Loss payable
Naturally, it would be of concern to unit owners if the money paid by the insurance company went to each unit owner or to a member of the board of directors; the disappearance of an individual with the money would mean that the money would not be available for reconstruction.

Thus, most condominiums require the insurance proceeds to be paid to a trustee who will administer distribution of the money, in the event of repair, to the contractors doing the work and, in the event of condominium termination, to each unit owner or mortgagee as the case may be.

Because the trustee charges both a fee to maintain its status in the absence of a claim and a percentage of the proceeds in the event of a claim, some policies provide that for very small claims the money should be paid to the condominium corporation.

It is important that this money be paid to the corporation and not the "insured" or else the claim cheque would have to name each and every unit owner.

A problem arises in the practice of many mortgagees who are used to having a loss made payable to themselves, or themselves jointly with a property owner, and therefore insist on being named on the policy.

Some of the better insurance policies provide that the mortgagee named in the policy is insured in spite of any breach of a condition in the policy by the condominium corporation. They further provide for special notice to the mortgagee and the trustee of potential cancellation of the policy. The policies do not provide for money to be paid to the mortgagee unless the building is not to be repaired.

Insistence by the mortgagee, however, has led in some cases to loss being payable jointly to the insurance trustee and to the named mortgagee, with consequent delays in using the money for reconstruction.

Adjustment
In the event of a loss, someone must prove the claim to insurance proceeds on behalf of the condominium corporation and the unit owners, then settle the amount with the insurer.

As all unit owners are insured, it is possible that each owner would have to deal separately with the insurer unless the policy provided that the condominium corporation had exclusive rights to deal with the insurer. Good policies will permit the condominium corporation to delegate that right to a unit owner where a single unit is damaged.

Similar considerations apply to the right to amend the policy where it would obviously be difficult to have a unit owner contact the insurer with a request for a change in the policy.

Permissions
Insurance coverage is valid only where the risk contemplated by the insurer is the actual risk. Where a change in usage of a building increases the risk, the coverage may be invalidated. As the usage described in the policy is almost always "residential", special care must be taken that the insurer gives permission for units to remain vacant, for incomplete construction to be finished, for repairs to be carried out, and for the condominium corporation to carry on its normal business, including running a management office. If there is commercial space, this should be mentioned as well.

Waivers
The Insurance Act makes it a condition of most insurance policies that the insurer may elect to repair, rebuild or replace the property damaged instead of making payment.

What of the case where substantial damage occurs, the unit owners do not vote to repair and the condominium corporation is terminated? Such a condition would prevent the owners from taking the money and might leave them in the position of being tenants in common of a building they do not want (see chapter on Termination). In this instance, the insurer should waive its right to repair.

Insurance policies frequently provide that breach of any condition of the policy is enough for the insurer to refuse to pay a claim. A breach of conditions by one insured could disentitle other insureds from collection. Even where the policy provided that the breach would disentitle only the offender, other owners would be prejudiced if this reduced the total money available for completion.

It is thus necessary for the policy to provide that breach of a condition does not reduce the money available. Many policies, which purport to provide this coverage, restrict themselves only to a breach of a condition imposed by statute.

The insurer has a right of subrogation; that is, the right to sue on behalf of the insured to recover the insurance proceeds from the person who causes damage. Although insurers interpret their policies as exempting the insured from such a suit, a number of unit occupants are still unprotected by the policy.

It is necessary for the insurer to waive his right to sue on behalf of the insured against the condominium corporation, owners, owners' families and other dependents, corporation employees, mortgagees in possession, and other persons that the condominium corporation wishes protected from suit, except for arson, fraud and vehicle impact.

Other policy considerations
Insurers frequently refuse to make full payment on a claim where the property is covered by a competing policy so as to avoid having the insured receive double payment.

The insurers instead treat their policies as insuring just a portion of the loss in the same proportion that their policies bear to the total coverage by all the policies.

Because the condominium corporation cannot control the individual insurance efforts of unit owners, it is wise to provide that the condominium policy be *primary* insurance without any policy maintained by a unit owner being brought into contribution.

Because of the time taken for corporate bodies to react, the normal 15 days notice of cancellation of the policy should be extended to 60 days notice to the condominium corporation, insurance trustee and mortgagees named in the insurance policy.

Other insurances
Standard building policies must be supplemented by other policies based on the needs of a particular corporation. Some of these are outlined as follows:

A. Boiler and machinery insurance
In every highrise and in some townhouses, special attention must be given to mechanical equipment which works under pressure, such as boilers, because these are rarely covered in the building policy.

Many condominium corporations have obtained such policies but are unaware that a number of the considerations applying to the building policy also apply to the boiler policy.

The policy must insure the condominium corporation because of its duty to repair common elements. Also, it must insure the unit owners because, at present, in the event that regulation of the property by The Condominium Act ceases due to substantial damage and failure of the owners to vote for repair, then the condominium corporation is terminated and no longer exists to take the money. (Refer to the chapter on Termination.)

If the unit owners are added as insured, then the considerations about adjustment and amendment apply, as does the consideration of having loss payable to a trustee and having sufficient notice of cancellation given to the corporation, trustee and named mortgagees. Replacement cost to any increased standards necessitated by changes in the law would also be in order.

B. Liability
Liability of the condominium corporation and of the unit owners' interests in the common elements, excluding only their liability for acts of commission or omission in their own units, should also be purchased. The policy should have a cross-liability provision so that unit owners could recover from the insurer payment for losses caused by another unit owner or the condominium corporation. Payment to a trustee would not normally be necessary because the insurer would make compensation payable directly to a third party.

C. Auto and non-owned auto
Coverage is also necessary for automobiles or other vehicles owned by the condominium corporation or its employees, if used for performing duties. The condominium corporation could find itself liable as employer for the actions of an employee in his automobile if the use of the vehicle is part of his work, or, it may find itself in a similar situation if a unit owner is involved in an accident while working for the corporation.

D. Fidelity bonding
If any employees, officer or director handles money such as the collection of the common expenses, loss as a result of theft of the money can be protected by bonding.

E. Directors and officers
Insurance for directors and officers is available but not commonly used, due to its expense.

F. Insurance by unit owners
The unit owner should insure the contents of his unit and any improvements made to the unit that are not covered in the condominium corporation's policy.

