



Financial Services Spotlight

News and information from Osler’s market-leading financial services practice group

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OSLER

Osler’s national Financial Services Group is pleased to present its inaugural newsletter. Each month, we will share an informative article with national relevance to finance law to help you stay current. Our newsletter will also help you know what is new and upcoming from Osler Financial Services.

What you need to know about the assumption of commercial mortgage loans

Ever since the Bank of Canada’s Overnight Interest Rate and Lenders’ prime interest rates (collectively, the Interest Rates) started to increase in March of 2022, there has been a significant increase in the number of commercial mortgage loan assumption transactions (Assumption Transactions) being completed across the country. Our Financial Services Group has completed more Assumption Transactions in the past 12 months than we have in the previous 10 years. Lenders who have never completed Assumption Transactions are finding that they are completing them for the first time at the request of their borrowers.

The driver for the increase in the number of Assumption Transactions is rapidly increasing Interest Rates and the desire for borrowers to take advantage of a lower existing interest rate. For existing borrowers, this means using attractive financing terms to entice a purchaser to buy their property or to increase the purchase price for their property. For new borrowers, this means saving the interest rate differential between currently available interest rates and the existing borrower’s lower fixed interest rate.

In this article, we discuss Assumption Transactions generally and explain what they are; highlight some of the benefits of Assumption Transactions for borrowers and lenders; discuss how Assumption Transactions are approached from a legal perspective; and highlight some common pitfalls and nuances for lenders to be aware of with respect to Assumption Transactions.



Assumption Transactions

An Assumption Transaction is a financing transaction in which, at the time of the completion of purchase and sale of a commercial property, the purchaser assumes the vendor's mortgage loan and related loan security. Upon completion of the purchase and sale transaction and the Assumption Transaction, the purchaser steps into the vendor's shoes, replacing it as the lender's borrower and assuming its obligations as borrower with respect to the mortgage loan and loan security and becomes liable to the lender.

Benefits of Assumption Transactions for borrowers and lenders

Borrowers and lenders can benefit from completing an Assumption Transaction in a number of ways, including those set out below.

Benefits for existing borrowers:

- avoidance of prepayment fees
- a potentially higher purchase price on the commercial property being sold
- an increased likelihood of completion of the purchase and sale transaction

Benefits for new borrowers:

- interest savings over the term of the mortgage loan
- benefiting from a previously paid mortgage loan insurance premium, without having to repay one
- potential savings on legal fees, the cost of title insurance and land titles registration fees
- a more efficient and quicker legal process

Benefits for lenders:

- building goodwill and strengthening relationships with both existing and new borrowers, thereby facilitating increased future business
- building new relationships with new borrowers that the lender hasn't historically dealt with
- savings with respect to time, money and effort that they would otherwise spend if a mortgage loan were to be paid out (as opposed to assumed)
- an improved security position with reduced risk profile
- a quicker, less onerous approval process compared to a new loan application
- increased fees with respect to amendments and the application for consent to the Assumption Transaction

Legal considerations for Assumption Transactions

If a lender is willing to consent to an Assumption Transaction, the lender typically issues a consent letter, setting out the terms and conditions upon which it is willing to permit an Assumption Transaction to be completed (a Consent Letter). The Consent Letter will also typically include any amendments required to the loan agreement and related loan security and provide for any new terms and conditions and security requirements.

When all parties sign off on the Consent Letter, the lender will instruct its solicitor to complete the legal work and prepare the legal documentation in relation to the Assumption Transaction, which typically includes the following:

- reviewing the underlying security and identifying required amendments
- completing the necessary legal due diligence on the loan parties, along with high-level due diligence on the commercial property
- preparing the assumption agreement and other loan security documents
- providing advice with respect to whether or not title insurance is required and whether the assumption agreement needs to be registered on title to the commercial property
- registering new or amended personal property registrations against the new loan parties granting security interests, as applicable
- working with the solicitors for the existing and new borrowers to determine appropriate trust conditions and closing mechanics for completion of the Assumption Transaction

Pitfalls and nuances for lenders

While Assumption Transactions may be fairly common and are beneficial to lenders, lenders should be cognizant of the following pitfalls/nuances with respect to Assumption Transactions:

- Be cautious not to release loan parties from obligations that would otherwise survive the payout of the mortgage loan (for example, environmental covenants and indemnities).
- Ensure the payment of interest up to and following the completion of the Assumption Transaction is accounted for (preferably by an adjustment between the existing and new borrower).
- Do not inadvertently diminish loan security through poorly papering the Assumption Transaction.

