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Law and Practice

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Contents

Stikeman Elliott LLP has a national real estate group that provides sophisticated but practical real estate expertise and advice to real estate investors and key industry players on the acquisition, disposition, municipal land use, development, financing and leasing of all classes of real estate. The firm provides full real estate capabilities and top-tier practices in Montréal, Toronto, Calgary and Vancouver. The key areas of practice in relation to the real estate sector are acquisitions and divestitures, auction processes, brownfield redevelopments, commercial leasing, construction contracts, construction finance, distressed real estate, due diligence, engineering and environmental audits, environmental assessments and permits, investment structuring, joint ventures, land use planning and development, landlord-tenant disputes, procurement, project finance, reciprocal easement agreements, security enforcement and title searches. The real estate group provides tailored and integrated advice to a variety of clients, including non-taxable institutional investors, publicly traded REITs, investment funds, private equity firms and foreign investors. It has particular experience in spin-off, sale/leaseback and other innovative transactions.

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1. General

1.1 Main Sources of Law

Under Canada's federal constitution, laws relating to real estate fall almost exclusively within provincial jurisdiction. Specifically, each Canadian province enacts its own legislation with respect to real property matters such as ownership structures, use, acquisitions and dispositions, financing and development. Generally speaking, the form and content of such laws tends to be similar across most of Canada's provinces, as well as in the three northern territories. The exception is Québec, which, as a civil law jurisdiction, establishes its real estate law in a Civil Code similar to those in use in many continental European countries.

In Canada's common law jurisdictions, being all provinces and territories other than Québec, common law jurisprudence is a key component of real estate law. In addition, some real estate-related common law principles have been codified in legislation in Canada's common law jurisdictions. In Québec, the Civil Code of Québec and other enactments serve as the primary sources of law, although case law is employed to clarify issues that remain after the application of the Civil Code of Québec and any relevant statutes.

International law is not a significant source of real estate law in Canada. Nevertheless, international treaties are occasionally reflected in Canadian legislation relating to real estate. Orders of foreign courts are enforceable in Canada under certain conditions.

1.2 Main Market Trends and Deals

Domestic and foreign investors appear to be largely undeterred by rising interest rates and a lower Canadian dollar, each as compared with recent years. Investment in residential and commercial real estate has continued to be robust across most of the country. Major international players from Asia, Europe and the USA have continued to show particular interest, although investment from Asia has moderated. The limited supply of real estate available for traditional purchase has led certain larger investors and Canadian pension funds to take over and privatise publicly traded real estate trusts and companies. This longstanding and continuing trend has resulted in a narrowed market and historically low capitalisation rates.

At a regional level, most segments exhibit high demand and low supply, with pension funds, real estate investment trusts, private equity firms, developers and individuals alike continuing to invest in commercial, mixed-use and multi-residential real estate. In Alberta, where depressed energy prices have affected the regional economy, the office leasing market has shown modest improvement, while the industrial market remains solid, primarily driven by large users looking for distribution space.

As discussed further below, one developing trend over the past few years has been a heightened level of public debate and government action with regard to housing affordability, with particular emphasis on Toronto and Vancouver. New mortgage regulations, transfer taxes and foreign-buyer taxes have been implemented to remedy supply shortages and overheated residential markets in some jurisdictions. As anticipated, year-on-year sales have slowed and prices are beginning to decline, particularly in residential segments of the real estate market in Vancouver and Toronto. However, optimism about the prospects for real estate investors in Montreal has not waned significantly in the past year.

2018 and early 2019 were marked by the conclusion or announcement of several large trades of trophy assets and acquisitions of publicly traded real estate vehicles, including:

- AIMCo Realty Investors LP acquired Edmonton Tower, a new 27-storey office and retail complex in the heart of the ICE District, from the Katz Group;
- Blackstone Group LP's acquisition, with a co-investment by Ivanhoe Cambridge Inc, of Pure Industrial Real Estate Investment Trust for CAD3.8 billion; and
- Elad Genesis Limited Partnership's acquisition of all the units it did not already hold in Agellan Commercial REIT for CAD400 million.

As with prior years, the past year saw the announcement of real estate developments amounting to millions of square feet across various asset classes in markets across the country, with particular growth in urban mixed-use/transit-oriented developments.

1.3 Proposals for Reform

While several Canadian jurisdictions already tax unregistered (or 'beneficial') transfers of land, others that previously had not done so have recently introduced such taxes (Québec) or are considering doing so (British Columbia). The British Columbia government has also recently passed legislation that limits the development of land within the agricultural land reserve. Ontario has imposed onerous disclosure requirements, including with regard to details of shareholdings and ultimate beneficial ownership, in respect of transfers of agricultural land and certain categories of residential properties.

