

Focus

REAL PROPERTY



Controlling the housing bubble

Canada should think twice before using foreign investment laws to regulate the industry



Mark Katz

Housing affordability continues to be a hot-button topic in Canada. This is especially true in cities such as Toronto and Vancouver, where there are serious concerns about the number of people who are being locked out of the housing market because of rising costs.

In searching to explain Canada's heated housing market, some commentators have fixed upon "foreign investors" as the primary culprits. As the argument goes, residents of unstable countries and regions (e.g., China, Russia, the Middle East) regard Canadian real estate as a safe haven for investment, and it is this insatiable foreign demand (aided by Canada's weakened dollar) that fuels Canada's skyrocketing real estate prices.

Opponents of foreign investment have offered a variety of different solutions, but a particularly interesting proposal is that Canada's foreign investment laws be used to regulate real estate acquisitions by non-Canadians.

As someone who has been practising in the foreign investment area for close to 20 years, I have to confess that the idea initially struck me as absurd. However, nowadays it is always dangerous to reach conclusions before doing a proper Internet search. And what a brief tour of the web quickly indicates is that there are comparable jurisdictions to Canada that already utilize their foreign investment regimes to curb foreign ownership of domestic real estate.

Australia offers a notable example. Australian law prohibits foreigners from purchasing "established" residential real estate. Rather, they are limited to acquisitions of new dwellings, with approval in advance from the Australian Foreign Investment Review Board. The objective is to reserve existing housing for "native" Australians while channelling foreign investment into the development of new housing stock.

The Australian rules are backed by strict penalties that have recently been toughened even further. Potential sanctions include criminal fines and/or imprisonment, divestiture, and civil penalties (such as potential forfeiture of capital gains on properties ordered to be divested). Sanctions may be applied not only against foreign purchasers but also complicit developers, real estate agents and lawyers in Australia. As part of a recent crackdown, there have been several high profile forced divestitures

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Why smart real estate lawyers are plugging in

Cutting edge technology increases efficiency and profits while reducing risk



Raymond Leclair

The most important change the real estate practice has seen in recent years is the advance of technology. However, I think it is underused by lawyers to their own and their clients' detriment. Most technologies are already available on the lawyer's desktop but like many telephone users, the full gambit of features is not being utilized.

Technology allows for faster, more efficient client and file management. This likely means a more profitable file for the lawyer and a better experience for the client. Satisfied clients pay their lawyers, return with other work and provide referrals to family and friends.

An emerging risk management issue is the need to be compliant on matters of cybersecurity, privacy and confidentiality. Lenders are facing increasing compliance regulations and are requiring their suppliers (i.e. real estate lawyers) to meet the same standards. In the very near future, not only will we need to be compliant but we will need to demonstrate and confirm that compliance to lenders.

Interestingly, most of the features that would provide the benefits mentioned above are in programs lawyers already have.

Document generation software is a good example. Since the registration process was digitized and automated it has been necessary



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for real estate lawyers to adopt and adapt to this new environment. An equally important part involves the preparation of all the other documents. From the initial letter to clients, authorizations and directions for searches and procedures, to the reporting letter—all can be automated with the appropriate software. No need to rely on preparing manual Word or WordPerfect precedents. As well, your notes and procedures are easily captured in case evidence of discussions and a client's instruction is required.

Automated data intake processes where clients provide the information required for the file are becoming more prevalent. Many lawyers now send a word processing file by e-mail to the clients and ask them to enter their information so the lawyer can cut and paste it into his or her system.

In fact, Adobe Acrobat permits a fill-in form with error checking capabilities which can automate the transfer of the information into the lawyer's system. Today, there are web- and cloud-based services that facilitate clients inputting their own data, monitoring the progress of their file, getting crucial and timely information and answering questions to provide the lawyer with authorizations and direction. Once set up, these services require little manual input by the lawyer and provide better information to the client.

