University of Alberta

Purchasing Condominium Units from Developers: A Critical Analysis of Purchaser Vulnerability in the Unregulated Market and British Columbia's Legislative Response

by

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ABSTRACT

Purchasers of unconstructed condominium units face a number of challenges in an unregulated market. Buying a property sight unseen, a purchaser is completely reliant on the developer's description of the property. Moreover, the disappointed purchaser is profoundly disadvantaged in seeking legal recourse. Common law and equitable remedies leave the purchaser with either limited remedies for being wronged, or even no remedy in some circumstances. Arguing that regulation of the unconstructed condominium market is required, this thesis explores the theoretical foundations for regulation. Specifically, this thesis considers three protectionist measures in the British Columbia *Real Estate Development and Marketing Act*, providing suggestions for law reform where appropriate. Overall, this thesis demonstrates that regulation favouring either the developer or purchaser results in an unbalanced, unfair marketplace. By choosing a middle ground, the aims of the legislative intervention in the undeveloped condominium market can be met while addressing the needs of all stakeholders.

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PART I. INTRODUCTION

The unregulated marketing and sale of unconstructed condominium units presents a number of impediments to purchasers. In the event that the purchaser becomes aggrieved, remedies are scant and difficult to obtain. In equity, for example, the remedy for pre-contractual misrepresentations is rescission alone. This remedy may be unattractive for disappointed purchasers. And, without a concurrent, actionable tort, a disappointed plaintiff may have no recourse to common law damages. Adding to the purchaser's plight is that developers are often in a dominant position of power. The result is that the buyer may not have all necessary information at the time of the agreement to fully understand what is being purchased. Purchasers may also cause themselves problems through irrational decision-making contrary to their best interests.

In 2004, amid a hot real estate market and presumably in response to the above issues, the British Columbia legislature passed the *Real Estate Development and Marketing Act*.[1] The general focus of the *REDM Act* is to regulate the marketing and sale of real estate, including condominiums, by developers. The *REDM Act* essentially repeals the ancient maxim of *caveat emptor* by displacing much, if not all, of a transaction's risk from the purchaser to the seller. Designated as "consumer protection legislation,"[2] the *REDM Act* provides consumers with a number of critical advantages that are ostensibly designed to level the playing field between purchasers and developers. With the

[1] SBC 2004, c 41 [*REDM Act*].
[2] *Dwane v Bastion Homes*, 2009 BCSC 726 [*Dwane*] at para 69. *Dwane* was one of the first decisions to analyze the Act.

real estate boom and later recession of 2008,[3] many condominium agreements were made and subsequently breached due to developers being unable to provide what they had promised. For this reason, provisions of the *REDM Act* are only now entering the advent of their litigation history, which makes addressing this topic all the more pertinent.[4]

Considering the above background, the first purpose of this thesis is to critically evaluate whether regulating the marketing and sale of condominiums by developers is justifiable.[5] This crucial topic has received little recent scholarly commentary.[6] If regulation is indeed justifiable, the next consideration is whether the Act efficiently protects consumer. Three protections provided by the *REDM Act* will be assessed in this regard: the tandem of disclosure and mandatory rescission rights; a private law right of damages; and the Act's avoidance remedy.

To provide context, Part II of this thesis describes the relationship between the purchaser and developer. In particular, this Part addresses issues of power

[3] See Kevin Marron, "Seller Beware", *Canadian Lawyer* (May, 2011), online: Canadian Lawyer Magazine <http://www.canadianlawyermag.com/seller-beware.html>.

[4] *Ibid.* Note that a number of decisions referencing the *REDM Act* indicate that the Act did not apply to the circumstances of the litigation; see, *inter alia*, *Bosa Properties (Claremont) Inc v Mossabeh*, 2010 BCSC 1326 (matter unsuitable for summary trial); *Robson & Homer Development Limited Partnership v Blaise*, 2010 BCSC 1680 (matter unsuitable for summary trial); *Strata Plan LMS 1564 v Odyssey Tower Properties Ltd*, 2008 BCCA 509 (application to strike portion of statement of claim); *Bosa Properties (White Rock) Inc v Gebara*, 2009 BCSC 1911 (no right of rescission under agreement); and *Sethna v 350 Kingsway Development Ltd*, 2010 BCSC 351 (cancelation of agreement was acceptable under contract).

[5] The *REDM Act* regulates, *inter alia*, the marketing and sale of condominium units by developers. However, the focus of this thesis is on the purchase of unconstructed condominiums. Much of the Act is aimed at addressing mischief stemming from the purchase of real property "sight unseen." Therefore, all references to condominium purchases or condominium purchasers are referring to the purchase of an *unconstructed condominium unit from a developer*.

[6] Apart from updated loose-leaf guides for practitioners, past Canadian literary contributions include, *inter alia*: DJ Pavlich, "Recent Changes to Condominium Legislation in British Columbia" (1978) 3:1 CBLJ 34; Bradley McLellan, "Two Problem Areas in Condominium Legislation" (1978) 36 U Toronto Fac L Rev 44; RCB Risk, "Condominiums and Canada" (1968) UTLJ 1; and Mary G Critelli, "Recent Developments in Condominium Litigation" (1993) 15 Advoc Q 440. Note that these authorities are in reference to regulation of the condominium industry generally.

imbalances and consumer irrationality. Part III describes the position of the condominium purchaser at common law and in equity, concluding that an aggrieved condominium purchaser has limited recourse. Part IV considers the main theoretical grounds opposing and justifying whether the state should regulate the marketing and sale of condominium units. This Part maintains that a middle ground between paternalism and neo-classicism is the appropriate response. Part V considers how disclosure and mandatory rescission rights seek to respond to the problems associated with the developer-purchaser relationship. Part VI takes a similar approach, considering the damages remedy in the *REDM Act* against the backdrop of the developer-purchaser relationship. Part VII addresses provisions that avoid the binding effects of an otherwise valid agreement at a purchaser's option. Parts V-VII argue that a limited, balanced approach should underlie legislation in this area. The analysis in these parts is buttressed by case law[7] on topic and comparison of legislation from Ontario and Alberta. Finally, Part VIII offers a brief conclusion with a summary of suggestions for law reform.

PART II. THE RELATIONSHIP BETWEEN PURCHASER AND CONDOMINIUM DEVELOPER

The first relevant enquiry in this discussion is whether there is a problem inherent in the purchaser-developer relationship mandating legal intervention. Concluding there is a problem, later sections in this thesis evaluate responses to the issues facing purchasers of condominium units.

[7] As the Act was only passed in 2004, it is in its litigation infancy.

A. Purchasers and Developers are not on Equal Footing

Consumers are challenged in their bargains with suppliers because they are not on equal footing. The relationship between condominium purchaser and developer (i.e. the original vendor) reflects a power imbalance. Commentators identify a number of factors that contribute to this power differential. This section identifies and evaluates the factors that *generally* characterize a power imbalance between a consumer and a supplier.

1. Standard Form Contracts

Standard form contracts (also known as "contracts of adhesion")[8] - which are prevalent in the condominium industry - often reflect power imbalances between vendor-suppliers and purchasers. The utilization of standard form contracts has drawn the ire of many commentators because they create a variety of disadvantages for consumers.[9] According to Jacob Ziegel, "the contract of adhesion has replaced the handshake."[10] Joshua Wright states, "despite the ubiquity of standard form contracts in competitive markets, legal scholars and courts have long viewed standard form terms with a sceptical eye, associating them with monopoly power or some related, but poorly defined, coercive force that compels consumers to accept unfavourable terms."[11] Thus, the "take-it-or-

[8] Todd D Rakoff, "Contracts of Adhesion: an Essay in Reconstruction" (1983) 96:6 Harvard L Rev 1173.
[9] *Ibid.* See eg Jenny Buchan, "Consumer Protection for Franchisees of Failed Franchisors: is there a Need for Statutory Intervention?" (2009) 9 Queensland U Tech L & Just J 232 at 233-234.
[10] Jacob S Ziegel, "The Future of Canadian Consumerism" (1973) 51 Canadian Bar Rev 191, reprinted in MH Ogilvie, ed, *Consumer Law: Cases and Materials*, 2nd ed (North York, ON: Captus Press Inc, 2000) 15 at 15.
[11] Joshua D Wright, "Behavioral Law and Economics, Paternalism, and Consumer Contracts: an Empirical Perspective" (2007) 2 NYU JL & Liberty 470 at 493 (footnotes omitted).

leave-it" nature of standard form agreements is considered rather problematic by a number of observers. [12]

Standard form contracts are problematic due to a number of factors. For instance, standard form agreements often accentuate a developer's common law rights [13] in a long, complex agreement. [14] The problem is compounded for consumers who have difficulty comprehending the content of standard form agreements. It is appropriate to consider, according to Marshall Shapo, the level of intelligence possessed by an "ordinary consumer."[15] In "Literacy and Contract," Ian White and Cathy Lesser Mansfield provide a compelling argument that contract law should recognize that consumers often have difficulty understanding agreements.[16] A consumer who is unable to understand an agreement, particularly one not written in plain language, remains susceptible to surprise and disappointment with respect to an agreement's actual contents.

[12] See the discussion in Russell Korobkin, "Bounded Rationality, Standard Form Contracts and Unconscionability" (2003) 70 U Chi L Rev 1203 at 1204-1205. The contention that standard form agreements are abhorrent simply because they are offered on a "take it or leave it" basis is unpersuasive because the problem does not lay in that one party authors the agreement. Agreements are frequently negotiated in a "take it or leave it" fashion with no opportunity to negotiate terms. In the context of residential sales, typically recorded by way of standard form contract, a vendor offers a property for sale and the purchaser must decide whether to purchase that property.

[13] *Ibid* at 1204.

[14] Allan M White & Cathy Lesser Mansfield, "Literacy and Contract" (2002) 13:2 Stan L & Pol'y Rev 233 at 233.

[15] Marshall Shapo, "A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment" (1974) 60 Va L Rev 1109 at 1304.

[16] White & Mansfield, *supra* note 14 at 234. See also Michael Trebilock & Steven Elliott, "The Scope and Limits of Legal Paternalism" in Peter Benson, ed, *The Theory of Contract Law: New Essays* (Cambridge, UK: Cambridge University Press, 2001) 45 at 47 who argue that vulnerable consumers should be entitled to obtain independent legal advice prior to entering a disadvantageous agreement, and if this occurs, consumers should be held to their bargains.

2. Consumer Sophistication and Informational Asymmetries

There is a disconnect between information possessed by a manufacturer/supplier and information obtainable by the consumer, thus creating an asymmetry of information between vendor and purchaser. Becher provides a useful definition of informational asymmetries:

> Generally speaking, the term ''asymmetric information'' refers to situations where parties are differently informed, with one party having access to better or more information than the other. Lack of familiarity with contractual terms is a specific category of asymmetric information. One party, the contract drafter (the seller), is well informed about the terms of the contract, whereas the contract signer (the consumer) is imperfectly informed.[17]

But according to Shmuel Becher, it is important that parties be on equal footing if contracts are to do what they were historically designed to do, namely, to promote wealth:[18]

> Contracts will systematically increase welfare if, and only if, contracting parties have the information necessary for an informed evaluation of all transactional aspects (including, of course, contract terms). Stated slightly differently, information inequalities belie the maxim that promisees (i.e., consumers) are the best judges of their own utility. Where imperfect information exists, the ability of parties to maximize utility via open market transactions will inevitably decrease.[19]

This excerpt reinforces the maxim that 'knowledge is power,' since greater knowledge for one party to a transaction will provide an advantage.[20]

Even when provided ample information to make a decision, consumers are nonetheless limited in their ability to process complex data. Given the number of

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[17] Shmuel I Becher, "Asymmetric Information in Consumer Contracts: the Challenge that is yet to be Met" (2008) 45:4 Am Bus LJ 723 at 733 [emphasis added].
[18] See Grant Howells & Stephen Weatherill, *Consumer Protection Law* (Brookfield, USA: Dartmouth Publishing Company, 1995) at 9 regarding the idea of contracts historically being viewed as a mechanism for building wealth.
[19] Becher, *supra* note 17 at 734 (footnotes omitted).
[20] Gillian K Hadfield, Robert Howse & Michael Trebilock, "Information-Based Principles for Rethinking Consumer Protection Policy" (1998) 21 J Cons Pol 131 at 141-142.

details associated with the construction of a development, condominium buyers are often impacted by their limited sophistication. As Iain Ramsay notes in reference to empirical evidence, "studies suggest that as the number of attributes and choices of products faced by a consumer rises there will be a reduction in the quality of consumer decision making. Thus a variation in the number of alternatives from 4, to 8, 12, and 16 resulted in poorer quality decisions."[21] Consumer purchasing typically occurs by individuals in small increments with minimal organization and power.[22] Lacking previous experience and relevant knowledge, condominium purchasers, like other buyers, may focus *only* on "salient" matters such as price, location, and quality of amenities, rather than considering *all* potential factors associated with a condominium purchase.[23] Consequently, buyers may receive *largely* what was expected, but may be disappointed on other fronts not considered salient at time of bargaining.[24]

Developers, on the other hand, are more sophisticated than the typical condominium purchaser. Developers are corporate entities (or limited partnerships) controlled by highly-sophisticated, experienced business people. Rather than contemplate only salient characteristics, a developer must consider all of a development's attributes and how they impact profitability. A condominium development consists of numerous common elements, the nature and quality of

[21] Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Portland: Hart Publishing, 2007) at 75, citing Jacob Jacoby, Donald E Speller & Carol Kohn Berning, "Brand Choice Behavior as a Function of Information Overload: Replication and Extension" (1974) 1:1 J Consumer Behav 33.
[22] Board of Trade, *Final Report of the Committee on Consumer Protection* (Molony Committee), Cmnd 1781/1962 at para 891 in Ramsay, *ibid* at 4.
[23] Korobkin, *supra* note 12 at 1206.
[24] *Ibid* regarding salience.

which could make a quality investment into a shoddy one. In respect of unconstructed condominium units, the developer is the *sole* source of knowledge of a development's major and minor details. Matters as major as the layout of a development's plumbing network to those as minor as the quality of baseboards are exclusively within the developer's knowledge until the condominium unit can be inspected.

3. Hype and Pressure

The context of some transactions can beckon consumer irrationality;[25] the hype surrounding the sale of unconstructed condominiums is no exception, particularly within a hot real estate market. The allure of the condominium industry was recognized by the B.C. legislature. Legislative debate over the *REDM Act* in 2004 illustrates this point, when the Hon. R. Collins, the Minister in charge of tabling the Act, stated:

> We are in a bizarre period of time right now. I was just sort of joking here that people go out for a latte and on the way to Starbucks stop and buy a condominium. It's sort of like the Soviet Union. You walk down the street, and there's a big lineup [sic]. Get in line, because you don't know what they're selling. You may want some. It's sort of a weird time right now. I've driven by a few of the lineups [sic] in the last couple of months — not my constituency but in the member for Vancouver-Burrard's constituency, in particular.[26]

Calculated marketing of condominiums can create hype for units. According to Eyal Zamir, the presentation of a product will heavily influence a consumer's purchase decision.[27] It is not uncommon for developers to capitalize on the condominium purchasing frenzy by marketing their developments

[25] Colin Camerer et al, "Regulation for Conservatives: Behavioural Economics and the Case for 'Asymmetric Paternalism'" (2003) 151 U Pa L Rev 1211 at 1238-1240.
[26] British Columbia, Legislative Assembly, *Report of Debates (Hansard)*, 10 May 2004, at 11027.
[27] Eyal Zamir, "The Efficiency of Paternalism" (1998) 84 Va L Rev 229 at 269-270.

intensively. Marketing teams can provide elaborate visual presentations, showing units and their amenities in three-dimensional viewing. Glossy brochures and other marketing strategies help prospective purchasers visualize their future residence with all of its luxuries. This hype enables a developer to create an environment wherein purchasers are enticed to buy.

The nature of condominium ownership itself can generate hype. Motivations to buy condominiums are diverse.[28] For some, condominiums represent an entry level residential purchase in an otherwise unaffordable market – or a market that may, with the passage of time, become unaffordable.[29] For others, condominiums offer common ownership of high-end amenities at an affordable price.[30] Condominiums are often built on or near spectacular waterfront locations, promising purchasers a piece of real estate they have dreamed of but would likely never be able to afford. Speaking albeit in the American context, Ronnie Cohen and Shannon O'Byrne summarize the emotions those wishing to enter the housing market experience, particularly in a hot real estate market:

> These commonly experienced emotions—the fear of missing out in a rising market and the wish to participate in the status and prestige of homeownership—are enormously significant and motivating. Indeed, the benefits of successful homeownership are tangible and significant, including an overall increased satisfaction with the quality of their life as compared to renters, [and] enhanced economic security...[31]

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[28] McLellan, *supra* note 6 at 44-45.
[29] *Ibid*.
[30] *Ibid*.
[31] Ronnie Cohen & Shannon K O'Byrne, "Burning Down the House: Law, Emotion, and the Subprime Mortgage Crisis" Real Prop Tr & Est LJ, forthcoming, online: Social Sciences Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1766123> at 13 (footnotes omitted). These authors note some studies to the contrary as well.

Thus, nearly all condominium purchasers, regardless of which of a variety of motives for purchase they possess, are subject to hype in buying a condominium.

4. Consumer Irrationality

Consumers do not always make decisions in their best interests. The field of behavioural economics has made significant advances in understanding consumer decisions, a chief contribution of which has been identification of poor consumer decision-making patterns. Behavioural economists have postulated that consumers have limited, or "bounded," abilities to make good decisions,[32] and use mental shortcuts to arrive at their decisions.[33] This overall weakness in decision-making contributes to consumers' plight.[34]

In short, the current consumer climate creates an environment in which purchasers may not obtain what was necessarily bargained for due to industry practice (i.e. standard form agreements) and a general disjuncture of knowledge through informational asymmetries and developer sophistication. Further, condominium hype creates problems that may render purchasers unduly eager to make such a significant investment. When these factors are considered in conjunction with consumer irrationality, consumers require some protection. The subject matter thus moves to the nature of that protection, with choices between current legal protection by the courts or regulation via legislated rules.

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[32] See generally Christine Jolls, Cass Sunstein & Richard Thaler, "A Behavioral Approach to Law and Economics" (1998) 50 Stanford LR 1471.
[33] Timur Kuran & Cass R Sunstein, "Controlling Availability Cascades" in Cass R Sunstein, ed, *Behavioral Law and Economics* (New York: Cambridge University Press, 2000) 374 at 380.
[34] The concept of consumer irrationality will be further discussed in Part IV, Section B of this thesis.

PART III. THE POSITION OF THE AGGRIEVED CONDOMINIUM PURCHASER IN AN UNREGULATED MARKETPLACE

To this point I have concluded that consumers are in a weaker position than developers due to general power imbalances and the nature of consumer decision-making. While other categories of purchasers may not require protection or relief, it is clear that at least some condominium purchasers do. This section evaluates the current common law and equitable remedies *generally* available to an aggrieved purchaser, particularly in respect of misrepresentations. It concludes that the applicable remedies are of limited use.

A. Misrepresentations

A condominium buyer could be easily induced into purchasing based on a false statement of fact. Such statements are the basis for a misrepresentation[35] in law. The law provides for three types of misrepresentation: fraudulent, negligent, and innocent. An actionable misrepresentation contains three ingredients. First, a misrepresentation must be unambiguous.[36] Second, it must be "material;" it must "relate to a matter that would be considered by a reasonable person to be relevant to the decision to enter the agreement in question."[37] Thirdly, a misrepresentation

[35] John D McCamus, *The Law of Contracts* (Toronto: Irwin Law Inc, 2005) at 326 defines a misrepresentation as "a statement of present or past fact that is false."

[36] Eg the representation must not be simply a "puff": See Paul M Perell, "False Statements" (1996) 18 Advoc Q 232 [*False Statements*] at 237. See also William H Traylor, "Consumer Protection Against Sellers Misrepresentations" (1969) Mercer L Rev 414 at 420, albeit in an American context.

