a developer to determine if in fact the developer is registered with Tarion, whether it has a sound record of fiscal accountability, whether it has paid reliable attention to deficiencies in the past, and whether the warranty program actually applies to the proposed or new unit in question.

f) *The First Year Budget*

The Act strictly discourages developers from proposing a low first annual condominium budget, thereby allowing a low common element fee per unit. The expectation of a low common element fee may entice a purchaser only to find later that the condominium corporation is forced to dramatically raise common element fees as the attractive budget as proposed by the developer did not accord with reality. Therefore, pursuant to section 75 of the Act, the developer is accountable to the corporation for the first year budget, and shall pay to the corporation the common expenses incurred that are in excess of the proposed budget. This is a strict provision of the Act. Once the developer is in receipt of the audited financial statement for the first year budget, it has thirty (30) days to pay the said amount.

g) *The Agreement of Purchase and Sale*

Agreements of purchase and sale drafted by a developer's lawyer legally mirror a David and Goliath contest. Such agreements are routinely dense, impenetrable for the casual reader, and overloaded in the developer's favour. Given that most condominium professionals are retained on the competitiveness of their fee, the multiple hours needed to review an agreement of purchase and sale and the disclosure statement leave many purchasers without the input that is their entitlement. This reality is reinforced by the fact that, unlike disclosure statements, agreements of purchase and sale have neither a prescribed form required by law, nor a universal format commonly shared throughout the industry. This is contrast with ubiquitous use of 'OREA forms' in residential re-sale deals throughout Ontario. A condominium lawyer may often be able to uncover and negotiate out levies, adjustments, enrollment fees, increased development charges, and excess deposit insurance that the developer, who is responsible for paying such accounts, has transferred to the purchaser via the agreement. In fact, to quote a leading expert in this area:

“A good condominium lawyer can often save a purchaser more than a lawyer's fee to review by deleting some important adjustments...A purchaser's lawyer will comment upon provisions pertaining to the vendor take-back mortgage, including arranging and discharging fees. The purchaser's lawyer will discuss the definition of 'substantial completion' which determines when a purchaser must take occupancy and begin paying occupancy fees, as well as the interest rate pertaining to an arranged mortgage. The lawyer will discuss title matters, including who will be registered as owner, and restrictions upon assignment of the agreement of purchase and sale before closing. The vendor's consent will normally be required to permit the purchaser to rent out the unit or assign it during the occupancy period. The purchaser should become aware of potential adjustments for development charges and educational levies. Amendments may be made to provisions relating to financial disclosure. Other amendments should be made to suit the nature of the deal and the purchaser's specific requirements, including detailed specifications for

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various selected and unit improvements.”

*Gardiner, J. Robert, “The Condominium Act, 1998 A Practical Guide” (Aurora: Canada Law Book Inc., 2001) p. 184-185*³

Once again, an experienced and knowledgeable condominium professional can provide vital and needed input into a process designed not to legally favour the purchaser.

3. Re-Sale Condominium Transactions

Buying a re-sale residential condominium does not attract the gauntlet of statutory provisions that a new condominium sale attracts in the Act, including the various protections in the purchaser’s favour. Notably absent from a residential re-sale is the ten (10) day rescission or ‘cooling-off’ period and the material change reporting for the re-sale version of a disclosure statement, being a status certificate. The core elements of any re-sale condominium transaction are shared by the agreement of purchase and sale and the status certificate provided by the appropriate condominium corporation.

a) Status Certificate

Pursuant to section 76 of the Act, anyone may acquire a status certificate from a condominium corporation. In principle, they are similar to a disclosure statement, as they attempt to meaningfully inform prospective purchasers on the nature, status and affairs of both the condominium corporation and the relevant unit. Upon request, within ten (10) days a condominium corporation must provide a status certificate to the requestor, that conforms with Form 13 of the Act’s regulations, for a fee not surpassing \$100.00, including taxes. The Act specifically demands that a variety of items be included in a status certificate, to highlight these include:

- “1. Common expense amount of the unit and any outstanding arrears (which run with the unit regardless of a change of ownership);
2. Any increase in common expenses for the unit and the reason for any increase;
3. Any reserve fund assessments levied against the unit since the last budget and the reason for the assessment;
4. Address for service of the condominium corporation and the names and addresses for service of the directors and officers;
5. Copies of the current declaration, by-laws and rules;
6. Copies of any court applications to amend the declaration;

