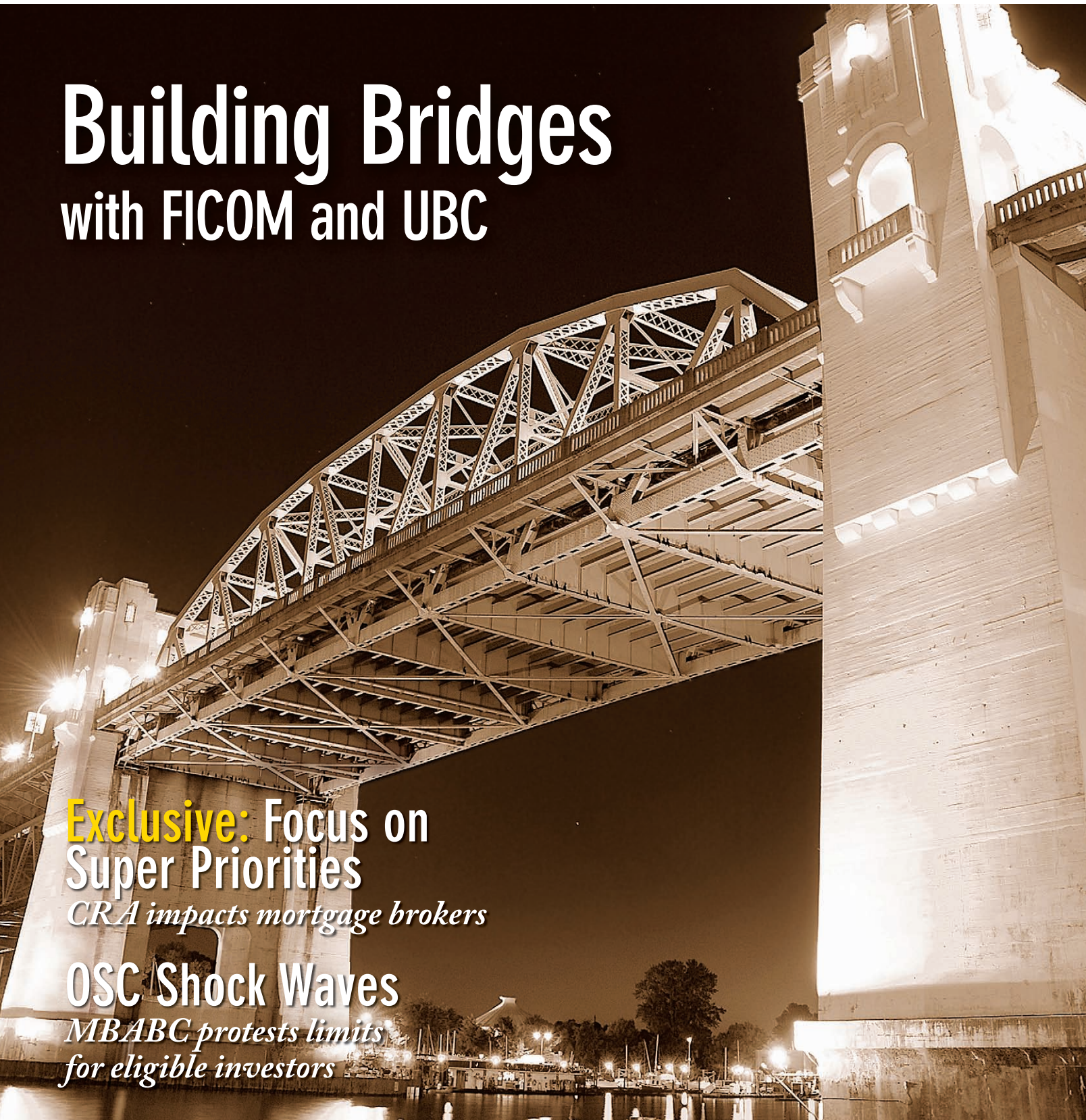
Summer 2014

MortgageBroker

ETHICAL • PROFESSIONAL • EDUCATIONAL



Building Bridges
with FICOM and UBC

Exclusive: Focus on Super Priorities
CRA impacts mortgage brokers

OSC Shock Waves
MBABC protests limits for eligible investors

Bill 17 Has Implications for Mortgage Brokers

With tougher rescission rules, it is more important than ever for mortgage brokers to make sure pre-sale purchasers are prepared to close with secure mortgage financing

