

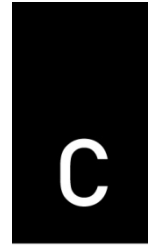


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CONDO
start to finish

ANTHONY ROMANELLI - LAWYER, CONDOMINIUM

ANTHONY
ROMANELLI
BRATTYS LLP



CONDO
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ANTHONY ROMANELLI PRACTICES IN THE REAL ESTATE AND FINANCIAL SERVICES DEPARTMENTS OF BRATTYS LLP.

Anthony represents condominium developers, freehold builders/developers, commercial landlords and financial institutions.

He obtained his law degree from the University of Ottawa and his Bachelor of Arts degree from York University.

Brattys LLP has serviced the development and financial services industries for over 50 years.

In 2011 and 2014, Brattys LLP was ranked by Canadian Lawyer Magazine as one of Canada's top 5 Commercial Real Estate Boutiques.

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CONDO: START TO FINISH™

STAGE 1 — PROJECT DESIGN + PRE-DEVELOPMENT

1. Preliminary condominium consultation.
2. Land optioning, agreements and acquisition.

STAGE 2 — MARKETING + SALES

1. Production meeting chairman.
2. Production meeting overview (timing, attendees, intent, importance).
3. Full disclosure versus “non-disclosure” disclosure.
4. Condominium disclosure preparation and release for marketing and sales.
5. Sales staff instruction on project-specific purchase and sales agreements and condominium disclosure documentation.
6. Purchaser lawyer enquiries.
7. Tarion application submissions.
8. Deposit trust agreements or bond issuance for purchaser’s deposit release/usage.

STAGE 3 — URBAN CONSTRUCTION

1. Construction financing assistance.
2. Deposit funds release to declarant - Tarion insured and Excess Condominium Deposit Insurance (ECDI).
3. Condominium disclosure and document revisions corresponding to project changes.
4. Project title document preparation including transfers, easements and agreements, as required.
5. On-going purchaser lawyer issues.
6. Conversion to land titles absolute finalized and registered, if applicable.

STAGE 4 — PLANNING + LEGAL COMPLIANCE

1. Transfer of easements for utilities and servicing, as required.
2. Transfer of street and lane widenings and 0.30 metre reserves lifting, if required.

LAWYER’S PERSPECTIVE

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STAGE 5 — CONDOMINIUM PRE-REGISTRATION + OCCUPANCY

1. Condominium declaration schedule A (legal description) review and updating.
2. Condominium declaration preparation, updating and submission to surveyor for condominium pre-approval to local land titles office.
3. Condominium declaration pre-approval submission to local municipality legal/planning department.
4. Purchaser occupancy closings.
5. Lawyer's condominium draft plan condition clearance of mutual servicing easements and right-of-way easements creation (multi-phase projects).

STAGE 6 — CONDOMINIUM REGISTRATION

1. Schedule A legal description to declaration, review and execution.
2. Land titles office correspondence for condominium registration.
3. Executed schedule B to declaration (mortgagees' consent) obtained from mortgagees.
4. Condominium declaration and schedules executed.
5. Executed schedule C to declaration and schedule F to declaration obtained from surveyor.
6. Schedule D to declaration obtained from property manager (approved by declarant).
7. Executed schedule G to declaration obtained from architect and/or engineer.
8. Pre-approved and executed final version of condominium declaration to local land titles office for registration.
9. Construction Lien Act notification guidance to declarant.

STAGE 7 — CONDOMINIUM POST-REGISTRATION

1. Unit closings within forty-five (45) days of condominium registration (10 working days for registry office PIN creation; title review by purchaser's lawyer).
2. Encumbrance payouts and purchaser unit closings.
3. Profit (if any) to declarant.
4. Attend and chair turnover meeting.
5. General issue negotiations with new condominium corporation on developer's behalf.

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PERSPECTIVE

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SUPPLEMENTAL
MATERIALS

1. Make sure you have the correct Tarion Addendum

- (a) Types of Tarion Addenda launched in 2012:
 - (i) **Freehold Form - Firm Closing Date Addendum or Tentative Closing Date Addendum:** for freehold dwellings and vacant land condominium units. For use if a purchase agreement is signed on or after October 1, 2012
 - (ii) **Limited Use Freehold Form - Firm Occupancy Date Addendum or Tentative Occupancy Date Addendum:** for parcels of tied land (freehold parcels tied to a common elements condominium). For use if a purchase agreement is signed on or after October 1, 2012
 - (iii) **Condominium Form - Firm Occupancy Date Addendum or Tentative Occupancy Date Addendum:** for freehold and leasehold condominium units (not vacant land condominium units). For use if the first arm's length purchase agreement in the condominium project (or a phase of a phased condominium) is signed on or after October 1, 2012

2. Adjustments Schedule B to 2012 Tarion Addenda

- (a) The Tarion Addenda each contain "Section 8", as follows:

8. Adjustments to Purchase Price

Only the items set out in Schedule B (or an amendment to Schedule B), shall be the subject of adjustments or change to the purchase price or the balance due on closing. The Vendor agrees that it shall not charge as an adjustment or readjustment to the purchase price of the home, any reimbursement for a sum paid or payable by the Vendor to a third party unless the sum is ultimately paid to the third party either before or after closing. If the Vendor charges an amount in contravention of the preceding sentence, the Vendor shall forthwith readjust with the Purchaser. This section shall not: restrict or prohibit payments for items disclosed in Part 1 of Schedule B which have a fixed fee; nor shall it restrict or prohibit the parties from agreeing on how to allocate as between them, any rebates, refunds or incentives provided by the federal government, a provincial or municipal government or an agency of any such government, before or after closing.

- (b) Schedule B is split into two parts:
 - (i) "PART I Stipulated Amounts/Adjustments"
 - (A) Additional charges, fees or other anticipated adjustments to the final purchase price or balance due on closing, the dollar value of which is stipulated in the purchase agreement.

(B) Example:

"NSF administrative fee of \$350.00, plus HST, pursuant to Section ___ of purchase agreement"

(ii) "PART II All Other Adjustments to be determined in accordance with the terms of the Purchase Agreement"

(A) Additional charges, fees or other anticipated adjustments to the final purchase price or balance due on closing which will be determined after signing the purchase agreement

(B) Example:

"Ontario New Home Warranties Plan Act enrolment fee pursuant to Section ___ of purchase agreement"

3. Title

(a) Purchase agreements often contain broad title provisions requiring purchasers to accept title to their dwellings subject to a number of documents, agreements, encumbrances and restrictions etc. (e.g. condominium documents, development agreements with municipalities, easements with utilities companies, notices of security agreements for certain types of equipment, agreements with neighbouring properties etc.)

(b) Typically, the vendor is entitled to respond to purchaser's solicitors' requisitions by way of a standard title memorandum, often posted to a website accessible by the purchaser's solicitor.

(c) Further, purchase agreements often contain clauses stating that any valid requisition is sufficiently answered if a title insurance policy would insure over the requisitioned matter. For example:

"Further, the Purchaser agrees that in the event that any valid requisition is not sufficiently answered by the Vendor, then the requisition shall be deemed sufficiently answered if a title insurance policy, available for issuance to the Purchaser by any company which issues title insurance policies in Ontario, would insure over the title matter which is being requisitioned."

(d) Purchase agreements also require purchasers to accept title to their dwellings subject to any outstanding mortgages (and any security collateral thereto), regardless of whether or not the mortgagee is an institutional lender or not and to accept the vendor's solicitor's undertaking to obtain and register a partial discharge of the said mortgages within a reasonable time after the closing date. For example, from a condominium purchase agreement:

"The Purchaser further agrees to accept the Vendor's solicitors' undertaking to discharge any mortgages, debentures, liens or encumbrances (the "Encumbrances") against the Unit or Common Elements that the Purchaser is not assuming and to close notwithstanding such mortgages, liens or encumbrances. In any event, the Vendor shall not be required to discharge the Encumbrances from the Unit until such time as the Purchaser has paid to the Vendor the Purchase Price for the Unit in full."