[37] McCamus, *supra* note 35 at 330. See especially *Panzer v Zeifman* (1978), 88 DLR (3d) 131 (Ont CA) [*Panzer*] at para 20, citing *Smith v Chadwick* (1882), 20 Ch D 27 at p 44. The classic example of materiality comes from *Redgrave v Hurd* (1881), 20 Ch D 1 (CA) [*Redgrave*] in which a lawyer misrepresented previous earnings from his law practice.

must induce a purchaser to enter an agreement.[38] All misrepresentations provide the equitable remedy of rescission,[39] and where a tort has been committed, the common law remedy of damages.[40] For the purposes of this section, rescission means the "unwinding or setting aside of the contractual relationship between the parties" to their pre-contractual position.[41]

1. Fraudulent Misrepresentation

Fraudulent misrepresentation has a long history, dating back to the seminal case of *Derry v. Peek*.[42] According to *Derry*, a misrepresentation is fraudulent if it contains a "fraudulently false" statement of fact.[43] This alone entitles the representee to rescission, subject to any equitable bars.[44] Proving fraud is beneficial, however, because it also creates a common law action for the tort of deceit, which provides a remedy of damages in addition to rescission.[45] A successful action in deceit requires proof that a false representation was made *and* that the representor: knew of a statement's falsity; did not believe in a statement's truth; *or* made a statement "recklessly."[46] This is a difficult matter to prove as it requires evidence that goes directly to the misrepresentor's state of mind.

[38] *Ibid*, *Panzer* at paras 19-20.
[39] McCamus, *supra* note 35 at 360.
[40] *Ibid*.
[41] McCamus, *supra* note 35 at 337.
[42] (1889), 14 AC 337 (HL) [*Derry*].
[43] McCamus, *supra* note 35 at 348.
[44] See *infra* at Subsection 5 of this Section for a discussion of equitable bars to rescission.
[45] McCamus, *supra* note 35 at 360.
[46] McCamus, *supra* note 35 at 348, citing *Derry*, *supra* note 42 at 327.

2. Negligent Misrepresentation

A successful action for negligent misrepresentation "imposes liability for negligently spoken or written words,"[47] entitling the victim to rescission in contract[48] and damages in tort. Negligent misrepresentation arose from the House of Lords decision in *Hedley Byrne & Co. v. Heller & Partners Ltd*.[49] *Hedley Byrne* established a new tort grounded in negligence and independent of the tort of deceit.[50] Actions for negligent misrepresentation were restricted to tort until the Supreme Court of Canada's decision in *Central Trust Co. v. Rafuse*,[51] which held that a defendant could be concurrently liable in tort and contract.

Canadian law adopted the *Hedley Byrne* test in *Queen v. Cognos*:

> The required elements for a successful *Hedley Byrne*, supra, claim … [has] five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.[52]

A finding of negligent misrepresentation requires establishment of a duty of care pursuant to the test enunciated in *Anns v. Merton Borough Council*,[53] which was adopted in Canadian courts in *Kamloops (City of) v. Nielsen*[54] and subsequently revised in *Cooper v. Hobart*.[55] In short, the first step of the *Anns* test, and indeed

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[47] Paul M Perell, "Negligent Misrepresentation Claims in Real Estate Transactions" (1994) 16 Advoc Q 156 at 157.
[48] McCamus, *supra* note 35 at 360.
[49] [1964] AC 465 (HL) [*Hedley Byrne*].
[50] Perell, *False Statements*, *supra* note 36 at 232.
[51] [1986] 2 SCR 147.
[52] [1993] 1 SCR 87 [*Cognos*] at para 34 [emphasis added].
[53] [1978] AC 728 (HL) [*Anns*].
[54] [1984] 2 SCR 2.
[55] [2001] 3 SCR 537 [*Cooper*].

the first step of the *Cognos* test, requires proof of a special relationship giving rise to a *prima facie* duty of care.[56] The second step of the *Anns* test questions whether there are compelling policy reasons to negate a *prima facie* duty of care.[57] It is trite that a developer and purchaser are in a special relationship creating a duty of care and in the ordinary case, at least, there are no policy reasons to obviate that duty.[58] For example, a classic policy objection of indeterminate liability[59] is not triggered since specific disappointed purchasers will be suing a defined condominium developer. Unfortunately for a plaintiff, the *Cognos* test requires that allegations of wrongdoing clear four more hurdles. The test's remaining impediments are inherently fact driven. Furthermore, even if the plaintiff relied on the defendant's misstatements, *proving* that reliance may be difficult.

3. Innocent Misrepresentation

An innocent misrepresentation is an untrue, but "non-careless" misrepresentation in contract.[60] It entitles a victim only to a right of rescission, for there is no accompanying actionable tort.[61] Bars to rescission may leave the remedy unavailable.[62] A purchaser who wishes to retain ownership of their

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[56] See *Anns*, *supra* note 53, *Cognos*, *supra* note 52 and *ibid.*
[57] *Cooper*, *supra* note 55 at para 30.
[58] See *413255 BC Ltd v Jesson Estate*, 2006 BCSC 1070 at paras 35-51: applying *Cognos*, *supra* note 52, Gerow J. found a duty of care between a developer and purchaser of condominiums in concluding that the developer had breached its duty by failing to alert purchasers of water damage.
[59] See especially Lewis N Klar, QC, *Tort Law*, 3rd ed (Toronto: Thomson Carswell, 2003) at 211-215.
[60] McCamus, *supra* note 35 at 360.
[61] *Ibid*.
[62] See the following Section in this thesis.

condominium but seeks damages for a misrepresentation may therefore be left without a remedy at common law or in equity.

4. Bars to Rescission

There are five bars that will preclude a misrepresentee from obtaining a remedy of rescission. They are briefly described here to illustrate the exclusionary power they wield in the current context.

a. Restitution is Impossible

A court's inability to restore the parties to their pre-contractual circumstances creates a bar to rescission.[63] Simply put, a buyer must return what was bargained for on seeking rescission in what is essentially a reversal of the bargained-for agreement.[64] In cases of fraud, however, Canadian courts have shown a willingness to disregard, or at the very least weaken, this bar. A prominent case on point is *Kupchak v. Dayson Holdings Co. Ltd*.[65] The plaintiffs in *Kupchak* agreed to exchange two properties for shares in a motel company owned by the defendants. The plaintiffs realized that the defendants had misrepresented the hotel's profitability early in their hotel operations. The complicating factor was that the defendants sold a half-interest in one of the two properties conveyed to them in exchange for the hotel shares and subsequently erected an apartment building. This alteration ought to have barred rescission based on restitution being impossible. The British Columbia Court of Appeal

[63] Sir Guenter Treitel, *The Law of Contract*, 10th ed (London: Sweet & Maxwell, 1999) at 350.
[64] *Ibid*. For instance, if a sale of shares is procured via fraud, rescission would require a return of the shares by the (victim) misrepresentee and a return of payment by the misrepresentor.
[65] (1965), 53 DLR (2d) 482 (BCCA) [*Kupchak*].

held, however, that rescission should not be barred respecting property that, though disposed of, had been acquired fraudulently. The Court awarded compensation[66] in an amount equivalent to the value of the property at the time of the initial conveyance. Though courts maintain a jurisdiction to do "what is practically just,"[67] they will presumably be less likely to assist a victim of an innocent or negligent misrepresentation,[68] potentially leaving an aggrieved condominium purchasers without recourse.

b. Execution

Execution of an agreement for real property remains a bar against rescission, absent fraud. In fact, Canadian courts have been unwilling to order rescission for misrepresentations once a transfer for real property has been completed. This unwillingness is problematic for condominium purchasers discovering a misrepresentation post-closing. A prominent decision on point is *Redican v. Nesbitt*.[69] In *Redican*, the plaintiff learned of a material misrepresentation a few days after the closing of an agreement for leasehold property. The purchaser had no prior opportunity to discover the misrepresentation. The Court declined to grant rescission but stated that execution would not be a bar to rescission in

[66] Compensation in the form of restitution. See also Treitel, *supra* note 63 at 353, citing *Hulton v Hulton*, [1917] 1 KB 813 at 826, and *Redgrave*, *supra* note 37: "In equity a representee who is able to make substantial, though no precise, restitution can rescind if he returns the subject matter of the contract in its altered state… thus a person who has gone into possession under a contract to buy, or take a lease of, land can rescind on terms of paying rent for the period of his occupation."
[67] *Kupchak*, *supra* note 65 at para 11.
[68] See *Spence v Crawford*, [1939] All ER 271: a sale of shares was negotiated by the purchaser. The purchaser (i.e. misrepresentor) later sold some of the shares. The misrepresentee was nevertheless entitled to rescind the agreement. According to Treitel, *supra* note 63 at 352, the question of whether the Court would have ordered rescission in the case of an innocent misrepresentation was left unanswered.
[69] [1924] SCR 135.

instances of fraud.[70] This draconian rule in a non-fraudulent context suggests that a purchaser of a condominium unit must take care to closely inspect their property prior to conveyance or risk entitlement to rescissionary relief.

The doctrine of merger presents an explanation to the execution bar to rescission. On conveyance of land, the lesser estate merges with the greater estate. In other words, the terms in an agreement of purchase (including surviving representations), being the lesser estate, merge into the title for the land, being the greater estate.[71] The result is that an aggrieved party, on execution of the conveyance, can no longer take action for a breach of the agreement's representations because they have merged into the larger estate of what was conveyed, that is, they no longer exist.[72] Lyn Stevens explains the policy reasons behind the doctrine thusly: "Undoubtedly, notions of finality and certainty in business affairs demand that there must be a certain point after which purchasers will be unable to pursue successful claims for damages, compensation or rescission. This is an important policy factor behind the doctrine of merger."[73] Fraud is the most notable exception to the operation of merger, although there are other exceptions beyond the scope of this thesis.[74]

[70] *Ibid*. See also Peter D Maddaugh & John D McCamus, *The Law of Restitution*, loose-leaf (consulted on July 6, 2011) (Aurora, Ontario: Canada Law Book, 2004) ch 20 at 15.
[71] Lyn L Stevens, "The Role of the Doctrine of Merger in Contracts for the Sale of Land – the Canadian Experience" (1973) 8 UBC L Rev 35 at 35.
[72] *Ibid*.
[73] *Ibid* at 37-38.
[74] *Ibid* at 42-58.

c. Affirmation

A purchaser cannot, on one hand, affirm an agreement that was induced by misrepresentation and, on the other hand, request rescission. On learning of a misrepresentation, and on knowing of their right to rescind, a misrepresentee has a one-time decision to either seek rescission or affirm the agreement.[75] Affirmation can be explicit or can be inferred from the misrepresentee's conduct.

d. Prejudice of Third Party Rights

Transfer of property rights to an innocent third party will usually bar rescission in situations that the transfer is to "a bona fide purchaser for value without notice of the underlying equity or difficulty with the title."[76] Regardless, courts have shown some flexibility with this bar, as occurred in *Kupchak*,[77] to fashion a remedy so that third party rights are not affected by disposition.

e. Laches

A period of undue delay in seeking rescission, known as the doctrine of laches, will create a bar to rescission. The reason for this, according to the decision in *Lindsay Petroleum Oil Co. v. Hurd*,[78] is that a significant delay is taken "to indicate that the misrepresentee has essentially waived the remedy or it

[75] McCamus, *supra* note 35 at 342.
[76] McCamus, *supra* note 35 at 343, and Treitel, *supra* note 63 at 355.
[77] *Kupchak*, *supra* note 65.
[78] (1874), LR 5 PC 221.

must have created a situation in which the granting of relief would be unfairly prejudicial to the mispresentor."[79]

Overall, the operation of a number of bars to rescission further disadvantage an aggrieved purchaser. These bars limit remedies available at common law and in equity, in which case, legislative intervention is justified.

B. Doctrines Protecting the Weaker Party

Classical contract theory views freedom of contract as being of utmost importance.[80] However, the law has developed doctrines to assist purchasers who did not give consent to an agreement; relevant doctrines for our purposes relate to duress, undue influence, and unconscionability. These defences provide the remedy of rescission.[81] As the following brief discussion illustrates, the application of these doctrines is unlikely to assist an aggrieved condominium purchaser.

1. Duress

Courts of common law traditionally developed the defence of duress to recognize that an agreement lacking consent ought not to be enforced.[82] Duress has historically operated to vitiate consent for agreements procured by violence[83]

[79] McCamus, *supra* note 35 at 345.
[80] See eg Carolyn Edwards, "Freedom of Contract and Fundamental Fairness for Individual Parties: the Tug of War Continues" (2008) 77 UMKC L Rev 647 at 647.
[81] Unfair Contracts Relief Project Committee, "Consultation Paper on Proposals for Unfair Contracts Relief" (December 10, 2010), online: British Columbia Law Institute < http://www.bcli.org/sites/default/files/2010-12-10_BCLI_Unfair_Contracts_Relief_Consultation_Paper.pdf> at 99.
[82] *Ibid* at 17.
[83] Unfair Contracts Relief Project Committee, *supra* note 81 at 53.

and threats of violence in the form of "interference with property rights."[84] Threats of either nature would be unlikely in the context of purchasing condominiums.

A second form of duress comes by way of economic duress. The decision in *Pao On v. Lau Yiu Long*[85] is instructive. *Pao* involved the sale of the plaintiff's company to a company owned by the defendant. The consideration provided to the plaintiff was shares in the defendant's company. The plaintiff sought to guarantee the value of the shares as of a certain date. The plaintiff recognized he had committed a strategic error in not anticipating a rise in the share price, in which case, he would not be entitled to the increased value. The plaintiff accordingly sought a new guarantee, threatening not to complete the agreement if a new guarantee was not provided. The defendant acceded, fearing bad publicity for his company if the deal failed to close. The stock market subsequently crashed and the shares were substantially devalued. The plaintiff sued on the defendant's guarantee. The Privy Council, per Lord Scarman, defined duress as "a coercion of the will so as to vitiate consent."[86] The test fashioned by the Court was whether the questioned conduct was a "voluntary act." The Court concluded that the defendant had bowed to commercial pressure, not coercion, and there was therefore no economic duress.

[84] McCamus, *supra* note 35 at 370.
[85] [1980] AC 614 (Hong Kong PC) [*Pao*].
[86] *Ibid* at 635; see McCamus, *supra* note 35 at 372.

The House of Lords revisited economic duress in *Universe Tankships of Monrovia v. International Transport Workers' Federation*.[87] A two-part test was enunciated in a decision again penned by Lord Scarman. First, there must have been "pressure amounting to compulsion of the will of the victim."[88] In other words, the court considers whether the plaintiff had any alternative but to submit to the alleged duress. The second branch weighs "the illegitimacy of the pressure exerted."[89] This branch of the test determines "whether, as a practical matter, the coerced party had any option but to yield to the pressure and, secondly, whether the pressure itself was illegitimate."[90]

The Canadian position on economic duress was somewhat clarified in *Greater Fredericton Airport Authority Inc. v. NAV Canada*.[91] It should be noted at the outset that the Court in *NAV* qualified its decision as only applying to variations to an existing agreement[92] though the reach of the test may extend over time. The parties in *NAV* were an airport authority and NAV Canada. They had an existing agreement for management of the airport's services and facilities. The airport authority extended a runway at its own expense. NAV Canada concluded that a navigational aid should be replaced in relation to this construction. The parties disputed who should pay for the navigational aid. The airport authority insisted that it was not contractually required to fund the navigational aid. However, NAV Canada threatened a delay in opening the extended runway if the

[87] [1983] 1 AC 366 (UKHL) [*Universe*].
[88] *Ibid* at 400.
[89] *Ibid* at 400.
[90] McCamus, *supra* note 35 at 374.
[91] 2008 NBCA 28 [*NAV*].
[92] *Ibid* at paras 50-51.

airport authority did not pay for the navigational aid. The airport authority agreed to pay "under protest" later refused after the navigational aid was installed. Robertson J.A. rejected *Pao* and *Universe* in respect of the question of "illegitimate pressure."[93] Robertson J.A. fashioned an alternate test:

> [A] finding of economic duress is dependent initially on two conditions precedent. First, the promise (the contractual variation) must be extracted as a result of the exercise of "pressure", whether characterized as a "demand" or a "threat". Second, the exercise of that pressure must have been such that the coerced party had no practical alternative but to agree to the coercer's demand to vary the terms of the underlying contract. However, even if those two conditions precedent are satisfied, a finding of economic duress does not automatically follow. Once these two threshold requirements are met, the legal analysis must focus on the ultimate question: whether the coerced party "consented" to the variation. To make that determination three factors should be examined: (1) whether the promise was supported by consideration; (2) whether the coerced party made the promise "under protest" or "without prejudice"; and (3) if not, whether the coerced party took reasonable steps to disaffirm the promise as soon as practicable.[94]

Robertson J.A. held that the first two conditions precedent were met on the facts as there was significant pressure with the airport authority having no "practical alternatives available."[95] Further, there was no consideration, the airport authority acceded under protest and the authority also attempted to disavow its commitment from the outset.[96]

Whether the test for economic duress is predicated on the decision in *Universe* or *NAV*, a purchaser again has a difficult bar to meet because the plaintiff must prove undue pressure or coercion. Further, the test for economic duress is very nuanced and fact-sensitive. The nature duress makes it unlikely to apply in the typical developer-purchaser relationship in light of most transactions involving individuals with a corporate developer.

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[93] *Ibid* at paras 43 and 47.
[94] *Ibid* at para 53.
[95] *Ibid* at paras 64-66.
[96] *Ibid* at para 66.

2. Undue Influence

Another rare doctrine for setting aside disadvantageous transactions is undue influence. Stephen Waddams describes undue influence thusly: "more commonly, the phrase has been applied to situations related to fiduciary duties where one party reposes trust in the other. Certain categories of cases have been said to give rise to a presumption of undue influence, but it is not necessary for the weaker party to bring his or her case into a recognised category: any case in which there is a relationship of trust or confidence may qualify for relief."[97] A fiduciary or trust-like relationship does not typically exist between a condominium developer and individual unit purchasers.[98] Therefore, undue influence is not of any meaningful assistance for aggrieved condominium purchasers.

3. Unconscionability

The third narrowly applied doctrine is that of unconscionability. Unconscionability involves a measure of "equitable fraud" that has a lower bar of proof than common law fraud.[99] Courts of equity historically retained jurisdiction to set aside transactions deemed "very unfair."[100] Unconscionability traditionally required an inequality of bargaining power and an "improvident" bargain.[101] An inequality of bargaining power may occur due to, *inter alia*, intellectual weakness,

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[97] Stephen Waddams, "Autonomy and Paternalism from a Common Law Perspective: Setting Aside Disadvantageous Transactions" (2010) 3:2 Erasmus LR 121 at 130.
[98] *Condominium Plan No 822 2630 v Danray Alberta Ltd*, 2007 ABCA 11.
[99] Unfair Contracts Relief Project Committee, *supra* note 81 at 26.
[100] Waddams, *supra* note 97 at 130.
[101] Maddaugh & McCamus, *supra* note 70 at ch 29 at 3, citing *Waters v Donelly* (1884), 9 OR 391 (HCJ).

intoxication, illiteracy, illness, lack of business experience, and language impediments.[102] According to Peter Maddaugh and John McCamus, an improvident transaction is one which goes beyond a disparity of consideration,[103] and shows that an inequality in bargaining power was used to take advantage of a weaker party.[104] The English case of *Hart v. O'Connor*[105] takes a slightly different view of the thrust of unconscionability doctrine at the present: the Court ruled that the defendant could not have taken advantage of the plaintiff since the defendant was unaware the plaintiff was of unsound mind.[106] The Court stated: "'[f]raud' in its equitable context does not mean, or is not confined to, deceit; 'it means an unconscientious use of the power arising out of the circumstances and conditions' of the contracting parties. It is victimization, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances."[107]

While the test for unconscionability has not been definitively resolved, the universal requirement is that the defendant must have procured an undue advantage due to inequalities in bargaining power.[108] The required elements of unconscionability are unlikely to be of assistance to the aggrieved condominium purchaser. First, the aggrieved purchaser is more likely to suffer a misrepresentation (either overtly or by omission) than enter a grossly unfair

[102] *Ibid* ch 29 at 4-6.
[103] *Ibid* ch 29 at 15.
[104] *Ibid* ch 29 at 17.
[105] *Hart v O'Connor*, [1985] AC 1000 (PC) [*Hart*].
[106] Maddaugh & McCamus, *supra* note 70 at ch 29 17, citing *ibid*.
[107] *Hart*, *supra* note 105 at 1024, Brightman LJ (citation omitted) (quoting *Earl of Aylesford v Morris* (1873), LR 8 Ch App 484 at 490).
[108] McCamus, *supra* note 35 at 407.

agreement. Second, the standard form nature of condominium purchase agreements and their accompanying publicized price will further blunt the potential for a dramatically unfair agreement because all standard agreements are provided to the Superintendent of Real Estate by virtue of being included in mandatory disclosure.[109] The marketing of unit prices to the public further lessens the potential for an unconscionable transaction.