The insurance should include a package, supplementary to the condominium corporation's general policies, insuring the unit owner against any failure by the condominium corporation to insure correctly. The insurance should also cover loss of use or occupancy of the unit.

Any insurance should contain a waiver of subrogation against the condominium corporation, managers, agents, employees, servants and against other unit owners and members of their households except for vehicle impact, arson or fraud.

Naturally, public liability insurance should also be maintained as well as automobile insurance, if the latter is necessary.

Other considerations
Most of the foregoing relates to what is available in insurance policies and what is advisable. Other matters must enter as well.

A. The mortgagee has a statutory right to apply insurance proceeds to the mortgage debt. Arrangements must be made with mortgagees to waive this right or to provide in the declaration that, by registering his mortgage, the mortgagee is deemed to have waived his right to the proceeds.

Many declarations state that no mortgage shall be registered unless the mortgagee waives these rights. Since most mortgages are registered without such a waiver, a problem exists as to the effect of the declaration provision in the absence of a penalty provision.

Recommendation No. 36:
The Mortgages Act be amended to deem the mortgagee of a condominium unit to have waived its right to have insurance proceeds applied to the mortgage unless the unit owners vote against repair. Such a provision be retroactive and all mortgages which might be invalid, by reason of a lack of waiver, be validated subject to this amendment.

The wording of this recommendation must be read in the light of the recommendations in the chapter on Termination.

B. Additionally, the insurer usually requires an appraisal before granting a stated amount/waiver of co-insurance provision. In the absence of that appraisal the condominium corporation should be prepared to get appraisals of the cost of reconstruction.

Many declarations now provide that annual or less frequent appraisals be done. Most condominium corporations are ignoring the provisions, rendering the boards liable for negligence if there is a loss because of insufficient insurance unless there is an indemnification provision in their by-laws.

C. Many mortgagees also insist that the condominium corporation be insured for the full value of the money outstanding on the unit mortgages although much of the value may be in the land. Premium reductions should be negotiated with the insurer because of the lesser risk if negotiations do not prove fruitful with the mortgagee. The mortgagee justifies his requirement as a cushion against inflation and rising construction costs.

D. The majority of condominium corporations do not look to their declarations and by-laws for their insurance requirements and many are in violation of their terms.

E. If, after substantial damage, the condominium corporation is terminated then the unit owners need someone, perhaps the insurance trustee, to negotiate settlement on the part of the unit owners. Many insurance trust agreements provide that the trustee is to act as a banker only, with no responsibility to prove claims or negotiate settlements. Thus, there is no one with the capacity to negotiate (see chapter on Termination).

Correction of the insurance problems requires: an amendment to The Insurance Act setting out statutory conditions for all future condominium policies; or an acceptable standard form policy universal in the industry and used without exception; or an analysis of all existing policies by the condominium corporations involved and renegotiation; or, if necessary, all of the above.

For those condominium corporations wishing to re-evaluate their insurance coverage, we have included the following brief checklist.

Condominium general fire insurance policy check sheet

Insured:		Corporation
		and unit owners from time to time
Loss Payable:		Insurance Trustee
		Named Mortgagee
Property Insured:		Units and Common elements
		and assets of corporation
	or	Buildings including services to the property line and personal property of the corporation
		Exclusions
Coverage:		All Risk
	or	Fire with extended coverage
		Exclusions
		Loss does not reduce coverage
Amount:		Stated amount/waiver of co-insurance
		Replacement cost
		To by-law standards
		To full appraised value
		Deductible
Adjustment:		Exclusive right of corporation
		Authorization to delegate to owner
Amendment:		Exclusive right of corporation
Permissions:		Normal business
		Vacant use
		Completion of construction
		Repair
Provisos:		No contribution (primary insurance)
		Trustee endorsement
		Named mortgagee endorsement
Waivers:		Insurer's right to repair
		Breach of statutory condition
		Subrogation against corp. owners, dependents, employees and mortgagees in possession
Cancellation:		60 days notice to corp.trustee. mortgagee
Conformance:		To declaration and by-laws
Extensions:		Trustee's handling fees
		Removal of debris
		Loss of business income
		Landscaping, TV antenna, valuable papers, etc.

Boiler, liability, non-owned auto, and automobile insurance policies may be checked against the same list on the understanding that not all items are applicable to all policies.

Recommendation No. 37:
The Insurance Act be amended to ensure statutory conditions for condominium insurance policies providing:

A. The insured as the condominium corporation and the unit owners from time to time.

B. The exclusive right of the condominium corporation to adjust or amend.

C. The condominium policy be primary insurance, not to be brought into contribution with unit owners' insurance policies on their units.

D. The insurer's right to repair be waived in the event of damage leading to the termination of the condominium corporation.

E. A breach of any condition in the policy not disentitle the insured to collect in the event the property must be repaired.

F. Cancellation be on 60 days notice to the condominium corporation and insurance trustee, if any.

G. Such other conditions as the superintendent of insurance deems advisable.

Recommendation No. 38:
Condominium corporations obtain all risk, stated amount replacement cost insurance, including replacement to any increased construction standard required by law.

Recommendation No. 39:
All condominium insurance policies be reviewed in the light of the discussions in the chapter on insurance.

Chapter 7
Purchasing a condominium

Only a decade old, condominium housing is a relatively new concept in Ontario. Because people are generally unfamiliar with condominium ownership, few purchasers have understood fully what it is all about until they have bought their own unit. It should come as a shock to no one that misunderstandings and difficulties have arisen.

At several of the hearings, the participants were asked whether they had seen copies of the Ontario Government's booklets called "Buying a Condominium" and "Living in a Condominium." Although a number of them had seen the booklets before buying, many had not seen them until after they had signed agreements of purchase and sale, and some had not seen them at all.

These booklets were prepared to inform condominium buyers of the matters they should be aware of before signing an agreement of purchase and sale. They are available upon request from the Communications Branch of the Ministry of Consumer and Commercial Relations, 555 Yonge Street, Toronto.

Because a prospective purchaser's first contact with condominiums is at the searching or buying level with sales representatives, we have chosen to begin our examination in the sales practices area.

Sales practices
Two major problems with those selling condominiums were reported to the Study Group. The first was the lack of knowledge exhibited by some sales people as to what a condominium actually is and how it works. The second was their virtually universal use of high-pressure sales techniques.

