



The Law Reform Commission

DISCUSSION PAPER

*THE WAY FORWARD FOR REGULATION OF TIMESHARES IN
THE CAYMAN ISLANDS*

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THE WAY FORWARD FOR REGULATION OF TIMESHARES IN THE CAYMAN ISLANDS

INTRODUCTION

1. Timeshares are an integral part of the tourism sector of the Cayman Islands but are only regulated by statute for the purposes of accommodation tax. A timeshare is generally defined as a holiday accommodation and facility package. Under the Tourist Accommodation (Taxation) Law (2013 Revision), the only current law to deal with timeshares, it is defined as “any living accommodation in the Islands, used or intended to be used, wholly or partly, for leisure purposes by a class of persons, all of whom have rights to use, or participate in arrangements under which they may use, that accommodation, or accommodation within a pool of accommodation (wherever located) to which that accommodation belongs, for intermittent periods of short duration”.

2. Timeshare accommodation may be found at a number of resorts on the Islands including the following-

- 7 Mile Beach Resort
- Castaways' Cove
- Coral Sands Resort, Grand Cayman
- Grand Caymanian Resort
- Morritt's Grand Resort
- Morritt's Tortuga Club
- Morritt's Tortuga Seaside
- Plantation Village Beach Resort
- Royal Reef Resort Grand Cayman.

3. Timeshare seems to have its roots in either Switzerland or France in the 1960s. The first documented company was called Hapimag in Switzerland, but some say that Paul Doumier of a French development company created a timeshare concept for his firm's Super Devoluy ski resort in the French Alps first. Timeshares started in the United States in 1965 at a hotel-condo complex known as the Hilton Hale Kaanapali on the island of Maui, Hawaii. Four years later the first non-hotel timeshares to be sold on a leasehold basis of forty year increments was by Vacation Internationale on the Hawaiian Island of Kauai. That company also introduced a timeshare product called the points program in the USA in 1974.¹

4. Under a points program some timeshare resorts sell points instead of weeks where purchasers receive a certain number of points that represent a particular size of unit and week at a certain resort. Timeshares at older resorts get a purchaser less points than newer

¹ buyatimeshare.com- History of Timeshares

resorts. A week in high season will cost more and give a purchaser more points than a week in low season. Those points can then be used through the internal exchange of the company in which the person purchased or through the company's international exchange program, if it has one.²

5. The first deeded timeshare program in the U.S. was offered in 1973 at Brockway Springs in Lake Tahoe, California. The developer was Innisfree Companies of Sausalito, California, the program was a 50/50 joint venture with the Hyatt Corporation. This was the first time "timeshare" was used to describe the product.

6. A part of the timeshare product which was developed in 1974 is the exchange program. Christel and Jon DeHaan invented the first exchange company, Resort Condominiums International (RCI), in 1974. Under such a program a timeshare owner is able to trade his week at one resort with a week at another affiliated resort in another state or country.

7. In the USA most timeshare purchases are deeded (or "fee simple") timeshares. This means that the purchaser is buying an actual share of ownership in the resort. Non-deeded timeshares, also known as right-to-use, certificate or vacation-interval timeshares, are more like a club membership. The purchaser owns the right to use the property for a specific time period but doesn't own any real property. The terms of a non-deeded timeshare can include an expiration date, while deeded timeshares confer permanent ownership.

8. While a 1/52 share is average, there are smaller shares (1/104, or one week every other year) and larger shares (1/12, which gives an entire month to use the property each year). Larger shares can usually be split up for use at different times of the year.

9. The specific time of year that a share can be used can affect the price; a share in the middle of prime tourist season will be more expensive.

10. All timeshare resorts charge purchasers annual fees for maintenance, utilities and taxes. These fees are due whether the purchaser uses the property or not. Resorts can increase the fees each year as the initial fees at the time of purchase are not locked in. Some timeshare contracts include a specific clause that limits future fee increases. Usually the annual fee does not cover property taxes but if such taxes apply, purchasers would then be responsible for those costs as well.

11. Timeshare resorts will also add on extra real-estate fees when the share is sold, such as a transfer fee and a recording fee. If the resort decides to make a major improvement to the property, or it has to make major repairs, it might be able to assess a large fee to the purchasers to cover the costs.

² "Understanding timeshare" Magda Embury, 2007, Solomon Harris

12. Our research shows that there are no deeded time shares in the Cayman Islands.³ The programs which are offered here are the right to use/ leasehold or fractional shares programs, points programs and club/trust/company membership programs. Under the first-mentioned program there is a right-to-use a week, or a block of weeks (called a fraction), of a resort club or membership company, backed by a long term lease of the resort property from the developer to the club or membership company of anywhere from 50-99 years. The lease is registered on the title of the resort and should contain protections for the club/membership company from the sale, transfer, assignment or foreclosure of the resort property by the developer for the duration of the lease. Under the club/ trust/company membership programs members belong to a club and their timeshare unit and the resort are held by trustees or a company who then grant right-to-use licences to members.

PROBLEMS IN THE TIMESHARE INDUSTRY IN THE CAYMAN ISLANDS

13. Several years ago after widely reported problems at a well-known timeshare resort, Indies Suites, which culminated in court action in the Court of Appeal, the Attorney General, with the approval of the then Leader of Government Business, asked for the preparation of legislation to regulate the management of timeshare schemes.

14. The main problems at that resort occurred after the passing of Hurricane Ivan in 2004 which saw the destruction of many premises. Indies Suites was very badly damaged by the hurricane and the developers of the resort could not afford to rebuild because the property had been severely underinsured, by about fifty per cent. Whilst trying to recover from the complete devastation Ivan brought, the developer sold the land and partially demolished buildings arguably at an under value without the knowledge of the timeshare owners. This was possible because there was no charge registered to the owners on any of the property.

15. Timeshare units purchased by the timeshare owners in the Indies Suites Resort entitled each unit holder to use of the apartments and other amenities for a specific period-usually for one week each year, for 99 years. The property was provided to a proprietary club, formed and owned by the company, to be operated as club premises. The timeshare entitlements were sold as memberships in the club. Members were required to pay a one-off membership fee and annual maintenance dues. Over 10 years, members paid \$5–6m. in membership fees. The rules of the club provided that in the event of destruction of the club, the company was obliged to repair or restore the property, the works had to commence within two years and the property was to be fully insured for those purposes. In breach of the rules, the property was not kept adequately insured. The proceeds of sale and of the insurance coverage were then divested to a separate but related company.

16. In 2005 two of the time share owners (joined in support by 175 of 500 owners) petitioned for the winding up of the company which owned and operated Indies Suites on

³ Is this correct?

the ground that they were owed a debt by the company. The petitioners alleged that their contract with the company, in the form of the club rules, had been breached and that they were immediately entitled to the return of their membership fees, if not in full, then pro rata with regard to the number of years left in entitlement. The Grand Court made the order sought. The petition for liquidation was opposed by the sole shareholder on the grounds of lack of standing and that the requirements of the Companies Law had not been met⁴. The sole shareholder applied to the Grand Court (Smellie, C.J.) to discharge the order and dismiss the petition as the timeshare owners were not “creditors” of the company under s.96 of the Companies Law (2004 Revision). Smellie, C.J. held that the respondents had standing as creditors under the Companies Law because the company owed them a contractual debt for a liquidated amount of money which could be readily quantified, and confirmed that the company should be wound up.

