



# **Enhancing Consumer Protection in British Columbia's Real Estate Market**

**Report to the Minister of Finance**



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This report has been prepared for the Minister of Finance, and not for any other purpose. It is not intended to provide legal information or advice to the public or to be a statement of BCFSAs's present or future regulatory intentions. Readers should obtain and rely on their own legal advice in respect of any matters contained in the report.



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## Executive Summary: Introduction

BC Financial Services Authority ("BCFSA") is pleased to deliver its report, *Enhancing Consumer Protection in B.C.'s Real Estate Market*, to the Government of British Columbia.

On November 4, 2021, B.C.'s Minister of Finance announced the Government's intention to introduce a cooling-off period during real estate transactions to strengthen protection for homebuyers. The Minister also tasked BCFSA to consult key stakeholders and experts on the parameters of a cooling-off period, also referred to as a homebuyer protection period. Additional consumer protection measures to address the risk associated with unconditional offers were also considered along with potential enhancements and alternatives to blind bidding. This call to action was made within the context of heightened activity in the housing market and concerns from the public and stakeholders. On April 25, 2022, the Government passed Bill 12, amending the *Property Law Act* to enable the creation of a homebuyer protection period, which BCFSA's advice would apply to.

As the regulator for B.C.'s financial services sector,

### **BCFSA aims to promote public confidence and ensure consumers are protected during the most important financial transactions of their lives**

including the purchase or sale of a home.

This report builds on BCFSA's public interest mandate by supporting British Columbians to make informed choices in a process that should be balanced, fair, and transparent.

## For the Government's homebuyer protection period, BCFSAs advises that the period be three-business-days.



### CONSULTATION AND CONSIDERATIONS

In delivering on this important mandate from Government, BCFSAs consulted with over 140 participants. Consultation participants brought diverse backgrounds and knowledge from industries ranging from real estate and owners' associations to home inspectors, the legal community, and public interest organizations. The scope of BCFSAs's consultation was laid out in the [Terms of Reference](#) and did not include issues relating to housing affordability, or the merits of a homebuyer protection period. The consultation process involved both virtual sessions and written submissions.

BCFSAs considered all feedback and input from stakeholders, including recommendations from the British Columbia Real Estate Association's ("BCREA") position paper proposing a minimum five-day pre-offer period. BCFSAs wishes to thank all consultation participants for taking the time to contribute such thoughtful and valuable input to inform this report.

#### → BCFSAs'S ADVICE:

##### ENHANCED CONSUMER PROTECTION AND TRANSPARENCY

BCFSAs supports the Government's focus on improving consumer protection in B.C. real estate transactions.

In formulating its advice to Government regarding the parameters of the homebuyer protection period and additional consumer protection measures, BCFSAs was focused on, among other things, improving transparency in real estate transactions and, to the extent possible, balancing the unique needs of buyers and sellers.

It is a cornerstone of BCFSAs's advice to improve transparency across the continuum of the transaction process. BCFSAs believes that its advice will ensure a more open and transparent process from start to finish to help both buyers and sellers make better informed decisions.

The objectives of buyers and sellers are often opposing; while the buyer tends to be focused on securing the lowest price for the property, the seller is typically focused on securing the highest price. With home sales surging over the last two years, B.C.'s real estate market conditions have strongly favoured sellers in most regions of the province, leading to an imbalance in the competing interests of buyers and sellers.

For example, consider in an environment where supply is limited and homes often sell quickly at prices above asking, prospective buyers have often felt pressured to submit unconditional offers in trying to gain an edge over competing buyers. Conditions on an offer are intended to ensure a buyer can conduct due diligence on a property, secure financing, and get advice on other legal considerations before the sale is finalized. Submitting an offer without conditions may make the buyer's offer more attractive, but it also exposes them to significant risk as they forego an opportunity for due diligence.

Given the Government's policy direction, BCFSAs's advice has the potential to ensure a more transparent and fair process that improves consumer protection for homebuyers while not unreasonably impacting sellers.

## → BCFSA'S ADVICE:

### IMPACTS ACROSS THE LIFECYCLE OF A REAL ESTATE TRANSACTION

Per its [Terms of Reference](#) from the Government, BCFSA examined consumer protection in the context of the entire lifecycle of a real estate transaction.

Ultimately, BCFSA developed a package of advice that makes enhancements across the continuum of a real estate transaction from the date of initial listing of the property to the date a contract becomes binding on both parties. BCFSA has provided the requested advice regarding the parameters for a homebuyer protection period as part of the package.

BCFSA's advice considers the following:

#### Homebuyer Protection Period

A homebuyer protection period provides a timeframe after an offer has been accepted for homebuyers to withdraw from the agreement before they are legally bound to a purchase. During this time, a prospective buyer may conduct additional due diligence activities such as a home inspection, confirmation of financing, and seeking legal advice to help ensure they have made a well-informed decision.

**BCFSA advises Government to set parameters for a homebuyer protection period as follows:**

- Three clear business days;
- Non-waivable;
- Narrow exemptions;
- Modest termination fee (between 0.1 per cent and 0.5% of the purchase price);
- Consider requiring disclosures of other active offers by prospective buyers; and
- Require sellers to provide reasonable access to the property for buyers to perform due diligence.

The advice on the duration of a homebuyer protection period is intended to strike a balance that minimizes potential delays in the marketing process for sellers while being long enough for a buyer to perform some meaningful due diligence in most cases. Given its importance and to ensure a level playing field, BCFSA's advice is that the homebuyer protection period be non-waivable and applicable to substantially all transactions. The modest termination fee strikes a balance between discouraging frivolous offers and recognizing the disruption in the selling process.

## Pre-Offer Period

In addition to the homebuyer protection period, BCFSA advises Government to:

- Establish a five-business-day pre-offer period; and
- Require that property disclosure forms, including key strata documents, be made available to prospective buyers at the time of listing or offer for sale.

A five-business-day pre-offer period—the minimum time spent on the market before any offer can be accepted—would begin when the property is listed or offered for sale. This would give buyers the opportunity to initiate due diligence activities, while simultaneously preventing preemptive time-limited offers, often referred to as “bully offers.”

The pre-offer period was proposed by multiple participants in the consultation period. BCFSA agrees that as part of a broader set of initiatives, a pre-offer period can provide an opportunity for careful review by prospective buyers and enhance the transparency of the existing transaction process.

To support the buyer’s ability to conduct due diligence during the pre-offer period, BCFSA also advises Government to enhance transparency at the time of listing or offer for sale through mandatory property disclosure forms, including key strata documents.

## Bidding Process

BCFSA advises Government to:

- Further explore open-bid, open-end auctions to enhance transparency in the transaction process; and
- Require inclusion of standard clauses in the contract of purchase and sale.

BCFSA sees value in a model that would allow prospective buyers to know the number and content of competing offers, while providing time to adjust their offers in response to legitimate competing bids. However, further work is needed to understand the full implications of open bidding in B.C.’s real estate market.

As a measure to enhance transparency in the existing bidding model, BCFSA advises Government to consider a requirement for sellers to disclose the number and prices of offers received when multiple offers have already been submitted and prospective buyers are being asked to submit counter offers, also known as a “bidding war.”

BCFSA’s advice includes considering disclosure from the buyer to the seller of any other active offers they have made to help signal the seriousness of an offer. It also includes a requirement that the contract of purchase and sale includes standard optional clauses related to financing, home inspection, insurance, and legal advice. Mandating the standardization of optional clauses in the contract would help ensure that buyers are aware of their importance before actively considering to decline them.

## Post-Sale

BCFSA advises Government to:

- Require that sellers make a disclosure of offers to all prospective buyers who submitted an offer.

After an enforceable contract is in place, BCFSA’s advice is to require sellers to provide anonymized disclosure of offers, including the sale price and number of offers, to all prospective buyers who submitted an offer.



## → **BCFSA'S ADVICE**

### **IMPLEMENTATION**

BCFSA recognizes that its advice to Government impacts existing contract law as well as long-standing real estate transaction practices.

As such, the implementation of these enhancements will require thoughtful consideration. Further engagement with industry and an extended implementation timeframe to embed changes to industry practice as well as standard forms and contracts will be important. Sufficient lead time is also necessary for the industry and consumers to understand the details of the homebuyer protection period and ensure a successful implementation.

## → **BCFSA'S ADVICE:**


### **DELIVERING ON BCFSA'S COMMITMENT**

The measures outlined in this report are meant to be considered as a package for the benefit of British Columbians when they are buying a home. When read together, this advice aligns with BCFSA's commitment to promote confidence across the financial services sector.

A more balanced, transparent transaction process will afford British Columbians the opportunity to conduct better due diligence and build confidence in their decision-making while buying or selling a home.

BCFSA remains committed to protecting consumers within B.C.'s financial services sector, ensuring they are adequately informed, and promoting confidence when deciding to purchase or sell a home. BCFSA looks forward to discussing its advice with the Government as it works to enhance consumer protection in B.C.'s real estate market.





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**BCFSA remains committed to protecting consumers, ensuring they are adequately informed, and promoting confidence when deciding to purchase or sell a home.**



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On November 4, 2021, B.C.'s Minister of Finance (the "Minister") [announced](#) the Government's intention to introduce legislation requiring a cooling-off period for residential real estate, including both resale and newly built homes, and to explore additional measures to further enhance transparency and protection for real estate consumers. As British Columbia's financial services regulator, BC Financial Services Authority ("BCFSA") was directed by the Minister to engage widely with industry and experts to provide advice to Government on the parameters of a cooling-off period as well as other measures that could enhance transparency and increase protection for real estate consumers in B.C. BCFSA was not asked to consult on broader housing affordability issues or to provide advice on measures to address affordability.

The Government's news release is available in [Appendix A](#), and the Terms of Reference provided to BCFSA can be found in [Appendix B](#).

On April 25, 2022, Bill 12 was passed in the Legislature, amending the *Property Law Act*. The amended legislation provides a framework for implementation of the cooling-off period (referred to by Government as the Homebuyer Protection Period), with specific parameters to be prescribed in regulation.

BCFSA has now completed its consultations and presents this report setting out its advice to Government.

**The report is divided into several sections, including an overview of BCFSA's consultation process and advice to Government in response to the Terms of Reference. BCFSA's advice is grouped into three main sections:**

- I. [Parameters of a Cooling-off Period;](#)
- II. [Additional Measures to Address Risks Associated with Unconditional Offers; and](#)
- III. [Potential Alternatives and Enhancements to Blind Bidding.](#)

BCFSA also requested transaction data from trading services brokerages. The results of the data call will be released separately in Summer 2022.

**“BCFSA’s goal is to ensure that British Columbians are protected when buying and selling homes – one of the most important financial transactions of their lives. Both buyers and sellers need to be supported and have time to make good financial decisions.”**

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BCFSA undertook a comprehensive consultation process in order to respond to the request from the Minister. The process included 20 virtual consultation sessions and five information sessions, and involved over 140 participants from across the province. Participants included representatives from real estate industry organizations, legal experts, and those from a broader public interest perspective such as academics, economists, and public sector organizations. These sessions were held in January and February 2022. The consultation period formally closed on February 24, 2022.

Written feedback was invited from participants, providing a further opportunity to reflect on and comment on the questions brought forward in the virtual consultation sessions. BCFSA received written feedback from 27 participants.

## CONSULTATION TOPICS

**The consultation sessions sought feedback on three key areas:**

- The parameters of a legislated cooling-off period;
- The merits of additional consumer protection measures to address unconditional offers such as mandatory home inspections, mandatory contract conditions, and mandatory property disclosure forms; and
- Potential alternatives or enhancements to the current blind bidding practice that seek to increase transparency. Those included open-bid auctions, escalation clauses, and enhanced disclosure of offers in multiple offer situations.

Based on the Terms of Reference, BCFSA did not consult on the merits of a cooling-off period or on issues related to housing affordability. That said, BCFSA did receive feedback from consultation participants on the cooling-off period and recognizes that the consumer protection measures under consideration are interconnected and may have unintended consequences on the real estate market. Those consequences are noted throughout the report. See [Appendix C](#) for a summary of discussion questions provided to consultation participants.

## CONSULTATION PARTICIPANTS

Participants included groups directly involved in the real estate sector, such as industry associations and real estate boards, as well as other professionals that regularly interact with real estate transactions, such as lawyers, mortgage brokers, and home inspectors. BCFSA also consulted consumer protection experts, economists, non-profit housing providers, strata owners, and Indigenous housing organizations to ensure that their important perspectives and feedback were included in the consultation process.

**Consultation participants represented diverse perspectives including:**

- Organized real estate;
- Other real estate industry and owners' associations;
- Real estate legal community;
- Financial services providers including mortgage brokers, lenders, and insurance providers;
- Home inspectors;
- Appraisers;
- Public sector and crown agencies; and
- Advocacy and public interest organizations, including academics and economists.

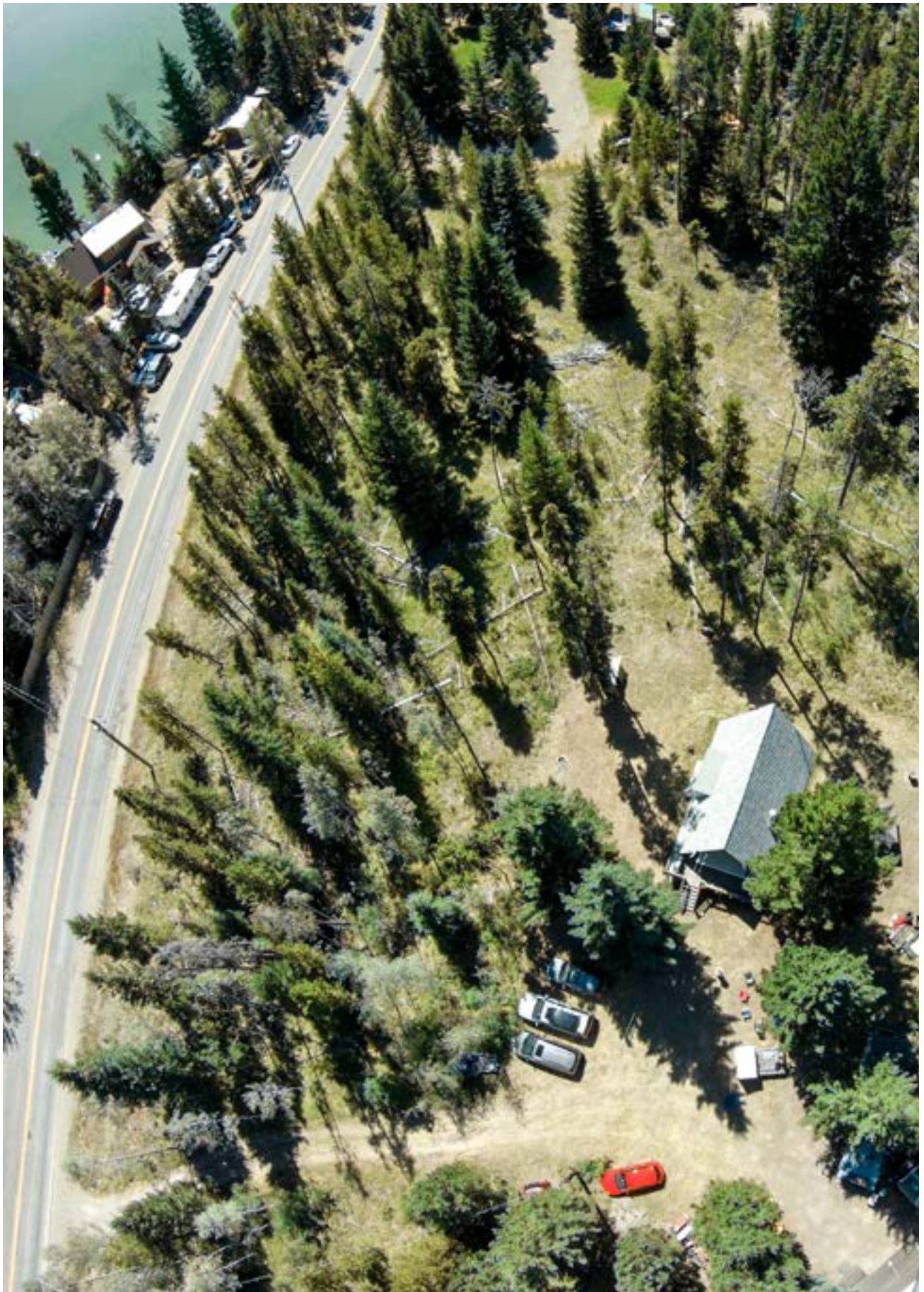
A list of the organizations that participated in the consultation sessions is provided in [Appendix D](#).

The [Terms of Reference](#) did not include public consultation with individual licensees or consumers.

## CONSULTATION PRINCIPLES

### Summary of Discussion Questions (continued)

Targeted Approach	The objective of the consultation was to receive targeted input on the parameters of the cooling-off period in light of Government's decision to legislate a cooling-off period. As a result, the consultation did not canvas perspectives on the merits of implementing a cooling-off period.
Diverse Perspectives	With the goal of enhancing consumer protection, BCFSa invited participation from diverse perspectives to assess the potential impacts of the measures considered.
Informed Participation	To support informed participation, BCFSa shared a discussion paper with participants well in advance of its consultation sessions. The discussion paper provided relevant background and contextual information to help make topics accessible for all participants, including those whose expertise is not specific to real estate services.
Building Connections	BCFSa welcomed the opportunity to strengthen positive stakeholder relationships for the benefit of B.C.'s real estate consumers.



