

# FEBRUARY 2023 UPDATE - NEW RESTRICTIONS ON SELLING LAND: AN OVERVIEW OF THE *PROHIBITION ON THE PURCHASE OF RESIDENTIAL PROPERTY BY NON-CANADIANS ACT* AND REGULATIONS

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## INTRODUCTION

The *Prohibition on the Purchase of Residential Property by Non-Canadians Act* [1] (the “**Act**”) and its accompanying 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. Please see our previous [bulletin](#) for an overview of the Act. This bulletin will provide further insight into the Act based on the introduction of the Regulations.

## KEY DETAILS PROVIDED BY THE REGULATIONS

The Regulations have shed some light on the practical effects of the Act by providing key definitions to “prescribed entities”, “control”, “prescribed real property or immovable” and “purchase”, among others. These definitions have significantly broadened the Act’s scope and may impact not only residential property transactions but certain commercial transactions. We have described the key definitions in more detail below:

### 1. Prescribed Entities

The definition of “non-Canadian” in the Act is as follows:

- 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); and
- d. a prescribed person or entity.

For the purposes of the above definition, the Regulations further defined “prescribed entities” as an entity formed outside the laws of Canada or a province, or an entity formed under the laws of Canada but controlled by a foreign entity or a foreign person.

## 2. Control

The Regulations define “control” with respect to a corporation or entity as:

- a. direct or indirect ownership of shares or ownership interests of the corporation or entity representing 3% or more of the value of the equity in it, or carrying 3% or more of its voting rights; or
- b. control in fact of the corporation or entity, whether directly or indirectly, through ownership, agreement or otherwise.<sup>[3]</sup>

Upon reviewing the definitions of “prescribed entities” and “control” in the Act and Regulations in order to determine whether they are controlled by a foreign entity a purchaser would have to confirm:

- a. whether the purchaser is a Canadian entity or corporation;
- b. whether any foreign individual, entity or corporation has “control” with respect to the purchaser; and
- c. whether any Canadian entities or corporations which have “control” with respect to the purchaser are themselves controlled by a non-Canadian.

Despite the assessment outlined above, to some extent it is still unclear to what extent a purchaser will need to go even deeper into their ownership structure in order to confirm that they qualify as a Canadian purchaser for the purposes of the Act and Regulations.

## 3. Prescribed Real Property or Immovable

In paragraph (c) of the definition of residential property in section 2 of the Act, residential property is defined as any “prescribed real property or immovable”. This phrase is further defined in the regulations stating that any prescribed real property or immovable is:

“land that does not contain any habitable dwelling, that is zoned for residential use or mixed use, and that is located within a census agglomeration or a census metropolitan area.”

Given the inclusion of lands zoned for mixed use in this definition, both vacant land and commercial property without a “habitable dwelling” located in the prescribed areas that are zoned for residential or mixed use would fall under the definition of “residential property”. We note that census agglomerations and census metropolitan areas may sometimes be broader than formal municipal boundaries, in some instances including outlying rural lands not commonly considered as part of the municipality.

Parties should also be alert to any changes in zoning bylaws (such as [Edmonton's ongoing bylaw overhaul](#)) which may impact residential or mixed use zoning for subject lands. In particular, parties should be aware of lands that enjoy “legal non-conforming” status under existing zoning. The legal non-conforming concept may apply differently in each province, but it generally means that when the use of land or structures was established it complied with the then-existing zoning and, as a result, the lands or structures continue to maintain that legal non-conforming status under the prior zoning regardless of the current zoning designation of the lands. For example, a long-standing commercial building with no habitable dwelling may enjoy legal non-conforming status under a prior commercial zoning designation even though the lands are currently zoned residential or mixed-use. It is not yet clear how legal non-conforming lands would be treated under the Act, but without further guidance from the legislature or the courts it may be prudent to consider those lands to be residential property under the Act and therefore caught by the prohibition.

Property that falls under census agglomeration or a census metropolitan area in **British Columbia** include areas such as:

- a. Vancouver;
- b. Squamish;
- c. Abbotsford;
- d. Chilliwack;
- e. Kelowna;
- f. Cranbrook;
- g. Quesnel;
- h. Prince Rupert;
- i. Fort St. John; and
- j. certain areas of Vancouver Island.[\[4\]](#)

In **Québec**, properties covered by the Act are, as of the date hereof, located in one of the following 7 census metropolitan areas or within one of the 25 census agglomerations[\[5\]](#):

- a. The Québec area of Ottawa/Gatineau;
- b. Drummondville;
- c. Montreal;
- d. Québec;
- e. Saguenay;
- f. Sherbrooke; and
- g. Trois-Rivières.

For the purposes of the application of the Act in the Province of Québec, it is still unclear whether usufruct, emphyteusis or the right of superficies, for example, will be covered by the Act as the Regulations define a “purchase” as the acquisition, with or without conditions, of a legal or equitable interest or a real right in a residential property.<sup>[6]</sup>

Areas in **Alberta** caught by this Act include the following:

- a. Calgary;
- b. Edmonton;
- c. Canmore;
- d. Sylvan Lake;
- e. Okotoks;
- f. Red Deer;
- g. Wood Buffalo

Finally, in **Ontario** there are forty-five (45) census agglomerations and census metropolitan areas including such areas as:

- a. Toronto;
- b. Ottawa – Gatineau;
- c. London;
- d. Kitchener – Cambridge – Waterloo;
- e. Barrie;
- f. Windsor;
- g. Catharines – Niagara;
- h. Guelph;
- i. Greater Sudbury;
- j. Hamilton; and
- k. Kingston. <sup>[7]</sup>

As evident by the relevant areas outlined above and the definition of “prescribed real property or immovable” in the Regulations, residential property as defined in the Act will capture properties which may more typically be bought and sold by corporations in areas which aren't strictly residential.