Although many complaints were levelled against persons selling condominium units, it became obvious that part of the problem facing condominium buyers stemmed from their inexperience in the housing market in general.

Whenever questions arose regarding sales representatives' techniques, the problem of buyers' expectations after seeing a model suite was also raised. Many purchasers commented that the model suites they were shown bore no relationship to the unit they purchased. Many of the buyers were surprised that they were not receiving the same finishes as in the model suites, and most blamed the sales people for not telling them that the model suite did not accurately represent, at least with respect to finishing touches, what would actually be purchased.

It was suggested that sales agents who are employed by developers be licensed. The licensing of sales people, however, is not really the type of assistance purchasers need when buying condominium units, as licensing does not necessarily improve the quality of personnel in any particular field, but only gives them an appearance of legitimacy.

The emphasis must be placed on attempting to educate not only the sales personnel, but, more important, the purchasers. High pressure sales techniques are not effective when applied to a fully informed consumer.

Recommendation No. 40:
The Ontario government provide assistance to consumer groups and the development industry in formulating courses to educate both sales personnel and consumers in the field of condominiums.

Individuals who sell condominiums for a developer may be either registered real estate agents or employees of the developer. A purchaser may not know which type the sales representative is; however, the controls over each vary.

The registered agent is licensed under The Real Estate and Business Brokers Act. The developer's employee, however, is not governed by any specific legislation.

From preliminary inquiries it has been determined that there are provisions available to control the problem of misrepresentations made by sales personnel of both types.

Section 24 of The Real Estate and Business Brokers Act entitles the Registrar to receive and investigate complaints concerning registered agents and brokers. Complaints concerning misrepresentation are not uncommon, but the Registrar of the Commercial Registration Appeal Tribunal has never suspended an agent's or broker's license for reasons of misrepresentation.

Recommendation No. 41:
The Registrar of The Commercial Registration Appeal Tribunal take more vigorous action in enforcing the provisions of The Real Estate and Business Brokers Act.

Section 36 (1) of The Combines Investigation Act, a federal statute, makes it an offence to make a representation which is false or misleading in a material respect. This provision applies to both oral and written statements and applies to all sales people.

This section is relatively new, yet under it, a developer has already been prosecuted. The developer in this case had advertised six acres of playground and parkland (which the judge found was probably untrue and at least deceptive) and $2,000 government rebates to first-time homebuyers (yet only 85 of the 328 units actually qualified). The judge found that the ads placed by W. B. Sullivan Construction Ltd. were "blatantly misleading" and he imposed a $12,000 fine.

Documents to be seen by purchaser
The buying of a condominium unit is more complex than the buying of a single family residential unit mainly because of the documents which govern the condominium lifestyle.

The Condominium Act requires that a purchaser of a condominium unit from a developer receive copies of the declaration, parts of the description, the by-laws, the rules and regulations, the management agreement, the statement of recreational amenities and the budget statement for the first year after registration. The Act provides that if the above-named documents are not provided to the purchaser any agreement of purchase and sale entered into by the purchaser is not binding on the purchaser.

The documents should be explained at this stage:

The Declaration: is equivalent to the written constitution of the condominium corporation. It sets the boundaries of the units, the ownership interest of the units and the percentage basis on which owners contribute to the common expenses. Since the items in the declaration determine how much of the common elements a person owns and on what basis contributions to common expenses are made, it can only be amended by consent of 100% of the unit owners and encumbrancers (Section 3) or pursuant to Section 3(b).

The Description: is the pictorial explanation of those parts of the declaration dealing with the boundaries of units, exclusive use common elements and common elements. It reflects what is written in the declaration (Section 4).

The By-laws: deal with matters of lesser importance than those in the Declaration, such as the holding of meetings, election of officers, maintenance of the property, collection of common expenses, and so on. Since these matters need not be fixed for all time they can be amended by a vote in favour of 66 2/3 per cent of the ownership interests (Section 10).

The Rules and Regulations: deal with matters respecting the common elements to prevent unreasonable interference with the use and enjoyment of the units and common elements. Rules and Regulations can only be made if a provision to do so is included in the by-laws. The Rules and Regulations can be amended by a vote of members who together won a majority of the units (Section 11).

The Management Agreement: is an agreement initially entered into between the builder, on behalf of the condominium corporation, and a management firm. It details the services to be provided by the management company and the cost of these services to the condominium corporation (Section 24b).

The Insurance Trust Agreement: is an agreement entered into by the builder on behalf of the condominium corporation, usually with a trust company, which provides for distribution of insurance proceeds when there is a claim (Section 24b).

The Statement of Recreational Amenities: sets out all the amenities which the developer intends to provide to the condominium corporation, such as recreational facilities, parks, laundry facilities, commercial space, superintendent's suite, etc. It also tells the purchaser whether the corporation will own the amenities outright, whether they are leased or whether ownership and costs are shared (Section 24b).

The Budget Statement: details the estimated expenditures for the first year after the date of registration. It should describe what services the corporation will receive and the frequency of service as well as the cost of each service (Section 24b).

Budget statements

As stated above, The Condominium Act requires a developer to provide each owner with a budget statement, which the developer guarantees until the end of the first year after registration. The purpose of Section 24b dealing with disclosure was to ensure that a purchaser had an opportunity to review the documents governing the condominium corporation before he executed an agreement to buy. Unfortunately, this has not been effective in practice (see chapter on Registrar).

The requirement has resulted in several serious difficulties. First, many developers have been contracting out of paying their full share of common expenses. They have done so by entering into agreements with purchasers which allow all the corporation's common expenses for the first year to be paid by the developer, with the owners paying a monthly contribution to the developer. By this method the developers have been able to leave condominium corporations with a zero balance at the end of the first year after registration. If the developer collects more than he is required to pay at the end of the first year, by the agreement, his position is that he is entitled to the surplus. If he collects less than what is budgeted, he makes up the difference.

There is a recent County Court decision in the unreported case of York Condominium Corporation #214 and Freg Developments Limited, in which an agreement providing for fixed payments to cover common expenses, leaving no debits or credits to the unit owners, was held to be valid.

This type of agreement is contrary to the intention of The Condominium Act, which states that each owner shall pay his proportionate share of the common expenses. It is also of concern that too many condominium corporations are starting out without adequate funds to continue operating into their second year (See chapter on Financial Administration).