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BCFSA is responsible for ensuring businesses and individuals who provide real estate services in the province uphold standards of conduct and are appropriately licensed. Real estate services include providing services to buy, sell, or lease property, or manage rental or strata property on behalf of another party for or in expectation of remuneration. While B.C.'s regulatory framework recognizes three categories of real estate services – trading services, rental property management services, and strata management services – this report considers trading services only (buying, selling, or leasing real estate). Licensees who provide trading services are commonly referred to as real estate agents.

In B.C., individuals and businesses that provide real estate services are regulated by the *Real Estate Services Act* (“RESA”), the Real Estate Services Regulation (“Regulation”), and the Real Estate Services Rules (“Rules”).

**Among a licensee’s most important responsibilities are their duties to clients. This includes:**

- Acting in the best interests of the client;
- Acting in accordance with the lawful instructions of the client;
- Acting only in the scope of the authority given by the client;
- Maintaining the confidentiality of the client’s information;
- Disclosing to the client all known material information about a trade in real estate;
- Communicating all offers to the client in a timely, objective, and unbiased manner;
- Using reasonable efforts to discover relevant facts regarding any real estate the client is considering acquiring;
- Taking reasonable steps to avoid any conflict of interest; and
- Promptly and fully disclosing a conflict of interest to the client where it exists.



**Licensees are also required to follow other standards of conduct. Central to the issues being considered in this report are the following:**

- When providing real estate services, licensees must act honestly and with reasonable care and skill. These duties apply to all interactions in relation to real estate services offered by a licensee and are not exclusive to their interactions with clients;
- A licensee who receives a signed offer to acquire or dispose of real estate must promptly communicate the offer to the relevant party to the trade in real estate; and
- A licensee who has obtained a signed acceptance of an offer to acquire or dispose of real estate must promptly deliver a copy of the signed acceptance to each of the parties to the trade and the licensee's related brokerage.

BCFSA produces comprehensive guidelines and practice resources for licensees in its [on its website](#). These principles-based guidelines provide best practices and set out the regulator's expectations. In relation to multiple offer situations, BCFSA's guidelines rely on the licensee's duties to clients to guide how offers are presented, countered, and accepted.

In B.C., a licensee may not provide real estate services to both the buyer and the seller in the same transaction – a practice known as dual agency. A narrow exemption to the restriction on dual agency is provided for real estate in remote communities that are underserved by licensees.

**In practical application, a licensee's duties result in very different outcomes depending on which party they represent in a transaction, given that buyers' and sellers' interests are often fundamentally opposed. For example:**

- A seller generally wants to reach the maximum price possible for their property; and
- A buyer generally wants to purchase at the lowest price possible.

In both scenarios, it is the licensee's duty to advise their client on the risks and implications of various marketing and negotiating strategies and to follow their client's lawful instructions on how to proceed. The implications of a licensee's duties to their clients are explored in greater detail below (see Additional Measures to Address the Risks Associated with Unconditional Offers and Alternatives and Enhancements to Blind Bidding).

It is important to note that BCFSA's regulatory authorities only extend to overseeing businesses and individuals who provide real estate services under RESA. BCFSA does not have authority to regulate consumer behaviour or activities directly (for example, regulating the actions of buyers and sellers).

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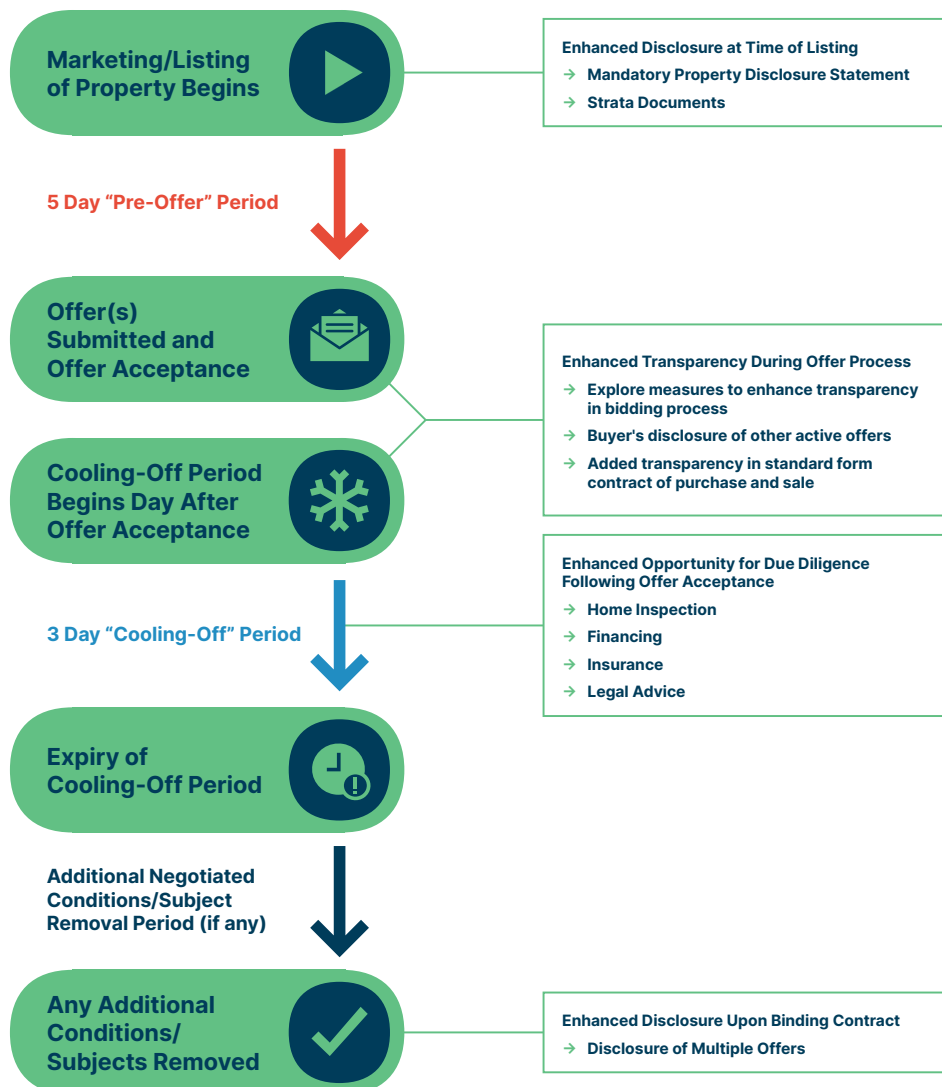
With the passage of amendments of the *Property Law Act*, Government provided a clear path forward to implement a cooling-off period. Within that context, BCFSAs has taken a holistic approach that considers the interests of both buyers and sellers as well as reflects the diverse and often conflicting perspectives of consultation participants.

**BCFSA's advice is intended to:**

- Withstand changing market conditions;
- Consider regional differences; and
- Consider the interests of buyers and sellers in B.C.'s real estate market.

Figure 1 below provides a high-level overview of BCFSAs's advice. As the graphic illustrates, BCFSAs recommends introducing measures to enhance protection for consumers at every stage of the real estate transaction process. Given the interdependencies between the measures, the advice is intended to be considered as a package of measures designed to enhance consumer protection. Advice given in one area has, in some cases, directly impacted BCFSAs's advice in another.

**Figure 1: Summary of Advice Timeline**



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## BACKGROUND

A **cooling-off period** is a limited period of time, established in legislation, in which buyers can change their minds and cancel the purchase with no or diminished legal consequences.

**During the cooling-off period, the buyer may complete due diligence activities to help them make an informed decision about their purchase before their offer is legally binding. Those activities could include:**

- Undertaking inspections of the property;
- Reviewing relevant documents regarding the property; and
- Confirming financing with a lender.

A cooling-off period may protect consumers from the risks associated with unconditional offers as well as present an opportunity to reduce the stress and pressure associated with the transaction process.

## PRACTICES IN OTHER JURISDICTIONS

In B.C. and other parts of Canada, various consumer protection statutes provide for cooling-off periods for a range of consumer contracts, such as door-to-door sales, gym memberships, and cellular phone services. While these consumer protection measures vary, it is generally rare that a fee is imposed upon a consumer who chooses to cool off.

Several Canadian jurisdictions provide a contract rescission period for the purchase of new real estate development units, such as strata-titled apartments and townhouses. For example, in B.C., the *Real Estate Development Marketing Act* provides a seven-day rescission period for consumers who purchase a pre-sale development unit. While several international jurisdictions provide cooling-off periods for re-sales of homes, the only Canadian example identified was Manitoba's *Condominium Act*, which provides a seven-day cooling-off period for purchasers of condominium units, including re-sales.

See [Appendix E](#) for additional highlights of BCFSAs' jurisdictional scan.



## WHAT WE HEARD: CONSULTATION HIGHLIGHTS

Through its consultation, BCFSA engaged a diverse cross-section of participants, including key real estate organizations and experts who shared their perspectives on the potential parameters of a cooling-off period. Input received during the consultation was wide-ranging and broad-based. Participants in some cases expressed divergent views on the issues under consultation. In light of Government's decision to implement a cooling-off period, as reflected in the November 4, 2021, announcement, BCFSA's consultation did not canvas perspectives of the merits of a cooling-off period. Below is a summary of the key highlights from the consultation.

### **No clear consensus on the appropriate duration of the cooling-off period**

Participants suggested durations from as little as 24 hours up to seven days or longer. Those who considered a cooling-off period simply as an opportunity for sober second thought (for example, following a high-pressure bidding war) favoured shorter periods, while those who saw it as an opportunity to complete due diligence investigations preferred a longer cooling-off period.

Perspectives varied even within the same industry (for example, home inspectors, appraisers, mortgage brokers) on what a reasonable period might be and how long it might take to complete due diligence on a property. Many in those industries favoured a longer due diligence period. There was recognition that robust due diligence could take several weeks in rural and remote communities where it might be difficult for all consumers to access home inspectors within a tight timeframe.

### **Limited support for exemptions to the cooling-off period**

Most participants agreed that exemptions to the cooling-off period should not be permitted, as they would unduly privilege buyers who were able to get an exemption. There was some support for considering potential exemptions for commercial properties, investment properties, newly built homes with a home warranty, estate sales, and sales conducted on behalf of an owner by a provincial body (for example, Office of the Public Guardian and Trustee).

### **Differing opinions on waiving the cooling-off period**

Participants did not reach consensus on whether prospective buyers should be able to waive the cooling-off period. Some participants stated that prospective buyers should be provided this ability and explained that it would enable buyers to differentiate their offers based on terms other than price. Others disagreed, noting that allowing waivers would create pressure on buyers to forgo cooling-off in addition to contract conditions.

### **No consensus on termination fees**

There was considerable discussion during the consultation as to whether the implementation of a cooling-off period would enable buyers to place frivolous offers on properties or "option" multiple properties concurrently while deciding which purchase to complete. No clear consensus was reached regarding what, if any, legal or financial consequences should be imposed on buyers to deter frivolous offers.

Many participants indicated that buyers who cool off should be required to pay a fee to terminate their purchase. Others pointed out that such a fee may be contrary to the intent of protecting consumers and would penalize buyers for making an informed decision about their purchase.



The appropriate amount of a termination fee stirred debate. Some participants advocated for a significant fee to penalize buyers who cool off, while others supported no fee or a modest fee only. Other participants suggested that the fee should increase in relation to the duration of the cooling-off period.

### **Debate about sellers' obligations**

A point of heated discussion was whether sellers should have explicit legal obligations to cooperate with prospective buyers by **facilitating access to the property** for home inspections during the cooling-off period.

Some participants, particularly those from organized real estate associations and licensees, warned that some sellers may attempt to frustrate the cooling-off period by refusing to provide access to home inspectors or other professionals engaged by the buyer. Presently, buyers who wish to complete due diligence such as a home inspection can make their offer to purchase subject to the satisfactory completion of an inspection. By accepting the offer, sellers are also, by implication, agreeing to provide access to the property for the purposes of an inspection.

### **Diverse views on unintended consequences**

Consultation participants offered a range of perspectives regarding potential unintended consequences of a cooling-off period, including:

- Potential harm to a seller's interests (for example, buyers rescinding offers if market conditions shift suddenly, buyers threatening to cool off if the seller does not agree to a lower sale price, known as "gazundering", and stigmatization of a property if multiple buyers cool off from the purchase of a specific property);

- Potential increase in demand for properties and multiple offer situations;
- Further price escalation as a result of reduced consequences to placing an offer on a property;
- Domino effect on other transactions that are part of a "chain" (for example, where a seller is also purchasing another property);
- Additional uncertainty in a rapidly changing real estate market;
- Application of a provincewide measure to very different regional real estate market conditions; and
- Potential to create additional consumer risks. Including the possibility of:
  - Driving sellers into the "unregulated" real estate market (for example, for sale by owner where the consumer protection measures provided by the real estate services regulatory framework do not apply) if the cooling-off period were applied only to transactions involving the services of a licensee; and
  - Having buyers offer – or sellers request – large non-refundable deposits as an alternate means to signal "commitment" to a transaction.

### **Support for the cooling-off period**

Although the merits of a cooling-off period were not part of BCFSAs' consultation mandate, many participants shared their views on whether a cooling-off period is needed. In general, participants from groups who were closest to the real estate transaction – such as real estate industry associations and members of the real estate legal community – were not supportive of implementing a cooling-off period. Participants who were less directly involved in real estate transactions were more likely to express neutral or supportive views.

## DISCUSSION

BCFSA's research demonstrates that parameters of a cooling-off period can vary significantly by jurisdiction. Further, BCFSA's consultation results revealed diverse opinions across and within groups of participants regarding the appropriate design parameters. With these results in mind, BCFSA has outlined a set of design parameters that considers the needs of both buyers and sellers as well as evolving and variable market conditions.

**Based on BCFSA's review of the amended *Property Law Act*, the following parameters of the cooling-off period are already set in legislation:**

- The cooling-off period applies to residential real estate sales, including newly built homes and residential re-sales;
- It does not apply to other types of real estate (for example, commercial or industrial real estate sales, development units subject to the *Real Estate Development Marketing Act*);
- The cooling-off period applies to all residential real estate transactions, including private transactions involving parties who are not represented by a trading services licensee; and
- The cooling-off period applies to buyers only and is not available to sellers.

### Duration

Although the cooling-off period is designed to protect homebuyers, BCFSA's view is that the impact on sellers should be considered. As such, BCFSA's advice is that the cooling-off period should be relatively short. Three clear business days – beginning on the day after the seller accepts the buyer's offer to purchase and ending on the third day – will provide an opportunity for the buyer to perform modest due diligence activities on the property (for example, home inspection or confirmation of financing) and make a more informed decision about the purchase.

For sellers, who will know within the week whether the buyer intends to carry out the purchase, limiting the cooling-off period to three clear business days minimizes any delay in the marketing process. Sellers who may be depending on the proceeds of the sale (for example, to finance another purchase or provide retirement income) will receive clarity on the contract in a timely manner. In cases where a buyer rescinds their offer, the seller can promptly resume marketing the property.

In less competitive markets, buyers and sellers could agree to conditions that extend beyond the three-day cooling-off period, providing time for the buyer to complete due diligence activities.

A shorter cooling-off period (for example, 24 hours) would allow for sober second thought but would not provide sufficient time for completion of any meaningful due diligence activities. On the other hand, the longer the cooling-off period, the greater the potential for unintended consequences, such as undue interruption to the marketing process.

### Waivers

BCFSA understands that the cooling-off period is intended to provide time for buyers to perform due diligence on a property before being bound to a contract. With this objective in mind, BCFSA advises against permitting buyers to waive the cooling-off period.

While there are circumstances where buyers may choose not to perform due diligence activities on a purchase, providing for waivers is likely to put pressure on buyers to show their commitment to the seller by waiving the cooling-off period. This would be contrary to the consumer protection purpose of a cooling-off period and could result in situations similar to those currently prevalent in some markets in B.C. where buyers may feel pressured to waive due diligence conditions. The Government may wish to consider regulations permitting waivers in the future if a specific need arises.

## Exemptions

Exemptions to the cooling-off period could be based on buyer characteristics, seller characteristics, or characteristics of the sale process. Consultation participants noted that providing exemptions based on buyer characteristics could advantage exempt buyers (for example, corporations) and would add complexity to the sale process (for example, determining whether a buyer is eligible for the cooling-off period).

**There may be situations where a cooling-off period may unduly harm sellers' interests. BCFSA advises the Government to consider creating narrow exemptions to the cooling-off period based on characteristics of the sale process. In addition to the exemptions already identified in the amended *Property Law Act*, other exemptions should, at a minimum, include:**

- Court-ordered sales/sales under court's conduct;
- Sales by auction; and
- Sales where the buyer has previously made an offer to purchase the same property within a prescribed time.

In these situations, both parties to the sale and any licensees representing them can determine up front that the sale is exempt from the cooling-off period. That way, they avoid uncertainty and disputes related to the applicability of the cooling-off period to the transaction.

Further consideration of the interests of provincial bodies in the sale of residential real estate (for example, Office of the Public Guardian and Trustee) is recommended to identify whether additional potential exemptions may be appropriate.

## Termination Fee

BCFSA advises establishing a modest termination fee (for example, 0.1 to 0.5 per cent of the purchase price) to be paid by buyers who exercise their right to cool off.

Presently, a prospective buyer who concurrently submits multiple unconditional offers to purchase a home faces significant potential legal consequences (for example, litigation) if more than one offer is accepted and they are unable to complete multiple purchases. During the consultation, BCFSA heard

concerns about the potential for non-serious buyers to make frivolous offers, since a cooling-off period would reduce the legal consequences for buyers who decide to walk away from a home purchase. As well, serious buyers could potentially place multiple concurrent offers on properties to see which offers are accepted and then decide about which purchase to follow through.

