

Stikeman Elliott

Practical Law
**Commercial Real Estate
in Canada**

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Commercial Real Estate in Canada: Overview

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A Q&A guide to commercial real estate law in Canada.

The Q&A gives a high-level overview of real estate investment structures; restrictions on foreign ownership; title; tenure; sale of real estate; real estate tax; real estate finance; leases; and planning law.

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Real Estate Investment

Investment Structures

1. What entity types and acquisition structures do investors typically use for real estate investment in your jurisdiction?

Common Entity Types

Legal persons (such as corporations) and natural persons can generally hold rights over real property in Canada. Investment in real estate can be made through direct ownership by an individual or ownership of shares in a corporation that owns real estate. Various relationships can also be established for land ownership, such as co-ownerships, partnerships, and trusts.

The choice of vehicle is based largely on tax consequences, liability concerns, and other business considerations. Corporations, partnerships, co-ownerships, and trusts are generally the most popular investment vehicles used for real estate purposes.

Corporations are legal entities distinct from their shareholders. While corporations provide limited liability for shareholders, the income, losses, gains, and capital cost allowances of the corporation are taxed or deducted at the corporate level, followed by the taxation of dividends in the hands of the shareholders.

A partnership is not a distinct legal entity. Rather, it is a legal and/or contractual relationship among its partners (individuals, corporations, other partnerships, and/or trusts). Depending on the jurisdiction, partnerships are governed by common law and/or statute. Depending on the type of partnership, limited liability may exist for some of the partners.

A significant advantage of investment through a partnership is the tax treatment. Although income and losses are calculated at the partnership level, they are taxed and deducted at the partner level.

Co-ownerships, like partnerships, are not separate legal entities but are a legal and/or contractual relationship between two or more owners of interests in land. Income and losses pass through to the co-owners, who can claim certain tax deductions separately from the other co-owners.

Trusts are not separate legal entities. They are a relationship that arises where a person holds property as trustee for the benefit of others. Both trustees and beneficiaries can, in some circumstances, be personally liable for the trust property.

Real Estate Investment Trusts (REITs)

Common Acquisition Methods

Asset purchases. Asset purchases are generally preferred by buyers and have the following advantages:

- The buyer can choose which specific assets and liabilities, if any, are acquired.
- The buyer may be able to increase depreciation for tax purposes by increasing the cost base of the assets.

The disadvantages of an asset purchase are as follows:

- It often requires the preparation of extensive conveyancing documents.
- The buyer is responsible for any sales tax obligations on tangible assets purchased, and property transfer tax and registration fees on real estate purchased.

In British Columbia and certain other provinces, a transfer of beneficial interest in real estate currently does not trigger payment of property transfer tax. Therefore, to avoid the payment of property transfer tax, owners of commercial property often use a nominee company to hold the property in trust for the beneficial owner and transfer the shares of the nominee and the beneficial interest to the buyer on closing.

In contrast, Ontario and Québec subject transfers of beneficial interest to land transfer tax. British Columbia has recently instituted a beneficial interest registry, which may precede a change in law.

Share purchases. Share purchases are generally preferred by sellers and have the following advantages:

- They are relatively simple and straightforward compared to asset transfers.
- The buyer avoids potentially significant property transfer tax and registration costs associated with acquiring real estate in an asset purchase.

The main disadvantage of a share purchase is that the buyer inherits all the liabilities of the target company, including tax liabilities.

Other acquisition methods. Auction/bidding processes are sometimes used by sellers to maximise the selling price and terms of sale. If a business is being sold by way of a share sale, the seller must ensure that it complies with local securities laws.

Restrictions on Foreign Ownership and Occupation



2. Are there restrictions on foreign ownership or occupation of real estate (including foreign ownership of shares in companies holding real estate)? Are there restrictions on foreign lending, security, and guarantees to buy or occupy real estate in your jurisdiction?

Foreign Ownership of Real Estate

The federal Competition Act, R.S.C. 1985, c. C-34 and Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.) provide for notification to, or review by, the federal government in certain circumstances involving acquisitions by non-resident buyers. The federal Citizenship Act, R.S.C., 1985, c. C-29 also permits each province and territory to enact laws restricting ownership of real property by non-residents.

At the provincial and territorial level, restrictions on the ownership of real property by non-residents vary between jurisdictions. Most jurisdictions have acted to preserve farm or non-urban land, for example by limiting the amount of farmland that can be owned by non-residents or requiring approval by the relevant agricultural commission, subject to certain exemptions.

Some provinces and territories also require corporations incorporated outside Canada to register or obtain a licence in the province to hold and exercise rights over real estate in those jurisdictions. All jurisdictions are facing increased disclosure and transparency requirements, and in certain jurisdictions disclosure of ultimate beneficial ownership (at the individual level) is mandatory on registration of a transfer of an interest in land.

