

# Points-Based Timeshare Plans

Sheena Mitchell | Current to: June 26, 2006

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*Due to the efforts of resorts and vacation clubs, "right to use" timeshare programs have gained a significant presence in BC in the last decade. In this article, Sheena Mitchell, Legal Counsel & Corporate Development for Vancouver's West Coast Timeshare Ltd., explains "right to use" timeshare structures and points exchange systems brokered by two major international companies.*

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## **I. Introduction**

### **A. Types of Timeshare**

There are three main types of timeshare structures:

1. fee simple, where the owner of the timeshare has a direct, deeded interest in real property;
2. leasehold, where the owner of the timeshare has a term limited entitlement pursuant to a lease agreement registered on the land; and
3. right to use, where the owner of the timeshare has an indirect ownership in real property.

It is the right to use timeshare structure that I will be discussing in this paper. Points-based timeshare programs, such as those offered by Intrawest and West Coast Timeshare, are right to use timeshare programs.

### **B. Why Would Points-Based Timeshare Plans be Governed by Real Estate Legislation?**

The *Real Estate Development Marketing Act (REDMA)* defines a "time share plan" to mean a plan in respect of land in which persons participating in the plan

- a) each have a right of recurring use, occupation, or possession of all or part of the land, including any accommodation or facilities located on it, on a periodic basis, and
- b) may or may not acquire an ownership interest in the land that is the subject of the plan.

A "time share interest" means a person's interest in a timeshare plan. Given that *REDMA* applies to "a developer who markets, in British Columbia, a development unit" (s. 2(1)) and a "development unit" means, inter alia, a time share interest, *REDMA* applies.

Division 2 of the *Business Practices and Consumer Protection Act (BPCPA)* does not apply to timeshare plans that fall under the auspices of *REDMA*. In fact, the level of disclosure required pursuant to *REDMA* is more onerous than that provided for under *BPCPA*. Timeshares that fall under the *BPCPA* generally have no relation to real property but would apply to timesharing in personal property such as boats or automobiles.

### **C. Advent of Points-Based Timeshare Programs**

Points-based timeshare programs have become more popular over the past several years. Club Intrawest, WorldMark developed by Trendwest, Aviawest, Whiski Jack Resorts developed by Raintree Vacation Club, Shell Vacations' Mountainside Lodge, and, of course, Point to Point Destinations developed by West Coast Timeshare, are a few of the points-based timeshare programs that are either based in BC or have a significant presence in BC. The points-based timeshare system became popular in the late 1990s at the same time that the two major international timeshare exchange companies, Resort Condominiums International (RCI) and Interval International (II), offered to broker points exchanges on behalf of the resorts participating in their exchange systems.

### **D. RCI and II**

RCI and II are timeshare brokers of time at participating resorts and vacation clubs. Timeshare programs frequently couple with either RCI or II to allow members of a timeshare program to also participate, on an exchange basis, in spending time at resorts, or vacation clubs, other than their home resort or club.

RCI and II are not timeshare programs; they simply broker time among participating resorts to allow timeshare owners to spend time at resorts other than their home. RCI and II are exchange systems, not timeshare memberships. Most timeshare programs participate in either RCI or II.

## **II. Structure**

### **A. Entitlement and Rights: How are They Established?**

Owners of a points-based timeshare membership do not have direct, deeded ownership in real property; rather their ownership interest is indirect, beneficial ownership via a trustee. Real property that comprises the timeshare program is held in trust by a trustee, usually a lawyer or notary, pursuant to a trust agreement among the trustee, the developer, and the timeshare owners association. The real property is deeded to the trustee; beneficial ownership resides with the participants in the timeshare plan. The trust agreement is registered on title to real property within BC or outside of BC.