Several Australian states require buyers who cool off to pay a termination fee, ranging from a flat fee of \$100 to an amount equivalent to 0.2 to 0.25 per cent of the purchase price. In Québec, developers of pre-sale strata units can negotiate a contract termination fee with buyers, up to a maximum of 0.5 per cent of the purchase price.

A nominal fee can help deter frivolous offers by the average buyer but may not deter frivolous offers from wealthy or sophisticated buyers (for example, corporations and investors). As well, applying a termination fee to all transactions where a buyer cools off would penalize buyers who decide to cool off based on legitimate concerns or issues identified during their due diligence investigations (for example, undisclosed latent defects and inability to secure financing). In this situation, a blanket termination fee would appear to be contrary to the policy intent of providing an opportunity for buyers to make an informed purchase decision based on due diligence activities.

Government may wish to consider whether to prescribe exemptions to the termination fee to address this type of situation and avoid the perception of penalizing buyers for conducting due diligence. For example, a buyer could be allowed to cool off without penalty if they provide the seller with a home inspection report or proof from a financial institution that they were unable to acquire financing. Government will need to consider how to termination fee interacts with contract conditions which may be agreed to by the buyer and seller. BCFSA recognizes that any exemptions from a termination fee would likely increase the complexity of the mechanism for payment of the fee and must be thoughtfully considered.

### Disclosure of Active Offers

Government may wish to consider implementing a requirement for buyers to make a disclosure to sellers of any other active offers they have made. This disclosure would provide information to the seller to guide their decision-making about accepting the offer, given the potential that the buyer may walk away from the purchase for reasons other than the results of their due diligence inspections. It may also give buyers pause in submitting multiple concurrent offers or prompt sellers to query prospective buyers about whether they are seeking to purchase multiple homes.

### Access to Property

During the consultation, BCFSa heard concerns about the potential that sellers may refuse to provide buyers with access to the property to conduct due diligence inspections during the cooling-off period.

When a seller accepts an offer that includes conditions such as due diligence inspections, they agree to give access to the property for the buyer to complete the specified inspections. However, a seller who accepts an unconditional offer with a cooling-off period has not reached an agreement with the buyer about access to the property.

BCFSa advises that a legal right of access to the property should be provided for professionals engaged by or on behalf of the buyer to perform due diligence inspections. In the absence of this right of access, or some other means of securing access to the property, the policy intent of the cooling-off period may fail to achieve its objectives. A legal requirement for sellers to provide access would also assist licensees in advising their seller clients on the importance of cooperating with the buyer's requests.

## ADVICE TO GOVERNMENT:

### PARAMETERS OF A COOLING-OFF PERIOD

#### 1. BCFSa advises Government to implement the following design parameters of a cooling-off period:

- a. Duration – Provide three clear business days, beginning on the day after the seller accepts the buyer's offer to purchase, for the buyer to exercise their right to cool off.
- b. Waivers – Do not allow the cooling-off period to be waivable.
- c. Exemptions – Provide for narrow exemptions to the cooling-off period based on characteristics of the sale process. At a minimum, exemptions should include:
  - Court-ordered sales / sales under court's conduct;
  - Sales by auction; and
  - Sales where a buyer has previously made an offer to purchase the same property within a prescribed time period.
- d. Termination Fee – To prevent frivolous offers, establish a modest termination fee (for example, 0.1 to 0.5 per cent of the purchase price) paid by buyers who exercise their right to cool off. Consideration could also be given to creating exemptions from the termination fee where buyers who exercise their right to cool off can demonstrate that they have completed due-diligence activities during the cooling-off period.
- e. Disclosure of Active Offers – Consider requiring buyers to make a disclosure to sellers of any other offers that they have made that are currently active.
- f. Access to Property – Establish an explicit requirement for sellers to provide reasonable access to the property for professionals engaged by or on behalf of the buyer to perform due diligence inspections.

It merits noting that a cooling-off period is a significant change to contract law and implementation requires thoughtful consideration, including further consultation with industry on the regulation and time for changes to be embedded in industry practice and standard forms. Sufficient lead time is required for industry and consumers to understand the operation of the cooling-off period prior to implementation. See [Appendix F](#) for additional matters Government should consider in implementing a cooling-off period.



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An unconditional offer is an offer to purchase a property without any conditions. Conditions – also known as “conditions precedent,” “subjects,” or “subject to clauses” – are clauses which provide specific conditions that must be fulfilled before a contract of purchase and sale are considered binding on the parties to the contract (buyer and seller). Conditions clauses may be included in an offer to the benefit of either the buyer or the seller. Common conditions that may protect buyers include a satisfactory home inspection, confirmation of financing and insurance, and legal advice.

When multiple prospective buyers are interested in the same property, buyers may feel pressured to waive contractual terms and conditions that would otherwise protect them. They may submit an unconditional or “subject-free” offer to make their offer more attractive to the seller.

**This practice leaves buyers potentially exposed to serious risks such as:**

- Inability to secure financing or obtain legal advice;
- Costly repairs; and
- Large strata special levies.

Real estate transactions in B.C., as in many other jurisdictions across North America, operate under the legal principle of “*caveat emptor*” or “let the buyer beware”. Buyers who do not undertake due diligence inspections of a property prior to purchase may not be entitled to a remedy from the seller if they discover deficiencies later.

Given that a home is one of the most expensive and important purchases that most consumers will ever make, it is important for buyers to know as much as they can about a property before they commit to buying it. However, when a buyer makes an unconditional offer, in some cases they agree to purchase the home with very limited information. In an active market, a buyer may only see a property once before offers are due or they may never see the property in person and may be relying solely on photos and the limited information disclosed by the seller or their licensee.

Without detailed information on the property, a buyer may later discover serious issues with the structure or land, such as foundation damage, soil contamination, poor insulation, or water damage. Not only are these issues costly to repair or potentially hazardous, but they may also impact a buyer’s ability to secure financing or home insurance.

**As part of its consultation, BCFSA explored measures to address the risks associated with unconditional offers including:**

- mandatory home inspections;
- mandatory contract conditions; and
- mandatory property disclosure forms.

**During the consultation sessions, BCFSA received additional feedback in relation to two areas:**

- a “pre-offer” period (mandatory minimum time on market); and
- mandatory disclosure of strata documents at time of listing/marketing.

A “pre-offer” period and mandatory disclosure of strata documents are discussed in greater detail in this section of the report.

**Regulatory Framework and Industry Practices**

The regulatory framework is silent on unconditional offers. However, a licensee representing a buyer has a duty to act in their client’s best interest, as well as a duty to follow their client’s lawful instructions. Ultimately, it is the client who decides what level of risk they are willing to accept and instructs their agent accordingly.

In a period of strong real estate market conditions where there is significant competition for properties, such as those experienced in many parts of B.C. over the last two years, buyers feel pressure to submit unconditional offers to increase their chance of success. A prudent licensee would discuss potential offer strategies, such as unconditional offers, and their associated risks with their buyer clients. Ideally, these conversations should begin early in the client relationship before the client is facing the decision to make an unconditional offer.

Licensees representing buyers may also assist their client to undertake due diligence on a property before placing an offer.

In spring 2021, in response to heightened market conditions, BCFSa published several articles warning of the risks to consumers associated with unconditional offers and provided guidance to licensees on how to advise and protect their clients from these risks in an active real estate market. BCFSa also developed consumer resources, including a series of articles intended to help buyers and sellers navigate the challenges of a competitive market. These resources are available at [bcfsa.ca](https://bcfsa.ca).

### **Contract of Purchase and Sale**

There is currently no prescribed form for the contract of purchase and sale for residential property in B.C. In the absence of a prescribed form (that is, one legislated by Government), a variety of contract forms exist, including standard forms published by industry associations. For example, the British Columbia Real Estate Association (“BCREA”), an industry association that represents over 24,000 licensees in the province, publishes various standard forms for use by its members as a value-added service. BCREA’s standard forms are widely used by licensees and are the dominant forms used in real estate transactions in B.C.

BCREA’s standard form Contract of Purchase and Sale (“CPS”) currently provides space for consumers to identify conditions in the contract to protect their interests. In April 2021, BCREA released a new standard form, *Buyer’s Acknowledgement of Information – Recommended Conditions*, to address concerns about the pressures on buyers in an active real estate market to forego the use of conditions. The form documents that the buyer is aware of the risks of making an unconditional offer and that the buyer has instructed the licensee to make an unconditional offer on a property despite these risks. BCFSa supports the use of this form by licensees as a measure to help ensure prospective buyers make informed decisions in real estate transactions.

## **HOME INSPECTIONS**

A home inspection provides an opinion of the state or condition of a property based on a visual, non-invasive examination and assessment of key structures, features, and components. A home inspection may be initiated by either a buyer or a seller. Home inspections are typically undertaken by a licensed home inspector and are most often used to provide buyers with a list of issues, conditions, and needed repairs associated with the home they are interested in purchasing.

### **Background**

While a home inspection is unlikely to identify all defects or issues with a property (for example, latent defects), it does provide consumers with a better understanding of a property’s condition as observed at the time of inspection. The home inspection helps provide buyers with information on potential deficiencies with a home, such as health hazards, plumbing problems, and unwanted pests, which can add significant repair costs to a home purchase. When a condition is included in an offer of purchase and sale for a home inspection, the buyer can consider the results of the home inspection – and potentially renegotiate elements of the offer (for example, price reduction, completion of repairs) – before being bound to the contract.

On the surface, mandating home inspections would have several perceived benefits, the most significant being that buyers would have a better understanding of a property’s condition and would be less likely to experience an unanticipated financial hardship associated with an unknown defect with the property.

**Other potential benefits, which would depend on when the inspection was conducted (pre- or post-offer) include, but are not limited to, the following:**

- Reduced likelihood of renegotiations with the offer;
- Reduced risk of future disputes tied to misrepresentations;
- Fewer impacts to transaction timelines;
- A means of walking away from a transaction, should the results of the inspection be unsatisfactory; and
- Improved knowledge, confidence, and peace of mind.



At the same time, it is important to recognize that home inspections may not identify all problems with a home because they are generally based on a visual, non-invasive inspection and are largely dependent on the knowledge and expertise of the inspector.

### Home Inspection Challenges

In B.C., home inspectors are regulated by Consumer Protection BC under the *Business Practices and Consumer Protection Act* and the Home Inspector Licensing Regulation. There are approximately 470 licensed home inspectors in the province<sup>1</sup>. The regulation of home inspectors provides requirements related to record keeping, contracts, and written reports. It does not, however, provide industrywide inspection standards and professional ethics for licensed inspectors. Currently, the scope of work in a home inspection is negotiated between the inspector and the client and there is no regulated minimum standard of items that must be covered by an inspection.

Home inspectors may choose to be members of a home inspector's association. These associations each have their own professional requirements for their members (for example, a standard for inspection, a code of ethics, continuing education, and discipline processes). However, the voluntary nature of membership in an association may lead to inconsistency and confusion for the public (for example, different inspection standards and ethical duties) and the potential for concerns related to professional discipline in instances of home inspector misconduct.

A challenge with mandating home inspections relates to the principles of contract law, which provide that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract (known as “privity of contract”). For example, only the party who commissioned the home inspection and the home inspector themselves are parties to the contract. Third parties do not enjoy the same rights and obligations and may not have legal recourse if the inspector's results are flawed, or do not address areas of concern to the buyer. A buyer who relies on the results of a pre-listing home inspection arranged by the seller may be challenged to hold the inspector liable if the inspection failed to identify defects in the home.

Further, home inspection reports in B.C. are generally confidential and licensed home inspectors are not allowed to share their findings with anyone except their client. Exemptions include where their client gives them permission, or they feel that the contents of the report could pose a serious health and safety risk. Buyers receiving a pre-listing inspection report from a seller are not privy to the contents of the contract, including its terms and conditions. This may reduce buyers' confidence in the seller's home inspection and may result in buyers seeking out their own inspector.

Given the fluctuating nature of the real estate market, it is also challenging to determine how mandated home inspections would impact the home inspection industry. For example, it is unclear if there would initially be enough home inspectors to meet the increased demand for inspections, particularly in more rural areas of the province where there is often only a single licensed inspector serving a community. Sellers and buyers alike would experience some degree of hardship if there were not enough licensed inspectors to conduct inspections, and it may result in some buyers being forced to forgo an inspection if they are unable to acquire one before certain contractual deadlines. The high cost of inspecting isolated and remote properties could place an additional burden on individuals in remote communities.

### Practices in Other Jurisdictions: Home Inspections

BCFSA conducted a jurisdictional scan to determine whether home inspections were mandated elsewhere. In most jurisdictions, home inspections were optional. However, some jurisdictions do have regulatory requirements related to home inspections. While mandatory home inspections are not yet a widespread practice, the number of jurisdictions that are adopting legislative requirements related to home inspections is growing.

See [Appendix E](#) for additional highlights of BCFSA's jurisdictional scan.

<sup>1</sup> <https://www.consumerprotectionbc.ca/wordpress/wp-content/uploads/2021/06/CPBC-2020-Annual-Report.pdf>



### WHAT WE HEARD: CONSULTATION HIGHLIGHTS

Most participants in BCFSA's consultation did not support mandatory home inspections. While virtually all participants recognized the value of home inspections, most believed that mandating them would not be practicable given the significant challenges involved.

#### **Participants were largely concerned that there may not be an adequate supply of home inspectors in all regions.**

Given the existing labour shortages across many sectors and regions, participants advised that mandating home inspections would constrain capacity in the home inspection industry even further. Participants also noted that mandatory inspections could lead to an influx of new and inexperienced home inspectors, reducing the quality, consistency, and credibility of home inspections.

Outside of labour market issues, participants believed that the cooling-off period reduced the need for inspections to be mandatory. That is, buyers would have an opportunity to undertake a home inspection during this period regardless of whether they made their offer conditional on a satisfactory home inspection.

### Discussion

Home inspections are a useful tool to help buyers make informed purchase decisions. Prospective buyers should give serious consideration to including a condition for a satisfactory home inspection in an offer to purchase a home.

With the introduction of a cooling-off period, which provides buyers with additional time to perform due-diligence activities, it is less critical to mandate home inspections, since many buyers will be able to obtain a home inspection even if they do not make their offer subject to one.

The Office of the Superintendent of Professional Governance is currently undertaking a review to determine whether home inspectors should move to a professional governance model of regulation. This review may help to establish a more rigorous regulatory framework and resolve some of the challenges identified by consultation participants with the current home inspection regime.

Ultimately, issues with the current governance model and regulation of home inspectors would need to be addressed for mandatory home inspections to provide sufficient value and benefit to consumers in most situations. Should Government decide to pursue mandatory home inspections at a future point, a standardized home inspection report that could be relied on by third parties could be considered.

BCFSA also encourages Government to consider how home inspectors could be utilized to address the increasing climate-related risks for home buyers, such as wildfires, drought, flooding, and heat waves, which can impact many facets of a real estate purchase. As climate change intensifies, it is increasingly important for consumers to know and understand a home's energy efficiency rating, as well as a home's ability to withstand and protect occupants against an extreme weather event.

Future inspection standards could consider climate-related risks including the direct and indirect impacts of climate change on a home, developing a home maintenance plan, and assessing the durability of a home's materials and components, including its energy rating. This information is likely to be increasingly important as climate change risks intensify and related maintenance costs rise.

## PROPERTY DISCLOSURE FORMS

A property disclosure is a document completed by the seller that provides information specific to the property being sold. A property disclosure complements a home inspection and provides additional information which may not be readily discernable by a home inspection but is of interest to buyers (for example, age of key systems, date of renovations, and whether municipal permits were obtained). A property disclosure generally serves as a starting point for a buyer's due-diligence activities. While it does not include everything the buyer may want to know about a property, it provides the buyer with a basic understanding of whether the property has any current or prior issues with its land, building, or services.

### Background

In B.C., a property disclosure is usually provided to buyers once an offer is made. However, there is no rule or law requiring that it be provided at this time, and some sellers choose to provide a property disclosure when they list their property.

At common law, a seller has an obligation to disclose latent defects to a prospective buyer that may render a property unsafe or unsuitable for habitation. Latent defects are defects that cannot be easily found through a reasonable inspection of a property (for example, asbestos or mould contained within a wall). A seller can make this disclosure in various forms, but it must be done before entering into a contract to purchase with a buyer.

A completed property disclosure is one of the only ways a buyer can gain insight into a property's latent defects, as home inspectors typically do not use invasive inspection methods needed to discover latent defects.

A limitation of property disclosures, however, is that the seller's disclosure is based on their own personal knowledge of the current state of their property. While a seller cannot knowingly mislead or omit information about latent defects, they may not have complete knowledge of the condition of the property, or they may forget important information. For this reason, a buyer should be cautious about relying solely on the information in a property disclosure form and undertake their own diligence to inspect a home's condition. A property disclosure also provides a starting point for a home inspection, if shared with the inspector.

### Regulatory Framework and Industry Practices

While there is no prescribed property disclosure in B.C., BCREA publishes various property disclosure forms, called Property Disclosure Statements ("PDS"), for use by licensees who are BCREA members. These forms are widely used in real estate transactions in B.C. where one or more parties are represented by a licensee.

Although all real estate boards in B.C. make the inclusion of the property disclosure mandatory for listings that are connected to multiple listing service (MLS®) transactions, there is no statutory requirement for a seller to complete the form. Indeed, a seller may strike out the PDS instead of providing any information. For this reason, some buyers choose to make their offer conditional on a property disclosure being provided, which enables them to review the information and remove the condition upon their satisfaction with the document. Buyers may also choose to incorporate a property disclosure into a contract of purchase and sale. The inclusion of a property disclosure into a contract of purchase and sale means that the seller is generally liable for any misrepresentations in the information disclosed.