Second, due to the length of time required to register a condominium in Ontario and a requirement that a budget statement be delivered to a purchaser before he executes the offer of purchase and sale, many developers are being forced to make up deficiencies in common expenses due to increases in hydro and other utilities over which they have no control and cannot accurately predict that far in advance.

Unrealistic budget statements, due to low-balling, have also been a problem.

Low-balling is a term used to describe a situation where a developer deliberately underestimates a cost to purchasers, in this case the monthly contribution to common expenses. This is sometimes done to induce purchasers into believing that the common expense payments are very low. Often, common expense payments increase dramatically in the second year after registration.

The 1975 amendment to The Condominium Act was an attempt to cure the problem of low-balling common expenses by requiring developers to guarantee common expenses for the first year after registration.

The amendment has not really resolved the problem; a few developers are still low-balling but by a different method. It is true that they guarantee the first year common expenses, but they build the cost of doing this into the price of the units. The unit owners see relatively low common expenses, with any excesses guaranteed by the developer. Frequently it is not until a year or two later that they realize for the first time what the actual costs are. By that time, they find that the common expenses are increasing; in some instances that were brought to our attention, increases were more than 100 per cent.

Although few in number, unscrupulous developers can do great damage to purchasers who buy condominiums that they cannot afford. Affluent or not, however, many unit owners discover what the true costs of running a corporation are only when the developer is no longer there to guarantee the expenses beyond the first year after registration.

Recommendation No. 42:
The Condominium Act be amended to provide that:

A. Budget statements supplied to purchasers be dated so that purchasers will know that the costs shown are estimated as of a particular date. Budget statements must also include the type, frequency and level of service to be provided.

B) Increases in hydro, heating fuel and other utilities, not including cable TV, not be required to be guaranteed by developers for the first year after registration, as these are costs over which the developer has no control. (see chapter on Municipal Services.)

C. A corporation be provided with a civil cause of action where a budget statement supplied by a developer proves to be unrealistic.

The Study Group's recommendation that all condominium corporations of more than 9 units be required to have annual audited financial statements will further ensure compliance with the above recommendation (see chapter on Financial Administration).

Offer of purchase and sale
As with any contract, it is most important that the parties involved seek the assistance of those persons with the training to best handle the complex yet necessary matters. When buying a condominium unit, the purchaser should always see his lawyer before signing the agreement of purchase and sale.

Most buyers are unaware that the fee they pay a lawyer includes the time the lawyer spends in reviewing and, where necessary, preparing an agreement of purchase and sale. Most buyers are also unaware that once they sign an agreement of purchase and sale and the agreement is signed by the developer, they have a binding contract: the lawyer they eventually see cannot assist them in altering the terms of that agreement, nor, as a rule, can the lawyer assist the purchaser in rescinding the agreement.

It is surprising that many condominium buyers move into their units without knowing that occupancy rent will be payable until after registration and that if the mortgagee so provides he may exercise the unit owner's right to vote. Complaints directed towards the legal profession's lack of condominium knowledge were often levelled in situations where the purchaser signed the agreement and then consulted the lawyer, or where the lawyer representing the purchaser was recommended by the developer.

Since the agreement of purchase and sale governs the conduct of the buyer and the seller until title is transferred, purchasers should not sign such agreements until they are fully aware of the documents which will govern their lifestyle and until they have a solicitor who has no conflict of interest.

Protection of purchaser's money

When a purchaser signs an agreement of purchase and sale, he will, as a rule, make a deposit payable to the builder. He will also have agreed to pay the remainder of the cash owing on account of the agreement of purchase and sale to the builder at the time he takes occupancy. At present, The Condominium Act provides that the money paid by a purchaser to a builder on account of the purchase price must be held in trust until its disposition to the person entitled to it or until delivery of the prescribed security.

This requirement in The Condominium Act was effected in 1975 to protect the funds of purchasers who took occupancy of their units and paid over their cash before receiving legal title.

It is not a serious problem where a buyer enters into an agreement of purchase and sale after the corporation is registered, and the developer is in a position to give title. After registration, the transaction, in terms of money changing hands, will be equivalent to a normal house transaction where the purchaser pays over his money and he receives a registered deed.

Because most purchases occur prior to the builder being able to give title, there is concern about the developer's ability to withdraw the purchaser's money from the trust account before he has given the purchaser title to his unit.

In a normal condominium transaction, where the agreement of purchase and sale is entered into before registration, the purchaser will pay his deposit at the time the agreement is entered into. He will pay his downpayment (either cash to the amount of the mortgage to be assumed, or all cash) when he takes occupancy.

First purchase deposit security

Under the Act, there is a method by which the developer may use the deposit money if he has given the purchaser a prescribed security.

The most common form of prescribed security acceptable under The Condominium Act is the HUDAC deposit receipt. At present, it provides coverage for loss of a deposit and down payment paid towards the purchase price of a condominium unit up to $20,000 per unit. Any money paid by a purchaser in excess of $20,000 is, under The Condominium Act, required to be held in trust by the developer or anyone receiving money on his behalf.

A new by-law passed by the HUDAC New Home Warranty Program provides that on any agreement of purchase and sale after November 1, 1977, there will be no ceiling on the liability of the warranty corporation for lost deposits and down payments.

Therefore, if a purchaser enters into an agreement of purchase and sale on November 2, 1977, pays $40,000 in cash towards the purchase price of his unit, and later is entitled to the return of his deposit and down payment, he will receive a refund of his full $40,000 as opposed to $20,000 under the scheme prior to November 1, 1977.

Once this plan becomes effective, all previously unoccupied condominium units, for which agreements of purchase and sale are entered into after November 1, 1977, will automatically have this coverage. However, conversion units are not covered by the HUDAC New Home Warranty Program; therefore, alternative arrangements must be made for dealing with funds paid towards the purchase of these units.

Since the HUDAC New Home Warranty Program does not apply in the case of a conversion from a rental building, or where the purchasers have signed agreements of purchase and sale prior to November 1, 1977, but have not yet received their deeds, to deposits in excess of $20,000, an amendment to the Act is required to assist consumers.

Recommendation No. 43:
The Condominium Act be amended to provide that in any transaction where the purchaser does not receive prescribed security under the Act, all cash paid via deposit or down payment towards the purchase price of a unit not be payable to the developer. The Act should provide that these monies are to be made payable to the developer's solicitor to be held in trust.