4. Subordination of Agreement

- (a) Notwithstanding that the purchase agreement may have been entered into prior to the vendor obtaining any construction financing, purchase agreements contain clauses indicating that the agreement is subordinate and postponed to any mortgages related to the project (a common request of construction lenders). This allows lenders to cut out the interests of purchasers by way of a power of sale if there is a default under a mortgage.
- (b) An example of a subordination and postponement clause is as follows (from condominium purchase agreement):

"The Purchaser agrees that this Agreement shall be subordinate to and postponed to any mortgages arranged or to be arranged by the Vendor and any advances thereunder from time to time, and to any easement, service agreement and other similar agreements made by the Vendor concerning the property or lands and also to the registration of all Condominium Documents. The Purchaser agrees to do all acts necessary and execute and deliver all necessary documents as may be reasonably required by the Vendor from time to time to give effect to this undertaking and in this regard the Purchaser hereby irrevocably nominates, constitutes and appoints the Vendor or any of its authorized signing officers to be and act as his lawful attorney in the Purchaser's name, place and stead for the purpose of signing all documents and doing all things necessary to implement this provision."

5. Purchaser's obligation to provide information

- (a) Purchaser agreements often contain requirements to provide certain information to the vendor's solicitor by a certain date. Purchasers will incur fees for any defaults under these type of provisions:
- (b) For example, from a condominium purchase agreement:

"The Purchaser covenants and agrees to provide the Vendor's solicitor, at least 60 days prior to the Occupancy Date, with the full names, birth dates, marital status, social insurance number of the Purchaser and any other parties permitted by the Vendor to take title to the Unit, and the address for service to be inserted in the transfer, failing which the Vendor shall be entitled to engross the Occupancy Agreement and the transfer to the Unit in the name of the Purchaser as noted on the front page of this

Agreement or as permitted herein, and the Purchaser shall be bound thereby and shall be estopped from requiring any further changes to the manner in which the Occupancy Agreement and/or the transfer are so engrossed."

"The Purchaser agrees to provide the name, address and telephone number of its solicitor and all other information requested or required for the completion of the transaction to the Vendor or its solicitor in writing no later than 60 days prior to the Occupancy Date. If the Purchaser changes solicitors or the Purchaser or its solicitor (i) fail to provide the aforesaid information or required title information; (ii) change or amend any of the information provided, including title information required for engrossing the Occupancy Agreement or the transfer to the Unit as required by the preceding paragraph; or (iii) provide information to the Vendor or its solicitors that is incorrect or amended for any reason, the Purchaser shall be charged a fee as determined by the Vendor plus Applicable Taxes on the Statement of Adjustments."

"The Purchaser shall advise the Vendor of any changes in any of its mailing address, telephone number or electronic mail address or of its solicitors forthwith upon such change, failing which the Purchaser shall be charged a fee of \$250.00 plus Applicable Taxes on the Statement of Adjustments."

6. Details/conditions of dwelling

- (a) Purchase agreements often contain provisions requiring purchasers to close their purchase transactions notwithstanding any deficiencies within their dwellings, said matters to be addressed under applicable Tarion rules.
- (b) Purchase agreements will also state that any dimensions shown in the purchase agreement or promotional material are approximate only, that the net living area of the dwelling differs from the floor area, that stated heights will be shortened by bulkheads and ductwork and that the dwelling may contain columns and beams. As well, vendors are often entitled to deliver a reverse plan of low-rise dwellings to purchasers.
- (c) Further, purchaser agreements also contain exculpatory language with regards to colour variations of any materials within a dwelling, for example:

"The Vendor is not responsible for shade difference occurring in the manufacture of items such as, but not limited to, finishing materials or products such as countertops, flooring and floor coverings, roof coverings, cladding, roof coverings, bath tubs, water closets, sinks and other such products where the product manufacturer establishes the standard for such finishes. The Vendor is also not responsible for colour variations in any products or finishes on products such as but not limited to floor coverings, stone, wood, laminate, cabinets, shelves, railings, spindles, trim as well as

stains or finishes applied to any of the aforesaid which colours may vary when finishes are applied to them. Nor shall the Vendor be responsible for shade difference in colour of components manufactured from different materials but which components are designed to be assembled into either one product or installed in conjunction with another product such as but not limited to toilet seats, toilets, tubs, cabinet finishes and paint and in these circumstances the product as manufactured shall be accepted by the Purchaser."

7. Warning clauses

- (a) Purchase agreements will contain warning clauses within the body of purchase agreement or within separate schedule
- (b) Warning clauses will often be required by municipalities or governmental agencies (conservation authorities, transit commissions etc). Other times, the warning clauses will be inserted by the vendor to alert the purchaser to certain facts about the development or its surroundings.
- (c) Example of a Toronto Transit Commission warning clause:

"The Purchaser specifically acknowledges and agrees that the proximity of development of the lands municipally known as _____ (the "Development") to Toronto Transit Commission transit operations may result in transmissions of noise, vibration, electromagnetic interference, and stray current, smoke and particulate matter (collectively referred to as "Interferences") to the Development and despite the inclusion of control features within the Development, Interferences from transit operations may continue to be of concern, occasionally interfering with some activities of the occupants in the Development. Notwithstanding the above, the Purchaser agrees to release and save harmless the City of Toronto and Toronto Transit Commission from all claims, losses, judgments or actions arising or resulting from any and all interferences. Furthermore the Purchaser acknowledges and agrees that an electromagnetic, stray current and noise-warning clause similar to the one contained herein shall be inserted into any succeeding lease, sublease or sales agreement, and that this requirement shall be binding not only on the parties hereto but also their respective successors and assigns and shall not die with the closing of the transition."

- (d) Example of school board warning clause:

"The Purchaser acknowledges that despite the best efforts of the • District School Board (the "School Board"), sufficient accommodation may not be locally available for all students anticipated from the development area and that students may be accommodated in facilities outside the area, and further, that students may later be transferred. Purchasers agree for the purpose of transportation to school, if bussing is provided by the School

Board in accordance with the Board's policies, that students will not be bussed home or to school, but will meet the bus at designated locations in or outside of the area."

- (e) Purchase agreements will often require purchasers to accept delivery of additional warning clauses after the purchase agreement has been executed; Said additional warning clauses will often be deemed to be incorporated into the purchase agreement upon delivery to the purchaser.

8. Harmonized Sales Tax (HST)

- (a) Purchase agreements typically stipulate that the purchase price is INCLUSIVE of the HST exigible on the transaction, LESS federal and provincial new housing rebates.
- (b) Purchase agreements will require the purchaser to assign the new housing rebates to the vendor on closing and execute all necessary documents to give effect to the assignment.
- (c) If the purchaser does not qualify for the federal or provincial new housing rebates because the dwelling is not intended to be personally occupied by the purchaser or the purchaser's qualified relatives (typically a spouse, sibling, parent, child, grandparent or grandchild) as their primary place of residence, then the purchaser will be required to pay the amount of the rebates to the vendor on closing.
- (d) Note – If there is more than one purchaser and one of the purchasers does not qualify for the new housing rebates, none of the purchasers will be eligible for the new housing rebates.
- (e) Purchase agreements often state that if the vendor, for whatever reason, believes that the purchaser does not qualify for the rebates (regardless of any documentation provided by or on behalf of the purchaser, the purchaser shall be obliged to pay to the vendor an amount equivalent to the rebates, in addition to the purchase price. For example, see following clause (from a condominium purchase agreement):

"If the Vendor believes, for whatever reason, that the Purchaser does not qualify for the Rebate, regardless of any documentation provided by or on behalf of the Purchaser (including any statutory declaration sworn by the Purchaser) to the contrary, and the Vendor's belief or position on this matter is communicated to the Purchaser or the Purchaser's solicitor on or before the Unit Transfer Date, then notwithstanding anything hereinbefore or hereinafter provided to the contrary, the Purchaser shall be obliged to pay to the Vendor (or to whomsoever the Vendor may in writing direct), by certified cheque delivered on the Unit Transfer Date, an amount equivalent to the Rebate, in addition to the Purchase Price. In those circumstances where the Purchaser maintains that he or she is eligible for the Rebate despite the

Vendor's belief to the contrary, the Purchaser shall (after payment of the amount equivalent to the Rebate as aforesaid) be fully entitled to file the rebate form directly with (and pursue the procurement of the Rebate directly from) the Canada Revenue Agency."