However, a seller does not have to warrant that what is in the property disclosure is factually correct, but rather they must honestly disclose their knowledge of the current situation. A property could therefore have a termite infestation, but if the seller is not aware of the termite infestation, they could disclose that they do not know of any infestation by insects or they are not aware of any infestation. In such a case, even if the property disclosure formed part of the contract, a seller would not be liable for the misrepresentation, unless the buyer could prove in court that the seller was in fact aware that there was a termite infestation (for example, the buyer later found receipts showing that the seller hired a pest control business to deal with the issue).

Ultimately, sellers must be careful with their answers in the disclosure. B.C. courts have ruled in favour of buyers who claimed a breach of contract for misrepresentations in the disclosure when evidence showed that a seller negligently or fraudulently withheld information about an issue. They have ruled in favour of sellers when a buyer claimed but was unable to prove that the seller was aware of specific issues. In other words, unless there is proof of fraud in most real estate matters around property disclosure, *caveat emptor* or “buyer beware” applies.





### **WHAT WE HEARD: CONSULTATION HIGHLIGHTS**

Consultation participants largely supported the idea of mandating the seller to complete a property disclosure. Most participants agreed that up-front disclosure to buyers is an important consumer protection mechanism. However, there was some concern with buyers potentially taking the property disclosure at face value and using it as a replacement for a home inspection. There were some concerns raised around increased seller liability.

#### **While most participants saw the value of the disclosure, they recognized its limitations.**

Because the property disclosure is based solely on an owner's understanding of their property, it will vary in terms of quality and usefulness, since owners have varying levels of knowledge about their property and its key systems.

Given its limitations, most participants wanted to see exemptions for owners who would have little knowledge of their property, such as absentee landlords, corporations, trustees, and executors. Other participants thought that exemptions should be made for properties where disclosure would have less value, such as new homes under warranty or tear downs. Conversely, some participants believed it is the owner's responsibility as a seller to have some knowledge of their property's condition and systems, and there should be no exemptions to this requirement. Despite the conflicting opinions on this subject, most participants saw value in mandating a property disclosure, provided that increased education and resources are provided to sellers and buyers to help them understand the risks and limitations of the disclosure.

BCFSA conducted a jurisdictional scan pertaining to property disclosure forms. It was found that a growing number of jurisdictions have implemented, or are looking into implementing, mandatory property disclosure forms for the sale of real property. Of note, many U.S. states have taken steps to require some form of mandatory seller disclosure.

See [Appendix E](#) for highlights of BCFSA's jurisdictional scan.

#### **Discussion**

Buyers would benefit from increased information prior to submitting an offer to purchase a property. Mandating that all sellers of residential property, whether represented or not, provide a property disclosure at the time of listing their property for sale would give buyers an opportunity to develop a more comprehensive understanding of the condition of a property before making an offer.

A mandatory property disclosure would provide for the disclosure of non-material defects, which otherwise are not required to be disclosed by a seller at common law. While these defects may not pose immediate health or safety hazards, they could later develop into larger issues that require extensive repair. Knowledge of a home's defects, whether material or not, can impact a buyer's decision to proceed with a purchase or may impact the price they are willing to pay. While it may have some limitations, a mandatory property disclosure would help protect buyers' interests in the context of such an important and costly decision.

While BCREA's PDS is used regularly, not all sellers choose to provide the PDS to potential buyers, and it is not used in unrepresented sales (for example, for sale by owner). Therefore, some buyers may lack this important information when considering a real estate purchase.

**When considering whether to mandate the usage of a property disclosure form, there are several practical issues to consider, including:**

- While a property disclosure is a useful document to buyers, it places additional liability on sellers. A seller who downplays or misrepresents a known problem of significance to help ensure the sale completes could be sued for giving false or misleading information. This can usually be prevented with sound advice from a licensee. However, unrepresented sellers may not realize the risks of filling out a property disclosure with inaccurate or misleading information.
- There is also a potential for increased costs to sellers. In some cases, mandatory disclosure of certain defects may force, or at least push, sellers towards making repairs that they may not have otherwise made if they were not obligated to disclose them. For example, if a seller must disclose that there are issues with the plumbing system, they are more likely to fix the issue before listing the property for sale. In cases where there are multiple or significant defects, a mandatory property disclosure could make a property more difficult to sell.
- Government would need to consider developing its own prescribed property disclosure form for use by licensees who are not members of BCREA and by unrepresented sellers who are selling their own home. For this document to be effective, it should work to supplement common law disclosure requirements and would require amendments from time to time to stay current with the evolving real estate industry.

**In summary, a mandated property disclosure would have many potential benefits, such as:**

- Increased information available to a buyer when considering a home for purchase;
- Increased buyer confidence in the home they are interested in purchasing;
- A smoother and less stressful or uncertain sales process; and
- Improved home inspections, as home inspectors would be aided by information contained in the property disclosure.

**ADVICE TO GOVERNMENT:**

**PROPERTY DISCLOSURE FORMS**

**2. BCFSA advises Government to:**

- a. Require sellers to provide a prescribed property disclosure form, filled out to the seller's best knowledge and ability, at the time of listing/offering for sale, for all properties subject to the cooling-off period;
- b. Where required, ensure that the property disclosure be incorporated into the contract of purchase and sale; and
- c. Consider providing exemptions or making specific sections of a property disclosure optional for certain sellers or situations, such as foreclosure or court ordered sales, newly constructed property that has never been occupied, sellers with cognitive impairments, government transfers, properties that pose health and safety risks where demolition is intended, and non-owner-occupied properties.

## CONTRACT CONDITIONS

Conditions are clauses in an offer to purchase that provide specific conditions that must be fulfilled before a contract of purchase and sale is considered binding for the buyer and seller. Conditions are discretionary, and parties may or may not decide to include them in an offer to purchase. Conditions may be included for the benefit of either party (for example, subject to the buyer obtaining a satisfactory home inspection report, or subject to the seller's purchase of another property) and are usually subject to a temporal element (for example, must be completed by a certain date).

### Common Conditions

**While the content of conditions can vary widely, common examples that may benefit a buyer include:**

- Home inspection – licensed home inspector must be allowed to inspect and report on condition of home;
- State of title – review of any charges on title;
- Fire/Property insurance – home must be insurable;
- Property disclosure – sellers are required to provide a property disclosure;
- Strata documents – seller must provide strata documents for buyer's review;
- Legal advice – buyer requires legal advice on the contract;
- Site survey – survey of property to ensure boundaries are as described and no buildings encroach on property;
- Time to sell – providing the buyer with time to enter a contract to sell their current home first;
- City planning and engineering – review of municipality documents, including permits and development records; and
- Underground oil tank scan – inspection of property to ensure it does not contain hidden oil tank.

### Background

Conditions are widely used in contracts for the purchase and sale of real estate and are an important part of a home purchase because they allow a party to carry out their due diligence before the contract becomes firm and binding. While they may seem straightforward, they are often a source of contention and have been the subject of multiple legal cases, as poorly drafted clauses can render a contract void for uncertainty, can create a bare offer or unenforceable option, or can lead to a buyer being unable to waive the clause. Therefore, parties are generally advised to be as clear and precise as possible when including conditions, especially with regards to the timing and fulfillment of the condition.

Ultimately, conditions act as a safety net. They are drafted into contracts to ensure that an event or action occurs. If that event or action does occur, the party for whose benefit the condition was included is obligated to fulfill their part of the contract (in a real estate transaction this would typically be the buyer being obligated to purchase the property). If the event or action does not occur, the party has no further obligations.

### There are two ways of implementing mandatory conditions in a contract of purchase and sale:

1. The first way is to require specific conditions in the contract and ensure they cannot be waived until a specified period, such as after an offer is accepted. For example, Government could mandate that a subject to financing clause be included in every contract of purchase and sale, and that it cannot be waived until after a seller accepts the offer. This would ensure that all contracts of purchase and sale are subject to financing, and sellers would be forced to assume that all buyers still need to confirm with their lender that they can acquire acceptable mortgage financing. In other words, by implementing mandatory conditions in this manner, sellers would never see an unconditional offer.
2. The other way to implement mandatory conditions is to require that all contracts of purchase and sale contain certain conditions but make it so they can be removed or waived at the discretion of the buyer. By doing it in this manner, sellers may receive offers with some or all the mandatory conditions, but they may also receive unconditional offers, as the buyer opted to remove the clauses from their offer.

### Industry Practices: Conditions

When purchasing a home in B.C., most buyers and sellers use a standardized CPS co-developed by BCREA and the Canadian Bar Association (BC Branch) and available to BCREA members. This document outlines the terms of the offer from a buyer to a seller in a real estate transaction, and includes items such as, purchase price, deposit, completion date, possession date, offer expiry, and terms and conditions.

BCREA's standard form CPS provides space for consumers to identify conditions in the contract to protect interests. However, given current market conditions, many buyers are opting to make offers without conditions, as this is the easiest way to make an offer more attractive without increasing the price. Sellers typically favour unconditional offers because once the offer is accepted, it is firm and binding on all parties.

As noted earlier, BCREA released a new standard form, *Buyer's Acknowledgement of Information – Recommended Conditions*, to address concerns about the pressures on buyers in an active real estate market to forego the use of conditions. The form documents that the buyer is aware of the risks of making an unconditional offer and that the buyer has instructed the licensee to make an unconditional offer on a property despite these risks.

### Practices in Other Jurisdictions: Conditions

BCFSA's jurisdictional scan did not identify any jurisdictions that require mandatory subjects and conditions in a contract of purchase and sale for real property. BCFSA identified one jurisdiction with a mandatory clause regarding conditions. However, buyers could choose whether to complete the clause.

See [Appendix E](#) for additional highlights of BCFSA's jurisdictional scan.





### **WHAT WE HEARD: CONSULTATION HIGHLIGHTS**

Overall, there was no consensus on whether specific conditions should be mandated in B.C. Some participants fully endorsed the idea of mandatory conditions. Licensees generally had mixed opinions when it came to mandatory conditions. Some did not think mandatory conditions would be feasible given each buyer's unique situation, while others saw them as a benefit for unrepresented parties since they would not be getting advice from a licensee and may not understand the importance of certain conditions.

#### **Mortgage brokers generally liked the idea of mandatory conditions, specifically a mandatory subject to financing clause.**

That is, they believed the cooling-off period could lead to an increase in unconditional offers, which could introduce challenges with buyers obtaining financing during this period.

However, other participants voiced concerns that mandatory conditions could lead to “backroom bargaining” where buyers would express their intentions of waiving the mandatory conditions as a way of enticing sellers into accepting their offer over others. Other participants did not see a need for mandatory conditions with the cooling-off period, since buyers would have time to undertake due diligence after submitting an offer.

### **Discussion**

Conditions are an important consumer protection mechanism and BCFSA sees value in requiring contracts of purchase and sale to contain standard, optional conditions related to financing, home inspection,

insurance, and legal advice. By implementing conditions in this manner, all buyers will gain an awareness of these important conditions and will have the option of including them in their offer or striking them out. By including these conditions as a standard part of a contract of purchase and sale, more buyers will likely take advantage of them and think twice before removing them. If a buyer chooses not to include the conditions in their offer, it is hoped that they will, at the very least, have a conversation with a licensee or lawyer what it means to do so.

The alternate approach—mandating specific conditions and requiring a specific period before being able to waive them—presents a number of challenges to effective implementation given the unique circumstances of different buyers. For example, a prospective buyer who intends to knock down a home and build a new one likely does not need or want a condition related to a home inspection.

Given that there is no prescribed or standard form contract of purchase and sale for real estate transactions, outside of BCREA/CBA's CPS, it may be challenging to ensure unrepresented parties or buyers working with a licensee who is not a member of an industry association would incorporate any mandated clauses into their contracts.

To ensure that all real estate consumers in B.C. use a contract for the purchase and sale of real estate that includes any mandated conditions, Government may wish to consider implementing its own standardized contract for real estate purchases. A prescribed contract, including standard conditions and property disclosure content, would provide greater consumer protection for buyers and sellers in B.C.

### **ADVICE TO GOVERNMENT:**

#### **MANDATORY CONTRACT CONDITIONS**

- BCFSA advises Government to require all contracts of purchase and sale for residential real estate to contain standard, optional conditions related to financing, home inspection, insurance, and legal advice.**



## PRE-OFFER PERIOD (MINIMUM TIME ON MARKET)

As part of its consultation, BCFSA heard considerable feedback from the real estate industry concerning the implementation of a “pre-offer” period, which would establish a minimum time on market before an offer could be accepted. On February 28, 2022, BCREA released a position paper, [“A Better Way Home: Strengthening Consumer Protection in Real Estate,”](#) which included 32 recommendations to improve protections for real estate consumers and address what BCREA considers are the root causes of B.C.’s lack of housing affordability. While the position paper was released after BCFSA’s consultation closed, its recommendations generally align with the feedback provided by BCREA and other organized real estate groups during the consultation sessions.

BCREA did not support the implementation of a cooling-off period and instead proposed a requirement for all properties to be listed for a minimum of 5 business days in a “pre-offer” period. During the pre-offer period, a prospective buyer (or their agent) could not present an offer to purchase the property.

BCREA’s position paper contends that a pre-offer period would allow prospective buyers time to conduct due diligence before making an offer on a property and would have an added benefit of combatting “bully offers.” A bully offer is a time-limited offer made by a buyer shortly after listing, ahead of a specified offer presentation date. Bully offers limit the ability for other buyers to place an offer on the property and also force the seller to make a decision on the offer without the benefit of testing the open market.

In and of itself, a “pre-offer” period is not a significant change from current practice and would continue to put buyers under pressure to conduct due diligence before submitting an offer, through home inspections at open houses or at pre-arranged times. There is also a significant up-front cost for buyers to engage a home inspector at this time, as well as a risk of “wasting” this money on an unnecessary inspection, as they do not know if their offer will be accepted. This is particularly true in an active real estate market where buyers may be competing on several properties.

A “pre-offer” period, if implemented by Government, could help prevent bully offers by making it unlawful to accept or submit such an offer. If implemented in conjunction with a cooling-off period, it would also considerably increase the ability for buyers to undertake due diligence prior to making an offer.

While enforcement of such a provision may be challenging where licensees are not involved in a transaction, BCFSA supports providing adequate time for buyers to make informed decisions about real estate purchases and taking measures to address bully offers. A five-business day minimum time on market, as suggested by BCREA, in addition to a three-day cooling-off period, provides a reasonable amount of time for consumers to make informed decisions and reduces the pressure on buyers to forgo due diligence.

### ADVICE TO GOVERNMENT:

#### PRE-OFFER PERIOD (MINIMUM TIME ON MARKET)

4. BCFSA advises Government to implement a “pre-offer” period (minimum time-on-market) of five business days, in combination with a cooling-off period, to provide adequate time for prospective buyers to perform due diligence on properties and to prevent the practice of bully offers.

## STRATA DOCUMENTS

Owners in a strata housing development own their individual strata lots and collectively own the common property and common assets as a strata corporation. Common forms of strata housing include apartments, townhouses, duplexes, and single-family homes registered under the *Strata Property Act*. Strata corporations operate under bylaws governing the use of both individual strata lots and common property, collect fees to cover shared common expenses, and hold meetings to discuss and vote on changes to bylaws and fees.

Strata properties bring distinct considerations in relation to disclosure of documents and information about the condition of a property. Due-diligence activities, such as a home inspection, may be of limited use in relation to some strata properties, since home inspections may focus on the unit's interior space, and not the building's systems, common property, and exterior. The building's systems, common property, and exterior are usually the strata corporation's responsibility to maintain, and it may be challenging to access these areas and systems. Therefore, documents prepared by the strata corporation may be more important to a prospective buyer.

Understanding the importance of strata documents, knowing which documents to obtain, and where to obtain them, is an essential part of the strata-buying process.

### Background

When buyers are considering a strata property, it is important that they review information about the strata lot and strata corporation to help them make an informed purchase. Strata properties operate under a democratic framework of strata legislation that requires strata owners to manage the common property, assets, and expenses of the strata development through a strata corporation.

Strata corporations have obligations to prepare, retain, and make accessible various documents such as depreciation reports, Form B: Information Certificates, and Form F: Certificates of Payment. They also determine the strata fees that owners are required to pay each month for expenses related to maintenance and repair, insurance, and the contingency reserve fund. A buyer considering a strata property may want to know if there are any restrictions on pets, rentals, age, or ways in which the unit can be used. They may also want to know how much money is in the contingency reserve fund, the condition of the strata corporation's assets, when the assets are expected to be repaired or replaced, what parking or storage owners are entitled to, and how the strata property is managed.

For buyers to discover this information, they need to request specific documents from either the existing owner, the strata corporation, or the Land Title and Survey Authority of B.C. While buyers typically rely on the Form B: Information Certificate, which discloses the current strata fees, balance of the contingency fund, parking stalls and storage lockers allocated to the strata lot, court proceedings (if any), rules and current budget of the strata, and the most recent depreciation report. However, other strata documents can sometimes reveal critical information. Those documents include: the strata plan, Form F: Certificates of Payment, engineering reports, financial statements, bylaws, strata corporation minutes, strata correspondence, easement agreements, schedule of unit entitlement, schedule of voting rights, air space parcel agreements, and insurance documents.

Currently, when a buyer purchases a strata property, the onus is on them to conduct any due diligence. This means that a buyer or their representative, if applicable, must request or seek out specific strata documents.

