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ROBINSON SHEPPARD SHAPIRO LLP
BUYING AND SELLING REAL ESTATE IN CANADA - QUÉBEC

ILN REAL ESTATE GROUP



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KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER CANADIAN (QUÉBEC) LAW

Unlike the other Canadian provinces and territories, which are all common law jurisdictions, Québec is a civil law jurisdiction. It is governed by the *Civil Code of Québec*, originally inspired by the French Napoleonic Code, and therefore quite distinct from other Canadian legal systems. In Québec, real estate is categorized as being immovable (real) property, as opposed to movable (personal) property. Both lawyers and notaries handle Québec real estate transactions, but only notaries may receive deeds creating encumbrances (hypothecs, known as liens or mortgages in other jurisdictions). Québec notaries are not analogous to notaries public in other jurisdictions; they receive the same legal training as lawyers but are members of the Chamber of Notaries and graduate from its distinct post-university program, specializing in real estate matters.

I. STANDARD FORMS OF AGREEMENTS

Residential Transactions – Pre-Sale Documents

All Québec licensed real estate brokers governed by the *Real Estate Brokerage Act* (Québec) and its Regulations are required to use the following forms provided by the *Organisme d'autoréglementation du courtage immobilier du Québec* (OACIQ) when preparing brokerage contracts as well as the following agreements for the purchase, sale, and lease of immovables:

- Exclusive brokerage contracts for the sale or purchase of:
 - (i) Chiefly residential immovables containing less than 5 dwellings excluding co-ownership
 - (ii) Divided co-ownership – Fraction of a chiefly residential immovable held in divided co-ownership

- (iii) Undivided co-ownership – Share of a chiefly residential immovable held in undivided co-ownership
- (iv) Residential lease
- (v) Sale of a mobile home situated on leased land
- Lease documents:
 - (i) Promise to lease
 - (ii) Counterproposal
 - (iii) Lease amendments
- Sale / Purchase documents
 - (i) Promise to purchase
 - (ii) Counterproposal to a promise to purchase
 - (iii) Amendments
 - (iv) Waiver of conditions (*e.g.*, financing, inspection)
 - (v) Annex F – Financing
 - (vi) Annex R– Residential Immovable
 - (vii) Annex RC – Remuneration and Costs
 - (viii) Declarations by the seller of the immovable (land and buildings, appurtenances, dependencies)
 - (ix) Declarations by the seller of the immovable - Divided co-ownership
 - (x) Enhancements prior to acceptance

Commercial Transactions – Pre-Sale Documents

In commercial purchases, either party may prepare the offer to purchase or sell (as the case may be). These are often highly negotiated



and tailored documents. They generally set out the legal description of the immovable property, the sale terms including price, deposit, conditions to be met to the satisfaction of the purchaser (such as financing, title search, environmental and other inspections), the outside closing date and the date and time by which the offer must be accepted, failing which it will be null and void.

Purchase and Sale Agreement

In both residential and commercial sales, the purchase and sale agreement takes the form of a deed of sale, signed by both parties, which sets out all the terms and conditions of the transaction, including the date of occupancy, the warranties provided by the seller (*e.g.*, title, condition of the property, seller's matrimonial regime in the case of individuals, seller's tax residency), the purchase price and payment terms, as well as the 5% federal goods and services tax ("GST"), 9.975% Québec sales tax ("QST") and mutation taxes due on the transaction. The deed must be signed before a Québec notary if there is a balance of price or if the buyer is assuming an existing encumbrance; otherwise, it may be signed either in notarial form (which is the general practice) or under private signature before two witnesses, who must also sign.

