



The International Comparative Legal Guide to:

# Real Estate 2017

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Alan Falach

**Group Publisher**

Richard Firth

**Published by**

Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
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# Canada

Osler, Hoskin & Harcourt LLP

Heather McKean



Stella Di Cresce



## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 11.1.**

The main laws that govern real estate in Canada are the statutes of each provincial and territorial government. In each province, there are separate real estate laws, which, save for Québec, are based on common law. In Québec, property law is governed by the *Civil Code of Québec* (“CCQ”), which is based on civil law and derived from the Napoleonic Code. Federal laws, including competition, criminal, and interest rate laws, apply to real estate.

**1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

With the exception of Québec, property law throughout Canada has developed through the English common law process and is greatly reflected in jurisprudence throughout Canada. In Québec, the law is based on civil law.

**1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

International laws do not directly impact Canadian real estate laws. In certain circumstances, orders of foreign courts may be enforceable in Canada.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

There are both federal laws, such as the Investment Canada Act and the Competition Act, and provincial laws, which vary by province, which may restrict the ownership of real estate by non-residents.

Some provinces do not have any direct restrictions, but may impose taxes, registration and reporting requirements. For example,

Ontario, Québec and British Columbia require foreign entities to obtain a licence to own and operate real estate. To deal with rapidly rising housing prices, British Columbia recently enacted a 15% transfer tax on foreign persons and entities that purchase residential property in Greater Vancouver Regional District. Additionally, Vancouver City Council passed a vacancy tax of 1% of the assessed value of vacant homes, coming into effect for vacancies during 2017. Other provinces have strict restrictions on land ownership by non-residents. For example, in Prince Edward Island, the Land Protection Act generally restricts, *inter alia*, the amount of land that a non-resident of Prince Edward Island may own to five acres. In Alberta, the Agricultural and Recreational Land Ownership Act restricts non-Canadians, including non-Canadian corporations and partnerships, from acquiring controlled land, which generally refers to large parcels of land outside of urban areas, such as farm land or rural recreational land. The provinces of Saskatchewan and Manitoba also restrict ownership of real estate by non-residents.

Legislation in Ontario coming into effect at the end of 2016 requires new Ontario corporations to maintain a register of their ownership interests in Ontario real property, which requirement will apply to all existing Ontario corporations by December 2018.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

In Canada, there are both freehold and leasehold rights. A leasehold right confers a right of exclusive possession on a tenant, which is enforceable against all, even the lessor. Both freehold and leasehold interests may be held on a co-ownership basis as a tenancy in common or joint tenancy.

Licences are purely contractual rights between the parties. A licence given by the licensor to the licensee allows the licensee to use the land in a manner specified in the contract but does not create an interest in the land. Easements, restrictive covenants and servitudes are additional rights in land. An easement provides one party a right to use a specific portion or land for a specific purpose, such as a right of way. A restrictive covenant is a contract where one party agrees not to use its land for certain purposes or in a manner specified in the contract. A servitude is an interest in land where an owner's possessory rights are burdened by another's non-possessory rights. In Québec, usufruct, servitudes, superficies and emphyteusis are among the types of rights giving limited rights in land.

### 3.2 Are there any scenarios where the right to a real estate diverges from the right to a building constructed thereon?

There are many exceptions where the right to real estate can indeed diverge from the right to a building constructed on the real estate. One method is by lease between contracting parties. This can provide the tenant with exclusive rights to the building, while the landlord retains ownership of the lands. Another increasingly common method of separating the real estate from the building in Canada is through strata title ownership, which is common with condominiums. In these instances, a condominium owner may own a portion of the building, its condominium unit, but the condominium corporation will own the real estate and retain the common elements of the building. Superficies is a similar concept used only in Québec, where a portion of the property either above or below ground is owned. In Québec, an emphyteusis is a dismemberment of the right of ownership for a specified period of time. The emphyteutic lessee enjoys all of the rights attaching to the status of an owner during emphyteusis but does not actually have the status of an owner.

## 4 System of Registration

### 4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?

All land owned in Canada is registered in a public land registry through either a registry system, a land titles system or a combination of both in the applicable province. The registry system is a public record of documents evidencing transactions affecting land where buyers and other inquirers must determine the quality of title themselves. In the land titles system, the applicable provincial government determines the quality of the title, and essentially guarantees (within certain important statutory limits) the title to, and interests in, the land. For such properties, the province has all original title documents. Currently, most common law provinces and territories use the land titles system or are in the process of converting title from a registry system to a land titles system.

### 4.2 Is there a state guarantee of title? What does it guarantee?

As indicated in question 4.1, there is a provincial guarantee of indefeasible title under the land titles systems but not under registry systems. This guarantee of title, subject only to fraud in acquiring the interest, is the fundamental difference between land titles systems and registry systems. Under provincial land titles systems, if a person has been wrongfully deprived of land or of some estate or interest in land through fraud or errors and omissions of the land registration system, such person can apply to a provincially administered assurance fund for limited compensation for the wrongful deprivation. However, the amount of recovery is quite limited. Title insurance is often used to insure against fraud.

### 4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?

Rights in land are not compulsorily registrable; however, pragmatically, most rights in land are always registered for several reasons, including establishing priority, providing notice to third parties (since a third party without notice is typically not bound by

interests that are not registered) and ensuring eligibility for available provincial assurance funds in case of wrongful deprivation of land or an interest in land through fraud or errors and omissions of the land registration system.

### 4.4 What rights in land are not required to be registered?

Pursuant to provincial land titles legislation, certain interests do not need to be registered in order to be effective against the owner of the land and third parties. In certain provinces, leases that do not exceed three years where there is actual occupation under the lease need not be registered. Similarly, there are also governmental, utility and railway rights that do not need to be registered against land, such as municipal taxes, certain easements, railway mortgages, expropriation rights and provisions of land planning and subdivision statutes.