The documents are not simply provided to prospective buyers as a matter of course. Some strata documents can take up to two weeks to prepare and provide to the requestor. A buyer may not have enough time to obtain these documents or may need to pay substantial “rush” fees to receive them in a shortened time frame. If a buyer does not take the time to request and review the information included in these documents, they could face unanticipated challenges (for example, restrictive bylaws) or unanticipated fees (for example, special levies) related to their purchase.

Strata corporations are legally required to provide strata lot owners or other authorized persons specific records and documents. There are limited circumstances where a strata corporation may lawfully redact or refuse to provide copies of records where the records contain information protected by legal privilege or personal information that the strata corporation is prohibited from providing without consent. In these limited situations, prospective buyers may not be able to access all information prior to making an offer.

Further, strata corporations are only obligated to provide a prospective buyer (as distinguished from a strata lot owner) with a Form B and a Form F, unless the lot owner has authorized the buyer, in writing, to obtain other documents. However, buyers may need a broader set of information to make their purchase decision. These additional documents include strata minutes and financials, which, at present, an owner could refuse to provide.

### **Regulatory Framework and Industry Practices**

BCFSA provides licensees with an Authorization to Licensee to Obtain Strata Documentation form that authorizes the licensee to inspect and obtain copies of any records the strata corporation is required to prepare and retain. This form must be signed by the owner of the strata unit in order for the licensee to collect certain documents that the buyer is not entitled to without the owner’s permission. In cases, where an owner refuses to sign the form, the prospective buyer would only be able to acquire Form B and Form F from the strata corporation.

BCFSA also provides licensees with an Authorization to Licensee to Deliver Strata Documentation form that allows them to deliver any of the records they obtained from the strata corporation to persons interested in the property. The purpose of these forms is to aid licensees and their clients in acquiring necessary strata documentation. Buyers that wish to see additional strata documentation would need to make specific requests at the Land Title and Survey Authority of BC.

Similarly, the Multiple Listing Contract – a standard form contract published by BCREA and signed by a seller and a licensee prior to advertising a property for sale on the MLS® system – contains an authorization where the seller agrees that the documents obtained by the listing licensee can be disclosed to, among others, persons interested in the property including prospective buyers and their agents. The authorization being relied on in the Multiple Listing Contract is presently broader than BCFSA’s authorization form relating to the use and distribution of documents obtained from a strata corporation and may be broader than the disclosure contemplated in the *Strata Property Act* (although the Act does not provide any guidance on what an owner may do with the documents once requested).



### WHAT WE HEARD: CONSULTATION HIGHLIGHTS

Although disclosure of strata documents was not a pre-identified topic of discussion during BCFSA's consultations, it was raised during consultation sessions with strata management organizations and strata homeowners' associations, among others.

In discussing a mandatory property disclosure, participants believed that an obligation on the seller and their representative to obtain certain strata documents before listing a property for sale would have a positive impact on buyers without unduly affecting sellers. For example, the cost for sellers to obtain the documents is not onerous (\$35 plus up to 25 cents per page for copying for a Form B), and having the owner obtain the documents introduces fewer challenges than having a prospective buyer request them.

**While participants noted that upfront disclosure of strata documentation could lead to fewer offers, it could also result in fewer renegotiations and fewer buyers cooling-off, since buyers making an offer will have greater awareness of issues with the strata property.**

### Practices in Other Jurisdictions: Strata Documents

Like B.C., most jurisdictions in Canada require strata corporations (or condominium corporations as they are referred to elsewhere) to provide information statements, typically called an "information certificate," relating to the specific unit and the corporation. In most jurisdictions, buyers must request this information from the strata corporation, and the strata corporation has a prescribed deadline set out in the relevant regulations (usually 10 days) to provide the required information. See [Appendix E](#) for additional highlights of BCFSA's jurisdictional scan.

### Discussion

Due diligence is an important component of B.C.'s real estate transaction process. Before purchasing a property, buyers are advised to perform due-diligence activities to ensure the property they are interested in fulfills their needs and expectations. For strata properties, these due-diligence activities differ in many cases from those used in the purchase of single-family homes.

**Prospective purchasers of strata properties may require a range of documents, including, but not limited to:**

- Form B: Information Certificate, which includes information about the strata corporation's contingency reserve fund;
- Strata corporation bylaws; and
- Two years of strata council minutes, including annual general meeting minutes.

This list is not exhaustive, and buyers may wish to view other strata documents (for example, registered strata plan, title, air space parcel agreements), many of which are available for purchase by a prospective buyer through the Land Title and Survey Authority of B.C.

Although the cooling-off period is anticipated to provide additional time for due diligence, it is not enough time to acquire and review strata documents. The Form B: Information Certificate, for example, takes up to seven days to acquire from the strata corporation, and other documents can take up to 14 days. Therefore, unless a buyer specifically makes their offer conditional upon the receipt and review of strata documents, it is unlikely they will be able to acquire the necessary documents during the cooling-off period to make an informed decision.

Government could reduce risks to strata buyers by mandating that sellers obtain specific strata documents prior to listing their property for sale and disclose this information to prospective buyers. Reviewing these documents in advance of an offer would enable a buyer to make a more informed decision with respect to the property. Early disclosure of these documents would likely have minimal impacts on sellers and should lead to fewer strata property buyers choosing to cool off as a result of discovering unanticipated information in strata documents after making an offer.

Given that strata documents are a point-in-time disclosure and strata corporations' business may undergo changes between the time a property is listed for sale and the time an offer is accepted or subjects are removed, an updated disclosure of any material changes to any of the required documents should also be considered. This would help ensure that buyers have the latest and most relevant information respecting their purchase, which may aid in their decision to cool off or remove certain conditions.

To make this type of requirement meaningful, Government may need to amend the *Strata Property Act* to require owners and strata corporations to provide prospective buyers with additional documentation, beyond Forms B and F.

## ADVICE TO GOVERNMENT:

### STRATA DOCUMENT DISCLOSURE

#### 5. BCFSA advises Government to:

- a. Require sellers of resale strata units to provide key strata documents to prospective buyers at the time of listing or marketing their property for sale. At a minimum, this should include:
  - Form B: Information Certificate;
  - Strata Corporation Bylaws; and
  - Two years of Strata Council minutes, including annual general meeting minutes.
- b. Require sellers of resale strata units to provide prospective buyers with an updated disclosure of strata documents if there is a material change between listing or marketing their property for sale and the date on which the contract for purchase and sale becomes firm or binding.

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Blind bidding is a term commonly used to describe an industry practice in which a prospective buyer submits an offer to purchase a property without knowing any information about the content of competing offers from other prospective buyers.

**This lack of transparency in real estate transactions can skew the perception of market fairness and potentially lead to distrust of the real estate transaction process. This includes concerns that:**

- Buyers are overpaying by offering a price that significantly exceeds the next highest offer;
- All offers are not presented to the seller; and
- Sellers and their agents are misleading prospective buyers about the number or content of offers on a property, with limited potential for being discovered.

Blind bidding may also contribute to rapid price escalation as the price of subsequent home sales in the area are based on, among other things, recent sales. This can lead to inflated valuations.

**Through research and consultations, BCFSA explored alternatives to the current blind bidding process.**

**This included:**

- The use of open-bidding models, such as live real estate auctions and real-time disclosure of offers, as alternatives to blind bidding; and
- The use of escalation clauses and after-the-fact disclosure of offers in multiple offer situations, as enhancements to blind bidding.

## **ALTERNATIVES TO BLIND BIDDING: OPEN-BIDDING MODELS**

As part of the consultation process, BCFSA explored open bidding models as an alternative to B.C.’s current closed offer process. A report published by the Smart Prosperity Institute<sup>2</sup> identifies two types of open bidding models common in real estate transactions.

**The models can be distinguished by the ability of the parties to a prospective purchase and sale to negotiate the endpoint:**

- Open-bid/closed-end auctions (for example, live public auctions) in which the seller largely determines the terms of the transaction, apart from the final sale price, and no negotiation occurs between parties. The auction has a fixed end date (for example, the auction sale date); and
- Open-bid/open-end auctions (for example, real time disclosure of offer content) in which the parties have greater ability to negotiate the terms of the transaction and alter the content of the offer. This type of offer process may occur over several days.

Both models end when no more bids appear. In comparison to blind bidding, these models provide a high degree of transparency to prospective buyers regarding the number and content of competing offers.

<sup>2</sup> [“Banning Blind Bidding: Would It Slow the Growth in Canadian Real Estate Prices?” Smart Prosperity Institute, October 2021. Blind Bidding - October 21 - FINAL.pdf \(smartprosperity.ca\)](#)

### Regulatory Framework and Industry Practices

B.C.'s real estate services regulatory framework currently does not prescribe the process through which real estate is purchased and sold. Although most residential transactions are conducted through blind bidding, the regulation explicitly contemplates the use of open-bid processes, such as auctions, and provides a licensing exemption for auctioneers conducting the sale of real estate.

The regulatory framework neither requires nor prohibits a licensee representing a seller to disclose information about the number of offers they have received or other relevant details such as the offer price. Commentators have often incorrectly reported that licensees are prevented from disclosing the substance of offers to competing prospective buyers. This may be true in some Canadian jurisdictions, it is not true of B.C.'s regulatory framework nor of industry practices.

B.C.'s regulatory framework provides that a licensee must act honestly, with reasonable care and skill, and must follow the lawful instructions of their client. This means that a licensee may not misrepresent or mislead prospective buyers and their agents about the number or substance of any competing offers. While BCFSA does not track offer information, licensees in B.C. are required to make and retain a Disclosure to Sellers of Expected Remuneration form for each offer submitted. In cases of complaints related to the offer process on a property, BCFSA can verify the number of offers submitted through audit or investigation.

It is important to note that a seller who offers real estate for sale is not obligated to accept an offer of purchase under any circumstance. This applies regardless of whether the offer is at or above the seller's asking price or the offer is the only offer received by the seller.

**BCFSA's regulatory guidance supports the view that a seller has multiple options to respond to an offer, including:**

- Rejecting all offers;
- Inviting new offers from some or all prospective buyers;
- Accepting one offer; and
- Countering an offer.

Local real estate boards in B.C. operate under internal rules regarding cooperation among licensees. In some boards, these rules require licensees to disclose when a multiple-offer situation arises, unless instructed otherwise in writing by their client. Industry practices do not further prescribe what information may or may not be disclosed, similar to B.C.'s regulatory framework.

Sellers have a high degree of discretion in deciding how to market their properties and structure the sale process. Most residential transactions are conducted through a closed process where other interested parties are not informed of the terms of competing offers. However, with their seller client's permission, licensees assisting sellers in a multiple-offer situation may disclose information about competing offers to potential buyers, such as the number of offers and/or key terms (for example, price, conditions, or possession date).

A licensee representing a seller may advise their client on potential strategies to achieve the seller's objectives in the transaction. Generally, it is in the seller's best interest to obtain the highest sale price. However, sellers may also want to achieve other objectives (for example, finding a buyer who will take care of the property, selling to a young family, or closing within a certain timeframe). It is the licensee's role to advise their client on the advantages and disadvantages of different strategies to respond to offers, including consideration of strategies which will help their seller client achieve the best possible outcome, and to follow the client's lawful instructions on how to proceed.

On the buyer’s side, nothing precludes a buyer’s agent from requesting information regarding offers on their client’s behalf. However, the seller’s agent cannot disclose the information without their client’s consent.

### Practices in Other Jurisdictions

No Canadian jurisdictions require full disclosure of offers. Internationally, some jurisdictions follow open-bidding models. These include Australia and New Zealand, where real estate transactions are conducted through both open-bid/closed-ending processes and private treaty negotiations (another name for the process used in B.C.), and Norway and Sweden, where real estate transactions generally follow an open-bid/open-end model.

See [Appendix E](#) for additional highlights of BCFSAs’ jurisdictional scan.



### WHAT WE HEARD: CONSULTATION HIGHLIGHTS

BCFSA heard a wide variety of perspectives about open-bidding models during its consultation. Highlights of these perspectives include:

- Lack of consensus on whether open-bidding models should replace the current blind-bidding model. Participants expressed concerns about both models. Some participants cited the literature pointing to open bidding leading to higher housing prices.
- Participants expressed that open bidding may help address transparency concerns and may reduce the potential for significant gaps between the sale price and the next highest offer that may occur under blind bidding. At the same time, open bidding may create privacy risks for buyers whose personal details could be shared with others; these concerns were particularly relevant to real-time disclosure models and to transactions in smaller communities.
- Open bidding does not address supply-side pressures or housing affordability issues, which some participants considered to be the root causes of many housing market challenges.

## Discussion

Live public auctions of the open-bid/closed-end variety are used in many jurisdictions for the purchase and sale of real estate, including B.C. However, blind bidding remains the dominant model for the purchase and sale of real estate in the jurisdictions surveyed. In most jurisdictions, government does not mandate a single transaction model and sellers are given choice about the transaction model that they wish to participate in, including private negotiations and auctions.

**Although live public auctions provide greater transparency about competing offers, they potentially create additional risks for consumers, including:**

- A relative power imbalance between buyers and sellers. For example, in some jurisdictions (for example, certain Australian states), sellers dictate the terms of the transaction (for example, showing dates or contract details such as closing date and deposit amount if applicable) according to their own needs. Buyers have no ability to influence these terms, compared to a privately negotiated sale.
- A shift of the due diligence burden for buyers to the front of the transaction. This contrasts with how real estate transactions are generally conducted in B.C., where buyers undertake any due diligence inquiries after the parties enter a conditional contract of purchase and sale. While present real estate market conditions may create circumstances in which some buyers are making a constrained choice to forego due diligence, in a more balanced market, prospective buyers have a greater ability to conduct these inspections under a private treaty model.
- Anti-competitive behaviours (for example, collusion, dummy bids, and intimidation) also appear to be a risk associated with live public auctions. Most jurisdictions have provisions to discourage and penalize anti-competitive behaviour (for example, fines of 20,000 AUD in South Australia).

While BCFSAs was not asked to consider issues related to housing affordability, it merits noting that live public auctions may contribute to greater price increases. Multiple studies show that controlling for the higher quality of properties, those sold at auctions tend to command price premiums over private treaty sales<sup>3</sup>. This is likely a function of “auction fever,” which generates emotionally driven bidding wars due to factors such as time pressure, hype, social facilitation (live audience), and a desire to win. This is also in line with the concept of affiliated valuation where if one buyer perceives the value to be high, this makes it more likely that other buyers will re-evaluate upwards their own perceived value. Since disclosing bids partially reveals other buyers’ private valuations, this results in higher expected revenues than the first-price sealed offer process used in private treaty negotiation models (that is, blind bidding). It should be noted that this research considers only live-auction markets, where both auction and private sale transactions occur frequently enough to allow for comparison.

In contrast, Norway’s open-bid/open-end model, described above, is a hybrid between the closed bidding typical of many North American jurisdictions and the live, public bidding experience in some Australian states. This model provides greater transparency regarding competing offers as well as the opportunity, in theory, for parties to negotiate the terms of the sale. From a consumer protection perspective, a transparent offer model benefits consumers and prevents the potential for unethical conduct by sellers (for example, misrepresenting the number or content of offers to drive up the sale price).

<sup>3</sup> See, for example, Maggie Rong Hu, Adrian D. Lee (2020) *Outshine to Outbid: Weather-Induced Sentiment and the Housing Market*. *Management Science* 66(3):1440-1472; Alex Frino et al., *The Impact of Auctions on Residential Sale Prices: Australian Evidence*, *Australasian Accounting Business and Finance Journal*, 4(3), 2010, 3-22; Kenneth M. Lusht, (1993), *A Comparison of House Prices Brought by English Auctions and Private Negotiations in Melbourne*.

BCFSA did not conduct an economic analysis of the impacts of bid transparency on sale prices. It is unknown whether findings that live public auction sale processes for real estate are related to higher sale prices also apply to models that provide for real-time disclosure of offers, such as those used in some Scandinavian countries. Before implementing a transparent offer process, additional research and analysis is needed to determine the economic implications of doing so. Further consideration is also needed regarding the content of any real-time disclosure and potential privacy implications for buyers, particularly in smaller communities.

In addition to seriously considering open-bid/open-end models similar to those used in Scandinavian countries, there is also merit in exploring interim measures to promote transparency in the current blind-bidding system. BCFSA encourages Government to consider implementing an interim model to promote greater transparency and disclosure in the offer process where prospective buyers are asked to compete directly against another buyer, commonly referred to as a bidding war. In this situation, buyers could receive an anonymized disclosure of the number and price of competing offers on invitation to submit a second offer or on counter-off from a seller that is intended to solicit a higher price in reference to a competing offer.

As part of its consultation, BCFSA heard concerns related to the lack of transparency in situations where prospective buyers were asked to improve their offers but received no information on the details of the competing offer they were being asked to bid against or whether such an offer even existed. Transparency in these situations could considerably improve the information imbalance between buyers and sellers at a critical juncture of the negotiation process and strengthen consumer confidence in the real estate transaction process.

## ADVICE TO GOVERNMENT:

### OPEN-BIDDING

#### 6. BCFSA advises Government to:

- a. Further explore open-bid/open-end auction formats used in Scandinavian countries to increase transparency during the offer process. Exploration should include additional research to identify the implications of open-bid/open-end auction formats and real-time disclosure of offers on sale prices and housing affordability; and
- b. As a measure to enhance transparency, consider implementing a disclosure in multiple-offer situations where prospective buyers are asked to compete directly against another buyer's offer following an initial round of offers (that is, in a bidding war). In these situations, an anonymized disclosure of the number of legitimate offers and the price of competing offers could be provided to the prospective purchaser on invitation to submit a second offer or on counter-off from a seller that is intended to solicit a higher price in reference to a competing offer.