The continuing shortage of affordable housing has led to further action being taken by provincial governments over the last year. British Columbia and Ontario have already instituted foreign-buyer taxes in respect of certain categories of residential property in certain geographic areas. The 2018 British Columbia Budget focused on promoting housing affordability and reducing speculative foreign ownership of residential property. As announced in the 2018 Budget, the British Columbia government has introduced an annual tax that targets 'speculators' who do not pay taxes in British

Columbia and who own real estate that is not their principal residence and is not made available for long-term rental. The goal of the tax is to encourage rental of underused residential properties in British Columbia's major urban centres and the tax rate varies from 0.5% to 2% of the property's assessed value, depending on the owner's tax residency and citizenship status. The availability of exemptions from the tax also depends on the owner's tax residency and citizenship status. Through these extensive property transfer tax, speculation tax and foreign-buyer tax initiatives, the British Columbia government is looking to increase its revenues and cool the housing market. In an effort to address affordable housing and maintain predictability of rental housing costs, the Ontario government instituted significant legislative reforms in 2017. Chief among the changes is that rental units in residential buildings occupied after 1 November 1991, previously exempt, are now subject to rent control, although very recent changes in late 2018 reintroduced an exemption for buildings occupied after 15 November 2018.

The British Columbia government has also taken steps aimed at increasing transparency and ending hidden (beneficial) ownership of real estate. On 20 June 2018, draft legislation was released that will establish a publicly accessible registry of beneficial owners in British Columbia that is intended to be shared with federal and provincial tax and law enforcement authorities. Effective 17 September 2018, corporations and other entities that acquire property must identify and provide information on all individuals who hold a significant interest in such entity. Effective 1 January 2019, developers of certain development properties located in British Columbia are required to collect, report and retain information with respect to assignments of purchase agreements in a new registry, which will be made available to federal and provincial tax authorities. The foregoing measures have all been subject to intense media scrutiny and criticised as being onerous and leading to the unnecessary increase of transaction costs. Lobbying by the real estate sector has been intense, especially with respect to the application of measures that ultimately increase development costs and therefore the price of homes, a result that is arguably contrary to the government's stated goals.

2. Sale and Purchase

2.1 Categories of Property Rights

Property rights generally fall within the jurisdiction of the provinces or territories (rather than the federal government). As a result, real property rights differ across the country. Each jurisdiction has enacted statutes that govern the acquisition, ownership, use, financing and development of real estate. In the common law provinces and territories, a freehold estate in real property is a right or interest that exists for an indefinite duration. In contrast, a leasehold estate exists for a duration that is fixed or capable of being fixed in time. A fee simple estate is the most common freehold estate in Canada and, for all intents and purposes, is considered absolute ownership of real property. A leasehold estate is not absolute but does give the tenant an exclusive right of possession during the term of the leasehold enforceable against everyone, including the owner of the freehold estate.

Other typical rights in land in the common law jurisdictions include:

- easements and rights of way, which are non-possessory rights to use a portion of real property for a specified purpose;
- *profits à prendre*, which are non-possessory rights to take natural resources from real property; and
- restrictive covenants, which are agreements not to use real property for specified purposes.

Licences to use land are purely contractual, do not grant exclusive possession and do not create an interest in land.

In the civil law province of Québec, real estate is generally governed by the Civil Code of Québec, which distinguishes between personal rights (rights enforceable against a person) and real rights (rights in real property). Real rights include:

- ownership (similar to fee simple under the common law);
- 'modalities' of ownership, or ways in which a person can be an owner, such as superficies (ownership of construction works or crops on third-party lands) and co-ownership; and
- 'dismemberments' of ownership, which involve the holding of some, but not all, of the attributes of ownership, such as emphyteusis, usufruct, use and servitude.

Superficies and servitudes may be perpetual or temporary, while ownership and co-ownership may be perpetual and emphyteusis is always temporary. Modalities and dismemberments of ownership rights bear many similarities with, but are not directly analogous to, common law concepts. It is, however, generally possible to replicate the risk profile of any common law ownership structure under Québec civil law.

