AGREEMENT CAUTIONS

Every real estate practitioner is well aware of the headaches associated with a client buying a new construction, single family home. There is a reasonable expectation of construction delays, deficiencies, reality versus plan errors and holdback negotiations. In a condominium project these difficulties are increased due to the sheer number of condominium units which must be completed at the same time. It often appears that this increase is exponential in nature. Compounding these difficulties is the nature of the product that your client is purchasing. A condominium is not a single family, residential property. It is a rather unique blend of property ownership coupled with a minority interest in a commercial enterprise, being the Condominium Corporation. A "Void" is a useful comparison as your client has purchased this piece of space, often from a set of plans with no physical entity to view. It is a rare client, and a rare real estate practitioner who can accurately visualize a finished condominium unit when the only basis for visualization is a set of architectural plans and occasionally what purports to be an identical model built to scale.

A real estate practitioner acting for a prospective buyer must approach an Agreement of Purchase and Sale for a new condominium development with extreme caution. It will not be a standard real estate association agreement of purchase and sale, hopefully. The agreement will have been drafted by the lawyer for the developer, will pertain solely to that development and will usually be biased in favour of the developer. The real estate practitioner and the buyer's lawyer must be able to advise the buyer as to the developer biases inherent in the agreement and what those biases mean to the buyer. Hopefully, then the buyer will be able to make an informed decision as to whether or not to sign the agreement. Do not assume that the agreement is a negotiable item. If the project has received good market acceptance the developer will have no incentive to change the agreement. Therefore, often the decision for your client would be to sign the agreement as presented or not to buy into the project. Perversely, if the market is weak and the developer is open to changing the agreement, this can often make the market weaker for there will be resentment amongst buyers who perhaps negotiated a better deal than other buyers, creating a taint for the project that will not fade away. Also a developer will not be able to easily complete a project consisting of non-standard agreements and non-standard units. This creates an organizational nightmare and will guarantee further closing delays.

The main items to address in the agreement are the following:

1. DEPOSIT

These agreements will usually require larger deposits than a normal single family home transaction. It is not uncommon to see deposits in the range of $10,000.00 that will be held for a longer period of time, possibly six to twelve months, during the construction phase of the project.

You should ensure that the deposits are held in an interest bearing trust account with the interest accruing to the favour of your client. There are proposals by Home Warranty Programs that the deposits will be guaranteed by those programs and then the deposits are released to the Developer. Personally I have not been convinced that the deposits are actually protected in this type of scenario and would advise that you proceed with the utmost caution if presented with this type of clause. I have successfully renegotiated these types of contracts to ensure that the deposits are held in trust by the seller's lawyer until I have been satisfied, on behalf of the buyer, that the deposit is indeed protected.

2. HST

Harmonized Sales Tax will always be a factor because you are purchasing a new housing unit. I have acted for developers that include HST in the agreement price and for developers who do not include HST in the agreement price. Obviously, you must determine from the agreement if HST is included or not. As well, it is important to determine whether or not your client would qualify for an HST rebate. There are restrictions such as non-residents and non-owner occupied properties that may affect rebate status and the developer will not be aware of the non-qualification of a buyer, unless put on notice.

3. CONTINGENCY FUND PAYMENT

There will be an extra payment on closing which is a contribution to the contingency fund of the Condominium Corporation. This is normally three times the estimated monthly condominium fee. This will effect the closing funds required by your client, and if they are unaware of this requirement, they may find themselves short of funds on the closing date.

4. SUPER'S UNIT

Certain developments have the Condominium Corporation purchasing a superintendent's suite and/or a guest suite immediately after registration of the project. In these situations the agreement will call for the buyers to pay an additional amount on closing which would be a percentage of the down payment for the purchase of these units. I personally disagree very strongly with this practice and advise my developer clients not to plan projects in this fashion. My preference is to have superintendent's suites included as part of the common elements, which is paid for by all buyers through the individual purchase price, thus avoiding a mortgage on the unit. However, developments are structured in this fashion and your client must be advised of the extra cash requirement as well as the fact that the Condominium Corporation will be starting out with long-term debt in the form of a mortgage on the superintendent's suite or guest suite.

5. FINANCING

The financing clause should allow a longer time period than a normal single family home purchase. The banks, especially as they become better educated about condominiums, will take longer to confirm mortgage financing on a particular building as it will take longer for them to assess the risk on a particular building. High ratio financing may not be available. CMHC will only insure 49% of a project and only if the other 51% is owner occupied or purchased by individual investors.

6. CLOSING DATE

The closing date is truly a fictional construct. We all could retire by betting on every project that the closing date will never happen on the agreed upon closing date. Unfortunately, we probably could find nobody to take our bet. Just as a single family home new construction project does not occur on the closing date, a condominium project will never occur on the closing date. This is initiated by the fact that construction will be delayed, and it is also compounded by the fact that government must register a project before it can be sold as a condominium. Registration may only take place after the project is completely finished. Therefore, the potential for delay is greater and the control of the delay is not within the developer's power as the government is a third party and will register the project based on their own schedule and availability. We are blessed in Nova Scotia in that our deputy registrar will do her utmost to register a project as quickly as possible, however, she is limited by the normal demands of her job and the astronomical increase in condominium projects.