PART IV. SHOULD THE STATE INTERVENE TO ADDRESS THE IDENTIFIED PROBLEMS?

I have, to this point, argued that consumers are generally disadvantaged in their relationship with condominium developers. When that disadvantage turns to aggrievement, purchasers are left with inadequate protection from common law and equity. Our analysis must transition, then, to determine whether state intervention for consumer protection can be justified. This subject matter pits a classical approach of freedom of contract and *caveat emptor* against recent empirical conclusions about consumer rationality.

A. Neoclassical Economics, *Caveat Emptor* and Freedom of Contract

Historically, neoclassical economics has been at the forefront of economic thought for a little over 100 years.[110] Neoclassical economics assumes that people have rational preferences and that the key to valuing a market actor's preference is

[109] See Financial Institutions Commission, Information Bulletin, "Real Estate Development Marketing Act Amended Policy Statement Five: Early Marketing – Development Approval" online: Financial Institutions Commission (30 January 2008) <http://www.fic.gov.bc.ca/pdf/real_estate/REPolicyStatement05-07.pdf.> at 2 requires the developer's form agreement for selling units in the development to be attached as an exhibit to a Disclosure Statement.

[110] Michel De Vroey, "The Transition from Classical to Neoclassical Economics: a Scientific Revolution" (1975) Journal of Economic Issues 9:3 415 at 425.

based on a "consumer's desires."[111] The utility of a product, in turn, will be reflected in consumer choice for that product.[112] Utility, in fact, is closely tied to a market actor's primary goal of wealth maximization.[113] Hence, neoclassical economics seldom views government regulation as required to create an efficient marketplace. Richard Epstein explains neoclassicism's scepticism towards market regulation:

> The usual point of controversy is the neoclassical conclusion that competitive markets - markets with multiple, self-interested players on both sides, armed with relatively full information -will generate a mix of goods and services that is superior to those that can be generated with various forms of government regulation. Conscious deviations from well-functioning competitive markets introduce either unwanted barriers or subsidies, both of which reduce overall output in the regulated sector, with spillover losses elsewhere in the general economy. The state creation of monopoly by entry restrictions, for example, will not only have a negative effect on the quantities and prices of the goods and services available to buyers and their customers, but will also provide an unwanted subsidy to the sellers of competitive technologies and services who operate in an unregulated segment of the market.[114]

Ramsay provides further context for limited market regulation: "[m]arket failure analysis assumes that an unregulated perfectly competitive market will achieve an efficient allocation of resources and that government intervention is only justified to remove barriers to the smooth operation of markets or to attain an important public objective."[115] Epstein buttresses Ramsay's point thusly:

> There are, however, two sets of well-recognized circumstances in which the neoclassical theory accepts that some government intervention *may* make sense: private monopoly and imperfect information. The first arises in industries that, for one reason or another, do not assume competitive form. In some instances, the best

[111] *Ibid* at 428-429.
[112] *Ibid* at 430 (Table 1).
[113] See Larry DiMatteo et al, *Visions of Contract Theory: Rationality, Bargaining and Interpretation* (Durham: Carolina Academic Press, 2007) at 18 in reference to the traditional law and economics application of the Coase Theorem.
[114] Richard Epstein, "The Neoclassical Economics of Consumer Contracts" (2007) 92 Minn L Rev 803 at 804 (footnotes omitted).
[115] Iain Ramsay, *Rationales for Intervention in the Consumer Market* (London: OFT, 1984) in Ramsay, *supra* note 21 at 61 [emphasis added].

> solution is to mandate that the parties cease all cooperative efforts and operate in direct competition with each other. [Emphasis original.]
>
> …
>
> The second topic - imperfect information - is more vast because it addresses the effects of misinformation on the operation of the full range of product and service markets. These difficulties can arise irrespective of the underlying market structure: both competitive and monopolistic markets fall within its scope.[116]

Finally, Epstein notes the rationales underlying neoclassicism's hesitance to accept state regulation:

> The neoclassical tradition establishes a presumption against regulation in both these areas for three simple and compelling reasons. First, all forms of public intervention cost money, so the proper question is not whether the current market operates imperfectly, but whether the costs of correcting the imperfections exceed the costs of allowing particular imperfections to remain. Second, most neoclassical economists fear that regulation will be misguided because of some misidentification of the particular imperfection…. Third, powerful political forces, with excellent private knowledge, often turn regulation to their own parochial ends by creating barriers to entry that block or hamper the emergence of strong competitive markets[117]

Since agreements were historically viewed as wealth-creating transfers, it follows that contracting parties were *assumed* to know what was in their best interests.[118] In other words, if a bargain was made, the parties had reason to make it.[119] Beyond this, consumers were presumed to learn from financial mistakes,[120] and if they failed to do so, "irrational actors… [would] not survive the market."[121]

Neoclassical economics forms the basis for traditional economic analysis of the law.[122] Traditional law and economics borrows the rationality assumption

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[116] Epstein, *supra* note 114 at 804-805 (footnotes omitted).
[117] *Ibid* at 806-807 (footnotes omitted).
[118] Howells & Weatherill, *supra* note 18 at 9.
[119] Richard Craswell, "Two Economic Theories of Enforcing Promises" in Peter Benson, ed, *The Theory of Contract Law: New Essays* (Cambridge, UK: Cambridge University Press, 2001) 19 at 24.
[120] Ramsay, *supra* note 21 at 72.
[121] *Ibid.*
[122] Gregory Mitchell, "Why Law and Economics' Perfect Rationality Shouldn't be Traded for Behavioral and Economics' Equal Incompetence" (2002) 91 Geo LJ 67 at 69.

from neoclassicism.[123] The primary normative element in traditional economic analysis is efficiency.[124] Since neoclassicism argues that rational people should be permitted to maximize their wealth, and that markets operate efficiently, traditional economic analysis of the law advocates that freedom of contract should almost always be honoured.[125]

The doctrine of *caveat emptor* shares a number of themes with neoclassical economics. A historical view of *caveat emptor* was espoused by Marshall C.J. in 1815:

> The question in this case is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of the opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties.[126]

Don Manderscheid, QC adds, "the fundamental precept of *caveat emptor* is that the onus is on the purchaser to ensure that the land to be acquired is in a state satisfactory for the purchaser's needs. Normally this onus is discharged through the purchaser's visual inspection of the land prior to completion of sale."[127]

In stark contrast to neoclassical ideals, accompanied by *caveat emptor*'s assumptions in the background, is overt state intervention, which is loosely defined as "paternalism." Paternalism is a vague concept, often referenced without a corresponding explanation of its meaning. Providing a comprehensive

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[123] Jolls, Sunstein & Thaler, *supra* note 32 at 1545.
[124] DiMatteo et al, *supra* note 113 at 15.
[125] DiMatteo et al, *supra* note 113 at 18.
[126] *Laidlaw v Organ* 15 US (2 Wheat) 178 in Anthony Kronman, "Mistake, Disclosure, Information and the Law of Contracts" (1978) 7 J Legal Stud 1 at 10.
[127] Don J Manderscheid, QC, "Caveat Emptor and the Sale of Land: the Erosion of a Doctrine" (2001) Alta L Rev 441 at 444 (footnote excluded).

definition of paternalism proves somewhat elusive, but Nguyen Van Cuong defines paternalism thusly:

> Paternalism allows the government to make certain decisions on behalf of its citizens for their own good, even if this is contrary to their wishes. The underlying assumption of this ideology is that the government is, sometimes, wiser than its citizens in making best decisions for them. Paternalism also requires that the weak parties in a transaction should be protected from being abused by the stronger party in that transaction.[128]

Zamir offers a similar definition with an expansion of paternalist rationales:

> Paternalism is intervention in a person's freedom aimed at furthering her own good. Paternalistic interventions are of numerous types and degrees and may be classified according to various parameters: the intellectual characteristics and mental condition of the person whose freedom is curtailed; the extent to which the frustrated choice is voluntary, informed, and rational; the kind and magnitude of the injury that may ensue in the absence of intervention; the probability of such injury, and the expected probability of its avoidance by the intervention; the degree of closeness between "the paternalist" and the other person; the degree of intervention in a person's individual liberty; the existence or absence of other justifications for intervention (e.g., protecting third persons, redistributing power and wealth); and the extent to which the paternalistic intervention entails restricting the freedom of people other than the person protected.[129]

And finally, Anthony Kronman simply states that "any legal rule that prohibits an action on the ground that I would be contrary to the actor's own welfare is paternalistic."[130]

The above definitions indicate three characteristics: paternalism involves state intervention; the state has deemed the intervention necessary for the benefit of the public; and, if presented with a choice, those affected would not necessarily take the same course of action as mandated by the state. Paternalist philosophy

[128] Nguyen Van Cuong, "Modification of Contractual Freedom for Consumer Protection: Canadian perspectives and lessons for Vietnam" (December 2007) online: Social Sciences Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1268143> at 14.
[129] Zamir, *supra* note 27 at 236, footnotes omitted.
[130] Anthony Kronman, "Paternalism and the Law of Contracts" (1983) 92:5 Yale LJ 763 at 763.

therefore posits that the state *should* intervene for the betterment of citizens,[131] with consumer contracts being one such area where the public at large may require state assistance. Given paternalism's validation of state intervention, it can be safely concluded that neoclassicism rejects most forms of paternalistic intervention, save the examples provided by Epstein and Ramsay, *supra*.

B. Challenges to Neo-Classicism

1. Behavioural Economics

Neoclassicism has been contested as an appropriate medium for analyzing consumer protection law by the influential field of behavioural economics.[132] Behavioural economics questions neoclassicism's rationality assumption by empirically demonstrating how consumer decisions are *actually* made.[133] The predictive power of neoclassical economic policies is impeached by behavioural economists, who argue that neoclassicism overlooks consumer irrationality.[134] Behavioural economics has elucidated several boundaries or limits to a consumer's capacity to make a favourable decision.[135] The important point, for our purposes, is that consumers do not always act rationally. Extrapolating from empirical data, Christine Jolls, Cass Sunstein, and Richard Thaler proffer three cornerstones to behavioural economics: bounded rationality, bounded willpower, and bounded self-interest. They discuss bounded rationality in this way:

> Bounded rationality, an idea first introduced by Herbert Simon, refers to the obvious fact that human cognitive abilities are not infinite. We have limited

[131] Wright, *supra* note 11 at 472: commentators have argued that poor consumer decision-making compels "paternalistic intervention."
[132] Ramsay, *supra* note 21 at 71-72.
[133] DiMatteo et al, *supra* note 113 at 23.
[134] Wright, *supra* note 11 at 471-472.
[135] See generally Jolls, Sunstein & Thaler, *supra* note 32.

> computational skills and seriously flawed memories. People can respond sensibly to these failings; thus it might be said that people sometimes respond rationally to their own cognitive limitations, minimizing the sum of decision costs and error costs. To deal with limited memories we make lists. To deal with limited brain power and time we use mental shortcuts and rules of thumb. But even with these remedies, and in some cases because of these remedies, human behavior differs in systematic ways from that predicted by the standard economic model of unbounded rationality.[136]

Rather than always operating rationally, consumers may use "mental shortcuts" in making decisions.[137] These mental shortcuts can leave people uninformed on a variety of fronts.[138] In fact, some scholars have argued that market actors capitalize on such biases.[139] Although bounded rationality is a problem, a positive point is that biases are predictable.[140] As such, interventions can be targeted to address consumer pitfalls.

With respect to bounded willpower, Jolls, Sunstein and Thaler summarize:

> This term refers to the fact that human beings often take actions that they know to be in conflict with their own long-term interests. Most smokers say they would prefer not to smoke, and many pay money to join a program or obtain a drug that will help them quit. As with bounded rationality, many people recognize that they have bounded willpower and take steps to mitigate its effects.[141]

Thus, as opposed to a consumer's *ignorance* as displayed in bounded rationality, bounded willpower refers to consumers making a choice while being *cognizant* that it is a poor decision.

And last, bounded self-interest is discussed as follows:

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[136] Jolls, Sunstein & Thaler, *supra* note 32 at 1477 (footnotes omitted).
[137] Kuran & Sunstein, *supra* note 33 at 380.
[138] *Ibid*.
[139] Wright, *supra* note 11 at 475, citing Oren Bar-Gil, "Seduction by Plastic" (2004) 98 NW U L Rev 1371 at 1395-1411, considering the use of credit card firms using exploitive tactics.
[140] Jolls, Sunstein & Thaler, *supra* note 32 at 1477.
[141] Jolls, Sunstein & Thaler, *supra* note 32 at 1479.

> [W]e use the term bounded self-interest to refer to an important fact about the utility function of most people: They care, or act as if they care, about others, even strangers, in some circumstances. (Thus, we are not questioning here the idea of utility maximization, but rather the common assumptions about what that entails.)… Self-interest is bounded in a much broader range of settings than conventional economics assumes, and the bound operates in ways different from what the conventional understanding suggests. In many market and bargaining settings (as opposed to nonmarket settings such as bequest decisions), people care about being treated fairly and want to treat others fairly if those others are themselves behaving fairly. As a result of these concerns, the agents in a behavioral economic model are both nicer and (when they are not treated fairly) more spiteful than the agents postulated by neoclassical theory.[142]

Bounded self-interest signifies that a consumer's treatment will dramatically affect their perception of a situation. From the above excerpt, it is inferred that consumers are considerably more willing to enter an agreement they perceive as fair, and conversely, less likely when perceiving unfair treatment. While relevant to the ideas of consumer protection generally, bounded self-interest has limited applicability to our consumer protection discussion. One such application would lay in a sophisticated developer's ability to frame a condominium deal to appear fair in the eyes of the purchaser but in actuality is heavily balanced in the developer's favour. Though this is a possibility, this is a narrow, hypothetical point beyond the scope of this thesis. The focus, instead, will be on bounded rationality and bounded willpower.

Unlike neoclassicism, behavioural economics does not have a consistent normative framework. DiMatteo et al. describe the impact of behavioural economics thusly:

> At a normative level, behavioural decision theorists' aspirations also tend to be relatively modest. Rather than aspire to remake the world…behavioural decision

[142] Jolls, Sunstein & Thaler, *supra* note 32 at 1479.

> theorists have tended to simply to reanalyze legal thinking in order to ensure that it is based upon accurate assumption about how people act and why.[143]

DiMatteo et al. shed further light on the issue in discussing the goals of behavioural economics:

> While the broad goal of at least some economists is to make economic efficiency (as judged by wealth creation or perhaps broader criteria) *the* goal of legal policy and to alter the law so that it advances that goal, behavioural decision theory has no such agenda. It seeks to generate useful policy prescription based upon analysis of how people actually make decisions, but beyond that goal, it has no particular philosophical or political agenda.[144]

This excerpt may be overstating matters since seeking to correct false assumptions about consumer behaviour is not neutral. The fact that behavioural economists seek to shift preferences and alter decision making is itself a tacit endorsement of a political agenda; its acceptance of state intervention to shift preferences should alert the observer that there is a political philosophy underlying behavioural economics, albeit a more inchoate one.[145]

Samuel Issacharoff, on the other hand, explicitly points to a nexus between behavioural economics and paternalism:

> What happens in markets with persistent consumer error? If we define consumer error as the inability to obtain the desired objectives from a transaction, then the question is necessarily one of a paternalistic override of apparent consumer preferences. One of the key contributions of behavioral economics has been a focus on alternatives to what may be termed "hard paternalism," the use of regulatory fiat to limit consumer choice. By contrast, behavioural insights offer a domain of 'soft paternalism' that may protect consumer welfare without restricting the flexibility and innovative potential of markets. Soft paternalism is defined as being generally

[143] DiMatteo et al, *supra* note 113 at 23.
[144] *Ibid* [emphasis added].
[145] Note, however, that scholars such as Jolls, Sunstein & Thaler, *supra* note 32 at 1544 are currently unprepared to go as far as DiMatteo et al: "All of the foregoing ideas raise many complexities; and we have not even touched upon the complicated philosophical literature on the legitimacy of paternalism. Application of these ideas to any specific topic in law would require a much fuller development of many issues than the space in this article permits. This shift triggers the potential of paternalism in some form underlying behavioural economics."

> low-cost to generate and directed to preserving the maximum of individual choice, unlike command-and-control direction of the range of potential choices."[146]

The implication of Issacharoff's comments is that behavioural economists can and do advocate some measure of state intervention, in this case, via what Issacharoff has termed soft paternalism.[147] The next section of this thesis explores a middle ground akin to "soft paternalism," which is called libertarian paternalism. Libertarian paternalism balances the competing needs of consumer sovereignty, freedom of contract, and consumer protection.

2. Libertarian Paternalism, Autonomy and Fairness

The continuum of contractual freedom may be expressed as absolute freedom from state intervention on the one hand, with paternalism taking on substantial state regulation of all consumer agreements on the other.[148] Figure One provides a contractual spectrum that encompasses concepts discussed in this section:

[146] Samuel Issacharoff, "Disclosure, Agents and Consumer Protection" New York Center for Law, Economics and Organization (2010) Law and Economics Research Paper Series, Working Paper No. 10-33, online: Social Sciences Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640624> at 4 [emphasis added].
[147] *Ibid*.
[148] See Todd D. Rakoff, "Is 'Freedom from Contract' Necessarily a Libertarian Freedom?" (2004) Wisconsin LR 477, Table 1 at 479 for a general discussion on the matter.

Figure One: Spectrum of Freedom of Contract[149]

	1. No regulation	2. Classical Position	3. Current Common Law Position	4. Soft Paternalistic	5. Paternalistic
	Absolute Freedom of Contract	Freedom of Contract	Freedom of Contract – subject to Restraints	Freedom of Contract – Subject to limitations	No Freedom of/from Contract
	(No Regulation, no enforcement)	(All agreements enforced unless illegal)	(Agreements enforced in the absence of fraud, duress, unconscionability or mistake)	Agreements enforced so long as legislative condition precedent or subsequent met)	State requires all contents of agreement
E.g.	No law governing agreements	Prohibitions such as usury laws		Agreement not valid without disclosure and/or cooling-off period	Crown corporations/ public utilities

Issacharoff's soft paternalism fits into category four and, if properly deployed, advances consumer protection while not interfering needlessly with free market principles. Issacharoff suggests that soft paternalism is closely related to the concepts of asymmetric paternalism and libertarian paternalism.[150] The idea of "asymmetric paternalism" was coined in a seminal piece by Colin Camerer et al. and is defined accordingly: "[a] regulation is asymmetrically paternalistic if it creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational. Such regulations are relatively harmless to those who reliably make decisions in their best interest, while at the same time advantageous to those making suboptimal choices."[151] Cass Sunstein and Richard Thaler invented "libertarian paternalism" in their article "Libertarian Paternalism is not an Oxymoron" and suggest similar terrain.[152] Beyond this, they perfectly

[149] This model is largely taken from Rakoff, *ibid.* Note, however, that it has been modified for relevance to this thesis.
[150] Issacharoff, *supra* note 146 at 4.
[151] Camerer et al, *supra* note 25 at 1212.
[152] Cass R Sunstein and Richard H Thaler, "Libertarian Paternalism is not an Oxymoron" (2003) 70 U Chi L Rev 1159.

frame the current discussion by stating, "libertarians embrace freedom of choice, and so they deplore paternalism. Paternalists are thought to be sceptical of unfettered freedom of choice and to deplore libertarianism. According to the conventional wisdom, libertarians cannot possibly embrace paternalism, and paternalists abhor libertarianism."[153] Thaler and Sunstein, however, "propose a form of paternalism, libertarian in spirit, which should be acceptable to those who are firmly committed to freedom of choice on grounds of either autonomy or welfare"[154] before defining their model:

> The libertarian aspect of our strategies lies in the straightforward insistence that, in general, people should be free to opt out of specified arrangements if they choose to do so.[155]
>
> …
>
> The paternalistic aspect consists in the claim that it is legitimate for private and public institutions to attempt to influence people's behaviour even when third-party effects are absent. In other words, we argue for self-conscious efforts, by private and public institutions, to steer people's choices in directions that will improve the choosers' own welfare.[156]

Based on the strength of Sunstein and Thaler's analysis, I will refer to soft paternalism, asymmetric paternalism, and libertarian paternalism *collectively* as "libertarian paternalism." By protecting weaker, uninformed parties while preserving a party's freedom of contract, libertarian paternalism is a welcome medium between extreme paternalism and predatory freedom of contract.

