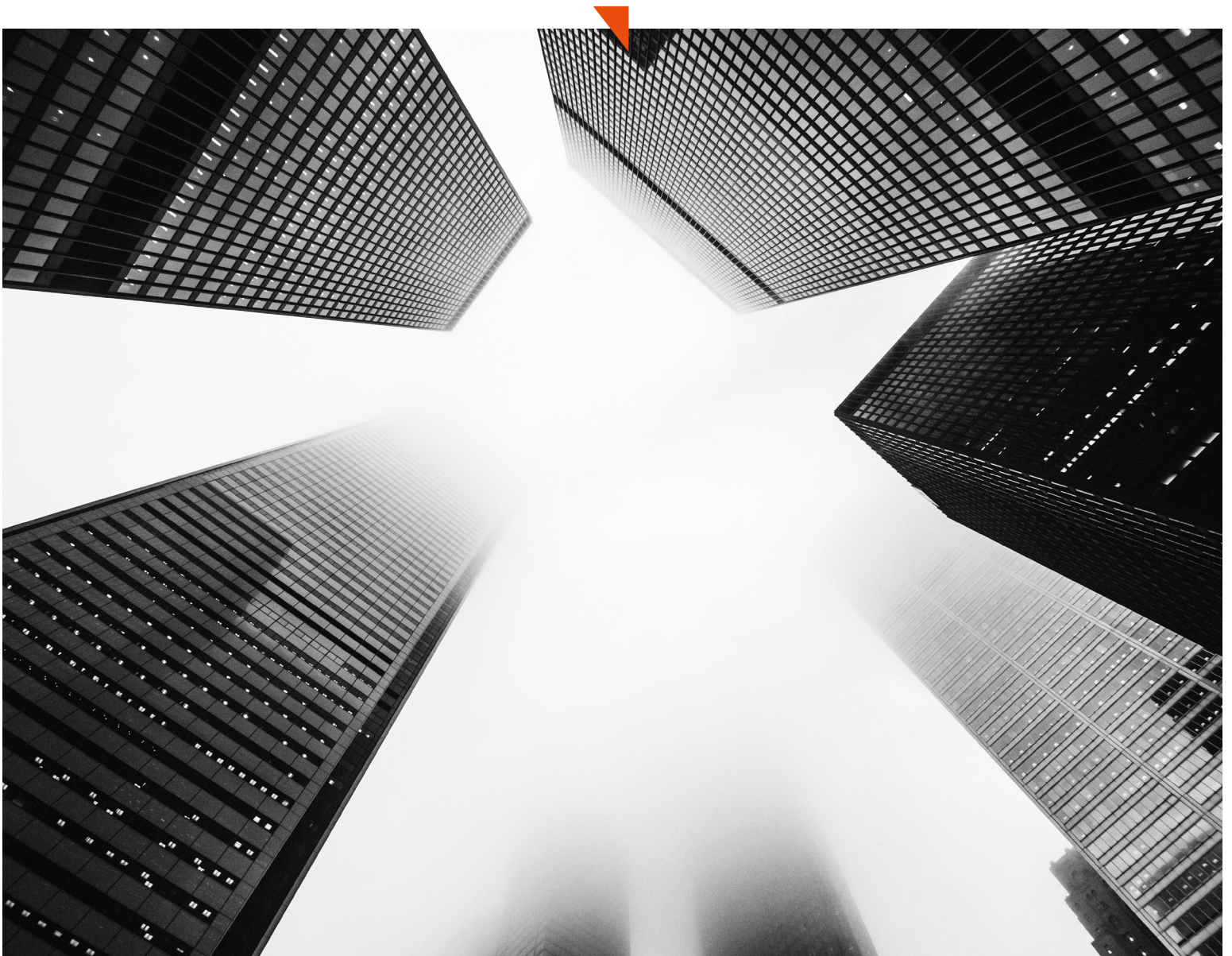


25.