The provinces of British Columbia and Ontario have recently imposed additional taxes on foreign investors purchasing certain residential real estate in specified urban areas (see [Question 10](#)).

Other than the additional taxes and disclosure requirements noted above, there are no restrictions on foreign ownership of shares in companies holding commercial real estate, although certain additional taxes may be payable on acquisition.

On 1 January 2023, the federal government introduced the *Prohibition on the Purchase of Residential Property by Non-Canadians Act*, which restricts non-Canadian individuals, corporations, and other entities from directly or indirectly acquiring an interest in residential real estate in certain parts of Canada. The legislation is temporary and currently expected to be in place until 2027.

While this legislation targets residential real estate, foreign investors in real estate for commercial purposes should ensure that any proposed transaction falls squarely outside of the ambit of this prohibition.

Foreign Lending, Security, and Guarantees

The provinces of British Columbia and Ontario have recently imposed additional taxes on foreign investors purchasing certain residential real estate in specified urban areas (see [Question 10](#)).

Other than the above, there are no restrictions on foreign ownership of shares in companies holding commercial real estate, although certain additional taxes may be payable on acquisition.

Foreign Lending, Security and Guarantees

Although any person can lend money and take a mortgage (a hypothec in Québec) to secure real estate loans, certain financial institutions are regulated by statute. Special provisions apply to foreign financial institutions and mortgage brokerage legislation apply to lending and security over real property in several provinces.

For the registration of security, certain land title registries require foreign lenders to provide evidence of their existence and good standing. Others require foreign lenders to be extra-provincially registered with the provincial corporate registry to take security over real property in the province.

Enforcement of security (for example, by way of foreclosure) may trigger foreign ownership of land restrictions and requirements.

Title to Real Estate

Title Registration

3. How is title to real estate evidenced? What is the system for public registration/recordation of title? Is electronic access and electronic conveyancing available?

How Title is Evidenced

All privately owned (as opposed to Crown owned) real property in Canada is registered. There are two land registration systems: the registry system and the land titles system (also known as the Torrens system). Each province uses a modified system of one or both of these systems to record title and interests affecting title.

The older, more traditional registry system is the registration of deeds system, which is a notice system of instruments purporting to affect land but does not itself make any qualitative statement on the status of title.

In contrast, provincial land titles systems may provide certainty as to the true status of title, subject to certain statutory exceptions. Most provinces and territories in Canada, except for Québec, have converted or are converting to the land titles system.

Registration is technically not compulsory. However, title to private land is virtually always registered as registration provides notice to third parties and establishes priority. Crown land is not always registered and is often recorded under separate legislative schemes, which vary depending on the type of Crown land and the jurisdiction.

Public Registration/Recordation System

In jurisdictions that use a land title system, title is registered, either physically or electronically (depending on the applicable land title system), by submission of instruments to the applicable land registry office. In jurisdictions operating under a registry system, title is recorded in a similar manner by submission of deeds to the applicable registry office.

Electronic Access and Conveyancing

While electronic access to instruments is generally available in every province, electronic registration is only available in certain provinces, including Ontario, Manitoba, Saskatchewan, British Columbia, and Québec. Electronic signatures on land title documents are only accepted in certain provinces, including Ontario. In the remaining jurisdictions, "wet ink" signatures are required.

4. What are the main information and documents registered/recorded in the public registration/recordation system? Can confidential information or documents be protected from disclosure?

Main Information and Documents

Registered ownership of real property is effected by the registration of a transfer or deed and other instruments evidencing an interest in land. In provinces where the land titles system applies, a certificate of title or parcel register for a particular parcel of real estate is issued. Information on the certificate of title or parcel register includes:

- The name of the registered owner.
- The legal description of the property.
- Interests or notices of interests in land specific to the land parcel held by third parties.

In all provinces except Québec, documents that transfer or affect title can be registered, including transfers/deeds, mortgages, assignments of mortgages, assignments of rents and leases, leases, easements, and restrictive covenants.

Confidential Information

Depending on the interest claimed, the registering party can choose not to include confidential information (for example, rent under a lease) provided that the registration of interests or notices of interests in land complies with legislative requirements.

5. Is there a state guarantee of title? Are authorities that manage public title registration/recordation systems liable for title registration errors? Is title insurance available and is it commonly used?

State Guarantee of Title and Compensation

There is a guarantee of title (subject to certain statutory limitations) in the provinces in which real property is registered under the land titles system. In these systems, a statutory fund is typically established to compensate in the case of error or fraud, including by authorities managing the systems. In the civil law province of Québec, notaries are liable for title registration

errors that they make in connection with notarisation of land title documents, although errors are likely to be covered by their professional insurance.