17. On appeal against the orders of Smellie, C.J., the appellant⁵ submitted that (a) the debts being claimed by the respondents were damages for breach of contract, rather than liquidated amounts, and unless they had a specific claim for a liquidated amount, they would not be creditors for the purposes of s.96 of the Companies Law (2004 Revision) but merely “prospective creditors”; (b) the Cayman Companies Law (2004 Revision) differed from its contemporary English equivalent, as whilst in 1907 the English legislation had been amended to extend the right to bring a winding-up petition to “prospective creditors,” they were still not mentioned in the Cayman Law; if the Cayman legislature had intended to confer the right to petition for winding up on prospective creditors, they would have included a clause to that effect in the Companies Law; furthermore, English precedent prior to the 1907 amendments (when the law was in *pari materia* with the Cayman Companies Law) did not allow prospective creditors to bring a winding-up petition; and (c) the respondents should not be allowed to amend their petition as the proposed amendments would amount to an entirely new petition.

18. The respondents submitted in reply that (a) they were clearly going to be owed a debt by the company and should therefore be treated as creditors; (b) even if they were only “prospective creditors,” English law had been changed in 1907 to allow prospective creditors the right to petition for winding up, and in the absence of provision to the contrary, the Cayman Law ought to be interpreted the same way; if this was not accepted then they ought still to be granted standing because the English authorities prior to 1907, restricting the rights of those with a mere claim for damages to petition for a winding up, were limited to those alleging fraudulent misrepresentation which was a much more uncertain and unquantifiable claim than that which they were bringing for breach of contract; and (c) if they could not be treated as creditors based on their original statement of claim, then they should be allowed to amend it in order to define the appellant’s liability to them as a sum which could be definitively calculated.

19. The Court of Appeal allowed the appeal and set aside the orders of Smellie, C.J. The Court of Appeal held, *inter alia* as follows-

⁴ In the Matter of Indies Suites Ltd, 2004–05 CILR 498

⁵ *Brac Construction Limited v. R. Broome and G. Broome*, 2006 CILR 185

“(1) The respondents were not “creditors” of the company for the purposes of s.96 of the Companies Law (2004 Revision) but “prospective creditors,” as their petition stated that they “had a claim for damages for breach of contract against the company” and a claim phrased in these terms was not sufficient to make a party a “creditor” until it had been converted into a judgment by the court, which gave the creditor a verified claim for a liquidated amount.

(2) As the respondents were not “creditors” of the company for the purposes of the Companies Law (2004 Revision), they did not have standing to petition for its winding up.

(3) The respondents would not be allowed to amend their petition to attempt to define the appellant’s liability to them as a sum which could be definitively calculated (namely, the sum originally paid to the appellant) as doing so would fundamentally reconstruct their case. Additionally, even if the amendment was granted, there would be no certainty as to the amount owed, as the respondents had already enjoyed the benefits of the property and so would not be entitled to the total sum they had paid. However, the respondents would be granted 30 days in which to bring a new petition based on the appellant’s liability to them for a sum which could be definitively calculated.”

20. The case was subsequently settled when the majority of timeshare owners decided to accept a settlement amounting to twenty cents on their invested dollar. When interviewed by the press⁶ one owner noted that he had only used his timeshare for three of his contracted 99 years and while only receiving 20% of his investment in return. The fact that the property was underinsured and was sold without the consent of the timeshare owners spurred some owners to call for timeshare regulation in the Cayman Islands.

21. In an article entitled “Timeshare owner sues Morritt’s Tortuga” the Caymanian Compass reported in January 2009 that a New York couple was suing Morritt’s Tortuga Club and Resort for a refund of their time-share payment claiming the resort company failed to build their holiday home. According to the report⁷ during their visit to the Cayman Islands the couple decided to buy their own one bedroom timeshare property at the resort to use two weeks a year, an arrangement they later upgraded to a two bedroom unit for use three weeks a year. The writ stated that they entered into an agreement with Morritt Properties Cayman Ltd. to purchase a property to use two weeks a year and could take up occupancy in 2007. The unit cost US\$18,410.25, which the couple paid on 8 May, 2006. Two weeks later, they upgraded to a two-bedroom unit for an extra cost of US\$12,090, and extended their agreement to add an extra week a year at an extra cost of US\$27,662. According to the writ the agreement they signed on 20 May included the clause that “a purchaser of an un-built unit, buying on a pre-construction basis, may terminate and cancel the contract, should the unit not be ready at the occupancy date

⁶ Cayman Compass, 26 June, 2006

⁷ Lorenz and Lorenz v Morritt Properties Cayman Ltd and Morritts Tortuga Club limited

specified in the purchase agreement. Under such circumstances, the purchaser would receive a full refund.”

22. When Mr. and Mrs. Lorenz showed up at the complex at the end of December 2007, they were told the unit was not ready to be occupied and were placed instead in a fifth-floor unit, an arrangement the family says was unsuitable for their eight-year-old twins. The writ, filed by Cayman law firm Samson and McGrath, continued that resort representatives assured them orally when the agreement was signed that the apartment would be completed on schedule by December 2006. However, at the time of filing, no date for completion of the unit has ever been given by the defendants. The couple was told in early January 2008 that the unit was still un-built and no dates for building or occupancy were provided. At that point, they asked for a full refund of their money. In an interview with the press a representative of the resort stated that the company had intended to start rebuilding the second building in autumn 2008, but due to the credit crunch, Morritt’s had postponed the work. The case was settled by consent order in August 2009 with a refund of monies to the plaintiffs.⁸

23. In other matters reported to the Law Reform Commission in 2013 with respect to another resort, owners complained of hearing about the sale of the resort in the press, poor maintenance of the premises, bad record keeping and the failure by the resort to keep owners abreast of developments in the resort.

PROBLEMS IDENTIFIED WITH TIMESHARE PRODUCTS WORLDWIDE

24. Research by the Commission shows that timeshares in other countries have faced a myriad of problems over the years, more specifically the following-

- avoidance of existing legislation;
- high pressure selling;
- lack of cancellation rights;
- loss of deposits and pre-payments;
- a failure to protect deposits and other advance payments;
- unclear information about what is being sold;
- failure to provide clear information about the business involved and where to find them;
- misleading or fraudulent claims; and
- financial failure of the business.

25. For years timeshare legislation in other countries has not necessarily had an impact on the rogue-trader element of the “timeshare” business. As legislation has been introduced those wishing to continue their unfair practices introduced new products which were not covered by the existing legislation and new ways to evade existing legislation. Many problems stemmed from the definition applied to the term “timeshare”

⁸ Consent Order of the Grand Court, 2009

being too narrow. The definition tended to have an element requiring the purchase to be a building or part of a building and that the agreement is made for no less than 36 months.

26. In the EU a Timeshare Directive was adopted in 1994 in order to protect consumer's interests including-

- giving purchasers the right to information in a prospectus before signing a contract and requirements for the content of the contract;
- once the contract is signed, giving the consumer a cooling-off period of at least 10 days, during which he can withdraw from the contract without giving any reason; and
- providing a ban on advance payments throughout the cooling-off period.

