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Impending Ban on Purchases of Residential Real Estate by Non-Canadians: What Home Buyers, Builders and Brokers need to know

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The *Prohibition on the Purchase of Residential Property by Non-Canadians Act* (the “**Act**”) will come into force on January 1, 2023, as one of several measures enacted by the federal government to target soaring housing prices, increase supply and curb foreign investor speculation. With few exceptions, the Act will impose a two-year ban on the purchase of substantially all types of residential property (including, without limitation, pre-construction condominium units and freehold homes, and potentially including vacant land zoned for residential development in certain geographical areas) by individuals who are not Canadian citizens or permanent residents of Canada. The ban will also apply to corporations that are not incorporated in Canada or controlled by Canadian citizens or permanent residents of Canada within the meaning of the Act’s Regulations (collectively, “**non-Canadians**”).

While the Act provides a detailed (albeit currently incomplete) breakdown of the applicability of the Act to certain individuals, corporations and property types, this article focuses on key aspects of the legislation and steps that buyers, builders and brokers should consider when buying, selling or advising on the purchase and sale of qualifying property. The Act does not apply to non-Canadians who enter into or assume liability under agreements of purchase and sale prior to January 1, 2023, and impending purchases of qualifying residential property will, therefore, not likely be impacted by the Act. However, agreements of purchase and sale and assumptions of existing agreements of purchase and sale entered into by a non-Canadian on or after January 1, 2023, will remain valid and the transaction can be completed. That said, we wish to bring the following to your attention:

a) **Buyers** should ensure that they are fully aware of their status as a non-Canadian or that of a buyer corporation controlled by them that the Act deems a non-Canadian, as the Act empowers the Court to order the sale of the acquired property on terms it considers appropriate. The Act provides that in no circumstance shall the proceeds received from such Court-ordered sale exceed the purchase price paid for the property. As such, a non-Canadian buyer will have sustained a significant financial loss after accounting for the “closing costs” incurred in connection with such purchase in addition to the penalties

and consequences detailed below, the most significant of which in Ontario being Land Transfer Tax and municipal Land Transfer Tax for properties located in Toronto. As a result, a non-Canadian buyer will have incurred a significant financial loss at the outset of a contravening transaction with no entitlement to the increased value of the acquired property after having potentially significant amounts of money tied up via deposits for several years in the context of pre-construction homes.

While the Regulations are expected to contain more specific restrictions regarding investments in qualifying property that can and cannot be made by non-Canadians, buyers should keep in mind that these restrictions could potentially restrict investment by non-Canadians in corporations, partnerships and limited partnerships acquiring title to land zoned for residential development or acquiring multiple residential units.

b) **Builders** are advised to ensure that their standard-form agreements of purchase and sale for sales of pre-construction condominium units and freehold homes are updated to properly contain assurances from buyers that they are not a non-Canadian within the meaning of the Act. They should also confirm that the relevant provisions of such agreements of purchase and sale adequately restrict assignments of existing agreements of purchase and sale to non-Canadian buyers. In this regard, builders' sales teams should have working knowledge of the relevant provisions of the Act such that they are equipped to make reasonable enquiries as to the citizenship status of a buyer. In the scenario where a buyer is a corporation, builders are advised to "drill down" to the shareholders of such corporation in order to satisfy themselves that they have not contracted to sell a qualifying property to a non-Canadian buyer. In Ontario, it is imperative that builders and their sales teams have working knowledge of the Act both for the reasons highlighted above as well as for the purposes of ensuring compliance with the *New Home Construction Licensing Act, 2017*, as its Code of Ethics requires all licensed home builders to comply with the laws of every jurisdiction in which they carry on business. The failure to comply may result in fines and/or remedial action required to be taken by licensed home builders, as well as other potential sanctions by the Home Construction Regulatory Authority that governs licensing and related matters for builders and vendors of new homes in Ontario.

c) **Brokers** are advised to have working knowledge of the relevant provisions of the Act such that they are in a position to properly advise and inform their potential buyer clients of the restrictions on purchases of qualifying property by non-Canadians prior to their entering into a purchase and sale transaction. Additionally, it is imperative that brokers have working knowledge of the Act for the purposes of their standing before the Real Estate Council of Ontario, as an offence committed by a broker under the Act is likely to also run afoul of the *Real Estate and Business Brokers Act's* relevant provisions regarding the ethics, duties and "Know Your Client" obligations of real estate agents and brokers licensed in Ontario.

Liability for contravention of the provisions of the Act carries a maximum fine of \$10,000 and extends to not only non-Canadian buyers, but also those who actually or attempt to "counsel, induce, aid or abet" a non-Canadian to purchase qualifying property, whether directly or by way of assumption of an existing agreement of purchase and sale, knowing that the non-Canadian is prohibited from doing so.

As the Regulations referenced within the Act have not yet been passed, and those Regulations are expected to contain several clarificatory provisions regarding the operation, applicability and prohibitions imposed by the Act, home buyers, builders and brokers are encouraged to watch for additional information regarding the status of the Act and its Regulations to ensure compliance with the legislation once it comes into force.

We look forward to sharing our additional insights with you once the above-noted Regulations have been passed. In the meantime, the authors and the other lawyers in our Commercial Real Estate Group would be pleased to answer any questions you may have regarding the Act and/or related matters.

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