BY **ED WILSON**

New rescission and disclosure rules

The opportunity for mortgage brokers to assist purchasers with obtaining financing for new construction pre-sale units usually comes within a couple of months prior to the anticipated completion date and not at the time the purchaser enters into the contract of purchase and sale with the developer. It can take two or three years for a development to be fully constructed, with occupancy permits and ready to be conveyed to the purchaser. The challenge for purchasers of pre-sale units is that they usually are unable to negotiate the developer's standard pre-sale contracts. The developer wants subject-free contracts from purchasers, which provide no fixed completion dates, but rather an estimate of when the development will be completed with a requirement for the developer to provide advance notice of the completion date. This can make financing arrangements tenous and challenging, particularly if the purchaser sought financing commitments early on, such as during the seven-day recission period from when they first received the disclosure statement. Not surprisingly, some purchasers who are stuck with a pre-sale unit and have been unable to secure financing by the completion date have sought to recind the contract under statutory protections where proper disclosure has not been provided to the purchaser by way of a disclosure statement. The B.C. government has now tightened up the rules around purchaser recissions, which of course makes the mortgage broker's role in assisting purchasers with obtaining pre-construction financing ever more important. Ed Wilson explains the new rescission and disclosure rules.

– Samantha Gale

The *Real Estate Development Marketing Act* came into force on 1 January 2005 and we have now had almost a decade in working under the act and the policy statements issued by the Superintendent of Real Estate (SoRE). Mortgagors and mortgage brokers, particularly those lending to developers, should be familiar with the provisions of REDMA.

This spring the B.C. Government introduced the *Miscellaneous Statutes Amendment Act, 2014* (Bill 17), which provided a number of refinements to REDMA that will assist developers in marketing their projects. Bill 17 received Royal Assent on 29 May and is now in force, though further regulations are anticipated.

Delivery of Disclosure Statements

REDMA has been amended to allow developers to deliver Disclosure Statements and Amendments to Disclosure Statements to purchasers by electronic means (e.g. fax or email), as long as the purchaser has provided their written consent to this delivery method. Developers should consider revising their standard purchase agreements to provide for electronic delivery of Disclosure Statements and Amendments to Disclosure. Developers will still be required to obtain acknowledgment of receipt of Disclosure Statements and Amendments to Disclosure from purchasers and care must be taken to ensure receipts are obtained and retained in every case. The lack of an email 'bounce back' may not be sufficient evidence of receipt.

Consolidated Disclosure Statements

With more and more Amendments to Disclosure Statements being required as projects become more complex and to ensure compliance with recent REDMA court decisions, it can be daunting for a new purchaser to be provided with a Disclosure Statement and several Amendments to Disclosure Statement running to hundreds of pages in length.

To address confusion among pre-sale purchasers, some developers adopted the practice of issuing Consolidated Disclosure Statements (CDS) that consolidated all of the amendments to a Disclosure Statement into a single document. Although this practice has been used for a number of years, there was previously no statutory authority to do so.

More recently, with the increased litigation in the pre-sales market, developers and their lawyers were reluctant to use CDS, even if they were easier for purchasers to understand. REDMA has now been amended to specifically authorize the use of CDS for new purchasers. Developers who use a CDS must still file a traditional Amendment to Disclosure Statement with the SoRE, amending the original Disclosure Statement and deliver the Amendment to Disclosure Statement to existing purchasers. They ▶

must also file the CDS with the SoRE, with the CDS being delivered to new purchasers. The original Disclosure Statement and all its Amendments must be provided at no cost to a purchaser within 30 days of written request.

Care must be taken to ensure that the CDS correctly reflects the cumulative effect of all of the amendments to the Disclosure Statement up to the date of the CDS.

Phase Disclosure Statement

Just as the CDS are useful in many situations, the amendments to REDMA allow for the provision of a Phase Disclosure Statement (PDS). A PDS consolidates all of the amendments to the original Disclosure Statement including those related to the new phase, into a single Disclosure Statement.