### 4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

There are different procedures in each province throughout Canada for first registration; the rules vary between the provinces. In Ontario, but not all other provinces, the title granted upon first registration (conversion) in the land titles system may be absolute, qualified or leasehold title, depending on the circumstances. In some provinces, a first registration may be later amended if there was fraud, a wrongful act or mistake. In Ontario, there is no probationary period following first registration in land titles. However, upon registering individual instruments in Ontario and most other jurisdictions, there is a certification process which can result in an instrument being rejected after the fact.

### 4.6 On a land sale, when is title (or ownership) transferred to the buyer?

On a land sale, ownership is generally transferred to the buyer when the deed or transfer is registered in the applicable land registry office, subject to the possibility of an instrument being rejected after the fact. This risk is often dealt with through title insurance.

### 4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?

Generally, priority of registration prevails. A right first registered will have priority over a subsequent registered right. However, there are some exceptions to this general principle, which may include the following: i) certain unregistered rights may have priority over registered rights, where the registered interest holder had knowledge of the unregistered right at the time of registration; ii) rights that arise by prescription may take precedence over registered rights (such as in the case of adverse possession); iii) legislation, such as bankruptcy legislation, or legislation pertaining to personal property, including security interests in fixtures, may provide for different priority rights; iv) construction liens; and v) parties may also contract to subordinate their interest to a subsequent registered right.

## 5 The Registry / Registries

### 5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.

Each province and territory in Canada has its own land registry system, whether it is a land titles system, a registry system or a combination of both. Each system has its own rules, although the land titles systems in British Columbia, Alberta and Saskatchewan have similar rules and requirements. The registry system applies in Prince Edward Island and Newfoundland and Labrador, and a similar system applies in Québec. Ontario has largely converted from registry systems to a land titles system and Manitoba, Nova Scotia and New Brunswick are in various stages of the conversion process.

### 5.2 Does the land registry issue a physical title document to the owners of registered real estate?

Typically, land registries throughout Canada do not issue a physical document to the owners of registered real estate. A transfer of ownership is actualised by registering, either physically or electronically (depending on the applicable land registry system), a deed or transfer with the applicable land registry office or land registrar, copies of which can be obtained from the relevant registry office, often electronically. Once registration is complete, a copy of the transfer (if in the land titles system) or deed (if in the registry system) or a copy of a certificate of title is issued to the owner to confirm the registration and status of title.

### 5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?

The rules regarding electronic registration of real estate documents vary across provinces, as each land registry, whether electronic or paper-based, is administered provincially. Canadian provinces are generally shifting towards electronic registration, which is permitted or mandatory in most provinces. To register an ownership right in the land registry, typically a deed or transfer must be provided to the land registry. Most jurisdictions have a prescribed form of deed or transfer that must be used. Information on ownership of registered real estate can be obtained electronically in most jurisdictions. However, under the registry system, any such ownership information can only be obtained by accessing the records at the land registry office.

### 5.4 Can compensation be claimed from the registry/registries if it/they makes a mistake?

As stated in questions 4.2 and 4.3, common law jurisdictions under the land titles system generally have a very limited assurance fund to compensate victims if the land registry or land registration system makes an omission or error (or there is a fraud) that wrongfully deprives a person of land or of an estate or interest in land.

### 5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate?

There are no restrictions on public access to the information contained in a Canadian land register. A buyer or other interested party can retrieve most but not all information they will reasonably need regarding encumbrances and other rights affecting land. Some claims in respect of real property work orders, taxes or utilities can also constitute encumbrances despite not being registered on the title to the property. There may also be other claims by public authorities or unregistered rights that may affect the property. Such rights may only be discoverable upon inquiring with the various governmental authorities, which may require the consent of the owner, or upon an examination of additional documents such as a municipal planning report from a third party consultant, an up-to-date survey, environmental assessment or building condition assessment. In Ontario, the previous purchase price on a deed may not be revealed on the land register if the previous buyer paid land transfer taxes directly to the Ministry of Finance and City of Toronto. In such cases, a subsequent inquirer can only determine the previous purchase price by inquiring directly with the Ministry of Finance or City of Toronto.

## 6 Real Estate Market

### 6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.

- a) Selling and purchasing agents (referred to as real estate brokers or agents)

Typically, a person who wishes to acquire or dispose of real estate will seek the assistance of a real estate broker. Real estate brokers are subject to special regulation in Canada. Each province has legislation regulating the trade in real estate, designed to protect consumers and instil confidence in the buying and selling of real estate. Unlike most other provinces, until recently in British Columbia, individuals licensed to provide real estate services could submit offers for British Columbia properties on behalf of their clients. These rules are being amended as part of a broader crackdown on foreign investment in residential housing in British Columbia.

- b) Lawyers

Lawyers play a significant role in commercial real estate transactions. If title insurance is not being obtained, lawyers will examine title to the property and conduct off-title searches and inquiries in order to determine the status of the property and whether there are any issues or deficiencies. Lawyers can hold payment and closing documents in escrow until the transaction has been completed. In commercial transactions, lawyers are frequently involved in drafting and settling the terms of the purchase agreement and closing documents, and will attend to registration of the transfer of the property. Lawyers can also assist with negotiation of a title insurance policy and will conduct limited diligence on title and off-title matters as required by the title insurance company.

