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Recommendations to BCFSA on proposed B.C. Government Cooling-Off Period Legislation and Other Real Estate Consumer Protection Measures

Introduction

On behalf of Mortgage Professionals Canada (MPC) members, we thank BCFSA for the opportunity to discuss how the provincial government's proposed "cooling off period" legislation and other real estate consumer protection measures may benefit and/or harm buyers and sellers in British Columbia. We also want to thank the B.C. Government for their proactive and honest approach in trying to understand the complex issues related to housing.

One of MPC's primary roles is to represent the mortgage broker channel and its participating businesses' interests to governments across Canada. With the B.C. Government proceeding with legislation related to an issue the federal government is advocating for (the Liberal Party of Canada's "[Home Buyers' Bill of Rights](#)"), this provincial consultation on "cooling off period" legislation has become a likely legislative precedent for real estate across Canada, an issue of national relevance to real estate consumers and industry professionals, homeowners and home buyers. This is why MPC feels this exercise is important not just to our over 1,500 members in B.C. but to our over 14,500 members across Canada.

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MPC has been actively discussing real estate issues with B.C.'s policymakers. President & CEO, Paul Taylor, and Director of Government Relations, J.P. Boutros, took part in BCFSA's informative January 20 roundtable discussion on the proposed legislation with other invited stakeholders. Our B.C. Chapter, representing our over 1,500 MPC members from the province, recently took part in discussions with [dozens of B.C. Members of Legislative Assembly](#), focusing on real estate, housing supply, and first-time home buyers. We also met recently with Attorney General and Minister Responsible for Housing David Eby and his staff for a sharing of ideas. We appreciate the efforts of everyone who took part. On a slight aside, Minister Eby's [recent comments](#) on housing supply and potentially introducing legislation in 2022 to accelerate housing supply were met with strong approval by members within and outside of B.C., as MPC strongly feels that inadequate housing supply is the top reason for housing price escalations.

In order to assist in your consultation, we have compiled comments from members in B.C. addressing your discussion paper's three key topics related to real estate consumer protection:

- A. Cooling Off Period Legislation
- B. Addressing Risks of Unconditional Offers
- C. Alternatives and Enhancements to Blind Bidding



Opening Comments

An important point we feel must be addressed from the onset is that we are unable to determine the government's intent behind a "cooling off period", as the term can be interpreted in different ways.

The B.C. Government announced in its [November 4, 2021 press release](#) its intention to have "enabling legislation for cooling off periods... drafted and targeted for introduction in spring 2022." In that press release, a "cooling off period" was specifically described as: *"limited periods of time in which buyers can change their minds and cancel the purchase with no or diminished legal consequences."*

The [Terms of Reference](#) document for this consultation says a cooling off period *"will give buyers the right to withdraw a purchase agreement within a specified period of time after an offer is accepted."*

[BCFSA's website](#) provides this answer to its question, "What is a cooling off period?": *"A cooling-off period gives buyers time to undertake due diligence when making a property purchase and provides the right to withdraw from a purchase agreement within a specified period of time after an offer is accepted."*

On Page 6 of BCFSA's December 2021 "Cooling-Off Period and Real Estate Consumer Protection Measures" discussion paper (the document MPC and other major stakeholders were asked to refer to in order to comment on the legislation) a "cooling off period" is defined as *"a legislated time frame after a seller accepts an offer to purchase a property during which a prospective buyer may rescind their offer if they are not satisfied with an aspect of their purchase. A cooling-off period provides an opportunity for buyers to complete due diligence on a real estate transaction before the contract is binding."*

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As these examples illustrate, a "cooling off period" has not been clearly defined, so the government's intent is difficult to discern. The interpretation of the intended purpose of "cooling off period" significantly impacts almost all the responses to the questions BCFSA has posed in its discussion paper.

Cooling off periods are limited periods of time in which buyers can change their minds and cancel the purchase with no or diminished legal consequences. BCFSA will consult with key industry stakeholders and experts to help determine the parameters of a cooling off period for resale properties and newly built homes and will present advice to government in early 2022. Enabling legislation for cooling off periods will be drafted and targeted for introduction in spring 2022.