A similar problem arises with that portion of the downpayment resulting from the purchaser paying an amount to reduce the principal outstanding on the mortgage on the title to the unit.

Although the purchaser has paid money to the builder, the lender is not obligated to honour that payment unless the lender receives the money. Where the builder does not pay the money to the lender, then the purchaser may find himself having paid all cash for his unit or of having paid a substantial sum to reduce the mortgage, yet having the full mortgage outstanding against the unit.

While the HUDAC New Home Warranty Program may cover the full amount of such loss if the agreement of purchase and sale is entered into after November 1, 1977, the warranty does not cover more than $20,000 of the loss if it occurred as a result of a purchase agreement entered into between January 1, 1977 and November 1, 1977, and does not apply at all to the sale of a previously-occupied unit, i.e., a conversion from rental.

Recommendation No. 44:
The Condominium Act be amended to provide that the agreement of purchase and sale include a provision that, where it is necessary for the vendor to reduce the mortgage committed to a unit, the purchaser need not deliver to the vendor that portion of the downpayment attributable to such reduction until the purchaser has received evidence of the reduction.

Some people have interpreted the statute to permit the developer to remove the funds from trust once the corporation is registered. However, the purchaser could be severely prejudiced if for some reason the developer were unable to give title to the unit, and had already utilized the purchaser's cash.

A builder should not be entitled to remove the funds from trust upon the corporation's registration, as Section 24(3) provides that a developer must pay interest on this money until a deed acceptable for registration is given to the purchaser. Section 24c(3), together with the intention to protect purchaser's monies, leads us to suggest that this point be clarified.

Recommendation No. 45:
The Condominium Act be amended to provide that the money paid by a purchaser on account of the purchase price of a condominium unit (excluding occupancy payments and money for which the prescribed security has been given) be held in trust until a deed in a registerable form has been given to the purchaser in accordance with the agreement of purchase and sale.

Waiving consumer protection provisions
It is normal practice in legislative drafting to specifically prohibit the contracting out of individual statutory provisions. An example of an exception is The Consumer Protection Act, R.S.O. 1970 c. 32, which provides in Section 44 that, "This Act applies notwithstanding any agreement or waiver to the contrary." This provision applies to the entire statute.

The Condominium Act, as it changes to meet consumer needs, is gradually evolving into consumer protection legislation. Some of the provisions currently included in the statute are proving ineffective in daily operation because of uncertainty over whether one can contract out of them.

The most predominant example of this is where developers include provisions in agreements of purchase and sale whereby the purchasers agree to waive the interest payable to them under Section 24c(2) and (3). Because the amount of interest involved is not usually a significant figure, no purchasers have tested the validity of this waiver agreement.

Purchasers should not be required to go to court over this issue. It is our opinion that the Legislature intended this, and other consumer protection sections of the legislation, to be mandatory so that all consumers would benefit from them.

Recommendation No. 46:
The Condominium Act be amended to include a general provision that the Act will apply, notwithstanding any agreement or waiver to the contrary.

Cooling-off period
As stated earlier the purchase of a condominium dwelling is far more complex than that of a single family home. Subsections 1 and 2 of Section 24b of The Condominium Act provide for disclosure of documents so that purchasers are aware of what they are buying.

These subsections require the developer to provide a purchaser with a copy of the declaration, certain parts of the description, a statement of recreational or other amenities, by-laws, rules and regulations, management agreement, insurance trust agreement and a budget statement. These documents, if provided to a purchaser before he executes an agreement of purchase and sale, should inform him properly of the matters that will affect his lifestyle in the condominium community.

Once the agreement of purchase and sale has been executed, the purchaser cannot normally rescind the agreement, nor can he have his lawyer amend the agreement to secure more favourable terms. Unless the documents are provided to a purchaser and the purchaser is given an opportunity to review them before signing or rescinding the agreement after he has had an opportunity to review them, the disclosure requirements will not serve their intended purpose.

Recommendation No. 47:
The Condominium Act be amended to provide that:

A. The purchaser of a residential unit have the right to rescind a purchase agreement, without incurring any liability for breach thereof, within 10 days from the later of the date the purchase agreement is executed or from his receipt of all the documents which the developer is required to provide.

B. A purchaser not have the right to rescind the purchase agreement if 10 clear days prior to the execution of the agreement he received all the documents the developer is required to provide. (see chapter on Registrar).

Adjustments
In the usual agreement of purchase and sale of a condominium unit there is a clause dealing with those items which are to be apportioned between the vendor and the purchaser. For example, if the purchaser agrees to take occupancy of his unit on the 15th of the month, the vendor will be responsible for those expenses up to the 15th, and the purchaser for those expenses from the 16th to the end of the month. These are referred to as adjustments.

It is usual that upon occupancy, closing adjustments are made on taxes, corporation insurance premiums (only adjusted on sale between developer and first purchaser), common expense contributions, and lump sum payments to the reserve fund.

There is concern about adjustments being made for common expenses and reserve funds which are properly payable only to the condominium corporation. Since these items may be adjusted on the occupancy closing and since there is no condominium corporation in existence before registration, the purchaser must make this payment to the developer. It is probable that the developer will have provided in the agreement that he will turn this money over to the corporation. There is, however, no guarantee to this effect. If a developer encounters financial difficulty, the purchasers may find these funds have been dissipated. It would therefore be better if the reserve fund were adjusted on final closing to ensure that the funds remain available to the purchasers.

Recommendation No. 48:
The Condominium Act be amended to provide that the portion of the adjustments to cover reserve funds or common expenses be payable directly to the condominium corporation.

In addition to the foregoing adjustments on closing, adjustments are also made on the mortgage, and these require some explanation. When the builder and purchaser estimate the adjustments, the builder requires the purchaser to pay interest from the date of closing to the interest adjustment date, the date being set out in the mortgage or assumption agreement, on the full amount of the mortgage, although the mortgage has not been fully advanced at the time of closing.

The builder will pay interest on the money advanced to the lender and will keep the remaining interest. He does so on the grounds that having delivered possession of the unit to the purchaser, the builder is subsidizing the purchaser for money the builder has not received; therefore, he is entitled to interest.

The builder also collects interest on the unadvanced portion of the mortgage from the interest adjustment date in the mortgage to the estimated date of the final advance. This is because the builder is attempting to counteract any deduction for accrued interest by the lender from the final advance.

