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Pre-Sale Law Critical to BC Development Industry in any Real Estate Market

The real estate market continues to be a hot topic in British Columbia, due in large part to property values in this Province outshining the rest of Canada. This past decade in particular could be characterized as the “Decade of the Condo” in BC, as the public was often inundated with stories of overnight line ups outside of sales centres, leading to announced sell-outs of many condominium projects. Underlying these good news stories is BC’s *Real Estate Development and Marketing Act* (REDMA) and its associated regulations and policies. It is an essential piece of legislation that allows the multi-family, new home market to operate in this environment and an understanding of its function is critical for both developers and property buyers in BC.

REDMA serves two important functions. The first is as consumer protection legislation. In this function, REDMA regulates how and when real estate developers are permitted to sell residential, multi-family projects to the public and creates the enforcement regime to compel compliance. Not only does REDMA provide for strict rules governing the handling of deposits by developers, but it also creates the rules which require that buyers be provided with a “Disclosure Statement” containing certain prescribed information prepared by the developer and filed with the Superintendent of Real Estate concerning their real estate purchase. Under REDMA, a developer may not enter into a purchase agreement with a buyer unless the buyer has had a reasonable opportunity to read the applicable Disclosure Statement. After this buyer has signed a purchase agreement with the developer, REDMA gives the buyer an additional seven days to walk away from the agreement with no strings attached. This seven day rescission period is viewed as a “cooling off” period, where an otherwise frenzied buyer is able to more carefully review the Disclosure Statement and evaluate his or her purchase decision after leaving the sales centre.

The second function that REDMA serves is to assist in keeping the multi family market efficient, as it permits developers to determine the viability of a development project by undertaking a sales campaign before being required to commence construction and take on the associated cost and risk. Provided that the developer has control of the relevant lands and has proceeded through the municipal entitlement process to a sufficient stage, the developer can market the project via the Disclosure Statement process. Once marketing has commenced, REDMA provides the developer with nine months to obtain a building permit and any required financing to ensure adequate arrangements are in place for the purpose of installing utilities and services associated with the project. If either of these requirements have not been met within the nine month period, the developer must stop marketing, and if within three more months such items have still not been obtained, buyers are again provided with the opportunity to freely walk away from their purchase agreements.

With strong demand for new homes and correlated rising market values, the pre-sale process (and thus REDMA) seldom had to be considered by the courts during most of this past decade, as buyers were happy to close on real estate that had typically already increased in value from the date of their agreement to purchase. Throughout this time, most developers and their advisors developed a good working understanding of REDMA and a basic comfort level as to what constituted compliance. Most developers are aware that if they fail to properly comply with REDMA, it could result in the applicable purchase agreement becoming unenforceable. Accordingly, developers have always been well advised to ensure they comply with the rules and regulations under REDMA.

As many projects are marketed under REDMA with certain variables still outstanding (such as certain title matters or specific amenities added to the project), the law also provides developers with the flexibility to identify changes in the project or to correct otherwise incorrect information contained in an earlier Disclosure Statement. In most cases, as long as such changes do not alter the identity of the developer or signal the appointment of a receiver (or similar person) to act on behalf of the developer due to financial problems, amendments to the Disclosure Statement do not give buyers the ability to break their contract. REDMA simply requires that any factors that could be expected to affect the value, price or use of the property must be reflected in an amendment to the Disclosure Statement that is to be filed with the Superintendent of Real Estate and then provided to each buyer within a reasonable period of time thereafter.

The recent global economic woes have not left the British Columbia real estate market untouched. As a result, some buyers have now turned to the courts to seek relief from their contractual obligations under purchase agreements entered into under the REDMA regime. Most notable of these recent cases are the BC Court of Appeal's decision in *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.* and the subsequent Supreme Court decision of *Maguire v. Revelstoke Mountain Resort Limited Partnership*. The essence of these cases is that the REDMA requirement for a developer to disclose its estimated project construction commencement and completion dates are material items. The courts ruled that developers should be required to amend their Disclosure Statements as soon as the developer knows these estimated dates are incorrect. In both of these cases, the developer's failure to so comply with REDMA allowed the buyers to walk away from their contracts.

As anyone who has undertaken a home renovation can attest, construction timing is perhaps one of the most unpredictable aspects of real estate development. All that *Sandcastle* and *Maguire* say is that a delay of many months from the originally estimated timing is considered a fundamental matter. The fact that the associated purchase agreement contains an outside date for completion or that the buyer has been kept informed by the developer as to construction timing through other communications, like project update emails, is not enough. From the court's perspective, in order to adequately protect the buyer, any changes in estimated timing must be communicated via an amendment to the Disclosure Statement.

Interestingly, the recent court cases involving REDMA are similarly themed to the swell of litigation in the 1980s surrounding the then income tax friendly Multi-Unit Residential Building (MURB) phenomenon. The theme underlying most of the MURB cases was a push by investors in MURBs to find a way out from otherwise binding contracts due to a falling market through reliance upon a failure to comply with a statutory marketing regime. In many of these cases, the BC Courts applied the equitable doctrines of waiver, estoppel, election and acquiescence and therefore buyers that acted as if their contracts were valid were unable to later use a statutory breach as grounds for getting out of their deal.

The recent REDMA cases did not consider these equitable doctrines, perhaps because in both cases the actual developments had not been completed at the time of litigation. As a result, it can be expected that when it comes to future completed developments, the courts may not release buyers from their contractual commitments where it can be shown that the buyer's decision to go to court came only after a buyer acted in a manner where they were actively marketing their unit for resale or were making attempts with the developer to renegotiate the agreement due to their lack of financial resources. Put simply, future buyers should not expect to be able to escape contractual commitments simply because their profit margins may have shrunk.

For now, these recent cases clarify that developers are wise to err on the side of caution by filing amendments to Disclosure Statements more frequently and sooner than they may otherwise have been previously been accustomed. Purchasers can likewise be assured that the BC courts will continue to uphold and enforce REDMA as consumer protection legislation.

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