



# The Law Society of Manitoba

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## REAL ESTATE

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### **Chapter 5** Condominiums

November 2019

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# A. CONDOMINIUMS

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## 1. What is a Condominium?

The term “condominium” refers to a system of real property co-ownership whereby some portions of the property are owned exclusively by individual unit owners while others are owned in common by all unit owners. This type of ownership dates back to ancient times, although the Manitoba condominium is a statutory creature of modern vintage: *The Condominium Act*, C.C.S.M., c. C170 was proclaimed into effect on February 1, 2015, finally replacing the original condominium legislation initially enacted on May 25, 1968.

## 2. The Three Basic Elements of a Condominium

*The Condominium Act* identifies three of the basic elements of condominium ownership which distinguish it from other forms of landholding, namely:

- (a) the unit;
- (b) the common elements; and
- (c) the role of the condominium corporation.

### a) The Unit

*Subsection 1(1)* of *The Condominium Act* defines the “unit” as a part of the land designated as a unit on a plan and includes the space enclosed by its boundaries and all the land, buildings, structures and fixtures within that space. As indicated, reference must be made to the condominium plan, as registered in the applicable Land Titles Office, for precise identification of the boundaries of the unit. In so-called conventional condominiums, the unit boundaries will be defined in the plan by reference to the walls, floors and ceilings of the building, while in bare land condominiums, the unit boundaries are shown in the plan as land boundaries without any buildings.

The unit is both the space within the boundaries specified and the material parts within that space, at the time of registration of the plan. For your client’s purposes, the unit consists of the living quarters within which they have exclusive possession and control. As stated in *section 34* of *The Condominium Act*, each unit owner is entitled to exclusive ownership and use of their unit, subject to of *The Condominium Act* and the declaration and by-laws of the condominium corporation.

### b) Common Elements

“Common elements” are defined in *The Condominium Act*, quite simply, as all of the property described in the condominium plan other than the units.

Typically, the common elements comprise all of the “bricks and mortar” of the building other than the improvements within the units, including:

- the foundation, roof, exterior walls and structure of the building;
- all interior hallways, staircases and elevators of the building;
- all parking areas (unless the parking stalls have been designated as part of the units);
- all outdoor yards, walkways, gardens and landscaped areas;
- the caretaker’s unit (although this may be registered as a unit);
- all common recreation facilities;
- the front lobby and all entrances to and exits from the building;
- all parts of the plumbing, heating, ventilating, air conditioning or other utility systems not contained within the units.

In the case of bare land condominiums, the common elements will be typically limited to common roadways, landscaped areas and common recreation facilities.

*The Condominium Act* provides that, subject to that legislation and the declaration and by-laws of the condominium corporation, each unit owner is entitled to make reasonable use of the common elements [section 40 of *The Condominium Act*]. Legal ownership of the common elements is described in section 35 of *The Condominium Act*; the owners are tenants in common of the common elements and each of them owns an undivided share in the common elements in the proportions specified in the declaration. This concept is reflected in the wording of the legal description contained in every unit title, which reads as follows:

Unit \_\_\_\_, Condominium Plan \_\_\_\_, \_LTO together with an undivided \_\_\_\_% interest in the common elements as appurtenant thereto. Subject to all entries set out on the title of \_\_\_\_\_ Condominium Corporation No. \_\_\_\_\_.

*The Condominium Act* does contemplate the specification of certain parts of the common elements which are restricted for the use of fewer than all of the unit owners if this is provided for in the declaration. “Exclusive common elements” might include such items as the following:

- mailboxes in a central mailbox area;
- lockers or storage compartments in a basement or separate storage area;
- parking stalls;
- all doors and windows set in the walls of the unit;
- any patio or balcony adjacent to the unit.

Current practice in condominium plan preparation and registration requires that certain exclusive use common elements, such as balconies, equipment rooms and other areas that are geographically adjacent to a unit and useable only in conjunction with that unit, must be shown and numbered on the plan in a manner that is similar to the numbering of units and this will also be reflected in the declaration. This practice is optional in the case of other exclusive use common elements like storage lockers or parking spaces. Less commonly, parking spaces and other areas that are commonly included in the common elements may be shown on the plan as units and therefore will be separately titled. As there are variations in practice, care should be taken to examine the declaration and plan for each condominium corporation.

### **c) The Condominium Corporation**

The condominium corporation is responsible to manage the property of the owners and any assets of the corporation and is also responsible for the control, management and administration of the common elements.

The duties of the condominium corporation normally include the following:

- to collect and receive all contributions towards the common expenses paid by the unit owners and to deposit them in a separate bank account;
- to provide those services set out in the declaration;
- to perform the maintenance and repair functions as set out in the declaration;
- to take out and maintain policies of insurance covering the project; and
- to maintain and pay for staff that may be required to carry out the condominium corporation's duties in the management, security and maintenance of the property.

The members of the condominium corporation are the owners of the units from time to time and, as such, share in the assets of the condominium corporation in the proportion provided in the declaration. They have voting rights in the corporation in the proportions provided for in the declaration. The proportions in which the owners own the common elements and in which they share in the common expenses are generally the same and are often based on the size of the unit, but this is not universally the case, and the proportions in which the owners have voting rights may also not correspond with the other proportions. Each declaration must be carefully reviewed to determine these percentages.