## ENHANCEMENTS TO BLIND BIDDING: ESCALATION CLAUSES

There are other bidding models that can co-exist with blind bidding, and which provide a greater level of transparency in relation to competing offers. For example, some buyers may include escalation clauses in their offers. An escalation clause, also known as an “escalator clause” or a “referential purchase price clause,” is used to defeat competing offers by automatically increasing the buyer’s purchase price by a pre-determined amount more than the highest competing offer. The escalation clause typically specifies a maximum purchase price, protecting the buyer from agreeing to pay a purchase price that exceeds a set level. For example, an escalation clause could provide that the buyer is offering \$5,000 above the price of the highest competing offer, up to a maximum of \$1,000,000.

BCFSA’s consultation sessions included discussion of the use of mandatory escalation clauses in offers to purchase residential real estate. A report by BMO Economics<sup>4</sup> highlighted escalation clauses as a potential means to limit the possibility of significant gaps between the sale price and the next highest offer. This would mitigate the potential for rapid price increases as subsequent listing prices are influenced by recent sales. By eliminating the potential for significant gaps between the price and the next highest offer, escalation clauses reduce the potential for buyers’ remorse wherein buyers may feel that they “overpaid” for their home.

### Regulatory Framework and Industry Practices

In B.C., the regulatory framework does not explicitly address the use of escalation clauses. However, the common law provides that offers must be able to stand on their own and be understandable without reference to another offer. In *Bank of Nova Scotia v Yoshikuni Lumber*, the B.C. Court of Appeal held that an offer which is dependent for its definition on the offers of others is invalid and unacceptable, as being inconsistent with and potentially destructive of the very tendering process in which it is submitted.

As part of their general duty to advise their clients on various strategies to purchase real estate and their related risks, a licensee may discuss the use of escalation clauses in an offer with their buyer client. Where two or more prospective buyers are looking for a property in a similar price range and are likely to offer similar purchase prices, an escalation clause may help one buyer to gain an advantage over another buyer with a similar offer. That said, a major consideration for buyers considering making an offer that includes an escalation clause is that the clause may reveal their maximum price.

A licensee advising their seller client on an offer that provides an escalation clause may discuss with their client whether to counter the offer. A contract with an escalation clause is unenforceable and the seller parties will need to identify a specific sale price in the contract. As part of the licensee’s duty to act in their client’s best interest, their discussions with their client could include whether to counter at a price based on the escalation clause (for example, \$5,000 above the next-highest offer received) or simply to counter at the maximum price identified in the buyer’s offer.

Because of their complexity and ambiguous legal standing, some real estate brokerages in B.C. prohibit the use of escalation clauses or otherwise advise their clients not to consider such offers where they are received.

### Practices in Other Jurisdictions: Escalation Clauses

A brief jurisdictional scan reveals that regulations differ by jurisdiction regarding the use of escalation clauses. In some jurisdictions (for example, B.C., Ontario), there is no explicit regulation of escalation clauses, although regulators acknowledge the complexities related to their use. In other jurisdictions (for example, Texas), escalation clauses are explicitly prohibited by regulations. No jurisdictions were identified that mandate the use of escalation clauses or provide for limitations on the purchase price of residential real estate with reference to other offers received.

See [Appendix E](#) for additional highlights of BCFSA’s jurisdictional scan.

<sup>4</sup> See [Canadian Housing Fire Needs a Response \(bmo.com\)](#), retrieved on March 16, 2022.



### **WHAT WE HEARD: CONSULTATION HIGHLIGHTS**

Generally, there was consensus among consultation participants that mandatory use of escalation clauses should not be pursued given their complexity and potential consumer protection concerns related to the disclosure of a purchaser’s maximum price. Many participants expressed the view that escalation clauses were too complex for practical application and were not seen as being bona fide offers.

### **Discussion**

While many prospective buyers may contemplate using an escalation clause as a strategy to increase their chance to “win” in a multiple-offer situation, escalation clauses may create additional potential consumer risks:

- They may be complex to evaluate, particularly where there are multiple offers being considered which contain escalation clauses, leading to potential errors;
- They require prospective buyers to disclose their “maximum” price as part of the clause and there is potential for a seller to simply counter at this price; and
- They may create legal issues for buyers and sellers as contracts that rely on a reference to another offer are unenforceable.

In relation to the sale of other types of goods (for example, art, antiques, collectibles), many online auction hosting sites allow bidders to enter their maximum price and then automatically counter competing bids in pre-determined increments. While this is an example of a practical application of escalation clauses, auctions – whether live or online – present additional risks for consumers, such as reducing prospective buyers’ latitude for negotiating the terms of the purchase and the reliance on price to determine the outcome of the auction. These risks are discussed in greater detail in this report in relation to open-bidding models (see Alternatives to Blind Bidding: Open-Bidding Models).

For the reasons outlined above, BCFSA does not consider escalation clauses to be a viable alternative or enhancement to the current blind-bidding system.

## ENHANCEMENTS TO BLIND BIDDING: DISCLOSURE OF OFFERS IN MULTIPLE OFFER SITUATIONS

This section of the report contemplates greater transparency within the existing blind bidding model through enhanced disclosure of offers in multiple-offer situations (that is, where two or more prospective buyers submit offers to purchase the same property).

One potential measure to increase transparency in the current blind-bidding offer process is to mandate greater disclosure to prospective buyers of information about competing offers. The disclosure could include a written summary of key details of offers made on the property and could be required at specific points after the offer process has concluded. The disclosure would be anonymized to protect the privacy of prospective buyers.

Based on feedback from the consultation process, BCFSa considered the practice of mandating an after-the-fact disclosure of offer information in multiple offer situations. This type of disclosure could increase confidence in the real estate transaction process by providing assurance to unsuccessful buyers that their offers were presented to and considered by the seller and verify information that may have been shared during the offer process about the number of prospective buyers and/or the substance of their offers.

### Regulatory Framework and Industry Practices

In B.C., the real estate regulatory framework does not prescribe any specific requirements for licensees regarding the disclosure of offers. Licensees are required to act in the best interest of their client and are required to present all offers to their client in a timely, objective, and unbiased manner. Licensees can advise their client on the disclosure of offers but they must always act according to the lawful instructions of their client and as such should not disclose offer information without their client's direction.

As discussed in relation to open-bidding, B.C.'s regulatory framework does provide that a licensee must act honestly and with reasonable care and skill. This means that a licensee may not misrepresent or mislead prospective buyers and their agents about the number or substance of any competing offers.

While BCFSa does not track offer information, licensees in B.C. are required to make and retain a Disclosure to Sellers of Expected Remuneration form for each offer submitted. BCFSa can verify any complaints related to the number of offers submitted through audit or investigation.

Industry practices in B.C. in relation to multiple-offer situations and offer presentation can vary widely. In an active real estate market, sales are often structured as an informal "auction," with set dates for viewing and offer presentation. While this approach has been criticized as creating undue pressure on buyers, it provides an equal opportunity for all interested buyers to view a property with the expectation that it will not be sold pre-emptively. There is the potential for buyers to make so-called "bully offers" ahead of the set offer presentation date as a strategy to pre-empt other buyers.

As a good practice, during offer presentation, licensees may ask their seller clients to initial or otherwise mark rejected offers as a method to demonstrate that the offer was presented to the seller in accordance with regulatory requirements.

### Practices in Other Jurisdictions

In Canada, some jurisdictions require disclosure of information to potential buyers in multiple offer situations. For example, in Ontario, licensees are required to disclose certain information to potential buyers in the event of a multiple-offer situation. They must disclose the total number of offers submitted, whether any of the buyers are represented by the same brokerage as the seller, and whether there are agreements in place to reduce the commission if their buyer client's offer is accepted. However, licensees are prohibited from disclosing the substance of the offers, including price. Prohibitions on licensees from sharing the contents of offers were put in place to prevent improper sharing of offer contents without the buyers knowing when and how these details were being shared and without their consent. No explicit requirements are provided on the timing of when the disclosure must be made.



As discussed in relation to open bidding, in Norway, the licensee conducting the sale is required to provide a copy of the detailed bidding record to the buyer and seller, including all details of the bids upon conclusion of a sale (for example, name and contact information of the bidders, price, time bids are received, acceptance deadline, time of rejection or acceptance). An unsuccessful bidder may receive, by request, an anonymized copy of the bidding record. This type of disclosure could also be contemplated in the context of an after-the-fact disclosure of offers in multiple-offer situations.

See [Appendix E](#) for additional highlights of BCFSAs jurisdictional scan.



### WHAT WE HEARD: CONSULTATION HIGHLIGHTS

Through its consultation, BCFSAs heard significant discussion about the content of an after-the-fact disclosure of offers. Some participants noted that price is not necessarily determinative of which offer a seller is likely to accept and supported broad disclosure of offer information, including information such as closing dates and contract conditions. In contrast, other participants expressed that only limited information should be disclosed, such as the number of offers, and that broad disclosure could have privacy implications for buyers.

### Discussion

While greater after-the-fact disclosure of offers in multiple-offer situations would not fundamentally change the current blind-bidding system, it could increase transparency and, potentially, consumer confidence and trust in the offer process.

Some consultation participants argued that prospective buyers should have a reasonable expectation that their offer and related negotiations will remain confidential. There may also be privacy concerns about disclosure of offers that could inadvertently reveal personal or financial information about a prospective buyer, particularly in smaller communities. These criticisms may apply, even if the disclosure of offers was anonymized.

Despite some of these concerns, BCFSAs advises Government to require that once an enforceable contract is in place (that is, after the cooling-off period has passed and any conditions have been removed), sellers provide an anonymized disclosure of offers to all the prospective buyers who submitted an offer. At a minimum, such a disclosure should include the number of offers, the representation status of prospective buyers, including the real estate brokerage involved (if any), and the sale price. Such a measure will increase transparency within the current blind-bidding process and strengthen consumer confidence and trust in the offer process.

### ADVICE TO GOVERNMENT:

#### ENHANCEMENTS TO BLIND BIDDING

7. BCFSAs advises Government to require sellers to provide an anonymized disclosure to all prospective buyers who submitted an offer once an enforceable contract is in place. At a minimum, this disclosure should include the number of offers, the representation status of prospective buyers, including the real estate brokerage involved (if any), and the sale price.

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## I. PARAMETERS OF A COOLING-OFF PERIOD

### Cooling-off Period

1. BCFSA advises Government to implement the following design parameters of a cooling-off period:
  - a. Duration – Provide for three “clear” business days, beginning on the day after the seller accepts the buyer’s offer to purchase, for the buyer to exercise their right to cool off.
  - b. Waivers – Do not allow the cooling-off period to be waivable.
  - c. Exemptions – Provide for narrow exemptions to the cooling-off period based on characteristics of the sale process. At a minimum, exemptions should include:
    - Court-ordered sales / sales under court’s conduct
    - Sales by auction
    - Sales where a buyer has previously made an offer to purchase the same property within a prescribed time period.
  - d. Termination Fee – To prevent frivolous offers, establish a modest termination fee (for example, 0.1 to 0.5 per cent of the purchase price) paid by buyers who exercise their right to cool off. Consideration could also be given to creating exemptions from the termination fee where buyers who exercise their right to cool off can demonstrate that they have completed due-diligence activities during the cooling-off period.
  - e. Disclosure of Active Offers – Consider requiring buyers to make a disclosure to sellers of any other offers that they have made that are currently active.
  - f. Access to Property – Establish an explicit requirement for sellers to provide reasonable access to the property for professionals engaged by or on behalf of the buyer to perform due diligence inspections.

## II. ADDITIONAL MEASURES TO ADDRESS THE RISKS ASSOCIATED WITH UNCONDITIONAL OFFERS

### Property Disclosure Forms

2. BCFSA advises Government to:
  - a. Require sellers to provide a prescribed property disclosure filled out to the seller’s best knowledge and ability, at the time of listing/offering for sale, for all properties subject to the cooling-off period.
  - b. Where required, ensure that the property disclosure be incorporated into the contract of purchase and sale.
  - c. Consider providing exemptions or making specific sections of a property disclosure optional for certain sellers or situations, such as foreclosure or court ordered sales, newly constructed property that has never been occupied, sellers with cognitive impairments, government transfers, properties that pose health and safety risks where demolition is intended, and non-owner-occupied properties.

### Conditions

3. BCFSA advises Government to require all contracts of purchase and sale for residential real estate to contain standard, optional conditions clauses related to financing, home inspection, insurance, and legal advice.

### **Pre-Offer Period (Minimum Time on Market)**

4. BCFSA advises Government to implement a “pre-offer” period (minimum time-on-market) of five business days, in combination with a cooling-off period, to provide adequate time for prospective buyers to perform due diligence on properties and to prevent the practice of bully offers.

### **Disclosure of Strata Documents**

5. BCFSA advises Government to:
- a. Require sellers of resale strata units to provide key strata documents to prospective buyers at the time of listing or marketing their property for sale. At a minimum, this should include:
    - Form B: Information Certificate;
    - Strata Corporation Bylaws; and
    - Two years of Strata Council minutes, including annual general meeting minutes.
  - b. Require sellers of resale strata units to provide prospective buyers with an updated disclosure of strata documents if there is a material change between listing or marketing their property for sale and the date on which the contract for purchase and sale becomes firm or binding.

## **III. ALTERNATIVES AND ENHANCEMENTS TO BLIND BIDDING**

### **Open Bidding**

6. BCFSA advises Government to:
- a. Further explore open-bid/open-end auction formats used in Scandinavian countries to increase transparency during the offer process. Exploration should include additional research to identify the implications of open-bid/open-end auction formats and real-time disclosure of offers on sale prices and housing affordability.
  - b. As a measure to enhance transparency, consider implementing a disclosure in multiple-offer situations where prospective buyers are asked to compete directly against another buyer’s offer following an initial round of offers (that is, during a bidding war). In these situations, an anonymized disclosure of the number of legitimate offers and the price of competing offers could be provided to the prospective purchaser on invitation to submit a second offer or on counter-off from a seller that is intended to solicit a higher price in reference to a competing offer.

### **Enhancements to Blind Bidding: Disclosure of Offers in Multiple Offer Situations**

7. BCFSA advises Government to require sellers to provide an anonymized disclosure to all prospective buyers who submitted an offer once an enforceable contract is in place. At a minimum, this disclosure should include the number of offers, the representation status of prospective buyers, including the real estate brokerage involved (if any), and the sale price.



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## APPENDIX A

### NEWS RELEASE: B.C. WORKING TO STRENGTHEN PROTECTION FOR HOME BUYERS

To better protect consumers in B.C.'s real estate market, the province is introducing legislation that requires cooling-off periods for resale properties and newly built homes.

This change will be similar to the cooling-off periods already in place for pre-construction condominium sales.

BC Financial Services Authority ("BCFSA") is being asked to consult with key stakeholders and experts and review other potential consumer protection measures. This includes looking at the blind bidding system, as well as condition waiving in offers and other practices that may pose risks to consumers.

These issues are being investigated in the context of a period of continued robust real estate market activity, where concerns have been raised that buyers may be purchasing a home without everything they need to make fully informed decisions.

"People looking to buy a home need to know they are protected as they make one of the biggest financial decisions of their lives. Especially in periods of heightened activity in the housing market, it's crucial that we have effective measures in place so that people have the peace of mind that they've made the right choices," said Selina Robinson, Minister of Finance. "With this step, we're moving ahead to protect people and their interests in the real estate market by bringing in a cooling-off period for homebuyers and looking at additional measures to ensure effective safeguards are in place."

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.

"Ensuring fair markets and promoting public confidence in B.C.'s real estate market is a key priority of BCFSA, and we welcome the direction from the minister to lead this valuable consultation work," said Blair Morrison, CEO of BCFSA and superintendent of real estate. "BCFSA's goal is to ensure that British Columbians are protected when buying and selling homes—one of the most important financial transactions of their lives. Both buyers and sellers need to be supported and have time to make good financial decisions."

On Aug. 1, 2021, BCFSA became the single regulator for all financial services in B.C., including real estate. The creation of a single authority responsible for regulating real estate in B.C. helps ensure a more co-ordinated approach to regulating all parts of the financial sector and better protects British Columbians buying and selling homes.

BCFSA will start its industry consultation in the coming weeks. Terms of reference can be found here: [bcfsa.ca](https://bcfsa.ca)

#### Quick Facts:

- In B.C., real estate markets have experienced significant volatility this year due to low interest rates, pent-up demand for additional living space following COVID-19 shutdowns and low inventory.
- In response to heightened market activity, BCFSA continues to provide consumer awareness information to educate consumers about the risks of a highly competitive market.
- Seven-day cooling-off periods for pre-construction sales of multi-unit development properties, like condominiums, are currently in place under the *Real Estate Development and Marketing Act*.

## APPENDIX B

### REAL ESTATE ENHANCED CONSUMER PROTECTION TERMS OF REFERENCE

**November 15, 2021**

On November 4, 2021, the Minister of Finance announced 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.

The Government of British Columbia is committed to ensuring that consumers are protected when purchasing a home. As a result, the Minister of Finance has also requested that BC Financial Services Authority ("BCFSA"), as the regulatory body responsible for the real estate industry, examine whether current real estate practices regarding the purchase and sale of a home adequately protect consumers and the wider public interest from activities that have been brought forward by concerned citizens and stakeholders.

#### Consumer protection concerns related to real estate practices include:

- Blind bidding, which is when home buyers submit offers to sellers and sellers choose not to disclose the details of competing bids; and
- Risks to buyers associated with unconditional offers.