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7. Any outstanding judgments against the corporation and the status of all legal actions to which the corporation is a party;
8. The current year's budget, the last audited financial statements and the auditor's report;
9. Listing of (i) the management agreement, (ii) any service insurance trust agreements and mutual use agreements, (iii) leases of common elements for business purposes entered into by a declarant-controlled board of directors, which are still effective, and (iv) any agreements with other corporations or with other units, along with a statement that the person requesting the certificate has the right to see the agreements;
10. Statement as to whether the parties are in compliance with the cost allocation agreements regarding changes to the common elements entered into with respect to the unit;
11. The most recent reserve fund study and any updates to it, the month-end reserve fund amount within the previous 90 days, and any current plans to increase the reserve fund;
12. Any proposed substantial changes to the services, assets or common elements of the corporation not yet implemented and the purpose of such changes;
13. Number of units for which the corporation has received notice of lease over the previous fiscal year;
14. Certificates of insurance for all current policies;
15. Amounts required to be added to common expenses of the unit under the Act;
16. Whether the court has appointed an inspector; and
17. Additional information required by regulations (including copies of the declaration, by-laws, rules, insurance certificates, budget and audited financial statements)."

*Loeb, Audrey, "The Condominium Act: A User's Manual 2nd Edition" (Toronto: Thomson Carswell, 2005) p. 208*⁵

As with a disclosure statement, all of the above matters must be carefully reviewed by the

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purchaser and his or her condominium professionals. The declaration, by-laws and rules should be reviewed to determine the controls and restrictions that exist in a condominium to determine if they accord with the buyer's own preferences. An important focus during a status certificate inspection is gauging the health of the reserve fund. Reserve fund studies that indicate under-funding often mean the eventual imposition of special assessments to restore this fund. As a result, attention should be paid both to the most recent reserve fund study but also to the reserve fund plan corporations are required to create once in receipt of a reserve fund study.

Unlike a disclosure statement, if any information is omitted from the status certificate, the corporation is deemed to provide that there is no such information. No rescission rights accrue to the purchaser as a result of this omission. Furthermore, the status certificate is binding only the day it was served upon the requestor. In addition, should a corporation fail to provide a status certificate, it will be deemed to have provided a status certificate stating;

- a) There has been no default in the payment of the common expenses of the unit;
- b) The board has not declared any increase in the common expenses for the unit since the date of the budget of the corporation for the current fiscal year; and
- c) The board has not levied any assessments against the unit since the date of the budget of the corporation for the current fiscal year to increase the contribution to the reserve fund.

Currently, the Act does not identify the ramifications of the corporation failing to provide all of the remaining sections as enumerated in a status certificate. Failing to provide a status certificate, or a deficient one at that, does not expose the corporation to the penalty provisions of section 137 of the Act, unlike a disclosure statement.

That said, many would consider it highly unwise for a purchaser to enter into an agreement of purchase and sale for a unit, without having a condition of receiving a satisfactory status certificate. Furthermore, a purchaser may also consider including into an agreement of purchase and sale a further condition by which the closing of the transaction is conditional upon the status certificate not having any information that is materially different from the representations and warranties made by the vendor in the agreement of purchase and sale. Lastly, a purchaser's solicitor may also wish to request the insertion of a further condition namely that another status certificate be provided on the eve of the transaction's closing date to reassure no changes have occurred to such.

b) OREA Form - Agreement of Purchase and Sale - Condominiums

This standardized agreement of purchase sale document is widely used for condominium re-sale transactions. It has significant differences from that used for traditional residential transactions, and is highly recommended.

c) Execution Search

A purchaser's solicitor should always coordinate an execution search against both the unit owner and condominium corporation to determine if any outstanding judgments have been entered against the corporation, which are the ultimate responsibility of the condominium unit owners.

4. Conclusion

A condominium purchase should be a milestone event in a person's life. That said, many unique challenges await the unknowing. Since both new and re-sale condominium purchases raise such a variety of challenges, purchasers should be vigilant to protect their hard earned investment with competent and experienced condominium professionals.

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