The purchaser makes full payments to the lender of interest on the mortgage as if the mortgage were fully advanced from the interest adjustment date in the mortgage. Thus, the purchaser should be certain to readjust the interest held by the builder after the final advance and to obtain a mortgage statement from the lender. This statement should show that any interest paid to the lender which was not earned by him because the money was not advanced, is credited to the mortgage principal.

A subsequent credit to the mortgage principal will, of course, affect any amortization schedule obtained by the purchaser showing the amount of principal and interest in each mortgage payment.

Provisions in agreements of purchase and sale
The agreement of purchase and sale usually contains a number of standard provisions:

- Completion of the unit means that work on it has finished and services and access to the unit make it habitable.
- Common element items, such as landscaping, need not be completed prior to the purchaser moving in.
- Before moving in, the purchaser will inspect the unit and accept it subject only to the deficiencies noted at the time.
- The unit deficiencies will be fixed, if possible, by the builder before the purchaser moves in.
- If the unit is completed prior to registration of the condominium, then the purchaser must move in and occupy the unit as a tenant until the condominium is registered and ownership can be given to the purchaser.

On moving in, the purchaser pays to the builder the downpayment and estimated amounts sufficient to pay the purchaser's share of insurance, taxes and such utilities as are billed to the unit. For example, the builder may estimate that he will have paid a portion of the municipal taxes in advance by the time a deed is given to the purchaser, and that the purchaser should pay to the builder that portion of the taxes that covers the time in which the purchaser will be the owner. These amounts are to be readjusted when the purchaser receives title to his unit and the builder's and purchaser's respective shares of these costs can be accurately determined.

During interim occupancy, i.e., before the purchaser takes title, the purchaser is to make monthly payments of rent as a fee for occupying the unit. These payments are usually not credited to the purchase price. The purchaser, during interim occupancy, is to govern himself as much as possible by the draft rules and regulations provided him and which will be the ones passed by the condominium corporation when it is created.

Some time after registration the purchaser will receive title to the unit from the builder, the rent for the final month occupancy will be adjusted so that the purchaser does not pay rent for the time he is the owner, and the money paid on the interim closing will be readjusted.

Occupancy rent
The interim occupancy arrangements provide the builder with rental income, which can help offset his mortgage interest charges and maintenance costs. This reduction in the builder's net carrying costs means that the initial purchase price can be less than if the builder has to include all these costs in his sale price. The builder requires the

downpayment and adjustment money to be paid when the purchaser goes into occupancy so that if a dispute arises when the deed is given, the purchaser cannot hold up payment of the money while retaining possession of the unit. However, the consequences of the occupancy arrangements are complex and sometimes unsatisfactory to the purchaser.

In the first years of condominium sales, some purchasers claimed they did not understand that the monthly fee they were required to pay during interim occupancy was merely rent. The Condominium Act was accordingly amended to provide that if money paid was to be only rent, then the agreement of purchase and sale must state that the money will not be credited to the purchase price.

The new provision merely created a hazard for the unwary builder; no matter how clear the provision for rental payments, if there was no provision that the money would not be credited to the purchase price, the money would be so credited and the purchaser received occupancy rent-free.

Recommendation No. 49:
The Condominium Act be amended to delete the requirement that the agreement of purchase and sale specify that rent money not be credited to the purchase price and the matter be left to the disclosure statement.

Today, a common complaint heard from purchasers regards the fact that principal is not reduced during the interim occupancy period. Some purchasers believe that the rent paid is wasted money and that they would rather be reducing their mortgage principal.

There are several reasons why the payment of mortgage principal during the interim occupancy period would be inadvisable. First, the lender's security during the period is the entire building (see chapter on Lending Institutions). Until registration as a condominium, the lender has no ability to separate the mortgage security by unit; therefore, the purchaser would have no protection for his payments in the event of a default by the builder on the construction mortgage.

Also, the amount of principal which could be paid off on each mortgage would be minimal and would not warrant the administrative costs of a special collection and recording where the purchaser is not yet the owner or the property divided into units.

The amount of the rental payment also poses problems. In a good market, the builder often sets the rental payment at what the sum of principal, interest, tax payments and common expenses would be if the condominium were registered and the purchaser were an owner assuming the full mortgage registered on the unit. Some builders charge a little more and some a little less. The lesser amount might be calculated so as to reduce the rent by the average amount of pincipal payments on the mortgage which are not being paid. The amount of rent charged is based on what the market will bear. A normal market for a condominium project permits interim occupancy payments (and indeed the principal, interest, taxes and common expenses after registration) to be from 15 to 20 percent more than the rent for an equivalent rental buidling.

In a poor market, the purchaser is in a better bargaining position because of the vendor's desire to sell the unit. In the agreement, the rental payment may be reduced to what the unit could be rented for if the building were a rental building or where the purchaser has made a large downpayment, the rental could be reduced to the amount the purchaser would be paying in monthly fees after title is obtained.

It is important for the purchaser to understand that the rental amount is fixed between the purchaser and the builder by the agreement of purchase and sale. All discussions must take place prior to signing the agreement, and the rental amount is one of the factors in the decision of whether or not to purchase. There is no use complaining about the rent after the agreement is signed.

The purchaser of a condominium unit who takes occupancy before registration should be aware that control of the condominium corporation does not automatically pass to the purchasers. Where title has not been conveyed to the purchasers, and there is no corporation in existence, the developer retains complete control over the project.

After registration, the developer conveys title to the individual unit purchasers but retains operating control by having his representatives on the Board of Directors. Once a developer has conveyed title to 50 per cent of the units, Section 9b(1) of The Condominium Act requires that the developer's board call a meeting to elect a new Board of Directors, and at that meeting purchasers who have received title may vote.

Occupancy status

When the concept of allowing a purchaser to take possession prior to his receipt of a deed was introduced, lawyers had many discussions as to the purchaser's status during the period prior to him becoming an owner. Some lawyers thought that the purchaser just had a licence under the agreement of purchase to enter the property. Other lawyers speculated that the purchaser was really a tenant under The Landlord and Tenant Act.

The introduction of The Residential Premises Rent Review Act, controlling rent increases, and the amendments to The Landlord and Tenant Act guaranteeing a tenant's right to the rented premises made it important that the status of the purchaser be decided.

