



October 21, 2022

Via Email

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Dear Ministers

Re: Proposed Regulations under Prohibition on the Purchase of Residential Property by Non-Canadians Act

1. Overview

As representatives of Ontario lawyers in private practice, we are writing to inform you of various concerns with the above legislation, currently set to come into force on January 1, 2023 and the consultation process that was concluded last month in respect of regulations proposed thereunder. The consultation process was extraordinarily short and did not offer sufficient time for any meaningful response from the various associations and their members that stand to be impacted by this legislation, particularly since most of the legislation is to be detailed by regulation. We are hopeful you will consider and include these comments in the scope of the regulations being considered for implementation in January, should the government not revoke the statute instead.

2. Who is FOLA and What is Our Role?

The Federation of Ontario Law Associations (**FOLA**), is an organization that represents the associations and members of the 46 local law associations across Ontario. Together with our associate member, The Toronto Lawyers Association, we represent approximately 12,000 lawyers, most of who are in private practice in firms across the

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province. These lawyers are on the front lines of the justice system, and a significant proportion are full-time or part-time solicitors in communities across Ontario.

3. Our Concerns

A. Ultra Vires and Jurisdictional Challenges

The essence of this legislation is to regulate matters which fall within the Provincial jurisdiction of property and civil rights. Ontario, British Columbia and other provinces have already taken steps to impose restrictions on purchase of certain property by non-residents and those regimes should be left in place to govern the policy matter or to address the Government's goals of preserving residential inventory for Canadians. Threatening resident advisors with fines for participating in transactions, which can often occur quickly and come to lawyers already signed and contractually committed, is how this legislation is being perceived and may, in fact, operate in practice.

It would not appear, from the language in the Act, that a failure to comply or to 'knowingly assist' in a purchase by a non-Canadian would be a criminal offence, requiring federal involvement. Without a reasonable need for federal interference, the subject matter should fall to the provinces to legislate based on their own needs to protect residential inventory as required.

B. Advisory Offences, Enforcement & Standard of Care

The Act appears to target real estate professionals and lawyers who fail to 'stop' non-Canadians from purchasing residential properties in Canada. The \$10,000 maximum fine for these assistive parties is material and consequential. There is a possibility that many lawyers may simply stop assisting clients on the prospect that they 'may' be a non-Canadian, in particular if the means to verify control of a corporation or as a distant beneficiary of a trust is too onerous to confirm. This could open professionals to claims of human rights violations.

The Act and regulations will create a standard of care for lawyers who are engaged in such transactions. In Kau v The Queen, it was held that one could not rely solely on a declaration from an individual as to his/her residency status, but rather the lawyer must make a 'reasonable inquiry' in the context regarding residency. This will be more significant in the context of a corporate purchaser where almost every shareholder will have to be scrutinized as to whether they are 'Canadian' citizens or permanent residents. This standard will likely only be clarified following charges being laid against lawyers who find themselves in such a precarious position.

In many cases, lawyers are engaged after an agreement is signed and committed between purchaser and vendor. The legislation does not allow a purchaser who has entered into the transaction to rescind the agreement. It is unclear what the purchaser can or ought to do in that case. A vendor may refuse to close for fear of being subject to the penalties under the Act (notwithstanding language proposed that suggests a sale made to a non-Canadian does not invalidate the sale, it is still open for the government to charge the Vendor for its role in the transaction). Similarly, if a non-Canadian who, after committing herself to a transaction, finds out that the purchase is illegal but wants to close and then resell the property to divest herself of the interest, she has no redress to use counsel, who would be charged as facilitating the closing, even if it were to demonstrate compliance by immediate resale. No solicitor would want to assist in light of the sanction. Would the non-Purchaser in this case only have recourse to self-disclose

to the Minister and wait for the Minister to issue a sale order under the Act? This would not be a good use of government resources.

In any event, it is extremely unclear how the Government would respond to these (and many other) gaps in how this legislation would work.