The members elect the directors of the condominium corporation, who essentially have the same responsibilities as any director of a company. However, [The Corporations Act](#), C.C.S.M. c. C225 does not apply to condominium corporations.

The condominium corporation will usually hold an annual meeting at which the unit owners will elect the directors and appoint auditors for the ensuing year. The

directors will appoint the officers of the condominium corporation and the directors and officers will meet from time to time during the year to make whatever decisions are necessary to carry out the affairs of the corporation.

It is not unusual for the directors to enter into a contract with a professional management company to manage the project to lend expertise to the decisions that must be made and to carry out the necessary work.

### **3. Creating a Condominium Corporation**

*The Condominium Act* provides that a condominium corporation is created upon the registration of a declaration, plan and initial by-law in the land titles office in which the land is situated.

When the declaration, plan and initial by-law are registered, the land titles office will issue a certificate of title in the name of the condominium corporation that shall state that the certificate of title is issued according to *The Condominium Act*. The land covered in this title will correspond with the legal description of the land immediately before registration. The land titles office will then issue individual condominium unit certificates of title in the name of the declarant (the owner of the land immediately before registration) for each unit created as a result of the declaration and plan. This will set forth the share in the common property, share in the common expenses and share in the voting rights appurtenant to the unit and that it is subject to easements, claims or other instruments registered against either the common property or the unit title.

Thus, if an owner mortgages their title, the mortgage will also cover the owner's interest in the common property. As indicated, the common elements are owned by all of the unit owners and one of the items that the declaration specifies is what percentage of the common elements belong to which particular unit. The percentage of the common elements divided amongst the unit owners must total exactly 100%.

These percentages may vary according to the size or location of the units. For example, in a 100 unit project with fifty 2,000 square foot units and fifty 1,000 square foot units, each 2,000 square foot unit would likely have twice the percentage of the common elements than each of the 1,000 square foot units. While a unit's percentage ownership of the common elements and share of the common expenses is usually based on the area of the unit, this is not required by *The Condominium Act* and different methods of allocation are permitted.

#### **a) The Declaration**

The declaration registered in the land titles office may in its simplest form require only sixteen items, including inter alia:

- (a) the legal description of the land that is the subject of the declaration and, if available, the address of the land;

- (b) a statement of intention that the land and the interests appurtenant to the land as described in the declaration and shown on the plan are to be governed by the Act;
- (c) the total number of units to be created upon registration;
- (d) the types of units and the approximate area of each type of unit and, for each type of unit, the number of units, the proposed use and any restrictions or qualifications that will apply;
- (e) a description of the common elements to be created upon registration, their proposed uses and any restrictions or qualifications that will apply to them;
- (f) the number of buildings and structures to be included in the property and, for each building, its dimensions, number of levels and number of units;
- (g) a statement of the proportions in which the unit owners are to share in the common elements, expressed in percentages allocated to each unit;
- (h) a statement of the proportions in which the unit owners are to contribute to the common expenses, expressed in percentages allocated to each unit;
- (i) a statement of the proportions in which the unit owners are required to contribute to the reserve fund, expressed in percentages allocated to each unit;
- (j) a description of the common expenses of the corporation;
- (k) a description of any common elements or parts of them that are to be used by owners of one or more designated units and not by all owners;
- (l) a statement of the proportions in which the unit owners are to have voting rights in the corporation, expressed in percentages allocated to each unit;
- (m) if the declarant intends to retain one or more units, a statement of its intention, the number of units it intends to retain and the percentage of voting rights attached to those units;
- (n) a description of a standard unit for each type of unit (other than a bare land unit in respect of which the corporation is not required to obtain and maintain insurance);
- (o) an address for giving notices and other documents to the corporation;
- (p) any additional information required by the regulations. Currently, in the case of a condominium on leasehold land, the regulations impose an obligation to disclose that it is a leasehold condominium corporation and certain information about the rent payable under the underlying land lease.

In addition to the basic items that must be contained in any declaration, you will find that a declaration normally encompasses some thirty pages because it contains a definition of the exclusive common elements and items dealing with the use of the common elements, the maintenance of the common elements, insurance and damage to the units or the common elements and the procedure when damage occurs, who is responsible for the damage and the method by which the insurance proceeds will be paid in the event of damage. A declaration may alter the maintenance and repair obligations for both the units and the common elements from the "default" position set out in *The Condominium Act* (which makes the condominium corporation responsible for maintaining and repairing the common elements and the unit owners responsible for maintaining and repairing their units). It is, in fact, quite common for the declaration to make unit owners responsible for part of the common elements and the corporation responsible for parts of the units.

The Act provides that all matters contained in a declaration, except the address for service, may be amended only with the written consent of the persons holding 80%, or such greater percentage as may be specified in the declaration, of the voting rights in the corporation.

For a sample declaration, see the precedents.

## **b) The Plan**

The condominium plan of the property may be quite simple, with a depiction of various parcels of land showing no buildings at all (bare land condominiums). The condominium plan may become extremely complicated if it is a high rise apartment building where it is necessary to prepare diagrams showing the shape and dimensions of each unit and the location of each unit with the other units in the building. Except in the case of bare land condominiums, architectural plans showing the structure of the buildings must also be included.