- (f) Of course, even though the purchaser may not qualify for any new housing rebates, the purchaser may be entitled (after closing) to apply for the residential rental property rebate if the dwelling is leased to a tenant

9. Entire agreement clause

- (a) Purchase agreements normally have "entire agreement" clauses stating that there are no other representations, warranties or conditions except as set forth in the purchase agreement.
- (b) In the event of any variance between the terms purchase agreement and any sales materials (brochures, ads etc.), sales-pitches by any salespeople or anything contained within the sales centre/model suite, the builder will argue that the purchase agreement will prevail.

10. Utility Agreements and Rental Items:

- (a) Purchasers will often be required to enter into metering agreements with hydro, gas and water metering companies (and possibly, thermal energy metering companies) as well as executing pre-authorized payment forms and providing void cheques for same.
- (b) Low-rise/townhome purchase agreements regularly purchasers to assume the rental of hot water tanks and heaters, with a monthly fee payable to the lessor

11. Early Termination Conditions

- (a) Most purchase agreements often contain conditions in favour of the vendor (Early Termination Conditions), which conditions are governed by the Tarion Addenda
- (b) Vendors routinely include the following Early Termination Conditions, as described at Section 1(b) of Schedule "A" of the Tarion Addenda:
 - (i) confirmation by the vendor that it is satisfied the purchaser has the financial resources to complete the transaction;
 - (ii) confirmation that the sale of dwellings in the project has exceeded a specified threshold by a specified date;
 - (iii) confirmation that financing for the project on terms satisfactory to the vendor has been arranged by a specified date.

- (c) There are other Early Termination Conditions that the vendor can insert in its favour, as described at Section 1(a) of Schedule "A" to the Tarion Addenda. Vendors seldom use these conditions because they are deemed to be inserted for the benefit of BOTH the vendor and the purchaser and CANNOT be waived. Examples of these conditions, include:
 - (i) The vendor obtaining a change to the official plan, other governmental development plan or zoning by-law (including a minor variance);
 - (ii) The vendor obtaining consent to the creation of a lot(s) or part-lot(s);
 - (iii) The allocation of domestic water or storm or sanitary sewage capacity;
 - (iv) Entering into site plan agreements, density agreements, shared facilities agreements or other development agreements with approving authorities or nearby landowners and/or any development approvals required from an approving authority.
- (d) If a purchase agreement for: (i) a parcel of tied land (using Tarion's Limited Use Freehold Form of Addendum), (ii) a freehold dwelling (using Tarion's Freehold Form of Addendum), or (iii) for a vacant land condominium unit (using Tarion's Freehold Form of Addendum) contains Early Termination Conditions in favour of the vendor, the Purchaser has 3 business days after the day of receipt of the purchase agreement to review the nature of the conditions and the purchaser can terminate the purchase agreement by giving written notice to the vendor within those 3 business days

12. Financial resources of purchaser

- (a) In addition to an Early Termination Condition allowing the vendor to satisfy itself regarding the purchaser's financial resources, purchase agreements often contain provisions requiring the purchaser to deliver to the vendor, at any time prior to closing, sufficient financial information to evidence the purchaser's ability to pay the balance due on closing. For example:

"The Purchaser represents that the Purchaser is capable of obtaining the financing the Purchaser requires to enable the Purchaser to complete this transaction. The Purchaser hereby consents to the Vendor obtaining a consumer report containing credit and/or personal information for the purposes of this transaction. In addition, the Purchaser shall deliver to the Vendor, within ____ days of acceptance of this Agreement by the Vendor and thereafter within ____ days of demand from the Vendor or any agent thereof, all necessary financial and personal information required by the Vendor in order to evidence the Purchaser's ability to pay the balance of the Purchase Price on the Unit Transfer Date, including without limitation, written confirmation of the Purchaser's income and evidence of the source of the payments required to be made by the Purchaser in accordance with this Agreement and a mortgage commitment from one of the Schedule "1" banks

in Canada with respect to this transaction of purchase and sale, all of the foregoing to be satisfactory to the Vendor in its sole, absolute and unfettered discretion. Any failure by the Purchaser to comply with the provisions of this paragraph shall constitute a default by the Purchaser, pursuant to which the Vendor shall have the right to terminate this Agreement and take forfeiture of the Purchaser's deposit in accordance with the provisions of this Agreement. In this regard, the Purchaser acknowledges and agrees that (a) the aforesaid information has been provided with the Purchaser's knowledge and consent that such information may be used by the Vendor, its consultants and its lending institution(s) for the purpose of arranging financing to complete the transaction contemplated by this Agreement and; (b) such information may remain on file by the Vendor for future reference."

13. Assignment rights

- (a) Almost all purchase agreements contain some sort of restrictions on assigning the purchase agreement to another party
- (b) Read the provisions dealing with assignments carefully – some contain complete prohibitions on assignments, others allow assignments after a certain threshold of dwellings have been sold.
- (c) Most assignments come at a cost to the purchaser: the assignor will be obligated to pay an assignment fee to the vendor and (often) the vendor's legal fees. The assignment and legal fees are sometimes stipulated within the purchase agreement; other times, the fees are at the discretion of the vendor
- (d) Purchase agreements will likely require that assignors and assignees enter into the vendor's form of assignment agreement.

14. Restrictions on listing

- (a) Purchase agreements will often contain clauses prohibiting the listing of the dwelling for assignment/sale/rent on MLS or by other means prior to final closing.
- (b) For example:

"In no event shall the Purchaser list or cause to be listed the Unit for sale, lease or otherwise on a listing service system including, without limitation, the Multiple Listing Service ("MLS") or any other publication. The Purchaser acknowledges and agrees that once a breach of the preceding covenant occurs, such breach is (or shall be) incapable of rectification, and accordingly the Purchaser acknowledges and agrees that in the event of such breach, the Vendor shall have the unilateral right and option of terminating this Agreement effective upon delivery of notice of termination to the Purchaser or the Purchaser's solicitor, whereupon the provisions of this Agreement dealing with the consequence of termination by reason of the Purchaser's default, shall apply."

15. Colour/option selection

- (a) Tarion requires that purchasers make colour/option selections within 30 days of the purchase agreement, or within any other time as agreed between the purchaser and the vendor.
- (b) If the vendor cannot supply a purchaser's selection, the purchaser must be notified in writing.
- (c) The purchaser is then responsible for making another selection within 7 days of receiving the notice from the vendor, or within any other time as agreed between the purchaser and the vendor.
- (d) If the purchaser does not make the original selection in time, or does not make new selections within 7 days, the vendor has the right to substitute options of equal or better quality.
- (e) For example (from a condominium purchase agreement)

"Purchaser's choice of colours and materials shall be from Vendor's standard samples, if not yet ordered or installed, and provided that colours and materials are available from suppliers. Without limiting the generality of the foregoing, any of the foregoing selection of features and finishes made by the Purchaser in accordance with this Agreement shall be subject to the availability thereof at the time that the Vendor is prepared to install same and if any selected feature or finish is not then available, the Purchaser will then be required to re select from any additional standard samples then available from the Vendor, again subject to the requirement of further re selection in the event that the additional selection(s) made by the Purchaser are also not available as described above. Purchaser agrees to select the colour and material within ____ days after notification by the Vendor; otherwise the Vendor reserves the right to choose the colour and material to complete the dwelling and the Purchaser agrees to close the transaction with the Vendor's choice of colour and material."