27. The Directive had been implemented in all Member States but after its adoption new products and contracts developed which were not covered by the legislation. These new products included ‘timeshare-like products’ (such as timeshare in canal boats, cruise-ships and caravans or contracts for less than 3 years) as well as the so-called “holiday discount clubs”. Resale and exchange of timeshare schemes were not covered either by the Directives. Some of the products and some transactions related to timeshares, in particular resale, which arose after the adoption of the Directive caused large detriment to consumers, as witnessed by a significant number of complaints, and unfair competition to honest traders, since they were, not covered.⁹

28. After a review of the 1994 Directive was conducted in 2007, in 2008 a new Timeshare Directive was implemented. The Timeshare, Long-Term Holiday Product, Resale and Exchange Contracts Directive 2008/122/EC was adopted in February 2009 and Member States had until 23 February, 2011 to introduce national legislation to comply with it.

29. The 2008 Directive covers a wider range of timeshare products as it sought to close the lacunae created by the developments in the timeshare industry after 1994. Its preamble noted that some subjects of the 1994 Directive needed to be updated or clarified in order to prevent the development of products aimed at circumvention. The Directive regulates timeshare contracts, long-term holiday product contracts, resale contracts, exchange contracts and contracts which are ancillary to timeshare and long-term holiday product contracts. It covers, among other things, advertising of products, pre-contractual information, the right of withdrawal, advance payments termination of ancillary contracts, judicial, administrative and out-of court redress to protect the interests of consumers.

30. Timeshares have existed in Florida since 1974 and despite legislative regulation as early as 1981, in 2012 the Governor of Florida was compelled to sign into law the Timeshare Resale Accountability Act to combat the many complaints about timeshare scams. It was noted that complaints about timeshares at the time were the largest number

⁹ Revision of the timeshare directive, European Commission

of consumer complaints made in many regions of Florida and many of those complaints related to re-sale frauds. The Palm Beach Post, in 2010, identified the re-sale scheme as Florida's top fraud complaint; penalties were not meaningful and the fraudsters would simply close their doors and move on. From the time of the economic crunch timeshare owners in Florida had found it very difficult to sell timeshare interests and many fell prey to re-sale scams where scam artists defrauded them into believing that they had someone who wanted to buy their timeshare. According to one source¹⁰, once the timeshare owner showed interest, the scam artist would then request thousands of dollars in upfront fees for such things as title or closing costs. After the timeshare owner pays, the supposed buyer never materializes and the scam artists claim that they were merely offering advertising services for the upfront money paid.

31. In an attempt to protect timeshare owners against such resale fraud, Florida enacted the Timeshare Resale Accountability Act which restricts the activities of certain timeshare resellers. The Act includes the following provisions¹¹-

- A timeshare resale advertiser may not misrepresent a pre-existing interest in the owner's timeshare.
- A timeshare resale advertiser may not mislead a customer as to the success rate of the advertiser's sales.
- A timeshare resale advertiser may not provide brokerage or direct sale services.
- A timeshare resale advertiser must honor a cancellation request made within 7 days following a signed agreement.
- A timeshare resale advertiser must provide a full refund to a timeshare owner within 20 days of a valid cancellation request.
- A timeshare resale advertiser must not collect any payment or engage in any resale advertising activities until the timeshare owner delivers a signed written agreement for the services.
- A timeshare resale advertiser must also provide a full disclosure statement printed in bold type, with no smaller than a 12-point font, and printed immediately preceding the space provided for the timeshare owner's signature.
- A timeshare advertising agreement must be put in writing.
- A company who violates these provisions has committed a violation of the Unfair and Deceptive Trade Practices Act with a penalty not to exceed \$15,000 per violation.

32. The resale service provider is also prohibited from¹²-

- providing brokerage services without holding a valid real estate license;
- misrepresenting its resale success rate;
- representing that a timeshare has a specific resale value; and

¹⁰ "Florida passes Timeshare Law to protect consumers", Jeffery Strain, June 23, 2012

¹¹ Office of the Attorney General of Florida, myfloridalegal.com

¹² www.nolo.com

- representing that it has clients waiting to buy or rent your unit without providing names, addresses, and telephone numbers.

33. The Commission has not received any reports of these types of frauds in the timeshare industry in Cayman but, based on the problems which have been reported in Cayman, any regulating legislation should not only focus on the regulation of the contracts but also on government supervision of the management of timeshare resorts. Good record keeping, easy access by purchasers and any enforcement body to such records and proper maintenance of premises should also form an integral part of any new legislation. The 2008 EU Directive emphasised that the existing regulatory gaps at the time created appreciable distortions of competition and cause serious problems for consumers, thus hindering the smooth functioning of the internal market. According to the Directive, since tourism plays an increasingly important role in the economies of the Member States, greater growth and productivity in the timeshare and long-term holiday product industries should be encouraged by adopting certain common rules. In the Cayman Islands we should also follow such guidance and seek to have rules which will conform as much as possible with existing international rules.

HOW DO CURRENT LAWS PROTECT BUYERS?

34. The laws governing timeshares differ in their detail, but generally attempt the following-

- a right to a cooling-off period from the day the timeshare contract is signed - during this time the contract can usually be cancelled for any reason without penalty;
- prohibiting sellers from seeking or accepting any money from buyers during the cooling off period, for themselves or anyone else;
- cancellation of linked credit agreements when the timeshare contract is cancelled;
- providing that brochures given to potential buyers must contain prescribed information, for example:
 - accurate description of the plan and units;
 - accurate description of amenities at the site;
 - number of units to be included in the timeshare plan;
 - full and clear information about the right to cancel and cooling off period;
- providing that contracts should contain basic minimum information as well as a repeat of the information in brochures the contract is usually required to include:
 - the names and addresses of the parties to the contract;
 - an accurate description and completion date for the property;
 - the purchase price and other charges relating to the use of common facilities, taxes, fees and administrative charges;
- providing for record keeping to accord with international standards;

- giving powers to public authorities to enter and inspect premises and records;
- adequate insurance of resorts; and
- prescribing non-disturbance provisions/protection of consumers against insolvency or other financial problems of resort.

35. The Commission has prepared for consideration a Timeshare Bill which will be discussed later in this paper and which can be found in the Appendix A. The legislative precedents which were considered in the preparation of the Bill were legislation in the UK, Bahamas and Alberta, Canada and they can be found in Appendix B. Below is a summary of the main provisions of such precedent legislation.

Regulation of timeshares in the UK

36. The UK approved regulations in 2010 in order to comply with the 2008 EU Directives. The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 regulate holiday clubs, all forms of holiday accommodation including boats, the re-sale of timeshare and holiday club memberships by consumers, exchange contracts and all purchases for a period of more than one year.

37. The Regulations-

- repeal the Timeshare Act of 1992 and revoke the Timeshare Regulations;
- contain provisions relating to the advertising of regulated contracts;
- require important key information to be provided in advance of a contract being agreed and in a standardised form;
- contain provisions relating to the form and content of the regulated contracts;
- ban any payment in advance of the completion of the withdrawal period of the regulated contract;
- set out provisions for payment for a long-term holiday product contract by way of yearly instalments;
- provide a consumer with a right to withdraw from a regulated contract within a standard 14 day withdrawal period and the additional right to withdraw from a long-term holiday product contract when payment of each instalment becomes due;
- provide for the automatic cancellation of a related credit agreement and other ancillary contracts;
- include sanctions and, where appropriate, criminal offences for non-compliance; and
- provide that consumers may bring civil action for breach of duties imposed on traders by the Regulations.

