Global Corporate Real Estate Guide - Canada

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*This chapter was last reviewed in August 2023.*

# Authors

# Real Estate Law

## What is included in the term “real estate”?

The term "real estate" includes the following:

Land

Any buildings or structures on it

## What laws govern real estate transactions?

Primary responsibility for property law rests with the provincial governments. In all provinces except Quebec, property law regimes have developed through a combination of statutes and the English common law process. In Quebec, property law is governed by the Civil Code of Quebec, a Napoleonic code derivative. On May 24, 2022, the National Assembly of Quebec passed Bill 96, an Act respecting French, the official and common language of Québec (“**Act**”), which sets out to confirm the status of French as the official language and the common language of Quebec. As a result of this Act, certain additional French language requirements apply to documents that will be registered in Quebec land registries.

Some federal laws to keep in mind in real estate transactions include interest rate, competition and anti-money laundering laws. The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) and provincial “Know your client” rules are playing an increasing role in real estate transactions.

## What is the land registration system?

All provinces maintain a public land title registration system where ownership can be verified and through which interests in land are registered. The purpose of the system is to provide notice to the public about the various interests that parties have in land. Priority of registration is paramount and the right first registered enjoys priority over any subsequently registered rights (subject to certain exceptions).

Land titles systems are in place in British Columbia, Alberta and Saskatchewan. Ontario, Manitoba, Nova Scotia and New Brunswick are in various stages of converting from registry based systems to land titles systems. Prince Edward Island, Newfoundland & Labrador and Quebec all continue to use registry based systems.

What this means for provinces like Ontario is that until all properties are converted to the land titles system there are two concurrent land registration systems operating: the registry system and the land titles system. The older more traditional registry system is a “registration of deeds” system, which provides only for the public recording of instruments affecting land and does not itself make any qualitative statement concerning the status of title. The land titles system, by contrast, is operated by the province and title to land within the system is effectively guaranteed by the province, subject to certain statutory limits. In Ontario, properties under the land titles system are either designated as “land titles absolute” parcels or “qualified land titles” parcels and this designation affects the quality of the title guarantee from the province.

## Which authority manages the registration of titles?

Title registration is usually managed by a land title office in a land title system and by a land registry in a registry system. Both the land title offices and land registry offices are operated under the jurisdiction of the relevant provincial government.

## What rights over real property are required to be registered?

Rights are generally not required to be registered. However, registration is important to establish priority and to provide notice to third parties. Third parties who do not have notice are generally not bound by unregistered rights over property. So, owners usually register any document creating or evidencing an interest in real estate to protect the interest. The following are the most common instruments that are registered:

Deeds or Transfers

Mortgages

Easements

Restrictive covenants

Leases (or notice of lease)

Co-ownership agreements

Options to purchase or right of first refusal

Mechanics’ Lien or Construction Lien

Some rights in land do not need to be registered to still be effective against owners and third parties. These rights include claim by adverse possession, certain utility easements, municipal taxes and government land planning or subdivision restrictions.

## What documents can landowners use to prove ownership over real property?

Land registries in Canada do not issue an original physical title document to a new owner of real estate. Once registration of the transfer or deed is completed, a copy of the registered transfer deed will confirm ownership. A copy of the certificate of the title or parcel register can be obtained from the Land Titles office for land title parcels to confirm the registration and status of title.

## Can a title search be conducted online?

All registered records are available to the public and information about the ownership of real property can be searched for a fee. Most land title jurisdictions allow electronic searches of land-related documents.

## Can foreigners own real property? Are there nationality restrictions on land ownership?

There are generally few prohibitions or direct restrictions on foreign ownership of Canadian lands, however, the last 5 years have seen a dramatic increase in government measures to curtail foreign ownership of land, particularly agricultural lands and residential real estate. Effective January 1, 2023, the federal government’s Prohibition on the Purchase of Residential Property by Non-Canadians Act (“**Non-Canadians Act**”) and the associated Prohibition on the Purchase of Residential Property by Non-Canadians Regulations (“**Regulations**”) came into effect placing a two year ban on foreign individuals, entities formed outside of Canada, and Canadian entities controlled by foreign individuals or foreign entities from acquiring an interest in certain real property (residential) in specific urban geographic centers within Canada. In addition, some provinces have imposed a combination of taxes, registration or reporting requirements on real estate acquired or owned by non-residents of Canada.

The following is a summary of some of the direct and indirect restrictions.