It allows developers of phased strata developments to market strata lots in phases subsequent to the first phase by filing a PDS, but only if the developer is not then marketing any strata lots in previous phases. This means the developer can provide new purchasers in a new phase with a single document that is easier to understand than a Disclosure Statement with a thick set of amendments.

This is useful only where the developer is not marketing any strata lots in earlier phases, and thus cannot be used to market units in the next phase when an earlier phase is still being marketed. It can be used where an earlier phase is sold out but construction is not yet completed, provided all marketing (such as getting back up offers) has ceased.

Post-Closing Rescission

REDMA currently provides that even if the sale of a strata lot has closed and title has transferred to a purchaser, a purchaser who was entitled to receive a Disclosure Statement (including an Amendment to Disclosure Statement) but does not receive one, may rescind the purchase agreement at any time. The Bill 17 amendments limit post-closing rescissions to situations in which the Disclosure Statement or Amendment to Disclosure Statement that should have been provided to the purchaser (but was not) discloses or would have disclosed facts that were material at the time of rescission or closing and were reasonably relevant to

the purchaser. The amendments to REDMA prevent a purchaser from rescinding their agreement for technical reasons that are not actually relevant to the purchaser.

Regardless of materiality the REDMA amendment also prohibits post-closing rescissions when a purchaser has owned a unit for a year or more. This one-year limitation period for post-closing rescissions applies however, only to situations where an Amendment to Disclosure Statement was not delivered. If a developer has failed to deliver a Disclosure Statement to a purchaser, then there is no one-year limitation period.

Finally, the amendments to REDMA allow the developer to seek a court order that would allow the developer to collect market rent from purchasers that have rescinded their units after closing.

Notwithstanding the amendments to REDMA, it remains vital that developers ensure Disclosure Statements and Amendments to Disclosure Statement are provided to purchasers and receipts obtained.

Not a developer

There has occasionally been some confusion as to who constitutes a "developer" under REDMA. The way certain developers or development groups are structured often complicates the analysis. The amendments to REDMA allow the government, through regulations to be adopted, to exclude a person or class of persons from being a 'developer' under REDMA and therefore the obligation to sign a Disclosure Statement. It is anticipated that this exclusion will apply to universities or municipalities granting ground leases to developers of leasehold strata developments. It may be broadened to address nominees and bare trustees in certain situations. Until the regulations are adopted the exemptions remain unknown.

Releasing deposits

Since its adoption, REDMA has provided that trustees (such as the developer's law firm) holding deposits could release the deposit to the developer if the purchaser fails to pay the next deposit.

The amendment makes it easier for developers to receive deposits from trustees (such as the developer's law firm) in the event that a purchaser defaults in paying a subsequent deposit (e.g. a second or third deposit), by expressly permitting the trustee to release the deposit to the developer, upon receipt of a certificate from the developer certifying that the purchaser has failed to pay a subsequent deposit. The amendments further clarify that the failure to pay the balance of the purchase price is considered to be a non-payment of a subsequent deposit.

Effect of Non-Compliant Disclosure Statements

Section 23 of REDMA was always troubling in that it provided that when Part 2 of REDMA (the marketing and holding of deposits part of REDMA including the Disclosure Statement obligations) was breached, any purchase agreement was not enforceable against a purchaser.

The amendment in Bill 17 makes purchase agreements enforceable where Part 2 of REDMA has been breached by the developer where:

- The breach involves a Disclosure Statement that does not comply with Part 2 of REDMA but contained no misrepresentation of a material fact that was or would have been reasonably relevant to the purchaser; or
- The developer was unaware of the misrepresentation at the time they entered into the purchase agreement and the misrepresentation is corrected in an Amendment to Disclosure Statement that is:
  - filed with the SoRE no later than 30 days after the developer becomes aware of the misrepresentation and the Amendment to Disclosure Statement is provided to the purchaser within a reasonable time after filing; and,
  - filed with the SoRE and provided to the purchaser no later than 14 days before the date on which the purchase agreement requires the developer to transfer title to the purchaser. ■

Ed Wilson is Partner Real Estate Group, Lawson Lundell LLP.