A policy bringing fairness and balance between parties to the marketplace is consistent with libertarian paternalism. Although none of the aforementioned

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[153] *Ibid* at 1160.
[154] *Ibid* (footnote omitted).
[155] *Ibid* at 1161. The "opt out" portion refers to a consumer's ability to reject the suggestion of preferences, not a consumer's right to opt out of the whole consumer protection regime.
[156] *Ibid* at 1162.

paternalistic theories outwardly endorse this principle, it is clear that libertarian paternalism can accommodate such a premise. The importance of bringing balance and spreading risks in the marketplace is sufficiently important to warrant its inclusion in the libertarian paternalism rubric for the purpose of this thesis.

More to the point, lack of fairness between consumer and supplier is a major criticism of the doctrine of *caveat emptor,* which one perspective of consumer protection law seeks to ameliorate.[157] Moreover, a key aspect of consumer protection law is its ability to spread losses and shift risks,[158] which also facilitates a fairer and balanced market. Complete consumer protection requires legislation that places all risk on suppliers. This is paternalistic, for the state intervenes to protect consumers in a manner that may be against their wishes (i.e. preventing rather than questioning purchase decisions) and one that would obviously be contrary to a supplier's wishes. An environment of limited consumer choice is not compatible with loss-spreading, but instead, advocates wholesale loss-shifting to suppliers. This shift may be achieved by legislative provisions holding developers strictly liable for legislative breaches. On the other end of the spectrum under *caveat emptor*, all risk is on the purchaser, and as a result, so is all potential for disappointment. We must consider, in evaluating the impugned legislative frameworks, how to shift risk from being *all* on the purchaser to *some* risk being on the purchaser. Libertarian paternalism addresses this theoretical quandary by permitting consumers to make the *ultimate purchase*

[157] Katalin Cseres, *Competition Law and Consumer Protection* (Hague, Netherlands: Kluwer Law International, 2005) at 154.
[158] Ramsay, *supra* note 21 at 88.

decision, thus absorbing some risk. The purchaser should bear some and where possible equal risk to the developer. The impact of preserving consumer sovereignty cannot be understated in this discussion.[159]

An example of libertarian paternalism relates to fast-food disclosure of nutritional information.[160] Legislatures in some areas of the United States, for instance, require varying degrees of disclosure of nutritional information such as caloric, sodium and fat content.[161] This is an excellent example of libertarian paternalism at work: the state is attempting to shift preferences to healthier foods by presenting nutritional information. The fully rational consumer will know that the piece of fried chicken they are about to enjoy may contain an excessive level of sodium that is inconsistent with a healthy diet. Such a consumer is unaffected by regulation. But the information is presented for the benefit of the ill-informed consumer, who is unaware of sodium levels. The paternalist theme is embodied in the requirement to display such information. The libertarian theme respects the consumer's choice to ignore the nutritional information and eat as many pieces of sodium-imbibed chicken as he or she wishes. Another example of libertarian paternalism relates to trans-fats, for an overly paternalistic attitude would ban all trans-fats from a given jurisdiction;[162] the limited paternalistic attitude would

[159] Not only is consumer sovereignty emphasized based on the principle that consumers ought to have the right to make their own decisions, maintenance of consumer sovereignty is of significant benefit since it arguably leads to market efficiency, and consequently, lower prices in the market place: Neil Averitt & Robert Lande, "Consumer Sovereignty: a Unified Theory of Antitrust and Consumer Protection Law" (1996) 65 Antitrust LJ 713 at 717.
[160] See eg Kenneth Bates et al, "Battling the Bulge: Menu Board Calorie Legislation and its Potential Impact on Meal Purchase Intentions" (2011) 28:2 J Consum Market 104.
[161] *Ibid.*
[162] See eg Andy SL Tan, "A Case Study of the New York City Trans-fat Story for Internal Application" (2009) 30 J Public Health Pol 3.

inform consumers about trans-fat content while allowing the consumer to decide whether to ingest what regulators deem a harmful substance. Consistent with balancing requirements in consumer contracts in libertarian paternalism, consumers, in this instance, require some incentive to be cognizant of the decisions they are making.

C. Response in British Columbia

In 2004, at the height of an economic boom, the British Columbia legislature passed the *REDM Act*. Intervention at some level was required because, as established in Parts II and III, an aggrieved condominium purchaser is typically disadvantaged in the unregulated marketplace, and further, has minimal recourse at common law and in equity.

In moving forward, this thesis assesses selected portions of the *REDM Act* against the backdrop of libertarian paternalism. In juxtaposing parallel provisions from Alberta's *Condominium Property Act*[163] and Ontario's *Condominium Act, 1998*[164] with those in the *REDM Act*, this thesis also offers recommendations for law reform.

PART V. LEGISLATIVE INTERVENTION IN RELATION TO DISCLOSURE AND RESCISSION RIGHTS

A. Background to Primary Disclosure

The marketing and sale of real property in British Columbia is governed by the common law, in addition to relevant portions of the *Real Estate Services*

[163] RSA 2000, c C-22 [*Condominium Property Act*].
[164] SO 1998, c 19 [*Condominium Act*].

Act,[165] the *Law and Equity Act*,[166] and the *Real Property Act*.[167] In the context of the *REDM Act*, *caveat emptor* does not reign supreme because the assumptions informing its application are not always met. As Johnson notes, disclosure is required due to *caveat emptor*'s affect on informational asymmetries: "[t]he common law doctrine of *caveat emptor* is predicated on two fundamental assumptions: the first assumption is that the premises being conveyed are simple and easy to inspect, while the second is that each party to the transaction has equal access to information regarding the quality of the premises conveyed. The second premise or assumption follows logically from the first."[168] In New York, for instance, a full disclosure enterprise was historically used to provide a condominium purchaser information to analyze risks.[169] The limitations of common law remedies and *caveat emptor* (and its associated assumptions) may explain why the *REDM Act* goes to great lengths to ensure that even if a purchaser wants to make a bad bargain, the purchaser must first be given ample opportunity to examine and consider what is being bargained for. This is particularly important since an unconstructed condominium is being purchased sight-unseen.

The complexity of condominiums and developments requires significant disclosure so that consumers can know what is being purchased. The lack of disclosure required under *caveat emptor* is addressed by the *REDM Act*'s establishment of a three pronged mechanism of protection for prospective

[165] SBC 2004, c 42.
[166] RSBC 1996, c 253.
[167] RSBC 1996, c 377.
[168] Alex M Johnson, Jr, "An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the *Caveat Emptor* Doctrine" (2008) 45 San Diego L Rev 79 at 116.
[169] Vincent Di Lorenzo, "Disclosure as Consumer Protection: Unit Purchasers' Need for Additional Protections" (1999) 73 St John's L Rev 43 at 45-46.

purchasers. First, a purchaser must be provided mandatory disclosure, discussed *infra*, prior to signing an agreement for purchase and sale.[170] Second, a purchaser must have time to review disclosure prior to executing a purchase and sale agreement.[171] Last, a purchaser is entitled to cancel or rescind their agreement within seven days by virtue of a statutory "cooling off" period.[172] If disclosure occurs after conveyance, the right to rescind survives for seven days after provision of disclosure.[173]

Disclosure, a frequently used method of consumer protection,[174] has a central role in regulating the marketing and sale of condominiums in British Columbia, Ontario, and Alberta. This section discusses disclosure provisions from these three jurisdictions. It concludes by evaluating disclosure's protection within the theoretical context of libertarian paternalism. Disclosure, for our purposes, takes two forms. The first shall be referred to as "primary disclosure," which is disclosure existing at the time an agreement is made. Primary disclosure is generally provided prior to entering an agreement of purchase and sale. The second type of disclosure shall be referred to as "secondary disclosure." It relates to a developer's ongoing requirement to make disclosure when significant changes are discovered to either the development or a condominium unit that were not addressed or have changed since the issuance of primary disclosure.

[170] *REDM Act*, *supra* note 1 s 15(1)(a).
[171] *REDM Act*, *supra* note 1 s 15(1)(b).
[172] *REDM Act*, *supra* note 1 s 21(2).
[173] *REDM Act*, *supra* note 1 s 21(2).
[174] See generally, Issacharoff, *supra* note 146.

1. Primary Disclosure Provisions in British Columbia

a. The REDM Act

The basis for a developer's disclosure obligation is found at s. 14 of the *REDM Act*.

> Section 14(1) A developer must not market a development unit unless the developer has
>
> > (a) prepared a disclosure statement respecting the development property in which the development unit is located, and
> >
> > (b) filed with the superintendent[175]
> >
> > > (i) the disclosure statement described under paragraph (a), and
> > >
> > > (ii) any records required by the superintendent under subsection (3).
>
> Section 14(2) A disclosure statement must
>
> > (a) be in the form and include the content required by the superintendent,
> >
> > (b) without misrepresentation, plainly disclose all material facts
> >
> > (c) set out the substance of a purchaser's rights to rescission as provided under section 21 [rights of rescission].[176]

The statutory meaning of the above provision appears clear on its face. However, the Financial Institutions Commission, the agency with regulatory oversight over disclosure statements and enforcement of the *REDM Act*, nevertheless provided additional explanation by the following policy statement: "The onus is strictly on the developer to disclose plainly all material facts, including a fact or proposal

[175] Superintendent of Real Estate, as defined at s 1 of the *REDM Act*, *supra* note 1.
[176] *REDM Act*, *supra* note 1.

that could reasonably be expected to affect the value, price, or use of the development property or a development unit."[177]

The legislature also sought to stress the importance of disclosure beyond s. 14. Section 15(1), in fact, requires that purchasers be provided a reasonable time to read disclosure:

> Section 15(1) A developer must not enter into a purchase agreement with a purchaser for the sale or lease of a development unit unless
>
> > (a) a copy of the disclosure statement prepared in respect of the development property in which the development unit is located has been provided to the purchaser,
> >
> > (b) the purchaser has been afforded reasonable opportunity to read the disclosure statement, and
> >
> > (c) the developer has obtained a written statement from the purchaser acknowledging that the purchaser had an opportunity to read the disclosure statement.[178]

Since all material facts must be disclosed to the purchaser, the thrust of the *REDM Act*'s disclosure framework hinges on its materiality definition. Material fact is defined thusly:

> "[M]aterial fact" means, in relation to a development unit or development property, any of the following:
>
> > (a) a fact, or a proposal to do something, that affects, or could reasonably be expected to affect, the value, price, or use of the development unit or development property;
> >
> > (b) the identity of the developer;
> >
> > (c) the appointment, in respect of the developer, of a receiver, liquidator or trustee in bankruptcy, or other similar person acting under the authority of a court;
> >
> > (d) any other prescribed matter;[179]

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[177] Financial Institutions Commission, "Information Bulletin, Real Estate Development Marketing Act Policy Statement One: Disclosure Statement Requirements for Development Property Consisting of Five or More Strata Lots" online: Financial Institutions Commission (1 January 2005) <www.fic.gov.bc.ca/pdf/real_estate/policy01.doc.> [Policy Statement One] at 1 [emphasis added].

[178] *REDM Act*, *supra* note 1.

Subsections (b) and (c) are straightforward. A change in who the developer[180] is counts as material. Also material are court proceedings commenced pursuant to the *Bankruptcy and Insolvency Act*,[181] and the *Corporations' Commercial Arrangements Act.*[182] Subsection (d) compels consideration of the *Regulation.*[183] At the time of this writing, the *Regulation* does not add to the materiality definition.[184] The crux of the materiality question will thus ordinarily reside in the subsection (a) definition, considering the use, value, and price of a development unit[185] *and* the development.[186]

b. Case Law

Bigleaf Ventures Ltd. v. Marine Properties Ltd.[187] is a leading case on materiality under the subsection (a) definition in the *REDM Act*.[188] The disclosure statement in *Bigleaf* communicated that the development's zoning permitted rentals. This was a misrepresentation. The Court decided it was necessary to undertake a fresh analysis of the meaning of "material fact" to determine if the Act was breached.[189] The definition of materiality from *Dureau v. Kempe-West*

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[179] *REDM Act*, *supra* note 1 s 1.
[180] This is presumed to include a corporate identity.
[181] RSC 1985, c B-3.
[182] RSC 1985, c C-36.
[183] BC Reg 505/2004 [*Regulation*].
[184] *Ibid.*
[185] *Per* the *REDM Act*, *supra* note 1 s 1, "development unit" is broadly defined to include: a subdivision lot; a bare land strata lot; a strata lot; a cooperative interest; a time share interest; a shared interest in land; and a leasehold unit.
[186] *Per* the *REDM Act*, *supra* note 1 at s 1, "development" is defined as five or more development units, except in the case of shared interests and cooperative interests, which will qualify as a development if containing two or more development units.
[187] 2009 BCSC 633 [*Bigleaf*].
[188] See also *Jameson House Properties Ltd* (Re), 2009 BCCA 339 [*Jameson*] at paras 40-41 which, analogizing to a securities context, held that failure to obtain original financing was not a material fact.
[189] *Bigleaf*, *supra* note 187 at para 40.

Enterprises Ltd. et al., a decision under the predecessor legislation, was ultimately endorsed:

> I adopt the meaning given to the words "material fact" in the *Securities Act* as appropriate to the meaning of the word "material" in section 59 of the [*Real Estate*] *Act*. There are differences in the legislation, but the definition is one which, in my view, accords with common sense. In other words, the word "material" is not specifically directed toward the loss that would be suffered if the material fact were found to be false, but rather to the effect which the material fact has, or is deemed to have, on the purchaser's willingness to buy, and for what price. In other words, you look at the effect which the material fact would have on the purchaser's willingness to buy for the price offered, and if the statement is such that it could reasonably affect his judgment as to whether to buy, and for what price, then it is material for the purpose of this section.[190]

The materiality definition, as it is currently written, will theoretically ameliorate informational asymmetries since the purchaser has a right to know all relevant details that may impact the development.[191]

More broadly, there are multiple decisions considering issuance of primary and secondary disclosure under the *REDM Act*. In *Dwane*,[192] the plaintiff was provided with the original disclosure statement but not amendments existing at the time the agreement was made. The Court concluded that disclosure statement amendments existing at the time a contract is entered are caught by the Act's disclosure requirements.[193] Justice Smith grounded the need for primary disclosure in the purpose of the Act:

> If a disclosure statement has already been amended by the time a purchaser signs a contract, the purchaser should know that fact and know what the amendments are, <u>for the simple reason that the purchaser is entitled to know what it is that he or she is purchasing</u>. To require developers to provide copies

[190] [1989] BCJ No 2123 QL (SC) at 11.
[191] Note that the *Condominium Act, supra* note 164 permits the purchaser to make an application to court pursuant to s 74(5), prior to closing for a determination of whether a fact is material. Though noteworthy, discussion of this issue is beyond the scope of this thesis.
[192] *Dwane*, *supra* note 2.
[193] *Ibid* at para 73; see also *Strata Plan LMS 3851 v Homer Street Development*, 2008 BCSC 1160 for an interpretation under the predecessor legislation, cited by Smith J. in *Dwane*.

> of existing amendments along with the disclosure statement is not to impose an onerous burden on them, and is consistent with the legislative objective of consumer protection.[194]

Justice Smith's analysis is linked to the principle of *consensus ad idem*[195] and the notion of consent. That is, the purchaser must know what is being purchased to create a binding contract.[196] Again, this is important because such a condominium was being purchased sight-unseen. Since the developer failed to provide necessary disclosure, the plaintiff was entitled to a remedy.

The analysis in *Dwane* is supported by the recent decision in *Ulansky v. Waterscape Homes Limited Partnership*,[197] though in the context of assessing primary disclosure that had not been amended at the time of purchase. At issue was whether the disclosure statement was deficient for failure to note that short-term rentals were permitted in the development. The disclosure statement read:

> 2.2 Permitted Use
>
> Most of the development property is zoned for residential purposes and in phases 1, 2, 3, 4, 5 and 6, all of the strata lots are intended for residential purposes only. It is possible that the strata lots in phases 7 and 9 of the development may be used for commercial or other purposes not ancillary to residential purposes. Any non-residential use must comply with the Bylaws and zoning of the City of Kelowna.[198]

Short-term rentals were considered disadvantageous to some buyers, as a number of the prospective purchasers were, at the time they entered their agreements, unhappy with the noise and commotion associated with short-term rentals at their current condominium residences. Unfortunately for some buyers, a number of current condominium owners in the defendant's development had engaged in

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[194] *Ibid* at para 74 [emphasis added].
[195] John Swan, *Canadian Contract Law*, (Markham: Lexis Nexis, 2006) at 194-195.
[196] *Dwane*, *supra* 2 note at para 74.
[197] 2011 BCSC 83 [*Ulansky*].
[198] *Ibid* at para 47 [emphasis added].

short-term rentals at the time of closing. The plaintiffs pointed to a lack of disclosure on the short-term rentals issue in seeking a remedy. The analysis by Masuhara J. was two-pronged. First, he determined that short-term rentals were, in fact, permissible under governing bylaws and zoning. He then considered whether the permitted use of development units was a material fact. He concluded, in deciding in the plaintiffs' favour, as follows:

> In adopting the principles set out in *Chameleon Talent Inc*. as well as the definition of "material fact" in REDMA, the test to be applied is whether a reasonable person would conclude that the fact in issue would affect "the value, price, or use of the development unit". In my opinion, a reasonable person would consider the fact that some units can be used as short-term rentals a material fact, since it affects the "use" of a development unit.[199]

Justice Masuhara added:

> Also, according to s. 8 of the *Interpretation Act*, R.S.B.C. 1996, ch. 238, "every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." Taking a purposive and remedial interpretation to the term "use" would again result in a duty to disclose all uses that would affect a potential purchaser's decision. It would not be in keeping with an obligation of disclosure to restrict this term to only primary uses. Rather, all permissible secondary uses would fall under a duty to disclose so that consumers are truly informed of the nature of their real estate purchase.[200]

Overall, the limited case law under the *REDM Act* establishes that all material facts, including facts that may be ascertained by the buyer themselves (i.e. permissible uses of land) must be disclosed in original disclosure for the agreement of purchase and sale to be binding. The decision in *Ulansky* shows a judicial willingness to interpret the Act's disclosure provisions favourably toward the purchaser. In sum, any purchaser not receiving full and timely disclosure, broadly construed, is entitled to a remedy.

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[199] *Ibid* at para 54.
[200] *Ibid* at para 56.

Only one decision has delved into the issue of reasonable opportunity to read disclosure. In *Mariner Towers Limited Partnership v. Imani-Raoshanagh*,[201] a plaintiff sought to set aside an agreement for purchase and sale on the basis of s. 15. The whole of Garson J.A.'s comments, in rejecting the defence, are as follows:

> In his statement of defence, Mr. Imani alleged a breach of the requirements of s. 15 of the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 (Act). As noted by the summary trial judge at para. 22, "[t]hat section requires the provision of the disclosure statement to a purchaser, that the purchaser has been afforded a reasonable opportunity to read it, and that the developer has obtained a written statement from the purchaser acknowledging that the purchaser had an opportunity to read the disclosure statement." In dismissing this defence the judge noted that there was no evidence from Mr. Imani to support this part of his statement of defence. Mr. Murray deposed that the necessary disclosure statements were provided to Mr. Imani, and attached to his affidavit were Mr. Imani's signed acknowledgements that he received the disclosure statements associated with each property and was afforded a reasonable opportunity to read them as required under the Act.[202]

Unfortunately, the trial decision is unavailable for consideration.[203] From *Mariner*, it appears that a purchaser acknowledging receipt of disclosure is sufficient to discharge the developer's onus under the Act.

2. Primary Disclosure in Ontario

a. Ontario *Condominium Act*

Under the Ontario *Condominium Act*, as with the *REDM Act*, a purchaser is not bound by their agreement to purchase a condominium if required disclosure has not been provided:

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[201] 2011 BCCA 261 [*Mariner*].
[202] *Ibid* at para 13.
[203] The appeal decision does not indicate a citation for the trial court's decision. Further, searches of online databases yielded no additional results.