- c) Notaries

Generally, notaries do not play a large role in real estate transactions in Canada other than in Québec. Notaries are commonly used in

Québec, and must be retained for anything that requires a notarial act. A gift of immovable property or hypothec on immovable property (i.e. a mortgage) are two documents that require a notarial act to be valid. A contract of sale of immovable property does not require a notarial act; however, notaries are involved in the registration of the deed of sale.

d) Surveyors

In the event that an existing survey of the property does not exist or the survey is out of date, a surveyor may be retained to provide a new survey. Surveys are often required to obtain a mortgage or to determine whether the building is in compliance with applicable setback requirements and to confirm the size, shape, boundaries and location of the property, the building and other improvements thereon.

e) Title insurers

Title insurance is not mandatory but is frequently used in residential and commercial transactions. A title insurer provides an insurance policy in favour of an owner or a lender of real property. Such insurance can protect an owner from losses related to survey and municipal issues, encroachment issues, title fraud and intervening registrations between the time of closing and registration, if such gap exists. Similarly, it can protect a lender from losses associated with title.

f) Third party consultants

Third party consultants, such as environmental consultants, engineering consultants and planning consultants, are often used in commercial real estate transactions. Environmental consultants determine the environmental status of a property, engineering consultants determine that the building and improvements are in good condition or in the condition represented by the seller, and planning consultants ensure that the planned or existing development will comport with local laws and regulations.

## 6.2 How and on what basis are these persons remunerated?

Real estate brokers are typically remunerated on the basis of commission which is generally paid out of the purchase price that would otherwise go to the seller upon the transfer. Fees of lawyers are charged based on hours worked or, increasingly, through alternative fee arrangements. Surveyors are typically paid a flat fee. Title insurers are paid based on the value insured. Third party consultants are typically paid a flat fee.

## 6.3 Do you feel there is a noticeable increase in the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?

There has been a noticeable increase in the availability of capital to finance real estate transactions for assets in Ontario and British Columbia, both in private equity and debt. Foreign investment continues to increase, particularly from Asian investors in the Vancouver and Toronto commercial markets. Specifically, a 66% interest in Bentall Centre I, II, III and IV, a commercial complex in Vancouver was sold to Anbang Insurance, a Chinese insurance company that also acquired the HSBC building in downtown Toronto in 2015. Further, Anbang Insurance has recently entered into an agreement to purchase a majority interest in Retirement Concepts, one of British Columbia's largest retirement home chains. InnVest REIT was sold to a corporation backed by Hong Kong capital and the Four Seasons Hotel in Toronto was sold at a record valuation for a Canadian hotel to a foreign investment group.

## 6.4 What is the appetite for investors and developers in your region to look beyond primary real estate markets and transact business in secondary or even tertiary markets? Please give examples of significant secondary or tertiary real estate transactions, if relevant.

The appetite for investors and developers to look beyond the primary real estate markets in Canada and transact in secondary or even tertiary markets remains low. In addition, with continued low oil prices, investors are very hesitant about investing in Alberta which has caused a decline in the number of transactions in Alberta.

## 6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.

There is a continued downward trend in interest in commercial real estate in the Alberta market as a result of declining oil prices and increasing vacancy rates, particularly in the office sector in downtown Calgary and Edmonton. Calgary's downtown office sector is currently at a record high vacancy rate of almost 25%, according to reports from Barclay Street Real Estate and ReMax Commercial. Many institutional investors in Calgary, including REITs, have lost value and have had credit ratings downgraded. Calgary developers are frequently delaying or discontinuing projects. Commercial real estate markets in Vancouver and downtown Toronto continue to gain strength, evidenced by six straight quarters of growth and record quarterly growth in 2016 for Vancouver commercial real estate deals.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

### 7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?

A transfer or deed of land must be accepted in written or electronic form by the applicable land registry office for the purchase and sale of real estate. An agreement of purchase and sale must be in writing to be enforceable. Québec has additional requirements, including for some transactions, an endorsement from a notary.

### 7.2 Is the seller under a duty of disclosure? What matters must be disclosed?

The starting principle in common law jurisdictions is *caveat emptor*, meaning buyer beware; however, there are many exceptions to this principle which require certain disclosures to be made by a seller. First, the seller must disclose latent defects in the property that render the property dangerous, a health hazard or unfit for habitation. Latent defects are defects which cannot be discovered upon a reasonable inspection of the property. Second, environmental contamination must be disclosed by the seller. Third, *caveat emptor* does not apply to fraud, and if such fraud is found to exist, a court may impose remedies that do not exist in the contract. Additionally, there are increased disclosure requirements on developers of condominiums. The civil law regime in Québec imposes certain warranties which pertain to title, encumbrances and compliance with the law; however, these warranties may be excluded or limited by contract.

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**7.3 Can the seller be liable to the buyer for misrepresentation?**


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Sellers can be liable to buyers for misrepresentation unless representations merge on closing. The liability of the seller and remedies available to the buyer also depend on whether the misrepresentation was innocent, negligent or fraudulent. Remedies that may be available to the buyer include damages and rescission. Recently, the Supreme Court of Canada recognised a general principle of good faith in contract law, requiring honest and reasonable performance of contractual duties, and a specific duty of honest performance with respect to all contracts in Canada, requiring that parties do not lie or knowingly mislead each other regarding matters directly linked to the performance of the contract.

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**7.4 Do sellers usually give contractual warranties to the buyer? What would be the scope of these? What is the function of warranties (e.g. to apportion risk, to give information)? Are warranties a substitute for the buyer carrying out his own diligence?**


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Sellers sometimes provide contractual representations and warranties to buyers. In commercial transactions, sellers sometimes sell on an “as is” basis with limited or no representations and warranties. The scope of the warranties provided depends on numerous factors, mainly pertaining to market forces and the bargaining power between the buyer and the seller. They typically relate to the seller’s knowledge of the property, agreements related to the property and matters that cannot be easily discovered by the buyer on its own. For example, a seller will generally provide a representation that all leases, contracts and environmental reports have been provided and that the seller has disclosed outstanding work orders and disputes with tenants. Representations and warranties are important as they provide information to the buyer and allocate the risk as between buyer and seller; however, they usually provide a limited amount of information. Thus, representations and warranties are not a substitute for the buyer carrying out its own due diligence. In Québec, as noted in question 7.2, certain warranties are imposed unless excluded by contract.