II. BROKERS AND AGENTS

Real estate brokers and agents are governed by the *Real Estate Brokerage Act* (Québec) and its Regulations. All brokers are licensed real estate agents, but not all agents are licensed brokers. Real estate agents work for a broker or brokerage firm, either as salaried employees, on commission or both, and the broker is legally responsible for its agents. Agents or brokers in Québec may act for the seller or the purchaser (although the latter is less common). As noted above, the brokerage contract is a prescribed form in residential, but not

commercial, land sales. Under Québec case law, even if the seller retains the broker or agent, they are still obligated to deal honestly with both parties and may not mislead the buyer. Where the broker or agent acts only for the seller, the seller pays the commission; where both parties are represented by brokers or agents, the two brokers or agents typically share the commission. The obligation to pay the commission is governed by the brokerage contract, but generally in order to trigger the obligation to pay a commission, the broker or agent must have introduced the buyer and seller. There is usually a clause in exclusive brokerage contracts protecting the rights of the agent(s) to collect a commission if the property is sold within a specified period (generally 90-180 days) after its expiration to a party introduced to the property while it was in effect.

III. BUYER'S INSPECTIONS

Residential:

Most offers are made conditional upon inspection and/or financing, although in a heated real estate market, a buyer who is prepared to make an offer without conditions may have an advantage if there are competing bids. The buyer will typically engage a licensed building inspector, who will visit the property and check for interior and exterior structural issues, verify the heating, ventilation, plumbing and electrical systems and the type and state of the roof, underground storage tanks, etc. and generally identify any issues which should be rectified, and which could influence the value of the property (and therefore potentially reduce the price).

The buyer's notary will conduct a formal title search on the property to establish the chain of title and to identify any hypothecs, prior claims, other encumbrances, servitudes (easements), concurrent or priority rights of ownership, and



any other right or charge reducing the value of ownership of the property. The notary will also obtain and verify an up to date (not more than 10 years old) certificate of location (survey) to be provided by the seller (and which will be required by the buyer's lender if the purchase is being financed). Finally, the notary will verify the zoning and any permits for renovations to the property, as well as payment of the property taxes (municipal, school, water, etc.) affecting the property, including the right of tax authorities to claim arrears of property taxes, the creation of a prior claim in their favour, the registration of a notice of sale of the property for non-payment of the property taxes followed by the sale of the property, and the registration of a notice of legal hypothec by the tax authorities or by any contractor. The notary will, in preparing the deed of sale, also prepare any adjustment of taxes, charges, utilities, etc. and confirm that the buyer has insurance coverage for the property in place as of the date of transfer of ownership.

Commercial

In addition to the inspections performed by residential buyers, commercial buyers also generally obtain at least a Phase 1 environmental review (with Phase 2 follow-up where the Phase 1 report raises concerns), and a use and zoning/permitting analysis, particularly if the buyer is planning any renovations to, or a particular usage of, the property.

If the property is leased, the buyer's due diligence should include a thorough review of all leases, including an assessment of the rentals stipulated compared to current market conditions, as well as all maintenance and other contracts relating to the operation of the property.

Title Insurance

In both residential and commercial sales, any title issues which cannot easily be resolved prior to the sale may be covered by the issuance of a title insurance policy, generally applied for by the buyer as beneficiary but at the seller's expense.

IV. FORMS OF OWNERSHIP

Residential property is commonly held in an individual's personal name (or both spouses' names in the case of a couple) but may also be held in a family trust or by a holding corporation. A family trust is created by signature of a notarial trust deed naming 3 trustees, at least 1 of whom must be independent (*i.e.*, neither the settlor nor a beneficiary), which identifies the beneficiaries and defines the trustees' powers.

Commercial property may be held in a variety of ways, including directly in the name of the owner, or through a corporation, partnership, limited partnership, unlimited liability company or trust. It may also be held in emphyteusis for up to 99 years, in which case the beneficial and legal (or "bare") ownership, which would otherwise be united in a single owner, are divided among one or more individuals or entities.

V. REGULATION AND DISTINGUISHING FEATURES OF EACH TYPE OF OWNERSHIP

Corporations

Canadian corporations may be incorporated federally, under the *Canada Business Corporations Act* (the "CBCA"), or under the corporate statute of a particular province or territory (in Québec, the *Business Corporations Act* or "QBCA"). A federal corporation "carrying on business in Québec", which definition includes owning immovable property, must register with the Québec Register of Enterprises (the "REQ"), and update that



information at least annually, as well as within 15 days of any change. One disadvantage to incorporating federally is therefore the requirement to file two annual returns and pay two annual filing fees, whereas only one return and one annual filing fee are required for a Québec corporation. Additionally, 25% of a CBCA's corporation's directors must be Canadian residents; there is no residency requirement for QBCA directors.