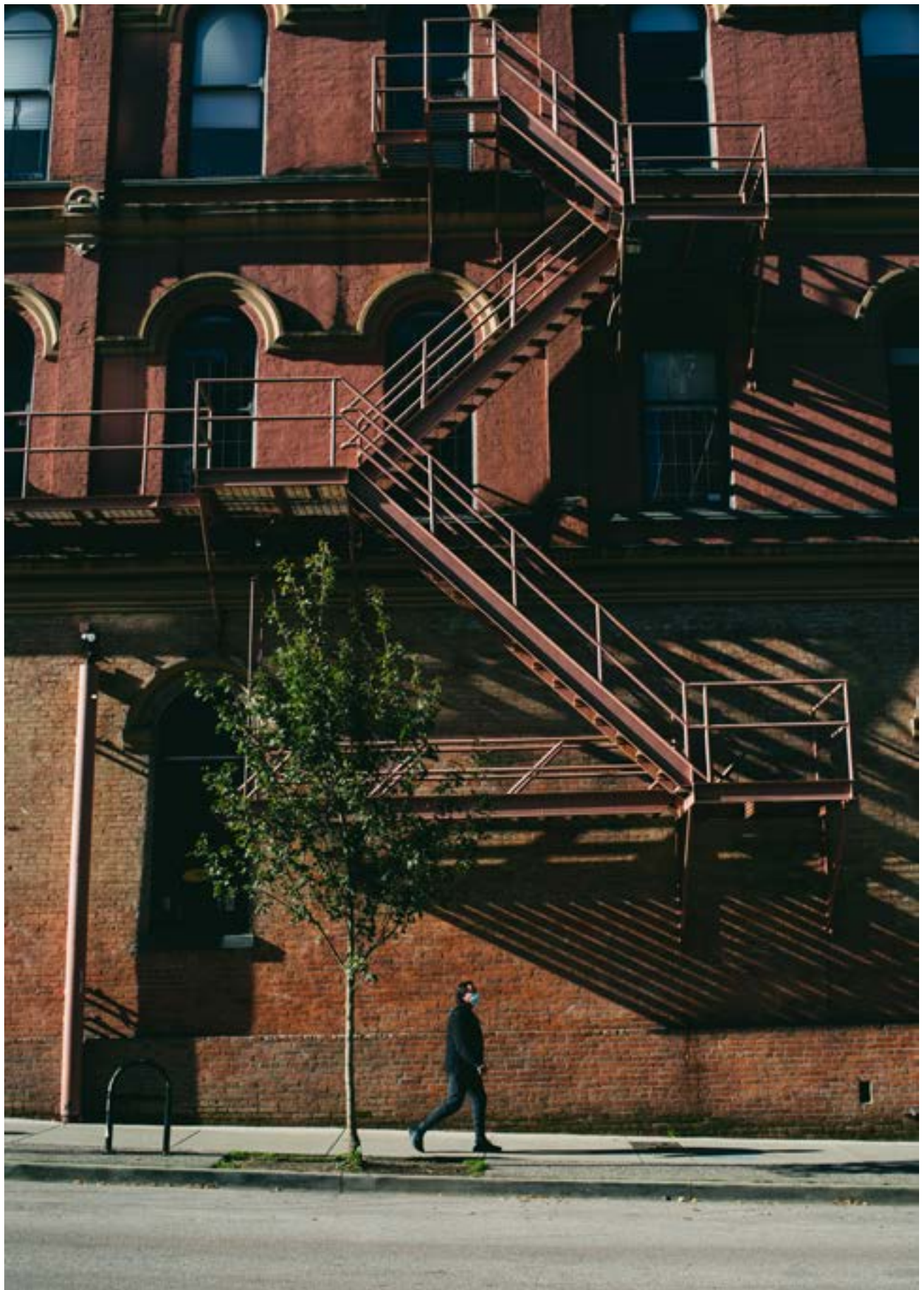
BCFSA will consult with key industry stakeholders and experts on consumer protection issues and return to Government with advice for other possible measures to enhance consumer protection and strengthen public confidence in the purchase and sale of homes.

#### In conducting its consultation, BCFSA will:

1. Consider appropriate parameters and provide advice for implementing a cooling-off period, including:
  - The appropriate length of the period; and
  - Whether or not to include penalties for exercising the right to rescission.
2. Examine existing practices involved with selling a home such as:
  - Blind bidding; and
  - Other practices that may be identified as consumer protection risks.
3. Examine rules, requirements and other activities related to the process of buying a home including those related to condition waiving such as:
  - Home inspections;
  - Financing; and
  - Other conditions that may be identified.
4. Provide advice to Government respecting any potential improvements, changes or prohibitions to the activities related to the process of buying and selling a home as outlined in number 2 and 3 above.
5. Engage the real estate industry to explore opportunities for collecting additional data to better understand current market practices.
6. Review practices in other jurisdictions.

BCFSA will report back to the Ministry of Finance by Spring 2022 with advice for enhancing consumer protection measures in B.C. real estate, as noted above. BCFSA is a Crown agency accountable to the public through the Minister of Finance. BCFSA is responsible for the supervision and regulation of the financial service sector, including licensees, mortgage brokers, insurance, pensions, trusts, credit unions, and the Credit Union Deposit Insurance Corporation.





## APPENDIX C

## SUMMARY OF DISCUSSION QUESTIONS

## Summary of Discussion Questions

<b>Cooling-off Period</b>	Parameters and unintended consequences	<ul style="list-style-type: none"> <li>• Considering the needs of both buyers and sellers in the transaction and the practicality of completing due diligence in this timeframe, how long should the cooling-off period be?</li> <li>• What risks or unintended consequences could arise with the implementation of a cooling-off period? How could they be mitigated?</li> <li>• What, if any, exemptions to the cooling-off period should be provided? Why?</li> <li>• What, if any, legal consequences should buyers experience for exercising their right to cool off? Why?</li> <li>• What, if any, legal obligations should be placed on sellers to help ensure they do not frustrate the cooling-off period?</li> </ul>
<b>Unconditional Offers</b>	Industry practices	<ul style="list-style-type: none"> <li>• What are current industry practices regarding unconditional offers?</li> </ul>
	Home Inspections	<ul style="list-style-type: none"> <li>• With the introduction of a cooling-off period, do you see a need for mandated home inspections? Why or why not?</li> <li>• If home inspections are mandated, should they be the buyer's or seller's responsibility? Why?</li> <li>• What risks or unintended consequences could arise with the implementation of mandatory home inspections?</li> <li>• What if any, exemptions to a requirement for mandatory home inspections should be considered?</li> </ul>
	Mandatory Contract Conditions	<ul style="list-style-type: none"> <li>• With the introduction of a cooling-off period, do you see a need for mandatory conditions precedent? Why or why not?</li> <li>• What, if any, conditions precedent should be mandatory? Why?</li> <li>• What risks or unintended consequences could arise with the implementation of mandatory conditions precedent? How could they be mitigated?</li> <li>• What, if any, exemptions should be permitted to the requirement to include mandatory contract conditions?</li> </ul>
	Mandatory Property Disclosure Statements	<ul style="list-style-type: none"> <li>• With the implementation of a cooling-off period, do you see a need for mandatory property disclosure forms? Why or why not?</li> <li>• What, if any, exemptions should be considered if a mandatory property disclosure is implemented?</li> <li>• If a mandatory property disclosure 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?</li> <li>• Are there any risks or unidentified consequences to be aware of when considering a mandatory property disclosure? How could they be mitigated?</li> </ul>

## Summary of Discussion Questions (continued)

<b>Blind Bidding</b>	Industry Practices	<ul style="list-style-type: none"> <li>• What are current industry practices regarding blind bidding?</li> </ul>
	Open Bidding	<ul style="list-style-type: none"> <li>• What risks does open bidding present for buyers? For sellers?</li> <li>• What unintended consequences could arise from greater use of open bidding in the purchase and sale of property? How could they be mitigated?</li> </ul>
	Escalation Clauses	<ul style="list-style-type: none"> <li>• What risks does mandatory use of escalation clauses present for buyers? For sellers?</li> <li>• What unintended consequences could arise from mandatory use of escalation clauses in the purchase and sale of property? How could they be mitigated?</li> </ul>
	Disclosure of Multiple Offers	<ul style="list-style-type: none"> <li>• If disclosure of offers were mandatory in multiple offer situations, what information should be disclosed? Why?</li> <li>• Who should receive the disclosure? Why?</li> <li>• When should disclosures be made? Why?</li> <li>• What unintended consequences could arise from disclosure of offers? How could they be mitigated?</li> </ul>

**APPENDIX D****SUMMARY OF DISCUSSION QUESTIONS****Consultation on Consumer Protection Measures in  
The Real Estate Sector – Participating Organizations**

<b>Groups</b>	<b>Organization Name</b>
<b>Organized Real Estate</b>	<ul style="list-style-type: none"> <li>• British Columbia Real Estate Association</li> <li>• Canadian Real Estate Association</li> <li>• Real Estate Board of Greater Vancouver</li> <li>• Chilliwack and District Real Estate Board</li> <li>• Fraser Valley Real Estate Board.</li> <li>• British Columbia Northern Real Estate Board</li> <li>• Association of Interior Realtors</li> <li>• Kootenay Association of Realtors</li> <li>• Kamloops &amp; District Real Estate Association.</li> <li>• Powell River Sunshine Coast Real Estate Board</li> <li>• Vancouver Island Real Estate Board</li> <li>• Victoria Real Estate Board.</li> <li>• Real Estate Brokers Association</li> </ul>
<b>Other Real Estate Industry and Owners Associations</b>	<ul style="list-style-type: none"> <li>• BCFSa Trading Services Advisory Group</li> <li>• BCFSa Strata Management Services Advisory Group</li> <li>• Condominium Home Owners Association of BC</li> <li>• Vancouver Island Strata Owners Association</li> <li>• Professional Association of Managing Agents</li> <li>• Urban Development Institute</li> <li>• Canadian Home Builders' Association</li> </ul>
<b>Appraisers</b>	<ul style="list-style-type: none"> <li>• Appraisal Institute Canada-BC</li> <li>• Canadian National Association of Real Estate Appraisers</li> </ul>
<b>Financial Services (Mortgage Brokers, Lenders, Insurance)</b>	<ul style="list-style-type: none"> <li>• Canadian Mortgage Broker Association-BC and representative members</li> <li>• Mortgage Professionals Canada</li> <li>• BC MIC Managers Association and representative members</li> <li>• Canadian Credit Union Association and representative members</li> <li>• Insurance Brokers Association of BC</li> </ul>

## Consultation on Consumer Protection Measures in The Real Estate Sector – Participating Organizations (continued)

Groups	Organization Name
<b>Home Inspectors</b>	<ul style="list-style-type: none"> <li>• Canadian Association of Home &amp; Property Inspectors</li> <li>• Canadian National Association of Certified Home Inspectors</li> <li>• Home Inspectors Association BC</li> <li>• National Home Inspector Certification Council</li> </ul>
<b>Real Estate Legal Community</b>	<ul style="list-style-type: none"> <li>• Canadian Bar Association – BC Branch (Commercial and Real Estate Section – Okanagan; Commercial and Real Estate Section – Vancouver Island; Real Property Section – Vancouver)</li> <li>• The Society of Notaries Public of BC</li> <li>• Leslie Howatt (Real Estate Errors and Omissions Insurance), Devin Kanhai (UBC Sauder), Bruce Woolley, QC (BCFSA Legal Update Editor), Brian Taylor (Norton Rose Fulbright LLP), Edward L. Wilson (Lawson Lundell LLP), Peter Borszcz (Montgomery Miles and Stone Law Firm), Jamie R. Matthews (Farris LLP).</li> </ul>
<b>Public Sector and Crown Agency</b>	<ul style="list-style-type: none"> <li>• BC Assessment Authority</li> <li>• BC Housing</li> <li>• Canada Mortgage and Housing Corporation</li> <li>• Competition Bureau</li> <li>• Consumer Protection BC</li> <li>• Land Title and Survey Authority of British Columbia</li> <li>• Office of the Public Guardian and Trustee</li> <li>• Ministry of Finance</li> <li>• Ministry of the Attorney General and Minister Responsible for Housing</li> <li>• Ministry of Energy, Mines and Low Carbon Innovation</li> <li>• Office of the Superintendent of Professional Governance</li> <li>• Technical Safety BC</li> </ul>
<b>Advocacy and Public Interest</b>	<ul style="list-style-type: none"> <li>• Post-Secondary Researchers: Tsur Somerville (UBC Sauder), Tom Davidoff (UBC Sauder), Andrey Pavlov (SFU Beadie), Andy Yan (SFU), Murtaza Haider (Ryerson University).</li> <li>• Economists/Economic Commentators: Mike Moffatt (Smart Prosperity Institute), Brian Yu (Central 1 Credit Union), Keith Stewart (Real Estate Board of Greater Vancouver), Paul Johnson, Rideau Economics, Jock Finlayson, Business Council of British Columbia</li> <li>• BC Non-Profit Housing Association</li> <li>• Aboriginal Housing Management Association</li> <li>• Real Estate Compensation Fund Corporation</li> <li>• Real Estate Foundation of BC</li> <li>• Real Estate Institute of BC</li> </ul>

## APPENDIX E

### Review of Practices in Other Jurisdictions: Jurisdictional Scan Summary

#### I. JURISDICTIONAL SCAN: COOLING-OFF PERIOD

BCFSA conducted a scan of jurisdictions which have implemented a cooling-off period. Some key findings are highlighted below.

- Cooling-off periods range in duration from two “clear” business day to 10 calendar days;
- Cooling-off periods apply only to buyers;
  - Buyers may walk away for any reason during the cooling-off period and are not required to provide a reason for their decision to withdraw from a contract.
- There are often exemptions to cooling-off period legislation (for example, for non-residential properties, purchases made at public auctions, and purchases by corporations).
  - Some jurisdictions do not provide a second cooling-off period to a buyer who makes multiple offers on the same property.
- In some jurisdictions, buyers can waive their cooling-off rights;
  - Generally, a solicitor’s certificate is required to confirm that the buyer understands the implications of such a decision.
- To discourage frivolous offers, certain jurisdictions impose financial consequences (for example, termination fee) on buyers if they decide to withdraw from a contract.
  - In some of those jurisdictions, legislation requires the buyer to pay a “holding deposit” equivalent to any termination fee and may further provide terms for the return of any additional deposit in excess of the termination fee.

- Mandatory cooling-off periods do not prevent parties from negotiating additional conditions on a potential purchase and sale, which may extend beyond the cooling-off period.
  - However, where both a cooling-off period applies and a contract includes additional conditions, buyers would only be able to withdraw from the contract for reasons related to the agreed conditions once the cooling-off period has passed.

It is important to note that in all the jurisdictions reviewed, the cooling-off period applies directly to the parties to a home purchase and sale.

The table on the following page provides a summary of some of the key features of cooling-off periods in select jurisdictions.

## Summary of Cooling-Off Periods in Select Jurisdictions

	Manitoba	France	Netherlands	New South Wales (AUS)	South Australia (AUS)	Victoria (AUS)
<b>Scope</b>	Sales of condominium units, including re-sales	Residential properties and building lots in housing developments	Residential properties	Residential properties	Residential properties and small businesses	Residential and small rural properties
<b>Exclusions (non-exhaustive list)</b>	Tax sales, power of sale provided for in a mortgage, sale under an order of foreclosure, sale authorized or required by the court	Exclusions for purchases by corporations or property investment companies, sales of bare land (for example, single building lots not in a housing development), purchases by real estate agents and developers	Exclusions for purchases by corporations, commercial properties, undeveloped land, hire purchases (similar to a rent-to-own structure), purchases by auction	Exclusions for commercial properties, pre-sale purchases from a developer, purchases at auction	Exclusions for purchase at auction, purchases by corporations of non-residential property, contracts for the purchase and sale of businesses (other than small businesses)	Exclusions for purchases at auction, farms >20 ha, purchases by real estate agents and corporations
<b>Duration</b>	7 days (including weekends and most statutory holidays), beginning on the later of (a) the date the offer to purchase is entered into or (b) the date the seller complies with the disclosure requirements.	10 days, beginning on the first business day after the purchaser receives a prescribed notice	Three business days, beginning at midnight on the day after the buyer receives a copy of the signed contract	Five days, beginning on the day the parties exchange signed contracts	Two “clear” business days, beginning on the day after the purchaser receives a prescribed disclosure (or amended disclosure)	Three “clear” business days, beginning on the day after the purchaser signs the purchase contract
<b>Waiver</b>	Cannot be waived	Cannot be waived	Cannot be waived	Requires solicitor’s certificate	Requires solicitor’s certificate	Cannot be waived
<b>Termination Fee</b>	None	None	None	0.25 per cent of the purchase price (“holding deposit”), paid at the time the buyer signs the contract	AUD 100	100 AUD or 0.2 per cent of the purchase price, whichever is greater
<b>Deposit</b>	N/A	N/A	N/A	The buyer pays a “holding deposit” equivalent to the termination fee at the time they sign the contract. An additional deposit amount (“standard deposit”) may also be paid after the cooling-off period expires.	There is no “holding deposit” or “standard deposit.” A deposit of \$5,000-\$10,000 is generally acceptable, paid on the next business day after the cooling-off period expires.	A buyer who cools-off is entitled to a refund of any deposit amount paid in respect of the property, minus the termination fee.