These plans must be prepared by a qualified Manitoba land surveyor and a qualified Manitoba architect and may take up to three or four months to prepare and be examined and approved for registration. As a result, if you are acting for an owner planning to convert an existing building to a condominium, or if you are constructing a new condominium, you must ensure an adequate time frame for the preparation of the plans.

## **c) By-Laws**

In addition to the declaration and the plan, *The Condominium Act* requires that the declarant submit the condominium corporation's initial by-law for registration (*s. 10*).

By-laws will usually provide for rules relating to the holding of meetings, the operation and election of the board of directors, and other procedural matters. By-laws may also sometimes provide for the following:



- the governing of the use of the units to prevent unreasonable interference with the quiet use and enjoyment of the other units and the common elements) - for example, no unit may be used for anything other than a single-family dwelling or no animals, livestock or fowl may be kept in any unit;
- the governing of the use of the common elements – for example, the sidewalks, walkways and passages shall not be obstructed or used for any purpose other than ingress or egress from the units, or no boats, trailers, snowmobiles or toboggans shall be parked on any part of the common elements except in specific locations provided for same and no parts of the common elements shall be used for the erecting of signs, billboards or notices.

Because the provisions in the by-laws are not as fundamental as those in the declaration, the Act provides that by-laws may be passed or amended by a vote of 75% of the voting rights held by unit owners who are in attendance or represented by proxy at a meeting of unit owners convened for that purpose.

A sample by-law is found in the precedents.

## 4. Basic Differences Between Conveying a House and Conveying a Condo

A lawyer acting on the purchase or sale of a condominium unit is responsible to perform essentially all of the same functions as a lawyer acting on the transaction of a single-family residential dwelling. The lawyer must make certain investigations on behalf of the buyer regarding the title to and condition of the property to ensure that the buyer will obtain what they bargained for under the accepted offer to purchase. The security and other requirements of the mortgage lender must be satisfied. The purchase monies are tendered to the seller's lawyer on the appropriate conditions of trust. Counsel for the seller of a condominium unit, as with any other type of real estate, must arrange for delivery of a registrable transfer of land upon receipt of the adjusted purchase price or the cash to mortgage and sufficient assurances that the balance will, in due course, be paid. Encumbrances on the title that the buyer has not agreed to assume must be paid out and discharged.

While the condominium transaction resembles the basic "house deal" in many respects, there are some fundamental differences to note. Those differences are highlighted in the sections which follow.

### a) Cooling Off Period

*Section 47(1)* of *The Condominium Act* provides that a prospective condominium unit buyer who has signed an agreement to purchase may cancel that agreement at any time within 7 days of signing or receipt of all documents required under *section 51* of *The Condominium Act* or within 7 days of receiving notice of a material change according to *section 52* of the Act (if the seller of the unit becomes aware of a material

change in the transaction before closing, the buyer must be given notice in a prescribed form advising of that change and disclosing a further 7 day period in which the buyer can withdraw) by personally giving the seller (or by registered mail, e-mail or fax) written notice of the cancellation.

## **b) Advising the Buyer on What is Being Purchased**

Most buyers approach the business of home buying with a “fee simple” mentality. As the maxim states, the owner of the soil is presumed to own everything “up to the sky and down to the center of the earth.” When advising the buyer of a condominium unit, it is important to ensure that your client understands the distinctive characteristics of condominium ownership. The legal idiosyncrasies of the condominium system of ownership may translate into significant limitations on your client’s lifestyle and personal habits. Unless this has been specifically removed from the scope of your retainer in an engagement letter, you must ensure that the buyer understands what they have bargained for before the transaction closes.

- (i) Advise your client to read *The Condominium Act*, the declaration and the by-laws of the condominium, and to ask you questions about any matters not understood.

Most declarations and by-laws are in a standard form which is practically impossible to change. Nonetheless, the buyer must have a general understanding of the contents of the declaration and the by-laws, as they will be legally bound to observe and comply with the provisions of those documents upon becoming a unit owner.

- (ii) Review those portions of the declaration and by-laws which are unique to the subject property and the unit, such as:
  - the percentages allocated to the unit in the declaration, as compared to the percentages assigned to the other units. Explain that these are the proportions in which the client:
    - will have an ownership interest in the common elements;
    - will be required to contribute to the expenses of managing, administering, maintaining and repairing the common elements (called the “common expenses”) and the reserve fund required to be maintained by the condominium corporation;
    - will have voting rights at meetings of members of the condominium corporation;
    - will be liable to satisfy judgments against the corporation;

- will be entitled to share in the distribution of the assets of the corporation if and when the condominium is de-registered and the property ceases to be governed by [The Condominium Act](#).
  - any common elements which are exclusively for the use of your client or which are exclusive to other unit owners and are not to be accessible to your client, and the responsibility to maintain and repair the same.
  - any restrictions on the type of use to which the units may be put. Several items relating to use may be located either in the declaration or the by-law and the relevant sections of some of these, including pet ownership and smoking, are highlighted in the disclosure statement required to be given to a buyer at the beginning of the cooling-off period.
  - insurance obligations. While in "conventional condominiums" it is the corporation's responsibility to arrange for property insurance on the basic units, the owners' furniture and other personal property and any improvements or betterments to the unit are for the owners to insure. Also, in the case of a bare land condominium, the declaration may set out that the owners are solely responsible for all insurance.
- (iii) In addition to the restrictions contained in the declaration, [The Condominium Act](#) provides that the Board of Directors may make reasonable rules respecting the use of the common elements [s. 169]. Obtain a copy of any current common element rules, and ensure that your client reviews them. Typical examples of common element rules would include restrictions regarding:
- the operation of motor vehicles on the common elements;
  - whether or not pets (or certain types of pets) may be kept in the units, or allowed on the common elements;
  - the posting of signs or advertising materials on the exterior walls or windows of any unit;
  - the hours of access to the recreational facilities on the common elements, such as pools or tennis courts.