Another potential disadvantage of incorporation under the CBCA is that all corporations which are not publicly traded are required to maintain "a register of individuals with significant control over the corporation" (an "ISC"). This is defined as any individual who, as registered holder or beneficial owner, controls any number of shares carrying 25% or more of the voting rights attached to all of the corporation's outstanding voting shares or equal to 25% or more of all of the corporation's outstanding shares measured by fair market value. Two or more individuals can each be considered an ISC if they have joint ownership or control of 25% or more of the shares in votes or value. The CBCA corporation must maintain a register containing each ISC's name, date of birth and address, jurisdiction of residence for tax purposes, the day they became or ceased to be an ISC, and a description of why they qualify as an ISC. This information must be confirmed, and updated if necessary, at least annually and may be maintained at the corporation's registered office or at any other place in Canada designated by the corporation's directors (such as the law firm where the minute books are maintained). The information is accessible to shareholders and creditors of the corporation or their personal representatives upon request during the corporation's usual business hours, and they may obtain an extract from the register on payment of a reasonable fee. The information

may not be used by any person except in connection with (i) an effort to influence the voting of shareholders of the corporation (*e.g.*, a proxy solicitation); (ii) an offer to acquire securities of the corporation; or (iii) any other matter relating to the affairs of the corporation. Failure by the corporation as well as its directors and officers to establish or maintain the register without reasonable cause, the recording or provision by a director or officer of false information, and the failure by a shareholder to reply accurately and completely to a corporation's request for information, are all punishable by fines and a maximum of 6 months' imprisonment. Similar requirements are at various legislative stages in each province and territory, so this requirement will eventually become universal throughout Canada, regardless of the jurisdiction of incorporation.

Unlimited Liability Company ("ULC")

ULCs, which are similar to American limited liability companies (LLCs), can currently be formed only under the laws of the Provinces of Nova Scotia, British Columbia, and Alberta; however, they can hold property in Québec if they register with the REQ. These entities permit flow-through treatment for profits and losses to their shareholders, although tax treaties may impact the ability to use this. However, Canadian ULCs do not provide limited liability protection, and it is therefore common practice to interpose a single purpose holding corporation between the ULC and its shareholder(s).

Partnerships / Limited Partnerships

These are formed under provincial/territorial law by the agreement of the partners in the case of a general partnership, or the general and limited partners in the case of a limited partnership.



General partnerships do not usually require any other formality in order to be created, whereas a limited partnership generally exists only from its registration date. The partnership agreement or limited partnership agreement, as the case may be, takes the place of the certificate and articles of incorporation and by-laws, and will govern the issuance of partnership units and the operations of the entity.

Typically, in a limited partnership, the general partner (which is often a shell corporation) is responsible for all the obligations and liabilities of the limited partnership. The liability of the limited partners is restricted to the amount of their respective contributions, provided that they do not become involved in the management of the limited partnership. To retain limited liability protection, the limited partner must remain a passive investor rather than an active participant in the operation of the limited partnership.

Both general and limited partnerships formed under Quebec law or carrying on business in Quebec must register with the REQ and provide information analogous to that required of a corporation.

Trusts

A trust carrying on a commercial enterprise, such as a business, investment, or real estate trust (whether or not profitable), which is not managed by a registered trustee (such as a trust company) must also register with REQ in the same manner as a sole proprietorship, partnership, or legal person (corporation) within 60 days of beginning operations.