The general opinion that the purchaser was a tenant was confirmed in a series of cases arising out of The Residential Premises Rent Review Act, but, this status is not without problems. As some tenants' rights are different from the rights of unit owners, the differences could cause confusion.

There are numerous rights and obligations of tenants that bear directly on the interim occupancy problem. First, a landlord may not require or receive a security deposit. As defined in The Landlord and Tenant Act, this is a deposit for the performance of an obligation or the payment of a liability of the tenant or to be returned upon the happening of a condition. It may be that money taken by the builder to secure the amount on closing falls into this definition. A consequence of tenancy status may be that the purchaser's downpayment or adjustments should not be paid, prior to the purchaser receiving his deed.

Second, no landlord may seize the personal property of a tenant just because rent is not paid.

Third, the landlord's agreement to provide heat and other utilities is interdependent with the tenant's obligation to pay rent. So, a tenant can withhold rent if the landlord does not deliver what he is required to under the lease. A unit owner, however, has no right to withhold common expenses just because of the failure of the condominium corporation to perform its duties.

Fourth, a tenant has the right to assign and sublet his lease. The landlord may require that his consent be given, but the consent must not be arbitrarily or unreasonably withheld. This conflicts with the interest of a condominium builder who may have a mortgage advance due to him based on the purchase and occupancy of a unit by a lender-approved purchaser. The builder may therefore wish to prevent an assignment or subletting. It is uncertain whether a refusal to consent to an assignment or subletting on the grounds of interruption of mortgage advances is reasonable.

Fifth, except in an emergency or in showing premises to future tenants after receiving notice that a tenant is leaving, the landlord must give 24 hours written notice or get permission from the tenant to enter his unit. A condominium corporation, or any person authorized by it, however, may enter any unit at any reasonable time to perform the objects and duties of the corporation.

Sixth, the landlord is responsible for providing and maintaining the premises in a good state of repair and for complying with health and safety standards The tenant is responsible for ordinary cleanliness and for repair of damage caused by his wilful or negligent conduct. In a condominium, the declaration may make either the corporation or the unit owner responsible for maintenance and repair of a unit or for maintenance of the common elements. The matter of maintenance in the unit is particularly important where unit purchasers make substantial changes in their units in anticipation of becoming owners.

Most builders attempt to maintain at least minimum levels of cleanliness and care during the period in which units are being sold. But, when all the units are sold there is little incentive, except to maintain their reputation in the hope of gaining a management contract with the condominium corporation after registration. Part of the problem in property management lies in the fact that units may be sold and occupied after completion so that at any one time, there may be a number of units vacant. Where the occupied units are scattered, the cost of maintenance may not be covered by the rental return to the builder.

At the same time, construction is being carried on so that many of the smaller builders, or those without management capability, prefer to use their construction staff for much of the early maintenance. The failure to provide professional property management allows early deterioration to set in because of improper maintenance and the lack of an effective preventative maintenance program.

Seventh, a landlord may not withhold reasonable supply of any vital service, such as heat, fuel, electricity, gas, or water, which it is his obligation to supply under the tenancy agreement. In a condominium, the agreement of purchase and sale rarely states what the developer is to provide during the interim occupancy period. The purchaser must look at the condominium documents to determine what the condominium corporation is to provide. From these documents the purchaser can determiner those services which the developer should provide during interim occupancy.

Eighth, there are extensive provisions with relation to the termination of a lease in The Landlord and Tenant Act, and to the landlord's right to possession of the property. The Landlord and Tenant Act has already been amended to state that where a tenancy arises by virtue of an agreement of purchase and sale of a condominium unit and the agreement is terminated, the right of a tenant to remain in the premises does not apply. In the event of vandalism or failure to pay rent, condominium builders have utilized these provisions to remove purchasers in possession under their agree- ments of purchase and sale.

Recommendation No. 50:
A. Purchasers in possession under an interim occupancy arrangement remain as tenants under The Landlord and Tenant Act, but that certain changes be made in their rights.

B. The Condominium Act be amended to provide that, notwithstanding the status as tenants of purchasers in possession:

a) The builder be required to provide only those services that the condominium corporation is to provide in accordance with the documents the builder must provide purchasers.
b) The reponsibility of the builder for repair and maintenance of the building be that of the future condominium corporation.
c) The builder have the same right of entry as the future condominium corporation.
d) The builder be allowed to withhold consent to an assignment of the interim occupancy agreement or to a subletting where this would interrupt the flow of mortgage advances.

Builder's solicitors should be advised that as a consequence of this tenancy status, purchasers in possession should not be required to pay estimated adjustments on occupancy, but only upon title passing.

Enforcement of rules
It is desirable that the purchaser's rights during interim occupancy be consistent with their subsequent rights as owners. If the developer fails to enforce the rules from the beginning, many purchasers form bad habits, at the expense or discomfort of the other purchasers, which are difficult to correct.

The agreement of purchase and sale often requires the purchaser to abide by the rules given the purchaser and which will be passed by the condominium corporation.

There is, however, little to ensure that the same rules are enforced against other purchasers before registration of the condominium. The right of the purchaser to enforce the rules against any owner who, for example, has a noisy pet or air-conditioner, is in The Condominium Act for use after registration under that act.

Many purchasers have found themselves waiting in frustration for registration because the builder did not bother to enforce the rules against the other purchasers during the interim occupancy period.

Recommendation No. 51:
The Condominium Act be amended to provide that the purchaser and the developer abide by the rules and regulations proposed for the corporation and that such rules be enforceable by the purchaser against other building occupants just as if the rules were rules of a registered condominium corporation.

The response of purchasers to problems in many unregistered condominium projects is to establish an interim homeowners' association to unify and communicate purchaser response to the builder. Sometimes, an association is created as a reaction to particular problems. Some builders appreciate this feedback of information from purchasers at an early stage and encourage such organizations by providing meeting rooms and printing facilities so that they get in the habit of making decisions and selecting representatives. A few representatives often become candidates for the first board of directors elected by the purchasers after the condominium is registered.

Such associations should be encouraged because communication and education at any early stage will result in stronger leadership once the developer's involvement in the project is reduced.

Occasions have developed, however, in which different directors were selected after registration and for reasons which remain obscure, the homeowner's association continued operating to keep an eye on the board elected by the purchasers. The existence of an elected board of directors and a "watchdog" committee from the association creates tension and interference in the normal running of the condominium corporation.