Increasingly, Corporations are adopting no-smoking rules as well.

- (iv) The nature of the parking arrangements is frequently a critical issue to a prospective buyer. The condominium documents (principally, the declaration) should be reviewed carefully to determine exactly what rights and responsibilities your client will have regarding the parking areas.

You will want to confirm, for example, that the parking stall has been properly designated to the seller, that the seller is entitled to assign its right to the parking stall to the buyer, and that the condominium corporation will not be

entitled to re-designate the parking stall to any other person without the consent of your client, the buyer.

If your client intends to lease or license the use of the parking stall to a third party, you will want to ensure that the intended disposition is permitted by the declaration. Some declarations will contain a prohibition against leasing or “selling” the parking stalls to persons other than unit owners.

- (v) Explain to your client the obligation of unit owners to contribute to the common expenses and reserve fund of the condominium corporation.

Common expenses and reserve fund contributions are concepts with which the buyer should be familiar.

Common expenses are the collective costs to the condominium corporation of performing its objects and duties under the declaration and by-laws; they are analogous to the operating costs which are shared amongst the commercial tenants of a shopping centre. Each unit owner is required to pay to the condominium corporation, monthly, their proportionate share of the common expenses, the percentage being as allocated to their unit in the declaration.

While most costs of operating and maintaining the building will be included in the common expenses, the declaration may specify that some charges will be individually levied to the units. For example, it is now common for utilities to be separately metered and billed directly to the unit owners. As indicated above, the declaration may also indicate that the cost of maintaining exclusive common elements (for example, balconies or windows) is to be borne by the unit owners entitled to their use.

*Part 7 of The Condominium Act* describes the obligation of the condominium corporation to establish a fund for the payment of common expenses and to collect from the unit owners their proportionate share of those common expenses. That part also identifies the condominium corporation’s right of lien against any condominium unit for unpaid common expense assessments owing by the unit owner. Such lien rights may be enforced in the same manner as the enforcement of a mortgage under *The Real Property Act*, C.C.S.M. c. R30. Upon proper registration of a notice of lien in compliance with the procedures and timelines laid down in the Act, the lien has priority over all encumbrances. For a sample lien, see the precedents.

Every condominium corporation is required to establish and maintain a reserve fund which is to be used for any major repairs or replacements of the common elements or other assets of the condominium corporation and shall not be used for any other purpose except where the reserve fund study shows that the reserve fund is larger than required and all of the unit owners consent

in writing to such other use [see [s. 143\(4\)](#)]. Each unit owner, including the developer or the declarant under the declaration, is required to contribute to the reserve fund in the proportions and at the times specified in the declaration or by-laws, provided that if the declaration or by-laws do not specify the proportion of these contributions, the unit owner will be required to contribute to the reserve fund in the same proportion as specified in the declaration for contributions to the common expenses.

Every condominium corporation in the province must have commissioned a reserve fund study that meets prescribed standards within three years of coming into existence and then have it updated every five years. A reserve fund study will set out an "ideal balance" for the reserve fund to allow the corporation to fulfill its maintenance and repair obligations as they occur. The board of directors of the condominium corporation must have regard to this ideal balance when setting the budgeted contributions to the reserve fund each year.

Many condominium corporations do not have adequate reserve funds and may be unable to pay for required repairs. In such cases, the condominium corporation may have no choice but to levy a special assessment against the owners; some recent cases have involved assessments of up to \$20,000 per owner, depending on the unit's percentage share. Buyers of condominium units must examine the state of the reserve fund carefully and enquire whether any major repairs are planned.

- (vi) The buyer should appreciate that they may not have the same freedom to renovate the unit as if it were a house. The boundaries of the unit are, in most cases, the inner side of the interior walls. The buyer does not "own" the walls themselves or any area beyond the walls; those materials form part of the common elements. Even in the case of bare land condominiums, there are often significant restrictions on changes that an owner may make to the building constructed on the bare land unit.

Most declarations will stipulate that no unit owner shall make any structural change or alteration to the unit, nor alter any utility installation within or attached to the unit, nor alter, decorate or repair the exterior design of the unit, nor make any change to any part of the common elements, without first obtaining the prior written consent of the directors of the corporation.

- (vii) Property taxes are not included in the common expenses. At some point following registration of the condominium (sometimes a year or more later), the taxing authorities will reassess the condominium property on a unit-by-unit basis. Thereafter, a separate statement and demand for realty taxes will issue to each unit owner. However, if your client is purchasing a unit in a newly-converted condominium, an individual realty tax assessment of the unit may

not yet have issued from the municipality. In such a case, it will be necessary for the parties to adjust based on estimated realty taxes for the period, on the understanding that a further adjustment will be required once the actual taxes are known.