Indirect restrictions – taxes, registrations and reporting requirements for foreign entities:

As real property is often part of an acquisition of a business, the Competition Act and the Investment Canada Act must also be considered:

The federal Competition Act provides for the review of certain commercial transactions for potential lessening or preventing of competition in a relevant market, where the party’s assets or revenue exceed certain thresholds

Under the federal Investment Canada Act, non-residents seeking to acquire control of existing Canadian businesses or to establish new Canadian businesses are subject to governmental review where the value of the transaction exceeds certain amounts (the review exemption threshold is significantly greater for investors who are residents of World Trade Organization member countries), or where the business falls within certain “sensitive” categories.

Foreign entities may need to obtain a license to own and operate real estate in certain provinces such as Ontario, Quebec and British Columbia.

British Columbia and Ontario both have non-resident speculation tax payable by non-resident purchasers of residential real estate calculated as a percentage of the purchase price for residential property acquired in specific geographic areas.

Direct restrictions:

Prince Edward Island (PEI), Canada’s smallest province, prohibits a person who is not a PEI resident from having an aggregate land holding in excess of five acres or having a shore frontage in excess of 165 feet (unless he/she first receives permission to do so from the lieutenant governor in council (see the Land Protection Act)).

Subject to certain exemptions, Alberta limits non-residents and non-Canadian corporate entities to two plots of “controlled land” (lands located outside of urban areas) not exceeding a total of 20 acres (see Agricultural and Recreational Land Ownership Act).

Saskatchewan restricts the amount of agricultural land sold to non-residents to 10 acres.

Manitoba restricts non-residents from owning more than 40 acres of farmland and requires that they move to the province within two years of purchasing the land.

Non-residents may apply for an exemption from the Alberta, Saskatchewan and Manitoba restrictions; and Canadian citizens and permanent residents (and corporations controlled by the same) are not subject to these restrictions.

Quebec does not permit non-residents to purchase farmland (land used for agricultural purposes having an area of not less than four hectares, consisting of one lot or several contiguous lots or several lots that would be contiguous were they not separated by a public road) without permission from the Commission of the Preservation of Agricultural Territory of Quebec (Commission de protection du territoire agricole du Québec).

## Can the government expropriate real property?

Property can be expropriated by government and quasi-government authorities, but appropriate compensation must be paid to the owner and/or occupier of the expropriated property. The primary expropriations are to build highways, airports, or other infrastructure projects.

## How can real estate be held?

The two most common ways to hold real estate are (i) exclusive ownership of the land through freehold rights; or (ii) exclusive possession of land through leasehold rights. Freehold and leasehold interests can be held either as tenants in common or as joint tenants.

Other interests that you can have in real estate:

Condominium or strata title ownership

Easements

Restrictive Covenants

License\*

\*A contractual license is a contract that binds only the named parties that give a licensee certain rights to use land but, unlike a lease, it does not run with the land and therefore does not create an interest in the land.

## What are the usual structures used in investing in real estate?

Corporations

Co-ownership or co-tenancy

Partnership

Limited partnership

Joint Venture

Trusts, including bare trusts or nominee arrangements

## How are real estate transactions usually funded?

Most real estate financing is arranged through institutional lenders such as banks, trust companies, pension funds, credit unions and insurance companies. Interest rates are generally fixed for a specified period of time or are variable, based on a “prime rate” set by the lending institution on a periodic basis. The prime rate is based upon a rate announced periodically by the central bank – the Bank of Canada.

Typically, it will be the borrower’s responsibility to pay for all of the lender’s legal and other costs, such as premium for lender’s title insurance policy and commitment and processing fees in arranging property financing. Generally, interest rates must be expressed as an annual or semi-annual rate and a higher rate upon default is not permitted when the loan is secured by real property.

In large commercial loan transactions, lender requirements can be very detailed and the terms of the loan agreements are often heavily negotiated between the borrower and the lender. Lending institutions typically take both primary and collateral security in real property and related assets. Typical primary security includes registration in the land registry of a mortgage or charge, a debenture containing a fixed charge on real property or, in some cases, where more than one lender is involved, a trust deed securing mortgage bonds or debentures and including a specific charge over real property. Collateral security often includes assignments of leases and rents, general security agreements for personal property and personal guarantees. Notice of collateral security is typically registered in the personal property registry system of the applicable province.

Banks and trust companies are regulated under provincial and federal legislation with special provisions applying to foreign financial institutions.

## Who usually produces the documentation in real estate transactions?

Generally, the buyer’s real estate agent and/or lawyer will prepare the initial draft of the purchase agreement and the buyer will submit it to the seller as an offer. The parties can then negotiate the terms of the deal and produce a final purchase agreement.