- Be careful not to provide personal rights inadvertently to new loan parties that were only intended to be provided to the existing loan parties.
- Do not confuse and overlap primary and secondary liability of the loan parties. Address this through the security requirements.
- Assumption Transactions with individuals need to be approached differently than Assumption Transactions with corporations given the differences with respect to available recourse.
- Consider whether title insurance is required notwithstanding that the loan security already exists.
- Be alive to any required third-party approvals (for example, Canada Mortgage Housing Corporation approval with respect to an insured loan) in connection with the Assumption Transaction and get ahead of them, so that there is no adverse impact to the timeline for closing the Assumption Transaction.
- Do not skip due diligence and assume that it can be glossed over because the loan is an existing loan. Ensure due diligence is still completed to some degree on the existing loan parties, the commercial property and any new loan parties.
- Consider whether there will be a change in relation to the property manager and review any new related property management agreement, if any prior to completion of the Assumption Transaction.
- Ensure that Know Your Client (KYC) and anti-money laundering (AML) legislation is complied with in relation to the new loan parties and not overlooked.
- Treat each Assumption Transaction as a unique transaction. While there are similarities with respect to each Assumption Transaction, there are differences, and the terms and conditions need to be tailored to each Assumption Transaction.

If you have any questions in relation to Assumption Transactions or any other financing matters, please do not hesitate to reach out to the Osler Financial Services Group. We have experts across the country that would be happy to assist you and answer any questions you may have. ■

This content provides general information only and does not constitute legal or other professional advice. Specific advice should be sought in connection with your circumstances. For more information, please contact us.

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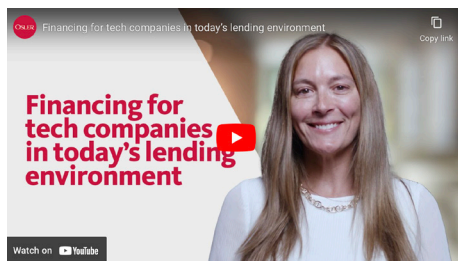


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New from Osler Financial Services

Financing for tech companies in today's lending environment



Despite the current economic uncertainty and slower activity in the lending market, tech companies are standing out with a strong deal volume. With financing still flowing, many are taking advantage of the current lending climate to boost growth or get ahead of their competitors.

Osler partner Joyce Bernasek outlines key requirements and issues facing tech companies looking to obtain debt financing in the Canadian market.

[Watch this video](#)

Osler bolsters Financial Services Group in Calgary

We recently welcomed partners Edward Wooldridge, Paul S. Taylor, Patrick Mah and Sameena Sarangi, and associates Aarabhi Chari, Renee Sam and Christian Karl to the Financial Services Group in the firm's Calgary office.

The arrival of these new team members represents another step forward in the expansion of our Calgary office, with new expertise coming on board in several practice areas, including financial services.

[Read more about this team](#)



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Osler's national Financial Services Group acts for every major Canadian financial institution and many foreign lenders, with leading expertise in such areas as corporate and asset-based lending, financial services regulatory, project finance and securitization and structured finance.

With experts across the country, we deliver strategic and innovative advice to support all aspects of our clients' businesses, including compliance, investigations, litigation, corporate development, proprietary M&A and capital issuance, investment banking, trading and capital markets, wealth management and private banking, and insurance and reinsurance.

About Osler, Hoskin & Harcourt LLP

Osler is a leading law firm with a singular focus – your business. From Toronto, Montréal, Calgary, Ottawa, Vancouver and New York, we advise our Canadian, U.S. and international clients on an array of domestic and cross-border legal issues. Our collaborative “one firm” approach draws on the expertise of over 500 lawyers to provide responsive, proactive and practical legal solutions driven by your business needs. For more than 160 years, we've built a reputation for solving problems, removing obstacles, and providing the answers you need, when you need them.

It's law that works.