16. Purchaser's Default

- (a) Purchase agreements usually contain "time is of the essence" clauses, such as the following:

"Time shall in all respects be strictly of the essence of this Agreement and no extension of time for any payment by the Purchaser or rectification of any breach of any agreement, stipulations, condition or restriction shall operate as a waiver of this provision with respect to any other payment or rectification of any other breach, except as specifically agreed upon in writing by the Vendor or the Purchaser, as the case may be."

- (b) Provisions pertaining to monetary defaults typically allow for the immediate termination of the purchase agreement by the vendor. Non-monetary defaults typically contain a cure period. For example:

"If any (a) monetary default by the Purchaser occurs under this Agreement; or (b) any non-monetary default by the Purchaser occurs under this Agreement and such non-monetary default continues for _____ days after written notice thereof is given to the Purchaser or his solicitor, then the Vendor may retain all monies paid as liquidated damages without prejudice to any other rights of the Vendor and the Vendor may thereupon cancel this Agreement. If the Vendor is required to pay any lien, execution or encumbrance, the Purchaser shall reimburse the Vendor for all amounts and costs so paid. Any monies owing to the Vendor (a) pursuant to this Agreement and not paid to the Vendor in accordance with the terms hereof; or (b) as a result of any expenses incurred by the Vendor arising from a breach by the Purchaser of any of the Purchaser's obligations described in this Agreement, shall bear interest at the rate of _____% per annum, calculated daily, not in advance, from the date of default with respect to any monetary default and from the date of written demand with respect to the aforesaid expenses. The Purchaser shall pay the Vendor's solicitor's fees in the amount of \$_____ (plus Applicable Taxes and disbursements) for each letter or other form of notice sent to the Purchaser or the Purchaser's solicitor relating to any default by the Purchaser."

PROVISIONS PERTAINING SOLELY TO CONDOMINIUM UNIT PURCHASE AGREEMENTS

17. Rescission rights and condominium purchase agreements

- (a) Pursuant to Section 73(2) of the *Condominium Act, 1998*, purchasers can rescind condominium purchase agreements within 10 days from the later of:
- (i) the date that the purchaser receives the disclosure statement; and
 - (ii) the date that the purchaser receives a copy of the purchase agreement executed by the declarant and the purchaser.
- (b) How do you know when the rescission period commences? Most condominium purchase agreements contain a schedule whereby the purchaser acknowledges that it has received the disclosure statement and executed purchase agreement on the date noted on the schedule

18. Allocation of parking and storage units

- (a) Purchase agreements for condominium units often contain language allowing the vendor to allocate any purchased parking and storage units at the discretion of the vendor.

- (b) For example:

"The Vendor shall have the right in its sole, absolute and unfettered discretion to designate the location of the Parking Unit(s)(if applicable) and/or the Storage Unit(s)(if applicable) and may re-designate any one or more of same from time to time prior to the Occupancy Date or the Unit Transfer Date. The Vendor may give priority as to the location of such units, if any, to persons with special needs as determined by the Vendor in its sole, absolute and unfettered discretion."

19. Rental during occupancy

- (a) Condominium purchase agreements regularly contain provisions prohibiting the renting of proposed units during the occupancy period

- (b) For example:

"Subject to the provisions hereof, the Purchaser may not assign or sublet the Occupancy Agreement or otherwise part with possession of the Unit, without the Vendor's prior written consent which consent may be arbitrarily withheld"

20. Insurance (condominium)

- (a) Purchase agreements will require purchasers to deliver evidence of insurance to the vendor on the occupancy date
- (b) Vendor's risk insurance (or condominium corporation's insurance, after registration) does not cover owner's contents, liability or the unit beyond the definition of a "standard unit"

1. The Problem of Positive Covenants

(a) Basic Rule:

If the promise is to do something, it is a positive covenant – and positive covenants do not run with the land

(b) Authority:

“...it is undisputed in English and Canadian law that the rule that positive covenants do not run with the land governs despite any express intention to the contrary contained in the agreement.” Charron J. in *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123* (2002), 58 O.R. (3d) 481, 211 D.L.R. (4th) 1 (Ont. C.A.) (“Amberwood”)

(c) Reasons Why They Don't Run With the Land:

- (i) Inalienability: “such covenants would tend to render land inalienable”¹
- (ii) Notice of Positive Obligation: “Persons dealing subsequently with the land would have great difficulty in ascertaining the existence of such covenants, because they do not normally have a physical manifestation.”²
- (iii) Privity of Contract: “...the Courts of common law would not enforce any covenant except by and against the parties to the contract....To enforce a positive covenant would mean the Courts of Equity would be undoing the common law concept of privity of contract.”³
- (iv) Supervision Required: “...because a positive covenant involves the expenditure of money, the Courts refuse to be involved in enforcing positive obligations. The Courts refuse to impose mandatory injunctions involving supervising positive acts.”⁴
- (v) Legislature Free to Change Rules: “It appears to be equally undisputed that the rule at times causes inconvenience, that its application in some cases may even result in unfairness, and that the present state of the law should be modified to meet the needs of modern conveyancing. However, it is my view that the call for reform is not one for the courts to answer but the Legislature.”⁵

¹ *Amberwood* at para 37 referencing *Keppell v. Bailey* (1834), 39 E.R. 1042, 2 My. & K. 517 (Eng. Ch. Div.).

² *Ibid.*

³ Craig Carter, “Positive Covenants” Ontario Bar Association Continuing Legal Education Presentation Dec 8, 2009 at tab 7, p. 12.

⁴ *Ibid.*

⁵ *Amberwood* at para 17.

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- (d) The [Decommissioned] Doctrine of Benefit and Burden – *Halsall v. Brizell* [1957] 1 All E.R. 371, [1957 Ch. 169.:
- (i) Basic Rule: “A person who claims the benefit of a deed must also take it subject to the burdens.”⁶
 - (ii) No longer a viable option as a result of the *Amberwood* decision:
 - (A) Since the rule does not require a connection between the benefit and the burden, its effect may be to negate totally or swallow the rule for which is meant simply to be an exception.
 - (B) “The adoption of this doctrine as a recognized exception to the to the rule in the common law of this province, in much the same way as the abolition of the rule itself, would have complex, far-reaching and uncertain ramifications that cannot be adequately addressed on a case by case basis.”⁷
 - (iii) Dissent had some interesting arguments, though: MacPherson J.A., in dissent (*Amberwood*) – 5 Elements for the “pure benefit and bargain exception” that would make a positive obligation run with the land:
 - (A) “The assignee of a positive covenant must have notice of the burden
 - (B) There must be an accompanying benefit
 - (C) There must be a qualitative threshold in the benefit and burden analysis
 - (D) There need not be a direct linkage between the benefit and the burden
 - (E) As a fundamental component, the assignee must be able to exercise a choice about assuming the benefits and burdens”⁸
- (e) Creating/Enforcing Positive Covenants in an *Amberwood* World:
- (i) The [Ideal] Situation of Privity of Contract:
 - (A) Requirements for Enforceability: consideration, must not be void for public policy grounds, conforms with *Perpetuities Act*, and it must not be *ultra vires*.

⁶ *Amberwood* at para 14 referencing *Halsall v. Brizell* (1956), [1957] 1 All E.R. 371 (Eng. Ch. Div.)

⁷ *Amberwood* at para 19.

⁸ Paul M. Perell, “A Commentary on *Amberwood Investments Ltd. v. Durham Condominium Corporation No. 123*”, 50 R.P.R. (3d) 52, at p. 6.

