



# ICLG

The International Comparative Legal Guide to:

# Real Estate 2018

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A practical cross-border insight into real estate law

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# Canada

Heather McKean



Stella Di Cresce



Osler, Hoskin & Harcourt LLP

## 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 12.1. Those relating to tax should be listed in response to questions in Section 9.**

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 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 licence, 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.

In 2017, in order to deal with rapidly rising housing prices, British Columbia enacted a 15% transfer tax on foreign persons purchasing residential property in Metro Vancouver. However, this year British Columbia exempted international residents with provincial work permits from the 15% transfer tax. Vancouver city council also passed a vacancy tax of 1% of the assessed value of vacant homes. Similarly, due to rapidly rising housing prices in the greater Toronto area, Ontario instituted a 15% non-resident speculation tax on foreign buyers of residential property in Toronto and surrounding areas. Permanent residents, as well as refugees and spouses of citizens or permanent residences that will occupy the premises as their principal residence are exempt from this tax. There are rebates available to foreign nationals that become a permanent resident of Canada within four years, those enrolled in full time studies for at least two years and foreign nationals legally working full-time in Ontario continuously for at least one year since the date of purchase.

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 Québec, Saskatchewan and Manitoba also restrict ownership of real estate by non-residents. Recently the federal government has expanded efforts to catalogue property information such as sale price and owner demographics to better understand the real estate markets.

## 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.

### 3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split?

In some provinces, there can be a split between the legal title and the beneficial title, wherein the legal title is held by the registered titleholder who holds the property in trust for the beneficial owner. As such, a search of title may not disclose the true owner of the property in the case where legal title and beneficial title are split. In Alberta, a beneficial owner can register a caveat on title indicating its beneficial ownership interest. Beneficial interest holders are not otherwise recorded, however, depending on whether land transfer tax on a transfer of a beneficial interest is payable in a particular jurisdiction, transfers of beneficial interests may have to be disclosed to the province and/or municipality where the real estate is located.

## 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. As indicated in question 3.3, beneficial ownership is not usually registered apart from legal ownership. 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 compulsorily 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.

Notwithstanding the above, new Ontario corporations are required to maintain a register of their ownership interests in Ontario real property. This requirement will apply to all existing Ontario corporations by December 2018.

### 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 probational 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 probational 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 make 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.

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.

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

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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.

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## 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?

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With commercial real estate transactions at a record level in the first half of 2017, capital remains readily available to finance such transactions, particularly for assets in Ontario and British Columbia, both in private equity and debt. Large Canadian pension funds are expected to continue to increase their allocation of total investments to real estate in the next five years, consistently providing a large injection of equity into the market. There have been particularly high volumes of office transactions in Toronto and Vancouver, such as Dream Office REIT's sale of its 50% interest in Scotia Plaza to a joint venture between AIMCo and Kingsett Capital and Cadillac Fairview's sale of a 50% interest in 12 office towers and Pacific Centre shopping mall in Vancouver to the Ontario Pension Board and the Workplace Safety and Insurance Board. Although interest rates have risen in 2017, rates remain low and attractive to those purchasing real estate. Some Chinese investors have faced increased difficulty investing in Canada this year due to regulatory constraints in China and increased taxation in Canada.

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## 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.

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Again in 2017, the appetite for large investors and developers to look beyond the primary real estate markets in Canada and transact in secondary or even tertiary markets is low. Many of the large real estate companies, investors and developers are looking to move out of these markets. However, the exit by these companies from these markets has proven attractive to local buyers, smaller to medium size public entities and private families. To illustrate, RioCan REIT is selling \$2 billion of real estate in secondary markets to reallocate this capital to the country's six largest cities. Dream Office REIT over the last two years has sold assets in such secondary markets and reduced its portfolio to focus on core assets located in downtown Toronto, downtown Montreal and downtown Calgary. Sears Canada Inc., one of the country's largest retail department store chains, filed for creditor protection and is in the process of closing all of its stores, many of which are located in secondary markets. In Toronto, Vancouver, Montreal and Ottawa, office vacancy rates are much higher in suburban areas than downtown locations.

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## 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.

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Interest in Alberta's commercial real estate seems to be stabilising, albeit at a much lower level, after a period of market corrections due to continued low oil prices. In Calgary and Edmonton, while vacancy rates for offices properties remain very high, vacancy rates have stabilised or slightly decreased for both office and industrial space from a year ago. To the contrary, industrial rental rates are rising and vacancy rates are low throughout the country. Commercial real estate markets in Vancouver and downtown Toronto continue to gain strength and have set new record levels in excess of previous record levels set in 2016.