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**7.5 Does the seller warrant its ownership in any way? Please give details.**


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Generally, a seller will warrant that it is the owner of the land and that it has good and marketable title to the land free and clear of all liens and encumbrances, save for those specifically permitted by the agreement of purchase and sale. A warranty of ownership is implied in Québec unless specifically excluded.

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**7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?**


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In addition to paying the purchase price for the sale of real property, the buyer has additional financial and non-financial obligations. In terms of financial obligations, the buyer will be responsible for land transfer tax and registration fees. In terms of non-financial obligations, the buyer will assume and be bound to perform the covenants and obligations of which they have notice or that run with the land, including mortgages, leases, options and municipal agreements.

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**8 Finance and Banking**


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**8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?**


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Some provinces require persons who lend money to be licensed. For example, in Ontario, the *Mortgage Brokerages, Lenders and Administrators Act, 2006* requires a person carrying on the business of dealing or trading mortgages, or carrying on business as a mortgage lender, to obtain a licence issued by the Superintendent of Financial Services. Financial institutions are regulated federally by the Bank Act. Generally, there are no particular differences for individual persons and corporate entities. Some jurisdictions require that foreign corporations be registered under provincial legislation in order to hold a mortgage.

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**8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?**


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The primary protection to a lender from default by the borrower comes by registration of the mortgage in the applicable land registry office. Registration establishes the priority ranking of the lender’s interest in the land and makes the lender a secured creditor. A lender will often take additional security, generally in the form of an assignment of rents and a general security agreement, notice of which may be registered in the personal property registry system of the applicable province. A lender may also require that the loan be full recourse to the borrower and/or may require a guarantor.

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**8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?**


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Proceedings regarding the realisation of mortgaged properties vary significantly between the provinces. The following five remedies are common, but not consistent, in Canadian provinces: foreclosure; power of sale; judicial sale; action on covenant (suing the borrower); and possession. Power of sale is a contractual remedy by which, pursuant to legislated processes, the lender can sell the mortgaged property for fair market value to the public, without involving court proceedings or the cooperation of the mortgagor. Québec has separate remedies which are analogous to those listed above. Remedies in Québec include a sale by the secured creditor, sale by judicial authority, taking the priority in payment of claim and possession for purposes of administration.

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**8.4 What minimum formalities are required for real estate lending?**


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To ensure that a mortgage protects the lender’s interest in the land, a mortgage must be in writing, duly executed and registered against title to the land. In Québec, a mortgage is referred to as a deed of immovable hypothec, which must be executed in the presence of a notary.

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

A real estate lender is protected from claims made by other creditors by the registration of its mortgage. This renders the lender a secured creditor, and gives it priority over all unsecured creditors, subject to certain exceptions for debts payable to the government, fraud, some construction liens and certain other exceptions pursuant to legislation.

The lender is protected from claims against the borrower through the remedies available to the lender in the mortgage and those prescribed by legislation. While remedies vary in each province throughout Canada, in all provinces, where the loan is payable on demand, the lender is obliged to provide reasonable notice before making demand for payment. Depending on the remedy being executed, in a demand or term loan, the lender may have to give notice under the federal bankruptcy legislation. The lender may also have the right to appoint a receiver either privately or by court appointment. Most provinces have legislation prescribing rights to one or more of the following remedies: foreclosure; power of sale; and judicial sale. In power of sale and judicial sale proceedings, the borrower will remain liable for any deficiency.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

Land transfer tax is payable on the transfer of real property in most jurisdictions throughout Canada, including upon the creation or assignment of a long-term lease. Land transfer tax is typically imposed at the provincial level; however, in certain jurisdictions it may also be imposed at the municipal level. Each jurisdiction has a different rate of land transfer tax. As of January 1, 2017, in Ontario, the land transfer tax will be approximately 2% of the total consideration. The City of Toronto, located in the province of Ontario, imposes an additional land transfer tax. On commercial properties, the tax is approximately 1.5% of the total consideration up to \$40,000,000 (Canadian) and 1% on the remainder of the consideration. Therefore, in the City of Toronto, where a provincial and municipal land transfer tax is imposed, the total rate of land transfer tax on a commercial property will likely be 3–3.5%. Ontario recently doubled the rebate of provincial land transfer tax available to first time home buyers, up to \$4,000, on the purchase of residential property in Ontario, which change will take effect on January 1, 2017. As mentioned in question 2.1, there is an additional 15% land transfer tax on foreign entities that purchase residential property in the Greater Vancouver Regional District. Land in Alberta, Newfoundland and Labrador, and some municipalities in Nova Scotia, is not subject to land transfer taxes. However, typically registration fees will apply in such jurisdictions. In most provinces, the buyer is liable to pay the land transfer tax.

### 9.2 When is the transfer tax paid?

The land transfer tax is typically paid when the transfer is registered with the land registry office. In Québec, land transfer tax is paid following the receipt of an invoice from the municipality issued after: (i) if the transfer is registered, the registration of the deed of transfer at the land registry office; or (ii) further to recent legislative

amendments, if the transfer is not registered on title, when the municipality receives the mandatory notification and disclosure of the transfer of the real property with the required disclosure information.