- (B) Remedies for Breach: specific performance, damages, mandatory injunctions and rescission.
- (ii) Conditional Grant:
 - (A) Mechanism: The grant of fee simple estate subject to a condition subsequent, which is made subject to a right of re-entry if the condition is broken.
 - (B) Operation: A right has been conferred to which a burden is attached, such that one cannot take the benefit without also accepting a connected obligation.
 - (C) Judicial Endorsement: In *Amberwood*, Charron J.A. recognized that if a grant is framed to be conditional upon the continuing performance of a positive obligation, that obligation may be enforceable “not because it would run with the land, but because the condition would serve to limit the scope of the grant itself.”
- (iii) Common Element Condominium Corporation:
 - (A) Setup: a type of condominium corporation authorized under the *Condominium Act*, 1998, S.O. 1998, c.19 that contains common elements, but no units. Parcels of land are allocated or “tied” to the CECC and these parcels are called “parcels of tied land” (POTL)⁹
 - (B) Holding Unit Owners Responsible: The owner of the POTLs are responsible for common expenses related to the CECC in a manner similar to the way regular condominium unit owners are required to pay common area expenses¹⁰
 - (C) Remedies for Default: Section 85(1) of the *Condominium Act*, 1998, S.O. 1998, c.19 – Lien Upon Default: “If an owner defaults in the obligation to contribute to the common expenses, the corporation has a lien against the owner’s unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.”
 - (D) *York Region Vacant Land Condominium Corp. No 968 v. Shickedanz Bros. Ltd.* (2006), 215 O.A.C. 158. (Ont. C.A.): Condominium corporations are not subject to a commercial

⁹ Jeffrey Lem, Annotation to *York Region Vacant Land Condominium Corp. No 968 v. Shickedanz Bros. Ltd.* (2006), 215 O.A.C. 158. (Ont. C.A.).

¹⁰ *Ibid.*

reasonableness test when developing common element expense formulas. CECC declarations are not subject to after-the-fact judicial review to ensure want of oppression or high prejudice to other POTL owners.¹¹

(f) Rentcharge:

- (A) A rentcharge is a periodic payment annexed to a freehold
- (B) It is incorporeal hereditament and is enforceable by the rentcharge owner against the freeholder currently in possession (termed the *terre tenant*)¹²
- (C) A rentcharge will bind subsequent purchasers of the land even though it imposes a positive obligation and despite the absence of privity of contract or estate
- (D) The amount of that obligation can be variable, so long as it is capable of being ascertained
- (E) Example: a rentcharge based on a percentage of “rateable value of the property” from time to time is treated as being sufficiently certain.
- (F) A failure to pay gives rise to an action in debt for the monies owing, and a right to levy distress. A right of distress is necessary to create a rentcharge – at common law – where there is no right of distress, the interest is a rent seck (or dry rent).
- (G) Developing a Rentcharge:
 - (I) Notice: although equity will recognize and give effect to unregistered rentcharges on lands purchase by individuals who take with notice,¹³ it is best to register the rentcharge on title to give continuing notice to future owners.
 - (II) Crafting the Grant:
 - (i) Specifically use the term “rentcharge”
 - (ii) Set out whether the rentcharge is nominal and/or variable
 - (iii) Include a power of distress

¹¹ *Ibid.*

¹² Bruce Ziff, “A Property Law Reader: Cases, Questions and Commentary”. 2nd ed. (Toronto: Thomson Carswell, 2008) at 931.

¹³ *Greaves v. Tofield* (1880), 14 Ch. D. 563 (Eng. C.A.).

- (iv) Include a power of entry
- (III) Example of a Variable Rentcharge Grant: "To hold unto the Purchaser in fee simple, reserving out of the premises to the Vendor in fee simple a perpetual yearly rentcharge for ever after issuing and payable out of the Transferable Areas of an amount equal to the Service Expenditure from time to time incurred by the Company and if the rentcharge obligations are not met, the Vendor may at any time enter into and upon the premises and execute and do such works, acts and things thereon as shall be necessary or proper...and may remain in the possession or receipt of the rents and profits of the premises until thereby or otherwise all sums of money expended by the Vendor or the persons deriving title under him in or about such works, acts and things as aforesaid, together with all costs and expenses occasioned by the exercise of this power, shall be fully paid and satisfied."¹⁴
- (H) "In England, the rentcharge is used in another way to enforce positive obligations...this technique involves attaching a right of entry to the rentcharge, so as to allow the holder of the charge to enter onto the servient lands in the event of a failure to perform whatever positive covenants are associated with that land. The right of entry can include the power to undertake the work required under the covenant, and charge the costs against the land."¹⁵
- (I) Proceed with Caution:
 - (I) No case in Canada explicitly adopts rentcharges.
 - (II) Canada has adopted rentcharges by proxy – Canadian courts have adopted the *Austerberry* decision (which endorses rentcharges) through *Parkinson v. Reid* [1966] S.C.R. 162 (S.C.C.).
- (J) Endorsement of Rentcharges by Lindley L.J. in *Austerberry v. Corp. of Oldham* (1885), 29 Ch. D. 750 (C.A.): "If the parties had intended to charge this land for ever, into whosoever hands it came, with the burden of repairing the roads, there are ways and means known to conveyancers by which it could be done with comparative ease; all that would have been necessary would have

¹⁴ *Prideaux's Forms and Precedents in Conveyancing*, 25th ed., vol. 1 (London: Stevens & Sons Limited, 1958) at 720-723 and see also *Orchard Trading Estate Management Ltd. v. Johnson Security Ltd.* (2002), [2002] E.W.J. No. 1356 (Eng. C.A.), at para 15.

¹⁵ Bruce Ziff, "A Property Law Reader: Cases, Questions and Commentary". 2nd ed. (Toronto: Thomson Carswell, 2008) at 931.

been to create a rent-charge and charge it on the rolls, and the thing would have been done.”

(K) Weaknesses¹⁶:

- (I) Difficulties in enforcing the performance of positive obligations
- (II) Overcoming the Weakness: The rentcharge can be set at the amount required to pay for maintenance services, or the rentcharge can be a nominal amount whereby failure to perform the positive obligation allows the rentcharge owner to enter the premises, perform the obligation, and recover the costs of doing so.
- (III) The use of rentcharges annexed to a right of entry has not been subjected to judicial scrutiny
- (IV) Counterpoint – Rentcharges have been Time-Tested: (1) the very fact that a tool that has been “known to conveyancers” to be in existence for well over a hundred years has not been before the courts is arguably evidence of its usefulness, and (2), it has often been mentioned in many English judgments without being abolished.

(g) Statutory Exceptions to the Rule that Positive Covenants Cannot Run with the Land – examples:

(i) *Conservation Land Act*, R.S.O. 1990 c. C.28:

- (A) Subsection 3(2)(a): Provides that the owner of land can grant a covenant to a conservation body “for the conservation, maintenance, restoration or enhancement of all or a portion of the land or the wildlife on the land;”
- (B) Subsection 3(4): “The easement or covenant is valid whether or not the conservation body or assignee owns appurtenant land or land capable of being accommodated or benefited by the easement or covenant and regardless of whether the easement or covenant is positive or negative in nature.”

(ii) *Ontario Heritage Act*, R.S.O. 1990 c. O.18:

- (A) “Allows the Ontario Heritage Foundation to enter into agreements, covenants, and easements with owners of interests in land for the conservation, protection, and preservation of the heritage of Ontario.”¹⁷

¹⁶ Melodie Hope, “Rent Charges in Canada: Enforcing Positive Covenants”, 25 R.P.R. (4th) 163 at p. 12.

¹⁷ Bruce Ziff, “A Property Law Reader: Cases, Questions and Commentary”. 2nd ed. (Toronto: Thomson

- (B) The covenants may be positive or negative, and may exist without a dominant tenement and the class of potential assignees of the benefit is unlimited – the benefit may be transferred to anyone.¹⁸
- (iii) *Agricultural Research Institute of Ontario Act*, R.S.O. 1990 c. A.13:

“An easement or covenant registered against real property...runs with the real property and such easement or covenant, whether positive or negative in nature, may be enforced by the Research Institute against the owner or subsequent owners of the real property, even if it owns no appurtenant land or real property that would be accommodated or benefited by the easement or covenant.”
- (h) Chain of Covenants:
 - (i) Charron J., in *Amberwood*, noted: “The simplest and most obvious way of avoiding the rule [against positive covenants] altogether is to use a chain of covenants so as to maintain privity of contract.”
 - (ii) Forging the Chain: Where a party purchasing property agrees to undertake certain positive obligations, that party may also promise to:
 - (A) Remain liable for breaches even when these occur after the land is sold by the original covenantor; and
 - (B) Extract similar promises from any party who later acquires the property
 - (C) Each subsequent owner is thus motivated to abide by the terms and to extend them to the next owner¹⁹
 - (iii) So long as each party in the chain can maintain an action against its immediate promisee, ultimate liability can reach the current owner of the burdened land by means of this technique
 - (iv) The Weakest Link: This method becomes problematic when one of the “links” in the chain of covenants breaks (i.e. as a result of death or insolvency). This is a significant weakness in the context of land development where insolvency is a constant threat.²⁰

Carswell, 2008) at 906.