7. EXCLUSIVE USE AREAS

Exclusive use areas must be determined especially with respect to parking and storage. The parking and storage spaces should be clearly identified and conform with the condominium plans. I am leery of agreements that say parking and storage will be determined by the developer and/or the initial board as this creates a degree of uncertainty and risk on the part of the buyer.

8. PARKING

Parking is an area that requires special attention as it is either exclusive use or deeded as a separate condominium unit. Many projects are now creating parking spaces as separate condominium units which are conveyed in addition to the residential condominium unit. It is also possible to purchase additional parking condominium units from the developer in many of these developments. Obviously, the nature of the parking must be very carefully explained to your client. The requirement for two parking spaces is often problematic as many developments are not built with sufficient parking spaces to allow two spaces for every condominium unit. The second space is available sometimes as an extra purchase item or possibly as a rental. However, it would definitely be on a first-come, first-served basis. Please explain this to your clients as I have seen almost as many disagreements over parking as I have over pets.

9. EARLY OCCUPATION

The agreements often contain a clause dealing with occupation prior to closing. This is both a positive and negative aspect of condominium developments in that it may require your client to occupy prior to actually owning the property and thereby paying a rental fee to the developer. However, it is often a benefit for if registration is delayed. Then the buyer may have nowhere to live and is all too happy to occupy the unit. I personally feel that the agreement should state that occupation will not take place unless an occupancy permit has been issued; however, ensure your client has the right to waive this requirement as they may need a place to live.

10. INITIAL MANAGEMENT

The agreement often states that the developer will manage the project for one to two years after registration. This is a non-arms length arrangement and hopefully will be on normal condominium management terms and remuneration. However, I feel this non-arms length relationship must be pointed out to your client.

11. EXERCISE ROOMS

Many developments contain exercise and/or special function rooms. These rooms may or may not be furnished by the developer, and if they are not to be furnished by the developer, then the Condominium Corporation will incur an expense in attempting to furnish these rooms. The potential expense should be pointed out to your client.

12. UPGRADES AND EXTRAS

Interior finishes, upgrades and extras are a nightmare for a condominium developer. The more unique features that a buyer wishes to have in his/her condominium unit only increases the construction cost and construction time and scheduling time for the project. Therefore, many developers attempt to limit the choice as much as possible and limit the subcontractors allowed to work on the project as much as possible. Your client must determine what they are allowed to do and what may be contracted for in addition to the purchase agreement. They should be advised to pay special attention to the cost of upgrades, including the addition of a management or administration fee charged by some developers.

13. PRE-SALES

A condominium development is a very expensive item for a developer and thus it can represent a huge financial risk to that developer. A way to lessen that risk is to add a clause to the agreement stating that the project will only be completed if a certain percentage of the units are presold. This is an extremely important clause to point out to your client especially if he/she is selling an existing property or cashing investments, etc. to pay for the purchase of the

condominium unit. Obviously, no major changes in their life situation should be committed to until they know for sure that the project will be built.

14. COMMON AREA CHARGES

A Condominium Corporation is funded by each unit owner paying a monthly contribution towards the cost of running the entire project. The developer will estimate the initial expenses. In my experience, these estimates are always low and therefore, I feel you should advise your client that the estimated monthly fee is only an estimate and in all likelihood will increase once they take occupation of the property. It would be extremely helpful for your client to ensure that the developer has actually produced a draft budget for the Condominium Corporation, and a copy of this budget is provided to your client.

15. ESTOPPEL CERTIFICATES

You are all aware that in purchasing a used condominium unit that you obtain an Estoppel Certificate from the Condominium Corporation. In new developments, it is often the case that an Estoppel Certificate will not be issued as there is very little to report on from a financial point of view. However, an Estoppel Certificate does much more than merely report on financial affairs as it talks about debt, lawsuits, capital expenditures, etc. Therefore, even if the agreement states that an Estoppel Certificate will not be issued, I still like to see a letter from the developer or the developer's lawyer indicating that these items do not exist and/or are not planned.

16. WARRANTY

Many projects are built that are not backed by the Atlantic New Home Warranty Project or a similar program. Often the warranty is a one year developer's warranty which may or may not have any force and effect as often the developer is a limited company, incorporated solely for the purpose of doing this one project. Therefore, you should advise your client that any warranty offered may have little or no strength.

17. CONDOMINIUM DOCUMENTS

Condominium documentation for a new project much be examined very closely by yourself and by your clients. This documentation will consist of the Declaration, Bylaws and Common Element Rules for the project. Often the documents circulated are draft documents and there may be changes prior to registration. Ideally, the agreement will state that there will be no material changes to the documentation unless the buyers agree; however, this is not always the case and must be a point of caution for your clients. You should insist that they have the right to review the registered documentation, not just the draft documentation. Please ensure that you send the documentation to your clients for their review as soon as you receive it, and do not simply leave it in your file to be transferred to them on the closing date or not at all.