### 9.3 Are transfers of real estate by individuals subject to income tax?

Transfers of real estate by individuals are subject to income tax unless the property being sold is the individual's principal residence. An exemption exists for the sale of a principal residence, which can reduce or eliminate the capital gains tax payable by the individual. Recently, the federal government enacted legislation to provide that the principal residence exemption is only available on one home per year and only to individuals who reside in the home being sold in the year the home is sold.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

Generally, transfers of commercial and new residential real estate throughout Canada are subject to a 5% Goods and Services Tax ("GST"). In some provinces, the federal GST has been harmonised with the provincial sales tax to form the Harmonized Sales Tax ("HST"). Québec has its own separate sales tax, which is applicable to transfers of commercial and new residential real estate, called the Québec Sales Tax ("QST"). In provinces where there is HST, the rate will be the 5% federal tax plus the provincial tax rate, which varies by province but in Ontario is 8% (for a total of 13% in Ontario). If the buyer is registered for GST/HST purposes, it may be permitted to self-assess the GST/HST. If not, the seller will remit the applicable taxes which are collected from the buyer. Used residential properties are generally exempted from these taxes. Subject to some exceptions, a commercial buyer can recover the GST/HST that was paid.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

Gains on the disposal of real estate are subject to taxation. One-half of capital gains are taxed. Additionally, if the seller is a non-resident of Canada, an additional tax is imposed on the gain on disposition of a property. The non-resident seller will have to provide to the buyer a clearance certificate from the government pursuant to s. 116 of the *Income Tax Act*. If the certificate is not received by closing, the buyer must withhold a percentage of the purchase price on behalf of the Canadian tax authorities until the seller provides the applicable clearance certificate to the buyer.

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

Land transfer tax is not generally paid on the sale of shares unless such a sale includes the right to the shareholder to exclusive occupation of the property. Ontario has recently amended a land transfer tax regulation that previously exempted transfers of partnership interests where a person acquired an interest in a partnership that did not give rise to an entitlement of more than 5% of the profits of the partnership. Québec recently revoked exemptions for transfers of real property between closely related entities. On a sale of shares, other taxes such as income taxes may apply.

## 10 Leases of Business Premises

### 10.1 Please briefly describe the main laws that regulate leases of business premises.

There are two main sources that make up the body of law surrounding commercial leases. First, there is the common law, which has evolved to provide a series of principles which set out the basic obligations of a landlord and tenant. Second, a number of provinces have enacted legislation to supplement the common law principles. In Ontario, the *Commercial Tenancies Act* defines the relationship between a landlord and tenant in relation to commercial properties and sets out some of the rights, responsibilities and remedies of each party to a lease. Similarly, in Québec, the CCQ governs the relationship between a landlord and tenant in respect of commercial leases.

### 10.2 What types of business lease exist?

While every lease is different and should be tailored to the specific use, there are two main categories of leases: gross leases; and net leases. Generally, in a gross lease, the tenant agrees to pay a fixed amount of rent that includes all operating costs and real estate taxes. In a net lease, in addition to a basic rent, the tenant is responsible for certain expenses that are not personal to the landlord in respect of the operation and management of the building, including real estate taxes, insurance, repairs, maintenance and upkeep of the building and common areas. Although those are the two main categories of leases, the structure of a lease and the payments required under such lease can also vary depending on a number of factors, including the type of property, the tenant's use of the property, the identity of the parties, and their relative bargaining power. In many retail leases a tenant will pay basic rent, additional rent and a portion of the tenant's revenues (known as percentage rent).

### 10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?

Though provisions in commercial leases vary significantly, some usual provisions include:

#### a) Length of term

The length of a term of lease varies, depending on the tenant's intended use. A common term of a lease between a landlord and tenant entering into a new relationship is five years, with the tenant having the right to renew or extend the lease for additional terms. Shorter and longer terms are not uncommon. In some provinces, land transfer tax is payable on long-term leases.

#### b) Rent increases

The rent payable under a lease will often increase throughout the term, particularly in the case of longer term leases. The amount may be set in advance, but it is also common to see future rent set in accordance with "prevailing market rates". This is often the case for renewal or extension terms. The determination of the increased amount of rent is not always simple, and leases may contain dispute resolution provisions to deal with situations where the landlord and tenant cannot agree on the new amount.

#### c) Assignment or sub-lease by tenant

It is quite common for leases to require the landlord's consent before a tenant can assign or sublet the premises. Common provisions

in a lease include the procedure to follow to obtain the landlord's consent, payment by the tenant of the landlord's fees in connection with the proposed assignment or sublet, and the rights of the landlord following a tenant's request for consent. The landlord may negotiate for the right to terminate the lease upon a request for assignment and sublet.

Often the landlord will require that the original tenant remain liable under the lease despite the assignment.

#### d) Insurance

Insurance provisions in a lease can be extensive and complex, setting out both the landlord's and tenant's obligations to maintain insurance. Landlords are usually responsible for insuring the building as a whole, and any liability with respect to the common areas. The costs of the landlord's insurance are typically passed along to the tenant in a net lease. Tenants are usually responsible for maintaining liability insurance and property insurance to cover personal property and leasehold improvements, as well as business interruption insurance. The tenant is responsible for the cost of its own insurance and in a net lease, for its share of the cost of the landlord's insurance.

#### e)(i) Change of control of the tenant

The restrictions on a tenant's right to assign or sublet often restrict changes of control, though there can be exceptions to the consent requirement, including for inter-company re-organisations, or for publicly traded companies.

#### e)(ii) Transfer of lease as a result of a corporate restructuring (e.g. merger)

It is common to negotiate an exception for a transfer of the lease as a result of a corporate restructuring, subject to the landlord receiving certain assurances.

#### f) Repairs

Leases will generally provide that it is the tenant's obligation to repair the premises during the term of the lease, and to repair any damage before vacating the premises. If a tenant does not carry out repairs in accordance with the lease, the landlord may be able to do so at the expense of the tenant. Often times, the lease requires that the landlord undertake repairs of a more structural nature or repairs required to the roof of the building which will be at the tenants' expense in a net lease.