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A number of tools can help you avoid fraud. The satellite view on Google maps shows the property and adjoining lands, while street view allows you to see the property as if standing on the curb. Seeing the property allows you to confirm the type of property, whether there is a shared driveway and other details.

Raymond Leclair
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way and other details. Also, you can search the names of parties to the transaction against some known fraud scenarios on the AvoidAClaim blog. Municipalities are increasingly making building compliance and zoning information available online so you can confirm information the clients provide or request. In the near future, tax and other municipal and agency information, important to our clients and the due diligence required in the transaction, will likely become available at the click of a mouse.

Many lenders are now instructing electronically. Are you signed up to receive your instructions in this fashion? If not, why not? Data can transfer into your

system, efficiently, profitably and with less risk of error.

Electronic agreements of purchase and sale are now legal in Ontario. Is this any different than receiving a faxed copy? Well, at least documents will be more legible than multi-copied and faxed versions and, more importantly, you can take advantage of digitally transferring the information into your client and file management systems.

Teranet has promised a new cloud-based version of Teraview software. What other innovations will be possible once this new version is available? Better data integration? Most assuredly better online security.

All in all, technology, if adopted and used to its fullest can make client and file management easier, more efficient and less cumbersome than the manual systems we grew up with. The client experience and service level will be improved since more time is available for answering questions and personal advice. The risk management of the transaction becomes a byproduct of better efficiency and a better client experience.

We must remember that we are a service industry. Clients are generally willing to pay for better service. Why not distinguish yourself by your service. A more mobile and tech-savvy public is embracing technology and expecting the same from you. As technology becomes better, cheaper and easier to use, we should adopt and adapt to provide the public with the smoothest experience we can.

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Penalties: The Australian approach involves fines and even jail

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and enforcers are apparently investigating over 1,000 additional cases of potential breach.

Could a similar foreign review system for residential acquisitions also work here? There are several factors that will need to be considered.

For one, implementing an Australian-type review system in Canada would require a basic re-orientation of our current foreign investment regime. The focus of the *Investment Canada Act* (ICA)—which is Canada's principal foreign investment legislation—is on regulating the acquisition by foreigners of Canadian “businesses.” Regulating the pur-

chase and sale of private residences (even if meant to be held as investments) would mean extending federal government regulation into a whole new area of commercial transactions.

Apart from anything else, this would run contrary to the recent trend (at least under the Conservatives) to progressively narrow the ICA's scope of application (e.g., by substantially increasing the most widely applicable threshold for review). It is still too early to tell if the new Liberal government is inclined to restrict foreign investment more aggressively. But the Liberals' commitment to “sunny ways” and putting a “friendly face” on Canada would

seem to militate against any material change in approach.

Another factor to consider is enforcement. The ICA is administered and enforced by a very lean team of officials at the Investment Review Division in Ottawa. The expansion of Canada's foreign investment review regime to residential transactions would undoubtedly require a substantial increase in the number of bureaucrats needed to make the scheme work. Moreover, as seen in Australia, it would also require the threat of significant penalties, which raises a basic question—do we really want people (Canadian or foreign) to pay large fines or go to

jail for simply buying a house?

But the most important consideration is also the most fundamental—will instituting a foreign investment review regime actually solve the housing problem? It is still unclear whether and to what extent foreign acquisitions are driving the affordability crisis. Some argue that levels of foreign investment in Canadian housing are actually too low to have an impact and that domestic investors are the real concern. At the very least, it is apparent that an information gap exists.

The current Liberal government is committed to “evidence-based” policy making. It would

thus seem imperative for more work to be done before any dramatic steps are taken to follow Australia's example. Indeed, a recent downturn in Chinese investment in Australian housing now has certain experts predicting a price collapse that could push Australia into recession. We in Canada will have to be very careful not to court similar disasters, especially if based on an unsubstantiated fear that foreigners are taking over our housing market.

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