

APRIL 2023 UPDATE: AMENDMENTS TO THE PROHIBITION ON THE PURCHASE OF RESIDENTIAL PROPERTY BY NON-CANADIANS REGULATIONS PROVIDE INCREASED DEAL CERTAINTY FOR COMMERCIAL REAL ESTATE INDUSTRY

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Introduction

The *Prohibition on the Purchase of Residential Property by Non-Canadians Act* [1] (the “**Act**”) and regulations [2] (the “**Regulations**”) came into force on January 1, 2023. The Act bans non-Canadians from directly or indirectly purchasing residential property in Canada for a period of two years. For additional information please see our previous bulletins published on [November 28, 2022](#) and [February 10, 2023](#).

Amendments to the Regulations were announced on the recommendation of the Minister of Housing and Diversity and Inclusion (the “**Amendments**”) [3]. The Amendments came into force at the time of the announcement on March 27, 2023 and narrow the application of the Regulations in an effort to ensure the Act only captures residential real estate purchases by non-Canadians.

Key Changes

The key changes in the Amendments are:

- the Act no longer prohibits the acquisition by non-Canadians of land that does not contain a habitable dwelling and is zoned for mixed use or residential use, which helps alleviate one of the more significant areas of concern with the Act and Regulations;
- the prohibition under the Act and Regulations no longer applies to any entity formed under Canadian provincial or federal law and publicly traded on a stock exchange in Canada, including REITs;
- the Act and Regulations continue to apply to non-publicly listed entities and corporations formed under Canadian provincial or federal law if they are “controlled” by a non-Canadian individual or entity, however, the threshold for “control” has been increased from 3% to 10% of the value of equity or voting rights. Accordingly, private corporations, REITs and limited partnerships will continue to be impacted provided

their investor base is at least 10% foreign controlled;

- there is now an exemption that allows non-Canadians to acquire residential property for development purposes; and
- the Amendments make it easier for temporary residents holding a work permit to purchase residential property.

More details below.

Narrowed Scope of “Residential Property”

A significant change to the Regulations impacting the commercial real estate industry is the amendment of the definition of “residential property”. This change addresses previous uncertainty around the interpretation of a property which “does not contain any habitable dwelling” and is “zoned for residential use or mixed use”. The Act and Regulations no longer consider land that does not contain a habitable dwelling and is zoned for mixed use or residential use “residential property”. Accordingly, the Act and Regulations no longer prohibit a non-Canadian from purchasing or leasing property zoned for either residential or mixed use if the property does not contain:

- a detached house or similar building, containing not more than three dwelling units; or
- 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.

Despite this change, some commercial and industrial properties may still be caught by the Act if there is a “residential property” on the property. For example, potential acquirers of property may encounter issues when purchasing commercial, agricultural or industrial properties that also contain a detached house or a residential unit.

Canadian Public Companies and Entities Exempted

Prior to the Amendments, the Act and Regulations exempted publicly traded *corporations* listed in Canada and formed under Canadian provincial or federal law. The Amendments expand this exemption to all entities, thereby including, amongst other entities, publicly listed Canadian REITs.

Increased Threshold for Foreign Control

Non-publicly listed Canadian entities and corporations formed under Canadian provincial or federal laws remain subject to the Act and Regulations if they are controlled by a non-Canadian individual, corporation or entity. Under the Amendments, “control” is defined as 10% direct or indirect ownership of shares or interest in

an entity equating to 10% or more of its value or 10% or more of its voting rights, or, control “in fact” whether directly or indirectly, through ownership, agreement or otherwise. Prior to the Amendments, the threshold for control was 3%. Accordingly, private corporations, REITs, limited partnerships and other entities remain subject to the Act provided their investor base is 10% or more non-Canadian. As the Act continues to require assessment of ownership on an “indirect” basis, potential acquirers of residential property will continue to struggle with determining whether their investor base reaches this threshold, thus requiring “self diligence” at the outset of any potential acquisition of residential property.