Real Estate



(Current as of December 2022)

Real Estate Law

Canadian real estate matters are primarily governed by provincial laws. The laws of all provinces, except Quebec, are derived from common law (the law of England). The laws of Quebec are derived from civil law (largely based on the Napoleonic Code from France). Real estate matters on reserve lands are governed by laws specific to Indigenous Peoples and are not covered in this guide.

Provinces largely delegate specific powers to municipalities, including the control of land use, development, building permits and related health and safety matters.

Real estate matters are also subject to federal laws. For example, the *Criminal Code* prohibits charging mortgage interest at a rate in excess of 60% per annum and the Prohibition on the Purchase of Residential Property by Non-Canadians Act prohibits the purchase of residential property by non-Canadian, as more fully explained below under the “Restrictions on Ownership” Section.

Ownership of Real Estate in Canada

All Provinces Except Quebec

Most interests in real property are either freehold titles or leasehold titles. A freehold title interest is perpetual whereas a leasehold title interest is for a fixed period of time. A third form of property ownership that can also be freehold or leasehold is strata title, in which each individual strata owner owns a volume of air within his/her

exclusive space (such as a condominium suite) and in which all strata owners together own the common property (such as hallways, elevators, roofs and external walls).

Quebec

In Quebec, the concept of ownership separates immovables (being real property and works of a permanent nature) from movables. In other provinces, a tenant acquires a right against real property pursuant to a leasehold interest. In Quebec a tenant does not acquire an interest in the leased real property.

However, tenant’s rights to the leased premises under the lease are enforceable against third parties, such as a prospective buyer and a secured creditor if the lease is published. Another means by which a third party may acquire a right of ownership in real property is by a right of superficies and co-ownership, which is similar to the concept of strata title in the other provinces. Quebec provides other ways to obtain real rights enforceable to third parties such as servitude, emphyteusis, usufruct and use.

Ownership and Co-Ownership Structures

Most commercial real estate interests are owned by corporations, partnerships, limited partnerships and/or real estate investment trusts. There are many governance and tax issues to be considered in determining the most appropriate real estate ownership structure.

Restrictions on Ownership

Generally, non-residents of Canada enjoy the same rights and protections in real estate matters as Canadians, with some exceptions. For example, British Columbia imposes additional

land transfer tax to non-Canadians purchasing certain real estate, and Prince Edward Island prohibits non-residents from owning more than five acres of real property. There are also special restrictions on some agricultural real property in Canada. For example, Alberta prohibits non-Canadians from owning more than 20 acres of controlled agricultural real property, subject to certain exceptions, Saskatchewan prohibits non-Canadians from owning more than 10 acres of farmland and Quebec requires non-Quebec residents to obtain government approval before acquiring any farmland. Effective January 1, 2023, the federal government has also implemented a two year prohibition on non-residents of Canada purchasing residential real estate, with some exceptions, the specifics of this temporary prohibition are at the time of writing still being established and we recommend that advice be sought for every such transaction.

The *Investment Canada Act* (ICA) requires that non-Canadians file a notification each time they establish or acquire control of a Canadian business including one that acquires or invests in Canadian real estate. Certain acquisitions or investments may be subject to net benefit or national security reviews under the ICA. For more information about the ICA, see [Doing Business in Canada Guide – Investment Policy Chapter 3](#).

Registration Systems

Canada has two land registration systems, the registry system and the land titles system.

Registry System

A registry system is a method for managing public records of ownership and encumbrances affecting real property. While provincial

governments maintain the records, they do not guarantee the quality or qualifications of titles, so lawyers or other professionals must investigate and verify the title by searching and reviewing historical documents. Lawyers are often retained to provide a title opinion in provinces that still maintain a registry system.

Land Titles System

A land titles system is a second method for managing public records of ownership and encumbrances affecting real property. Unlike the registry system, provincial governments do guarantee the quality of title. Though significant issues in a land titles system are rare, in most provinces, if a party is wrongfully deprived of an interest in real property, there is an insurance fund that provides compensation as a backstop to the guarantee of title. Because the government guarantee of title does not cover certain specified risks and because the compensation may be limited, title insurance is still commonly purchased in provinces utilizing a land titles system.