In some circumstances, transactions involve interests in land that are not privately owned, but remain vested in the federal or provincial government, including Aboriginal/First Nations reserve land (as defined in the federal Indian Act), which is held in the name of the federal government. For the most part, such lands are not recorded in provincial land registries and the occupant or project developer will not own the land, but hold possessory rights by way of lease, licence or right of way. Such lands are generally outside urban centres and will be involved in most oil, gas, energy, mining, forestry and other resource-based projects in Canada. Increasingly, registries are being created by governmental agencies and certain First Nations to facilitate and encourage the economic development of such lands, and to provide better certainty of tenure to developers, lenders and investors. For project development, other environmental and project approvals are usually required in connection with, or as a condition to, the grant of the interest in land by the provincial or federal government. Transactions involving any such interests in land will involve an assignment of the interest (eg, assignment of lease), which will often involve obtaining the consent of the relevant government entity that owns the land.

2.2 Laws Applicable to Transfer of Title

Transfers of title are governed by provincial and territorial statute. Certain jurisdictions – such as Alberta, Manitoba, Prince Edward Island, Québec and Saskatchewan – impose restrictions on the ownership of farm land or rural recreational land by non-residents. In the applicable Québec legislation, non-residents include, in the case of physical persons, residents of other Canadian provinces or countries and, in the case of legal persons, those whose directors and ultimate shareholders are not domiciled in Québec.

2.3 Effecting Lawful and Proper Transfer of Title

In common law jurisdictions, registered (or legal) title is typically transferred to the buyer on registration of a deed or transfer in the relevant land registry office. In Québec, as between the parties to the sale, title is transferred as soon as there is a 'meeting of the minds', but the sale may not be set up against third parties until registration of a deed.

There are two types of land registration system in Canada: the registry system, which is a public record of instruments affecting land and does not guarantee title, and the Torrens system of land titles, which is also operated by the government and effectively guarantees title, subject to certain statutory limitations.

Each province and territory uses one or a combination of both of these systems. However, most common law jurisdictions that had traditionally used a registry system have converted or are in the process of converting to the more modern land titles system.

The procedural and documentary requirements for registration of instruments affecting land differ across the various provinces and territories. Instruments submitted for registration must adhere to the applicable statutory and regulatory requirements regarding procedure, format and content. Electronic registration of instruments affecting land is available in certain jurisdictions across the country.

Title insurance is commonly used in Canada, but somewhat less so in provinces with a Torrens system (ie, with a statutory assurance of title). Although not yet a universal practice, many real estate lenders commonly require borrowers to obtain title insurance, which can also be used to insure against instances where aspects of diligence have not been performed, when a legal survey is not immediately available, or when unusual title risks exist.

2.4 Real Estate Due Diligence

Typically, a buyer and seller will enter into a conditional purchase agreement, following which due diligence is conducted. If the buyer is satisfied with its investigations, it will waive its due diligence condition and the transaction will become 'firm', assuming that any other conditions have also been satisfied.

Real estate due diligence generally consists of:

- examining title and zoning of the subject property;
- conducting various off-title inquiries with municipal, provincial and federal departments, regulatory bodies and utilities;
- reviewing leases, property contracts, financial statements and surveys; and
- commissioning environmental and building condition assessments.

2.5 Typical Representations and Warranties

The typical contractual representations and warranties that a seller gives a buyer will depend on market conditions and the relative bargaining power of the parties. Real property is commonly sold on an 'as is' basis, with limited warranties given by the seller. A seller will usually warrant factual matters that might be difficult for a buyer to verify independently through its own due diligence, such as the fact that the seller:

- has been duly authorised to execute the purchase agreement;
- has delivered copies of all contracts, leases and reports related to the real property in its possession or control; and
- has not received notices of non-compliance, environmental contamination or expropriation.

In the common law provinces and territories, no general duty of disclosure is imposed on a seller by statute or under the common law. As a general rule, the principle of caveat emptor (buyer beware) applies to buyers when purchasing real property. However, there are exceptions to this principle that oblige the seller to disclose certain matters such as environmental contamination or latent defects that render the property dangerous or uninhabitable.

In Québec, legal warranties as to ownership and the absence of latent defects apply unless excluded or limited by contract under the deed of sale. A professional seller may not exclude or limit these warranties in respect of undisclosed defects of which it is aware or should be aware. A non-professional seller, on the other hand, may exclude or limit these warranties on the basis of the Québec caveat emptor equivalent. Notwithstanding the foregoing, all sellers are bound to act in good faith under Québec civil law and failure to disclose a known defect would likely amount to fraud and almost certainly invalidate any attempt to exclude legal warranty.