- (viii) *Section 51* of *The Condominium Act* sets out a list of documents and other types of information that the buyer must receive, before or at the time of executing the unit purchase agreement, as a condition of the enforceability of that agreement against the buyer. These conditions vary depending on whether the unit is a new one in a development not yet registered under the Act or a resale unit. In the case of a newly developed unit the conditions are:
- (a) the legal description of the land that is the subject of the declaration and, if available, the address of the land;
  - (b) a statement of intention that the land and the interests appurtenant to the land as described in the declaration and shown on the plan are to be governed by the Act;
  - (c) the total number of units to be created upon registration;
  - (d) the types of units and the approximate area of each type of unit and, for each type of unit, the number of units, the proposed use and any restrictions or qualifications that will apply;
  - (e) a description of the common elements to be created upon registration, their proposed uses and any restrictions or qualifications that will apply to them;
  - (f) the number of buildings and structures to be included in the property and, for each building, its dimensions, number of levels and number of units;
  - (g) a statement of the proportions in which the unit owners are to share in the common elements, expressed in percentages allocated to each unit;
  - (h) a statement of the proportions in which the unit owners are to contribute to the common expenses, expressed in percentages allocated to each unit;
  - (i) a statement of the proportions in which the unit owners are required to contribute to the reserve fund, expressed in percentages allocated to each unit;
  - (j) a description of the common expenses of the corporation;

- (k) a description of any common elements or parts of them that are to be used by owners of one or more designated units and not by all owners;
- (l) a statement of the proportions in which the unit owners are to have voting rights in the corporation, expressed in percentages allocated to each unit;
- (m) if the declarant intends to retain one or more units, a statement of its intention, the number of units it intends to retain and the percentage of voting rights attached to those units;
- (n) a description of a standard unit for each type of unit (other than a bare land unit in respect of which the corporation is not required to obtain and maintain insurance);
- (o) an address for giving notices and other documents to the corporation;
- (p) excerpts from the proposed condominium plan showing the proposed size and location of the unit within the project.

In the case of a resale unit or a new unit where the declaration and plan have already been registered, the documents are as follows:

- (a) a current disclosure statement that is signed by the seller and meets prescribed requirements;
- (b) a disclosure statement that meets prescribed requirements and is signed by or on behalf of the condominium corporation not more than 90 days before the seller gives it to the buyer;
- (c) a copy of the condominium corporation's budget for the current fiscal period, as approved by the board, and a copy of its budget for the ensuing fiscal period, if it has been distributed to the unit owners;
- (d) a copy of the condominium corporation's most recent financial statements, together with the auditor's report on the financial statements if they were audited;
- (e) if the agreement of purchase and sale is entered into before the end of the 12 months referred to in [section 49](#), a copy of the statement of financial projections prepared by the declarant under that section;
- (f) a copy of the condominium corporation's current by-laws and rules, if any, and any proposed by-laws or rules or amendments to them that have been approved by the board but are not yet in effect;
- (g) a copy of any property management agreement currently in effect or to come into effect at a later date;

- (h) a statement containing prescribed information about the cooling-off period and the buyer's right to cancel the agreement within that period;
- (i) a statement containing prescribed information about the buyer's right to cancel the agreement in the event of a material change;
- (j) if the condominium corporation is proposing to participate in an amalgamation, a copy of the meeting notice given to the seller under [subsection 251\(3\)](#);
- (k) a copy of any notice or other document received by the seller about a proposal under [Part 15](#) to withdraw the property or a part of the common elements from governance by this Act, unless the condominium corporation has not received the required level of consent and the time for obtaining that consent has expired;
- (l) a statement containing prescribed information about the giving or withholding of consents if the period for obtaining consents has not expired;
- (m) a copy of any notice given to the seller for any general meeting of unit owners that is to be held after the date of possession for the unit;
- (n) a copy or summary of the reserve fund study if required under this Act or, if that study has been updated, a copy or summary of the most recent update; and
- (o) excerpts of the condominium plan that show the size and location of the unit within the development.

[Section 51\(4\)](#) of *The Condominium Act* requires that the documents be accompanied by a table of contents that indicates which documents are provided and, if any required documents have not been provided, why this is or when they will be provided. The table of contents serves as a convenient checklist of matters which should be investigated and discussed with the purchaser before closing.

## **c) The Offer to Purchase**

### **i. Prescribed Offer**

Just as for a single-family dwelling, [The Real Estate Brokers Act](#), C.C.S.M. c. R20 has prescribed a form of an offer to purchase to be used for completed condominium units. This form must be used where the offer is completed by a realtor in a resale. It is not required where the offer has been prepared by a lawyer and is not appropriate for a new condominium under construction.