Exception for Development Purposes

The Amendments introduce an exception for the acquisition by a non-Canadian of residential property provided it is for development purposes. According to the updated FAQs on the Act and Regulations provided on the Canada Mortgage and Housing Corporation (“**CMHC**”) website, there must, however, be clear evidence of development intention respecting the property prior to its acquisition. Subsequent failure to develop the property once acquired may not necessarily contravene the Act provided a good faith intention for development can be demonstrated and that any change leading to a good faith decision not to proceed with development can also be demonstrated.

The updated CMHC FAQs, which we note are not law and therefore not binding, do provide some guidance respecting the Act and Regulations. The FAQs state that “development” means the process of evaluating, planning and undertaking 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 includes the redevelopment of an existing building. The FAQs further provide examples of what would not be considered development, including:

- a non-Canadian purchasing residential property in reliance upon the development exemption for the mere purpose of leasing or renting the property out to tenants or otherwise managing it as a rental property as part of its portfolio; and
- undertaking repairs, renovations, remodels or other similar modifications to an existing residential property including: expanding an existing dwelling unit, remodeling an existing dwelling unit, re-demising interior space, adding a porch, deck or patio and finishing an unfinished basement.

Loans

The CMHC FAQs state that a mortgage or other security by a non-Canadian lender does not breach the Act provided the lender is not making the mortgage or taking a security interest to assist a non-Canadian to acquire residential property in contravention of the Act.

Similarly, CMHC's FAQs indicate that providing a mortgage to a non-Canadian for residential property does not contravene the Act unless the lender is aware the purchase contravenes the Act. In addition, CHMC's FAQs also indicate that non-Canadians who have already acquired a residential property before January 1, 2023 can grant or renew a mortgage or hypothec of that residential property while the prohibition is in effect.

Change to Benefit Work Permit Holders

The Amendments make it easier for those holding a work permit or are authorized to work in Canada under the *Immigration and Refugee Protection Regulations* to purchase residential property. Prior to the amendments, filing income tax returns were required for a minimum of three of the four preceding taxation years and for the individual to have worked full time for a minimum of three of the four preceding years.

Under the Amendments, a temporary resident holding a work permit is eligible to purchase residential property if they have 183 days or more remaining on their work permit or work authorization at the time of the purchase and they have not purchased more than one residential property.^[4]

Enforcement Casts a Wide Net

The prohibition in the Act is to be enforced through quasi-criminal prosecution that could lead to a maximum fine of \$10,000 and a record of a conviction. Section 6(1) of the Act makes it an offence to contravene the basic prohibition on the purchase of residential property. This is directed at non-Canadians. The provision, however, also makes any Canadian person or entity *knowingly assisting* a non-Canadian to carry out the prohibited activity guilty of an offence. Specifically, any Canadian person or entity who counsels, induces, aids or abets a non-Canadian to purchase a residential property (or attempts to do any of the foregoing) *knowing* the non-Canadian is prohibited under the Act from doing so is guilty of an offence, whether or not the non-Canadian is prosecuted.

The Act further contains a separate offence for those indirectly involved. Any officer, director, agent, senior official or anyone authorized to exercise managerial or supervisory functions for a corporation or entity can be found guilty of the offence if they directed, authorized, assented to, acquiesced in or participated in its commission.

Lastly, if a non-Canadian is convicted of the offence, the Minister may order that the residential property be sold.

Conclusion

While the Amendments narrow the scope of the Act and the Regulations, there are many considerations to take into account when considering the potential acquisition of property in commercial transactions. Please

contact McMillan LLP for guidance navigating the acquisition of land in Canada.

[1] Prohibition on the Purchase of Residential Property by Non-Canadians Act, SC 2022, c 10, s. 235 (the “Act”).

[2] Prohibition on the Purchase of Residential Property by Non-Canadians Regulations: SOR/2022-250 (the “Regulations”).

[3] Regulations Amending the Prohibition on the Purchase of Residential Property by Non-Canadians Regulations: SOR/2022-250 (the “Amendments”).

[4] Amendments, s.5, Regulations, s.5(b)(i)-(iii).

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A Cautionary Note

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