Common law provinces now use a land titles system or are in the process of converting to it. Currently, Ontario has both a registry system and a land titles system, but is transitioning to a land titles system exclusively. Quebec's unique system is closer to a registry system.

Registration of Interests

The registration of interests in real property, in both the registry system and in the land titles system, is essential since the priority of registration is often the determining factor in a case of conflicting interests.

Some interests in real property do not require registration in order to be effective, such as government liens for taxes and government

rights of expropriation. In contrast to registered or “legal” title (the owner recorded in a registry system or in a land titles system), beneficial title (the true owner of real property and which shows the real property as an asset on its balance sheet) may not always be shown in the registry system or in the land titles system. Efforts are now being made in many provinces to provide more transparency regarding beneficial ownership. For example, British Columbia has recently introduced the requirement that beneficial ownership be disclosed in a public registry. Quebec also requires all nominee structures be disclosed to the government.

Real Estate Acquisition Due Diligence and Conveyancing

Real estate transactions usually involve professionals from a variety of disciplines.

Real Estate Brokers

Canadian real estate brokers are licensed professionals who often assist with the acquisition, sale and/or leasing of real property. Their advice is usually of a business nature, with particular focus on projected income and related valuation.

Lawyers

Lawyers are usually engaged for the preparation and negotiation of an agreement of purchase and sale, the examination of title, conducting off-title research (such as work orders, realty taxes and utilities), negotiating terms of new mortgage financing and negotiating closing documents and related adjustments.

Notaries

Most lawyers in the provinces other than Quebec are notaries and serve a very limited function in that capacity. Quebec notaries are legal professionals that have the ability to execute notarized deeds such as deeds of hypothec (mortgage), deeds of sale and wills.

Third Party Consultants

Third party consultants (such as environmental engineers, structural/mechanical engineers, zoning/planning consultants and surveyors) are often hired to assist with the acquisition due diligence process.

Title Insurance Companies

Title insurance companies are often retained by buyers or lenders as an alternative to undertaking a full title search and the significant off-title searches. Additional benefits include insurance against the risks of title defects, survey defects, the absence of a survey/certificate of location and title fraud. Title insurance is an insurance policy, it does not correct the underlying title defects or other identified issues.

Real Estate Financings

The financing of real estate in Canada almost always involves the registration of a mortgage. Typically, lenders are Canadian financial institutions, however, individuals or other entities resident in or outside Canada may also act as lenders, subject to compliance with provincial laws regulating mortgage lenders. Larger mortgage loan transactions often require a commitment agreement or a loan agreement, a comprehensive security package (securing the real property, the rents/income earned from the real property, related non-realty assets/personal property and shares in relevant corporations)

and other standard closing documents. A lender may also require guarantees/indemnities from third parties and security supporting such guarantees/indemnities.

If a mortgage loan is payable on demand, then a lender must provide reasonable notice before making a demand for payment or enforcing its remedies pursuant to its security. Common remedies include foreclosure, power of sale, judicial sale, an action on covenant and an action for possession. In Quebec, mortgage remedies include taking possession for administration, taking in payment, sale by creditor and sale under judicial supervision. Power of sale is the most common remedy in many provinces including Ontario. Power of sale involves the sale of a mortgaged property at its fair market value, with the sale proceeds being distributed first to the lender in satisfaction of the mortgage debt, and then the balance distributed to the borrower. Foreclosure is a remedy more commonly used in the western provinces. It is a more expensive and time-consuming remedy and will result in the lender becoming the registered owner of the mortgaged property.

Real Estate Matter Taxes

The taxes relevant to real estate matters are realty tax, land transfer tax, income tax and sales tax.

Realty Tax

Realty tax is assessed by the municipal government (and Quebec school boards) and payable annually. Realty tax rates vary for different classifications of use, such as retail, office, multi-residential and industrial. In most commercial leases, the obligation to pay realty taxes is passed on to the tenant.