38. The Regulations are enforced by the regional Trading Standards Enforcement officers who are empowered, where they have reasonable cause to suspect that an offence under the Regulations has been committed, to require a trader to produce any document relating to the trader's business and take copies of it, or of any entry in it, or to seize and detain such records.

39. As stated the Regulations provide the key information which must be provided in the regulated contracts. A timeshare contract must, for example, include the following-

- identity, place of residence and legal status of the trader(s) which will be party to the contract;
- short description of the product (e.g. description of the immovable property);
- exact nature and content of the right(s);
- exact period within which the right which is the subject of the contract may be exercised and, if necessary, its duration;
- date on which the purchaser may start to exercise the contractual right;
- if the contract concerns a specific property under construction, date when the accommodation and services/facilities will be completed/available;
- price to be paid by the purchaser for acquiring the right(s);
- outline of additional obligatory costs imposed under the contract; type of costs and indication of amounts (e.g. annual fees, other recurrent fees, special levies, local taxes);
- a summary of key services available to the purchaser (e.g. electricity, water, maintenance, refuse collection) and an indication of the amount to be paid by the purchaser for such services;
- a summary of facilities available to the purchaser (e.g. swimming pool or sauna);
- information on whether the costs of facilities and how they will be paid;
- information on where an exchange scheme will apply to the contract and if so the details on such scheme; and
- general information on the right to withdraw from the contract, the period of time during which a person may withdraw and on the law which governs the contract.

40. Consumer legislation in the UK also provides other regulation of timeshares and these include the Consumer Protection From Unfair Trading Regulations which deal with misleading statements and omissions and which are relevant where a consumer considers that there was misrepresentation. However, those Regulations are only relevant if a person has suffered any loss as a result of the misrepresentation. The Consumer Credit Act 1974 provides an opportunity for consumers who paid by credit card, or used a “linked” loan for the purchase, to obtain recompense from the lender. The Unfair Terms in Consumer Contracts Regulations 1999 provides enforcement authorities with the power to stop the use of contracts which are unfairly biased against consumers.

Regulation of timeshares in the Bahamas

41. Timeshare ownership is a vibrant part of the tourism product in the Bahamas in that as the timeshare interest has already been paid for, tourists have more discretionary funds to spend on vacation. In late 2013 the Bahamas was touted by industry experts as the preferred destination in the Caribbean for timeshare ownership.¹³ The Vacationing Plan and Timesharing Act was brought into force in the Bahamas in 2000 and contains a

¹³ Guardian, 1 November, 2013

wide range of regulatory provisions. The legislation seeks to ensure the financial viability of timeshare projects as well as to provide protection for consumers under timeshare contracts.

42. The Bahamas Investment Authority is responsible under the Act for the licensing of all persons who engage in the construction, development, marketing, selling or managing a time share project in the Bahamas. Thus, a person cannot construct a new building, effect any improvement in or repairs or alterations to an existing building, or use or change the use of an existing building for the purpose of such building being used in the operation of a timesharing project except under and in accordance with the terms of a developing owner's licence granted for that purpose by the Authority. A person who wishes to engage in the advertising, marketing, offering for sale or in the management of a timesharing project must do so under and in accordance with the terms of a marketing agent's licence or managing agent's licence, as the case may be, granted by the Authority.

43. Before a developing owner may be granted a licence the Authority must, unless it determines in its discretion not to do so, approve the timeshare contract which is to be executed by the purchasers of the timeshares and the contract cannot be materially varied without the written approval of the Authority.

Management of timeshare properties

44. The financial viability of the timeshares resorts are ensured by the requirement of a developing owner to establish at a financial institution an escrow fund, trust fund as well as a sinking fund.

45. **Escrow fund** - The Act requires the proceeds of all on-site and some off-site sales of timesharing interests to be paid immediately upon receipt into the escrow fund. The financial institution is empowered to disburse those funds in the following circumstances and in the following amounts-

- (a) to the purchaser, on the cancellation of his contract within the 7 days cancellation period allowed in the contract, the total amount of all payments made by the purchaser less any contract benefits;
- (b) to the developing owner, on the cancellation of a purchaser's contract within the cancellation period allowed therein, the proportion of any contract benefits the purchaser has actually received under the contract prior to the effective date of cancellation;
- (c) to the marketing agent, pursuant to a contract in writing between the developing owner and the marketing agent and upon the expiration of the cancellation period of a purchaser's contract, up to an amount not exceeding thirty-five per cent of the gross amount realised from the sale of

the timesharing interest of that purchaser for the purpose of paying the costs of marketing the timesharing project;

- (d) to the developing owner, where he is also the marketing agent, upon the expiration of the cancellation period of a purchaser's contract, up to an amount not exceeding thirty-five per cent of the gross amount realised from the sale of the timesharing interest of that purchaser for the purpose of paying the costs of marketing the timesharing project; or
- (e) to the developing owner, upon the expiration of the cancellation period of a purchaser's contract, five per cent of the gross amount realised from the sale of the timesharing interest of that purchaser; and the developing owner shall immediately pay the same into the sinking fund.

46. The financial institution must, after making such disbursements, transfer the balance to the trust fund or to the sinking fund in certain circumstances.

47. **Sinking fund-** Section 32 of the Act provides for the establishment by the developing owner of a sinking fund. The sinking fund comprises monies paid in from the escrow fund as well as such amount that represents five per cent of the gross amount realised from the off-site sale of any timesharing interest by the developing owner after the operation of the respective cancellation period. The monies paid into the sinking fund must be applied for payment of any repairs, alterations or replacements necessary to the premises of the completed timesharing project by reason of defects in materials or workmanship. Any sum paid to the sinking fund may, unless applied in payment to the purposes for which the sinking fund is established, be repaid to the developing owner anytime after three years from when construction of the timesharing project is completed, and the sinking fund is held by the developing owner during such period on trust for the benefit of all purchasers for such purposes.

48. Section 32 further provides that the advisory membership structure of any timeshare owners' association provided for under the Act is entitled to use the funds held in the sinking fund, if any, for the purposes for which they are intended upon the failure of the developing owner so to do. In that regard, the developing owner shall, at the request of the advisory body, provide the financial institution at which the sinking fund is kept, the signatures of two persons approved by that body as being authorised to make any necessary withdrawals. A developing owner who contravenes the provisions of this section is guilty of an offence and is liable on summary conviction to a fine of five thousand dollars or to imprisonment for one year or to both such fine and imprisonment.

49. The Investment Authority may permit the developing owner, in lieu of having a sinking fund, to provide to the Authority an alternative assurance in such amount and form as the Board may accept, including a surety bond, letter of credit or a company guaranty issued by the developing owner (or its parent company), provided the Authority is satisfied that the developing owner (or its parent company) has a net worth in excess of twenty-five million dollars and is otherwise financially sound.