## II. JURISDICTIONAL SCAN: MEASURES TO ADDRESS THE RISKS ASSOCIATED WITH UNCONDITIONAL OFFERS

### Home Inspections

BCFSA conducted a jurisdictional scan to determine whether home inspections were mandated elsewhere. In most jurisdictions, home inspections were optional. However, some jurisdictions do have regulatory requirements related to home inspections.

#### For example:

- Québec mandates that real estate agents recommend to buyers that they make their offer to purchase conditional upon a satisfactory home inspection. However, buyers are not required to follow this advice. Quebec is currently giving further consideration as to whether home inspections should be mandatory.
- In Rhode Island (U.S.), every contract of purchase and sale of real estate must provide a potential purchaser with a 10-day period to conduct inspections of the property before the purchaser becomes obligated under the contract to purchase. While this inspection period is mandatory, parties can mutually agree on a different period of time, and a purchaser may waive this right to inspection in writing.
- Australian Capital Territory has implemented a mandatory home inspection that cannot be waived, requiring a building and compliance inspection report (a written, standardized account of a property's condition) for the sale of residential property. The report must be undertaken less than three months prior to the property being advertised or offered for sale. In addition to this report, an energy rating assessment, asbestos advice and assessment report, and a pest inspection report are also required before listing a property for sale.

While mandatory home inspections are not yet a widespread practice, a growing number of jurisdictions are increasing their disclosure regimes.

### Property Disclosure Forms

BCFSA conducted an extensive jurisdictional scan pertaining to property disclosure forms. It was found that a growing number of jurisdictions have implemented, or are looking into implementing, mandatory property disclosure forms for the sale of real property, particularly in the United States, where many states have taken steps to require some form of mandatory seller disclosure.

#### For example:

- In 2019, North Dakota introduced a new law that requires written property disclosure by sellers if a licensee assists a party with a transaction. The written disclosure is quite extensive; sellers are required to disclose all material facts that could adversely or significantly affect a buyer's use and enjoyment of the property, including latent defects, environmental issues, structural systems, mechanical issues, and more.
- In Connecticut, sellers of residential property, whether they are assisted by a licensed broker or not, are required to provide a disclosure report to buyers before the buyer's execution of any contract to purchase. If the seller fails to furnish the report, they must credit the buyer with \$500.
- New York introduced legislation that requires sellers of residential property to fill out and turn over to purchasers a 48-question disclosure form, which must be provided before the buyer signs the purchase contract. Sellers' agents are required to inform their clients of this obligation and if the seller refuses to fill out the form, they must pay a credit of \$500 to the buyer at closing towards the purchase price.
- Louisiana also provides for a mandatory disclosure. In addition, Louisiana provides that if the buyer receives the disclosure document after they made an offer, the buyer is free to terminate any resulting contract or withdraw the offer for up to 72 hours after receipt of the document without penalty.



While Canadian jurisdictions have not implemented mandatory property disclosure to the same extent as the United States, some provinces have taken steps in this direction.

**For example:**

- Quebec requires sellers of residential property (with less than five dwellings) to complete a Declarations by the Seller of the Immovable Form. For properties with more than five dwellings, this form is strongly recommended. The form is similar to BCREA's PDS; it asks sellers to disclose in good faith everything they know about the property once they sign a contract with a brokerage. If the seller refuses to provide the requested information, their broker will not be able to represent them in the sale. Sellers that have not lived on the property must still fill out the Form, but do not have to declare things that they are not aware of.
- Manitoba requires the property disclosure form as part of their standard Offer to Purchase, as a way of increasing buyer and seller usage and knowledge of the form. However, sellers are not required to complete the property disclosure form and may strike it out while still satisfying the requirement.

Were B.C. to mandate a property disclosure form, it would not be the first jurisdiction to do so, and Government could draw on the experiences of other jurisdictions when considering what the prescribed form would look like.

**Conditions**

BCFSA's jurisdictional scan did not identify any jurisdictions that require mandatory subjects and conditions in a contract of purchase and sale for real property.

The only jurisdiction that came close to a mandatory subject to clause was Queensland, Australia. Standard contracts for the purchase and sale of real estate in Queensland include a subject to finance clause but it must be completed in full for the clause to take effect. If a buyer chooses not to complete this section, their offer will not be subject to finance. It is unclear if having a finance clause included by default in every contract of purchase and sale increases the rate at which it is used by purchasers, but its inclusion does raise awareness

of the clause and may generate discussion as to its importance. A 14 to 21-day finance clause is most common in Queensland, but an alternative timeframe can be negotiated with the vendor.

**Strata Documents**

Like B.C., most jurisdictions in Canada require strata corporations (or condominium corporations as they are referred to elsewhere), to provide information statements about various matters relating to the specific unit and the corporation. This information is contained in what is typically called an "information certificate," depending on the jurisdiction. In most jurisdictions, buyers must request this information from the strata corporation, and the strata corporation has a prescribed deadline (usually 10 days) to provide the required information set out in the regulations.

For example, in Ontario, a corporation must provide the status certificate within ten days after receiving a request for it and payment of the prescribed fee (\$100). As in B.C., Alberta has two documents that may be requested by buyers: an estoppel certificate (showing fee payments, arrears, and interest) and an "information on request" document, which covers a variety of matters. New Brunswick, Quebec, and Saskatchewan have similar disclosure documents, and, like B.C., the onus is on the buyer to request the information.

The only province that requires sellers to actively provide specific information to buyers is Manitoba. Manitoba's relatively new Condominium Act requires sellers of condominium units, as well as the condominium corporation, to each provide buyers with a Disclosure Statement that includes information about the corporation and unit, such as insurance, reserve funds, restrictions on use of units, etc. Once buyers receive these disclosure documents, they have a seven-day cooling-off period to review the information. Manitoba also requires condominium corporations to provide a status certificate to prospective buyers, which sets out any amount the unit owner owes the corporation and other prescribed information; however, buyers must request this certificate.

### III. JURISDICTIONAL SCAN: ALTERNATIVES AND ENHANCEMENTS TO BLIND BIDDING

#### Alternatives to Blind Bidding: Open-Bidding Models

No Canadian jurisdictions require full disclosure of offers. In Ontario, licensees are required to disclose certain information to potential buyers in the event of a competing-offer situation. Specifically, they must disclose the total number of offers submitted, whether any of the buyers are represented by the same brokerage as the seller, and whether there are agreements in place to reduce the commission if their buyer client's offer is accepted. However, licensees are prohibited from disclosing the substance of the offers. The regulations preventing licensees from sharing the contents of offers were put in place to prevent any improper sharing of offer contents without the buyers knowing when and how these details were being shared and without their consent. The regulations are also silent on the timing of when the disclosure must be made.

Internationally, some jurisdictions follow open-bidding models. These include Australia and New Zealand, where real estate transactions are conducted through both open-bid/closed-ending processes and private treaty negotiations (another name for the process used in B.C.), and Norway and Sweden, where real estate transactions generally follow an open-bid/open-end model.

#### For example:

- Australia – As a federation, auctions are regulated at the state level in Australia. While it is not known what proportion of real estate transactions are conducted through an open-bid/closed-end auction in Australia, it is estimated that they account for approximately 10-30 per cent of sales depending on market conditions and location<sup>5</sup>, with private treaty sales remaining the dominant model. BCFSa reviewed auction processes in New South Wales and South Australia. There are number of similarities in how these states regulate auctions, including:
  - Prescribing what information sellers need to disclose prior to the auction (for example, contract, bidders guide issued by the regulator, title, and property information);
  - Prohibiting collusive practices and providing significant penalties to deter this conduct. States may permit a prescribed number of vendor bids, which must be clearly announced to bidders. This is generally done to provoke additional bidding where the sellers' reserve price has not yet been reached. The reserve price must be set in advance of the auction and cannot be altered after the auction begins; and
  - Maintaining records, including records about the property and the identity of bidders.

<sup>5</sup> See Australian Financial Review, March 2020. <https://www.afr.com/companies/media-and-marketing/rea-domain-count-on-digital-auctions-20200325-p54doi>, Corelogic, 2015. <https://www.corelogic.com.au/news/which-properties-sell-at-auction>.

Generally, despite their increased level of transparency, live auctions maintain the power imbalance between buyers and sellers in an active market. Any due diligence must be performed by the buyer prior to auction day and the seller sets the contract terms (other than details about the buyer and the final sale price) with no opportunity for negotiation between the parties. Sales at auction are binding and buyers do not receive a cooling-off period. In addition, there is a body of scholarly research that supports the assertion that sales by auction may lead to higher prices<sup>6</sup>.

- Norway – Real estate sales in Norway are commonly conducted through an open-bid/open-end model. Norwegian real estate “auctions” are not conducted in person, in contrast to real estate auctions in some other jurisdictions (for example, Australia). Rather, properties are marketed in advance with open-house showings where prospective buyers sign up to receive notifications about offers received during the “auction.” At the open house, prospective buyers also receive a copy of a property brochure, including results of the building survey prepared for the seller (similar to a home inspection report).

During the “auction,” buyers receive real-time, full disclosure of offers as they are received. Each offer contains a specific expiry deadline. When no further offers are received before the latest offer expires, the buyer who made the final offer “wins” and the auction concludes. The real estate agent conducting the sale must maintain a detailed record of bids (for example, name and contact information of the bidders, price, time bids are received, acceptance deadline, time of rejection or acceptance). The agent is required to provide a copy of the bidding record to the buyer and seller. An unsuccessful bidder may receive, by request, an anonymized copy of the bidding record.

### **Enhancements to Blind Bidding: Escalation Clauses**

A brief jurisdictional scan reveals that regulations differ by jurisdiction regarding the use of escalation clauses. In some jurisdictions (for example, B.C. and Ontario), there is no explicit regulation of escalation clauses, although regulators acknowledge the complexities related to their use. In other jurisdictions (for example, Texas), escalation clauses are explicitly prohibited by regulations. No jurisdictions were identified that mandate the use of escalation clauses or provide for limitations on the purchase price of residential real estate with reference to other offers received.

### **Enhancements to Blind Bidding: Disclosure of Offers in Multiple-Offer Situations**

In Ontario, licensees are required to disclose certain information to potential buyers in the event of a multiple-offer situation. They must disclose the total number of offers submitted, whether any of the buyers are represented by the same brokerage as the seller, and whether there are agreements in place to reduce the commission if their buyer client’s offer is accepted. However, licensees are prohibited from disclosing the substance of the offers, including price. Prohibitions on licensees from sharing the contents of offers were put in place to prevent improper sharing of offer contents without the buyers knowing when and how these details were being shared and without their consent. No explicit requirements are provided on the timing of when the disclosure must be made.

As discussed in relation to open bidding, in Norway, the licensee conducting the sale is required to provide a copy of the detailed bidding record to the buyer and seller, including all details of the bids upon conclusion of a sale (for example, name and contact information of the bidders, price, time bids are received, acceptance deadline, time of rejection or acceptance). An unsuccessful bidder may receive, by request, an anonymized copy of the bidding record. This type of disclosure could also be contemplated in the context of an after-the-fact disclosure of offers in multiple-offer situations.

<sup>6</sup> See, for example, Maggie Rong Hu, Adrian D. Lee (2020) Outshine to Outbid: Weather-Induced Sentiment and the Housing Market. *Management Science* 66(3):1440-1472; Alex Frino et al., The Impact of Auctions on Residential Sale Prices: Australian Evidence, *Australasian Accounting Business and Finance Journal*, 4(3), 2010, 3-22; Kenneth M. Lusht,(1993), A Comparison of House Prices Brought by English Auctions and Private Negotiations in Melbourne.



## APPENDIX F

### ADDITIONAL IMPLEMENTATION CONSIDERATIONS

In addition to the foregoing advice, BCFSA has identified several implementation considerations for Government's consideration.

#### I. ADDITIONAL CONSIDERATIONS IN RELATION TO THE PARAMETERS OF A COOLING-OFF PERIOD

##### Legislative Implementation Considerations –

Government will need to explore several implementation considerations which may be addressed in regulations, including:

- The mechanics of exercising a right to cool off (for example, form of notice to seller, who receives notice, how notice is delivered, etc.);
- The mechanics of any termination fee provisions (for example, whether a “holding deposit” equivalent to any termination fee will be mandatory as part of the sales process to cover the termination fee, how it is held and by whom); and
- Enforcement considerations (for example, who will be responsible for resolving disputes related to the cooling-off period).

##### Industry and Public Implementation Considerations –

Government will need to provide time for legislative changes to be embedded in real estate transactions, including:

- The real estate and legal industries require time to embed changes to contract law, including amending standard forms and contracts. These types of changes can only be made after regulations are made available and require considerable legal analysis to understand the implications of a cooling-off period, which represents a fundamental change to contract law; and
- Public education is required as well as targeted education for licensees and other professionals who are involved in real estate transactions (for example, lawyers, notaries and lenders).

**Property types** – While it did not come up in the consultation, Government should consider whether the consumer protections afforded to buyers through a cooling-off period should be applied to residential sales that do not involve title transfer, such as leaseholds, co-op housing, and manufactured homes that are purchased separately from the rental of the pad they sit on.

**Price Impacts** – Although BCFSA was not given a mandate to consult on issues related to housing affordability, many consultation participants shared concerns that a cooling-off period may contribute to further price escalation in B.C. For example, reduced legal consequences to making an unconditional offer may increase the number of prospective buyers who make offers on a property, potentially increasing competition for homes and raising prices. Government may wish to further consider the economic implications of a cooling-off period.

#### II. ADDITIONAL CONSIDERATIONS IN RELATION TO ADDITIONAL MEASURES TO ADDRESS THE RISKS ASSOCIATED WITH UNCONDITIONAL OFFERS

**Prescribed Contract of Purchase and Sale** – While it did not come up during the consultation, Government may wish to consider developing a prescribed contract of purchase and sale to ensure all consumers have equal access to a standard form contract of purchase and sale and to reduce the burden on unrepresented parties to include recommended condition clauses in their offers to purchase. In addition to ensuring prescribed conditions and property disclosure forms in contracts for the purchase of property, a prescribed contract of purchase and sale could permit Government to regulate other aspects of consumer contracts (for example, deposit terms and property access).

## GLOSSARY

*These definitions provide general information only. These definitions are not legal advice or tailored to any specific fact situation.*

**Blind bidding:** A term commonly used to describe an industry practice in which a prospective buyer submits an offer to purchase a property without knowing any information about the content of competing offers from other prospective buyers.

**Bully offer:** A time-limited offer to purchase made by a buyer shortly after listing and ahead of a specified offer presentation date. A bully offer forces the seller to make a decision without the benefit of testing the open market. Bully offers also limit the ability for other buyers to place an offer on the property.

**Caveat emptor:** A legal principle that the buyer alone is responsible for checking the quality and suitability of a property before a purchase is made. "Caveat emptor" means "let the buyer beware."

**Clear business day:** A full business day, beginning on the morning after a specified event. For example, in the case of the cooling-off period in the Australian state of Victoria, if the purchaser signed the purchase contract on Monday, the cooling-off period would begin on Tuesday morning and end on Thursday evening.

**Conditions:** Clauses which provide specific conditions (also referred to as "conditions precedent," "subject to clauses," and "subjects") that must be fulfilled before a contract of purchase and sale is considered binding on the parties to the contract (that is, buyer and seller). In contrast to a cooling-off period, conditions are discretionary, and parties may or may not include them in an offer to purchase.

**Cooling-off period:** A limited period of time, established in legislation, in which buyers can change their minds and cancel the purchase with no or diminished legal consequences.

**Escalation clause:** A clause that offers to automatically increase the buyer's purchase price by a specific amount more than the highest competing offer. The escalation clause typically specifies a maximum purchase price, protecting the buyer from agreeing to pay a purchase price that exceeds their budget. Also known as an "escalator clause" or a "referential purchase price clause."

**Home inspection:** A visual assessment of the condition of a property performed by a qualified individual, such as a licensed home inspector in B.C.

**Latent defect:** A property defect that is not discovered by a reasonable inspection or inquiry and which makes the property dangerous or uninhabitable. Examples of latent defects could include faulty electrical wiring contained within a wall or sewer lines infiltrated by tree roots.

**Licensee:** A business or an individual licensed to provide real estate services under the *Real Estate Services Act*. Also known as a real estate agent.

**Multiple Listing Contract:** A standard form contract published by BCREA and signed by a seller and a licensee prior to advertising a property for sale on the MLS® system. The Multiple Listing Contract also documents in writing the agency relationship between the licensee and client.

**Multiple offer situation:** A circumstance in which two or more buyers submit offers to purchase a property for the seller's consideration at the same time.

**Privity of contract:** A common law principle that provides that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract. In the context of home inspections, for example, only the party who commissioned the home inspection and the home inspector themselves are parties to the contract; third parties (for example, a buyer in the case of a pre-listing inspection commissioned by the seller) do not enjoy the same rights and obligations.

**Property disclosure:** A disclosure completed by the seller that provides information specific to the property being sold. A property disclosure complements a home inspection and provides additional information which may not be readily discernable by a home inspection but is of interest to buyers (for example, whether there has been an insect infestation or water damage in the past, age of key systems, date of renovations and whether municipal permits were obtained).

**Unconditional offer:** An offer to purchase a property that does not provide any conditions to the contract. This type of offer is binding once accepted by the seller. Also known as a subject-free offer.

## **SELECT LIST OF ABBREVIATIONS**

**B.C.** – British Columbia

**BCFSA** – BC Financial Services Authority

**BCREA** – British Columbia Real Estate Association

**CPS** – Contract of Purchase and Sale

**MLS®** – Multiple Listing Service

**PDS** – Property Disclosure Statement

**RESA** – Real Estate Services Act

**Regulation** – Real Estate Services Regulation

**Rules** – Real Estate Services Rules



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