### 10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

Since provinces and territories in Canada have their own tax regimes, the types of taxes payable, as well as the amount, will depend on where the property is situated. GST, HST and/or QST are all payable by tenants under commercial leases. If the tenant is a GST and/or QST registrant, the tax will likely be recoverable by the tenant will be subject to income tax, after deductible expenses are subtracted. Some tenant, but the landlord is still responsible for collecting it on behalf of the tax authorities. The rent received by a landlord from jurisdictions impose business taxes on leased premises in addition to real estate taxes.

### 10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?

Generally, commercial leases terminate at the end of their term, on default, or unilaterally on the exercise of a contractual termination right.

Other circumstances that may result in the contractual termination of a lease include a landlord's decision to withhold consent to an assignment or sublet, or major damage to the building. If the tenant has a termination right, often a termination payment is negotiated.

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**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?**

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When a landlord assigns its interest in a lease on a sale of the property, the assignee landlord automatically becomes obligated to perform all covenants made by the original landlord and is entitled to all benefits from all covenants made by the tenant, that run with the land. When a tenant assigns its interest in a lease, the tenant is not typically released from its obligations under the lease unless the lease provides for such a release. Leases generally provide that the landlord is released on a sale of the property. Typically on a sale of the property, the assignee landlord will request an estoppel certificate from the tenant in order to flush out any issues that the tenant may have with the existing landlord. A buyer will also include an indemnity in the assignment agreement wherein the existing landlord will indemnify the buyer for any pre-existing claims that the tenant may have under the lease.

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**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the “environmental footprint” of a building. Please briefly describe any “green obligations” commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

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Examples of “green obligations” that are found in commercial leases include targets for electricity use, natural gas consumption, water consumption, waste diversion and carbon dioxide levels. Whether green obligations are enforceable between the parties depends on how such obligations and the remedies relating to the same are described in the lease. For example, while failing to comply with “green obligations” could constitute an event of default under a lease, the obligations as set out in the lease may merely require a party to use commercially reasonable efforts to meet targets and consult with the other party on how to best achieve the objectives. The enforceability of such clauses will also depend on the bargaining power of the parties. A landlord with greater bargaining power will make the tenant's obligations to comply with the landlord's green obligations binding covenants whereas it may make its own objectives, for instance achieving a Leadership in Energy and Environmental Design (“LEED”) standard, aspirational. However, a tenant with greater bargaining power may hold the landlord to certain “green obligations” including achieving a LEED standard, and may negotiate for certain self-help remedies if they are not achieved.

## 11 Public Law Permits and Obligations

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**11.1 What are the main laws which govern zoning and related matters concerning the use and occupation of land? Please briefly describe them and include environmental laws.**

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Property zoning and development is regulated primarily at the

municipal level with oversight from the province. Each province enacts laws that govern zoning and matters relating to the use and occupation of land. Government authorities typically control land use and the density of development through official plans and zoning by-laws. Many municipalities impose development charges on new developments within their jurisdiction. Several provinces restrict and regulate the ability of an owner to subdivide property.

Construction of new projects is also subject to provincial and municipal legislation. In addition to regulating the maintenance of existing structures, building codes set specific standards for the construction of buildings. Before construction commences, most municipalities require that building permits and all regulatory approvals be acquired.

Environmental legislation may be enacted federally or by the provinces. Environmental liability may flow from laws, and civil liability based on environmental claims is also possible.

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**11.2 Can the state force land owners to sell land to it? If so please briefly describe including price mechanism.**

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There is no constitutional protection of property rights in Canada. Federal, provincial and municipal governments, as well as public utilities, can force land owners to sell them their land, or interests therein, such as easements, through expropriation. This can generally occur for public purposes only. Generally, each expropriation must be approved by an approving authority, which in most statutes is the Minister responsible for administration of the act or the council of the municipality (if the municipality is executing its expropriation powers). Expropriation statutes also provide for compensation to land owners when their property interests are expropriated. Compensation is usually determined based on the market value of the land, any damages attributable to disturbance or for injurious affection and any special difficulties of the owner in relocation.

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**11.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

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Land/building use is regulated primarily at the municipal level with oversight from the province. Environmental matters are subject to provincial and federal legislation. Official plans and zoning by-laws control matters such as the use of land and the density of development permitted. Buyers can obtain reliable information from applicable government authorities concerning the permitted uses under applicable zoning regulations, existence of work orders and open building permits. Buyers should acquire information regarding environmental contamination independently, through conducting environmental site assessments. Environmental liability can arise merely from the ownership of contaminated property, despite the contamination taking place before a party acquires ownership. Buyers may need to commission a municipal planning firm to ascertain if buildings comply with certain zoning requirements, such as setbacks, density, number of parking spaces and compliance with the building code and fire and health regulations. The buyer may also require an up-to-date survey.

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**11.4 What main permits or licences are required for building works and/or the use of real estate?**

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The construction, renovation or demolition of a building requires a demolition and/or building permit. The specific permits required and additional licensing requirements depend on the type of construction, renovation or demolition project proposed.

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**11.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**


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Building permits are generally required before carrying out construction or renovation, and failure to obtain a permit can constitute an offence. Obtaining the required permits and licences can be a time-consuming process, and can involve coordination with the municipality, as well as specific agencies if, for example, there are environmental concerns. If the use of land or a building does not conform with the current laws, but the use was permitted before the enactment of such laws, and has continued uninterrupted, the owner may have a right to continue a non-conforming use.

