

LEX MUNDI
PUBLICATION



ISSUES RELATING TO FOREIGN INVESTMENT

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1) Is provincial governmental permission required for foreign investors to acquire real estate? If so, please identify.

No. All real and personal property located in Canada may be taken, acquired, held and disposed of by a non-Canadian citizen in the same manner as by a Canadian citizen.

2) Are there other provincial restrictions imposed on ownership of real estate by foreign investors? To acquire interests in entities which own real estate? If so, please identify.

Foreign registered or foreign-controlled entities should be aware that an acquisition of Canadian real estate may need to comply with merger control provisions contained in the Investment Canada Act (Canada) and anti-trust provisions contained in the Competition Act (Canada). The anti-trust provisions contained in the Competition Act (Canada) are triggered if: (a) on a combined basis, the parties have assets in Canada or gross revenues from sales in, from or into Canada of over CDN\$400 Million; and (b) the assets or target firm being bought are valued over, or generate gross revenues from sales in or from Canada of over CDN\$50 Million.

The Province of Alberta imposes greater restrictions. Under the Agricultural and Recreational Land Ownership Act (Alberta), no foreign-controlled company can acquire an interest in certain controlled land (that is, privately owned land outside urban boundaries exceed 20 acres, for example, farm land or rural recreational land), without government permission.

The Province of Quebec prohibits the acquisition by non-residents of any interest in agricultural land without the prior consent of the government. In addition, Quebec restricts ownership of classified cultural properties.

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The Province of Prince Edward Island restricts the amount of land that can be held by persons not resident in the province.

Otherwise, there are generally no restrictions imposed on foreign investors, although certain tax, reporting and registration provisions may apply. For example, the Extra-Provincial Corporations Act (Ontario) requires foreign registered or foreign-controlled entities to obtain licenses to carry on business in the province. This may include an interest (other than by way of security) in real estate.

3) Are foreign investors required to invest with a local partner? If not, is investment with a local partner advisable?

A local partner is not required. However, a non-resident intending to provide mortgage loans in a number of provinces will have to consider the mortgage brokers legislation of the respective province, which imposes certain constraints. For example, in the Province of Ontario, in order to carry on a business involving lending on the security of real estate, a person or entity must be registered under the Mortgage Brokers Act (Ontario) as a mortgage broker. To become registered, an individual, partnership, association or corporation must be a Canadian citizen or permanent resident of Canada. The Act does not permit corporations to carry on business as mortgage brokers if the total percentage of shares held by non-residents exceeds 25%, the percentage of shares held by a single non-resident exceeds 10%, or if the corporation has not been incorporated in Ontario or federally.

4) What provincial taxes are levied solely on foreign individuals or entities acquiring or transferring real estate or interests in entities which acquire real estate?

Direct ownership of Canadian real estate by an investor not resident in Canada will lead to taxation of income either on a withholding basis or, if the activity amounts to carrying on of a business, on a basis generally equivalent to the taxation of a Canadian resident.

A source withholding tax of 25% on rental payments to non-residents is imposed. There is no reduction of this rate under the Canada-U.S. Tax Convention.

The Canadian government imposes a withholding tax of 25% on most payments of interest by Canadian residents to foreign lenders. Bilateral tax treaties between Canada and the investor's country may help by setting a lower withholding tax rate. As well, there are limited exemptions from Canadian withholding tax on interest. For example, there is no withholding tax on interest payable by a resident Canadian corporation to an arm's length foreign lender, provided that no more than 25% of the principal amount of the loan is due within 5 years, except in certain circumstances, such as default in the scheduled payment of interest or principal.

If the vendor of Canadian real estate is not a resident of Canada, a clearance certificate is required from the Canadian government pursuant to Section 116 of the Income Tax Act (Canada), failing which the purchaser may hold back from the closing proceeds an amount equal to 50% of the purchase price.

Although not imposed solely on foreign investors, a foreign investor should be aware of the following: (a) a land transfer tax (LTT) is payable upon the transfer of ownership of real property. The LTT is imposed at graduated rates, but for most commercial transactions, it is approximately 1.5% of the total consideration for the transfer in the Province of Ontario and the Province of Quebec, approximately 2% of the total consideration for the transfer in the Province of British Columbia, and varies in other provinces; (b) if the purchase of real estate is accompanied by the purchase of certain goods, such as furniture or appliances, retail sales tax is payable, in most provinces, by a purchaser at a rate of 7-8% of the value of the tangible personal property acquired; and (c) a goods and services tax of 6% is payable on a "supply" of real property in Canada, unless otherwise exempted under the Excise Tax Act (Canada). A supply includes the sale of real property, as well as a lease, license or other similar arrangement.

5) Describe reporting requirements for reporting the acquisition, ownership or disposition of real estate which relate solely to foreign direct or indirect owners of real estate.

The *Investment Canada Act* (Canada) applies to all non-Canadians seeking to acquire control of existing Canadian businesses or establish new Canadian businesses, whether through the acquisition of assets or shares. A transaction will be “reviewable” if its value exceeds CDN\$5 Million in case of a direct acquisition, CDN\$50 Million in the case of an indirect acquisition (share acquisition), or, at the discretion of the Canadian government, if the business in question falls into a class related to Canada’s cultural heritage or national identity. Reviewable transactions require a determination that the investment is likely to be a “net benefit to Canada”. Transactions involving investors who are residents of World Trade Organization (WTO) member countries relating to direct acquisitions by or from a WTO investor have a review exemption threshold of CDN\$250 Million as of 2005, adjusted upward for inflation annually. Indirect acquisitions involving a WTO investor are not reviewable. If the transaction is not reviewable, it will be “notifiable”, requiring filing of information about the parties, the nature of the business and the value of the assets with the applicable governmental agency within 30 days after the close of the transaction.