¹⁸ *Ibid.*

¹⁹ Bruce Ziff, “Restrictive Covenants: The Basic Ingredients” in *Real Property Law: Conquering the Complexities* (Toronto, Irwin Law, 2003) at p. 313.

²⁰ Melodie Hope, “Rent Charges in Canada: Enforcing Positive Covenants”, 25 R.P.R. (4th) 163 at p. 3.

2. Elements of Reciprocal Agreements

(a) The basics:

- (i) Identify the cost-shared facilities/works
- (ii) Identify cost-sharing proportions / methodology (e.g. share costs on usage basis, square footage basis etc)
- (iii) Identify commencement of obligations / payments of respective parties
- (iv) Identify who owns/controls the shared facilities
- (v) Identify who performs works / carries out tasks
- (vi) Identify access rights that each party has over another party's lands
- (i) Identify standards of repair, reconstruction, maintenance and operation re: shared facilities, structures and works
- (ii) Identify rules/prohibitions pertaining to use of shared facilities / enjoyment of access rights
- (iii) Create method for setting/creating budget related to cost-shared facilities/works
- (iv) Self-help remedies - allow an innocent party to perform tasks of a defaulting party and allow for charging of defaulting party's property if work is performed and payment is outstanding
- (v) Ensure deletion of construction liens / encumbrances registered upon an innocent party's lands is addressed

(b) Assumption / Acknowledgement of Reciprocal Agreement

- (i) Require transferees to assume obligations, covenants etc of the transferors
- (ii) Require mortgagees to acknowledge and be bound by obligations, covenants etc of mortgagors if mortgagees enforce their security, take possession, appoint receiver/manager etc.
- (iii) Consider appending form of assumption agreement to the reciprocal agreement

(c) Delegation of responsibilities to committee

- (i) Consider delegating certain responsibilities re: operation, maintenance and repair of shared facilities and performance of work etc. to a committee composed of representatives from various parties

- (ii) Identify various issues such as quorum, decision making process
- (d) Dispute Resolution
 - (i) Identify dispute resolution mechanisms, timing related to same (e.g. good faith negotiations, mediation, arbitration etc.)
 - (ii) Consider appointing certain professionals (cost consultants, engineers etc.) to be the arbiters of certain disputes/issues
- (e) Partial Releases / Postponements

Create mechanism for providing partial releases / postponements when lands / easements are conveyed to governmental authorities and utilities (road widenings, easements etc)
- (f) Estoppel certificates
 - (i) Identify details regarding issuance of certificates: e.g. time limits, fees, parties that can request certificates, addressees of certificates
 - (ii) Consider 'deeming' provisions whereby reciprocal agreement is deemed to be "in good shape" if a certificate is not provided within a certain time period
 - (iii) Consider "free" certificates for certain requesting parties (especially if the requester is your client)
- (g) Insurance
 - (i) Ensure that insurance consultants are engaged to provide / review /amend insurance provisions to ensure proper coverage
 - (ii) Consider appointment of insurance trustee to collect / disburse insurance proceeds
- (h) Termination
 - (i) Identify method of terminating the agreement (usually not capable of termination other than by consent by all parties / mortgagees)
 - (ii) Address what occurs to outstanding obligations upon termination of agreement (e.g. sums owing)
 - (iii) Identify consequences if a condominium corporation is a party to the agreement and the corporation is terminated in accordance with Act

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- (i) Damage or destruction of shared facilities / components of a site
- (i) Identify whether parties are required to reconstruct / repair their respective structures. Consider adding “damage thresholds” whereby parties may / may not be required to reconstruct / repair their respective structures
 - (ii) If reconstruction / repair is carried out, address the standards / timing of same, relocation / realignment of easements and access rights, suspension of payment of shared costs etc.
 - (iii) If reconstruction / repair is NOT carried out, address the relocation / realignment of easements and access rights, suspension of payment of shared costs etc.
- (j) Flexibility
- (i) Certain cost-shared facilities or works may be overlooked at the drafting stage or may not be identifiable at the drafting stage (e.g. because certain structures may not yet be constructed). Accordingly, insert language that allows parties to add / modify cost-shared items in the future
 - (ii) Similarly, certain necessary easements and access rights may be overlooked at the drafting stage or may not be identifiable at the drafting stage (e.g. because certain structures may not yet be constructed). Accordingly, insert language that allows parties to add / modify / relocate easements and access rights items in the future
 - (iii) The cost-sharing proportions / methodology may need to be updated / modified in the future. Consider inserting provisions allowing the revisiting of the cost-sharing proportions / methodology every few years.
 - (iv) If cost-sharing payments are based on the payment of certain fixed fees, consider inserting CPI increase (or similar) provisions

RESCINDING A CONDOMINIUM PURCHASE AGREEMENT

Originally presented at the
Law Society of Upper Canada on November 22, 2011



1. Rescission under Section 73 of the *Condominium Act, 1998* (the "Act"):

(a) Statutory rescission right as per Section 73(1):

- (i) A purchaser who receives a disclosure statement under Section 72(1) of the Act may rescind the purchase agreement in accordance with Section 73 of the Act
- (ii) Rescission right applies to all condominium purchase agreements whether commercial, residential etc.
- (iii) Rescission right is at an end when purchaser accepts a deed to the purchased unit
- (iv) Declarant is required to deliver to the purchaser of a unit or proposed unit a copy of the current disclosure statement for the condo of which the unit forms part. The required contents of the disclosure statement are described at Section 72 of the Act, at Form 12 of O. Reg. 48/01 and Section 17 of O. Reg. 48/01
- (v) If a supposed disclosure statement provided to a purchaser does not contain the information required under the Act, the document does not constitute a disclosure statement for the purposes of the Act. Until a proper disclosure statement is made, the right of rescission runs until final closing of the unit occurs
- (vi) A purchaser's equitable right to rescind a purchase agreement is not supplanted/replaced by the statutory right to rescind under the Act

(b) Notice/method of rescission, as per Section 73(2):

- (i) Who may rescind: Purchaser or purchaser's solicitor
- (ii) How: Notice of rescission given in writing to declarant or declarant's solicitor
- (iii) Timing: Notice of rescission must be received within 10 days of the later of (a) the date the purchaser receives the disclosure statement and (b) the date the purchaser received a copy of the purchase agreement executed by the declarant and the purchaser
- (iv) Reasons: Neither purchaser nor its solicitor is required to provide reasons to the declarant for the rescission

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- (c) Refund upon rescission, as per Section 73(3):
- (i) Return of money: If a declarant receives a valid notice of rescission, declarant must return all money received under the purchase agreement and credited towards the purchase price to the purchaser plus interest
 - (ii) Interest – declarant to also pay purchaser interest on the money calculated at the 'prescribed rate' from the date declarant received money until date declarant refunds it – prescribed rate is defined at O.Reg 48/01 Section 19.(3)
 - (iii) Timing of refund – refund must be made "promptly"

