Global Corporate Real Estate Guide - Canada

Real Estate Law

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# 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”.

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