50. **Trust fund-** A developing owner is required to establish and maintain with a financial institution (the trustee) a trust fund into which fund shall be paid any amount which may be transferred from the escrow fund to the developing owner under section 31. Disbursements from the trust fund must be made by the trustee to the developing owner, of the balance of the proceeds of sale of the timesharing interest in relation to the facilities of the timesharing project in respect of which a certificate of occupancy has been granted. Funds may also be paid to a timesharing purchaser, in respect of any sum payable under a judgment obtained by him in a court of The Bahamas for breach of contract in connection with his purchase of a timesharing interest, provided there are moneys standing to the credit of the fund. A developing owner may not use the funds held in the sinking fund or the trust fund as collateral security in support of any loan or other financial obligation incurred by him.

51. Where a developing owner fails to complete the timesharing project in accordance with the terms and conditions of his licence or is adjudged a bankrupt by a court of competent jurisdiction and his licence is revoked, any interested party may make an application to the Supreme Court for an order enabling that person to complete the timesharing project by using the funds in the trust fund, if any, or for the disbursement of such funds to the purchasers on a *pro rata* basis.

52. The Act also regulates the management of the premises by providing for the appointment of a managing agent, mandating the insurance of the timeshare project and stipulating how financial records of the timeshare project should be kept.

53. **Managing agent-** Section 26 of the Act provides that before the first sale of timesharing interest within a timesharing project, the developing owner must create or provide for a managing agent, which shall be either the developing owner, a separate manager or management firm, the board of administration of an owners' association, or some combination thereof. The managing agent acts in the capacity as the fiduciary of purchasers under the timeshare contracts. The duties of the management agent include-

- (a) the management and maintenance of all accommodations and facilities constituting the timeshare project;
- (b) the collection of all assessments for common expenses;
- (c) providing each year, to all purchasers an itemized annual budget which shall include all estimated revenues and expenses and which shall be in such form as may be required by the Authority;
- (d) maintenance of all books and records concerning the timeshare plan and the timesharing project so that all such books and records are reasonably available for inspection by any purchaser or the authorised agent of such purchaser;
- (e) scheduling occupancy of the timeshare units, when purchasers are not already entitled to use specific timeshare periods, so that all purchasers will be provided the use and possession of the accommodations and

- facilities of the timeshare plan with respect to which they have purchased;
and
- (f) performing any other functions and duties which are necessary and proper to maintain the accommodations or facilities as provided in the timeshare plan and as advertised.

54. **Proper keeping of records-** The managing agent must maintain among its records and provide to the Authority, upon request, a complete list of the names and addresses of all purchasers and owners of timesharing interests. All books and financial records of the timeshare plan and of the timesharing project must be maintained in accordance with International Accounting Standards and the managing agent must notify all purchasers of the location of the books and records and the name and address of the custodian in the copy of the annual budget.

55. **Insurance-** The developing owner or his managing agent is required¹⁴ to provide and maintain for the benefit of all purchasers and their guests public liability insurance in respect of the accommodations and facilities to be used under the timeshare plan. Such insurance must be in an amount of not less than one million dollars, or such greater amount as the Authority may see fit to impose from time to time. Insurance must also be provided for all the property of the timesharing project of an insurable nature insured against loss or damage in an amount not less than the replacement cost of such property. A developing owner who fails to provide such insurance commits an offence and is liable on summary conviction to a fine of ten thousand dollars or to imprisonment for two years or to both such fine and imprisonment.

56. A public officer designated by the Authority and other public officers including the police, fire officers and officers of the Department of Health have power to enter and inspect the premises and records of a timeshare project to ensure compliance with the Law. They may also enter for the purpose of investigating any complaints made by an aggrieved purchaser regarding the application of the Act to any particular project.

Protection of the interest of the purchasers

57. A seller of a timeshare interest must utilise and furnish each timesharing purchaser with a fully completed and executed copy of a contract pertaining to the sale, which contract must contain the matters set out in the First Schedule of the Act. A developing owner or managing agent who contravenes such provisions commits an offence and is liable on summary conviction to a fine of five thousand dollars or to imprisonment for one year or to both such fine and imprisonment.

58. Matters which must be set out in the contract include the following-

- (a) the actual date the contract is executed by each party;

¹⁴ Section 30

- (b) the names and addresses of the developing owner, any holder of a mortgage or other security instrument, and any owner or lessor of any underlying estate in freehold or leasehold;
- (c) the total financial obligation of the purchaser, including the initial purchase price and any additional charges to which the purchaser may be subject, such as financing, reservation, maintenance, management and recreation charges;
- (d) the estimated date of completion of construction of each accommodation or facility which is not completed at the time the contract is executed;
- (e) a description of the nature and duration of the timesharing interests being sold and of the timeshare plan, including the specific number of years constituting the term of the timeshare plan; and
- (f) immediately prior to the space reserved in the contract for the signature of the purchaser, in conspicuous type, substantially the following statement:

“YOU MAY CANCEL THIS CONTRACT WITHOUT ANY PENALTY OR OBLIGATION WITHIN SEVEN DAYS FROM THE DATE YOU SIGN THIS CONTRACT, AND UNTIL SEVEN DAYS AFTER YOU RECEIVE THE PUBLIC OFFERING STATEMENT, WHICHEVER IS LATER. IF YOU DECIDE TO CANCEL THIS CONTRACT, YOU MUST NOTIFY THE DEVELOPING OWNER IDENTIFIED IN THIS CONTRACT IN WRITING OF YOUR INTENT TO CANCEL. YOUR NOTICE OF CANCELLATION SHALL BE EFFECTIVE UPON THE DATE SENT AND SHALL BE SENT TO (NAME OF DEVELOPING OWNER) AT (ADDRESS OF DEVELOPING OWNER). ANY ATTEMPT TO OBTAIN A WAIVER OF YOUR CANCELLATION RIGHT IS UNLAWFUL. WHILE YOU MAY EXECUTE ALL COMPLETION DOCUMENTS IN ADVANCE, THE COMPLETION, AS EVIDENCED BY DELIVERY OF YOUR OWNERSHIP CERTIFICATE OR OTHER DOCUMENT, BEFORE EXPIRATION OF YOUR SEVEN DAY CANCELLATION PERIOD, IS PROHIBITED.”.

59. The developing owner of a timeshare development must register a buyer's interest. Once the interest is registered a charge is created for the duration of the purchaser's interest. The charge prevails against any subsequent purchaser. This prevents the developing owner from selling the project without notifying the owners. At section 23 of the Act there are provisions relating to the timeshare owner's rights and interests should the timeshare development become insolvent. These provisions are commonly called non-disturbance clauses. Section 23 provides, inter alia, that, notwithstanding any law to the contrary, in no event shall the foreclosure, exercise of power of sale or pursuit of other right or remedy under a mortgage or other debt instrument covering all or any portion of a timesharing project (whether covering real or personal property or both), extinguish or impair a purchaser's timesharing interest in the same timesharing project, irrespective of whether any such mortgage or other debt instrument is given or filed for record prior to completion of any such timesharing interest. However, this provision does not prohibit the foreclosure, exercise of power of sale or pursuit of any other right or remedy pursuant to any law relating to-

- (a) a chattel mortgage (or other debt instrument) covering a purchaser's time-sharing interest that was given at the time of completion of any such time-sharing interest in order to secure all or any portion of the unpaid purchase price thereof (including any future advances made thereafter under any such chattel mortgage or other instrument between the same parties or their respective successors); or
- (b) any charge or lien upon a timesharing interest arising out of any law or by contract whereby any such charge or lien arises or is given in order to secure payment of a purchaser's pro rata share of operating, maintenance or similar expenses to which such purchaser is subject under a time-sharing plan.