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**11.6 What is the appropriate cost of building/use permits and the time involved in obtaining them?**


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The cost and time it takes to obtain a building permit and any additional approvals depends on a number of factors, including where the proposed construction is taking place, the type of building or structure being constructed, the area of the building or structure, the cost of the project, the complexity of the project, and which approvals are required. Municipalities may require payment of development charges and conveyances of part of the property (for parkland or road widening, for example) as a condition of approval. After an application is submitted, the review process can take a matter of days to a matter of months, and once a permit is obtained there may be regular inspections during the construction.

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**11.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate?**


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Each level of government, federal, provincial and municipal, has a role to play in protecting heritage sites. For example, municipal by-laws can set guidelines for the preservation of heritage sites and may limit the extent to which renovations can be carried out, or whether buildings or structures can be demolished. Regulations are usually enacted to conserve historic properties as opposed to preventing transfers from occurring. Generally upon purchasing a historic property, the new owner will have to provide notification pursuant to provincial or municipal legislation where the property is situated. Some historical monuments, such as railway stations, grave sites and lighthouses, are protected by federal legislation. At the municipal level, the City of Toronto designates culturally and/or historically significant neighbourhoods as Heritage Conservation Districts to maintain the character, history, cultural values and integrity of such districts. Property owners must obtain a permit before altering property within a Heritage Conservation District. Cities such as Vancouver and Calgary have instituted policies to compensate owners of properties designated as heritage properties without the consent of such owners, either through tax breaks or density rights that can be sold and transferred to other developments. Similarly, the City of Toronto provides tax breaks for maintenance and conservation to properties that are within a Heritage Conservation District or designated under the Ontario Heritage Act.

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**11.8 How can e.g. a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**


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As discussed in question 11.3, conducting independent investigations, often through environmental site assessments of the property in question, is the best way to determine if land is contaminated or polluted. To some extent, environmental risk can also be allocated in the contract through representations, disclosures, indemnities, releases or remedial work. One cannot contract out of liability for contamination but one may have remedies against the counterparty through the types of contractual provisions described above. Although there are provincial registries of properties with known contamination issues, these registries are not comprehensive and generally contain information provided by the property owner. Thus, referring to a registry can confirm contamination but cannot confirm a property is free from contamination, pollution or environmental issues.

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**11.9 In what circumstances (if any) is environmental clean-up ever mandatory?**


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Environmental regulation takes place at the federal and provincial level, and different jurisdictions within Canada have their own sets of rules relating to environmental clean-up. For example, in Ontario, the Ministry of the Environment and Climate Change ensures compliance with environmental laws and standards, and under Ontario's *Environmental Protection Act*, when there is damage or where damage to the environment, animal life or human health or safety is likely, the person responsible or the person in control of the property can be ordered to repair or prevent it.

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**11.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**


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A large part of the ongoing assessment and management of the energy performance of buildings is done through third party rating programmes. These include Leadership in Energy and Environmental Design ("LEED") and the "Go Green" programme, administered by BOMA BEST® (Building Environmental Standards) which, among other things, evaluate and certify the energy performance of buildings. While there are no regulations pertaining to the energy performance of existing buildings, provinces, such as British Columbia, are beginning to adopt standards that must be achieved in newly constructed buildings. These standards arise pursuant to the *National Energy Code of Canada for Buildings 2011*, which is a set of federal standards for energy efficient buildings that must be adopted provincially to come into force in that specific province.

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## 12 Climate Change

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**12.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**


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In 2016, Canada ratified the Paris Agreement, an international agreement to keep the global temperature increase below two degrees

Celsius. Canada has also entered into an international agreement to phase down the use of hydrofluorocarbons, a potent greenhouse gas used in air-conditioning and refrigeration. The federal government currently has regulations in place which pertain to transportation, electricity and renewable fuels. Regarding transportation, there are regulations in place that limit emissions from cars and light trucks. These regulations are projected to reduce greenhouse gas emissions by 50% on such vehicles made in 2025, from those made in 2008. Gasoline in Canada is required to contain 5% renewable content and diesel fuel is required to contain 2% renewable content. The federal Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations sets the performance standard at 420 tonnes of carbon dioxide per gigawatt hour (CO<sub>2</sub>/GWh) for coal-fired electricity generation units. Further, the Green Energy Act creates financial incentives for the development of renewable energy.

Recently, the federal government announced that it is imposing a minimum price for carbon of \$10 per tonne in 2018 and rising incrementally to \$50 per tonne of carbon by 2022. All provinces will have to design their own carbon tax or cap and trade system that is stringent enough to meet or exceed the federal benchmark. If provinces do not have such a system in place, the federal government will implement a carbon price in that jurisdiction.

The provinces of Québec and Ontario have a cap and trade system that is harmonised with California's cap and trade system and implemented through the Western Climate Initiative. Ontario has opened registration in its system but compliance requirements do not begin until 2017. There are industries and classes of companies that must register and participate in the cap and trade system, including companies in Québec and Ontario that emit 25,000 metric tonnes or more of CO<sub>2</sub> equivalent annually. In Ontario, fuel suppliers that sell more than 200 litres per year of fuel and importers of electricity are also required to participate in the programme. Industries are provided with limits of total pollution that are reduced each year. Companies operating in such industries are allocated emission allowances, which they can sell if their emissions are below projections or purchase additional credits if they exceed their allowances. Companies that are subject to such regulations must track their emission allowances in a database called CITSS used by all Western Climate Initiative system participants. The CITSS system initially sets an emissions ceiling which is lowered each year by reducing the number of emission units in circulation each year. There are enforcement mechanisms for regulated participants whose emissions exceed their allowances or credits. Manitoba will require only its largest polluters to join the cap and trade system described above. Alberta will have a carbon tax of \$20 per tonne beginning in 2017 and rising to \$30 per tonne in 2018. Some other provinces, such as British Columbia, have carbon tax policies in place, while others currently have no carbon taxing or pricing legislation. Some provinces, such as British Columbia, have revenue neutral carbon tax policies, whereas other provinces, such as Ontario, will use their carbon tax or cap and trade policies to raise provincial revenues.

