

February 24, 2022

Stakeholder Engagement Team
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Re: BCFSA Consultation on Proposed B.C. Government “Cooling-Off Period” Legislation and Other Real Estate Consumer Protection Measures

The Canadian Mortgage Brokers Association - British Columbia (CMBA-BC) thanks you for the opportunity to make submissions concerning the B.C. Government's stated intention to introduce "cooling-off period" legislation and possibly other real estate consumer protection measures, such as restricting blind bidding and making certain conditions precedent mandatory.

Approach

For your ease of reference, we are answering questions in the order they are presented in the consultation document.

We have focused our comments on those matters that have the potential to most directly impact real estate buyers who use mortgage brokers to arrange financing for their purchases.

Cooling-Off Period (Parameters and Unintended Consequences)

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?

The term “cooling-off period” is a misnomer that conflates two distinct concepts, one centred on the emotional state of the buyer and the other on allowing the buyer further time to perform due diligence. The two concepts attract different considerations and need to be discussed separately.

Emotional State Basis for Cooling-Off Period

The need for a cooling-off period in relation to the emotional state of the buyer presumes that the buyer's state of mind is unduly altered by the excitement of the buying process, the pressure of the circumstances, or the desperation of wanting their offer to be accepted. The underlying assumption being that the buyer, given time to cool down from their compromised state, will make a rational decision reflecting their true circumstances.

We submit that buyers who identify a property they want to purchase are indeed under pressure to put together an offer that will be accepted by the seller. This is due not to the state of the

mind of the buyer but rather due to the state of the current marketplace – there is a shortage of supply and many buyers compete for the same property. At most, all but one of the interested buyers will be disappointed when their respective offers are not accepted. The successful buyer will have distinguished their offer from the others by having offered a higher price or other terms attractive to the seller. This buyer is viewed as needing protection, not from the seller but from their own decision; a cooling-off period imposed for this reason would have the effect of imposing the cost of protecting the buyer onto the innocent seller.

A cooling-off period based on the emotional needs of the buyer is unwarranted and should not be put into place. If it is to be put into place, it should be the shortest period possible such as to minimize the impact on the seller (such as lost opportunities to pursue other sales) and others in the real estate transaction process. For example, a short cooling-off period could avoid mortgage brokers being put in a position where they invest time, cost and effort to arrange a mortgage in a transaction from which the buyer can walk away without reason. The buyer should not be empowered to, on a whim, shift the cost of their changed decision onto others in the real estate transaction process.

Due Diligence Basis for Cooling-Off Period

The need for a cooling-off period in relation to allowing time for the buyer to perform due diligence presumes that the buyer needs further information to make an informed buying decision. The change sought here is not a change in the buyer from irrational to rational but rather from uninformed to informed in relation to the property. It is not truly a matter of cooling off but one of the buyer becoming more educated as to the property that is the subject of the transaction.

We recommend buyers be required to specify what due diligence they want to perform and thresholds be set as to what would allow a buyer to back out of the transaction. For example, if the due diligence concerns the quality of well-water, then the buyer should specify whether the threshold is that the well-water be drinkable, meet certain standards, or be able to be consumed by an intended resident with a special need. Because of the variety of due diligence that can be desired and the variance in availability of experts who can assist in the process, the parties should be left to determine the duration of the due diligence clause. This would allow the seller and others in the transaction process (including mortgage brokers) the opportunity to assess whether they want to spend time, costs, and efforts while the transaction is at the whim of the buyer.

Question: What risks or unintended consequences could arise with the implementation of a cooling-off period? How could they be mitigated?

A real estate transaction is often one in a series of linked transactions. The seller in one transaction is often the buyer in the next transaction in the series. The series can be a few transactions long, but often involves twenty, thirty, forty, or more transactions. If one of the transactions does not proceed, the result can be that other transactions in the series also cannot proceed. For example, a seller may have already entered into a contract to purchase property on the condition that they are able to sell their current property by a certain date. They could then manage to find a potential buyer but be unable (in a practical sense) to remove the condition until the sale of their own property becomes unconditional. Unduly extending this

period can have the effect of raising transactional costs and other costs (such as those incurred due to delays in paying out mortgages) and correspondingly the cost of purchasing real estate.

Note that this issue arises in part because the consumer protection aspect of the contemplated changes focuses on the buyer as that consumer, when in fact the seller too is an impacted consumer in need of protection. Unduly empowering the buyer is to unduly diminish the seller.

What, if any, exemptions to the cooling-off period should be provided? Why?

In addition to examples provided in the consultation documentation, time sensitive sales (such as foreclosure proceedings) where rights expire on certain dates (such as redemption rights or conducts of sale) should be exempted from any requirements concerning cooling-off periods.

What, if any, legal consequences should buyers experience for exercising their right to cool off? Why?