#### **4.Purchase**

In section 4(1) of the Regulations a “purchase” for the purposes of the Act is defined as the “acquisition, with or without conditions, of a legal or equitable interest or a real right in a residential property.”

Based on this definition, the sale of residential property to a non-Canadian isn't the only acquisition that may be caught under the Act. Acquiring an interest in residential property through a commercial lease, or through another type of interest in land such as an option to purchase may be caught as an acquisition of a legal or equitable interest or real right in residential property under the Act.

It is important to note however that there are some exceptions to this definition outlined in section 4(2) of the Regulations. These exceptions include:

- 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; gold
- d. the transfer resulting from the exercise of a security interest or secured right by a secured creditor.

Despite these exceptions, the definition of “purchase” in the Regulations applies broadly to commercial activities. For example, parties leasing land for a commercial purpose in an area zoned mixed use and located within a census agglomeration or a census metropolitan area will need to be aware that they may be caught under the Act.

In addition, although the Act does not apply to a transfer of residential property as a result of the exercise of a security interest or secured right, it is unclear whether the Act applies when a party registers a mortgage or other security interest in residential property. Until further clarity is provided by the legislature or through future court decisions it may be prudent to assume the Act applies to all such interests.

## EXCEPTIONS

The Act contains exceptions to the prohibition, further defined by the Regulations. These exceptions allow non-Canadians to purchase residential property if they meet certain conditions. The prohibition will not apply to “Prescribed Persons” which include refugees, protected persons, foreign diplomats and temporary residents.

[8] In order to fall under the exception, temporary residents must satisfy one of the following conditions: [9]

- a. be enrolled in a program of authorized study at a *designated learning institution* and:
  - i. file income tax returns for the preceding five years before the purchase;
  - ii. be physically present for at least 244 days in Canada for the preceding five years before the purchase;
  - iii. ensure the residential property was purchased for less than \$500,000; and
  - iv. not purchase more than one residential property; gold
- b. hold a *work permit* or are otherwise authorized to work in Canada and:

- i. work in Canada for at least three out of four years immediately preceding the purchase of residential property;
- ii. file all required income tax returns for at least three out of four years immediately preceding the year in which the purchase was made; and
- iii. not purchase more than one residential property.

In addition to the above exceptions, the Quebec Superior Court recently ruled that the prohibition in section 4(1) of the Act does not apply to sales resulting from an agreement of purchase and sale entered into by non-Canadians before January 1, 2023 in order to deal with ambiguity in the French version of the Act. This decision aligns with section 4(5) of the English version of the Act.

## **PENALTIES**

The offenses under the Act will have a wide reach. The penalties will not only apply to non-Canadian purchasers, but to anyone who participates in or facilitates a prohibited real estate transaction, and is knowingly a party to a contravention of the Act. Anyone guilty of an offense may be liable on summary conviction to a maximum fine of \$10,000. In addition, corporations, directors, officers, managers, and others who have authorized or participated in the violation may be held personally liable.

## **OTHER LEGISLATION**

Even if the parties have complied with the Act and Regulations, there are still other prohibitions on foreign ownership which may need to be considered, such as Alberta's *Foreign Ownership of Land Regulations* [\[10\]](#) (“**FOLR**”) and Quebec's *Act Respecting the Acquisition of Farm Land by Non-Residents* [\[11\]](#) (“**ARAFL**”), which have different foreign ownership tests, exemptions and applicable lands. Unlike the regime of the Act and its Regulations, the procedures under FOLR and ARAFL for applicable lands require, among other things, certain prescribed forms to be completed and submitted as part of a submission for registration at the Alberta Land Titles Office or the Québec Land Registry. In other words, in addition to the Act and Regulations there is an active process to review transfers of land and other dispositions of real property for non-compliance under the FOLR or ARAFL, with the possibility of submissions being rejected on that basis.

## **IMPLICATIONS**

As a result of the definitions outlined in the Regulations, the Act has a broad reach. It captures not only purely residential purchases but also some commercial transactions by Canadian corporations and entities that are controlled by a non-Canadian. For example, if more than 3% of the shares of a Canadian corporation are indirectly owned by a non-Canadian, that Canadian corporation is prohibited from purchasing commercial lands with no “habitable dwelling” that are zoned for mixed use.

In addition, we anticipate that vendors and lenders may begin to require a purchaser to provide evidence confirming that there is no contravention of the Act.

## CONCLUSION

Anyone involved in the purchase or sale of residential property as defined in the Act should familiarize themselves with the prohibitions under the Act and Regulations to ensure compliance with the legislation and avoid any potential liability. We strongly recommend seeking legal advice before entering into a purchase agreement for any such lands.

If you wish to obtain further information on the Act and Regulations, and their potential implications, please do not hesitate to contact us.

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

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

[3] Regulations, s. 1-2.

[4] [2021-12572-01-B.pdf \(statcan.gc.ca\)](#) – follow link for full list of areas.

[5] *Id.*

[6] Regulations, s. 4(1).

[7] *Id.*

[8] Act s. 4(2) Regulations s. 5.

[9] Regulations s. 5.

[10] [Foreign Ownership of Land Regulations](#), Alta Reg 160/1979.

[11] [Act Respecting the Acquisition of Farm Land by Non-Residents](#), CQLR, c. a-4.1.

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## A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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