> 72(1) The declarant shall deliver to every person who purchases a unit or a proposed unit from the declarant a copy of the current disclosure statement made by the declarant for the corporation of which the unit or proposed unit forms part.
>
> (2) An agreement of purchase and sale of a unit or a proposed unit entered into by a declarant is not binding on the purchaser until the declarant has delivered to the purchaser a copy of the current disclosure statement.[204]

The *REDM Act* provides a general description of disclosure;[205] requirements are also found in the *Regulation*[206] and the Superintendent's discretion.[207] On the other hand, the Ontario *Condominium Act* enumerates much of the disclosure requirements:

> 72(3) A disclosure statement shall specify the date on which it is made and shall contain,
>
> (a) a table of contents prepared in accordance with subsection (4) and located at the beginning of the disclosure statement;
>
> (b) a statement indicating,
>
> (i) whether the corporation is a freehold condominium corporation or a leasehold condominium corporation, and
>
> (ii) if the corporation is a freehold condominium corporation, the type of freehold condominium corporation that it is;
>
> (c) a statement of the name and municipal address of the declarant and the mailing address of the property or the proposed property and its municipal address if available;
>
> (d) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with all conditions that apply to the provision of amenities;
>
> (e) if the declarant has made an application for approval described in subsection 9 (4), a summary of the reports, if any, that the approval authority has required be made under subsection 9 (4) and the

[204] *Condominium Act*, *supra* note 164.
[205] Eg by way of requiring disclosure of all material facts*: REDM Act, supra* note 1 at s 1.
[206] *Regulation*, *supra* note 183.
[207] This occurs, primarily, through the Superintendent of Real Estate's Policy Statements, "Information Bulletins," online: Financial Institutions Commission <http://www.fic.gov.bc.ca/responsibilities/realestate/bulletins.htm#Policy>.

agreements, if any, that the approval authority has imposed under subsection 9 (5) as a condition of approval;

(f) a statement indicating whether the property or part of the property is or may be subject to the Ontario New Home Warranties Plan Act or whether the declarant has enrolled or intends to enrol the proposed units and common elements in the Plan within the meaning of that Act in accordance with the regulations made under that Act;

(g) a statement whether a building on the property or a unit or a proposed unit has been converted from a previous use;

(h) a statement whether one or more units or proposed units may be used for commercial or other purposes not ancillary to residential purposes;

(i) a statement of the portion of units or proposed units which the declarant intends to market in blocks of units to investors;

(j) a statement of the portion of units or proposed units, to the nearest anticipated 25 per cent, that the declarant intends to lease;

(k) if construction of amenities is not completed, a schedule of the proposed commencement and completion dates;

(l) a list of the amenities that the declarant proposes to provide to the purchaser during a period of interim occupancy of a proposed unit under section 80;

(m) a copy of the existing or proposed declaration, by-laws, rules and insurance trust agreement, if any;

(n) a brief description of the significant features of all agreements or proposed agreements mentioned in section 111, 112, 113 or 114 and of all agreements or proposed agreements between the corporation and another corporation;

(o) a statement of whether, to the knowledge of the declarant, the corporation intends to amalgamate with another corporation or whether the declarant intends to cause the corporation to amalgamate with another corporation within 60 days of the date of registration of the declaration and description for the corporation;

(p) if an amalgamation is intended under clause (o), a copy of the proposed declaration, description, by-laws and rules for the amalgamated corporation, if available;

(q) a copy of the budget statement described in subsection (6);

(r) a copy of the budget of the corporation for the current fiscal year if more than one year has passed since the registration of the declaration and description for the corporation;

(s) a statement setting out the fees or charges, if any, that the corporation is required to pay to the declarant or another person; and

(t) all other material that the regulations made under this Act require.[208]

[208] *Condominium Act*, *supra* note 164.

b. Case Law

Ontario's *Condominium Act* does not have any express material fact definitions. However, the seminal case of *Abdool v. Somerset Place Developments of Georgetown Ltd.*[209] established the common law test for materiality under the *Condominium Act*, and further, the legislation was amended to codify the *Abdool* test for the definition of material change. The *Abdool* test objectively considers whether a purchaser would reasonably consider a fact to have been so important that the purchaser likely would not have purchased the property or likely would have cancelled the agreement within the 10-day cooling-off period had the fact been disclosed.[210] The *Abdool* test is reflected in the material change provisions of Ontario's *Condominium Act*:

> Section 74(2) "material change" means a change or a series of changes that a reasonable purchaser, on an objective basis, would have regarded collectively as sufficiently important to the decision to purchase a unit or proposed unit in the corporation that it is likely that the purchaser would not have entered into an agreement of purchase and sale for the unit or the proposed unit or would have exercised the right to rescind such an agreement of purchase and sale under section 73, if the disclosure statement had contained the change or series of changes, but does not include,
>
> > (a) a change in the contents of the budget of the corporation for the current fiscal year if more than one year has passed since the registration of the declaration and description for the corporation,
> >
> > (b) a substantial addition, alteration or improvement within the meaning of subsection 97 (6) that the corporation makes to the common elements after a turn-over meeting has been held under section 43,
> >
> > (c) a change in the portion of units or proposed units that the declarant intends to lease,
> >
> > (d) a change in the schedule of the proposed commencement and completion dates for the amenities of which construction

[209] *Abdool v Somerset Place Developments of Georgetown Ltd* (*sub nom Budinsky v Breakers East Inc*) (1992), 96 DLR (4th) 449 (Ont CA) [*Abdool*].
[210] *Ibid* at para 47.

> had not been completed as of the date on which the disclosure statement was made, or
>
> (e) a change in the information contained in the statement described in subsection 161 (1) of the services provided by the municipality or the Minister of Municipal Affairs and Housing, as the case may be, as described in that subsection, if the unit or the proposed unit is in a vacant land condominium corporation.[211]

In short, the Ontario *Condominium Act* definition considers a reasonable purchaser's motivations to enter an agreement.[212] Therefore, any change in the development that may have, objectively speaking, motivated a purchaser to rescind or not enter a purchase agreement.

Ontario has taken a similar approach to British Columbia with respect to primary disclosure documents. Based on the *Abdool* test, Ontario courts have emphasized the need to supply a purchaser with a compliant disclosure statement at the outset. Failure to do so provides the purchaser a rescission right. For instance, in *Hidden Valley Lakeside Condominiums Inc. v. Vercaigne*,[213] the developer's disclosure materials were confusing and unclear regarding pools and other recreational amenities available to purchasers. Applying the *Abdool* test, the Court decided for the plaintiffs, concluding:

> In this case, the terms of the deal as set out in the other documents were not clear, coherent or consistent with respect to the issue of amenities, nor did those terms reflect the purchasers' understanding of the access to Hotel amenities based on the promotional literature, their dealings with the Hidden Valley agent. Ms. Lazar, nor the site plan included in each agreement of purchase and sale. The disclosure statement merely compounded the confusion by modifying rather than summarizing the other documents.
>
> Therefore the first problem in this case is that the terms of the "deal", that is, the legal obligations of the developer, in respect of recreational amenities were not

[211] *Condominium Act*, *supra* note 164.
[212] The idea that this wording may lead to a modified objective test is further discussed *infra*.
[213] (1997), 12 RPR (3d) 227 (Ont Ct of J (Gen Div)).

> set out clearly in writing anywhere. It follows that the disclosure statement could not "fully and accurately disclose" a description of those amenities.[214]

In sum, the Court held that a reasonable person, considering the luxurious nature of the condominium being purchased, would have rescinded their agreement.[215] Other cases have followed *Abdool's* treatment of presentation of material facts in primary disclosure materials.[216]

3. Primary Disclosure in Alberta

a. Alberta *Condominium Property Act*

Whereas the *REDM Act* and Ontario's *Condominium Act* have requirements governing the contents of a disclosure document, the Alberta *Condominium Property Act* specifically enumerates the documents that comprise a disclosure package:

> 12(1) A developer shall not sell or agree to sell a unit or a proposed unit unless the developer has delivered to the purchaser a copy of
>
> (a) the purchase agreement,
>
> (b) the bylaws or proposed bylaws,
>
> (c) any management agreement or proposed management agreement,
>
> (d) any recreational agreement or proposed recreational agreement,
>
> (e) the lease of the parcel, if the parcel on which the unit is located is held under a lease and the certificate of title to the unit or proposed unit has been or will be issued under section 5(1)(b),

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[214] *Ibid* at paras 78-79.
[215] *Ibid* at paras 98-99.
[216] See eg *Grinberg v Law Development Group (Thornhill) Ltd* (1996), 2 RPR (3d) 209 (Ont Ct J (Gen Div)) at para 12: Sharpe J held that the number of windows presented in a disclosure statement and promotional materials were such that a reduced number of windows in the actual condominium unit would cause a reasonable purchaser to exercise their cancellation rights during the 10-day cooling-off period.

> (f) any mortgage that affects or proposed mortgage that will affect the title to the unit or proposed unit or, in respect of that mortgage or proposed mortgage, a notice prescribed under subsection (2), and
>
> (g) the condominium plan or proposed condominium plan.[217]

A disclosure statement's required inclusions under the Alberta *Condominium Property Act* pale in comparison to those under the Ontario *Condominium Act*, the *REDM Act* and under the *Regulation*. This difference presumably benefits the developer since it reduces the amount of information that must be provided, and furthermore, designates the common law as the venue for dispute resolution. It should be noted that *Condominium Property Act* contains no materiality provisions.

b. Case Law

Not surprisingly, Alberta courts have refused to enforce agreements with defective disclosure. The recent decision in *Qualex Landmark Investments Inc. v. Soroya*[218] is instructive. The decision was very fact-sensitive, but nonetheless illustrates the importance of providing disclosure that meets statutory requirements. In *Qualex*, the defendant contended, as a defence to closing, that she had not been provided disclosure in relation to condominium units she was purchasing for herself and as an agent for her family members. Evidence as to whether disclosure was provided was unclear. Justice Hall concluded that disclosure was not provided to the defendant. The defendant was therefore not obligated to close on three agreements.

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[217] *Condominium Property Act*, *supra* note 163.
[218] 2011 ABQB 354 [*Qualex*].

The plaintiffs in *Bugar v. 928028 Alberta Ltd*.[219] were not provided a disclosure statement whatsoever prior to a condominium purchase. Hess Prov. J. declined to enforce the agreement that the plaintiffs were denied a cooling-off period pursuant to the disclosure documents.[220] *Bugar* and *Abdool* were followed by Jacobson Prov. J. in *Clyne v. Lear Enterprises Ltd*., which again voided the agreements of purchase and sale, in part, for lack of compliance with provision of disclosure requirements.[221]

In summary, courts in British Columbia, Ontario, and Alberta have held that the requirement to provide disclosure in compliance with each province's respective legislation is a strict one with little room for manoeuvring in the event of non-compliance. This narrowness reflects that the consumer protection element of condominium disclosure is weighted in the purchaser's favour even in the event of a seemingly minor error or omission.

B. Background to Secondary Disclosure

The starting point, as is well established by legislative provisions and case law, is that all material facts must be provided through disclosure prior to or at the time of entering an agreement for purchase and sale. Next, we must address a developer's secondary disclosure obligations. This analysis will only focus on the *REDM Act* and Ontario's *Condominium Act*, as Alberta's *Condominium Property Act* contains no secondary disclosure requirements.

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[219] 2006 ABPC 268.
[220] *Ibid* at para 12.
[221] 2009 ABPC 134 at para 114.

1. Secondary Disclosure in British Columbia

a. REDM Act

The *REDM Act* contains provisions requiring ongoing disclosure by the developer in the event there is a change in a material fact contained in primary disclosure documents. The *REDM Act* explains:

> 16(1) If a developer becomes aware that a disclosure statement… contains a misrepresentation, the developer must immediately
>
> (a) file with the superintendent, as applicable under subsection (2) or (3),
>
> (i) a new disclosure statement, or
>
> (ii) an amendment to the disclosure statement that clearly identifies and corrects the failure to comply or the misrepresentation, and
>
> (b) within a reasonable time after filing a new disclosure statement or an amendment under paragraph (a), provide a copy of the disclosure statement or amendment to each purchaser
>
> (i) who is entitled, at any time, under section 15 *[providing disclosure statements to purchasers]* to receive the disclosure statement, and
>
> (ii) who has not yet received title, or the other interest for which the purchaser has contracted, to the development unit in the development property that is the subject of the disclosure statement.
>
> (2) A developer must file a new disclosure statement under subsection (1) (a) (i) if the failure to comply or misrepresentation referred to in that subsection
>
> (a) is respecting a matter set out in paragraph (b) or (c) of the definition of "material fact" in section 1 *[definitions]*,
>
> (b) is respecting a matter set out in paragraph (d) of the definition of "material fact" in section 1, and the regulation prescribing the matter specifies that a new disclosure statement must be filed if subsection (1) of this section applies, or

> (c) is of such a substantial nature that the superintendent gives notice to the developer that a new disclosure statement must be filed.[222]

Section 16 obligates a developer to file and deliver an amended disclosure statement once a misrepresentation is discovered. A misrepresentation relating to subsections (b),[223] (c),[224] and (d)[225] of the material fact definition automatically triggers a renewed seven-day rescission period. It may be recalled that the subsection (a) materiality definition relates to a change in the use, value, or price of a condominium or the development.

b. Case Law

The issue in *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.* [226] surrounded the interpretation of a requirement, instituted by the Superintendent of Real Estate, that disclosure statements provide an actual or estimated date for construction commencement and completion. A building permit was obtained about five months after the date estimated in the disclosure statement. After delays, the revised estimated completion date was about one year later than the original date. An amended disclosure statement was only delivered after the initial five-month delay in construction. Moreover, the amended disclosure statement communicated that a building permit had been obtained but did not provide a revised completion date. The Court analyzed the definition of "estimated" as used in the Superintendent of Real Estate's policy

[222] *REDM Act*, *supra* note 1 [emphasis added].
[223] A change in the developer's identity.
[224] A change in the developer's solvency.
[225] Any other prescribed matter in the *Regulation*, *supra* note 183 of which none currently exist.
[226] 2009 BCSC 1670 [*Chameleon*].

statements.[227] Rice J. held that "estimated" provides some "elasticity for delays,"[228] which may amount to one or two months. A delay in construction of five months was unacceptable: "a reasonable purchaser would not be led to expect a longer period [of one two months] of uncertainty."[229] Furthermore, the condominium unit was ultimately completed about a year late. Thus, the amended disclosure provisions of the Act had been breached, entitling the purchaser to a remedy.

In *Pinto v. Revelstoke Mountain Resort Limited Partnership,*[230] the developer provided the purchaser with the original disclosure statement but did not provide amendments in existence at the time the agreement was executed until much later. One of the amendments related to an increase in the number of strata units as well as a delay in construction of recreational facilities. The Court noted that a purchaser has a right to rescind on initially receiving disclosure materials under the Act, but does not on receipt of amendments filed subsequent to execution of the agreement of purchase and sale.[231] Smith J. cited *Dwane* for authority that failure to deliver available disclosure statement amendments is tantamount to not making full initial disclosure.[232] On this basis, the Court ordered a remedy in the purchaser's favour.

[227] *REDM Act*, *supra* note 1.
[228] *Chameleon*, *supra* note 226 at para 22.
[229] *Chameleon*, *supra* note 226 at para 28.
[230] 2010 BCSC 422 [*Pinto*].
[231] *Ibid* at para 19.
[232] *Pinto*, *supra* note 230 at para 31.

Maguire v. Revelstoke Mountain Resort Limited Partnership,[233] another case revolving around secondary disclosure, considered timeliness for compliance with secondary disclosure requirements under s. 16(1). In *Maguire*, the plaintiffs enquired a number of times about the development's viability. They received no response. In fact, the developer was aware that the development was 10 to 16 months behind schedule. Although an amendment to the disclosure statement was drafted, it was never provided to the purchasers. The plaintiffs refused to pay a second deposit on their condominiums, prompting the developer to cancel their agreements and declared the plaintiffs' first deposits forfeited. The Court relied on *Jameson*[234] to interpret "immediately" in the context of secondary disclosure. The Court stated: "the word 'immediately' in s. 16(1) of *REDMA* is to be construed to allow for a reasonable time for compliance in a commercial context."[235]

In *Watson v. Havaday Developments Inc.*,[236] the issue confronting the Court was whether a change in completion date was material. The Court concluded it was. The enquiry shifted to whether the plaintiffs had been provided amended disclosure about the revised completion date. The Court, relying on other cases decided under the *REDM Act*, held that disclosure statement amendments are critical and must be immediately provided.[237] The Court found

[233] 2010 BCSC 1618 [*Maguire*].
[234] *Jameson*, *supra* note 188.
[235] *Maguire*, *supra* note 233 at para 87, citing *ibid* at para 42.
[236] 2011 BCSC 505 [*Watson*].
[237] *Ibid* at para 24.

that the defendants had failed to provide disclosure providing amended material facts to the plaintiffs, which entitled them to a remedy.[238]

The recent decision in *299 Burrard Limited Partnership v. Essalat*[239] appears to have qualified a developer's liability for failure to have a condominium prepared exactly on time. In short, the development unit was completed five months late but an amended disclosure statement was not provided. The purchaser argued that a completion date is material, and therefore, the developer's failure to deliver an amendment was fatal to the agreement's enforcement. Justice Sewell relied on the recent decision in *Sharbern Holdings Ltd. v. Vancouver Airport Centre Ltd.,*[240] a decision addressing common law materiality, to inform his analysis. On that basis, and in contrast to prior case law that focussed exclusively on changes in use, value or price of a unit, the Court determined that "…[it] must be satisfied that there was a substantial likelihood that the undisclosed delay in completion would have had actual significant to a reasonable purchaser in making a decision whether to purchase a unit."[241] Justice Sewell answered this enquiry in the negative.[242] The reach of the decision in *Essalat* remains to be seen; however, at this point it can be reasonably inferred that a construction delay of five months may not necessarily be a material fact requiring amended disclosure.

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[238] *Ibid* at para 28.
[239] 2011 BCSC 996 [*Essalat*].
[240] 2011 SCC 23.
[241] *Essalat*, *supra* note 239 at para 76.
[242] *Ibid* at para 77.

2. Secondary Disclosure in Ontario

a. Ontario *Condominium Act*

The secondary disclosure provisions in the Ontario *Condominium Act* state:

> 74 (1) Whenever there is a material change in the information contained or required to be contained in a disclosure statement delivered to a purchaser under subsection 72 (1) or a revised disclosure statement or a notice delivered to a purchaser under this section, the declarant shall deliver a revised disclosure statement or a notice to the purchaser.[243]

The *Condominium Act* mimics the *REDM Act*'s requirement for delivery of an amendment within a reasonable time:

> 74(4) The declarant shall deliver the revised disclosure statement or notice to the purchaser within a reasonable time after the material change mentioned in subsection (1) occurs and, in any event, no later than 10 days before delivering to the purchaser a deed to the unit being purchased that is in registerable form.[244]

Most important, for our purposes, is the result of a material change under Ontario's *Condominium Act*:

> 74(6) If a change or a series of changes set out in a revised disclosure statement or a notice delivered to a purchaser constitutes a material change or if a material change occurs that the declarant does not disclose in a revised disclosure statement or notice as required by subsection (1), the purchaser may, before accepting a deed to the unit being purchased that is in registerable form, rescind the agreement of purchase and sale within 10 days of the latest of,
>
> (a) the date on which the purchaser receives the revised disclosure statement or the notice, if the declarant delivered a revised disclosure statement or notice to the purchaser;
>
> (b) the date on which the purchaser becomes aware of a material change, if the declarant has not delivered a revised disclosure statement or notice to the purchaser as required by subsection (1) with respect to the change; and
>
> (c) the date on which the Superior Court of Justice makes a determination under subsection (5) or (8) that the change is material, if the purchaser or the declarant,

[243] *Condominium Act, supra* note 164.
[244] *Condominium Act, supra* note 164.