## 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.

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

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. In Canada there is a general principle (established by the Supreme Court of Canada) 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.

### 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?

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. A buyer’s due diligence should include searching title to identify any existing registered encumbrances and liens. In Québec, as noted in question 7.2, certain warranties are imposed unless excluded by contract.

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

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.

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

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.

## 8 Finance and Banking

### 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?

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, Insurance Companies Act and through regulations imposed by the Office of the Superintendent of Financial Institutions (OSFI). 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.

OSFI recently enacted stricter mortgage lending regulations which come into effect as of January 1, 2018. These regulations make it more difficult for certain buyers to qualify for a mortgage, are designed to ensure that home owners are not over-leveraging their finances through a mortgage and are a response to high household indebtedness and record low housing affordability across Canada.

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

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.

### **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?**

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 property in payment of claim and possession for purposes of administration.

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

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.

### **8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?**

Provided that security is properly registered/perfected, there are limited ways to avoid a lender's enforcement of security. Some

possible ways include through obtaining a stay of proceedings through a restructuring filing under the Companies' Creditors Arrangement Act (Canada) or the Bankruptcy and Insolvency Act (Canada). In Canada, a court overseeing insolvency proceedings can grant a charge on the assets of a debtor in priority to existing security interests to secure certain payments, such as interim or "DIP" financing, and there are also narrow instances where statutory claims or deemed trusts "prime" (take priority over) security. If a lender subsequently materially alters the terms of a loan, for example by advancing additional funds to a borrower, this may, in some instances, render a prior guarantee unenforceable if the guarantor was not notified of and did not consent to the additional advance and the terms of the guarantee did not waive the guarantors right to be notified of and consent to such material alterations.

### **8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?**

In addition to the actions mentioned in question 8.6, before taking enforcement action on demand facilities, a lender must make a reasonable demand to its borrower for payment and give the borrower reasonable time to pay, even if the borrower waived such right; if not, the borrower can defend on these grounds. Lender enforcement actions may also be frustrated or even result in liability for damages if the lender breaches the statutory rules for seizing and selling secured assets, such as complying with notice requirements (including the 10-day notice requirement under the Bankruptcy and Insolvency Act (Canada)) or satisfying the duty to act in good faith and in a commercially reasonable manner.

## **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. There are some exemptions available for beneficial transfers of title that are not registered.

Each jurisdiction has a different rate of land transfer tax. In Ontario, the land transfer tax will be approximately 2% of the total consideration, except that in the City of Toronto, located in the province of Ontario, imposes an additional land transfer tax. On commercial properties, the tax was increased in 2017 to approximately 1.5% of the total consideration up to \$400,000 (Canadian) and 2% on the consideration greater than \$400,000. 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 almost 4%. Ontario and Toronto have each recently increased the rebate of land transfer tax available to first time home buyers. As mentioned in question 2.1, there are additional 15% land transfer taxes on some foreign entities that purchase residential property in Toronto and surrounding areas and Greater Vancouver Regional District. Land in Alberta, Newfoundland and Labrador, and some municipalities in Nova Scotia is not subject to land transfer taxes. However, registration fees will typically 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, or in respect of a beneficial transfer, the land transfer tax may be paid within a specified time following such transfer if an exemption is not available. 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. In addition, recent changes have resulted in foreign investors who are not residents of Canada being required to pay capital gains tax on residential property.

## 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 exempt 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. To the extent tax depreciation was claimed in respect of a building when that building is sold, the tax depreciation previously claimed will be included in the vendor's income and subject to income tax. In addition, one-half of any capital gains realised on a sale of the land and building will be subject to income tax.

## 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, one-half of any capital gain realised on the sale of the shares will be subject to income tax.

## 9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?

A buyer of real estate should always diligence whether the owner of the real estate is a non-resident of Canada. If the owner of the real estate is a non-resident of Canada, it is necessary to obtain a clearance certificate under the Income Tax Act (Canada) prior to closing. If such a certificate is not obtained, the purchaser is jointly and severally liable for the vendor's tax liability arising from the disposition of the real estate. The purchaser will be subject to a 25% withholding tax to the extent the purchase price relates to land and a 50% withholding tax to the extent the purchase price relates to the building. A buyer will need to know whether they need to be registered for GST/HST and whether the supply of the property to the buyer will be taxable for GST/HST purposes. Additionally, a buyer will always inquire with the applicable municipality to ensure that there are no outstanding realty taxes that form a prior lien on the property.