Across Canada, caveat emptor does not apply to fraud. A seller will be liable for latent defects where the failure to disclose them amounts to fraudulent misrepresentation. In the common law jurisdictions, a seller may be liable to a buyer for a misrepresentation, which may be innocent, negligent or fraudulent.

The liability of the seller and remedies available to the buyer vary depending on the type of misrepresentation and whether the representations merge on closing pursuant to the purchase agreement. The good-faith requirement under Québec law can give rise to liability for misrepresentation if the seller knew or should have known of a defect and did not disclose it. In other provinces and territories, courts are beginning to recognise obligations of good faith in contractual performance in a growing range of circumstances.

The remedies for misrepresentation are rescission (the setting aside of the contract) and/or damages. For fraudulent and negligent misrepresentation, the claimant may claim rescission and damages. For innocent misrepresentation, the court has discretion to award damages in lieu of rescission but cannot order both remedies simultaneously.

2.6 Important Areas of Law for Investors

An investor will want to obtain comfort that the value of the property at the time of investment, and/or its revenue stream, is retained over time. An investor will first want to consider the applicable land titles law and conduct investigations to determine whether any registered or unregistered agreements affect the lands (such as covenants, restrictions, easements/servitudes and rights of way) and whether the subject real estate is free from undisclosed liabilities that could diminish the value or constrain the use of the land. Secondly, the zoning and other land-use legislation should be reviewed to determine whether the current and intended uses of the land are compliant.

With respect to liabilities, one of the principal issues is the environmental condition of the lands and whether it is subject to environmental contamination or whether contamination is emanating from the lands on to other lands or into the environment. All Canadian provinces have environmental legislation in place designed to deal with polluted land and potentially compel remediation of the pollution and/or payments to affected parties. Depending on the circumstances, a purchaser of real property can be liable to third parties (both under environmental legislation and at common law) for pollution that exists on, or that migrates from, the subject lands. Importantly, such liabilities can exist even if the purchaser did not cause the pollution and/or is unaware of it. Accordingly, the purchaser's consideration of environmental laws and investigations as to the environmental condition of the lands, and the allocation of environmental risk as between purchaser and seller, are central considerations.

2.7 Soil Pollution or Environmental Contamination

Environmental contamination and remediation of real property is governed by federal and provincial or territorial legislation; however, enforcement is primarily at the provincial or territorial level and clean-up requirements vary across the country. Although responsibility and potential liability to regulators, buyers and third parties for environmental clean-up generally rests with the seller or person that caused the contamination, subsequent owners, occupiers and those exercising control over real property can be liable for such contamination under environmental law, even if that subsequent owner/occupier did not cause the contamination. This occurs mostly (but not always) when the subsequent owner/occupier failed to perform diligence, knowingly accepted the environmental condition of the lands and/or when they contractually assumed environmental liability.

As between buyers and sellers, environmental risk and liability is often addressed and allocated by representations, warranties and indemnities in the underlying agreement and, in some cases, adjustment of the purchase price. It is essential to note, however, that parties cannot contract out of regulatory liability and their liability for environmental contamination is potentially unlimited, other than in the cases of certain provincial governments that recognise and account for the contractual allocation of liability by the parties.

2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

The permitted uses of a parcel of real estate under applicable zoning or planning law can be ascertained through enquiries with local planning authorities and review of municipal land use by-law regulations. For larger developments, real estate developers are required to enter into various agreements with the applicable municipality to facilitate the development, whether in connection with obtaining construction approvals, the subdivision of the land into smaller parcels, or in connection with any change to the current land use by-laws. These agreements will commonly relate to servicing commitments, requirements to provide public facilities, land dedications, phasing of the development and financial requirements.

2.9 Condemnation, Expropriation or Compulsory Purchase

The expropriation of real estate falls under both federal and provincial regulatory regimes. The federal government has the statutory authority to expropriate land or immovable real rights for public works or other public purposes pursuant to the Expropriation Act (Canada). Similarly, each province and territory has expropriation legislation that grants expropriation powers to authorities such as the provincial government, municipalities and utility companies.

Expropriation legislation across the country sets out specific procedural requirements for expropriating authorities, such as prescribed notice periods. Compensation is generally based on the fair market value of the lands being expropriated and, in some instances, may include reasonable costs and damages for injurious affection.

