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Regulation of the Marketing of Real Estate Development



I recently read in a local paper that Canada was ranked 5th (tied with the US and the UK, behind Hong Kong and New Zealand) in the Economic Freedom of the World 2007 Annual Report rankings. Canada scored 8.1 out of 10.

The report seeks to identify the level of government interference in a nation's economy (a low level being good), the recognition of private property rights, the stability of a nation's legal system, and its willingness and ability to enforce private contracts. The thesis is that the more economic freedom a country has, the more prosperity it will enjoy.

So should we as a society be shooting for 10 out of 10 for Canada, instead of a mere 8.1? If so, we would need to reduce, if not eliminate altogether, the various regulatory bodies that "interfere" with economic freedom and enforcement of contracts in the financial services industry.

We have three levels of government, all with regulatory bodies with the power to limit our freedom to conduct business any way we please in a vast range of financial activities, from lending money to selling securities.

But is "economic freedom" our most important goal? For every individual in the financial services industry who would advocate for reduced regulation, there are unhappy consumers who have been victimized by unscrupulous, greedy, dishonest, or simply incompetent representatives of that industry. Consumer protection from such behaviours is a form of freedom, too.

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While it may be true that at times regulators lose sight of their core purpose—consumer protection—and overreach in ways that stifle legitimate activity, it is my view that when functioning properly, most of our regulatory bodies are genuinely committed to protecting consumers of financial services.

One of the most important regulatory bodies at the provincial level is British Columbia's Financial Institutions Commission, known as FICOM (Google "FICOM" for its Website). FICOM is responsible for

the regulation of four main areas of financial activity in the province.

- Credit unions and trusts
- Insurance
- Pensions
- Real estate and mortgage brokers

The last of the four, real estate and mortgage brokers, is of particular interest to Notaries and real estate lawyers who deal with Realtors, mortgage brokers, and developers—as well as their customers—on a daily basis.

The Real Estate and Mortgage Brokers Department of FICOM is responsible for the administration of four provincial statutes:

- *Mortgage Brokers Act*;
- *Real Estate Development Marketing Act*;
- *Strata Property Act*; and
- *Real Estate Services Act*.

The FICOM Website is excellent. It directs you easily to an overview of each area in the *Real Estate and Mortgage Brokers Act* Department, making it clear in each case the department's role in respect of each of the statutes its administers, and also the limits of its jurisdiction.

The message is clear: Their job is to protect the public. In each area, there are links to "Consumer Alerts" and "File a Complaint."

The responsibility for qualifying, licensing, and disciplining of Realtors under the *Real Estate Services Act* has been delegated to the BC Real Estate Council, governed by a board consisting of members of that industry. In other words, this profession is self-regulated, as are lawyers, Notaries, doctors, accountants, and other professions. The goal is still the protection of the public, but the oversight comes from those with practical experience in the field.

I will focus on the marketing of real estate developments, where it is the government, in the form of the Superintendent of Real Estate and his staff, that does the regulating. Is there too much regulation or too little?

As a practising real estate lawyer, I get complaints from both sides in real estate developments. When my client is a developer, he wants to be free to sell units in his project without the government leaning over his shoulder.

On the other hand, individual purchasers are very happy to learn that under the *Real Estate Development Marketing Act*, they are entitled to receive prescribed detailed disclosure about the important aspects of a new development before having to part with their funds.

The Website offers a valuable tool in the form of Frequently Asked Questions, divided into two parts: one for developers, the other for purchasers. Here are some examples of the two types of questions and their answers.

Developers

Q. What types of development property are subject to the Act?

- A.** The Act applies to “development property,” which is defined as
- 5 or more subdivision lots (unless each lot is 64.7 hectares or larger);
 - 5 or more bare land strata lots;
 - 5 or more strata lots in a stratified building;
 - 2 or more cooperative interests;
 - 5 or more time-share interests;

- 2 or more shared interests in land; or
- 5 or more residential leasehold units.

Each type of development property is defined in section 1 of the Act.

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Q. To comply with the Act, what must a developer do before it can market a unit in a development property?

- A.** It must
- meet preliminary approval requirements (see sections 4 to 10 of the Act);
 - adequately assure title, utilities, and services (see sections 11 to 13 of the Act); and
 - file a Disclosure Statement with our office (see sections 14 to 17 of the Act and the Superintendent of Real Estate’s Policy Statement).

Q. Who must be given a copy of a Disclosure Statement and any Amendments to the Disclosure Statement?

- A.** A developer must give a purchaser a copy of the filed Disclosure Statement and a copy of any filed Amendment to the Disclosure Statement, before entering into an agreement for sale or lease with that purchaser. See section 15 of the Act.

Q. Must all deposits received by a developer be placed in trust?

- A.** Yes. A developer who receives a deposit from a purchaser or a lessee must place the deposit with a real estate brokerage, lawyer, or Notary Public, who must hold the deposit in a trust account in British Columbia. See section 18 of the Act. If

authorized deposit insurance has been obtained, the trustee may release a deposit to the developer. See section 19 of the Act.

Purchasers

Q. What information must a developer provide to a purchaser?

- A.** A developer must give each purchaser a copy of the filed Disclosure Statement and a copy of any filed Amendment to the Disclosure Statement, before entering into an agreement for sale or lease with that purchaser. See section 15 of the Act. The required form and contents for a Disclosure Statement are explained in our Policy Statements 1 to 3 and 9 to 11.

Q. After a purchaser has signed a purchase agreement, can the purchaser cancel that agreement?

- A.** Yes, but only during the 7-day rescission period. Thus, a purchaser or lessee may rescind a purchase agreement by serving written notice of that rescission on the developer within 7 days after the later of: the date the purchase agreement was made and the date the developer obtained a receipt from the purchaser for the Disclosure Statement. See section 21 of the Act.

Q. What remedies does a purchaser have if the Disclosure Statement contains an omission or misrepresentation, or is amended after the purchase agreement was signed?

- A.** A purchaser’s rights are governed by contract law and the purchase agreement. Under contract law, a purchaser may ask a court to order compensation, or may ask a court to rescind the purchase agreement, as a remedy for any breach of contract.

Additionally, under the Act a purchaser is deemed to have relied on the Disclosure Statement, whether or not he or

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she received it. A purchaser may ask a court to order compensation from a developer and its directors for any false or misleading statement of a material fact, or any omission of a material fact. See section 22 of the Act.

A purchase agreement is not enforceable against a purchaser by a developer who has breached any provision in sections 3 to 20 of the Act. See section 23 of the Act.

The Real Estate and Mortgage Brokers department of FICOM has made itself user-friendly, and has made the prescribed forms of Disclosure Statements for different types of development available on its Website. In theory, the regulators are only interested in ensuring full disclosure of the nature and features of the interest being purchased, and the risks associated with resale.

In practice, because they can reject a disclosure statement that does not comply with the appropriate form, they are in a position to tell developers what features their projects must have. This can inhibit innovation.

As long as the regulators of development marketing do not stifle the creation of innovative housing options that can make at least some housing choices affordable, then, in my view, the degree of regulation in the marketing of real estate developments that currently exists represents a reasonable balance between the interests of the developer and those of the consumer. ▲

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