### **B. The Players: Developer, Trustee, and Owners Association**

Developers provide the impetus for the timeshare plan. They arrange for the trustee, establish the owners association, and, usually, manage the timeshare program. Developers are regulated by *REDMA*, carry the burden of compliance, but reap the rewards of profit. A developer can also

be the manager of the timeshare plan and have an agreement with the owners association, separate and apart from any arrangement with the trustee, to manage the resort property as a property manager and to manage owner requests in a customer service capacity.

The trustee is generally a lawyer, notary, or third-party organization such as a financial institution. Think transfer agent, with a twist. The trustee has obligations to the owners association, the owners association appoints the trustee, and the trustee acts in the best interests and at the direction of the owners association. The trustee holds deeded title to the real property and is restricted to dealing with the real property in accordance with the terms of the trust agreement. The trustee acts as the transfer agent in dealing with the issuance, cancellation, and "repossession" of points. It is the trust agreement that crystallizes the timeshare owner's rights to the points. Generally, points are issued on a perpetual basis.

Owners associations are not-for-profit entities, functioning in a manner similar to that of a strata corporation. Owners of the timeshare plan belong to the owners association by virtue of having purchased a timeshare membership. When an owner purchases a timeshare membership, they purchase points and the right to join the owners association.

This organization collects the bundle of rights and obligations that timeshare owners have in an "owners declaration". The owners declaration is the set of bylaws that spell out a timeshare owner's obligations, such as the payment of annual dues, but also provides for rights that the owner has within the timeshare plan; for example, the right to "bank, borrow, or transfer" points.

### **C. Points Valuations: How Does it Work?**

Points represent the value, or currency, of the real property that comprises the timeshare plan. Timeshare owners purchase a specified number of points. The timeshare owners can then use the points that they own to stay at their home resort, or stay at an exchange resort that participates in an exchange system such as the RCI or II systems.

### **D. How are the Points Assigned to the Real Property that Comprises the Timeshare Plan?**

The determination of the number of points assigned to real property within a timeshare plan usually depends on the location of the real property (resort), the size of the suites within the resort, the amenities available to participants in the timeshare plan at the resort, and demand for a particular resort. Developers can use a proprietary methodology of determining the points or can adopt either exchange company's methodology, but there needs to be a definable basis for the valuation of the real property. Developers such as Intrawest and Trendwest use their own proprietary points systems.

Exchange companies RCI and II have their own methodologies of determining the point value of a timeshare plan. II uses the Travel Demand Index, with 100 being the average demand for a particular resort. RCI uses the Points by Unit Number (PBUN) system. An example

of a PBUN for a timeshare plan at a well-known ski resort in BC (not Whistler) is attached.

RCI's PBUN provides point values on a daily and a weekly basis. The point values are assigned based on a number of criteria: larger units require more points than small ones; popular season (and holiday) dates require more points than off-season dates; resorts or areas in high demand require more points than those with lower demand. In our example, RCI PBUN staying in a one-bedroom unit during week 7, which would be a check-in date of February 18, 2007, requires 22,500 points per week, or 2,700 points per day, Sunday to Thursday.

From the developer's perspective, a points-based timeshare plan is extremely flexible to manage. There is no requirement to file Form As and Form Cs in the Land Titles Office. A purchaser of a points-based timeshare is not issued a state of title certificate; rather, they are issued a membership certificate by the timeshare plan's trustee. It is the trustee that records the ownership and entitlement to the points purchased. It is the owners declaration that specifies the owner's rights within the timeshare plan.

From the consumer's perspective, a points-based timeshare membership is flexible because the owner does not need to be confined to a particular week, in a given season, at a particular suite at the resort. Owners of a points-based timeshare are generally not limited to the time when they can use their timeshare; the only limitation could be the availability of the resort. (Of course, they are also limited by the number of points owned.)

### **III. Disclosures**

The *Real Estate Development Marketing Act* is the governing legislation for this type of timeshare plan. A disclosure statement is required to be filed, and it must:

- be in the form and include the content required by the Superintendent of Real Estate;
- without misrepresentation, plainly disclose all material facts;
- set out the substance of a purchaser's rescission rights - *pro forma*; and
- be signed, as required by the regulations.