60. Purchasers are further protected by the prohibition in the Act against overselling. In accordance with section 24, the developing owner and managing agent shall ensure that the timesharing project with respect to which they are licensed is constituted and in fact operated such that the timesharing interests therein are not oversold. Also, a purchaser cannot waive any of the requirements of the Act or of any of his rights or remedies of a purchaser set out in the Act or under any other law.

Prohibitions and penalties

61. The Act sets out a number of things which are deemed to be prohibited transactions. These are as follows-

- (a) developing owner or marketing agent selling a timesharing interest where such interest was previously sold and not otherwise reacquired by the developing owner into his inventory;
- (b) the advertising, marketing or sale of a timesharing interest that would expire after forty-five years from the date on which the occupancy permit pertaining to that unit was issued;
- (c) the advertising, marketing or sale of any timesharing interests otherwise in contravention of the terms of this Act; and
- (d) the advertising, marketing or sale of any timesharing interests in or from any place other than a place approved by the Authority or the place where the timesharing project is located.

62. Any person who commits a prohibited transaction is liable on summary conviction to a fine of ten thousand dollars or to imprisonment for two years or to both.

63. Among other things, a person who makes certain false statements under the Act may also be convicted of an offence. Thus, for example, any person who, in the course of developing, managing, advertising, marketing or selling a timesharing project-

- (a) makes a statement which he knows to be false; or
- (b) recklessly makes a statement which is false as to any of the following matters-

- (i) the nature, extent or scope of any services, accommodations or facilities provided with respect to the timesharing project or the timeshare plan;
- (ii) the time at which, manner in which or persons by whom any services or accommodations or facilities are so provided;
- (iii) the location of the project, amenities offered or any accommodation or facilities provided, or
- (iv) a prediction of any increase in the price or value of a timesharing interest,

is guilty of an offence under the Act and is liable on summary conviction to a fine of five thousand dollars or to imprisonment.

64. The Bahamian Act is comprehensive and provides excellent guidance on the management of timeshares which appears to be the principal problem in the Cayman Islands. It sets out not only provisions which regulate contractual terms but in providing detailed licensing and management provisions it addresses the regulation of the timeshare industry in Bahamas in a holistic manner.

Alberta Timeshare and Points-Based Contracts and Business Regulation

65. Alberta revised its timeshare regulatory scheme in 2005 but five years later, the Alberta government determined that its rules had not kept pace with the changes in how vacation ownership products are structured, marketed and sold. The government took into account international moves for better regulation of the sector and in November 2010 adopted Alberta Regulation 105/2010, the Time Share and Points-Based Contracts and Business Regulation, to replace the Time Share Contracts Regulation. It is submitted that the Alberta regulation is a cross between the purchaser/seller regulatory approach of the UK legislation and the wider regulation approach taken by the Bahamian Act. The regulation was enacted under the Fair Trading Act. Other legislation which apply to the regulation of timeshares in Alberta are the General Licensing and Security Regulation.

66. The Timeshare and Points-Based Contracts and Business Regulation provide, inter alia, for the following matters-

- contract requirements;
- cancellation of contracts;
- supplier's obligations;
- licensing of time share businesses; and
- unfair practices and other offences.

Contract requirements

67. The Regulation regulates timeshare and points-based contracts and provides for the mandatory inclusion of a wide variety of matters in such contracts. All such contracts¹⁵ must be written and must include, inter alia -

- (a) the consumer's name and address;
- (b) the supplier's name, business address including a street address, telephone number and, if applicable, fax number and e-mail address;
- (c) the name and position of any agent or employee who is representing the supplier in respect of the contract;
- (d) the date and place at which the contract is entered into;
- (e) in the case of a time share contract-
 - (i) a description of the time share property, including its legal description and precise location; and
 - (ii) a full description of the time share interest being purchased by the consumer under the contract, including a statement of any period during which, or any dates on which, the consumer is entitled to use, occupy or possess the time share property;
- (f) in the case of a points-based contract-
 - (i) an explanation of the options available to the consumer under the contract to exchange points for the right to use, occupy or possess real or personal property within the time share plan, and
 - (ii) a full description of the time share interest being purchased by the consumer under the contract and a statement of the terms of any trust or other arrangement under which the consumer's interest is to be held;
- (g) any financial conditions that must be met before the consumer may exercise a right under the contract, including any requirement that all or any portion of the purchase price be paid beforehand;
- (h) an itemized statement of-
 - (i) the total cost of the time share interest being purchased by the consumer,
 - (ii) the number of points, if any, being acquired by the consumer,
 - (iii) any closing costs payable by the consumer in respect of the contract, and
 - (iv) any expense, fee, levy, assessment or cost to which the consumer is or may become subject under the contract, time share plan or exchange program, if any;
- (i) if credit is extended by the supplier-
 - (i) a statement of any security taken for payment, and
 - (ii) the disclosure statement required under Part 9 of the Act;
- (j) a statement as to whether the number of points referred to in clause (h)(ii) or any expense, fee, levy, assessment or cost referred to in clause (h)(iv) is

¹⁵ Regulation 2

- subject to change in the future, and if so, an explanation of how and when it may change;
- (k) the terms of payment;
 - (l) unless the third party's interest and any financial encumbrance associated with it are the subjects of a non-disturbance clause, provisions warranting-
 - (i) that the time share property and any other property or facility in respect of which the consumer has an interest or right under the contract are not subject to any leases or mortgages, liens, charges, money judgments, security agreements or other financial encumbrances of a third party,
 - (ii) that the supplier will not mortgage the property or facility, pledge it as security or lease or otherwise grant any interest in it to a third party, other than a time share interest, and
 - (iii) that the supplier will discharge any financial encumbrance or lease registered by a third party as soon as reasonably possible;
 - (m) full particulars of the time share plan under which the contract is made, or in which the consumer is to be a participant;
 - (n) a statement of the consumer's cancellation rights, in the form set out in the Schedule.

Cancellation

68. In accordance with regulation 5, every timeshare contract and every points-based contract must contain a provision allowing the consumer to cancel the contract at any time within one year after the date on which the contract is entered into if-

- (a) the supplier does not hold a valid licence at the time the contract is entered into and is not excluded by regulation 13 from the requirement to hold a licence;
- (b) the supplier does not include the information required by regulation 2 in the contract;
- (c) the contract is not signed by the consumer, or
- (d) the supplier does not provide a copy of the contract to the consumer as required by the Regulation.

69. A points-based contract must contain a provision allowing the consumer to cancel the contract, without any reason, at any time from the date the contract is entered into until 10 days after the consumer receives a copy of the contract. A points-based and timeshare contract is cancelled on the giving of a written notice of cancellation. A notice can be sent by registered mail, email or fax.

Suppliers' obligations

70. A supplier is defined as a person who, whether directly or through an employee, representative or agent, engages in the activities of a time share business. A timeshare business" means the activity of offering, soliciting, negotiating or concluding timeshare

contracts or points-based contracts. A supplier must hold in trust all funds received from the consumer under a contract in consideration for the transfer of the property until-

- (a) the end of the cancellation period;
- (b) construction of the property is complete; or
- (c) the consumer has a legal right to use or occupy the property,

whichever is latest.