## 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 Civil Code of Québec 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).

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**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?**

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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. 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 proportionate 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 transfer often restrict changes of control in addition to assignments and subleases, though there can be exceptions to the consent requirement for changes of control generally, inter-company re-organisations, or for publicly traded companies.

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

It is common to negotiate an exception to requiring the landlord's consent for a transfer of the lease as a result of a corporate restructuring, subject to the landlord receiving notice and 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, the lease requires that the landlord undertake repairs of a structural nature or repairs required to the roof of the building which may be at the tenants' expense in a net lease.

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

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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, HST and/or QST registrant, the tax will likely be recoverable by the tenant but the landlord is still responsible for collecting it on behalf of the tax authorities. The rent received by a landlord will be subject to income tax, after deductible expenses are subtracted. Some jurisdictions impose business taxes on leased premises in addition to real estate taxes.

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**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?**

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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 upon sale of the property. Typically upon 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 Leases of Residential Premises

### 11.1 Please briefly describe the main laws that regulate leases of residential premises.

Leases of residential premises are regulated provincially. In Ontario and Alberta, the Residential Tenancies Act, of the respective province, is the main law that regulates leases of residential premises. In Québec, the Civil Code of Québec, articles 1892 and following, regulate leases of residential premises.

### 11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?

Throughout Canada, there may be different laws for non-profit housing co-operatives, residential complexes owned by a government or government agency, care homes, developmental services homes and mobile homes. Generally, in most provinces, subject to different safety and maintenance standards for various types of buildings, the residential leasing laws are very similar for premises for single or multiple tenants. One variation in Ontario is that for premises with no more than three residential units, a landlord has greater termination rights.

### 11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c) the tenant’s rights to remain in the premises at the end of the term; and (d) the tenant’s contribution/obligation to the property “costs” e.g. insurance and repair?

- In Ontario and Alberta the length of the initial term is typically one year, with tenants typically electing month-to-month renewals or one year renewal terms thereafter. In Québec, the length of term is typically at least one year.
- In Ontario, caps on rent increases, which tie maximum increases to inflation and cap them at 2.5%, now apply to all private rental units. This new law has led to over 1,000 new construction units that were planned rental units being converted to condominiums, which can provide greater returns to developers. Alberta does not have any rent control legislation, provided a landlord cannot increase the rent payable under a residential tenancy agreement unless at least 365 days has passed since the last increase (if any). Rent increases in Québec are controlled, particularly for a continuing tenant.

- In Ontario, subject to a landlord’s right to terminate for certain reasons set out in question 11.4, the tenant has the right to remain in the premises at the end of the lease on a month to month basis. In Alberta, residential tenancies can be either fixed term or periodic tenancies (no fixed end date). In Québec, the lease of a dwelling is generally renewed automatically and there are no obligations for an exchange of notices between a landlord and tenant.

- Leased residential premises must be kept by the landlord in a good state of repair and fit for habitation, with the landlord being responsible for complying with health, safety, housing and maintenance standards as well as providing vital services. Tenants are typically responsible for ordinary cleanliness and repairing undue damage caused by wilful or negligent conduct of the tenant or its invitees. Usually a tenant will insure its belongings and the landlord will insure the premises. Each will obtain their own liability coverage.

In Alberta, the landlord must ensure that the premises meet at least the minimum standards prescribed for housing premises. It is a prescribed part of that residential tenancy agreement that the tenant will not do or permit significant damage to the premises or the common areas. Outside of damages caused or permitted by the tenant, it would be up to the parties to determine who will pay for property costs such as insurance and everyday repairs. The Civil Code of Québec sets out the repair and maintenance obligations of each party. The landlord is bound to deliver a dwelling in good habitable condition and is bound to maintain it in that condition throughout the term of the lease. The tenant is bound to keep the dwelling in clean condition. The tenant will take out rental insurance as required and the parties will determine whether rent paid includes certain services from the landlord or utilities.