Title Insurance

Title insurance is commonly used in Canada to mitigate title and other legal risks. While assurance of title alone is less of a risk in provinces using a land titles system, the use of title insurance has become common practice in those provinces as well, due to other risks that title insurance covers. The majority of real estate lenders require borrowers to obtain title insurance to insure the lender's interest in the property.

Title insurance can also be used to insure against instances where aspects of due diligence have not been performed, a legal survey is not immediately available, or there are unusual title risks.

Types of Tenure

6. How can real estate be held (that is, what types of tenure and other main ownership rights exist over land)?

Freehold Title/Absolute Ownership

Real property is essentially a matter of provincial jurisdiction. Each province and territory of Canada has enacted statutes that govern the acquisition, ownership, use, financing and development of real estate.

In the common law provinces and territories, a fee simple estate is the most common freehold estate and is generally considered absolute ownership of real property.

In the civil law province of Québec, real estate is generally governed by the Civil Code of Québec, which distinguishes between personal rights (enforceable against a person) and real rights (rights in property), including ownership, which is similar to a fee simple under the common law.

Real property can be held on a co-ownership basis as a tenancy in common or on a joint basis as joint tenants.

Leasehold Title

In the common law provinces and territories, a leasehold estate is not absolute but gives the tenant an exclusive right of possession during the term of the leasehold enforceable against everyone, including the owner of the freehold estate.

In the civil law province of Québec, real rights include emphyteusis, which is similar to leasehold title under the common law.

Condominium Ownership/Equivalent

Each common law jurisdiction has enacted statutes that govern condominium (strata) ownership, which differ across the country. All Canadian condominium laws are based on the concept of shared ownership of real estate, typically consisting of exclusive ownership of individual units and shared ownership and use of common areas.

In the civil law province of Québec, co-ownership is a similar concept under which the right of ownership is apportioned among various co-owners in fractions, each comprising a physically divided private portion and a share of the common portions.

Other Rights

As property rights generally fall within the jurisdiction of the provinces or territories (rather than the federal government), real property rights differ across the country.

In addition to freehold and leasehold estates, other typical rights in land in the common law jurisdictions include:

- Easements and rights of way, which are rights to use a portion of real property for a specific purpose.
- Restrictive covenants, which are agreements not to use real property for specified purposes.

Licences to use land are purely contractual, do not grant exclusive possession, and do not create an interest in land.

In the civil law province of Québec, real rights also include:

- "Modalities" of ownership, or ways in which a person can be an owner, such as superficies (ownership of construction works or crops on third party land) and co-ownership.
- "Dismemberments" of ownership, which involve the holding of some, but not all of the attributes of ownership, such as emphyteusis, usufruct, use, and servitude.

Superficies and servitudes can be either perpetual or temporary, while ownership and co-ownership is perpetual and emphyteusis is always temporary. Modalities and dismemberments of ownership rights bear many similarities with, but are not directly analogous to, common law concepts. However, it is generally possible to replicate the risk profile of any common law ownership structure under Québec civil law.

Sale of Real Estate

Preliminary Agreements

7. What types of preliminary agreements are typically used in the sale of real estate and are they legally binding?

The parties sometimes enter into a letter of intent before the conclusion of a purchase agreement, although this is not legally required in Canada. A letter of intent allows the parties to negotiate the terms of a conclusive purchase agreement for a stated

period, while enjoying enforceable covenants of confidentiality and exclusivity. However, the other commercial terms are typically not binding.

An increasing trend for major real estate dispositions is to invite buyers through a co-ordinated bidding process. The form of preliminary or final sale contract can be dictated by the bid process, so a letter of intent may or may not be used.

Exchange and Completion/Closing

8. When does the sale become legally binding? What are the main documents and formalities for exchange and completion/closing of the sale? When does title transfer? Is notarisation required?

When Legally Binding

A contract for the purchase and sale of land must be in writing to be enforceable. A contract will be enforceable once executed, but buyers typically include due diligence or other conditions that must be satisfied or waived before the buyer is obliged to proceed with the purchase.

If the buyer is satisfied with its due diligence investigations, it will waive its due diligence condition and the transaction will become firm and binding, provided any other conditions have also been satisfied.

Typically, an initial deposit is paid on execution of the purchase agreement. Often, an additional deposit is paid once conditions are removed and the deal becomes firm.

Completion/Closing Documents

The completion of a sale is handled by the parties' solicitors who hold documents and funds in escrow pending registration of the transfer. The purchase agreement will dictate the documents, procedures, and other conditions of closing in detail.