The prescribed form includes the following features that distinguish it from the form used for regular residences:

- If there are two or more buyers, they must designate one buyer to be the buyer who receives the disclosure documents (and any notice of a material change between the making of the offer and the closing of the purchase) and who has the right to exercise the rights of cancellation during the cooling-off period.
- Particulars of the unit number and condominium number as in the certificate of title are to be supplied.
- The percentage interest in the common elements as in the certificate of title is to be stated.
- The exclusive common elements included in the purchase price are to be identified.
- The current monthly common expense assessed against the unit is to be identified.
- The Buyer's rights under [section 51](#) of *The Condominium Act* are stated and required to be brought to the buyer's attention and receipt of the documents acknowledged.
- Under paragraph 5, a statement that the tenant of the unit may have the special tenure and first refusal rights provided for tenants of condominiums who were tenants at the time the declaration and plan were registered.
- Paragraph 16 reminds the buyer to obtain a status certificate from the condominium corporation, before closing, if possible.

## **ii. Non-Standard Forms of Offer**

Where a lawyer has prepared the form of offer or where the project is under construction, care should be taken to read all facets of the offer to purchase carefully. The following are particular points to watch for.

- Is the parking space included in the purchase price or extra?
- Are there any restrictions on the use of the unit?
- Can the developer amend the declaration where required?
- Completion of renovations and/or construction.
- Warranties. [Note – a third party warranty would generally be provided as required by the not yet proclaimed [The New Home Warranty Act](#), S.M. 2013, c. 23 (if it is eventually proclaimed into force).]

- Contributions to the reserve fund.
- Adjustment for common expenses.
- Pre-occupancy inspections.
- Holdback accounts.
- Delays in registering the condominium.
- GST treatment.

Naturally, all other conditions, such as those dealing with financing and how the deposit is handled, should also be examined as would be done in any purchase or sale of a house deal.

## **d) Searches**

### **i. Condominium Index**

Each land titles office maintains a condominium index listing all documents filed in the land titles office for each condominium corporation. Search by condominium corporation number. The index includes information as to the date of registration of the condominium, filing particulars and any amendments to the declaration, plan and by-law, and the address of the corporation for service. A search here is essential to confirm that all of the required documents have been included in the disclosure package.

### **ii. Unit Title**

In addition to normal information regarding registered owners and encumbrances, a search of the unit title to a condominium will indicate the percentage interest in the common elements appurtenant to the unit. The legal description incorporates by reference all registrations against the master title.

### **iii. Master Title**

The master title is a “notional” title issued by the Land Titles Office in the name of the condominium corporation. The legal description corresponds to the legal description of the land owned by the declarants before registration of the declaration. No real interest in land is reflected in this title.

Registrations against the master title normally included utility caveats, rights of way, development agreements and other registrations affecting the project as a whole. Registrations relating to monetary obligations such as a mortgage would not normally be found on a master title but would have been brought forward to all unit titles at the time of registration. While a few master titles still have caveats and the like registered on them, in most cases, the Land Titles Office has brought these forward to the unit titles as well.

All registrations against the master title will be incorporated by reference on all the individual titles for the units.

#### **iv. Condominium Plan and Declaration**

You should review the location of the purchase unit on the plan with the client to confirm that the offer to purchase deals with the appropriate unit. Differences between the unit numbering schemes used on condominium plans and the suite numbering systems used in the marketing process have led to several cases where title to the wrong unit has been conveyed to a buyer. If the declaration contains a table correlating the unit number and suite number (these often are different), make sure that you review these with the client.

#### **v. Building Location Certificate**

Where possible obtain a copy of a building location certificate for the project as a whole. Where not available try ordering an excerpt from the condominium plan from the Land Titles Office. Where the unit is a bare land condominium unit, consider ordering a new building location certificate for the structures located on the unit.

#### **vi. Zoning**

Where available obtain a zoning memorandum for the project as a whole. Compliance with zoning requirements and any restrictions contained in the development agreement will be disclosed.

#### **vii. Taxes**

Search realty taxes to the subject unit and obtain a tax certificate in the normal course. Note that, in newly registered condominium projects, either new construction or conversions, there may be a delay of many months before a separate tax roll is created for the individual units. In this case, consider an agreement to readjust between the parties to deal with the eventual assessment of the taxes.

#### **viii. Common Expenses**

Check with the condominium corporation to ascertain the current level of common expense assessment and any special assessments. This will usually require you to order a status certificate from the corporation. This is best done after the first day of the month preceding the date of closing. The title search in the Land Titles Office will disclose the presence or absence of liens. In the absence of any liens, the buyer is responsible only for unpaid assessments accruing after the date of possession.

## **ix. Management Contract**

Review the provisions of the management agreement, particularly its term and any rights of cancellation. Also note that [section 81](#) of *The Condominium Act* gives a first elected board the right to terminate a property management agreement within 12 months after the turn-over meeting (see [sections 75-80](#)), without penalty, if the agreement was entered into before the date of that meeting.

## **e) Insurance Requirements**

### **i. Who Insures What?**

Except in the case of bare land condominiums, the primary obligation to place insurance on the condominium property, both the units and the common elements, falls upon the condominium corporation under [section 185](#) of *The Condominium Act*.

However, the insurance placed by the condominium corporation will exclude coverage on any improvements made by the unit owner. These improvements, the unit contents, and the owner's personal effects should be insured by the unit owner under a separate policy.

In the case of bare land condominiums, the declaration may provide that the owners are fully responsible for insuring any buildings on their units or it may provide for insurance by the condominium corporation. It is very important to understand this when advising a buyer or potential mortgagee of a bare land unit.