### 11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?

Under provincial laws, a landlord may have the right to terminate a periodic residential lease (subject to certain prescribed notice periods) if certain criteria are met. In Ontario, landlords have such rights upon the occurrence of certain events including the non-payment of rent, if a landlord or a relative (or a purchaser or its relative) intends to occupy the premises, the tenant has committed an illegal act, the tenant wilfully or negligently causes damage to the rental unit, upon extensive renovations or a demolition, conversion to a use other than for residential purposes or if the tenant substantially interferes with the reasonable enjoyment of other tenants or the landlord. In Alberta, landlords have such rights if a landlord or a relative (or a purchaser or its relative) intends to occupy the premises or for a demolition or major renovation of the premises, if there is an intention to use the premises for a non-residential purpose, and to convert the premises to a condominium. In Ontario, a landlord shall not recover possession of the unit unless the tenant has vacated or abandoned the unit or the landlord has an order of the Landlord and Tenant Board authorising recovery of possession.

Obtaining vacant possession in Alberta may require an application to court or to the Residential Tenancy Dispute Resolution Service.

Under Québec law, under the right to maintain occupancy, residential leases essentially do not have unrenounceable terms. A landlord may terminate a lease by way of repossession and may also evict the tenant to subdivide the dwelling, enlarge it substantially or change its use. An owner can retake possession of the dwelling if they wish to live there themselves or have certain family members live there.

There are more complex rights and rules regarding repossession by a landlord if the tenant and/or landlord is over 70 years of age. The owner-landlord must send the tenant a written notice informing the lessee of his or her intention to retake possession of the dwelling by specific deadlines with required notice information.

## 12 Public Law Permits and Obligations

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

Property zoning/permitting and related matters concerning the occupation and use of land are regulated primarily by municipalities with oversight from the province. Each province enacts statutes granting municipalities jurisdiction over land use planning and development within their boundaries in accordance with approved provincial and municipal planning policies. Municipalities typically control land development through such planning instruments as official plans, zoning by-laws, subdivision, severance and site development controls. Municipalities are also empowered to issue building and development permits, and to impose conditions on development, including the payment of development charges or levies. In some provinces, municipal planning decisions can be appealed to provincial tribunals, although there is a trend under existing and proposed provincial legislation (e.g. Ontario) to limit the scope of such appeals and to provide greater deference to municipalities.

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 legislation, particularly provincial environmental legislation, governs land use and occupation through permitting and approval requirements for certain commercial and industrial activities and, in some cases, by restricting the ability to change land use to a more sensitive use (e.g., from industrial to residential) without a regulatory process. Local conservation authorities may also have the ability, through provincial legislation, to impose land-use and development restrictions where proposed developments are located near environmentally sensitive areas.

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

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.

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

Land/building use is regulated primarily at the municipal level with oversight from the province, as set out in question 12.1. Environmental matters are subject to provincial and federal legislation, with such legislation administered by federal and provincial ministries (for example, the Ontario Ministry of the Environment and Climate Change) and, in some cases, local conservation authorities. 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, by retaining an environmental consultant to conduct 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. A property that is in a flood plain area may have restrictions on development.

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

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.

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

Building permits are generally required before carrying out construction or renovation, and failure to obtain a permit can constitute an offence. Environmental permits and approvals are typically required prior to commencing certain commercial and industrial operations, and permits may be required if construction or renovation is to take place on or near environmentally-sensitive areas. Obtaining the required permits and licences can be a time-consuming process, and can involve coordination with the municipality, as well as specific local, provincial or federal 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.

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

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 many months, and once a permit is obtained there may be regular inspections during the construction.

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**12.7 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 requirements 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 of the area in which 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 can designate individual properties to protect their heritage attributes, as well as 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 that has been individually designated for heritage protection or that is located 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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**12.8 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 12.3, conducting independent investigations, often through environmental site assessments of the property in question by an environmental consultant, 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, and certain public and private databases of other environmental issues (for example, known spills), these registries and databases 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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**12.9 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. Typically, provincial environmental Ministries have the power to order environmental clean-ups against current and former owners of contaminated property (or the source of contamination that has migrated off-property) and current and former occupiers of such property who have caused the contamination. 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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**12.10 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 programs. These include Leadership in Energy and Environmental Design ("LEED") and the "Go Green" program, 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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## 13 Climate Change

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**13.1 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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Canada has ratified the Paris Agreement, an international agreement to keep the global temperature increase below 2 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. Regulations to limit emissions from cars and light trucks 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, in Ontario the Green Energy Act creates financial incentives for the development of renewable energy.