The seller's documents include:

- Transfer or deed of sale.
- Statement of adjustments.
- Direction regarding funds.
- Certain affidavits and undertakings.
- Other ancillary documents.

The buyer's documents include:

- Direction regarding title.

- Affidavits in respect of any land transfer tax payable.
- Other ancillary documents.

In a share sale, a transfer or deed of sale is not required. Instead, share transfer documents must be executed, including instruments of transfer and new share certificates, and any corporate documents necessary to change the directors of the company.

When Title Transfers

In common law jurisdictions, registered (or legal) title is typically transferred to the buyer on registration of a deed or transfer. In Québec, as between the parties to the sale, ownership is transferred as soon as there is "a meeting of the minds", but the sale cannot be enforced against third parties until registration of a deed.

Instruments submitted for registration must comply with the applicable statutory and regulatory requirements regarding procedure, form, and content, which differ across the provinces and territories. In some common law jurisdictions, land title instruments must be witnessed and certified by a lawyer or notary public. In Québec, any instruments submitted for registration must be drafted exclusively in French or must include a certified French translation. Endorsement from a notary is required for certain transactions in Québec (*see below, Notarisation*).

Notarisation

In Canada's common law jurisdictions, notarisation of land title documents is not required.

In Québec, a deed of sale must be in notarial form if it contains an immovable hypothec (for example, to secure a balance of sale). Otherwise, it can be in private signature form. However, to be registrable, a deed in private signature form must include a certificate from a Québec lawyer or notary. The notarial fee depends on whether the notary prepared the deed or simply received and registered it.

Environmental Issues

9. Briefly outline the environmental legislation and potential liability in a purchase of real estate. Is it common to carry out environmental due diligence and obtain environmental insurance? How is environmental liability typically dealt with in the sale contract?

Environmental Legislation and Liability

All Canadian provinces have environmental legislation to deal with spills, polluted land and remediation procedures and requirements. These statutes also authorise environmental regulators to compel remediation of the pollution and/or compensation for harm suffered by affected parties in certain circumstances. In some provinces, this legislation creates statutory causes of action with respect to spills and/or contamination.

Responsibility and potential liability to regulators, buyers, and third parties for environmental clean-up generally rests with the current owner or person that caused the contamination.

However, subsequent owners, occupiers, and those exercising management or control over real property can be liable for such contamination, even if that subsequent owner/occupier did not cause the contamination.

This risk is heightened if any party in the historical chain of ownership ceases to exist or becomes insolvent, because any other owner in the chain of ownership from and after the occurrence of the environmental issue can remain potentially liable.

Environmental orders can be issued on a joint-and-several basis and are typically not subject to time limitations or limitation periods.

Environmental Due Diligence and Insurance

In all parts of Canada, environmental surveys are typically carried out by specialist environmental consultants.

The surveys generally have two parts (Phase I and Phase II environmental assessments).

While certain provincial government agencies offer databases of environmental information pertaining to land, those databases are of limited use, and will not replace the information offered by a recent Phase I and/or Phase II environmental assessment, which include the use of private and fee-based databases.

In certain provinces, there are mandatory notification and/or reporting obligations on the discovery of contamination, which should be considered when assessing whether to proceed with (or from a seller's perspective, allow) a Phase II environmental assessment.

Environmental insurance is available but is not common, as it can be costly or offer only limited coverage. As with any insurance, environmental insurance typically covers events that are not known or have not yet occurred. Insurance coverage can be available for known issues or risks, but typically requires environmental due diligence information including the surveys noted above.

Environmental Issues in the Sale Contract

Environmental risk and liability are often addressed and allocated by representations, warranties, and indemnities in the underlying agreement.

The purchase price for the land also typically reflects any reduction in value due to contamination or the presence of other environmental risks, although most appraisals expressly exclude consideration of environmental impacts and assume the land is uncontaminated in the absence of information such as remediation estimates by environmental consultants.

Additionally, parties cannot contract out of regulatory liability and their liability for environmental contamination is potentially unlimited, although certain provincial governments recognize and account for the contractual allocation of liability by the parties.

Transactional insurance, such as representations and warranty insurance, typically exclude known and potential environmental issues that, in the view of the insurer, were not adequately investigated during due diligence.

Real Estate Tax

Stamp Duty/Transfer Tax

10. Is stamp duty/transfer tax (or equivalent) payable on a purchase of real estate? Who pays and are there any exemptions? Does it apply to the transfer of shares in a company holding real estate?

Stamp Duty/Transfer Tax

Transfers of real estate in most Canadian jurisdictions are subject to transfer tax, which is imposed at the provincial level and typically levied and paid/payable on registration of the transfer instrument in the relevant land registry.