18. HOLDBACKS

Most agreements will attempt to restrict your client's rights with respect to deficiency holdbacks on the units, deficiency holdbacks on the common elements and lien holdbacks. Again, if the project is selling well you will have little or no negotiation room with respect to these items. One good thing is that since occupancy permits must be issued before registration can take place, there are often very few major deficiencies in a condominium project when the actual closing takes place. As well, often the period of substantial completion, noted as the date of the occupancy permit, many times is forty-five days prior to the actual closing thus lessening the need for a lien holdback.

19. RESERVE FUND STUDY

It is now a requirement at the time of registration for a new condominium project to have a reserve fund study filed with the Registrar of Condominiums. This is a long term maintenance study which projects the amount of money expected to be expended on the project over the next thirty years. It is the basis upon which the reserve fund will be calculated and the contribution of unit owners to the condominium project will be calculated. I feel it is essential that you discuss this type of study with your client as it may impact on their monthly contributions and/or the need for special assessments in the future. I feel if you do not bring this to your client's attention, then you may in fact be negligent and face liability in the future if these types of costs are necessary.

20. BILL 64

On February 16, 2000, Bill 64 was proclaimed which dealt with several amendments to the Condominium Act. At the date of this writing a Consolidated Act does not exist in print form and therefore the Condominium Act must be read in conjunction with Bill 64 Amendments. It is possible to view the consolidated act electronically at gov.ns.ca. Attached to these materials is my summary of the major Bill 64 changes that impact on condominium development and condominium living. I have already dealt with the reserve fund study aspect and point out that is only one aspect of Bill 64. Bill 64 also changes the percentages required for many votes in a condominium situation, who can sit on the Board of Directors, who is allowed to vote and the types of condominium developments that are now possible. It is entirely probable that the Declaration, Bylaws and Common Element Rules may conflict with Bill 64. Therefore, I feel that it is incumbent upon you to understand that due to the principal of paramountcy, the Condominium Act and Bill 64 out-rank the condominium documents. I feel you should explain this to your client to avoid confusion on their part when they are attempting to look at the documentation and possibly the act and Bill 64.

NEW DEVELOPMENT TYPES

There are three areas of development that are in the process of coming into existence in Nova Scotia. I predict they will receive market acceptance and thus end up on your desks as new purchase files. The education curve for these types of projects is huge for all involved. Therefore, time periods are even less certain than for a more normal condominium development. My prior comments apply to these new condominium development areas; however, each of these will add further complications to you and your clients:

1. PHASED DEVELOPMENT

This is a means to build more than one building over time and add the additional buildings to the Condominium Corporation created when the first phase, being the first building, was finished. There is no duty on the developer to complete all phases. If there is to be a material change to a subsequent phase then all existing owners of units must consent. Certainly the initial phase will be in an area of on going construction as the subsequent phases are built. Most developments I am currently involved in are phased projects.

2. BARE LAND DEVELOPMENT

This is a very new concept for Nova Scotia that is now being examined by several of my clients. Picture a single-family home subdivision where the subdivision is a condominium corporation and the individual lots, not the houses, are the condominium units. The houses are built according to restrictions contained in the condominium documents and are exclusive use areas to the owner of the unit. Common elements are the streets, recreational areas, utilities etc. Many of the walled or gated communities in the U.S. are bare land condominiums, as is most of the new housing development in Alberta.

3. CONVERSIONS

We currently have clients doing studies on converting existing apartment complexes to condominiums. This is problematic due to dealing with existing tenants and creating the required plans for registration. Disclosure to buyers on required repairs and building structure is not well regulated and may lead to problems. Hopefully, mandatory reserve fund studies will increase this type of disclosure. High ratio financing is also difficult. Due to the lease extensions for existing tenants, the developer is forced to be a multi-unit investor owner for a period of time. CMHC is currently re-examining their rules as they pertain to the unique aspects of conversions.

CONCLUDING COMMENTS

Given the current economy in Nova Scotia, condominium development is experiencing an upsurge not just in Metro Halifax but throughout the Province. Therefore, it will become virtually impossible to be a real estate practitioner in Nova Scotia and not deal with condominium resales and the purchase of new condominium units on behalf of your clients. The most important message I can leave you with is that condominiums are unique and each Condominium Corporation is unique from every other Condominium Corporation. Therefore, please do not look upon a condominium purchase as a property purchase for it is not a property purchase. It is a unique beast requiring unique skills and understanding on your part, and more time spent in dealing with your client and ensuring that they understand the product they are purchasing. Obviously, if condominium files are being treated as just another property purchase, neither the client nor you is being adequately served.

If you have any questions about this area of law as it relates to new condominium purchasing or to any aspect of condominium law, please feel free to contact me with your questions. On a daily basis I receive questions from the legal community, real estate practitioners, bankers, insurance agents, property developers, managers and everyone involved in the condominium market. I attempt to answer these questions as quickly as possible and to steer people in directions where they may receive the information they are seeking. I view this as a volunteer activity both in my role as a lawyer and in my role as the National President of the Canadian Condominium Institute. CCI is the only lobbying and educational group for condominium interests that exists in Canada. I strongly urge you, if you are interested in this area, to join CCI, to take part in our educational programs and to get involved in the organization.