2.10 Taxes Applicable to a Transaction

Transfers of real estate in most Canadian jurisdictions are subject to transfer tax, which is imposed at the provincial levels and is typically levied and paid or payable upon registration of the transfer instrument in the relevant land registry. In some provinces, municipalities (such as the City of Toronto in Ontario and various municipalities in Québec) may levy a land transfer tax in addition to the tax levied by the province. The rate of such taxes varies across the country, from a high of 5% of the value of the consideration for certain residential properties in Toronto (the combined municipal and provincial tax rates) and on the value of residential properties in excess of CAD3 million in British Columbia, to no tax at all in Alberta, Newfoundland and Labrador, and parts of Nova Scotia (although, as in other provinces, there are registration fees that are generally nominal).

In Ontario and Québec, unregistered transfers of beneficial interests in real property are also taxed, subject to some exceptions, and the transfer of an interest in a partnership that owns land is considered by the taxing authority to be a transfer of beneficial interest in that land and is taxed on that basis, subject to certain exemptions in certain circumstances. Although beneficial transfers are not yet taxable in British Columbia, the broad anti-avoidance rules imposed with respect to the foreign buyer tax (see below) arguably include beneficial transfers made in connection with purchases subject to the foreign buyer tax.

In most jurisdictions, the buyer is liable for the payment of land transfer tax. In addition, the buyer is typically responsible for paying the applicable sales taxes, registration fees and other expenses relating to the purchase.

British Columbia and Ontario also impose taxes of 20% and 15%, respectively, on the transfer of certain residential properties in certain urban areas to foreign nationals, foreign corporations or trustees for a beneficial owner that is a foreign national or foreign corporation.

2.11 Legal Restrictions on Foreign Investors

At the federal level, the Competition Act and the Investment Canada Act provide for notification to, or review by, the federal government in certain circumstances involving acquisitions by non-resident purchasers. The federal Citizenship Act also permits each province and territory to enact laws restricting ownership of real property by non-residents.

At the provincial and territorial level, restrictions on the ownership of real property by non-residents vary from jurisdiction to jurisdiction. Most jurisdictions have taken measures to preserve farm or non-urban land – for example, the following all limit the amount of farm land that can be owned by non-residents (which in Québec and Prince Edward Island means persons who are not domiciled in the province) or require that the acquisition of farm land by non-residents be approved by the relevant agricultural commission, in each case subject to certain exemptions:

- the Agricultural and Recreational Land Ownership Act in Alberta;
- the Farm Lands Ownership Act in Manitoba;
- the Land Protection Act in Prince Edward Island;
- the Act Respecting the Acquisition of Farm Land by Non-Residents in Québec; and
- the Saskatchewan Farm Security Act.

Some provinces and territories also require that corporations incorporated outside Canada obtain an extra-provincial licence or complete certain registrations to hold and exercise rights over real estate in those jurisdictions. As mentioned in **2.10 Taxes Applicable to a Transaction**, the provinces of British Columbia and Ontario also impose additional taxes on foreign investors purchasing certain residential real estate in specified urban areas.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

Acquisitions of commercial real estate, including large portfolios, are typically financed through mortgage debt provided by financial institutions such as banks, insurers, trust companies, pension funds, credit unions and other entities that lend money in the ordinary course of business.

3.2 Typical Security Created by Commercial Investors

Real estate financing is most commonly secured by granting a mortgage and a general assignment of rents and leases, or an immovable hypothec in Québec, in respect of the borrower's interest in the subject real estate, along with a general security agreement, or movable hypothec in Québec, with respect to the borrower's personal property. These real property mortgages and personal property security interests are generally created by the execution of security documents and perfected by registration in the applicable land title and personal property registries. In certain circumstances, lenders may also require additional security such as an assignment of contracts and/or require a third-party indemnity or guarantee.

3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

Although any domestic or foreign legal or natural person having full legal capacity may lend money and take a mortgage (in Québec, a hypothec) to secure real estate loans, financial institutions such as banks and trust companies are regulated under provincial and federal legislation, with special provisions applying to foreign financial institutions, and mortgage brokerage legislation applies to lending on the security of real property in several provinces. In addition, in connection with the registration of security, certain land title registries require foreign lenders to provide additional documentation evidencing their existence and good standing. In some provinces, a foreign lender must be extra-provincially registered with the provincial corporate registry in order to take security over real property in the province. Further, although mortgage interests may be exempt from restrictions on foreign ownership of land, the act of realising upon security (for example, by way of foreclosure) could constitute a contravention of such restrictions.

3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

Nominal registration fees apply to the registration of a mortgage, general assignment of rents, hypothec or other registered real property security.