In some provinces, transfer tax is payable on long-term leases (the threshold varies).

In some provinces, municipalities may levy a land transfer tax in addition to the tax levied by the province.

In Québec, the municipalities charge and collect transfer duties and these duties are only payable once invoiced following a transfer.

No tax applies in Alberta, Newfoundland and Labrador, and parts of Nova Scotia (although, as in other provinces, there are registration fees that are generally nominal).

In Ontario and Québec, unregistered transfers of beneficial interests in real property are also taxed, subject to some exceptions.

British Columbia and Ontario also impose taxes of 20% and 25%, respectively, on the transfer of certain residential properties to foreign nationals, foreign corporations, or trustees for a beneficial owner that is a foreign national or foreign corporation.

Effective from 2018, the British Columbia Government introduced an annual "speculation tax" in certain specified taxable regions. For 2019 and subsequent years, the rate of the tax is 2% for foreign owners and satellite families and 0.5% for British Columbians and other Canadian citizens or permanent residents.

On January 1, 2022, the federal Underused Housing Tax came into effect, imposing a 1% tax on non-Canadian owners of vacant or underused housing in Canada. Although the act affects residential properties, such as houses or condominiums, non-Canadian investors may trigger this annual tax based on the type of investment made.

Certain municipalities, including Toronto and Ottawa, have also introduced taxes payable on vacant residential properties.

Who Pays

The rate of transfer taxes varies across the provinces and territories. For example, the rate is 5% of the value of the consideration for certain residential properties in Toronto (the combined municipal and provincial tax rates) and on the value of residential properties that exceed CAD3 million in British Columbia.

In most jurisdictions, the buyer is liable for paying land transfer tax, although in Québec the seller may also be liable where a false transfer duties declaration is made.

Exemptions

In British Columbia and certain other provinces, transfers of beneficial interests are currently exempt from land transfer tax. In addition, certain transfers between nominees or affiliated entities as well as corporate amalgamations are exempt from land transfer tax, depending on the applicable provincial legislation.

Transfer of Shares

Land transfer taxes do not apply to the transfer of shares of a corporation that holds real estate.

However, in Québec, land transfer tax will be payable if:

- A tax-exempt transfer in favour of the corporation occurred in the two years before the transfer of the shares.
- The transfer would comprise the closely-related party condition during that period .

In Québec, the transfer of an interest in a limited partnership that owns real estate does not generally attract land transfer tax. However, the above rule applicable for corporations regarding previous tax-exempt transfers also applies to the transfer of an interest in a limited partnership.

The transfer of an interest in a limited partnership that owns real estate attracts land transfer tax in Ontario, subject to some exceptions.

Tax on Seller's Profits/Gain

11. Is tax imposed on a seller's profit or gain on a sale of real estate? Are there any exemptions? Does it apply to a transfer of shares in a company holding real estate?

Tax on Seller's Profits/Gain

Canadian federal and provincial income tax is generally levied on a seller's gain on a sale of real estate located in Canada, the taxation of which will depend on whether the property is held as inventory (that is, for re-sale) or as capital property, which is determined primarily by the seller's intention.

When a seller engages in the business of real estate sales, a sale will be taxed on income account, so that the entirety of the proceeds of sale (sale value less initial cost and sale expenses) will be subject to tax. When a seller holds real estate as capital property (generally where it is the location or site of an essential part of a seller's business or held for long periods of time with the intention of future development or use), the sale will be taxed on capital account, which is currently taxable at 50% of the tax rate otherwise applicable to business income.

Withholding tax generally applies to a sale of Canadian real estate by a non-resident seller. Specific rules are set out in the federal Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).

In addition, if the real estate includes a building in respect of which previous depreciation deductions were claimed, recapture of the depreciation may be realised by the seller on the subsequent sale (which will be fully included in the income).

Exemptions

There are generally no exemptions from income taxes payable by a Canadian seller on a sale of commercial real estate unless the seller is a tax-exempt entity such as a registered charity or pension fund.

Transfer of Shares

A transfer of shares in a company holding real estate by a Canadian seller is subject to income tax, either on income or capital account.

A non-Canadian seller will generally be subject to tax on the sale of shares of a company holding real estate if the company derives (or has derived in the last 60 months) more than 50% of its value from Canadian real estate (subject to relief under any applicable tax treaty).

Withholding obligations are also imposed on a purchaser of such shares from a non-Canadian seller under Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).

Value Added Tax (VAT) or Equivalent

12. Is VAT (or equivalent) payable on a sale of real estate? Who pays? Are there any exemptions?

VAT/Equivalent

In Canada, depending on the province, VAT takes one of the following forms (in Québec, both GST and QST apply):

- Goods and services tax (GST).
- Harmonised sales tax (HST).
- Québec sales tax (QST).