> as the case may be, has made an application for the determination.[245]

Therefore, any change in a material fact provides the purchaser a renewed 10-day rescission right. This is a sweeping remedy. The remedy is tempered, however, by the limitation that rescission must be exercised prior to transfer of ownership, unlike rescission rights under the *REDM Act*.

b. Case Law

Despite Ontario's *Condominium Act* having been passed much earlier than the *REDM Act*, there is relatively little case law under s. 74.[246] Guidance can be taken, however, from case law decided under the predecessor legislation.[247] *Essex Condominium Corp. No. 89 v. Glengarda Residences Ltd*.[248] was a lawsuit by a condominium corporation respecting non-disclosure of a HVAC (heat, vacuum and air condition) system lease. The HVAC system was originally owned by the condominium corporation, but was sold by the developer to a financial institution within three months of the corporation's birth. As part of the sale, the condominium corporation agreed to lease the HVAC system from the bank. The disclosure statement included a budgeted amount of $34,900 for the lease. At trial, the Court held that a reasonable purchaser would have assumed that the system was included in the common elements of the development, and furthermore, would want to know about lease payments for the HVAC system. The Court of

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[245] *Condominium Act*, *supra* note 164 [emphasis added].
[246] The only case which has not received negative treatment appears to be *Gore Plaza Inc v Bains (In Trust)*, 2007 CarswellOnt 8284 (Sup Ct J), a decision that does not add a significant contribution to the discussion.
[247] *Condominium Act*, RSO 1990, c C-26 [*1990 Condominium Act*].
[248] 2010 ONCA 167.

Appeal overturned the decision. The Court reasoned that the presence of the projected lease amount in the projected budget suggested to a reasonable purchaser that the HVAC system would not be owned by the corporation.[249] The *Abdool* materiality test was thus not met.

Atkinson v. TWS Developments Inc.[250] is a straightforward decision showing the nature of a material change. In *Atkinson*, the plaintiff agreed to purchase a condominium after receipt of the disclosure statement. The disclosure statement listed monthly fees of approximately $182. In fact, the fees were approximately $328 per month at the time of closing. The condominium corporation was also involved in a major lawsuit at the time of closing, a fact that had not been previously disclosed. The Court found these to be material changes and the plaintiff was granted a remedy.[251]

C. Are the *REDM Act's* Disclosure Provisions Justifiable and Effective?

Although some measure of mandated disclosure can be justified through the lens of libertarian paternalism, the *REDM Act*'s disclosure regime contains a number of paternalistic aspects. Provision of disclosure *generally* is not without its detractors. For instance, White and Mansfield note that the impact of disclosure is often questionable.[252] To this end, they cite a report revealing that a U.S. law requiring disclosure of borrowing costs only affected two percent of

[249] *Ibid* at paras 34-35.
[250] (2005), 32 RPR (4th) 38 (Ont Sup Ct J) [*Atkinson*].
[251] *Ibid* at para 14.
[252] White & Mansfield, *supra* note 14 at 234.

prospective borrowers.[253] Also blunting disclosure's affects is that consumers may feel psychologically committed to an agreement by the time disclosure is provided.[254] Most consumers do not even read provided disclosure, so the degree to which it enhances autonomy may fluctuate.[255] Therefore, although well-intentioned, it is questionable whether disclosure is practically effective in fostering autonomy for condominium purchasers.

With respect to problems with disclosure under the *REDM Act specifically* (i.e. how the Act has been applied), recent case law under goes well beyond creating a balanced playing field between developer and purchaser; in fact, it overly protects the consumer. As noted in *Ulansky*,[256] the issue was whether the developer had an obligation to disclose that such rentals were permitted. Rather than delve into this analysis, the developer merely provided the municipality's permitted uses. In other words, it made no representation one way or the other. From a libertarian paternalism standpoint, the developer provided what was necessary: the permitted uses for the development. A misrepresentation would have occurred if the developer incorrectly stated that short-term rentals were not permitted. Surely, some risk ought to rest with the purchaser. In this case, that risk should have been in the form of a modified version of *caveat emptor*; if the notion of short-term rentals was so important to the purchasers, it would have

[253] *Ibid*, citing Glenn B Canner et al, "Recent Developments in Home Equity Lending" (1998) 84 Fed Res Bull 241 at 245.
[254] Anthony Duggan, "Consumer Credit Redux" (2009) online: University of Toronto Faculty of Law <http://www.law.utoronto.ca/documents/conferences2/Trebilcock09_Duggan.pdf> at 4.
[255] *Ibid* at 15 lists sources indicating that disclosure often goes unread. See also R Ted Cruz & Jeffrey J Hinck, "Not My Brother's Keeper: the Inability of an Informed Minority to Correct for Imperfect Information" (1996) 47 Hastings LJ 635 at 635-636
[256] *Ulansky*, *supra* note 197.

been prudent to seek clarification from counsel about what was being purchased. What is more, *Ulansky* threatens the use of disclosure as an effective means of consumer protection by placing all risk on the developer. It should be emphasized that the problem created by *Ulansky* is idiosyncratic to the Act's interpretation, not the wording of the Act itself.

Another paternalistic aspect *specific* to the *REDM Act* disclosure matrix is the sheer volume of mandated disclosure. The volume of information in the *REDM Act* disclosure framework may actually have the opposite of its intended effect; "information overload" may occur, in which case, the consumer may not even comprehend the disclosure.[257] It is trite that the British Columbia legislature deems disclosure to be beneficial; otherwise, it would not be prescribed. But if the corollary is to provide so much disclosure that a purchaser does not consult it, then the volume of disclosure has had the opposite effect. It would be interesting to test whether a consumer is likely to consult a 10-page disclosure document at length but unlikely to consider putting aside a 100-page document.

However, behavioural economics addresses some of the *general* problems of disclosure. For example, behavioural economics has frequently demonstrated that consumers are overly optimistic with respect to their ability to afford future expenses.[258] Condominium purchasers are no different. In addition, a prospective condominium purchaser may not be sufficiently sophisticated to understand the excess expenses associated with owning a condominium (i.e. strata fees).

[257] Ramsay, *supra* note 21 at 75.
[258] Jolls, Sunstein & Thaler, *supra* note 32 at 1541-1542

Disclosure addresses this issue through the requirement that a budget be provided.[259] Furthermore, the decision in *Atkinson* demonstrates the importance of having accurate budgetary information so that a prospective purchaser can make an informed decision about buying. And while White and Mansfield tell us that disclosure impacts a relatively few number of purchasers, it is arguable that any impact whatsoever is positive since the result is measure, albeit limited, of consumer protection.

Turning to issues *specific* to the *REDM Act*'s disclosure regime, the approach in the Alberta *Condominium Property Act* may address the problems identified with legislation in Ontario and British Columbia. The Alberta *Condominium Property Act*, in mandating provision of limited but salient information to the purchaser, may be more successful at conveying relevant information. If regulators are concerned that purchasers either require, or in some cases desire, more disclosure a proposed measure of law reform would be to make the additionally mandated disclosure available should purchasers exercise their right to obtain it. This option would truly be a libertarian paternalist approach, since the provision of information would remain a requirement but the purchaser would ultimately choose whether to consult disclosure. The proposed changes would be beneficial for informed and uninformed consumers, since the informed consumers could obtain all information they wish and the uninformed consumer is less likely to be buried in information. Furthermore, the purchaser bears some risk should they choose not to consult the additional disclosure. More importantly

[259] Superintendent of Real Estate, Policy Statement One, *supra* note 177 at 9.

than being limited in its paternalism, this approach may ultimately be more successful by providing an accurate snapshot of what is being purchased.

Another positive aspect of disclosure *specific* to the *REDM Act* relates to the requirement that a purchaser be told of their rescission rights. Indeed, it is an odd situation in which an adverse party, in this case the purchaser, must be advised of legal rights and remedies that are contrary to the information provider's best interests. Clearly, a purchaser unaware of their cancellation right is no further ahead than if the rights of cancellation did not exist. Ross Cranston argues that consumers typically have inadequate knowledge of their legal rights.[260] *Caveat emptor* is indifferent to this discrepancy. However, such an attitude is incompatible with a fair, balanced marketplace. Telling a purchaser of their rescission rights is in harmony with libertarian paternalism since provision of the disclosure will have no impact on those not requiring its benefits.[261] For consumers requiring disclosure, it can be delivered at a low cost and be highly beneficial.[262] A developer's ability to present disclosure in a low-cost manner that has the potential to positively shift preferences appears to favour of the *REDM Act* retaining a pronounced disclosure component. But, the acceptance of disclosure generally does not include all requirements under the *REDM Act.*

The *REDM Act*'s requirement that a purchaser be provided a "reasonable opportunity" to read disclosure cannot be justified by libertarian paternalism. Libertarian paternalism always respects a consumer's autonomy to decide whether

[260] Ross Cranston, "The Growth of Consumerism and the Law" reprinted in MH Ogilvie, *supra* note 10, 2 at 3.
[261] Camerer et al, *supra* note 25 at 1232-1236.
[262] Camerer et al, *supra* note 25 at 1233.

to take advantage of a protectionist measure. The consumer can *choose* whether to read disclosure or not. The purchaser should similarly be permitted to choose whether to take opportunity to read disclosure. Therefore, the requirement that the purchaser be provided a "reasonable" opportunity to read disclosure is overly paternalistic. As this provision neither appears anchored in fairness nor balance, it should be repealed. Furthermore, it will later be argued that the cooling off period contained in the Act should be made a pre-contractual cooling-off period, which would ultimately eradicate the necessity for such a provision.

D. Background to Legislative Rescission Rights

Each piece of condominium legislation discussed in this thesis contains a right of cancellation by the buyer within a specified period of time, also known as a rescission right or "cooling-off period."[263] Statutory rescission rights differ from equitable rescission rights in that equitable rescission is solely concerned with restoration of parties to their pre-contractual position generally due to some misdeed.[264] Conversely, statutory rescission is a purchaser's right on entering an agreement - without any hurdles - subject to legislated exceptions. This section considers the implications of rescission rights as used in the cited legislation.

1. Rescission Rights in British Columbia

The execution of an agreement to purchase a condominium from developers automatically triggers a rescission right under the *REDM Act*:

[263] Camerer et al, *supra* note 25 at 1239.
[264] See *supra* Part III.

> Section 21(2) Regardless of whether title, or the other interest for which a purchaser has contracted, to a development unit has been transferred, a purchaser of the development unit may rescind the purchase agreement by serving written notice of the rescission on the developer within 7 days after the later of
>
> (a) the date that the purchase agreement was made, and
>
> (b) the date that the developer obtained, under section 15 (1) (c) *[providing disclosure statements to* purchasers*]*, a written statement from the purchaser acknowledging that the purchaser had an opportunity to read
>
> (i) the disclosure statement provided under that section, or
>
> (ii) a new disclosure statement, if any, described in section 16 (1) (a) (i) *[non-compliant disclosure statements]*.
>
> (3) Regardless of whether title, or the other interest for which a purchaser has contracted, to a development unit has been transferred, if a purchaser is entitled to a disclosure statement in respect of a development property under this Act and does not receive the disclosure statement, the purchaser may rescind, at any time, a purchase agreement of a development unit in that development property by serving a written notice of rescission on the developer. [265]

Noteworthy is that the purchaser need not provide a motive for cancellation. Also important is that the cooling-off period begins from the later of two events: execution of the agreement or receipt of disclosure materials. Significant, too, is the emphasized portion of the above provision, which is a repeal of the rule that restricts equity's jurisdiction to grant rescission due to execution.[266]

The nexus of the purchaser's rescission right and disclosure is demonstrated by the Financial Institutions Commission's Policy Statement One requiring the following to be displayed in "conspicuous type" on the second page of a disclosure statement:

> Under section 21 of the *Real Estate Development Marketing Act*, the purchaser or lessee of a development unit may rescind (cancel) the contract of purchase and sale or contract to lease by serving written notice on the developer or the developer's brokerage, within 7 days after the later of the date the contract was

[265] *REDM Act*, *supra* note 1 [emphasis added].
[266] McCamus, *supra* note 35 at 344. See *supra* Part III.

> entered into or the date the purchaser or lessee received a copy of this Disclosure Statement.[267]

Thus, the disclosure framework under the *REDM Act* is closely tied to the rescission right.

The marketing of unconstructed condominium units and time-share developments influenced the legislature's insertion of a cooling-off period into the *REDM Act*. Member of Legislative Assembly Halsey-Brandt offered the following comments during legislative debate: "having the seven days is just great. Although we don't have a lot of time-shares, I think most of us in this chamber have probably been in some part of the world where we've run into time-share salespeople. The pressure does get pretty heavy on you, so having that seven days is a great benefit for consumers."[268] Taking the member's comments as authority, mandatory rescission rights guard consumers from pressure-sale situations. The Honourable R. G. Collins, the minister in charge of tabling the legislation, stated that such a provision is responsive to market demand.[269] We can conclude, then, that the legislature focused on issues confronting the economy at the time, namely, a limited supply, and a considerable demand for new condominium units.

There are no decisions litigated under this provision of the *REDM Act*.

2. Rescission Rights in Ontario

The rescission provisions in Ontario's *Condominium Act* are nearly identical to those in the *REDM Act*, save a longer cooling-off period:

[267] Policy Statement One, *supra* note 177 at 5.
[268] British Columbia, Legislative Assembly, *Report of Debates (Hansard)*, 10 May 2004, at 11027 (G Halsey-Brandt).
[269] Collins, *Report of Debates (Hansard)*, *supra* note 26.

> 73(1) A purchaser who receives a disclosure statement under subsection 72 (1) may, in accordance with this section, rescind the agreement of purchase and sale before accepting a deed to the unit being purchased that is in registerable form.
>
> (2) To rescind an agreement of purchase and sale under this section, a purchaser or the purchaser's solicitor shall give a written notice of rescission to the declarant or to the declarant's solicitor who must receive the notice within 10 days of the later of,
>
> (a) the date that the purchaser receives the disclosure statement; and
>
> (b) the date that the purchaser receives a copy of the agreement of purchase and sale executed by the declarant and the purchaser.[270]

There are no decisions litigated under this provision of the *Condominium Act*.

3. Rescission Rights in Alberta

Alberta's *Condominium Property Act* also has a 10 day right of rescission:

> 13 Every developer who enters into a purchase agreement shall include in the purchase agreement the following:
>
> (a) a notification that is at least as prominent as the rest of the contents of the purchase agreement and that is printed on the outside front cover or on the first page of the purchase agreement in bold face, in upper case and in larger print than the rest of the purchase agreement stating as follows:
>
> "The purchaser may, without incurring any liability for doing so, rescind this agreement within 10 days after its execution by the parties to it unless all of the documents required to be delivered to the purchaser under section 12 of the *Condominium Property Act* have been delivered to the purchaser not less than 10 days prior to the execution of this agreement by the parties to it."[271]

There are no decisions litigated under this provision of the *Condominium Property Act*.

[270] *Condominium Act, supra* note 164.
[271] *Condominium Property Act, supra* note 163.

E. Are the *REDM Act*'s Legislative Rescission Rights Justifiable and Effective?

Cooling-off periods are an effective method of consumer protection from the standpoint of libertarian paternalism. Beyond imposing a short delay, these provisions have minimal impact on those that understand the nature of their agreement and wish to proceed (i.e. such individuals will not exercise their rescission rights), while those that make hasty decisions will have a period of reflection prior to being bound.[272] Thus, cooling-off periods allow a party to reconsider what might otherwise be an emotional decision.[273] The cooling-off period also reflects the behavioural economics principle of hyperbolic discounting, which means that consumers tend to make better decisions in the long term.[274] Cooling-off periods address hype created by a condominium developer and the market at large. Rather than succumb to hype, a purchaser is given time to reconsider their decision outside an emotionally charged, pressure sales environment. The pressure, from sales people, the market, and possibly within, will undoubtedly be exacerbated by considerable demand (visually punctuated by actual line-ups) of other consumers hoping for an opportunity to buy a condominium. However, as cooling-off periods provide a "temporary suspension"[275] of a valid, binding agreement, they are quite "intrusive."[276]

[272] Kronman, *supra* note 130 at 786.
[273] *Ibid*.
[274] See Ramsay, *supra* note 21 at 72-73 for a discussion of hyperbolic discounting.
[275] Kronman, *supra* note 130 at 786.
[276] Camerer et al, *supra* note 25 at 1239.

Anthony Kronman argues that cooling-off periods suggest a "moral deficiency" in prospective contracting parties.[277]

The use of mandatory rescission rights may have unintended consequences that make the Act's approach too paternalistic. Although no research has been done to date, the fact that a purchaser *automatically* has a right of rescission may foster demand, in essence creating a false or higher demand, since a consumer is aware that an agreement can be automatically rescinded without explanation. Purchasing condominiums speculatively can therefore prove lucrative in a rising market. A prospective purchaser may view the situation as no lose: if the demand for condominium units is not present (i.e. the development is not sold out immediately), then rescission can be exercised at no cost to the purchaser. However, if there is significant demand for the units, the prospective purchaser may buy one or several units with the intent of flipping them for a profit. In the end, the consumer purchasing the condominium unit for personal use is the loser: if speculation is substantial, developers are more likely to price their product higher, creating an inflated price due to artificial demand. Therefore, the *REDM Act*'s cooling-off period as currently framed may lead to unfairness for legitimate purchasers and developers alike.

The aim of the seven-day rescission period is to provide purchasers a chance to consider their decision and/or to review disclosure. Clearly, there is sufficient time to review disclosure in the seven-day period. Research into

[277] Kronman, *supra* note 130 at 795.

hyperbolic discounting [278] suggests that consumer decision making is more efficacious in the long-term; but it is not clear whether seven days is sufficient to make a good decision. Be that as it may, there may not be a long enough time that could be legislated without undermining efficient business practices.

Alberta's *Condominium Property Act* takes a very different approach to rescission rights than those provided in the *REDM Act* and Ontario's *Condominium Act*. From a libertarian paternalism standpoint, Alberta's legislation avoids shortcomings contained in the rescission provisions of the *REDM Act* and the Ontario *Condominium Act* by denying a cooling-off period when disclosure has been in place for an equivalent time as the cooling-off period. Thus, a purchaser who has had time to review disclosure and consider their decision is not afforded more protection, indeed an undue level of protection, by being provided a cancellation right. The purchaser in such circumstances has the opportunity to review disclosure materials at home or with counsel, thus satisfying one goal of the *REDM Act*'s disclosure framework – the purchaser working against informational asymmetries by understanding exactly what is being purchased.[279] The Alberta approach to rescission is one that balances the purchaser's potential for making a hasty decision without consulting disclosure with the developer's need for certainty of sale once a party has had adequate disclosure. As such, the Alberta approach inserts an element of fairness that is consistent with libertarian paternalism.

[278] Ramsay, *supra* note 21 at 72-73.
[279] See the dictum of Smith J in *Dwane*, *supra* note 2 at paras 69-74.

From the standpoint of consumer irrationality, it may be prudent to remove the right of cancellation and instead institute a pre-agreement cooling-off period.[280] A seven-day pre-contractual cooling-off period is obviously paternalistic, but is limited since the purchaser can choose not to consult disclosure in the seven days prior to entering an agreement. In any event, such a measure may reduce the affects of a pressure-filled, hyped environment since purchasers would not execute agreements *at the place and time of marketing*. This measure would also eliminate the provision that a purchaser be provided a reasonable opportunity to read disclosure.

Pre-contractual cooling-off periods are more closely aligned with libertarian paternalism than standard cooling-off periods because the former do not alter a binding agreement.[281] After the pre-contractual cooling-off period elapses, the buyer must *take positive action to buy*. Conversely, post-agreement cooling-off periods permit cancellation of an agreement, or postponement of the binding nature of the agreement.[282] There, the agreement is already signed. Importantly, then, the consumer must take a *positive action to rescind*. The behavioural economics concept of framing provides evidence that a pre-contractual cooling-off period may be more effective: "[f]raming underlines the importance of default rules since different default rules will affect the choices that individuals make. Thus programmes that require an individual to 'opt in' will

[280] Cooling-off periods can take two forms: one that permits rescission after the fact and another that requires a period of time elapses before an agreement can be made: Camerer et al, *supra* note 25 at 1240.
[281] But for a number of legal doctrines, such as those discussed in Part III that render a contract voidable.
[282] See eg Camerer et al, *supra* note 25 at 1240 regarding cooling-off periods that permit cancellation of an agreement.

result in a much smaller take up than programmes where the default rule includes all consumers in the programme but permits them to opt out."[283] It appears wise to have the consumers "opt in," which in the case of condominium purchases would mean taking the positive action of buying.[284] Moreover, a consumer may be hesitant to cancel an agreement for a number of reasons, including psychological commitment to the agreement,[285] loyalty to a salesperson, or simply neglecting to reflect on whether the agreement should be cancelled. Further, legislating a pre-agreement cooling-off period would reduce transaction costs since there would be no transaction to cancel after the agreement is made. A savvy consumer could even negotiate the price in advance, although the formal agreement could not be made until after the cooling-off period elapses.