Real Estate Enhanced Consumer Protection Terms of Reference

On November 4, 2021 the Minister of Finance announced the government's intention to create a legislated cooling off period for resale and newly built homes. This measure will give buyers the right to withdraw a purchase agreement within a specified period of time after an offer is accepted.

What is a cooling-off period?

A cooling-off period gives buyers time to undertake due diligence when making a property purchase and provides the right to withdraw from a purchase agreement within a specified period of time after an offer is accepted.

A **cooling-off period** is a legislated time frame after a seller accepts an offer to purchase a property during which a prospective buyer may rescind their offer if they are not satisfied with an aspect of their purchase. A cooling-off period provides an opportunity for buyers to complete due diligence on a real estate transaction before the contract is binding.



A cooling off period can be interpreted as a period of time designed to serve as an appropriate due diligence time allowance to allow for inspections, appraisals, or other technical aspects of a real estate transaction. A cooling off period can also be interpreted as the colloquial understanding of the term, meaning a period of time when a purchaser can be allowed to escape a purchase agreement simply due to a variety of more emotional reasons - buyer's remorse, a short period of reflection, a realization that the purchase decision was the wrong one emotionally - but not due to any technical aspect of the purchase and sale transaction itself. The discussion paper later goes on to elicit feedback on industry sentiment toward the possible introduction of other mandatory conditions (mandatory home inspections, mandatory contract conditions and mandatory property disclosure statements).

As a general comment, if the intent is for the cooling off period to be understood as a minimum due diligence period, our expectation is that condition free offers will immediately become the norm in British Columbia as the industry begins advising its clients that the government's new legislated provision ensures this minimum period to manage these items. We can also envision, if this period is not of sufficient duration, that *many* purchase agreements will be rescinded due to a lack of time to complete traditional conditions. As a single example of the kind of challenges we see, some regions of B.C. are finding home appraiser availability is very limited due to the volume of transactions taking place. This makes expediting required appraisals for financing approval very challenging, if not impossible. The reliance upon the cooling off period rather than specifying a traditional financing condition could cause the purchase agreement to be withdrawn. As such, **the intent of the cooling off period must be a significant consideration of policymakers when determining appropriate duration**, and will have considerable impact on any discussions about the need for further mandatory conditions.

With that context set, the following responses and comments, along with supporting comments from members, address considerations for two different plausible interpretations of the B.C. Government's intent for the cooling off period: The due diligence intent and the buyer's remorse/reconsideration intent. We appreciate your consideration of our recommendations and commentary.



A. Cooling-Off Period Legislation

Question: Considering the needs of both buyers and sellers in the transaction and the practicality of completing due diligence in this time frame, how long should the cooling-off period be?

If the cooling off period is intended to permit offers to be withdrawn due to emotional considerations ("buyer's remorse"), then the cooling off period should be very short: three (3) calendar days is our recommendation. We would stress the importance of setting a time frame short enough to reinforce the perception that the cooling off period duration could not, and should not, practically be used for usual purchase and sale transaction due diligence; purchase offers should include conditions if a buyer has concerns about the property or the ability of the buyer(s) to obtain necessary financing to complete the transaction.

If the cooling off period is intended to serve as a due diligence period, we would insist on an absolute minimum of seven days, but recommend that a longer period may be more appropriate: 14 to 21 days. Given the scheduling difficulties and availability of third-party service providers in the very busy housing markets these changes are intended to assist, sensitivity to these realities must be provided.

Regardless of the duration, some risks are inherent in the implementation of a cooling off period:

- Purchasers may rely solely upon the cooling off period for protection and often not specify any conditions in their purchase offer.
- In overheated markets where subject free offers are the norm and often expected, any minimum cooling off period will likely be the maximum duration of delay that sellers will reasonably tolerate.
- If the purchaser does not specify a condition of financing or inspection, this will create a lack of transparency of the purchaser's intent, and practical ability of the purchaser to complete the transaction, to the seller.
- The over-reliance on the cooling off period to perform due diligence may result in more transactions failing.
- Failed transactions can harm the seller's ability to sell their home, as well as harm its subsequent sale price. Properties relisted for sale are known to Realtors and will create questions in the minds of purchasers as to the reason for the failure, perhaps increasing the suspicion of defects or other causes for concern with the property.
- A consequence free ability to rescind an offer creates an additional negotiation mechanism for a purchaser. Understanding the potential damage to a sale price and the distress to sellers, and the domino effect on other purchases a relisting may create, purchasers may demand a reduced purchase price or threaten a transaction withdrawal at the end of the cooling off period.