71. A supplier is required within two banking days after receiving funds to deposit the funds into a trust account at a bank, treasury branch, credit union or trust corporation in Canada, and continue to hold the funds in trust until they are releasable under the Regulation. Funds held in trust under this section must not be commingled with non-trust money.

72. A supplier is mandated to keep proper records which must include the following-

- (a) every time share contract and every points-based contract entered into, including cancelled contracts;
- (b) any assessment of the monetary value of a time share interest sold under any time share contract or points-based contract entered into by the licensee and, if applicable, the number of points assigned to the interest;
- (c) all marketing and advertising materials used in relation to a time share plan, time share contract or points-based contract; and
- (d) all refunds given to consumers in respect of time share contracts and points-based contracts.

Licensing requirements

73. Every supplier must have a licence to operate as such and this licence must be renewed every year. There are three types of licences- a Right to Use Licence; a Personal Property Ownership Licence and a Real Property Ownership Licence. A licensee may hold more than one type of licence.

74. A **Right to Use Licence** authorises the holder to engage in the activities of offering, soliciting, negotiating and concluding time share contracts and points-based contracts that provide a consumer with the right to use, occupy or possess real or personal property but that do not provide the consumer with an ownership interest in any property. A **Personal Property Ownership Licence** authorises the holder to engage in the activities of offering, soliciting, negotiating and concluding time share contracts and points-based contracts that provide a consumer with an ownership interest in personal property but that do not provide the consumer with any right or interest in respect of real property. A **Real Property Ownership Licence** authorises the holder to engage in the activities of offering, soliciting, negotiating and concluding time share contracts and points-based contracts that provide a consumer with an ownership interest in all the real

property that is subject to the time share plan, whether or not the consumer receives any other interest, right, privilege or benefit under the contract.

75. In order to obtain or renew a licence a person must provide security in a form and amount approved by the Director of Fair Trading.

Unfair practices

76. In order to protect the consumer, the Regulation contains a range of practices in which a supplier is prohibited from engaging. Such practices include-

- making false representations regarding the contents of the contract or the time share plan;
- offering or selling rights in a timeshare plan where such rights are oversold; and
- offering, negotiating or concluding a time share contract or a points-based contract that provides a consumer with a right to use, occupy or possess, or with an ownership interest in, any real or personal property that is subject to a lease or a mortgage, lien, charge, money judgment, security interest or other financial encumbrance, unless the lease or financial encumbrance is the subject of a non-disturbance clause.

77. A non-disturbance clause is essentially “an arrangement between a supplier and a creditor with a security interest in the time share property whereby each agrees that: (a), in the event of receivership, sale or other transfer of the time share property caused by the exercise of any right of the person, the receiver, purchaser or other transferee assumes the obligations of the supplier (b) the consumers’ time share interests take priority over the interests of the creditor; and (c) the creditor will not interfere with the consumers’ use and enjoyment of the time share property.”¹⁶

78. A failure to carry out certain obligations and engaging in unfair practices are offences for the purpose of the Regulation and the Fair Trade Act under which the Regulation is made. The Fair Trading Act protects consumers from unfair business practices before, during or after a consumer transaction. Section 164 of the Act provides for a penalty of \$300,000 for an offence under the Regulations or 3 times the amount obtained by the defendant as a result of the offence, whichever is greater, or to imprisonment for not more than 2 years. The Regulation also provides that suppliers are responsible for the acts and omissions of their employees, agents and contractors.

THE TIMESHARE BILL, 2014

79. The Timeshare Bill was drafted to fully address the regulation of the timeshare industry and the Bill not only seeks to regulate the contractual relationship between timeshare suppliers and consumers but also sets out licensing and management

¹⁶ Regulation 1; BakerHostetler, “Substantial changes in Alberta’s Timeshare Law go into effect on November 1”,

requirements for timeshare properties. The approach taken under the Bill is similar to that of the Bahamian Act summarised above.

Timeshare and Points-Based contracts- minimum requirements

80. Part 2 of the Bill sets out the matters which must be expressly provided for in timeshare and points-based contracts. Thus, for example, a timeshare contract should include terms relating to-

- the consumer's name and address;
- the supplier's name, business address including a street address, telephone number and, if applicable, fax number and e-mail address;
- the name and position of any agent or employee who is representing the supplier in respect of the contract;
- the date and place at which the contract is entered into;
- a description of the timeshare property, including its legal description and precise location; and
- a full description of the timeshare interest being purchased by the consumer under the contract, including a statement of any period during which, or any dates on which, the consumer is entitled to use, occupy or possess the timeshare property.

81. Other matters to be addressed in a contract include-

- (a) any financial conditions that must be met before the consumer may exercise a right under the contract, including any requirement that all or any portion of the purchase price be paid beforehand;
- (b) an itemised statement of-
 - (i) the total cost of the timeshare interest being purchased by the consumer;
 - (ii) the number of points, if any, being acquired by the consumer;
 - (iii) any closing costs payable by the consumer in respect of the contract; and
 - (iv) any expense, fee, levy, assessment or cost to which the consumer is or may become subject under the contract, timeshare plan or exchange program, if any;
- (c) if credit is extended by the supplier, a statement of any security taken for payment;
- (d) unless the third party's interest and any financial encumbrance associated with it are the subjects of a non-disturbance clause, provisions warranting-
 - (i) that the timeshare property and any other property or facility in respect of which the consumer has an interest or right under the contract are not subject to any leases or charges, liens, money judgments, security agreements or other financial encumbrances of a third party;
 - (ii) that the supplier, if he is the proprietor of the timeshare property, will not charge the property or facility, pledge it as

- security or lease or otherwise grant any interest in it to a third party, other than a timeshare interest; and
- (iii) that the supplier will discharge any financial encumbrance or lease registered by a third party as soon as reasonably possible;
- (e) full particulars of the timeshare plan under which the contract is made, or in which the consumer is to be a participant; and
- (f) a statement of the consumer's cancellation rights in the prescribed form.

82. The statement of the consumer's cancellation rights must be prominently set out in the contract. All contracts must be signed by the suppliers and the consumer and a copy of the contract must be given to the consumer.

83. The Bill also sets out cancellation rights of consumers and provides for the refund of monies to consumers by suppliers in the case of cancellation. Clause 6 provides that a timeshare contract and a points-based contract must contain a provision allowing the consumer to cancel the contract at any time within one year after the date on which the contract is entered into if-

- (a) the supplier does not hold a valid licence at the time the contract is entered into and is not excluded under the legislation from the requirement to hold a licence;
- (b) the supplier does not include the required information in the contract;
- (c) the contract is not signed by the supplier or by the consumer; or
- (d) the supplier does not provide a copy of the contract to the consumer pursuant to the legislation.

84. Clause 7 provides that a contract must contain a provision allowing the consumer to cancel the contract, without any reason, at any time from the date the contract is entered into until ten days after the consumer receives a copy of the contract.

85. Written notice of the cancellation must be sent by the consumer to the supplier either by fax, email or by post to the business address of the supplier.

