

## Update on the Prohibition on the Purchase of Residential Property by Non-Canadians Act

Robert Lysy, Kwaku Tabi, Joseph Brydon, Steven Adler

March 31, 2023

This is an update to our Cassels Comment dated January 13, 2023, regarding the *Prohibition on the Purchase of Residential Property by Non-Canadians Act*, S.C. 2022, C.10, s.235 (the Act) and the associated regulations under the *Prohibition on the Purchase of Residential Property by Non-Canadians Regulations* SOR/2022-250 (the Regulations), available here.

While the Regulations provided some much-needed clarity on the Act's applicability and enforcement, there remained areas of concern for many developers, lawyers, lenders, brokers, realtors, and others. Over the intervening months since the publication of the Regulations, the Minister of Housing and Diversity and Inclusion and the Canada Mortgage Housing Corporation (CMHC) have consulted with various stakeholders to further update the Regulations. These efforts have resulted in CMHC's announcement on March 27, 2023, regarding amendments to the Regulations (the Amendments) available here. The Amendments came into force on March 27, 2023, and will provide further clarity on the Act and its applicability, including changes designed to increase the flexibility of businesses engaged in development opportunities. The exact text of the regulations is also available here.

The Amendments can be summarized as follows:

- Section 1, Paragraph (a) of Regulations, being the definition of "control", which was previously set out as follows: "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" has been revised such **that the threshold for "control" is increased from 3% to 10%**.
- Section 2, Paragraph (b) of the Regulations, which previously exempted only Canadian publicly-traded companies, has been revised to clarify that **any Canadian publicly-traded entity, including partnerships and real estate investment trusts, are exempt from the Act's prohibitions**.
- Section 3(2) of the Regulations, which extended the definition "Residential Property" in the Act to apply to land without a habitable dwelling that is zoned for residential or mixed use has been repealed. **As a result, the Act will no longer apply to such lands (including vacant lands and commercial developments)**.
- Section 4(2) of the Regulations, dealing with exceptions to the definition of a "purchase" under the Act, has been expanded to **include a new Section 4(2)(e) providing a new exception regarding the ability of non-Canadians to acquire residential property** for the purpose of development. We've included below some guidance provided by CMHC on their interpretation of the term

# Cassels

“development”.

- Finally, Section 5(b)(i) to (iii) of the Regulations have been repealed and replaced to clarify the conditions for a temporary resident to legally purchase residential property.

The Amendments will come as welcome news to many stakeholders who were concerned by the broad application of the Act and the Regulations. However, it remains to be seen whether the Act, the Regulations, or the Amendments will effectively address high housing costs in Canada, as is the Federal Government’s stated rationale for the Act’s implementation. Despite the Amendments, the Act and Regulations still cast a wide net over many potential transactions. Any person or entity deemed a non-Canadian by the Act (or advisors who work with such non-Canadians) engaged in real property transactions or investments should still be aware of the Act and its potential consequences. Those with questions or concerns are encouraged to seek legal advice with respect to the Act and its application. Additionally, even those non-Canadians permitted to purchase residential property in Canada by the Act or Regulations (as revised by the Amendments) should still be aware of the various provincial based regulations on such purchases. In Ontario, these provincial regulations include the Non-Resident Speculation Tax implemented under the *Land Transfer Tax Act*, R.S.O. 1990, c. L.6, which applies throughout the entire province of Ontario and includes a 25% tax on non-resident purchases of residential homes. In British Columbia, these include the Additional Property Transfer Tax for foreign entities (see here), and depending on the use of a certain property, some non-residents may be affected by applicable municipal speculation and vacancy taxes (see here).

## Summary of FAQ on “Development”

As mentioned above, there is a new exception which allows non-Canadians to purchase residential property for the purpose of development. The CMHC has published frequented asked questions (FAQ), available here, which provide guidelines as to what constitutes “development” under the Act:

- “Development” means the process of evaluating, planning and undertaking of alterations or improvements to a residential property or the land on which the residential property is located, including redevelopment of an existing building.
- Some non-determinative factors that may indicate that an alteration or improvement constitutes Development include:
  - That the alteration or improvement engages the applicable review and approval process of the relevant municipality (or other land use planning regulator);
  - That the alteration or improvement is accompanied by a change of use;
  - An expansion or remodel that is so extensive that it is tantamount to the construction of a new building.
- Things which would *not* be considered development are:
  - A non-Canadian purchasing residential property in reliance upon the Development

# Cassels

exemption and for the purpose of leasing/renting the property out to tenants or managing it as a rental property as part of its portfolio;

- Repairs, renovations, remodels or other similar modifications to an existing residential property.
- An existing structure or building does not need to be altered for there to be Development. The construction of a new building or development of the land without alteration of an existing building could both be considered Development.

Individuals or businesses concerned about the Act's potential impact on their ability to buy or sell real estate in Canada are encouraged to reach out to a member of the Cassels Real Estate & Development Group for assistance.

---

*This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.*