A buyer should be required to prove they used best efforts to remove the due diligence conditions on which they rely to back out of the transaction. If they cannot do this, the buyer should be required to pay a fee for backing out. The amount of the fee needs to be sufficient to dissuade insincere bidders, but not so much as to trap would-be buyers who have a legitimate due diligence reason to backout. The buyer should be required to deposit the fee in a realtor's, notary's, or lawyer's account so as to ease collection costs for the seller.

What, if any, legal obligations should be placed on sellers to help ensure they do not frustrate the cooling-off period?

Sellers should be required to reasonably facilitate the buyer having the due diligence completed.

Unconditional Offers

The task of the mortgage broker is to assist with arranging financing on the transaction in the form it arrived. From a mortgage broker's perspective an unconditional offer with a completion date that allows time to arrange financing is ideal. An agreement with a subject-to-financing clause allowing adequate time to arrange a mortgage is no less attractive. This is not to suggest others in the process would not be better served otherwise.

Mortgage brokers tend to not be involved with conditions of a purchase agreement except the subject-to-financing clause. While it is true that lender-brokers (mortgage brokers who are also the lender on a transaction) could benefit from home inspection reports and property disclosure statements, they are able to arrange such inspections as they wish as part of the mortgage application process. Accordingly, we do not oppose mandatory requirements that the buyer receive the benefit of home inspection reports and property disclosure statements, but nor do we strongly suggest that such requirements be imposed. We will leave it to those involved in the process to protect the buyer in the role of buyer (such as real estate agents) rather than in the role of borrower to put forward their positions.

With the introduction of a cooling-off period, do you see a need for mandatory condition precedents? Why or why not?

Consistent with our comments throughout this submission, this question conflates emotional and due diligence concerns related to the buyer by using the term cooling-off periods to cover both. Giving the buyer a period of time to walk away from the transaction on a whim binds the seller to an agreement that does not truly bind the buyer. This offends the long-standing principle of mutuality of contract, either both parties are to be bound or neither is bound. At the very least, the duration of the period needs to be very short. However, true conditions precedent can rightfully be for longer periods of time and should accordingly be stated separately.

What, if any, condition precedents should be mandatory? Why?

As a key submission, we suggest that a subject-to-financing clause in favour of the buyer with a minimum duration of seven business days, from the time the offer becomes otherwise unconditional, be mandatory. We emphasize that seven business days should be the minimum period considered and a longer period, in light of the comments we make here, would be more appropriate.

Subject-to-financing clauses with short expiration dates are not workable where needed experts are not quickly available. For example, appraisers can be difficult to book during busy times in larger centres and often at all times in smaller centres.

We are advised by some of our members that clients in search of a mortgage often bring in agreements with short completion dates, short subject-to-financing clauses, or no subject-to-financing clause at all. This puts the buyer in a position where they either cannot secure financing to complete their purchase within the time provided or they obtain a mortgage at far less favourable terms than the market would ordinarily dictate. A reasonable subject-to-financing clause, coupled with the following suggestions, would not put the buyer in a position to walk away from the transaction on a whim.

What risks or unintended consequences could arise with the implementation of mandatory condition precedents? How could they be mitigated?

Buyers could use the subject-to-financing clause to walk away on a whim. It is true that courts have sometimes implied a term requiring the buyer to have used best efforts to obtain financing and imposed liability accordingly, but the litigation process can be an expensive solution. In order to exercise the right to walk away based on a subject-to-financing clause, the buyer should be required to demonstrate to the seller having used best efforts to obtain the financing specified as being needed.

What, if any, exemptions should be permitted to the requirement to include mandatory contract conditions?

A buyer should be permitted to prove to the seller that financing is not required and that the otherwise mandatory subject-to-financing clause is not required. There is no reason to hold a person who truly does not need a mortgage to the requirements of a person who does.

Blind Bidding

Mortgage brokers tend to become involved in purchases after a purchase and sale has been agreed upon. Their task is to assist the buyer to arrange financing of the arrived upon purchase.

They are generally not involved in the process of the buyer and seller negotiating the terms of the sales transaction. Hence, we will leave it to those involved in that part of the process, primarily real estate agents, to comment on this part of the consultation.

Conclusion

Caution needs to be exercised to not impose permanent solutions on an ever-changing matter, especially when the goal is to protect buyers from themselves. Other solutions are possible, such as educating buyers and their real estate agents to avoid transactions that are not suitable for the buyers' circumstances.

From the perspective of mortgage brokers, a mandatory subject-to-financing clause with a minimum duration of seven business days (considerably longer is recommended) could be helpful to the buyer without compromising the seller. In order to back out of the transaction, the buyer should have to prove that best efforts were used but failed.

Finally, caution should be exercised before imposing a far from ideal, permanent solution to address a constantly changing state of affairs. Buyers' markets have existed before and undoubtedly they will again.

We thank you for the opportunity to participate in BCFSA's consultation process. We would be pleased to discuss the above recommendations in more detail or provide additional commentary.

About CMBA-BC

CMBA-BC was incorporated in 1990 to support mortgage brokers and private mortgage lenders in British Columbia. Part of its mandate is to support and enhance professionalism and ethical standards within the mortgage industry.

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