3.5 Legal Requirements Before an Entity Can Give Valid Security

While the giving of financial assistance has traditionally been restricted or prohibited, both at common law and by statute, in recent years many Canadian jurisdictions have eased or eliminated the requirements. However, legislation in some provinces still contains express disclosure and reporting requirements, and even where financial assistance is not directly prohibited or restricted by statute, directors must observe their fiduciary duty to act in the best interest of the corporation when approving such arrangements.

3.6 Formalities When a Borrower is in Default

In the common law provinces, the remedies for mortgage lenders generally (but not in all jurisdictions) include foreclosure, action on the covenant, judicial sale, power of sale and possession. Power of sale is a sale of the mortgaged property by the mortgage lender without court proceedings or supervision, either pursuant to the provisions of the mortgage that expressly grant the lender the power to sell the mortgaged property upon default, or the applicable provincial mortgage legislation. In Québec, analogous remedies include a personal right of action against the debtor, as well as the hypothecary rights of taking in payment, sale by a secured creditor, sale by judicial authority and taking possession for the purposes of administration. Many of these remedies may be exercised concurrently and consecutively in most Canadian provinces, but are subject to certain technical and procedural requirements, and borrower protections imposed by provincial statutes.

A lender is obliged to give 'reasonable notice' before making demand for payment and, in most circumstances, will be required to send notices under federal bankruptcy legislation before seeking to enforce its security over the interest in land. In some provinces (Ontario, New Brunswick, Prince Edward Island and Québec), the lender will be free to sell the property privately by following a process prescribed by statute, while reserving the right to sue the borrower for any deficiency in the sale proceeds. In some provinces (British Columbia, Alberta, Ontario and Québec), the lender can sue for foreclosure, which is a court order that results in title to the property passing to the lender in full satisfaction of the debt. More commonly, most provinces also permit a lender to apply to court for a judicial sale of the property, with the borrower remaining liable for any deficiency that may result. In many provinces, the lender can avail itself of multiple remedies.

3.7 Subordinating Existing Debt to Newly Created Debt

Certain registered and unregistered statutory liens for property taxes, pension deficits, construction liens or other statutory remittance obligations may have priority over secured debt, even if the secured debt was registered/perfected prior to the creation of such statutory liens/obligations. Subject to the foregoing, existing debt secured by registration may generally only be subordinated to new debt by agreement of the existing secured party and/or registered postponements or other instruments.

3.8 Lenders' Liability Under Environmental Laws

Generally speaking, merely holding security will not expose a lender to environmental liability, although the value of the secured asset could be reduced if such liability comes to light during the term of the loan. Upon taking steps to realise on the security and taking possession or effective control of the subject lands, a lender could be exposed to environmental liability.

3.9 Effects of Borrower Becoming Insolvent

Generally speaking, if security interests were granted by a borrower on a legitimate bona fide basis, for good consideration, then the subsequent insolvency of the borrower should not affect the enforceability of the security interest. That being said, the secured party's enforcement proceedings may be subject to court oversight and associated delays, due to the insolvency of the borrower and the administration of its assets and liabilities through federal insolvency legislation. If security was granted for little or no consideration, or on any basis where it could be proven that the intent of the grant of security was to prefer certain debts over other debts, then federal legislation imposes 'claw-back' rules that could impair or invalidate the security.

3.10 Consequences of LIBOR Index Expiry

At this time, the question is not applicable to Canada's jurisdiction.

4. Planning and Zoning

4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning

Provincial governments are constitutionally responsible for land use planning (other than on federal lands), but delegate most planning and zoning functions to municipalities. Much of the regulation of real property is in the form of zoning by-laws (informed by overarching provincial policies and plans, municipal official plans and '*plans d'urbanisme*') and building by-laws.

4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction

Municipal land use by-laws regulate nearly all aspects of the use of land, the nature of buildings and structures thereon, the size and intensity of development of the parcels of land and the permissible development of land. Building permits are required for the construction of, and additions/alterations to, buildings. Building permit fees vary by municipality, but are typically calculated based on the floor area of the proposed building or the value of the proposed construction, and the type and use of the building (ie, residential or non-residential). Building by-laws, including building permit requirements and building code standards, govern the types of building materials that must be used, heating and ventilation systems, electrical systems, sewerage and water systems, fire safety, access and inspection. The National Building Code of Canada has been adopted in whole or in part by the municipalities of most provinces, resulting in a trend towards national uniformity in building regulation. If an existing building has heritage value, federal, provincial or municipal regulations may restrict redevelopment. Depending on the applicable zoning by-laws for developments in specialised urban areas, additional approvals pertaining to design may be required.