The closing documents that actually transfer ownership to the land are generally prepared by the seller’s lawyer but this can vary by jurisdiction. For example, in Ontario and New Brunswick it is the seller’s lawyer that prepares the documents but in British Columbia it is the buyer’s lawyer.

## Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before the real estate was bought or occupied?

Yes. Any owner, occupier or person in management or control of real property may be liable for environmental contamination of real property and for contamination migrating from real property (regardless of whether the cause of the contamination was directly attributable to that owner or occupier).

## Does a seller or occupier retain any liabilities relating to the real estate after they have disposed of it?

A seller or occupier can retain liabilities relating to the real estate even after it has disposed of it. The seller (and potentially any occupier) is liable for any contamination and/or resulting environmental harm caused before, during, and, to the extent causally linked to the seller or occupier, even after ownership is transferred as the liabilities “run with the land”.

# Acquisition of Real Property

## What are the usual documents involved in such transactions?

Sale and purchase agreement

The first document in any real estate acquisition is normally the sale and purchase agreement between the buyer and the seller. This agreement should contain all necessary business terms for the transaction, including the description of the land, purchase price, deposit (if any), due diligence and other conditions, representations and warranties, closing date and any other special terms.

Due diligence report

Once the sale and purchase agreement is signed, it is generally the responsibility of the buyer, usually through the buyer’s lawyer, to conduct due diligence with respect to the property being acquired. This includes both title and off-title searches. Common off-title searches include a review of realty tax charges, water/sewer charges (or water quality for properties services by well or septic systems), unregistered agreements, zoning compliance, work orders, fire protection, occupancy permits, heritage designation, development charges and surveys. An independent environmental assessment is often recommended and an independent engineering review of the property, particularly in the case of property with older buildings or sensitive use sites such as former gas stations. The buyer’s lawyer will also provide a title opinion to the buyer or obtain title insurance for the buyer (in which case the lawyer will provide a title opinion to the insurer).

Requisitions

If the results of the due diligence inquiries identify defects in title or other problems, the buyer’s lawyer will submit a requisition letter to the seller’s lawyer before the due diligence period set out in the sale and purchase agreement expires. The seller (through its lawyer) will respond to the requisition and will either repair the defect or negotiate a solution with the buyer.

## What are the warranties given by a seller to a buyer?

The recent trend is for sellers to give limited representations and warranties. Thus, a buyer is generally responsible for conducting extensive due diligence with respect to the property to be acquired.

## When is the sale legally binding?

Parties are legally bound as soon as they execute the sale and purchase agreement, subject to the terms and conditions contained therein, including the buyer being satisfied with the results of its due diligence.

## When is title transferred?

Ownership of the land is generally transferred when the deed or transfer is registered in the applicable land registration office. Prompt registration is important to preserve registration priority.

## What are the costs usually shouldered by the parties?

The buyer usually pays for the following:

Its legal costs

Due diligence costs for consultants who have prepared building condition reports, environmental assessments, valuation appraisals and real estate surveys

Due diligence inquiries made to statutory and government bodies

Registration fees

Land transfer taxes\*

Sales taxes (HST or GST/PST) (if applicable)\*\*

\* Transfer tax: land transfer tax is usually paid when the transfer is registered with the land registry office and the amount of tax varies between the provinces. Some transfers can qualify for an exemption from land transfer tax. For example, in some provinces a parent corporation can transfer land to a subsidiary corporation (or vice versa) without triggering land transfer tax payment. Typically transfer of registered ownership of land triggers the transfer tax but, in some provinces, it can also be triggered when there is a transfer of beneficial ownership.

\*\* Sales tax: in general, sales taxes apply to the supply of all real property unless there is a specific exemption. The main exemptions are for used residential property and for the sale of personal use property. The seller has the responsibility to remit the tax on behalf of the buyer. If the buyer is a GST/HST registrant, it may be permitted to self-assess the GST/HST and the seller will not need to collect the GST/HST at the time of the transfer.

The seller usually pays for the following:

Real estate agent’s commission\*

Its legal costs

Income tax on any profit made on the sale of the real estate (capital gains)\*\*

\* Commission: buyer’s agent’s fees are usually paid out of the listing agent’s fees rather than by the buyer. Typically commission is paid out of the purchase price on closing. Commission are subject to sales taxes (HST or GST/PST).

