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FOREIGN BUYER'S BEWARE: CANADIAN GOVERNMENT ENACTS A TWO-YEAR BAN ON PURCHASES OF RESIDENTIAL REAL ESTATE BY NON-CANADIANS

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Note: This article has been updated following the registration of the Regulations Amending the Prohibition on the Purchase of Residential Property by Non-Canadians Regulations as of March 27, 2023 (the "Amending Regulations").

As of January 1, 2023, the federal government's *Prohibition on the Purchase of Residential Property by Non-Canadians Act* (the "**Act**") has come into force. The Act prohibits "non-Canadians" from purchasing residential property directly or indirectly from January 1, 2023 to December 31, 2024.

According to the Act, a non-Canadian means:

- (a) an individual who is neither a Canadian citizen nor a person registered as an Indian under the *Indian Act* nor a permanent resident;
- (b) a corporation that is incorporated otherwise than under the laws of Canada or a province;
- (c) a corporation incorporated under the laws of Canada or a province whose shares are not listed on a stock exchange in Canada for which a designation under Section 262 of the *Income Tax Act* is in effect and that is controlled by a person referred to in paragraph (a) or (b) above; and
- (d) a prescribed person or entity (non-Canadien).

The Prohibition on the Purchase of Residential Property by Non-Canadians Regulations (the "**Regulations**") was published on December 21, 2022 in the Canada Gazette. The Regulations address certain aspects of how the Act will operate and clarifies provisions in the Act which previously raised uncertainty.

1. What if I signed my contract before January 1, 2023, but have not completed?

Vendors can rest easy knowing that the prohibition will not apply to purchase and sale agreements that





were entered into prior to January 1, 2023. The mere act of signing the purchase and sale agreement is sufficient. As such, it was not necessary for a non-Canadian to complete a residential purchase prior to January 1, 2023 or to wait until 2025.

2 . What is considered control by a non-Canadian?

The Act had originally deferred the definition of “control” to the Regulations and allowed for the “non-Canadian” to be clarified as per paragraph (d) above.

The Amending Regulations has clarified that with respect to a corporation or entity, “control” means a threshold of 10 percent direct or indirect ownership of shares or ownership interests, or carrying 10% or more of its voting rights, by any non-Canadian in an entity that has been formed under Canadian law or a province (and which is not publicly traded).

3. What is considered a purchase?

Under the Act and Regulations, “residential property” means any real property or immovable (other than real property that is located in an area of Canada that is not within either a census agglomeration or census metropolitan area) that is situated in Canada and:

- (a) is a detached house or similar building, containing three or less dwelling units; or
- (b) is a part of a building that is a semi-detached house, rowhouse unit, residential condominium unit or other similar premises that is, or is intended to be, a separate parcel or other division of real property or immovable owned, or intended to be owned, apart from any other unit in the building;

The Amending Regulations has repealed its inclusion that “residential property” that land in a census agglomeration or census metropolitan area that is zoned for residential or mixed use.

However, there are exceptions to the prohibition as Section 4(2) of the Regulations provide the following circumstances that do not constitute a “purchase” under the Act:

- (a) the acquisition by an individual of an interest or a real right resulting from death, divorce, separation or a gift;
- (b) the rental of a dwelling unit to a tenant for the purpose of its occupation by the tenant;





- (c) the transfer under the terms of a trust that was created prior to the coming into force of the Act;
- (d) the transfer resulting from the exercise of a security interest or secured right by a secured creditor;
or
- (e) the acquisition by a non-Canadian of residential property for the purposes of the development.

Subsection (e) was added to the Regulations by the Amending Regulations. While “purposes of development” is not defined by the Amending Regulations, as of March 27, 2023, the Canada Mortgage and Housing Corporation has provided the following commentary on “development” on its FAQ webpage.

“Development means the process of evaluating, planning and undertaking of alterations or improvements (with or without a change in use) to a residential property or the land on which the residential property is located and, for greater certainty, includes redevelopment of an existing building...”

Additionally, the Act will not apply to the following classes of persons:

- (a) Temporary residents, within the meaning of the *Immigration and Refugee Protection Act* are exempted if one of the following conditions are met:

- (i) if they are enrolled in a program of authorized study at a designated learning institution, and they have fulfilled the following conditions:

- (A) they filed all required income tax returns under the *Income Tax Act* for each of the five taxation years preceding the year in which the purchase was made;

- (B) they were physically present in Canada for a minimum of 244 days in each of the five calendar years preceding the year in which the purchase was made;

- (C) the purchase price of the residential property does not exceed \$500,000; and

- (D) they have not purchased more than one residential property; or

- (ii) if they hold a work permit or are authorized to work in Canada, and

- (A) they have 183 days or more of validity remaining on their work permit or work





authorization on the date of purchase; and

(B) have not purchased more than one residential property.

(b) foreign states purchasing residential property for diplomatic or consular purposes;

(c) foreign nationals who hold a passport that contains a valid diplomatic, consular, official or special representative acceptance issued by the Chief of Protocol for the Department of Foreign Affairs, Trade and Development;

(d) foreign nationals, with valid temporary resident status, whose temporary resident visa was issued, or temporary resident status was granted, if the Minister is of the opinion that the exemption was justified based on public policy considerations to provide safe haven to those fleeing conflict; and

(e) persons that have made a claim for refugee protection, if that claim has been found eligible and referred to the Refugee Protection Division under the *Immigration and Refugee Protection Act*.

4. What are the offences and penalties?

Those who contravene the Act may be guilty of an offence and may be subject to fines up to \$10,000 per person or entity.

Contravening the Act does not invalidate the sale necessarily, however, the superior court of the province may order that the residential property be sold if the following conditions are met:

(a) the non-Canadian is the owner of the residential property at the time the order is made;

(b) notice has been given to every person who may be entitled to receive proceeds from the sale; and

(c) the superior court of the province is satisfied that the impact of the order would not be disproportionate to the nature and gravity of the contravention, the circumstances surrounding the commission of the contravention and the resulting conviction.

Any order under the Act must provide that the proceeds of the sale be distributed as follows:

(a) the payment of the costs of the sale, including the costs incurred by the Minister in bringing the application for the order and any unpaid fines by the non-Canadian under the Act;





(b) the payment of those, other than the non-Canadian, who are entitled to receive the proceeds of the sale in amounts and according to priorities that the superior court may determine;

(c) the repayment of the non-Canadian of an amount that is not greater than the purchase price they paid for the residential property; and

(d) the payment of any amount remaining to the Receiver General for Canada.

5. Who is responsible?

This penalty not only applies to non-Canadians, but also may include every person or entity that attempts to counsel, aid or abet a non-Canadian to purchase, directly or indirectly, any residential property under the Act.

Anyone involved in a real estate transaction (e.g. developers, builders, vendors, realtors, brokers, lawyers, and other advisors) should be cautious on advising on potential transactions.

Developers, in particular, should train sales staff regarding the requirements of the Act and should ensure that sales staff undertake reasonable inquiries as to whether purchasers are non-Canadians. This will protect developers from being found to have entered into contracts with non-Canadians knowingly or with willful blindness.

If you are a developer, vendor, or any professional advisors that may be involved in a real estate transaction, it is important to ensure that there is no exposure to the consequences imposed by this legislation.

Should you have any questions about this article, please contact the author of this article Jeevan V. Ahuja at jahuja@rbs.ca, or any member of our real estate group found here.