4.3 Regulatory Authorities

As noted in **4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction**, most planning and zoning functions for which the provinces have responsibility have been delegated to municipalities. Zoning by-laws and building by-laws enacted by municipalities designate geographic zones within the municipality and prescribe the types of uses allowed or that will be considered in each zone. These by-laws will generally also restrict density, height and parcel size, and impose requirements such as minimum building setbacks and parking requirements.

4.4 Obtaining Entitlements to Develop a New Project

Development projects will typically require applications for subdivision permission, re-zoning and development permits. Each municipality has differing eligibility, procedural and documentary requirements for each category of development permissions. The process and requirements can range from submitting an application and paying fees to meeting with municipal committees or the public, submitting plans and seeking the approval of municipal councils. Depending on the development application sought, third parties (particularly neighbours) may have the right to be given notice of the application and participate at a public hearing.

4.5 Right of Appeal Against an Authority's Decision

The availability of a right of appeal in these matters varies by province. In some provinces, such as Alberta and Ontario, the decision of a municipality may be appealed to a specialised tribunal. In others, such as British Columbia, there is no such tribunal and municipal council decisions are not subject to judicial review on their merits (although they may be reviewable on formal grounds such as lack of jurisdiction, procedural fairness or natural justice).

4.6 Agreements with Local or Governmental Authorities

Large-scale developments by private real estate developers will typically require an agreement or agreements with the municipality setting out the terms and conditions under which development is to proceed. These terms and conditions typically relate to the allocation of responsibilities with respect to the construction of public facilities, as well as to land dedications, servicing commitments and requirements, and other financial obligations, fees and levies.

4.7 Enforcement of Restrictions on Development and Designated Use

Provincial legislation generally provides for fines and penalties for contravention of applicable zoning and building by-laws. Municipalities may also take direct enforcement action against an offender to bring about compliance and have the capacity to pursue injunctions (which can be temporary or permanent) and other court orders, and in exceptional circumstances may exercise their expropriation powers.

5. Investment Vehicles

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

Generally speaking, legal persons (such as corporations) and natural persons may hold and exercise rights over real property in Canada. As such, investment in real estate may be made by way of direct ownership by an individual or through ownership of shares in a corporation or company that owns real estate. In addition, various relationships may be established in respect of the ownership of land, such as co-ownerships, partnerships and trusts. The choice of vehicle is based largely on tax consequences, liability concerns and business considerations. Corporations, partnerships, co-ownerships and trusts are generally the most popular investment vehicles used for real estate purposes in Canada.

5.2 Main Features of the Constitution of Each Type of Entity

Corporations are legal entities distinct from their shareholders. While corporations provide the benefit of limited liability for shareholders, the income, losses, gains and capital cost allowances of the corporation are taxed or deducted at the corporate level, followed by the taxation of dividends in the hands of the shareholders.

By contrast, a partnership is not a distinct legal entity and rather constitutes a legal relationship between or among its partners (being individuals, corporations, other partnerships and/or trusts) governed, depending on the jurisdiction, by common law and/or statute. Under Canadian law, there are two principal types of partnership, general and limited, as follows: (i) in a general partnership, all partners can participate in management and all are subject to unlimited joint and several personal liability for the partnership's obligations, and (ii) in a limited partnership, partners are divided into general and limited partners, with the latter's liability being limited to the amount of their capital contributions on the condition that they do not participate in the management of the business of the partnership.

A significant advantage of investment via a partnership (of either type) is the tax treatment: although income and losses are calculated at the partnership level, they are taxed and deducted at the partner level.

Co-ownerships, like partnerships, are not separate legal entities but constitute a legal and/or contractual relationship between two or more owners of interests in land. Income and losses pass through to the co-owners, who may claim certain tax deductions separately from the other co-owners. For this reason, it is important to take care when drafting co-ownership agreements to avoid the possibility that the relationship may be construed as one of partnership (where, for example, each partner can bind all the other partners) rather than co-ownership.

Trusts are also not separate legal entities and instead constitute a legal and fiduciary relationship that arises where a person holds property as trustee for the benefit of others. Both trustees and beneficiaries can, in some circumstances, be personally liable in connection with the trust property, subject to indemnification of the trustees by the beneficiaries and/or from the trust's assets. Additionally, publicly traded real estate investment trusts have certain legislative protections in this regard. Income may be taxed at the trust or beneficiary level.

5.3 Minimum Capital Requirement

There is no minimum capital requirement for any of the entities mentioned.