86. In order to ensure that funds are available to refund persons who may cancel, the Bill provides in clause 9 that where a timeshare contract provides for the transfer of real property, a supplier shall hold in trust all funds received from the consumer in consideration for the transfer of the property until-

- (a) the cancellation period provided by clause 7(1);
- (b) construction of the property is complete; or
- (c) the consumer has a legal right to use or occupy the property,

whichever is latest.

87. The funds must be paid by the supplier into a financial institution of a type set out by the legislation and must not be comingled with any other funds. It is provided that a

supplier who contravenes this section commits an offence and is liable on conviction to a fine of one hundred thousand dollars, to imprisonment for two years or to both.

Licensing

88. Under the Bill it is proposed that the Hotel Licensing Board will have supervision of the timeshare industry and will be the entity responsible for the licensing of persons engaged in timeshare business. Part 4 of the Bill provides for licensing. Under that Part, the proprietor of the timeshare property, the managing agent of a timeshare property and a supplier of timeshares will be required to be licensed. Clause 17 provides that a person shall not engage in any timeshare business except under and in accordance with the terms of a proprietor's timeshare licence, a managing agent's timeshare licence or a supplier's timeshare licence, granted for that purpose by the Board. The Board may grant a licence under this clause subject to such terms and conditions as may be specified in the licence or as may be prescribed. A person may hold more than one class of timeshare licence.

89. A licence may be granted for a period not exceeding five years and, except in the case of a proprietor's licence, is not transferable. A proprietor may transfer a licence when he no longer has any estate, right, title or interest in a timeshare property.

90. The Board will have the power to vary, revoke or suspend a licence subject to any representations that a licensee will have. The Board may, under clause 28, require a proprietor to provide security in such form as is prescribed and may, in the case of a renewal, require further security. The purpose of this provision is to ensure that a proprietor of a property has the financial standing to continue with the provision of timeshares at the timeshare property.

Registration of consumer's rights

91. One of the main points which arose in the Indies Suite case was that timeshare owners were not considered creditors for the purpose of the Companies Law and were merely prospective creditors who did not have the standing to bring an order for the winding up of the timeshare company. Further, the property had been sold without the knowledge of the timeshare owners. The Commission has in response to those problems included provisions similar to those of the Bahamian legislation which provide for the registration of consumer's rights and the charging of the timeshare property with such rights. Clause 13 deals with registration with a proposed Registrar of Timeshares; clause 14 provides for the creation of a charge on the timeshare property upon registration of the consumer's interests and clause 15 contains a non-disturbance clause similar to section 23 of the Bahamian Act.¹⁷

Management of timeshare properties

92. The Bill seeks in Part 5 to regulate the management of timeshare properties. Provided for is the appointment of a managing agent who may be the proprietor, a

¹⁷ Ante, paragraph 56

separate management company contracted by the proprietor to manage the property, a board of the consumers or a combination of all of those persons. A managing agent must be licensed as such by the Board. The duties of a managing agent will be similar to those under the Bahamian Act¹⁸.

93. There are provisions under Part 5¹⁹ for dealing with delinquent owners who fail to pay assessments for common expenses of the timeshare property as well for maintaining certain amounts of public liability insurance and insurance against loss and damage to the timeshare property.

Inspection of timeshare property and records

94. Pursuant to provisions which again are similar to those found in the Bahamian Act the Board will be empowered²⁰ to inspect the premises of a timeshare property periodically with such scope and frequency as it determines is necessary in order to ascertain whether there is compliance with the legislation and for the purpose of investigating any complaints made by an aggrieved consumer regarding the application of this Law to any particular timeshare property. Where, as a result of an inspection, the Board determines that it is in the public interest that the licence of a managing agent should be suspended, the Board may suspend the licence of the managing agent and, by notice in writing, require the proprietor within such time as is specified in the notice to appoint, subject to his approval, an interim or other managing agent for the orderly continuation of the management of the timesharing property.

95. It is proposed²¹ that the summary court will have the power to issue a warrant to a police officer to search timeshare premises where it has been made to appear to a magistrate that premises not licensed as a timeshare property are being operated as such. A police officer would, subject to such warrant, be able to enter upon and inspect the premises and to conduct such enquiries in the premises for the purpose of determining whether there is a contravention of the legislation.

Offences and penalties

96. The Bill provides for several offences throughout. It is an offence, for example, for a supplier to fail to provide a consumer with a copy of a signed contract at the time the contract is signed. The supplier would be liable on summary conviction to a fine of ten thousand dollars in such a case. Also, a proprietor or a managing agent who fails to provide insurance in accordance with the legislation will be liable on summary conviction to a fine of fifty thousand dollars or to imprisonment for two years or to both.

97. Offences under clause 38 carry penalties as high as \$300,000 and imprisonment for two years. Such offences include-

¹⁸ Ante paragraph 50

¹⁹ Clauses 33 and 34

²⁰ See Clause 35

²¹ Clause 36

- the making of false representations regarding the contents of the contract, the timeshare plan, any exchange program or any interest, right, privilege, benefit or obligation of a consumer under the contract or the Law or its regulations;
- misrepresenting the availability of any prize, gift or other promotional item or discount offered in connection with a timeshare contract or a points-based contract;
- offering, negotiating or concluding a timeshare contract or a points-based contract that provides a consumer with a right to use, occupy or possess, or with an ownership interest in, any real or personal property that is subject to a lease or a charge, lien, charge, money judgment, security interest or other financial encumbrance, without the lease or financial encumbrance being the subject of a non-disturbance clause; or
- inviting a consumer to any event, function or location where sales or promotional activity will occur unless the invitation and any correspondence regarding it clearly indicates that the sales or promotional activity will occur.

98. The Bill also provides penalties, inter alia, where a person develops, markets or manages a timeshare property when he does not have a licence under the legislation to develop, market or manage such property. Such a person would be liable on summary conviction to a fine of fifty thousand dollars or to imprisonment for two years or to both.

MATTERS FOR CONSIDERATION

99. The Ministry responsible for tourism was asked in June for its comments on the issues identified in the first version of this paper and the recommendations for regulation of the timeshare sector as set out in the Timeshare Bill, 2014. After meeting with representatives of the Ministry and the Department of Tourism it was advised as follows-

- (a) the categories of licences provided in the Bill are acceptable;
- (b) the licensing authority under the Bill should be the Hotel Licensing Board;
- (c) the insurance requirements set out in the Bill were acceptable but further feedback from stake holders and the public was required on the type of securities licensed proprietors should provide in order to satisfy the licensing authority of their financial ability to operate a timeshare resort;
- (d) the minimum terms and conditions for contracts set out in the Bill were satisfactory but they should either be included in regulations or a Schedule to the legislation in order to facilitate flexible amendment;
- (e) based on their knowledge, the Bill covers the types of timeshare products available in the Islands;
- (f) they agreed with the contract cancellation provisions; the registration of timeshare contracts and provisions relating to management of timeshares; and
- (g) they recommended giving existing timeshare operators a two year transitional period to comply with the legislation.

100. The Bill was amended to accord with the discussions held with the Ministry and the Department of Tourism and the Commission now invites comments on the issues highlighted in this paper and on the provisions of the Bill.

Law Reform Commission
Monday, September 15, 2014

APPENDIX A
The Timeshare Bill, 2014

APPENDIX B
Legislative precedents- Bahamas, UK, Alberta