

REPRESENTING THE PURCHASER OF A NEW CONSTRUCTION CONDOMINIUM UNIT
THE AGREEMENT OF PURCHASE AND SALE

Any lawyer who has practiced in real estate for any length of time has an area of the practice that causes hyperventilation, sweaty palms, and nervousness. My own particular phobia is the purchaser who wishes to acquire a unit in a yet to be constructed multi-storey condominium building.

The transaction usually starts with your client walking in the office and placing on your desk, a small mountain of material, three to seven inches thick, and saying: "Could you review this before I sign the Agreement of Purchase and Sale this afternoon?"

This massive amount of paper usually contains an Agreement of Purchase and Sale (with numerous schedules attached), various unit sketch plans, a proposed Management Agreement, proposed Declaration, proposed By-Laws and Common Element Rules, and other bits and pieces of documentation specifically designed to give the property practitioner a drug dependency problem.

The material is frequently contained in an impressive binding, on the cover of which is pictured a lovely artistic impression of the building into which your client hopefully (with your help), will ultimately move. Oh, that everything was so easy! It is my own personal feeling that once a solicitor or a real estate salesperson has worked through and understood the process for acquiring a new construction condominium unit, they should be ready for anything.

In preparing this brief presentation, I re-examined three or four Agreements of Purchase and Sale that I have been involved with in the last six or seven months. All of the agreements had, of course, been prepared by the Developer's lawyer. I also act for Developers and have been involved in drafting their Agreements of Purchase and Sale.

It is my feeling that there are probably 15-20 potential problem areas that you should check each time when reviewing a Condominium Purchase Agreement for your client, particularly where new construction is involved. I will discuss some of these in greater depth later on.

I have also devoted part of this presentation to dealing with the practical considerations that arise at closing. A number of the problems are very common to any form of new construction, but have their own particular little twists when a Condominium Corporation is

involved. I think it is important that the lawyer be cognizant of all the areas that need to be covered on behalf of the client when approaching this type of closing. It will avoid problems and misunderstandings arising for your client subsequent to he or she taking possession of the unit and closing the transaction.

When first meeting with my client, I try to sit down and thoroughly discuss with them (if they don't already know) exactly what it is that they are buying. Even if a client owns or has owned a condominium unit, I frequently find that they are not entirely sure what they are obtaining. I want the client to know that they are:

- (a) purchasing a self-contained unit;
- (b) obtaining a percentage share of various common elements and the right to use those common elements with others;
- (c) obtaining the right to exclusive use of certain common elements;
- (d) becoming involved in a Condominium Corporation and how they exercise their rights in running the Corporation.

I also like to review with the client another important factor which deals with the restrictions and common element rules by which the unit owner will have to abide. It is important to determine at the very beginning whether there are certain restrictions which your client may find unacceptable.

The client must also be aware of the monthly condominium expense fees and how they increase in a similar form to property taxation. I would also suggest that you discuss with your client the contribution to the contingency fund made by first time buyers in most Condominium Corporations.

Finally, I like to have a discussion with my client about condominium insurance, dealing with both the Insurance Trust Agreement and the policies that are necessary and available for the unit holder to protect themselves.

At our firm, the above information has been incorporated in a six or seven page brochure which we put together a number of years ago. This allows us to review the foregoing with clients and then give them a handout allowing a more leisurely and indepth review by the client.

Having done all of the above may be of limited use when, as indicated earlier, your client walks in your office to present you with an Agreement of Purchase and Sale which they may or may not have

already signed. In the latter instance, you are going to wish to have some input into the Developer's standard form agreement, and I have listed out some of those areas that I feel should attract your attention and consideration.

1. Mortgage Financing

- Be sure the clients understand that they must immediately arrange their mortgage and once the principal amount is approved, then the Purchaser must close "with the current interest rate in existence on the closing date". The closing may be more than a year away.

2. Deposits

- There may be a lengthy time period until the units close; it is probably appropriate to discuss having the deposit put in an appropriate form of account so that interest will accrue to your client.

3. Monthly Condominium Expenses

- Has this amount been estimated or is it simply "1/12th of the estimated annual common expenses assessed against the property ...".
- Is there any indication of how the amount has been calculated?
- When is the first payment due and to whom is it made?
- Once the declaration has been filed, does the developer start paying common expense fees for those units which have not been sold?

4. Contingency Fund Contribution

- Is there a fixed amount for payment?
- Is it to be calculated in relation to the common expenses "3/12th of the estimated annual common expenses for the 1st year of the Purchaser's owner which amount shall be paid into the contingency fund ..."?
- When is this amount to be paid and to whom will it be paid?
- Is there any contribution by the developer to the contingency fund at the time the declaration is filed?