GST, HST, and QST generally apply to the transfer of commercial real property and new residential real property.

Who Pays

Rates range from 5% to 15%, depending primarily on whether GST, HST or QST/GST applies in the jurisdiction in which the transfer takes place.

The seller is responsible for collecting VAT from the buyer, except in certain circumstances where the buyer is entitled to self-assess VAT (buyers registered for VAT purposes that acquire taxable real estate in the course of their commercial activities).

Exemptions

The transfer of used residential real estate is generally exempt from VAT. Transfers of real property in the context of the sale of a business may not be subject to VAT if a joint election is entered into with the seller.

Municipal/Local Taxes

13. Are municipal/local taxes paid on the occupation or ownership of business premises or business ownership? Are there any exemptions?

Municipal property taxes are payable by the owner of the property and are generally passed on to tenants. They are typically calculated based on the use and assessed value of the property. Some municipalities provide exemptions from municipal property taxes for public and/or non-profit organisations or for geographical areas in which the municipality wishes to provide an incentive for development.

Real Estate Finance

Secured Lending Involving Real Estate

14. Briefly outline the typical security package required by lenders in relation to commercial real estate lending. How are the most common forms of security interest relating to real estate created and perfected? Is there a mortgage tax/registration fee?

Typical Security Package

Real estate financing is most commonly secured by:

- A mortgage (such as a debenture or collateral charge) and a general assignment of rents and leases in the common law jurisdictions, or an immovable hypothec in Québec, over the borrower's or guarantor's interest in the real estate.
- A general security agreement in the common law jurisdictions, or movable hypothec in Québec, with respect to the borrower's personal property.

Common Forms of Security: Creation and Perfection

Real property mortgages and personal property security interests are generally created by the execution of security documents and perfected by registration in the applicable land title and personal property registries.

Mortgage Tax/Registration Fees

Taxes are generally not payable for mortgage registration, although registration fees are payable in most provinces, which vary depending on the amount of the mortgage.

Lenders' Remedies

15. Briefly outline the main remedies for lenders in relation to secured real estate if the borrower defaults on the loan. What is the effect of the borrower's insolvency on the lender's remedies?

Lenders' Remedies

In the common law provinces, the remedies for mortgage lenders generally include:

- Foreclosure.
- Action on the covenant.
- Judicial sale.
- Power of sale. This is a sale of the mortgaged property by the mortgage lender without court proceedings or supervision, either:
 - under the provisions of the mortgage that expressly grant the lender the power to sell the mortgaged property on default; or
 - the applicable provincial mortgage legislation.

However, mortgage realisations generally involve court proceedings, especially when there are multiple lenders.

- Possession.

In Québec, analogous remedies include:

- A personal right of action against the debtor.
- Hypothecary rights of taking in payment.
- Sale by a secured creditor.
- Sale by judicial authority.
- Taking possession for administration purposes.

The principal limitations on a lender's remedies are:

- The owner's/borrower's "equity of redemption" or a standstill period allowing the borrower to find the funds to retain ownership of the lands.
- Obligations to derive maximum value from the land to satisfy other mortgagees or secured creditors.

Effect of the Borrower's Insolvency

When an insolvent debtor becomes bankrupt, the bankruptcy triggers an automatic stay of proceedings against unsecured creditors. The right of secured creditors to enforce their security is expressly preserved under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

Real Estate Leases

Negotiation of Leases

16. Are commercial lease provisions regulated or freely negotiable? Which legislation applies?

The provisions of commercial leases are freely negotiable. Most (but not all) provinces have separate commercial tenancy statutes that typically have little impact on most commercial leases, and residential tenancy statutes that, as public policy statutes, tend to limit (in some provinces, completely limit) contractual freedoms to protect residential tenants.

The main body of law relevant to commercial and residential leases in Québec is the Civil Code of Québec.

Rent Payments

17. At what intervals is rent usually paid in a business lease? How are rent levels usually determined and reviewed?

Rent Payment Intervals

Under commercial leases, rent is typically payable monthly, in advance.

Rent Review

Rent under commercial leases is freely negotiated. Market conditions and circumstances of the parties determine whether the lease is for a fixed rental rate for the duration of the term, or whether the rental rate will incrementally increase or be determined at market rates at certain milestones throughout the lease and/or on extension or renewal of the term.

18. Is stamp duty and VAT (or equivalent) payable on rent?

Depending on the province, GST, HST, or QST is payable on rent of commercial real estate. It must be collected by landlords.

If the commercial tenant is registered for GST/HST/QST purposes, and uses the premises in the course of its commercial activities, up to 100% of these taxes should be recoverable by the tenant.