Land Transfer Tax

All Canadian provinces, except Alberta and Saskatchewan, charge land transfer tax on the transfer of real property. Those two provinces charge special registration fees that are, in effect, a land transfer tax alternative. Some municipal governments also impose a land transfer tax, which is in addition to that charged by the province. Ontario and Quebec charge land transfer tax on unregistered transfers of beneficial interests in real property, whereas transfers of beneficial interests are not yet taxed in British Columbia. Land transfer tax does not apply to the transfer of shares in a corporation that owns real estate, subject to certain exceptions. The payment of land transfer tax and the above-described special registration fees are usually the responsibility of the buyer.

Income Tax

Generally, income tax is charged against 50% of the profit earned from the sale of real property and against 100% of the profit earned from the leasing of real property. If a seller is a non-Canadian, then the buyer is required to withhold part of the sale proceeds to satisfy the seller's resulting tax liability. The application of Canadian income tax law to the sale and leasing of real property is complex and we recommend that advice be sought for every transaction.

GST/HST

Commercial and new residential real estate sales are subject to Canada's federal value-added tax—the GST/HST, with rates varying by the province where the real property is located.

The rate of GST/HST is 13% in Ontario, 15% in Newfoundland, New Brunswick, Nova Scotia and Prince Edward Island and 5% in the remaining provinces. Quebec also has a provincial value-added tax that applies to real estate sales—the

QST—of 9.975% in addition to the 5% GST/HST that applies. The seller is generally responsible for collecting and remitting GST on any sale of real property, except where the buyer is registered for GST/HST/QST and entitled to self-assess the tax owing. Leases of commercial real property are also normally subject to GST/HST/QST and the landlord is required to collect such taxes.

Commercial Leases

The two principal types of commercial leases are the net lease and the gross lease, with the net lease being far more common. In a net lease, a tenant is responsible for paying a base or minimum rent each month together with its pro-rata portion of all building expenses such as realty taxes, insurance, repairs and maintenance. In a gross lease, a tenant pays a fixed non-fluctuating amount each month that includes base/minimum rent and all contributions to building expenses.

The terms of commercial leases can vary significantly. Landlords and tenants often heavily negotiate terms to fit their specific needs, and advice/assistance is often sought from real estate brokers and lawyers for the negotiation.

Most commercial leases have a term of 5 years or 10 years, often with significant rights of renewal. Some provinces restrict the length of these lease terms. Quebec requires that the term of a lease not exceed 100 years. Ontario requires that the term (including renewals) of certain leases not exceed 21 years without special government permission. In Ontario, land transfer tax is charged in respect of all leases with a term exceeding 50 years. In British Columbia, land transfer tax is charged in respect of all leases with a term exceeding 30 years. In Quebec, land transfer tax is charged in respect

of all leases with a term (including renewals) exceeding 40 years.

Commercial leases usually prohibit a tenant from assigning its lease without landlord consent and often prohibit a corporate change of control without landlord consent.

Land Use and Development

The regulation of land use and development is usually shared between a provincial government and a municipal government. The most significant components of that land use and development regulation are the municipal government's comprehensive development plans (also known as official plans) and zoning bylaws.

A comprehensive development plan divides a municipality into parts and sets out general policies for the future use of those parts. Zoning bylaws put the comprehensive development plan into effect and provide for its day-to-day administration.

Zoning bylaws govern the construction and alteration of buildings and all related matters including building permits, building codes, building materials, heating and ventilation systems, electrical systems, sewage and water systems, emergency protection and inspections. Before commencing the construction or alteration of a building, municipal governments often require that building permits and various other regulatory authorizations are first obtained. In most provinces, municipal standards are tied to the National Building Code of Canada, resulting in general uniformity of construction and safety matters across the country.

Both federal and provincial environmental laws often impose restrictions on use or authorized activity, in an effort to protect the environment.

Owners and occupants of contaminated sites may have certain obligations, regardless of whether they were responsible for the contamination or own the real property. Environmental concerns are of significant importance in Canadian real estate transactions, and often legal counsel and third-party consultants with expertise in such matters are retained to address the related environmental risks.