Nominee or prête-nom agreements

Nominee or “prête-nom” agreements are commonly used in real estate transactions to register property in the name of a nominee corporation, which holds legal title only, with

the beneficial ownership retained by the true owner(s). Nominee corporations are often used to collect rent and pay expenses, or to acquire family assets such as a residence. Even if already disclosed in the taxpayer’s tax return, all Québec taxpayers must file prescribed form TP-1079.PN disclosing all nominee agreements:

- Signed on or after May 17, 2019, on the later of (i) 90 days following the date of signature and (ii) December 23, 2020; or
- Signed before May 17, 2019, but having income tax consequences continuing on or after May 17, 2019 (*e.g.*, deduction of expenses, attribution of rental income, imposition of a capital gain, principal residence exemption claims, creation of tax attributes such as adjusted cost base, etc.) by or before December 23, 2020.

Nominee agreements signed before May 17, 2019, but not having income tax consequences on or after that date need not be disclosed.

The information to be disclosed includes the date and a copy (if in writing) of the nominee agreement or other document evidencing same, the identity of the parties, a full description of the transaction (or the series of transactions) covered by the nominee arrangement and the identity of any person or entity for which there are resulting tax consequences. Disclosure by one party to the nominee agreement is deemed to be disclosure by all parties.

Failure to disclose a nominee arrangement can result in an initial penalty of \$1,000 plus an additional daily penalty of \$100 (up to a maximum total penalty of \$5,000). As well, Revenu Québec can suspend the taxpayer’s tax assessment period, such that prescription does not begin to run on any tax claims for that period.



VII. CLOSING COSTS / ADJUSTMENTS

Mutation (“welcome”) tax

The buyer must pay the mutation or transfer tax (colloquially referred to as the “welcome tax”) to the Québec Minister of Revenue under the *Mutation Tax Act* (Québec) within 31 days of issuance of the first tax bill, subject to certain exceptions for transfers between related parties (e.g., two spouses, a parent and child, or a corporation and its shareholder, provided the shareholder holds at least 90% of the shares and the buyer does not re-sell or “flip” the property within 24 months of the initial exempt sale).

Mutation tax rates are calculated on the higher of the purchase price and municipal evaluation of the property (both of which are identified in the deed, as is the amount payable, even where an exemption applies). The 2021 rates are as follows: (i) 0.5% of the first portion of the taxable amount up to \$51,700; plus (ii) 1% of the portion of the taxable amount between \$51,700.01 and \$258,600; plus (iii) 1.5% of the portion of the purchase price in excess of \$258,600.01. Québec municipalities are entitled to impose a surcharge of up to 3% for properties having a purchase price or municipal evaluation over \$500,000. This is the case in many cities including Montreal, its suburbs, and surrounding areas. For example, Montreal charges (i) 1.5% on the portion of the purchase price between \$258,600 and \$517,100, (ii) 2.0% on the portion of the purchase price between \$517,100 and \$1,034,200, (iii) 2.5% on the portion of the purchase price between \$1,034,200 and \$2,000,000 and (iv) 3% on the portion in excess of \$2,000,000.

Even where an exemption applies, the city has the right to charge a supplemental tax as follows: none if the taxable value is less than \$5000, 0.5% of the taxable value between

\$5000 and \$40,000, plus a fixed amount of \$200 if the taxable value exceeds \$40,000.

Non-resident vacant or underused property tax

The 2021 federal budget announced the government’s intention to implement an annual national 1% tax on the value of Canadian property owned by non-Canadian residents which is considered to be vacant or underused, effective January 1, 2022. The tax will require all owners, other than Canadian citizens or permanent residents of Canada, to file a declaration as to the current use of the property, with significant penalties for failure to file.

Adjustments

The buyer and seller adjust for taxes, utilities, and other prepaid expenses as at the date of transfer of ownership. In addition, in the case of commercial property, adjustments are also made for rents, third party operating expenses and common area maintenance expenses.

Typically, the offer and deed will provide that the buyer chooses the notary and pays the notarial fees, including the cost of publication and the provision of notarial copies to both parties. If the purchase is financed, the lender will choose the notary to receive the deed of hypothec (mortgage), who will ideally also handle the sale, and the buyer will assume those costs. If there are existing encumbrances on the property (e.g., the balance of a hypothecary loan) to be paid out at closing, the notary will obtain a payout letter from the lender, arrange for payment from the sale proceeds and have the prior lender’s security radiated, all at the seller’s expense.