2. Rescission for material change under Section 74 of the Act

- (a) Material change, as per Section 74(1) to (4):
- (i) Revised disclosure statement or notice: If there is a material change in the disclosure documents required to be given to a purchaser, the declarant must give a revised disclosure statement or notice of a material change to the purchaser (Section 74(1))
 - (ii) Material change: A change or changes that would lead a reasonable purchaser, on an objective basis, to never have entered into the purchase agreement or to have rescinded the purchase agreement under Section 73 if the disclosure statement had contained the change or changes (Section 74(2))
 - (iii) Statutory exclusions to material change: The most applicable exclusions are changes: in the current budget if the condominium has been registered for more than a year, in the number of units the declarant intends to lease and in the timing of the construction of proposed amenities (Section 74(2))
 - (iv) Content of revised disclosure statement or notice: Revised disclosure statement or notice to clearly identify the changes that declarant reasonably believes are material (Section 74(3))
 - (v) Timing of delivery: Revised disclosure statement or notice to be delivered within a reasonable time after material change occurs and no later than 10 days prior to the delivery of a deed in registerable form to the purchaser (Section 74(4))

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- (b) Application to court re: material change, as per Sections 74(5) and 74(8)
- (i) Purchaser's Application: Purchaser can make application to court to determine whether a change is material within 10 days after receiving a revised disclosure statement or notice under Section 74(1)
- (ii) Declarant's Application: Declarant can only make application to court to determine whether a change is material within 10 days after receiving a notice of rescission by purchaser for material change under Section 74 (as described below)
- (c) Rescission after material change as per Section 74(6):
- (i) Right to rescind purchase agreement if:
- (A) a change or changes within a revised disclosure statement or notice constitute a material change; or
- (B) the purchaser becomes aware of a material change.
- (ii) Timing: Notice of rescission must be received within 10 days of the latest of:
- (A) date the purchaser receives the revised disclosure statement or notice;
- (B) date the purchaser becomes aware of a material change, if a revised disclosure statement or notice is not delivered;
- (C) date the court makes a determination that a change is material pursuant to a purchaser or declarant's application under Sections 74(5) or 74(8).
- (d) Delivery of rescission notice as per Section 74(4)
- The identity of persons that may rescind the purchase agreement and may receive notice and the method of giving the rescission notice are identical to those in Section 73 (save for the timing of the delivery of notice, as discussed immediately above)
- (e) Refund upon rescission, as per Section 74(9)
- The amounts that are refunded to purchasers are identical to those in Section 73 (save for the timing of the delivery of the refund, as discussed immediately below)

RESCINDING A CONDOMINIUM PURCHASE AGREEMENT

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- (f) Timing of refund upon rescission, as per Section 74(10)
 - (i) within 10 days after receipt of notice of rescission, if neither the purchaser nor the declarant has made an application to the court to determine whether a change is material under Sections 74(5) or 74(8); or
 - (ii) within 10 days after a court makes a determination whether a change is material under Sections 74(5) or 74(8).

3. How not to exercise rescission rights under the Act

- (a) The "I swear, I told the sales agent that I rescinded the deal" excuse

Notice of rescission must be in writing.
- (b) The "Unilateral Declaration of Extension" extension

Giving notice given to declarant or declarant's solicitor that the rescission period is automatically extended unless otherwise advised by declarant or its solicitor.
- (c) The "prove that you love me or I'll leave you" request

Purchaser or purchaser's solicitor requests certain amendments to the purchase agreement (which is fine) subject to the condition that if the amendments are not agreed to, the purchase agreement is automatically rescinded.
- (d) The "I'll come back if you say you love me" request (also known as the "back from the dead" purchase agreement)

Purchaser or purchaser's solicitor delivers notice of rescission which states that the purchase agreement will automatically be *un*-rescinded if the vendor agrees to certain amendments to the purchase agreement.
- (e) The "Oh maaaaan, I thought you meant 10 *business days*" excuse

The 10 days to exercise the rescission rights at Section 73 and 74 are calendar days.



1. **WHY ARE LEASES IN A CONDOMINIUM DIFFERENT?**

Negotiating a lease on behalf of either a landlord or a tenant for premises located in a condominium raises many unique issues that do not arise (or are not as important) in usual retail lease negotiations.

2. **DIFFERENT CONDOMINIUM SCENARIOS**

There are a number of condominium scenarios that landlords and tenants may face. The set-up of the condominium needs to be carefully considered in order that the parties can properly determine what rights and obligations should be assigned to each party. Any of the following scenarios could apply:

(a) **Two Condos in One Building: Commercial Condominium plus Residential Condominium**

Tenant is leasing premises (typically) on the ground level of a building which is comprised of a commercial condominium on the ground level and a residential condominium above (either mid-rise or high rise).

The landlord may own all of the units in the commercial condominium and operate such units as a Shopping Centre OR the landlord may only own the unit(s) leased to the tenant.

(b) **One Mixed-Use Condominium with Commercial Units and Residential Units**

Tenant is leasing premises (typically) on the ground level of a multi-use condominium building (commercial on the ground level and residential above).

The landlord may own all of the commercial units and operate them as a Shopping Centre OR the landlord may only own the unit(s) being leased to the tenant.

(c) **Freehold Commercial Area below a Residential Condominium**

Tenant is leasing premises on the ground level of a building which has a residential condominium above it. The landlord (usually also the declarant of the residential condominium) owns all of the commercial area.

(d) **One Commercial Condominium**

Tenant is leasing premises within a commercial complex composed entirely of other commercial units. The uses of the units may sometimes vary, allowing for a range of commercial uses, including retail and office uses.

The landlord may own all of the units within the commercial condominium and operate such as a Shopping Centre OR the landlord may only own the unit(s) being leased to the tenant.



3. CONDOMINIUM DOCUMENTATION

Each condominium is governed by a number of documents:

- **disclosure statement** – provides a detailed description of a proposed condominium, including number and type of units, number of stories, and facilities provided to owners. Given to all those who purchase a unit from a declarant.
- **budget statement** – is a statement for the one-year period immediately following the registration of a condominium and contains a description of the expenses of the condominium and the common expenses payable by owners of units (note that Schedule “D” to the declaration sets out the proportionate share allocated to each unit).
- **declaration** – the declaration is a condominium’s governing document. It describes the units and the common elements, how the units and common elements may be utilized and other matters governing the ‘operation’ of the condominium.
- **rules and regulations** – provides a list of the prohibitions governing the owners and occupants of the units and their invitees.
- **draft condominium plan** – provides a graphical description of the units within the condominium.
- **mutual use agreements** – these agreements govern the mutual use of facilities and services (and the sharing of costs pertaining to same) by multiple entities (for example two condominium corporations or a residential condominium and the owner of freehold commercial lands).

4. ACCESS TO INFORMATION

- Section 83(c) of the *Condominium Act, 1998* (the “Act”), requires the owner who leases a unit (or renews a lease) to provide the tenant with a copy of the declaration, by-laws and rules of the corporation within 30 days of entering into the lease or the renewal.
- Tenants should request a complete set of relevant condominium documentation prior to executing a lease agreement even if they are still in draft form. If the documents are still in draft form, then a covenant should be obtained that the final condominium documents will be delivered to the tenant (tenant should consider negotiating a termination right if the final documents contain any changes which will detrimentally affect the tenant and the right to be reimbursed by the landlord for all costs incurred with respect to the lease as a result of such termination).
- Landlord should include an acknowledgement from tenant that it has reviewed all the condominium documentation and that it is satisfied with same and agrees to be bound by them.
- The lease should contain a covenant that all further documentation or notices issued by the declarant or the condominium corporation be delivered to the tenant, in particular any amendments to the condominium documents. The landlord may only



want to agree to provide documents or notices that pertain to the units being leased by the tenant.

- If the condominium is not yet constructed, tenant should obtain covenant from the landlord (usually the declarant) that the unit's dimensions will not be substantially altered prior to occupancy; tenant should ask for right to terminate lease in case of changes.