The disclosure statement format can be found in Policy Statement 8: Time Share Interests, Form 8A. Form 8A is the disclosure statement form for time share use plans—in other words, points-based timeshare plans. The form is straightforward, and written into the form are "suggestions" on what to disclose.

The requirement is to "disclose plainly all material facts, including a fact or proposal that could reasonably be expected to affect the value, price, or use of the development property or a development unit". In the case of a points-based timeshare plan, it is important to describe the point values for the real property that comprises the plan. The disclosure statement must be filed with the Superintendent of Real Estate if the marketing of a timeshare plan is taking place in BC, regardless of whether the real property is located in BC. Section 10 of *REDMA* allows early marketing,

with permission of the superintendent, subject to the requirements set out in Policy Statement 5: Early Marketing—Development Approval.

Amendments are required to be filed "if a change occurs that would have the effect of rendering a statement false or misleading or that brings into being a fact or proposal which should have been disclosed if the fact or proposal had existed at the time of filing". Section 16 of *REDMA* requires developers to file an amendment for changes to the timeshare plan, such as additions of property and changes in members' use of the property. An entirely new disclosure statement is required to be filed for change in identity of the developer, or if a receiver, liquidator, trustee in bankruptcy, or other person has effective control over the right to acquire or dispose of the property.

## **IV. Practices by Developers**

### **A. Marketing and Sales**

How do timeshare developers market to Jane Average Consumer about their timeshare developments? Most timeshare developers, including Intrawest, use some form of telemarketing. All timeshare developers will be affected by Canadian do-not-call legislation ("DNCL") that is to come into effect on January 1, 2007. However, there is a favourable exemption, the "existing business relationship" exemption. The existing business relationship exemption allows calls made to a person with whom the person making the call, or the person or organization on whose behalf the call is made, has an existing business relationship, and who has not made a "do not call" request in respect of the person or organization on whose behalf the call is made. An "existing business relationship" is a business relationship that has been formed by a voluntary two-way communication between the person making the call and the person to whom the call is being made arising from:

- a) the purchase of services or the purchase, lease, or rental of products within the 18-month period immediately preceding the date of the telecommunication, by the person to whom the telecommunication is made from the person or organization on whose behalf the telecommunication is made; or
- b) an inquiry or application, within the six-month period immediately preceding the date of the telecommunication, by the person to whom the telecommunication is made in respect of a product or service offered by the person or organization on whose behalf the telecommunication is made; or
- c) any other written contract between the person to whom the telecommunication is made and the person or organization on whose behalf the telecommunication is made that is currently in existence or that expired within the eighteen-month period immediately preceding the date of the telecommunication.

The CRTC is now in the public consultation process of developing DNCL rules, having held its public hearings in early May. By the end of 2006, the DNCL rules will be established and released to the public.

## **B. Adding Points Inventory and Controlling Points Inventory**

When a developer adds points to their timeshare plan inventory, what it really means is they have added development units to the timeshare plan. The cost of inventory is expensive, and the real property cannot have a mortgage or other financial charge against it; it must be "free and clear". Most prudent developers will adopt a "just in time" inventory strategy and file an amendment each time inventory is added to the timeshare plan.

## **V. Management of Points-Based Timeshare Programs**

### **A. Assurance of Title**

Section 11 of *REDMA* requires that developers provide "assurance of title" to purchasers and assurance of the management of the timeshare plan. These requirements can be met by:

- a) having the title to the property held by a lawyer, notary, or other person/class of persons, specified by the superintendent; and
- b) the developer providing a bond to the superintendent, or other person specified by the superintendent, for the benefit and protection of purchasers (timeshare owner/members). The title of the property in a points-based timeshare plan is held by a trustee pursuant to a trust agreement among the trustee, the developer, and the owners association. A bond in the amount represented by one year's worth of annual dues on unsold inventory is held for the benefit of the owners association, should the developer default in its obligations to the owners association.