In December 2016, the federal government announced that it is imposing a minimum price for carbon or equivalent emissions 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.

Other key federal commitments announced in the 2017 Pan-Canadian Framework on Clean Growth and Climate Change, include completely phasing out coal by 2030, developing increasingly stringent building codes starting in 2020, developing a clean fuel standard based on a full life-cycle analysis, implementing methane regulations with the goal of reducing methane emissions by 40–45% by 2025, and reducing federal government greenhouse gas (GHG) emissions by 40% below 2005 levels by 2030 or sooner.

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. The cap and trade system is established through a legislative framework which requires emitters to quantify and report their GHG emissions and submit allowances and credits to match the reported emissions at the end of each compliance period. In Québec the cap and trade program was implemented in 2013 and the province is currently in its second compliance period, which culminates this year. In Ontario, the first compliance period began in 2017 and continues for three years. 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. 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.

In 2017, Alberta enacted the Climate Leadership Implementation Act, which implements a carbon levy on fuels. The carbon price was set at \$20/tonne for 2017 and will rise to \$30/tonne on January 1, 2018, followed by an increase in real terms, suggested to be inflation plus 2%, each year after that. The levy applies throughout the fuel supply chain. Alberta has also committed to phasing out coal-fired electricity generation and, beginning in 2018, coal-fired generators will pay a \$30/tonne carbon price based on an industry-wide performance standard. The oil sands will also be subject to a legislated emissions limit of 100 mega tonnes (Mt) per year under the Oil Sands Emissions Limit Act. Today, the oil sands emit approximately 70 Mt per year.

Other provincial jurisdictions have committed to a variety of initiatives to combat climate change. British Columbia has legislation targeting coal-based electricity generation facilities and liquefied natural gas facilities by stating a GHG emissions benchmark and requiring operators that exceed the benchmark to purchase offset credits. Manitoba initially announced plans to adopt a cap and trade program for large industrial emitters to be linked with Ontario and Québec's cap and trade systems, but the Province has since back-tracked on this commitment and is, instead, considering the implementation of a carbon tax. Nova Scotia has also announced that it will be implementing a cap and trade system, beginning in 2018, across all sectors of its economy. Newfoundland & Labrador passed the Management of Greenhouse Gas Act in 2016, which requires facilities that emit 15,000 tonnes of CO<sub>2</sub> equivalent per year to report their emissions to the government. The underlying purpose of the reporting requirement is for Newfoundland & Labrador to develop appropriate reduction targets to reduce the Province's overall emissions.

### 13.2 Are there any national greenhouse gas emissions reduction targets?

As mentioned in question 13.1, 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.

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

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. LEED Canada CS is a standard that a building owner can obtain that pertains only to the core and shell of the building, notwithstanding interior fit up standards, which a landlord of an office tower may not have control over. 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 partial refunds of development charges. 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.

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Heather 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. 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; she is also ranked as a leading commercial real estate lawyer by *Chambers Global*, *Chambers Canada* and *The Best Lawyers in Canada*.

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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 and dispositions 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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Osler's Real Estate Group has acted on some of the most significant real estate transactions in Canada in the last five years. Osler is counsel to Sears Canada Inc. *et al* in its insolvency proceedings, which includes complex commercial real estate issues. We advised Target stores on its entry into and exit from Canada and Fast Retailing Co. Ltd. and Uniqlo Canada Inc. on the expansion of Uniqlo into Canada, marking the brand's first entry into the country. We recently advised Dream Office REIT in connection with the sale of its remaining 50% interest in Scotia Plaza (a 68-storey office and retail complex in the Toronto financial core) to KingSett and AIMCo, and the sale of a portfolio of 35 properties across Canada to KingSett. We were counsel to Dream Office REIT and H&R REIT on their original acquisition of Scotia Plaza from The Bank of Nova Scotia in 2012 and the sale of a 50% interest in Scotia Plaza to KingSett and AIMCo in 2016.

We regularly advise on commercial real estate portfolio acquisitions, divestitures, joint ventures and investments, as well as real estate financing arrangements and commercial leasing. Osler is a leading business law firm providing business-critical advice to Canadian, U.S. and international clients. Founded in 1862, Osler has over 450 lawyers working together from offices in Toronto, Calgary, Montréal, Ottawa, Vancouver and New York.

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