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### **12.2 Are there any national greenhouse gas emissions reduction targets?**

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As mentioned in question 12.1, to fulfil international obligations and reach government goals with respect to climate change and

greenhouse gas emissions reductions, the federal government has set a floor price of \$10 per tonne of carbon by 2018 which will rise to \$50 per tonne by 2022. Provinces can enact their own carbon tax or cap and trade policy but it must meet such federal minimum price or the federal government will impose a tax on such provinces to make up the difference, returning the funds to the province.

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### **12.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?**

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In Canada, there are numerous policies and programmes which aim to monitor and improve the sustainability of newly constructed and existing buildings. Most of the standards and certifications commonly advertised by new and existing buildings in Canada were market-driven initiatives as opposed to real property laws imposed by a level of government.

The Building Owners and Managers Association created BOMA BEST® (Building Environmental Standards), a national, independently verified, four-level certification programme regarding energy and environmental performance of buildings. The Canada Green Building Council developed the LEED rating system to recognise sustainable site development, water savings, energy efficiency, materials selection and indoor environment quality in buildings. LEED has four levels of certification, to accommodate a variety of sustainable building strategies. All newly constructed federal office buildings are required to attain a LEED® Gold standard for environmental performance. At the provincial and municipal level, there are incentives for LEED-certified buildings. Other privately developed certifications, such as the WELL Building Standard®, which aims to improve the wellness of people in various types of buildings, are in an earlier stage of development. The City of Toronto has developed the Toronto Green Standard (TGS), which is a two-tier set of performance measures regarding sustainable site and building design. Tier 1 is mandatory for new construction and Tier 2 is voluntary and provides financial incentives. Achieving Tier 1 and Tier 2 performance provide LEED credits.

Although there are widely used market-developed initiatives, there are also many government created policies and programmes aiming to improve the sustainability of new and existing buildings in Canada. The Energy Efficiency Act gives the federal government the authority to prescribe energy efficiency standards. The federal government of Canada has developed an "EnerGuide" mark to label appliances and heating and cooling equipment with a label to indicate its energy efficiency. Along with other federal programmes, EnerGuide was designed to promote energy efficiency in the Canadian marketplace. Although there are no building sustainability standards imposed nationwide, these and many other programmes, certifications and regulations constitute a quickly developing sustainability regime in Canada.

### **Acknowledgment**

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### Heather McKean

Osler, Hoskin & Harcourt LLP  
100 King Street West  
1 First Canadian Place,  
Suite 6200, P.O. Box 50  
Toronto, ON M5X 1B8  
Canada

Tel: +1 416 862 6612  
Fax: +1 416 862 6666  
Email: [hmckean@osler.com](mailto:hmckean@osler.com)  
URL: [www.osler.com](http://www.osler.com)

#### National Chair and Partner, Real Estate

Heather is the National Chair of the Real Estate Practice Group at Osler, a leading Canadian business law firm with one of the best commercial real estate practices in the country. She has served on the Board of Directors of the Toronto Commercial Real Estate Women (CREW) and as Canada's delegate to the U.S.-based CREW Network, and continues to be a member. For three years, Heather served as Managing Partner of Osler, with responsibility for business strategy and client relationship management, and as a member of the Firm's Executive Committee. She is the author of *Purchasing Real Estate in Canada* in the European Lawyer Reference Series.

Based in Toronto, Heather is lead counsel to Target Corporation, the second largest retailer in the U.S., in connection with its establishment of operations in Canada, including the \$1.825 billion acquisition of department store leases across Canada and in connection with its subsequent wind-down of operations in Canada. She is also lead counsel to General Motors and Oxford Properties, the real estate arm of one of Canada's largest pension funds, as well as to many other clients, representing them in complex real estate transactions and debt financings.

Heather is listed in Euromoney's Expert Guides of *The World's Leading Women in Business Law* and *The World's Leading Real Estate Lawyers*. Heather is also ranked as a leading commercial real estate lawyer by *Chambers Global*, *Chambers Canada* and *The Best Lawyers in Canada*.



### Stella Di Cresce

Osler, Hoskin & Harcourt LLP  
100 King Street West  
1 First Canadian Place  
Suite 6200, P.O. Box 50  
Toronto, ON M5X 1B8  
Canada

Tel: +1 416 862 5957  
Fax: +1 416 862 6666  
Email: [sdicresce@osler.com](mailto:sdicresce@osler.com)  
URL: [www.osler.com](http://www.osler.com)

#### Partner, Real Estate

Stella's practice involves all aspects of commercial property transactions, including the acquisition, disposition and financing of commercial real estate, joint ventures, property management and leasing of office, retail and industrial space. She has developed particular expertise in portfolio acquisitions for real estate investment trusts (REITs), publicly-traded real estate companies and other institutional investors. Based in Toronto, Stella is lead real estate counsel to the Dream group of companies (formerly Dundee) including Dream Unlimited Corp., Dream Industrial Real Estate Investment Trust, Dream Global Real Estate Investment Trust, Dream Office Real Estate Investment Trust and Dream Hard Asset Alternatives Trust. Stella also advises on the real property aspects of insolvency and security enforcement transactions, as well as on real property matters as part of corporate acquisitions, reorganisations and insolvency restructurings.

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59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [info@glgroup.co.uk](mailto:info@glgroup.co.uk)

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59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [info@glgroup.co.uk](mailto:info@glgroup.co.uk)

[www.iclg.co.uk](http://www.iclg.co.uk)