Sales Tax

The sale of a new residential property, or of an existing property that has undergone major renovations, from the builder / developer is subject to the GST and QST, with a partial



rebate available for individuals only. If the purchase price is between \$350,000 and \$450,000, then up to 36% of the amount of GST not exceeding \$6300 is refundable. If the purchase price is between \$200,000 and \$300,000, then 50% of the amount of QST not exceeding \$19,950 is refundable.

The sale of an existing residential property which is occupied by its owner and not rented property is not subject to GST or QST; however, if the owner of the property resides in part of it and rents part (*e.g.*, a duplex or triplex), the portion not used by the owner as a residence, determined on a pro-rated basis, will be taxed in the same manner as the sale of a commercial property.

The sale of a commercial property is subject to both GST and QST, unless both parties declare in the deed that they are registered for both taxes, provide their respective tax numbers and file an election to have the transaction be treated as non-taxable.

It is the buyer's obligation to collect and remit the GST and QST, so the seller's tax numbers should be verified; if they are invalid, the buyer will be liable to pay these amounts to the tax authorities.

If the seller is not a Canadian resident, the buyer must withhold 25% of the gross proceeds in trust (typically with the officiating notary) until the Canada Revenue Agency confirms the amount to be paid and issues a certificate of compliance ("tax clearance certificate") when the tax has been fully paid, at which time any excess funds may be released to the seller. A buyer who fails to withhold and remit the required tax could be held liable for the entire amount, plus penalties and interest.

VII. RECORDING REAL ESTATE DOCUMENTS

The Quebec land register traces all real estate transactions carried out in Quebec since its

creation in 1830. The overall system is known as the Cadastre du Québec, and the province is divided into various registration divisions, each one of which has its own registry office.

Title can be searched electronically via the Index of Immovables, using the lot number. The municipal evaluation is also generally accessible on-line, depending on the municipality, using the civic address, which will also yield the lot number(s). Copies of the registered deeds may also be ordered on-line.

Leases under Québec law are a personal, rather than a real, right. However, notice of the lease may be published against title. This protects the tenant by ensuring that if the property is sold, the new owner must respect the balance of the term of the lease, including any renewal options. If the lease was not published before the sale, the new owner is only obliged to continue it for the shorter of the balance of the term (not including renewals) and 12 months from the date of the sale. This puts the tenant in a very precarious position, particularly if the premises are desirable and the rental is below market, if the tenant cannot easily find replacement premises, or if the tenant has made significant improvements and cannot recoup their cost.

Since February 1st, 2021, all documents to be published at the Land Registry may be submitted electronically or in paper form. A digital inscription may be submitted by land surveyors and bailiffs, in addition to lawyers and notaries, even if they did not prepare the underlying document. As of November 8, 2021, only digital submissions will be accepted.

VIII. ANNUAL COSTS FOR PROPERTY OWNERSHIP

In addition to the purchase price, a buyer must typically budget for the following annual expenses of property ownership:



- A. Property Insurance (including boiler and machinery, fire, damage and liability).
- B. Property Taxes (municipal, school, water, special assessments); if all or part of the property is rented out, the rental income will be subject to income tax in the hands of the landlord.
- C. Operating expenses (e.g., utilities, maintenance, repairs).

CONCLUSION

Real estate is an area of interest for most people, regardless of their profile and focus, whether as an owner, tenant, landlord, or merely someone who keeps an eye on the economy, as fluctuations in the real estate

market are often seen as a reliable barometer of its state and condition.

In addition to demanding a deep understanding of the ever-changing real estate market and conditions, the field covers a vast landscape of legal issues, such as leasing, commercial and corporate law, litigation (including arbitration, mediation, and other forms of dispute resolution), financing, construction, tax, co-ownership and condominium law, municipal law, bankruptcy and insolvency and environmental law, many of which come into play in any real estate transaction.