- Purchasers may also make simultaneous offers on multiple properties with the comfort that they can simply withdraw offers accepted in the event that they are successful in multiple properties. MPC believes this risk will actually increase in regions where real estate markets are cooler or typically favour the buyer.

Recommendations to mitigate risks:

- Withdrawing an offer should have some penalty if the withdrawal is due to a non-technical reason:
 - In the event the cooling off period is implemented to protect against buyer's remorse, MPC recommends requiring the withdrawing purchaser to provide the Seller with 0.25% of the agreed to purchase price. This mechanism is currently in place in New South Wales, Australia, and we see it as an acceptable minimum penalty fee (for example, \$1,875 on an offer of \$750,000), a minimally reasonable amount to compensate the Seller(s) for inconvenience and lost time, relisting costs, and a sufficient deterrent to counter abuse. That said, if these fees are to be collected with, or withheld from the return of, the purchaser's deposit, there will need to be a very clearly defined dispute resolution process.
 - If the cooling off period is implemented with due diligence in mind and the offer withdrawal is as a result of a would-be purchaser's inability to obtain required financing or defects identified with the property through an inspection, no penalty should be assigned.
- Purchasers must be required to disclose to Sellers if they have, or intend to make, concurrent offers on other properties.
- In the event the cooling off period is intended for due diligence, a minimum of three (3) property site visits must be permitted for the purchaser to conduct required inspections. Buyers can be present for all or none of the third-party visits.



B. Addressing Risks of Unconditional Offers

Questions: With the introduction of a cooling-off period, do you see a need for mandated home inspections? Why or why not?

Members appreciated the BCFA's consideration of a mandatory pre-inspection by the Sellers, including strata documents provided up front.

MPC recommends that mandated home inspections should only be considered if the cooling off period is implemented for a short time frame with no due diligence expectation.

There is strong agreement within our BC membership that issues related to real estate transactions would be reduced if comprehensive information about the home for sale was required to be made available and provided at time of listing. Many also believe inspections and appraisals should be mandatory to protect the purchaser.

A senior member of our industry suggests exploring “a collaborative approach between home inspectors and the insurance industry to create a comprehensive but point form obligatory inspection report for properties for sale, to determine their safety, insurability, and ability to finance. This would be similar to a depreciation report, would be required on all sales, and would be provided at the time of listing at the Sellers’ cost.” Such a report would make transactions smoother, “remove the concern around buyer beware, and have more meat than a Property Disclosure Statement (PDS).” We note that this would not be in lieu of a full inspection. Such a report would cover the main structural elements of a subject property, including foundation, electrical, and water. It is not meant to include the “nice to have” elements of a home purchase, but the items which truly matter, the elements insurers and lenders care most about. Obligating sellers of residential homes to provide such detailed information about the home they wish to list can benefit all participants in a transaction, including mortgage professionals.

Question: With the introduction of a cooling-off period, do you see a need for mandatory condition precedents?

Generally speaking, mortgage professionals often lament how many buyers make subject-free offers. Mortgage professionals have a strong preference (naturally, considering their roles in the process) for bidders to make all presented offers “subject to financing”. A continually stated concern during our consultations in preparation for this submission was that a legislated cooling off period could lead to subject-free offers becoming the norm.



Question: With the implementation of a cooling-off period, do you see a need for mandatory property disclosure statements?

There is broad agreement that fully completed property disclosure statements (PDS) documents are essential. However, there are several questions and areas within the PDS that permit "does not know" responses. In our view, "does not know" is an unacceptable response and details should be determined and attested to by the seller in all instances where it is reasonably practical to do so. Without rigorous requirements to fully disclose details, such options permit sellers to avoid disclosures and potential liabilities.

Question: If a mandatory PDS was implemented, should it be mandated that it form part of the contract of purchase and sale or merely that it be provided to a buyer?

A PDS report would be significantly less meaningful if it was not referenced and formed part of the contract. Additionally, it should be clearly stated that prospective buyers should not rely on the details in a PDS if the seller is not prepared for the PDS contents to form part of the purchase and sale agreement

Questions: Are there any risks or unidentified consequences to be aware of when considering a mandatory PDS? How could these be mitigated?