### **B. Inventory Audits**

Quarterly and annual audits of the inventory should be undertaken. The audit, ideally, should be conducted by an accounting firm with experience in the area of points-based timeshare plans. The inventory audit confirms the total number of points within the plan, the number of points sold to timeshare owners, and the remaining number of points available for sale. Publicly traded companies such as Intrawest would be required to conduct these audits in order to comply with the securities regulator's internal control and reporting requirements. Inventory audits should be undertaken particularly where the developer adopts the just-in-time inventory strategy.

### **C. Re-Sales of Points-Based Timeshare Memberships**

If the re-sale agent is providing "real estate services" as defined by s. 2 of the *Real Estate Services Act (RESA)*, then the agent will have to be licensed pursuant to *RESA*, as the definition of "real estate" in *RESA* includes a "time share interest" as defined in *REDMA*, regardless of whether or not the timeshare interest is an interest in land. The resale of a points-based timeshare membership is regulated by *RESA* to the same extent as any other "trade in real estate" or "trading service" is regulated by *RESA*. A "trade in real estate" means:

- a) a transaction for the purchase or sale of real estate, for the leasing of

real estate or for any other form of acquisition or disposition of real estate, or

b) a prospective trade in real estate within the meaning of paragraph a).

"Trading services" means any of the following services provided to or on behalf of a party to a trade in real estate:

a) advising on the appropriate price for the real estate;

b) making representations about the real estate;

c) finding the real estate for a party to acquire;

d) finding a party to acquire the real estate;

e) showing the real estate;

f) negotiating the price of the real estate or the terms of the trade in real estate;

g) presenting offers to dispose of or acquire the real estate; or

h) receiving deposit money paid in respect of the real estate,

but does not include an activity excluded by regulation.

Re-sales of timeshare memberships by third parties are covered by RESA.

## **VI. Conclusion**

The timeshare industry is big business. Timeshare hot spots in BC include Intrawest's Storied Places in Whistler, Bear Mountain in Victoria, and, new to BC, Trendwest, Shell Vacations, and Raintree Vacation Club.

The Ragatz Associates' "Resort Timesharing in the United States" survey determined that, in 2002, there were \$9.4 billion USD worth of timeshare sales worldwide, with the average price of a "timeshare week" being \$10,600 USD. They also determined that timeshare owners' purchase motivation is generally dependent on flexibility, certainty of quality accommodations, and credibility of the timeshare company. Worldwide, in 2002, Ragatz Associates determined that there were 5,425 timeshare resorts and 6.7 million timeshare owners, with the average size of a timeshare resort comprising 60 units. BC will continue to participate in the growth and evolution of timeshare plans.

## **VII. Appendix - Example of an RCI "PBUN" (Points By Unit Number)**

**Resort Name and ID #: Popular Ski Resort #XXXX**

Check-In Type		Daily: 2 Night Min.				
Housekeeping Fees		\$40	\$50	\$65	\$70	
Unit Description					Loft	
Check-In Day		Sunday				
DBL Unit Type						
<b>-- Reservation Side--</b>						
Bedrooms		S	1	2	2	3
Bathrooms		1	1	1.5	1.5	1.5
Kitchen		F	F	F	F	F
Max Occ		2	4	6	8	8
Priv Occ.		2	2	4	4	4
Square Footage:		530	670	1040	1153	1248
Lockoff		<b>No</b>	<b>No</b>	<b>No</b>	<b>No</b>	<b>No</b>
<b>Weekly Valuation</b>						
Weeks	Season	S	1	2	2	3
1	5	12,000	15,500	22,000	26,000	27,000
2	5	12,000	15,500	22,000	26,000	27,000
3	5	12,000	15,500	22,000	26,000	27,000
4	5	12,000	15,500	22,000	26,000	27,000
5	5	12,000	15,500	22,000	26,000	27,000
6	5	12,000	15,500	22,000	26,000	27,000
7	4	17,000	22,500	32,000	37,000	38,500
8	4	17,000	22,500	32,000	37,000	38,500
9	4	17,000	22,500	32,000	37,000	38,500
10	4	17,000	22,500	32,000	37,000	38,500
11	4	17,000	22,500	32,000	37,000	38,500
12	4	17,000	22,500	32,000	37,000	38,500
13	4	17,000	22,500	32,000	37,000	38,500
14	4	17,000	22,500	32,000	37,000	38,500
15	3	20,500	27,000	38,000	44,500	46,500
16	3	20,500	27,000	38,000	44,500	46,500
17	3	20,500	27,000	38,000	44,500	46,500