5. **SPECIFIC LEASE ISSUES TO CONSIDER WHEN NEGOTIATING LEASES IN A
CONDOMINIUM**

(a) **Common Element Expenses v. Operating Costs**

- (i) The landlord, as the owner of the condominium units comprising the premises, will be required to pay "common element expenses" pursuant to the condominium documents. From a landlord perspective, it is best for the lease to provide that the tenant is required to reimburse the landlord for 100% of these costs. From a tenant perspective, reserve fund contributions and special assessments should not be passed through to the tenant. A tenant may also want to exclude certain capital expenses of the condominium and costs in connection with removal or remediation of hazardous substances (but practically speaking, it may be difficult for the landlord to exclude these types of expenses from common expenses).
- (ii) The landlord may also try to charge "operating costs" to the tenant (with "common element expenses" usually being an item of "operating costs"). From a tenant perspective, consider whether this is appropriate given the set-up of the condominium and whether the landlord or the condominium corporation are responsible for maintaining and repairing the common areas.
- (iii) Where the landlord owns all of the commercial units in the condominium and it is operating them as a Shopping Centre, it is generally fair for the landlord to charge "operating costs" to the tenant (but, as always, these provisions should be carefully reviewed by a tenant). The tenant should be careful to ensure that there is not a second layer of costs being charged to it, particularly where the landlord only owns one unit.
- (iv) Consider whether an administration fee is appropriate, and if it is, whether it should only apply to operating costs charged by the landlord (excluding common element fees).
- (v) Regardless of the set-up, the landlord may maintain some liability, rental income or property insurance. Consider whether these costs should be paid by the tenant.
- (vi) Tenant should include a covenant on the landlord's part to deliver copies of all condominium documents related to common expenses, including annual budgets and audited financial statements. Landlords should be



mindful when granting audit/review rights as much of this information may be under the condominium corporation's control, not the landlord's control.

- (vii) Pursuant to Section 55 of the Act, the condominium corporation is required to permit all owners or its agent to examine the records of the corporation (including financial records).

(b) Maintenance and repair of Common Areas/Elements

- (i) Both parties need to carefully review the definitions of "common elements" (of the condominium) and "common areas" of the commercial area, if any.
- (ii) Landlords need to ensure that they have not covenanted under the lease to do things which are the condominium corporation's responsibility. For example, common element areas of the condominium are the responsibility of the condominium corporation so the landlord's lease should not include an covenant on the landlord's part to maintain and repair these areas. Where the landlord owns the entire commercial area, then the usual covenants would remain with respect to the "common areas" of the commercial portion, but an acknowledgement should be obtained from the tenant that the landlord is not responsible for the "common element" areas of the condominium.
- (iii) The tenant should insist on a covenant from the landlord to enforce its rights under the Act and the condominium documents as an owner to ensure the condominium corporation complies with its obligations.
- (iv) The tenant may also want a covenant from the landlord that if its tenancy is being affected by failure of the condominium corporation to comply with its obligations under the Act or the condominium documents or the conduct of the condominium corporation is or threatens to be oppressive or unfairly prejudicial to the tenant or unfairly disregards the interests of the tenant, then the landlord will exercise those rights afforded to it as an owner under the Act to enforce compliance by the condominium corporation with its obligations on behalf of the tenant. The tenant may also want an agreement that if the landlord fails to comply with the above provisions that it is deemed to assign to the tenant such rights to enforce compliance.
- (v) Consider whether there are any portions of the common elements that the condominium corporation is not responsible to maintain and repair (e.g. exclusive use common elements). If there are, who will maintain and repair these areas?

(c) Use Clauses and Exclusivities

- (i) Landlords need to be mindful of the use restrictions set out in the condominium documents and ensure that the use clause negotiated does



not conflict with the condominium documents.

- (ii) Tenants need to consider how to protect any exclusive granted to it. Consider the following options:
 - (A) Amend declaration to include the exclusive.
 - (B) Register a notice of lease on all of the commercial units.
 - (C) Register a notice of lease on the premises and a notice of restrictive covenant on the remaining commercial units.
- (iii) If the landlord only owns the premises, then it will not be able to restrict other commercial units from breaching the exclusive.

(d) **Signage and Antennas**

- (i) Tenant to ensure condominium documents allow for contemplated signage and for communication devices such as satellite dishes, antennas or other communication devices.
- (ii) Tenant to determine who controls/owns the portions of the condominium in question (i.e. part of unit or of common elements) and obtain covenants accordingly.
- (iii) Obtain covenant from landlord (if same as declarant) not to obstruct signage during completion of construction or otherwise.

(e) **Damage and Destruction**

- (i) Note that damage and destruction of a condominium is addressed under the Act. For example, if “substantial damage” occurs to the condominium (damage for which the cost of repair is 25 % or more of the replacement cost of the buildings and structures), a vote occurs to determine whether to repair or terminate the condominium (upon 80% of units voting to terminate).
- (ii) Tenant may want to obtain covenant from landlord to exercise its rights as an owner to get the condominium corporation to repair the condominium, not to terminate it.
- (iii) If the condominium is terminated, tenant should request that the landlord pay an amount equal to the unamortized cost of its improvements.
- (iv) If the condominium is being repaired, the tenant should seek an abatement for the period from the date of the damage until it can re-open.

(f) **Parking**

- (i) Tenant to ensure sufficient parking is provided for in the condominium documents and the lease and the ‘type’ of parking (unitized or exclusive use parking spaces vs ‘open’ common element parking).



- (ii) Tenant to ensure that its use can be accommodated from a parking standpoint (i.e. that it does not trigger a need for a minor variance)

(g) **Enforcement Rights**

- (i) The condominium corporation has a lien against the unit(s) comprising the premises if the owner/landlord defaults in its obligations to pay common expenses.
- (ii) Notice of the condominium corporation's lien is given to any encumbrancer who is registered against title of the unit affected by the lien.
- (iii) Pursuant to Section 87(1) of the Act, if the landlord/owner defaults in its obligation to pay common expenses, the condominium corporation may, by notice to the tenant, require that the tenant pay to the corporation the lesser of the amount of the default and the rent due under the lease.

(h) **Voting and Proxy Rights**

- (i) Tenants should obtain covenant from landlord to advise it of any upcoming owners meetings and any votes by owners that affect the tenant.
- (ii) Tenants should obtain a covenant from the landlord whereby the landlord agrees not to exercise its voting rights in a manner that adversely affects the tenant.
- (iii) Tenants should request that the landlord appoint the tenant as a proxy to exercise its voting rights with regards to the tenant's unit(s).

(i) **Condominium Corporation Approvals**

- (i) Tenant to review condominium documents to determine what approvals are required from the condominium corporation or the declarant (e.g. for signage, alterations to common areas, alterations to leased premises).
- (ii) Tenant should obtain covenant from Landlord to assist Tenant in obtaining approvals from condominium corporation.
- (iii) Tenant to be mindful that Condominium may have specific design criteria or that a third-party may review and approve all alterations (i.e. architect, design consultant).

6. PROTECTING YOURSELF

(a) **Landlord Perspective**

- (i) Obtain a covenant from the tenant to comply with the Act and the condominium documents and an acknowledgement that any conflict between the condominium documents and the lease will be resolved in



favour of the condominium documents.

- (ii) Obtain an acknowledgement from the tenant of those responsibilities that are the condominium corporation's responsibility and an acknowledgement that the tenant cannot look to the landlord to perform such obligations.
- (iii) Acknowledgement from tenant that the approval of the condominium corporation will be obtained where required under the condominium documents.

(b) Tenant Perspective

- (i) Obtain a covenant from the landlord to comply with the Act and the condominium documents and an acknowledgement that as between the landlord and the tenant, any conflict will be resolved in favour of the lease.
- (ii) Obtain a covenant from the landlord to enforce its rights as an owner in a manner that ensures the condominium corporation complies with its obligations and that it will exercise any voting rights in a manner which will not result in any detrimental interference with the tenant's use of the premises and its business operations from the premises.
- (iii) Obtain a covenant from the landlord that it will use its best efforts to assist the tenant in obtaining any consents that are required by the condominium corporation.
- (iv) Carefully review the condominium documents to assess the risks and obligations. Consider whether any of the following should be negotiated:
 - (A) additional indemnities from the landlord;
 - (B) representations and warranties from the landlord;
 - (C) whether additional rent should be fixed for the first year with annual caps on the increase; and
 - (D) protection of special/personal rights.