The value of an association lies entirely before the directors are elected by the purchasers; it is primarily in the area of training people to become future board members.

Activities of an association include analysing financial information, construction quality, and the maintenance standards necessary for proper running of the building, and developing social activities that encourage purchaser participation in the building community.

A major difficulty in developing such activities is an insufficient budget to retain outside help such as lawyers and engineers to aid in analysing management and construction quality; social activities are often self-supporting. It is only when the condominium is registered and a board of directors is elected that there is sufficient cash flow for this external aid.

Reliance during the pre-election period must be placed on money obtained from voluntary contributions or in expertise provided by other condominium corporations. This expertise is often available through regional condominium associations. Several of these associations made presentations to the Study Group and showed capability in assembling and organizing data on complex questions.

Recommendation No. 52:
Condominium purchasers in a particular project join together to create an interim association. This association should then select an individual whom the developer could include on his board of directors immediately upon registration. The developer should include at least one purchaser-occupier on the board of directors as soon as possible after the registration of the corporation.

Delays in registration
The lack of payment towards the mortgage principal, inability to control abuses of the documentation, uneven management, and lack of outside aid encourages criticism of the lengthy registration process. This criticism is compounded by a suspicion that the builder is deliberately delaying the process in order to make money on the building rental.

At public hearings, some purchasers expressed suspicion that builders profited from delay where the building had not been assessed for municipal taxes as occupied, where the construction mortgage had not been fully advanced and corresponding interest charged by the lender to the builder, and where maintenance was poor or the building was half-empty (see chapter on Approval Process).

Suspicion of an incentive for the builder to delay was sufficient in 1974 for The Condominium Act to be amended to provide that every agreement of purchase and sale was deemed to contain an agreement by the vendor to take all reasonable steps to register the condominium.

Unfortunately, there was no definition of what were reasonable steps. In any case, court action by an individual purchaser was necessary to compel the builder to speed up the process. Builders possessing a mortgage commitment that required a certain percentage of sales to be made before the lender would consent to registration can say that having to comply with this provision was not reasonable.

As well, builders can involve themselves in a number of difficulties which would prevent registration, or at least seem plausible enough to discourage an application by a purchaser to the court. For example, a dispute with the municipality leading to a delay in the municipality sending its letter of approval of the condominium to the Minister of Housing might be one such delaying tactic.

Recommendation No. 53:
The Condominium Act be amended to provide that a notice of intent to register a condominium be registered when the building permit is issued and such notice be signed by all existing encumbrancers. (Those who have a financial or non-financial interest or claim on the property). *These and all subsequent encumbrancers must be deemed to have consented to the registration of a condominium, conforming with the information filed with the Condominium Registrar* (see chapters on Approval Process and Registrar).

This arrangement would replace the existing requirement that encumbrancers consent to registration of the condominium declaration.

Chapter 8
Property management

It was apparent from our hearings that a number of problems associated with condominium ownership originate with the method of management used in various developments. Proper management of a condominium corporation must be recognized as an essential part of the concept if it is to be successful. Good management can contribute much in overcoming the present fears and misconceptions that the public has about condominium living.

Management

Maintenance of the corporation's common elements and management of the corporation's assets represent the major areas of responsibility of the board of directors. The board must provide the initiative in: ensuring the property is maintained; establishing rules and regulations to govern the use of facilities; determining methods of enforcement; adopting a course of action on common expense arrears; supervising the accounts payable and accounts receivable; insuring proper bookkeeping records are maintained; preparing the budget; and responding to complaints from fellow owners. These are only a sample of the many tasks involved in providing good management.

There are several methods of management from which the board may choose. The choice will be influenced greatly by the design and number of units in the development and the quality and frequency of service desired. Most large corporations find that commercial management is a necessity, while many smaller corporations may not need such extensive assistance. The latter corporation may be fortunate in having a sufficient number of experienced resident-owners willing to provide the basic management functions if they are supplemented by selective professional assistance.

Boards of directors should be very sensitive to their management needs. A decision on a form of management, based solely on cost, may not necessarily be in the best interest of the owners. If proper management is sacrificed the development may deteriorate due to improper or insufficient maintenance. The temptation may be to allow selective repairs and maintenance to go unattended in order to realize lower maintenance charges. However, in the long run this practice results in early deterioration of facilities. Owners might appear to benefit initially by such activity but may have to spend excessive amounts of time and money later to repair or upgrade facilities which otherwise would have been adequately maintained.

A most important decision for the board of directors is determining the best management approach for their needs at a reasonable cost. The board might consider a variety of options ranging from total commercial management as one extreme and self-management as the other. Any major change in management procedure, particularly a move to self-management, should be discussed with the mortgagee. Failure to obtain the mortgagee's consent for a major change could result in the mortgagee's decision to exercise his right to vote.

The board's decision may be similar to one of the following options for management:

A. The corporation may employ a commercial management company to assume the entire maintenance and financial management responsibility using the firm's employees for maintenance duties.

B. A large corporation may wish to involve the services of a full-time on-site manager, a secretary-bookkeeper, and a management firm, all of whom are employed by the board.

C. The board may employ several companies or individuals through contracts for different maintenance responsibilities and supervise the quality of their work.

D. A smaller corporation may choose not to utilize the services of a commercial management firm, in which case experienced owner-residents may be involved in management roles and maintenance tasks may be assigned to various committees of the corporation.

The above sample options are only included to illustrate that various management packages may be considered. Additional management arrangements can be obtained and negotiated with commercial management firms. Sound management is vitally important to the harmony and successful evolution of condominium living.

Checking the experience of the condominium corporations listed by a property manager as references is one method of ensuring that sound management is obtained.

A carefully drawn management agreement should contain well-defined policy decisions by the board which should be communicated to the management firm when the contract is being negotiated.

A check list for property management

The items contained in this list are general in nature and may cover several points with which the management firm of a small or medium sized corporation would not be involved. Several participants at our hearings requested such a list to be used by new boards in examining proposals for management contracts.

1. The contract should state exactly the responsibilities of the management firm. Is it just to maintain the common elements? Does it apply to exclusive use common elements?

2. A maintenance and activity schedule should be considered and agreed upon. The maintenance schedule should include a specific preventative maintenance program for mechanical equipment. (Examine the sample developer's maintenance schedule included in Chart 5 for comparison).