MPC supports mandatory property disclosure statements completed prior to, and within 15 calendar days of, a property's listing on MLS, irrespective of a cooling off period. This should apply to each separate MLS Listing number, meaning if a property is taken off the market and relisted, it should have a new set of PDS documents.



C. Alternatives and Enhancements to Blind Bidding

Questions: What risks does open bidding present for buyers? For sellers? What unintended consequences could arise from greater use of open bidding in the purchase and sale of property? How could these be mitigated?

MPC recommends the disclosure of offers after the sale is firm. There is strong consensus against any “auction” process, seen by members as inappropriate for the B.C. market. We believe it would potentially inflate prices.

Questions: What risks does the mandatory use of escalation clauses present for buyers? For sellers?

MPC sees no benefit to, and no reason to support, any mandatory use of escalation clauses.

Questions: If disclosure of offers were mandatory in multiple offer situations, what information should be disclosed? Why?

There is demand among members for such disclosure, preferably with the names of potential buyers anonymized but their Realtors and/or agencies named in the disclosures. This process would allow for a seller to see all offers. It would also allow for losing bidders to analyze the competition they were in, the number of bidders, the number of bids, and if they were (hopefully not) unwittingly bidding against themselves. It would also protect against fake offers. Most importantly, it would keep bad actors in check.

Such disclosures would also allow policymakers to make better policy through a better understanding of a market now purposely opaque through aptly named blind bidding.

We feel that any such disclosure should be disclosed very soon **after** the purchase is firm. Practically speaking, disclosure of bids before a sale is firm is effectively an auction, albeit a slow moving one with no determined time limit. The disclosure should be made publicly available with anonymity of the seller(s) maintained. Again, bidders would be anonymized. The impetus to better understand price escalations in B.C., and the general desire for additional real estate transaction transparency by a notable majority of British Columbians, now makes such disclosure essential.

MPC also suggests BCFSa consider restricting or eliminating the practice of “bully offers”. This could reduce the more extreme tensions prospective buyers face, help level the playing field, and perhaps cool more frenzied activity. We suggest that MLS listed properties have a mandatory seven (7) calendar day listing period before offers can be accepted, allowing all potential buyers equal opportunity to view the property, and be better prepared.



Conclusion

As stated in our opening comments on this proposed legislation, we feel it is essential to have clarification from the government as to the intent of its “cooling off period” legislation. Absent this, we have attempted to give our recommendations based on two consequentially different interpretations of cooling off as presented by BCFSa and the Ministry of Finance, and trust that there is enough information here to ensure that, depending on the actual intent of the legislation, the contextually appropriate recommendation(s) from MPC will be included for consideration and deliberation.

We thank the B.C. Government for their exploration of real estate consumer protection measures. As was said earlier, this process and any resulting legislation will likely set precedents for other provinces. We welcome future opportunities to meet with Minister of Finance Selina Robinson, Attorney General and Minister for Responsible Housing David Eby, their staff, and any other B.C. policymakers responsible to discuss these measures and broader housing policy.

We thank BCFSa staff for their efforts and collaborative approach throughout this consultation process, and welcome any requests for supplementary commentary from MPC.

We also welcome the thoughts of all who might read this. If you require testimonials from our members and/or their clients, we would be pleased to help provide it. Our Director of Government Relations and Regulatory Affairs is J.P. Boutros, who can be reached at jpbutros@mympc.ca, 416-644-5466, or at our office address below.

On behalf of our over 1,500 members in B.C., thank you for considering our recommendations.

Sincerely,

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About Mortgage Professionals Canada

Mortgage Professionals Canada (MPC) is Canada’s mortgage industry association. Founded in 1994, MPC represents over 14,500 individuals and over 1,000 companies, including mortgage brokerages, lenders, insurers and industry service providers. The mortgage broker channel originates greater than 35% of all mortgages in Canada and 55% for first-time buyers, representing approximately \$110 billion dollars in annual economic activity. Our members make up the largest and most respected network of mortgage professionals in Canada, and MPC represents their interests to government, regulators, media and consumers. We are dedicated to maintaining a high standard of industry ethics, consumer protection and best practices.