GST/HST/QST payable by commercial landlords on their expenses incurred in the course of their commercial rental activities is generally recoverable, while GST/HST/QST payable by residential landlords is not.

19. Is a rent security deposit or other security usually required by the landlord?

A security deposit may be due at the start of a lease, to be managed as provided in the lease. In some jurisdictions, if the lease term exceeds certain thresholds, transfer tax may be triggered and become due and payable (see [Question 10](#)).

In some provinces, such as British Columbia, there are limits on the amount of rent security deposit a landlord can request in a residential lease.

A landlord may also require the tenant to grant the landlord security over the tenant's personal property or require a third-party guarantee from a parent company or subsidiary.

Length of Term and Security of Occupation

20. Is there a typical length of lease term or restrictions on the duration of a lease? Do tenants of business premises have security of occupation or rights to renew the lease at the end of the contractual lease term?

Length of Lease Term

Lease terms are freely negotiable, except that the Civil Code of Québec caps the term at a maximum of 100 years.

An initial lease term typically ranges from five to ten years and is often subject to a tenant's option to extend for one or more additional periods.

A ground lease typically has a longer initial term and options to extend, as the tenant will have constructed the building or improvements on the leased land and will want a long enough term to allow the tenant to fully depreciate its investment in those improvements.

In some provinces, long-term leases attract transfer tax (*see Question 10*).

Security of Occupation

Commercial tenants generally do not have the right to continue to occupy the relevant real estate after the expiry or termination of the lease term if the extension rights, if any, have been exhausted.

Disposal

21. What restrictions typically apply to the disposal of the lease by the tenant?

Assignment and Subletting of the Lease

Commercial leases typically prohibit the tenant from transferring or assigning the lease or subleasing or sharing possession of the premises (whether or not to or with related companies) without the landlord's consent. Some provincial laws (such as

Ontario's Commercial Tenancies Act, R.S.O. 1990, c. L.7) provide that unless the lease states otherwise, a prohibition against assignment without consent is deemed to contain a proviso that consent is not to be unreasonably withheld.

Group (Affiliate) Sharing

See above, *Assignment and Subletting of the Lease*.

Legal Reorganisation or Transfer/Sale of the Tenant

Changes in control by amalgamation or change in shareholder ownership may be prohibited by the terms of a lease. A guarantee will not be affected by a reorganisation or transfer of the tenant unless specifically provided in the guarantee itself.

22. Does a landlord or tenant retain any liability under the lease after the lease is assigned?

Landlord's Retained Liability

Commercial leases generally provide that the landlord is released on sale of the property (often only if the buyer covenants to assume the lease).

Tenant's Retained Liability

Unless stated otherwise in the lease or otherwise agreed to by the landlord and tenant, on an assignment of the lease to a third party, the original tenant typically continues to be liable to the landlord for the covenants agreed to in the lease, including payment of rent.

Landlord's Remedies and Tenant's Insolvency

23. What remedies are available to a landlord for a breach of the lease by the tenant? On what grounds can the landlord usually terminate the lease? What is the effect of the tenant's insolvency?

Landlord's Remedies and Grounds for Termination

A landlord typically has the right to terminate a lease and/or re-enter the premises and re-lease them as agent of the tenant for failure to pay rent or other material breach or on the tenant's bankruptcy or insolvency.

Exercising these remedies typically requires notice to the tenant and, for certain breaches, the opportunity to cure the breach. The tenant may be required under the lease to grant to the landlord security over the tenant's personal property realisable on a tenant default, although this is of limited practical benefit to the landlord as tenants' personal property is often financed by third-party lenders or suppliers, who have priority.

A lease may also include self-help remedies that allow the landlord to step in and perform the obligation, with costs to be recovered from the tenant. If the landlord requires additional security, it can enforce any such cash security or collateral guarantees or indemnities.

Effect of the Tenant's Insolvency

A tenant's insolvency typically constitutes a default and permits the landlord to terminate the lease. However, bankruptcy legislation applies to the termination process, and may limit the landlord's rights and remedies, balancing those rights against those of other creditors of the bankrupt tenant. Accordingly, events of default may include early indications of insolvency, so that the landlord can impose its remedies before bankruptcy/insolvency legislation being invoked.

Planning and Development Controls

24. In what circumstances can local or state authorities purchase property compulsorily (expropriation/eminent domain)? Is the purchase price or compensation based on market value?

Compulsory Purchase/Expropriation

The expropriation or taking of real estate by compulsory sale falls under both federal and provincial regulatory regimes. The federal government has statutory authority to expropriate land and immovable real rights for public works or other public purposes under the Expropriation Act, R.S.C., 1985, c. E-21. Similarly, each province and territory has legislation that grants expropriation powers to authorities such as the provincial government, municipalities, and utility companies.