5. Closing Dates

- Is there any fixed closing date stated or is it to be "10 working days following acceptance of the Declaration for registration by

the Registrar ..."

- If there is a fixed date, are there override provisions to allow for the situation where:
 - (a) The Declaration has not been filed as of the closing date;
 - (b) "If the completion of the dwelling or the condominium project is delayed by reason of strikes, walkouts, lockouts, or other labour disputes... unexpected contingencies such as inclement weather... the Vendor should be allowed a further period of grace of... to substantially complete the dwelling...".
 - (c) Are there clauses that allow the Vendor at their discretion to cancel the agreement if, in fact, the delays become too extensive?

6. Deficiency Holdbacks/Mechanics' Lien Holdbacks

- Does the agreement allow for any type of holdback at all?
- If there are holdbacks, does it stipulate who will hold them?
- Is there an arrangement as to who will determine when deficiency work has been adequately completed?
- What arrangements are made for a pre-closing inspection and completion of the deficiency list not only for the units but for the common areas?

7. Minimum Unit Sales

- There will usually be a clause in the Agreement requiring a minimum number of unit sales to take place before a Developer is obligated to proceed with the development.
- Alternatively, there may be a clause whereby the Developer's obligations are conditional "upon it being satisfied with the economic feasibility... which determination the Vendor will make by...".

8. Declarations/By-Laws

- Are they available and are they the provisional or proposed documentation?
- Does the agreement allow the Vendor to amend various parts of the Declaration and By-Laws after the closing?
- Is there a clause stating that "The Purchaser does hereby appoint the Vendor its attorney for purposes of amending the Declaration and By-Laws...".
- The Purchaser will not be able to demand any changes or amendments to this documentation.
- Is your client's proportionate share of common expenses now available in this documentation?

- Do the By-Laws allow your client to have pets and are there any other restrictions that your client may not be happy with?
- Is there some form of sketch plan available showing the location and layout of your client's unit?

9. Management Agreement

- Is there a form of Management Agreement available with the documentation provided by the Vendor?
- Who is the Management Agreement to be with, what are the Managing Company's duties and what payment arrangement will be made with them?

10. Parking/Storage Areas

- Is there one parking and/or storage space for each unit?
- Are the parking spaces specifically assigned or simply random usage.
- Is there any specific cost for parking or is it included as part of your unit ownership?
- Are the storage areas exclusive or are they being assigned to more than one unit?
- Is the parking space to be conveyed to you in your Deed as a separate item from the unit.

11. Access by Developer after Closing

- Is there a clause in your agreement which states that "Notwithstanding the transfer of title...the vendor, servants, and agents shall have free access at all reasonable times to the property in order to make inspections or do any work or repairs ..."
- Is there any indication as to when this right ceases?

12. Appliances

- Does the agreement adequately describe type and model of appliances that are to be transferred with the unit?
- Is there a requirement for a Bill of Sale to be provided?

13. Interim Occupancy Agreements

- Does the agreement allow for interim occupation between completion of construction and the Declaration being accepted for registration?
- What will be the cost of this occupation?
- Can there be occupation by a third party tenant?

- If the declaration is not accepted for registration, how may the Vendor remove your client?

14. Title Searching

- How much time is allowed to search title?
- When does that time begin to run?
- What easements, encumbrances, and restrictions will the conveyance be subject to at the time of closing? This is usually stated in the agreement.

15. Extras During Construction

- Does the payment for extra work, during construction, take place prior to the work being done?
- If the transaction does not complete, is your client entitled to get any portion of the payment back?

16. Construction After Closing

- Is there a clause in your agreement which states that "The purchaser acknowledges that the vendor, its successors, or assigns may construct or continue to construct Condominium Units immediately adjacent to the unit which is the subject of this agreement. The purchaser acknowledges and agrees that such construction, if any, shall not be regarded by the purchaser as an inconvenience or nuisance and ... shall not object to such construction or make any claim for damages or injuries...".

17. Construction Plans

- Is there a clause in the agreement where the Purchaser acknowledges having inspected the construction plans for the building? Have they?
- There is usually a clause whereby "the vendor may at its discretion vary or alter such plans and specifications as long as material substituted for those specified are approximately of equal quality... and such alterations do not materially effect the size of the unit".

18. Builders' Warranty

- Is there any discussion in the Agreement with respect to a Builders' Warranty?
- Will the warranty be given by the Developer or the Builder?

- Will there be an individual warranty given to each unit holder or just to the Condominium Corporation?
- Will there be an individual warranty for an individual unit?