\*\* Income tax: unless a specific exemption applies there will be income tax payable on the sale of real estate. The main exemption is on the sale of an individual’s principal residence. If a seller is a non-resident of Canada there is an additional tax imposed on the gain on disposition of real property. Non-resident sellers must provide the buyer with a clearance certificate from the government pursuant to section 116 of the Income Tax Act (Canada).

# Leases

## What are the usual forms of leases?

Ground leases

One form of a leasing arrangement is a long-term ground lease, in which a tenant leases vacant land and develops it. Once development is completed, the ground tenant may sublet space to retail, office or industrial tenants, depending on the type of development. Ground leasehold interests may be bought and sold in a manner similar to freehold property interests. The use of ground leases for development projects has become increasingly popular over the past 30 years.

Commercial leases

Most commercial office and retail space, and much of the standard industrial space in Canada is available only through a commercial lease. Most commercial lease transactions commence with an offer to lease, which contains the business terms agreed upon by the parties, including the space, term, rent and any tenant inducements.

Commercial leases usually fall into two categories: net lease or gross lease. The most typical form of a commercial lease is a net lease which requires a tenant to pay basic rent plus additional rent comprising a proportionate share of realty taxes, insurance, utility and common area maintenance charges. In a retail lease, a tenant may also be required to pay rent based on a percentage of its annual sales. In a gross lease the tenant agrees to pay a fixed amount and that fixed amount includes the tenant’s share of operating expenses and realty taxes.

Residential leases

Residential leases are regulated by provincial legislation; in some cases, the applicable legislation will override the terms of the lease contract, regardless of the intention of the parties. In some provinces, including Ontario, the ability of the landlord to increase residential rents is limited by provincial regulation.

## Are lease provisions regulated or freely negotiable?

Generally, lease provisions are not regulated and are freely negotiable. However, most provinces establish certain rights and obligations of commercial landlords and tenants that apply to all commercial leases which cannot be limited, changed or modified in the lease.

## Is there a maximum term for leases? Can these be extended?

Long term leases will sometimes trigger planning issues and land transfer taxes (these are generally not triggered by leases for terms of less than twenty years, including renewal and extension rights). Some provinces set a maximum term for leases. In Quebec, the maximum term of a lease, including renewals, is 100 years. In Ontario, unless planning consent is obtained or the lease covers only a portion of a building, a lease for a term of 21 years or more that only applies to a portion of the landlord’s real property is generally considered void. If a lease is for a term of 50 years or more it is subject to land transfer tax on the fair market value of the land.

## What are the usual lease terms?

Most commercial leases are for a 5-year or a 10-year term. Often, the leases will provide the tenant with extension or renewal rights.

## Are there instances where tenants may demand an extension of the lease?

Commercial tenants do not have a default legal right to renew or extend their leases. Renewal and extension rights are a matter of negotiation between landlords and tenants.

It must also be noted that there is a distinction between a renewal right and an extension right. The exercise of a renewal right terminates the existing lease and begins a new lease. Rights that are personal to the tenant, such as purchase rights, rights of first refusal and exclusivity rights will not apply during the renewal term, unless the lease expressly provides otherwise. By contrast, the exercise of an extension right continues the existing lease, including rights that are personal to the tenant.

## On what grounds may a lease be terminated?

Commercial leases generally terminate at the expiry of the lease term but can also be terminated when there is a breach or default of the lease or if there is a contractual right to terminate the lease early. Termination for breach or default of the lease is usually the result of a tenant’s failure to pay rent, insolvency of a tenant (subject to statutory restrictions) or tenant assigning or subletting the property without the consent of the landlord.

## Must rents be paid in local currency?

The parties are free to set the rent in other currencies, but arrangements for payment of rents in foreign currency are not typical in Canada.

## Is rent paid on a monthly basis? Is it required to be paid in advance?

This will depend on the agreement of the parties. Rent is usually paid monthly, at the beginning of the month, in advance.

## How is rent reviewed? Are there limits to the increase in rent?

Basic rent is usually fixed at the beginning of the initial term and will often increase each year during the term. Basic rent upon renewal or extension may also be fixed or may be adjusted to reflect the market value at the time of renewal or extension. In addition to the basic annual rent, commercial tenants will generally also pay a share of municipal taxes, insurance and common area maintenance costs on terms set out in the lease agreement.

Some provinces, like Manitoba, British Colombia and Ontario, set an allowable annual percentage increase in rent for residential leases.