When acting for a subsequent buyer of a unit, it may not be possible for you to determine, as a question of fact, which improvements to the unit were effected before the creation of the condominium (in which case the condominium corporation's master policy should afford coverage) and which improvements must be covered by your client's policy. Your obligation will be to confirm, by obtaining the appropriate assurances from both your client's insurance broker or agent and the insurer of the condominium corporation, that the buyer's policy of insurance will respond where the corporation's policy is not effective or is inadequate.

All condominiums registered after February 1, 2015 will contain a standard unit description that will define the characteristics and specifications of a standard unit and, by extension, what the corporation insures and what would be the responsibility of the owners. Also, corporations formed before February 1, 2015 may, but are not required to, pass and register a standard unit by-law that would fulfill the same role. Any unit components that are in addition to or in replacement of components identified in the standard unit

description contained in the declaration or a standard unit by-law will be the responsibility of the owner to insure.

## **ii. To Whom are Insurance Proceeds Payable?**

Perhaps the most basic distinction between the property insurance maintained by the condominium corporation and the standard homeowner's coverage placed by the owner of a house relates to the loss payable clause. Normally, in the case of a non-condominium property, the buyer's lawyer seeks to obtain a certificate of insurance or binder letter, evidencing the appropriate coverage with loss payable firstly to the mortgagee, or, if the title is unencumbered, to the insured as owner. However, *The Condominium Act* provides that, notwithstanding the terms of the insurance policy, the named insureds are to be the corporation and the unit owners from time to time, and making loss payable to a mortgagee is not possible for several reasons. Most importantly, the Act requires the corporation to maintain replacement cost insurance against the units and common elements and to repair promptly after damage in most circumstances. Allowing loss to be payable to a mortgagee would defeat the corporation's ability to fulfill its responsibility through insurance proceeds.

Traditionally, many corporations entered into insurance trust agreements at the insistence of mortgagees. The insurance proceeds would then be made payable to the insurance trustee, which would see to the application of the proceeds to repairs. In the unlikely event that the owners voted against repair (in the case of damage to 25% or more of the project), the insurance trustee would, it was thought, ensure that the mortgagees were paid out before the unit owners could receive any insurance proceeds.

Many older corporations have dispensed with the need for an insurance trust arrangement and newer corporations have never entered into these contracts.

Because all insurance proceeds will be paid to the insurance trustee (if any) or the corporation, the unit mortgagee's best protection is:

- (a) give the corporation written notice of its interest in the unit to ensure that the corporation is aware of its interest in the event of a distribution of insurance proceeds;
- (b) obtain from the mortgagor of the unit an assignment of the voting rights for that unit and advise the corporation of that assignment and as to whether the mortgagee requires that notice of any owners' meetings be given to it.

*Section 126(1)* of *The Condominium Act* provides that the mortgagee may exercise the unit owner's voting rights if the mortgagee has given written

notice of the mortgage to the condominium corporation and the address for services and notices on the mortgagee. If the mortgagee has notified the corporation and provided an address, in the extremely unlikely event that the owners vote to terminate the condominium corporation's existence and to divide insurance proceeds amongst themselves instead of using the proceeds to repair the damage, the mortgagee will be entitled to be paid before the mortgagor unit owner receives any money.

## **f) Mortgage Considerations**

Many mortgagees have their own form of mortgage or standard charge mortgage terms for condominium transactions. If your instructions from the mortgagee do not require you to use a standard form of mortgage or standard charge mortgage terms, you should ensure that appropriate clauses regarding insurance, payment of common expenses and assignment of voting rights are included in the mortgage. See the sample mortgage clauses in the precedents. Also, some mortgagees may require you to provide a separate proxy and/or notices and minutes of meetings. Your opinion regarding priority over condominium liens, assignment of voting rights and payment of insurance proceeds in the event of a loss may also be sought.

## **g) Tenant Considerations**

It should be noted that *The Condominium Act* contains provisions for the protection of tenants (which are in addition to those contained in *The Residential Tenancies Act*, C.C.S.M. c. R119 as discussed in Chapter 2 on Purchase and Sale of Residential Property).

Briefly stated, where a tenant was in possession of the unit when the condominium plan and declaration were filed, that tenant can continue to rent the unit for at least as long following registration as they had occupied the unit before registration. This right, which only arises when an existing rental project is converted to condominium, will prevent a buyer from terminating a tenancy, even at the end of a lease term, where the tenant has not yet enjoyed the guaranteed number of years of continued tenure. It should also be noted that tenants have rights of first refusal to buy the units they occupied at the time of registration.

*The Condominium Act* also provides that an owner entering into a tenancy agreement must notify the corporation of the name and address of the tenant. *Section 56.1(3)* of *The Residential Tenancies Act* requires the landlord to give the tenant copies of all provisions of the declaration that apply to the tenant and copies of all by-laws and rules. The tenant can also obtain these from the corporation.

## 5. Closing the Transaction

The closing of a condominium transaction is essentially the same as any other form of real estate conveyance, except for a few additional documents which the buyer requires.