PART VI. LEGISLATIVE INTERVENTION REGARDING DAMAGES AND DEEMED RELIANCE

A. Background

A purchaser who has suffered a misrepresentation has recourse despite the passing of the mandatory rescission period. That recourse is found in the *REDM Act*'s statutory right of damages. Private rights of action for aggrieved consumers can compensate for a loss and encourage compliance by suppliers.[286] Two factors differentiate the right of damages under the *REDM Act* from a common law right of damages. First, the *REDM Act* expands who damages may be sought against to

[283] Ramsay, *supra* note 21 at 74.
[284] See also Camerer et al, *supra* note 25 at 1224-1225 regarding the importance of default rules in protecting consumers.
[285] Duggan, *supra* note 250 at 4.
[286] William C Whitford, "Structuring Consumer Protection Legislation to Maximize Effectiveness" (1981) Wis L Rev 1018 at 1026.

automatically include all directors, anyone named in a disclosure statement, and anyone consenting to be named in a disclosure statement. Second, an aggrieved purchaser is "deemed" to have relied on misrepresentations in disclosure materials even if there actually was no such reliance.

1. Director Liability at Common Law

The test for director liability at common law arguably remains in flux. It is appropriate to first discuss the common law in Ontario since British Columbia law builds on Ontario jurisprudence. The test in Ontario is marked by two somewhat inconsistent decisions. The first authority is *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc*.[287] The Ontario Court of Appeal in *ScotiaMcLeod* was confronted with the issue of personal liability of directors and officers. At issue was that some of the directors had personally engaged in misrepresentations whereas others had not. The Court restricted liability of directors as follows:

> The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare. Those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour…..Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.[288]

We can conclude from *ScotiaMcLeod* that director liability will be rare and indeed confined to instances of "fraud, deceit, dishonesty or want of authority."[289]

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[287] (1995), 129 DLR (4th) 711 (Ont CA) [*ScotiaMcLeod*].
[288] *Ibid* at para 25 [emphasis added].
[289] *Ibid*.

Just four years later, the issue of director liability again arose in *ADGA Systems International v. Valcom Ltd*.[290] In that decision, the Ontario Court of Appeal purported to follow *ScotiaMcLeod*[291] but nevertheless gave the following dictum: "the consistent line of authority in Canada holds simply that, in all events, officers, directors and employees of corporations are responsible for their tortious conduct even though that conduct was directed in a *bona fide* manner to the best interests of the company."[292] Therefore, the *ADGA* test holds that directors will be held personally liable in tort on a strict basis regardless of whether they were acting within the scope of their duties. Applying the respective tests to director liability for condominium disclosure, *ScotiaMcLeod* would provide immunity for directors not exhibiting tortious conduct of "their own" with a "separate identity" from their ordinary office. *ADGA*, conversely, would hold all of a developer's directors strictly liable for the corporate misrepresentation. This apparent inconsistency[293] has resulted in significant critical commentary.

The test for personal liability of directors remains somewhat unsettled in British Columbia. This point was explicitly made by Sigurdson J. in *Strata Plan LMS 2643 v. Harold Developments Ltd*.[294] In *Harold*, condominium owners sought to hold directors liable for defective construction. Sigurdson J. cited *ScotiaMcLeod* and *ADGA* in concluding there is no uniform test for ascertaining

[290] (1999), 168 DLR (4th) 351 (Ont CA) [*ADGA*].
[291] *Ibid* at paras 39-40. See eg Edward M Iacobucci, "Unfinished Business: an Analysis of Stones Unturned in *ADGA Systems International v Valcom Ltd*" (2001) 35 Can Bus LJ 39 at 42-43 for discussion of this ostensible inconsistency.
[292] *Ibid* at para 18.
[293] See eg Iacobucci, supra note 286 and Janis Sarra, "The Corporate Veil Lifted: Director and Officer Liability to Third Parties" (2001) 35 Can Bus LJ 55 at 64-67.
[294] 2007 BCSC 1095.

director liability in British Columbia.[295] As a result, there was a triable issue, justifying that the litigation should proceed.

However, recent case law from the British Columbia Court of Appeal may provide clarity. At issue in *Strata Plan No. VIS3578 v. Canan Investment Group Ltd.*[296] was whether the Court would permit the addition of the corporate defendant's directors to the action. Though there had been controversy in British Columbia as to whether there were two lines of authority similar to the *ADGA-ScotiaMcLeod* dichotomy, Neilson J.A. moved the Court toward the *ADGA* test. Neilson J.A. disregarded any notion of a dichotomy and went on to rely on the decision in *London Drugs v. Kuehne & Nagel International Ltd.*[297] in concluding:

> In my respectful view, the perception of a dichotomy involves a misreading of the governing authorities. *London Drugs* lays down the general rule that personal claims in tort, at least for the tort of negligence, may be advanced against employees, officers and directors. The negligence of the defendant employees in that case in physically damaging the plaintiff's transformer illustrates the breach of duty personal to them. As emphasized in the passage from *ScotiaMcLeod* quoted above, the facts giving rise to personal liability must be specifically pleaded.[298]

The above quote appears to bring the law in British Columbia toward *ADGA* by emphasizing that directors acting in the course of their employment can nevertheless incur strict personal liability in tort. In the end, the *ScotiaMcLeod-ADGA* distinction is not germane to our discussion except to note that the deemed reliance provisions in the *REDM Act*, if the true test for director liability in British Columbia is *ScotiaMcLeod*, significantly expand director liability by making it strict.

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[295] *Ibid* at paras 26-27.
[296] 2010 BCCA 329 [*Canan*].
[297] [1992] 3 SCR 299.
[298] *Canan*, *supra* note 296 at para 69.

2. Deemed Reliance and Damages in British Columbia

a. REDM Act

The *REDM Act* provides a statutory right of damages pursuant to s. 22:

> 22(3) If a developer files a disclosure statement respecting a development property and the disclosure statement contains a misrepresentation, a purchaser of a development unit in the development property, whether the purchaser received the disclosure statement or not,
>
> (a) is deemed to have relied on the misrepresentation, and
>
> (b) has a right of action for damages against
>
> (i) the developer,
>
> (ii) a director,
>
> (iii) a person who consented to be named, and was named, in the disclosure statement as a developer or director,
>
> (iv) a person who authorized the filing of the disclosure statement, and
>
> v) a person who signed the disclosure statement.[299]

In short, all directors of a developer selling condominiums pursuant to the *REDM Act* are strictly liable by virtue of being directors. This inclusion may encourage less directors for corporate developers.

b. Case Law

Only one case has explicitly considered the awarding of damages under the *REDM Act*.[300] *Bigleaf Ventures*[301] considered whether six plaintiff purchasers

[299] *REDM Act*, *supra* note 1 [emphasis added].

[300] Note, however, that *Sharbern*, *supra* note 240 considered the deemed reliance provisions under the predecessor legislation. The provisions under the predecessor act also deemed reliance, but did not have provisions which would rebut the presumption of reliance, such as are present in the *REDM Act*. The Supreme Court of Canada recognized that the issue of deemed reliance was essentially a moot one, for the current act permits deemed reliance to be rebutted when a plaintiff is aware of the misrepresentation. The Court noted that this new provision did not require the Court to address the issue of whether deemed reliance may be rebutted in respect of a

should be entitled to a remedy under the *REDM Act* against the corporate developer and the principal of the corporate developer, presumably a director.[302] The disclosure statement at issue indicated that short-term vacation rentals would be permitted by the development's zoning. This was inaccurate. The Court considered two amended disclosure statements issued by the developer, both of which failed to update information with respect to short-term rentals. Russell J. awarded damages to the plaintiffs on the basis of s. 22(3). The Court anchored part of its finding of liability for damages on s. 39(1) of the Act,[303] which is the offences provision. The provisions the Court relied upon are as follows:

> Section 39 (1) A person who does any of the following commits an offence:
>
> (a) contravenes
>
> section 16 [non-compliant disclosure statements],
>
> (c) subject to subsection (2), makes a statement in a disclosure statement filed or provided under this Act that, at the time and in the light of the circumstances under which the statement is made, contains a misrepresentation;[304]

It seems that the reference to s. 39 was erroneous. A plain reading[305] of this provision indicates that the offences and penalties sections relate to hearings conducted by the Superintendent of Real Estate. This relationship is evident by the preceding sections, which include the Superintendent's investigative powers,[306] power to hold hearings,[307] and authority to make orders under the

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condominium purchaser buying from a developer. Nevertheless, Rothstein J at para 119 said in *obiter* that deemed reliance is rebuttable.

[301] *Bigleaf*, *supra* note 187.

[302] Unfortunately, the decision does not disclose whether the principal of the defendant, also a named defendant, was a director.

[303] *Bigleaf*, *supra* note 187 at para 52.

[304] *REDM Act*, *supra* note 1.

[305] See *Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 20.

[306] *REDM Act*, *supra* note 1 at s 25.

[307] *REDM Act*, *supra* note 1 at s 27.

Act.[308] The decision in *Bigleaf* therefore remains questionable authority on which to base a damages analysis but only to the extent that it wrongly applied s. 39.

3. Deemed Reliance and Damages in Ontario

a. Ontario Condominium Act

Contrasted with the provisions of the *REDM Act*, Ontario's *Condominium Act* has a clear but narrower right of damages for purchasers suffering from a developer's misrepresentation:

> 133(2) A corporation or an owner may make an application to the Superior Court of Justice to recover damages from a declarant for any loss sustained as a result of relying on a statement or on information that the declarant is required to provide under this Act if the statement or information,
>
> (a) contains a material statement or material information that is false, deceptive or misleading; or
>
> (b) does not contain a material statement or material information that the declarant is required to provide.[309]

A prominent aspect of the above provision is that the right of action for damages is limited to the developer (declarant). Furthermore, there is no provision that reliance is deemed for the purposes of disclosure. This essentially renders the provision as essentially a codification of the common law, save the ability for an aggrieved consumer to make an application directly to court (i.e. without commencing a traditional lawsuit) to recover damages. This is advantageous because it negates the long-term procedural aspects of commencing a formal lawsuit, including discovery of documents, examinations for discovery and trial.

b. Case Law

[308] *REDM Act*, *supra* note 1 at s 30.
[309] *Condominium Act*, *supra* note 164 [emphasis added].

The statutory right of damages under the Ontario *Condominium Act* states:

> 133(2) A corporation or an owner may make an application to the Superior Court of Justice to recover damages from a declarant for any loss sustained as a result of relying on a statement or on information that the declarant is required to provide under this Act if the statement or information,
>
> (a) contains a material statement or material information that is false, deceptive or misleading; or
>
> (b) does not contain a material statement or material information that the declarant is required to provide.[310]

This provision has not been considered by Ontario courts to date. However, the predecessor provision,[311] which more closely mirrors the *REDM Act* provisions, received some consideration. It stated:

> Section 52(5) Where any statement or material required under this Act to be provided by a declarant or proposed declarant to a purchaser of a unit or proposed unit for residential purposes contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information, the corporation or any unit owner who relied on such statement or material is entitled, as against the declarant or the proposed declarant to damages for any loss sustained as a result of such reliance.[312]

The leading case on the interpretation of s. 52(5) of the predecessor to the Ontario *Condominium Act* is *Wellington Condominium Corp. No. 61 v. Marilyn Drive Holdings Ltd.*[313] The condominium development at issue contained a residential suite for the development's superintendent. A problem arose when it was discovered that the superintendent's suite was not part of the development's common elements. Instead, the developer retained title to the superintendent's suite but later offered to sell it to the condominium corporation for $125,000. There was no mention that the developer would retain ownership in the disclosure statement. The condominium corporation sought damages of $125,000 against

[310] *Condominium Act*, *supra* note 164.
[311] *1990 Condominium Act*, *supra* note 247.
[312] *1990 Condominium Act*, supra note 247 [emphasis added].
[313] (1998), 16 RPR (3d) 1 (Ont CA) [*Wellington*].

the developer. The trial judge found that the condominium corporation had sustained a loss but that it had failed to prove reliance on behalf of a number of owners. The decision was overturned by the Court of Appeal. The Court of Appeal, surprisingly, went so far as to distinguish the materiality discussion in *Abdool* for the purpose of rescission to the materiality question for the purposes of the damages question:

> In view of the different remedies and the different wording of the subsections I would adopt a different test under s. 52(5) than the test set out in [*Abdool*]. In [*Abdool*], Robins J.A. was concerned with a type of defect that would render an apparently binding agreement unenforceable. It is entirely appropriate in that context that the test of materiality be commensurate with the nature of the remedy. Where, however, the plaintiff does not seek to set aside the agreement but seeks only damages for the loss occasioned by the defective disclosure, a less rigorous test is appropriate. Further, in [*Abdool*], the Court was concerned with statutory language referring to a "material amendment". The language of s. 52(5) is broader and refers to "any material statement or information" and provides a remedy not only for false, deceptive or misleading disclosure, but disclosure that "fails to contain" any material statement or information.
>
> Another reason for adopting a different test lies in the fact that s. 52(5) gives a remedy to the condominium corporation as well as the unit owner. In my view, by providing that the corporation is entitled to damages, the Legislature must have envisaged that there could be a loss to the owners as a group, as represented by the corporation. This loss, while significant to the owners as a whole, might not be sufficiently material that any individual owner would have considered rescission.
>
> There is a related reason for giving s. 52(5) a different meaning where the condominium corporation is the plaintiff. The corporation was not a party to the original agreement of purchase and sale. Indeed, it did not exist at that time. In those circumstances, it is difficult to apply a test of materiality premised on rescission of that agreement.[314]

Finlayson J.A. in *Wellington* went on to iterate that the materiality test formulated by Robins J.A. in *Abdool* is notably flexible:

> …[T]he onus is on the corporation to show that the degree of deficiency in the disclosure is such that it has occasioned a loss or expense to the unit owners as a whole that can be measured in damages. Not every defect or omission will have this effect so as to warrant a remedy. Mere technical departures from the requirements of s. 52 will not suffice. On the other hand, to properly balance the "consumer protection and commercial realities of the condominium industry", to quote Robins J.A. in [*Adbool*], *supra* at 145, the approach must be a broad and flexible one, not a

[314] *Ibid* at paras 36-38.

> rigid or stringent one. Otherwise, a legitimate claim for damages would be defeated because the corporation could not demonstrate that any of the purchasers would have resorted to the drastic remedy of rescission.[315]

Finlayson J.A. in *Wellington* held that the appropriate test was to determine whether a reasonable purchaser would consider the impugned asset to be part of the common elements of the condominium corporation.[316] Furthermore, Finlayson J.A. held that actual reliance need only be proven in situations that a unit-holder seeks damages.[317] He reasoned:

> The issue of reliance where, as here, it is alleged that the damage has been sustained by the unit owners as a whole as represented by the corporation is more difficult. I cannot accept that the Legislature intended that the corporation in an action under s. 52(5) must adduce evidence from each of the unit owners that they relied upon the omission. I also find it difficult to accept that the measure of damages would be different depending on the number of owners the corporation was able to show did rely upon the inadequate disclosure.[318]
>
> . . .
>
> A much more reasonable approach to reliance in the context of the condominium corporation would require the corporation merely to demonstrate that it cannot reasonably carry out its duty to control, manage and administer the common elements and the assets of the corporation [s. 12(2)] and to manage the property [s. 12(1)] without incurring the expense occasioned by the false, deceptive or misleading statement or information or the expense that should have been disclosed in the disclosure statement.[319]

Finlayson J.A.'s analysis creates a deemed reliance provision in relation to condominium corporations by dispelling the corporation's need to have actually relied on materials. His comments with respect to the difficulty in adducing evidence from individual owners are persuasive.

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[315] *Ibid* at para 40.
[316] *Ibid* at para 42.
[317] *Ibid* at para 52.
[318] *Ibid* at para 50 [emphasis added].
[319] *Ibid* at para 53.

In *Atkinson*, the plaintiff was denied damages since the plaintiff had never become a unit owner (the plaintiff was, however, provided a right of rescission).[320] Thus, the Ontario approach as embodied in s. 133(2) of the Ontario *Condominium Act* and the similarly worded provision of s. 52(5) of the predecessor legislation is significantly narrower than the BC approach in that only a condominium unit owner may seek damages. The exclusion of non-owners from a statutory right to damages means that an aggrieved purchaser who chooses not to close on their agreement, perhaps due to learning of a misrepresentation, cannot seek damages under the legislation.[321]

4. Deemed Reliance and Damages in Alberta

The Alberta *Condominium Property Act* does not contain a statutory right of damages against developers for misrepresentations in disclosure materials.

B. Are Deemed Reliance and Damages Provisions Justifiable and Effective?

The *REDM Act* damages provisions completely displace the risk that would otherwise be squarely on the purchaser's shoulders under *caveat emptor* to those of the developer. Provisions deeming reliance place pressure on a developer to ensure that all facts are scrupulously accurate, for if developers misrepresent a material fact, they are liable regardless of whether a purchaser even read the disclosure. The deemed reliance provisions are accordingly successful at loss shifting and ameliorating the power differential between purchaser and

[320] *Atkinson, supra* note 250 at para 15.
[321] For the theoretical underpinnings of reliance-based damages in contract, see LL Fuller and William R Perdue, Jr, "The Reliance Interest in Contract Damages" (1936) 46 Yale LJ 52.

developer.[322] Specifically, a failure to disclose information subject to an asymmetry beckons strict liability for the developer.[323]

Deemed reliance has a significant hurdle to overcome in that the plaintiff typically must prove that they have suffered *some* loss due to wrongful conduct.[324] Deemed reliance and similar provisions permit an aggrieved party to circumvent requirements to prove reliance on a misrepresentation.[325] Victor Schwartz and Cary Silverman argue that this is unjust: "consumers that never saw or heard of or relied on a conduct that allegedly injured them should not be able to bring imaginary claims. There must be some deceptive conduct that influences the plaintiff to purchase the product before there is a private law cause of action."[326] The argument that a purchaser who did not even consider disclosure may receive a windfall in the form of damages is a compelling one, making the analysis of the deemed reliance provisions against the backdrop of libertarian paternalism all the more important.

Contrary to the argument by Schwartz and Silverman, however, is that the *general* thrust of deemed reliance provisions is harmonious with libertarian paternalism. While these provisions arguably shift more risk to the developer, this is not unduly onerous as a developer can easily comply by disclosing all

[322] Ramsay, *supra* note 21 at 88.
[323] A rare case found using "strict liability" in relation to a misrepresentation is *Silver v Imax Corp*, 2009 CarswellOnt 7874 (Ont Sup Ct J). This case was interpreting the misrepresentation provisions in s 130 of the *Securities Act*, RSO 1990, c S-5. The Court stated at para 371: "The secondary market misrepresentation regime creates strict liability for material misrepresentations by a reporting issuer, with a reverse onus on defendants to establish a reasonable investigation or other defence."
[324] Victor E Schwartz & Cary Silverman, "Common Sense Construction of Consumer Protection Acts" (2005) 54 U Kan L Rev 1 at 50.
[325] *Ibid* at 52.
[326] *Ibid*.

material facts. Without a deemed reliance provision, all risk lays with the purchaser. The shortcomings of having to prove reliance are demonstrated by the trial decision in *Wellington*, which illustrated problems for a condominium corporation proving reliance, let alone an individual purchaser. The hype and emotional elements surrounding the sale of condominiums is markedly in favour of developers; however, deemed reliance on misrepresentations mitigates the impact of hyped circumstance by requiring full and accurate disclosure. Furthermore, deemed reliance may be rebutted by operation of s. 22(5) of the *REDM Act*, [327] which holds that a purchaser with knowledge of a misrepresentation cannot access deemed reliance provisions. Therefore, the deemed reliance provisions reflect an attitude of balance and fairness.

The appropriate middle ground for legislative reform is a hybrid of Ontario's *Condominium Act* and the *REDM Act* approaches. The elements from the *REDM Act* that ought to be retained include the deemed reliance provisions and the ability for a unit purchaser (i.e. not yet a unit owner) to collect reliance-based damages[328] for misrepresentations in disclosure materials. Otherwise, the scope of the Ontario *Condominium Act* is preferable since it limits the parties against whom damages for a misrepresentation can be sought to only the developer. Absence of director and employee liability provisions will permit the common law to develop and reconcile current ambiguities. This is particularly important in the event that *ScotiaMcLeod* is ultimately accepted as good law.