18	3	20,500	27,000	38,000	44,500	46,500
19	3	20,500	27,000	38,000	44,500	46,500
20	3	20,500	27,000	38,000	44,500	46,500
21	3	20,500	27,000	38,000	44,500	46,500
22	2	26,000	33,500	47,500	55,500	58,000
23	2	26,000	33,500	47,500	55,500	58,000
24	2	26,000	33,500	47,500	55,500	58,000
25	2	26,000	33,500	47,500	55,500	58,000
26	1	34,500	44,500	63,500	74,000	77,500
27	1	34,500	44,500	63,500	74,000	77,500
28	1	34,500	44,500	63,500	74,000	77,500
29	1	34,500	44,500	63,500	74,000	77,500
30	1	34,500	44,500	63,500	74,000	77,500
31	1	34,500	44,500	63,500	74,000	77,500
32	1	34,500	44,500	63,500	74,000	77,500
33	1	34,500	44,500	63,500	74,000	77,500
34	1	34,500	44,500	63,500	74,000	77,500
35	1	34,500	44,500	63,500	74,000	77,500
36	2	26,000	33,500	47,500	55,500	58,000
37	2	26,000	33,500	47,500	55,500	58,000
38	2	26,000	33,500	47,500	55,500	58,000
39	2	26,000	33,500	47,500	55,500	58,000
40	3	20,500	27,000	38,000	44,500	46,500
41	3	20,500	27,000	38,000	44,500	46,500
42	3	20,500	27,000	38,000	44,500	46,500
43	5	12,000	15,500	22,000	26,000	27,000
44	5	12,000	15,500	22,000	26,000	27,000
45	5	12,000	15,500	22,000	26,000	27,000
46	5	12,000	15,500	22,000	26,000	27,000
47	5	12,000	15,500	22,000	26,000	27,000
48	5	12,000	15,500	22,000	26,000	27,000
49	5	12,000	15,500	22,000	26,000	27,000
50	5	12,000	15,500	22,000	26,000	27,000
51	3	20,500	27,000	38,000	44,500	46,500
52	2	26,000	33,500	47,500	55,500	58,000
<b>Daily Valuation</b>						
Season	Days	S	1	2	2	3
1	Fri-Sat	6,900	8,900	12,700	14,800	15,500

	Sun-Thur	4,140	5,340	7,620	8,880	9,300
2	Fri-Sat	5,200	6,700	9,500	11,100	11,600
	Sun-Thur	3,120	4,020	5,700	6,660	6,960
3	Fri-Sat	4,100	5,400	7,600	8,900	9,300
	Sun-Thur	2,460	3,240	4,560	5,340	5,580
4	Fri-Sat	3,400	4,500	6,400	7,400	7,700
	Sun-Thur	2,040	2,700	3,840	4,440	4,620
5	Fri-Sat	2,400	3,100	4,400	5,200	5,400
	Sun-Thur	1,440	1,860	2,640	3,120	3,240
Unit Numbers		330	604	302	601	608
		803	605	510	901	724
		1003	612	518	907	1016
			613	525		
			620	526		
			728	531		
			812	532		
			820	602		
			821	609		
			904	610		
			1005	615		
			1012	616		
			1020	618		
			1028	624		