## What are the basic obligations of landlords and tenants?

The following are usually required of landlords:

Repair and maintain the structure of the property, except when the tenant leases all of the property and makes improvements on it

Insure the property

Provide tenants with a valid notice of termination (in writing) if terminating the tenancy

Provide a non-defaulting tenant with quiet enjoyment of the property

The following are usually required of tenants:

Pay rent on time, including taxes and a share of the operating expenses for certain asset classes

Keep the property in good order

Inform the landlord if repairs are needed that are the landlord’s obligation and give the landlord access to the property to carry out repairs

Give the landlord access (often by appointment) for inspections and landlord’s work

Seek the landlord’s prior consent before making alterations to the property

## What provisions or restrictions typically apply to the transfer of the lease by the tenant? May a tenant sublet the leased premises?

Tenants are generally allowed to assign the lease or sublet the premises, provided that they obtain written consent from the landlord. The landlord is usually required to act in a commercially reasonable manner when considering the tenant’s request.

## What happens in the event of destruction of the leased premises?

If the premises are substantially damaged or destroyed by an act of God, the lease is often terminated. Rent generally abates according to the extent of the damage or destruction.

If the premises are damaged or destroyed due to causes attributed to the tenant, then the tenant may be liable for repairs or replacement.

## Who is usually responsible for insuring the leased premises?

Leases typically require that both the landlord and the tenant will obtain insurance, each for their respective interests in the leased premises and its contents. The Landlord typically carries business interruption insurance, “all risks” insurance on the structure (including leasehold improvements), boiler and machinery insurance and a general commercial liability policy. Tenants typically carry building “all risks” insurance, general commercial liability insurance, business interruption insurance and property insurance for the contents.

## Will the lease survive if the owner sells the leased premises?

Generally, lease agreements survive a sale and are binding upon the new owner of a property.

## Will the lease survive if the leased premises are foreclosed?

In the absence of a non-disturbance agreement, if a property is sold through a mortgage power of sale or foreclosure of a mortgage over the property that has priority over the lease, the lease will not survive at the option of the lender and may be terminable at the option of the tenant. Typically, a lender and tenant enters into a subordination and non-disturbance agreement that governs what will happen to a lease in the event of a foreclosure sale.

# Planning and Environmental Issues

## Who has authority over land development and environmental regulation?

Property development is provincially regulated, primarily at the municipal level. Municipalities typically control land use and the density of the development through official plans and zoning laws. The ability of an owner to subdivide property is restricted and regulated in a number of provinces, including Ontario. Development charges are also imposed by many municipalities on new developments within their jurisdiction.

Construction of new projects is also subject to provincial and municipal legislation. Building codes set specific standards for the construction of buildings and most municipalities require building permits before the commencement of construction. Building codes also regulate the maintenance of existing structures.

Environmental regulation are mainly at the federal and provincial levels. Many federal environmental programs have been delegated to provincial environmental regulatory authorities to implement and enforce. Certain municipalities also have limited environmental regulations, often related to construction and municipal services (e.g., sewer and wastewater).

## What environmental laws affect the use and occupation of real estate?

Each province issues laws on matters affecting the use and occupation of real estate, including regulations relating to air, water, hazardous substances, waste, and protected species.

## What main permits or licenses are required for building or occupying real estate?

Generally, a site plan agreement and/or a building permit are required for the construction or renovation of real property. Environmental permits are generally required for environmentally relevant activities on the real estate and not for the building itself or for the general occupancy of the real estate. Depending on how the property may be used, environmental permits or licenses may be required, including for air emissions, and stormwater and wastewater discharges as a result of the use.

## Can an environmental cleanup be required?

Federal and provincial regulators have authority under environmental laws and regulations to require investigation and remediation of environmental contamination. Generally, an environmental cleanup may be required where authorities seek to reduce or mitigate potential dangers to human health or the natural environment. Development or subdivision of a site will often trigger the need to clean up contamination as part of the permit and development approval process.

## Are there minimum energy performance requirements for buildings?

Energy codes are developed at the national level through model code and standards processes. The codes are usually adopted by the provinces and enforced locally. Local building codes provide minimum energy efficiency requirements for new buildings. Old buildings are usually not covered by these requirements.

There are a number of voluntary standards for environmentally sustainable buildings. The Building Owners and Managers Association has a voluntary environmental certification program for commercial buildings. The Canada Green Building Council promotes the Leadership in Energy and Environmental Design (LEED) Green Building Rating System, a third-party certification program and an internationally accepted benchmark for the design, construction and operation of high-performance green buildings.

## Are there other regulatory measures that aim to improve the sustainability of newly constructed and existing buildings?

No.

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