[327] *REDM Act*, *supra* note 1.
[328] See Fuller & Perdue, *supra* note 316.

PART VII. LEGISLATIVE INTERVENTION BY WAY OF AGREEMENT AVOIDANCE PROVISIONS

A. Background

We have discussed, to this point, that a developer must disclose all material facts at the time of purchase and any subsequent changes prior to closing. A failure to accurately present all material facts creates a statutory right of action for damages against the developer and a number of related parties. The next element in this discussion is the *REDM Act*'s avoidance remedy. The avoidance remedy permits a purchaser to avoid the binding effects of an agreement based on a developer's breach of the Act.

B. Avoidance of Agreements

1. Agreement Avoidance Provisions in British Columbia

a. REDM Act

The *REDM Act* creates a significant remedy for any purchaser who is victim of a developer's marketing, sale, or disclosure misdeed:

> 23 A promise or an agreement to purchase or lease a development unit is not enforceable against a purchaser by a developer who has breached any provision of Part 2.[329]

Part 2 of the Act relates to marketing and sale of development units (sections 3-22).[330] Prior to moving forward, it is important to distinguish rescission from avoidance. Statutory rescission rights (i.e. the legislated cooling-off period) under the *REDM Act* are *automatic* on an agreement of purchase and sale of a

[329] *REDM Act*, *supra* note 1.
[330] *REDM Act*, *supra* note 1.

condominium unit from a developer. The avoidance provisions are *remedial*, that is, they are only set in motion on a *breach* of the Act by a developer.

There is an obvious tension between primary and secondary disclosure provisions and s. 23 of the *REDM Act*. On a misrepresentation relating to price, value, or use, a developer retains all contractual rights as vendor, but the purchaser acquires a statutory right of damages to compensate for the developer's misrepresentation. However, if the developer fails to comply with Part 2 of the Act, which includes disclosure and amended disclosure provisions, the purchaser can invoke s. 23 as a shield to closing. Hence, the purchaser's remedy increases substantially. The issue of voiding agreements for non-compliance under s. 23 has been central the *REDM Act*'s limited litigation history.

b. Case Law

In *Chameleon Talent Inc*.,[331] the Court was petitioned for a remedy due to the developer commencing construction five months late and failing to consequently update adequate disclosure. The Court concluded:

> Specifically there were breaches of the disclosure statement when the defendant failed to amend it at least by November 2006 or thereabouts in order to report the delay in commencement of construction. I consider the amendment of May 2, 2007, to be inadequate and misleading for not saying explicitly that construction was delayed and failing to re-estimate the completion date when it was or ought to have been known that a November 2008 completion date was unlikely. At least by November 2008, a new completion date, estimated or otherwise, should have been substituted. There was a further breach and material misrepresentation in estimating and not immediately amending the disclosure statement when November 2008 passed with a year more to go.[332]

[331] *Chameleon*, *supra* note 226.
[332] *Chameleon*, *supra* note 226 at para 30.

The trial judge held that the failure to deliver amended disclosure with respect to the completion date rendered the agreement void pursuant to s. 23.[333] This decision was upheld by the Court of Appeal.[334] There, the Court again emphasized that statutory non-compliance results in an agreement being void pursuant to s. 23 (i.e. strict liability for the developer).[335]

In *Pinto,*[336] the developer failed to provide the plaintiff purchaser with disclosure statement amendments existing when the agreement was made. At trial, Smith J. concluded that at least one of the amendments related to material changes. Section 23 rendered the contract voidable for failure to deliver an amendment as required by the Act. Moreover, Smith J. relied on the Alberta Court of Appeal decision in *Hi Hotel Ltd. Partnership v. Holiday Hospitality Franchising Inc.*[337] to illustrate that purchaser motives should not affect the s. 23 analysis. Justice Smith stated the following, including excerpts from *Hi Hotel*:[338]

> Nothing in the Act requires a purchaser who does not receive an amendment to demonstrate that the receipt of the amendment would have led to a different course of action. The right of rescission or the right to resist enforcement of the purchase agreement arises automatically on the developer's non-compliance with the Act. That, too, is consistent with the purpose of such consumer protection legislation.
>
> In *Hi Hotel Ltd. Partnership v. Holiday Hospitality Franchising Inc.*, 2008 ABCA 276 (Alta. C.A.), the Alberta Court of Appeal considered the effect of non-compliance with that province's franchise legislation. The plaintiff received a required disclosure document before entering into a franchise agreement, but the document was not dated and signed as required by the legislation. Although that omission was of no importance to the plaintiff, the plaintiff was still able to exercise a statutory right of rescission after operating the franchise for almost a year.

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[333] *Ibid* at para 51.
[334] *Chameleon Talent Inc v Sandcastle Holdings Ltd*, 2010 BCCA 300.
[335] *Ibid* at paras 16-19.
[336] *Pinto*, *supra* note 230.
[337] 2008 ABCA 276 [*Hi Hotel*].
[338] *Ibid.*

> Although a right of rescission at common law requires the plaintiff to have relied on the misrepresentation, the Court said that requirement is not relevant to a statutory right of rescission:
>
> > Whether signature or dating is mere form, and of no real importance, is not a common-law question to be decided by the courts. It is part of a statute, and not a cryptic one either.
>
> The Court also said the plaintiff's motives for seeking rescission were similarly irrelevant:
>
> > The appellant franchisor also suggests that the respondent franchisee simply rescinded because it was financially advantageous to do so. With respect, that is no answer. That is the inevitable result of any legislation to protect consumers or investors. Rarely does such legislation automatically nullify a sale or investment, and so it gives the consumer or investor an election whether to get out of the transaction. Only a malcontent or crank would do so if the transaction was profitable for him or her. The person whose shares go up will not complain that he or she did not get a prospectus.
>
> That cannot be a reason to refuse to enforce the legislation. To give protective legislation effect only where the transaction made a profit, would virtually repeal the legislation and make it useless.[339]

Pinto was affirmed on appeal[340] and is the most recent statement by the Court on the relationship between failure to make adequate disclosure and s. 23. The Court cited the recent Supreme Court of Canada decision in *Seidel v. Telus*, which held that consumer protection legislation ought to be interpreted "generously" [341] in favour of the consumer.[342] Beyond this, Bennett J.A. wrote:

> Even if Revelstoke is correct that it was only required to deliver amendments that were required to be made pursuant to s. 16, I am of the view that Revelstoke was required to deliver, at a minimum, Amendment 5, which related to building additional strata units and changing the completion dates for the recreational facilities. Both of these changes fall within the definition of a "material fact" as defined in s. 16(2)(a) in that both changes may affect the "value, price or use of the development unit or development property". In *Chameleon Talent Inc. v. Sandcastle Holdings Ltd*., 2010 BCCA 300 (CanLII), 2010 BCCA 300 at para. 10, this Court held that substantial delays of many months in the construction of a condominium project will generally be "material to purchasers and prospective

[339] *Pinto*, *supra* note 230 at paras 32-35 [emphasis added].
[340] *Pinto v Revelstoke Mountain Limited Partnership*, 2011 BCCA 210 [*Pinto Appeal*].
[341] 2011 SCC 15 at para 37.
[342] *Pinto Appeal*, *supra* note 340 at para 17.

> purchasers in respect of the price to be paid for, the value there may be in, and the use of a condominium unit that is being purchased."[343]

Again, the Court of Appeal reiterated the importance of accurate completion dates as part of the materiality definition.

In *Ulansky,*[344] 12 plaintiffs sought to avoid their contracts of purchase and sale on the basis that the subject development permitted short-term rentals. As discussed earlier, Masuhara J. first concluded that the information about short-term rentals was material. Since a material fact was not disclosed, the plaintiffs were all entitled to avoid their contracts pursuant to s. 23.

The mere failure to provide a purchaser with disclosure statement amendments creates a right to the avoidance remedy. In *Watson,*[345] the Court considered amendments to the development's "outside completion date" and the developer's decision to use two phases of construction rather than one. Finding the changes clearly material, the enquiry shifted to whether the plaintiffs had been provided with amended disclosure statements detailing those changes. On a question of fact, the Court found that the plaintiffs had not received revised disclosure, in which case, they were entitled to void their agreements.

In a case similar to *Chameleon,*[346] *Maguire*[347] involved the failure of a developer to provide amended disclosure when it knew that construction was between 10 and 16 months behind schedule. The change in completion dates was

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[343] *Pinto Appeal*, *supra* note 340 at para 30.
[344] *Ulansky*, *supra* note 197.
[345] *Watson*, *supra* note 236.
[346] *Chameleon*, *supra* note 226.
[347] *Maguire*, *supra* note 233.

clearly material.[348] The failure to comply with Part 2 of the Act rendered the purchase agreement unenforceable pursuant to s. 23.[349] Therefore, the *REDM Act* applied a strict liability test to the avoidance remedy. On any breach of the Act, the purchaser can avoid the binding effect of an agreement, regardless of motives for doing so.

2. Agreement Avoidance Provisions in Ontario

a. Ontario *Condominium Act*

Although Ontario's *Condominium Act* does not contain parallel provisions to the avoidance remedy, a comparison can be drawn between the avoidance remedy and the renewed rescission rights under the *Condominium Act*. As discussed in Part V of this thesis, the *Condominium Act* requires issuance of an amendment to a disclosure statement on any material change, that is, any change that would reasonably impact a purchaser's decision to buy or to rescind during the 10 day cooling-off period.[350]

C. Are Agreement Avoidance Provisions Justifiable and Effective?

The avoidance remedy significantly counters the power imbalance between purchasers and developers by placing all risk on the developer. The common law default position, which leaves the purchaser ripe for abuse, is significantly altered if not eradicated by provisions that permit cancellation for an otherwise validly bargained for agreement. The goal is ostensibly to encourage

[348] *Ibid* at para 88-89.
[349] *Ibid* at para 90.
[350] *Condominium Act*, *supra* note 164 s 73.

the developer to be more rigorous in identifying changes in material facts, and further, when material facts are unearthed, to be honest and reveal them in a timely manner. Failure to reveal breaches in a timely manner is a breach of the Act opening the developer to avoidance. Thus, a rigorous, honest approach by developers could be the difference between paying damages to the purchaser and having no agreement at all.

The avoidance provision in the *REDM Act* is a significant consumer protection measure. Does the provision go too far? Unfortunately, the avoidance remedy, such as other aspects of the *REDM Act* completely shifts rather than balances risks, making it incompatible with libertarian paternalism. That is, the burden here is obviously shifted to the developer, who is strictly liable for a myriad of breaches under the *REDM Act*. A crucial point is that it is not merely a secondary misrepresentation that will trigger the avoidance remedy. A breach of a seemingly innocuous provision may nonetheless provide an option for *all* purchasers to avoid their agreements, which places all risk on the developer and none on the purchaser. Further, a windfall may be unjustly created for purchasers who wish to resile from their agreements for specious reasons. For instance, breaches of the Act that could lead to avoidance include:

- A breach s. 14(1)(b) by providing a purchaser an unfiled disclosure statement, even if the disclosure statement is identical to a copy filed shortly thereafter.[351]
- A breach of s. 15(1)(b) by failing to afford the purchaser a "reasonable time" to read the disclosure statement.[352]

[351] *REDM Act*, *supra* note 1.
[352] *REDM Act*, *supra* note 1.

- A breach of s. 15(1)(c) by failing to obtain "a written statement from the purchaser acknowledging that the purchaser had an opportunity to read the disclosure statement."[353]
- A breach of s. 15(2)(a) by failing to retain a copy of the written statement referred to in s. 15(1)(c).[354]

While the above provisions are important, they appear *prima facie* insufficient to render an agreement fatal at the purchaser's option. The legislation appears overly punitive in permitting a purchaser to avoid their agreement on such a basis. This is not a fair or balanced approach.

The avoidance provision is unnecessary as a draconian measure, given that the *REDM Act* already contains considerable penalty provisions.

> 40 A person who commits an offence under section 39 [offences] is liable,
>
> (a) in the case of a corporation,
>
> (i) on a first conviction, to a fine of not more than $100 000, and
>
> (ii) on each subsequent conviction, to a fine of not more than $200 000, and,
>
> (b) in the case of an individual,
>
> (i) on a first conviction, to a fine of not more than $100 000 or to imprisonment for not more than 2 years, or to both, and
>
> (ii) on each subsequent conviction, to a fine of not more than $200 000 or to imprisonment for not more than 2 years, or to both.[355]

The developer faces considerable risk for failure to adhere to the provisions of the *REDM Act* through strict fines for corporations and individuals alike, and with the possibility of a two year sentence for non-compliance. Given the penalties that may be levied through public law enforcement, the developer already has

[353] *REDM Act*, *supra* note 1.
[354] *REDM Act*, *supra* note 1.
[355] *REDM Act*, *supra* note 1.

incentive to comply with the Act. Therefore, the avoidance remedy does not need to be so one-sided to adequately protect condominium purchasers.

Accordingly, it is appropriate to target the avoidance provision for law reform in the following manner. First, the avoidance provision should be repealed. In its place, British Columbia should adopt the secondary disclosure framework currently used in Ontario. The most notable difference with this change would be a renewed rescission right on a material change. Again, materiality under the Ontario *Condominium Act* considers whether a reasonable purchaser would consider a change so significant that the purchaser would not buy the condominium unit or would choose to rescind the agreement within the rescission period. Since changes deemed material will trigger a renewed 10-day period of rescission under the Ontario *Condominium Act*, there is a potential for a number of purchasers to rescind, thus creating an impact on the development and buyers at large. One problem with avoidance provision as it currently stands is that the objective test for materiality, combined with the strict liability framework, permits too many purchasers to avoid their agreement for no other reasons than second thought or a falling market. The avoidance provision thus provides a windfall period for purchasers. To remedy this problem, I propose use of a "modified objective test" to determine materiality.[356] Just as value may be in the eyes of the beholder, the courts ought to recognize the same about materiality. In short, I would propose to modify the *Abdool* test to ask, would a reasonable person *in this purchaser's circumstances* have purchased the property or chosen to rescind

[356] See especially *Arndt v Smith*, [1997] 2 SCR 539 at paras 9-18: a modified objective test is one that considers "a reasonable person in the plaintiff's position."

within the cooling-off period had the impugned fact been disclosed? If the answer is yes, then the fact is material. The Court in *Abdool* implicitly recognized an element of subjectivity in their analysis by making comments directly in reference to the purchasers at issue, not the objective standard of a reasonable purchaser:

> Indeed, there is no evidence that these purchasers would themselves have rescinded their agreements within the 10-day cooling-off period had the disclosure statements contained the information which they allege was improperly omitted. Quite to the contrary, these statements played no part in the purchasers' decision to seek rescission. It is not suggested that their content, or lack of content, caused any purchaser to misunderstand the nature of his or her purchase or the effect of the condominium documents. Nor is it suggested that the disclosure statements prevented any purchaser from making an informed decision on whether to affirm or rescind his or her agreement. Indeed, it is clear that the purchasers' decision to seek rescission was prompted by declining real estate values, dissatisfaction with their purchases or a change in personal circumstances. The disclosure statements were in no way material to this decision.[357]

The Court in *500 Glencairn v. Farkas,*[358] made a similar finding:

> Moreover, on the facts of this case, it would appear quite evident that the defendant Farkas did not view the disclosure statement to be of significance to his objective of reselling the unit at a profit. On the other hand, the evidence is clear that Mr. Farkas examined the reciprocal agreement very carefully, in an attempt to rescind the agreement of purchase and sale, by attempting to locate material amendments to the disclosure documentation. There appears little doubt that this enterprise was motivated by a substantial decline in the value of condominium units, and not by any concern on the part of the purchaser that the reciprocal agreement had affected changes depriving the purchaser of substantial use or enjoyment of the property or had occasioned a loss of value in the property. It must be clearly understood that, in the circumstances of this case, whether Mr. Farkas was a speculator or not is irrelevant to a determination of the first issue if the reciprocal agreement constitutes a material amendment to the disclosure documentation. I have found that none of the matters contained in the reciprocal agreement constitute a "material amendment" within the test posited by Robins J.A. in *Abdool* , supra.[359]

An application similar to that enunciated in the previous excerpts from *Abdool* and *Farkas* may change the outcome in decisions such as *Ulansky*. It is possible, even probable, that not all 12 plaintiffs consulted and relied on disclosure respecting short-term rentals. Since the burden of establishing materiality is on

[357] *Abdool*, *supra* note 209 at para 65 [emphasis added].
[358] *500 Glencairn v Farkas* (1994), 36 RPR (2d) (Ont Ct J (Gen Div)) [*Farkas*]. See also *Ceolaro v York Humber Ltd* (1994), 37 RPR (2d) 1 (Ont Ct of J (Gen Div)) at para 271.
[359] *Ibid* at para 65 [emphasis added].

the party asserting misrepresentation of a material fact,[360] a modified objective test would require evidence as to the fact's materiality. Consequently, such a party would be subject to cross examination on their *viva voce* or affidavit evidence to determine if specious reasons motivated their position. As it stands now, however, all that needs to be proven is a non-compliance with the *REDM Act*.

PART VIII. CONCLUSION

The unconstructed condominium industry requires regulation to protect consumers from power imbalances and their own irrational decision-making. Theories of state intervention vary considerably, with neo-classicists advocating no intervention and paternalists arguing for significant state intervention on behalf of consumers who are unable to protect themselves. An approach of libertarian paternalism is central to the state protecting purchasers while maintaining consumer sovereignty by ultimately permitting the consumer to decide whether to accept a suggested shift in preferences. Further, libertarian paternalism is consistent with a balanced approach to consumer protection that spreads the risks and helps shift burdens in the commercial marketplace. Whereas *caveat emptor* places all risk with the purchaser, regulation of the condominium industry arguably goes too far by placing an undue risk on developers in some aspects.

This thesis has reviewed three major methods of consumer protection for condominium purchasers. First, the tandem of disclosure and rescission rights

[360] *Abdool*, *supra* note 209 at para 47.

directly addresses issues of power imbalances and consumer irrationality. Disclosure addresses these problems by providing the consumer with information to make an informed choice. Rescission rights counter hype surrounding sales created by developers and the market itself by allowing a period of second-thought. Furthermore, a mandatory rescission period provides consumers time to reconsider their agreement. The *REDM Act* provisions are beneficial for these reasons, but they could be enhanced. Accordingly, law reform is recommended by adopting a pre-agreement cooling-off period which would require that disclosure be provided a specified time prior to the agreement being executed. This provision would guarantee that purchasers have an opportunity to consult disclosure, if they so choose. In the event this measure is viewed as too paternalistic, I recommend that the Alberta approach be adopted, which provides that a rescission right is not provided to prospective purchasers that have received disclosure for an equivalent time to the rescission period. This measure is justifiable because the purpose of the cooling-off period – to provide a time for the purchaser to review disclosure and re-consider a purchase agreement – occurs through such a framework.

The second topic of condominium sale regulation I discussed in this thesis is the statutory right of damages. The *REDM Act* provisions not only expand who may be liable but also alleviate the need to prove reliance on disclosure materials, thus making proof of misrepresentation easier for an aggrieved consumer. That said, law reform is recommended by repealing the portion of the *REDM Act* damages insofar as it includes a party other than the corporate developer.

The last topic I addressed was use of the avoidance remedy. The avoidance remedy creates a strict liability framework that unduly penalizes developers for misrepresentations and other breaches of the Act. The legislative structure creates a situation that could lead to mass rescission by purchasers for illegitimate reasons. Accordingly, I recommend that the legislature repeal the avoidance remedy and adopt the Ontario approach to secondary disclosure. The Ontario approach permits rescission on a change of a material fact. Rescission is justified here, for it would balance against the fact that a purchaser is buying a property sight-unseen, and thus, if there is a change in what has been purchased, a purchaser has a right to re-evaluate their decision. Moreover, many matters will clearly be material changes for all purchasers, such as a drop in value or a delay in closing. In instances where materiality is not straightforward, a modified objective test should be adopted to produce a just, balanced approach. Overall, the Act generally does a good job of protecting consumers, however, there are ample areas of law reform to balance protection of consumers and commerce alike.

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