### a) The Disclosure Statements and Status Certificate

The disclosure statements and status certificate, which are prescribed by regulation, are two documents unique to condominium conveyancing which are required by the buyer in all cases. They are in addition to the declaration as to possession which the buyer obtains from the seller, containing the usual sorts of representations as to the seller's title to the unit. A disclosure statement is given by each of the seller and the condominium corporation and relate to similar matters regarding the condominium property as a whole and the status of the condominium corporation. These documents must be provided to the buyer when the offer to purchase is made.

The status certificate is generally obtained immediately before closing. In it, the corporation certifies the amount of any assessment, penalty and accounts owing by the unit owner to the corporation for which the corporation has a lien or right of lien, how the assessment, penalty and accounts are payable, and the extent to which they have been paid.

These are the only representations that the condominium corporation is obligated to deliver by the terms of *The Condominium Act*. Sample disclosure statements and a certificate are found in the precedents.

The seller's lawyer may undertake to provide these documents to the buyer's lawyer, but if that is not an obligation that the seller's lawyer is prepared to assume, the buyer's lawyer must contact the condominium corporation directly.

### b) Section 51(1) Documents

*Sections 51(1)* and *51(2)* of *The Condominium Act* require (depending on whether the sale is that of a proposed unit or a unit after registration) that certain information and documents be provided to the buyer of a unit as a condition of the agreement of purchase and sale of that unit being enforceable against the buyer (including the disclosure statements).

The seller and the buyer must each submit a statutory declaration regarding the delivery of *section 51(1)* disclosure documents to the Land Titles Office along with the transfer of land, so all of these must be delivered as quickly as possible. Following the final delivery, the buyer has a 7-day cooling-off period in which to determine whether to cancel the purchase.

Although the buyer will probably have initialled the agreement of purchase and sale acknowledging their receipt of all *section 51(1)* documents, such documents may not

have been delivered to the buyer. Remember that all outstanding section 51(1) documents must be delivered before the 7-day cooling-off-period will commence.

Further, the buyer's lawyer will want to obtain copies of the insurance trust agreement, if any, as well as the documents respecting building location, zoning and evidence of insurance outlined above.

Before closing a purchase of a condominium unit, the buyer's lawyer should enquire if the buyer is aware of any material change to any of the information contained in the [section 51\(1\)](#) disclosure documents or if any notice of material change was provided by the seller. *The Condominium Act* provides for a further 7-day opportunity to cancel the deal in the event of a material change.

### **c) Assignment of Parking Stall**

In most cases, the transfer of the seller's title to the unit will be sufficient to pass to the buyer all of the seller's rights to any parking stalls on the condominium property that have been assigned to the seller. However, the declaration should be reviewed to ensure that this will be the case. If the declaration permits unit owners to assign or lease the right to use of the parking stall to third parties, the buyer will want to obtain evidence that no such leases or assignments have been given and that the buyer will obtain the right to exclusive use of any parking stalls referred to in the agreement of purchase and sale.

The buyer should ask for an assignment of parking stall document from the seller. Since such documents are not uniformly requested, the seller's lawyer should be put on notice that it will be required.

It is prudent practice to provide a copy of the assignment of parking stall document or another form of notice to the condominium corporation regarding the buyer's rights in the stall.

It should be noted that the status certificate should also be reviewed to ensure that the parking the buyer expects will be provided.

### **d) Statement of Adjustments**

The seller's lawyer will be expected to deliver a statement of adjustments for the transaction. In addition to the usual adjustments for the deposit, GST on the transaction, if any, and any seller take-back mortgage, the statement of adjustments will reflect the following:

#### **i. Realty Taxes**

In an established condominium project, a separate realty tax assessment for the unit will have been levied, in which case realty taxes can be adjusted on the usual per diem basis. However, for newly-converted condominiums, realty taxes on the unit may not yet have been separately assessed. In such a case,



the parties may agree to adjust based on some reasonable estimate of the unit taxes, on the understanding that readjustment will be necessary once the actual taxes are known.

**ii. Common Expenses**

If the date of adjustments is other than the day of the month on which common expense payments are to be made to the condominium corporation (typically the first day of the month) or if outstanding assessments are owing to the condominium corporation by the seller, an adjustment for common expenses allocable to the unit should be reflected on the statement of adjustments.

**iii. Monthly Parking Fees**

As with common expense payments referred to above, if the unit owner is responsible to pay a monthly fee to the condominium corporation for parking stalls designated to it, an adjustment for such fees may be necessary.

**iv. Reserve Funds**

In compliance with [The Condominium Act](#), the statement of adjustments would not normally reflect a credit to the seller for the amount kept in the reserve fund account of the condominium corporation in respect of that unit, unless the agreement of purchase and sale specified that there would be an adjustment for that amount.

**e) Transfer of Land**

While title to a condominium unit can be transferred using the normal form used to transfer any other real property in the Province of Manitoba, there are special considerations when completing such a transfer:

**i. Master Title Encumbrances**

In addition to listing all encumbrances set forth on the title to the condominium unit, all encumbrances affecting the master title and not otherwise registered against the unit title must also be listed.

**ii. Declaration from Buyer and Seller**

All transfers of condominium units must be accompanied by statutory declarations from each of the seller and the buyer regarding the delivery of the disclosure documents required by [section 51\(1\)](#) and the cooling-off period specified in [section 54](#). Sample declarations can be found in the precedent section.