19. Miscellaneous Clauses

- Is there a clause in the agreement whereby the purchaser accepts the vendors' undertaking to obtain partial releases of encumbrance at the time of closing? (not to be confused with an undertaking of the vendors' solicitor)
- Is there a clause such as "The purchaser agrees to complete this transaction of purchase and sale provided the condominium documents have been accepted for registration?"
- Is there a clause stating that "In the event the purchaser does not designate any solicitor to act on his behalf or revokes any designation, then the purchaser shall be deemed to have waived tender".

CLOSING THE TRANSACTION

We will presume that you have survived the preparation and execution of the Agreement of Purchase and Sale and hopefully the successful construction of the condominium building. You will eventually receive from the Vendor's lawyer, notification that the Declaration and ancillary documents have been accepted for registration by the Registrar of Condominiums.

There are now going to be a number of items that you will have to deal with prior to and at the time of concluding your adjustments with the Developer's (Vendor's) lawyer.

There are instances where the matters may already have been dealt with in the Agreement of Purchase and Sale thereby precluding any further discussion on the subject.

I have not discussed every aspect of the closing, which in many areas will be similar to the closing in any new construction transaction. I have tried to deal with those areas that are either peculiar to condominium transactions or are normal items that have an added twist because it is a condominium unit that is involved.

1. Updating Title Search/Examination of Documentation

- Normal registry update of title search.
- Check, double check, triple check the documentation that has been filed with the Registrar of Condominiums and at the Registry of Deeds.
- Does the unit designation correspond between the Agreement of Purchase and Sale, deed for the unit, schedules attached to the Declaration, and the sketch plan provided?
- Make sure the plan is shown to your client at the closing to ensure that they are getting the right unit.
- Have there been any changes to the final documentation from the proposed documentation that was originally provided to your client?

2. Mechanics' Liens and Deficiency Holdbacks

- Is there to be a holdback, remembering that your unit may be completed but there may be many thousands of dollars worth of work to be done in the common areas within the building, and more importantly, to the exterior with respect to landscaping, recreational facilities to be installed, etc. It may be many months before this work is completed?

- Ask for a copy of the Architect's Certificate of Substantial Completion for the development, together with an estimation by the Architect of the money required to complete "external" deficiencies.
- Is there to be a deficiency holdback with respect to your individual unit?
- Calculate a holdback for the external deficiencies.
- Who will be the determining body as to whether "external" deficiencies have been completed properly as it is probably impossible for the Developer to respond to the likes and dislikes of many unit holders?
- Have you determined from what date the lien period will run from?

3. Insurance Trust Agreement

- Check with the Vendor's lawyer to find out if an Insurance Trust Agreement has been entered into. You will require this information to "join" your mortgage lender, presuming there is one involved in the transaction.
- If there is no mortgage lender you are still concerned, on your client's behalf, that the structure of the building is adequately insured and protecting your client's interest.

4. Parking/Storage Areas

- Have these now been designated for your client?
- Are the individual parking spaces allocated on the plans filed with the Declaration?
- Has the storage area been allocated to your client, if they are available?

5. Builders' Warranty

- Hopefully this matter has already been sorted out at the time that the Agreement of Purchase and Sale was entered into.
- Presumably a determination has been made as to exactly when and to whom the Buildings' Warranty will be issued.
- Is it to the individual unit holder or will it be to the Condominium Corporation itself?

6. Condominium Fees and Contingency Fund Contribution

- Are these being paid to the Vendor's lawyer?
- What is the Vendor's lawyer going to do with them?
- Is he forwarding them to a Management Company and do you have his

or her undertaking to that effect?

- Remember the Developer's lawyer does not provide a bookkeeping and secretarial service for the Developer; find out who is managing the condominium so that these questions can be directed to them.
- Don't forget to advise the Management Company of the assignment of voting rights contained in most condominium mortgages.

7. Condominium Corporation Meetings

- Try to establish when there will be an anticipated first meeting of unit holders.
- This will vary substantially depending on what stage you are at when your clients acquire their new unit.
- You may be very close to a meeting or one may not be anticipated for many many months and your client therefore may be on his own in dealing with deficiencies, etc. if he or she is not able to get together with other unit holders.

8. Occupancy Permits

- Ask for a copy of the Occupancy Permit as one should be available once the condominium has been accepted for registration.

9. Estoppel Certificates

- There is unlikely to be one available if you are buying directly from the Developer shortly after construction has been completed.
- Double check this, as again, the availability of an Estoppel Certificate will vary depending on how far down the road you are from the completion of construction and how far along the road the Management Company is with dealing with the affairs of the Condominium Corporation.

I think that if the above points are dealt with, you can be fairly confident that your client has been well served and will hopefully be entering a situation that will give he or she many years of happy condominium ownership.

Many of my remarks are based on errors or mistakes that I have made myself, and I leave you with this thought:

Learn from the mistakes of others - you can never live long enough to make them all yourself.