Expropriation legislation across Canada sets out specific procedural requirements for expropriating authorities, such as prescribed notice periods.

Compensation

Compensation is generally based on the fair market value of the land or right being expropriated, and in some cases may include reasonable costs (such as lawyers' or appraisers' fees) and damages for injurious affection.

25. What authorities regulate planning control and which legislation applies?

Provincial governments are constitutionally responsible for land use planning (other than on federal land) but delegate most planning and zoning functions to municipalities. Much of the regulation of real property is in the form of zoning by-laws (supplemented by overarching provincial policies and plans, municipal official plans, and *plans d'urbanisme*) and building by-laws.

Municipal land use by-laws regulate nearly all aspects of land use, the nature of buildings and structures, the size and intensity of development, and permissible development.

26. What are the main authorisation and consultation procedures in relation to planning consents?

Initial Consents

Each municipality has differing eligibility, procedural, and documentary requirements for each category of development permissions.

The process and requirements can range from submitting an application and paying fees to meeting with municipal committees or the public, submitting plans, and seeking the approval of municipal councils. The timeframe for a decision from the relevant municipal body varies greatly, depending on the complexity of the proposed development, availability, and capability of municipal personnel to review the application, whether third party property owners and/or other governmental agencies are involved, and by jurisdiction.

Third Party Rights and Appeals

Depending on the development application sought, third parties (particularly neighbouring residents and property owners) may have the right to be given notice of the application and participate at a public hearing in support or opposition of the application.

The availability of a right of appeal in these matters varies by province. In some provinces, such as Alberta and Ontario, the decision of a municipality can be appealed to a specialised tribunal. In others, such as British Columbia, there is no such tribunal and municipal council decisions are not subject to judicial review on their merits (although they may be reviewable on formal grounds such as lack of jurisdiction, procedural fairness, or natural justice).

Certain developments may require consultation with affected indigenous peoples. While the Crown is constitutionally required to conduct such consultation, procedural aspects are often delegated to the proponent of the development.

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Recent transactions

- Strathallen Capital Corp. in its CAD702.9 million acquisition of a portfolio of 44 properties from OneREIT, and concurrent sale by Strathallen of six of the acquired properties to Alberta Investment Management Corporation.
- OMERS Realty Corporation and Canada Pension Plan Investment Board in their CAD480.6 million sale of Constitution Square to Greystone and Canderel.
- Mohari Canada Inc. in its purchase of the Thompson Hotel located in Toronto, Ontario from Hotel 550 Wellington GP Ltd.

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Recent transactions

- Symphonia Development 2, L.P. in its CAD150 million syndicated construction financing for a 43-storey condominium residential property.
- Westcliff Management Ltd., Montez Corp Inc. and Novaho Realty Limited in their CAD26 million sale-leaseback of two industrial buildings from Olymel and related joint venture agreements.
- Westcliff Management Ltd. in its CAD25 million purchase from Investors Group Inc. of a 50% undivided interest in a shopping centre.

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Recent transactions

- CPP Investment Board and Oxford Properties in the sale of the portfolio collectively known as Edmonton City Centre, a 1.4-million-square-foot office and retail complex, to a consortium including LaSalle Canada Property Fund, Universal-Investment on behalf of Bayerische Versorgungskammer, North American Development Group, and Canderel.
- AIMCo Realty Investors LP in its acquisition of Edmonton Tower, a new 27-storey office and retail complex in the heart of the ICE District, from the Katz Group.

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Recent transactions

- GIC Private Limited in its acquisition of a 75% interest in Oxford Properties Group's Western Canadian Fairmont Hotel Portfolio (Banff Springs Hotel, Chateau Lake Louise, Jasper Park Lodge, and Chateau Whistler) including the establishment of a joint venture with Oxford, an acquisition financing, and the establishment of asset management arrangements.

- Lax Kw'alaams and Metlakatla First Nations in their acquisition of an equity share of Ridley Terminals Inc. from the Government of Canada. Arising from the privatisation of this West Coast export coal terminal, related shareholder and benefit agreements were negotiated on behalf of these Indigenous groups. This transaction will stand as a noteworthy precedent and resulted in a groundbreaking joint venture between the purchaser, a US private equity group and these First Nations.
- Advising on the most complex and sophisticated real estate transactions serving a wide range of clients.
- Advising on real estate matters including commercial, residential and mixed-use development projects, commercial leasing matters, capital project dispositions, and acquisitions.
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RESOURCE HISTORY

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This document has been reviewed by the author as part of its periodic maintenance to ensure it reflects the current law and market practice on 1 February 2025.

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