C. Geographical and Property Scope

One such concern relates to the scope of the legislation. The consultation paper suggests that regulations will identify census metropolitan areas that would be applicable to the scope of the prohibition. Lawyers work in the area of exact details and the jurisdictional boundaries of these census metropolitan areas will need to be precisely identified and defined with respect to each province's land titles system and, ideally, municipal boundary. In many cases, the federal boundary identification standards (such as electoral districts, ridings, postal code areas and such) are not aligned with the actual municipal boundaries.

Similarly, a suggestion that the Act would not apply to recreational properties as a category is not sufficient as there are a number of such properties located within census metropolitan areas that contribute towards tourism and other economic effects.

The arbitrary limit of 3 or less dwelling units in a property is also a concern as it suggests that a non-Canadian purchaser would not be interested in larger buildings (like apartment buildings or condominium/strata projects) and there is no prohibition on those under the Act. We can envision situations such as a non-Canadian parent wanting to purchase a single home for her child who is studying or working in Canada; she would be precluded from this under the Act, and only if the child qualified under the proposed exemptions, would she then be able to lend the money to the child (assuming this too is not an indirect ownership interest). There is no clarification proposed in the consultation paper about situations like this.

D. Other Exemptions

Most of the exemptions relating to non-Canadians are mirrored in the Ontario Land Transfer Tax Act which imposes the non-resident speculation tax, namely the refugee status and work or student visa exemptions. Given the timing to get status and visas, it may be that the two year statutory prohibition will end before some of these exemptions can materialize.

The financial threshold of \$500,000 or higher, which would apply to prohibited residential properties, is arbitrary. As the prohibition is against certain properties in census metropolitan areas, there are few properties that would be available under this price point and, if there were, it is unclear why non-Canadians would not be prohibited from accessing those lower-valued properties. If the intention is to promote housing inventory for local residents and citizens, this financial threshold complicates the policy rationale of the Act.

The notion that a non-Canadian shareholder of 3% or more of the voting control of a corporation renders the entire corporation incapable of acquiring residential property under the Act is a very low threshold. A recent regulatory threshold of 25% has been applied when assessing control in a corporate context, particularly to comply with FINTRAC guidelines.

It is unclear why certain trusts that devolve real property to beneficiaries would be caught by the prohibition, particularly when a trust has reached its maturity or is required to distribute under provincial trust laws. This raises the above concern about complexity of real property rights that is better left to the Provinces to regulate. A trustee would now be potentially liable under the Act if she administers the trust contrary to the Act but in accordance with the trust.

The Act and regulations do not speak to properties that include residential premises as part of a larger parcel of land or a mixed use building. It is increasingly frequent to see ground level commercial/retail properties with one or two levels of residential housing above it. A non-Canadian would now be precluded from such an investment because of the tied residential component. Similarly agricultural properties often have housing on the farm for workers or family; would a non-Canadian be precluded from acquiring the farm in this context?

This discussion identifies a number of possible complications with the Act that would require more planning and consultation rather than hastily promulgating it and leaving such wide gaps of interpretation open for debate, or before the Courts in the context of a regulatory sanction.

4. Conclusion

This legislation has not been thoroughly thought out and the consultation process not vastly disseminated to provide meaningful feedback to guide prohibitions of this nature and with such implications for local professionals. The preference is to revoke the Act and if the Government feels that the policy in having such restrictions is still reasonable, a more fulsome dialogue would be appropriate.

As noted, the jurisdictional issues are material and may pose a significant issue of constitutional validity. Clearly there are practical implications to be sorted out in its passage. Both reasons are sufficient to revoke the Act prior to its coming-into-force date of January 1, 2023 and to better prepare professionals, trustees, investors and non-Canadians who may have transactions in the works, to understand how they can comply or manage this without liability.

If there is still an opportunity for further discussion, we would be pleased to arrange a meeting at your convenience.

Yours truly,



Mark Giavedoni

FOLA Real Estate Chair

Cc: Douglas Judson, Chair, FOLA
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