5.4 Applicable Governance Requirements

Corporations can be incorporated federally or provincially and are required to file articles of incorporation with the relevant governmental authority. A corporation's governance framework can be shaped by its shareholders through provisions in its articles, shareholder agreements and corporate by-laws. The articles provide basic details such as the corporation's business name, registered office, first director(s), share capital and any share provisions. By-laws are commonly used to add to, or in some instances supplant, default provisions set out in the corporation's governing statute. Shareholder agreements may, among other things, regulate how shares in the corporation will be sold, specify procedures by which important decisions are made and provide protection for minority shareholders. Although there are mechanisms to individualise a corporation's governance structure, federal or provincial statutes nonetheless stipulate certain corporate requirements such as the number and residency of the directors and fiduciary duties. Additionally, public corporations are subject to securities law requirements of the applicable jurisdiction in which they distribute securities.

While provincial and territorial partnership legislation may impose basic governance rules, most sophisticated parties enter into partnership agreements setting out matters of governance in detail. The partnership agreement typically addresses capital contributions, the operation of the business, the distribution of profits and losses, and the addition or removal of partners. Partners that are corporations will also be subject to the governance requirements applicable to corporations.

Based on the contractual nature of a co-ownership, governance requirements vary widely depending on the agreement between the parties. The contract between the co-owners may establish particular rights and restrictions relating to the underlying land, determine profit sharing and delegate management responsibilities. Co-owners that are corporations will also be subject to the governance requirements applicable to corporations.

The governance requirements of a trust are determined by provisions of the agreement establishing the trust.

5.5 Annual Entity Maintenance and Accounting Compliance

Annual legal costs for entity maintenance are typically less than CAD1,000.

6. Commercial Leases

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

Leases and licences are the two primary arrangements that allow a person, company or other organisation to occupy and use real estate for a limited period of time without buying it outright. Leases and licences are contractual arrangements made between two parties with respect to use and occupancy of land. A lease interest granted in favour of a tenant provides the tenant with exclusive possession over a specific area of real estate for a limited period. A licence may also allow a person, company or other organisation to occupy and use real estate for a limited period; however, a licence only permits a party to use real estate and does not necessarily grant that party exclusive possession.

6.2 Types of Commercial Leases

Various forms of commercial lease have evolved to address particular uses of real property. The most common categories of commercial lease include commercial/office leases, retail leases and industrial/warehouse leases.

Commercial leases may be further categorised into 'net leases', being the most common type of commercial lease, and 'gross leases', which are far less frequently used. Under a net lease, all operating costs and expenses relating to the property are passed on to the tenant(s) in addition to the required payment of base rent, although responsibility for capital expenses may remain with the landlord. Under a gross lease, tenants are charged a fixed gross rent – typically calculated to cover the landlord's operating and capital costs and expenses, while providing the tenant certainty as to its financial obligations relating to the property – but no additional rent.

Ground leases (emphyteutic leases in Québec) are another type of lease, the hallmarks of which are generally a long term, with few landlord obligations and a right or obligation on the part of the tenant to construct, manage and control the buildings and/or improvements on the land. The distinguishing factor between ground leases and other leases is that the tenant can invest in, and enjoy the depreciation of, the buildings on the land. For this reason, the landlord will typically enjoy a relatively low threshold of oversight and control, while the tenant will have greater contractual certainty of tenure in order to enjoy, protect and finance its investment.

6.3 Regulation of Rents or Lease Terms

Rents and lease terms are freely negotiable with the exception that the Civil Code of Québec caps the term at a maximum of 100 years. If the term exceeds 100 years, the effect of the relevant provision in the Civil Code is to reduce the term to 100 years.

6.4 Typical Terms of a Lease

An initial lease term typically ranges between five and ten years, and is often subject to a tenant's option to extend for one or more additional periods (commonly of five years each). The length of a lease term will depend on the strength of the parties' positions and market conditions. A ground lease, in which the tenant will generally have financed and constructed the buildings and/or improvements on the land, will typically have a longer initial term and options to extend for several periods of five or ten years each.

Most leases impose the obligation to maintain and repair the leased premises upon the tenant.

Most leases require that rent be paid monthly, in advance.

6.5 Rent Variation

For commercial leases, rent is based on market conditions and negotiated prior to settling the lease agreement. Market conditions and circumstances of the parties will determine whether there will be a fixed rental rate for the duration of the term or whether the rental rate will incrementally increase at certain durations throughout the lease.

6.6 Determination of New Rent

Rent is commonly changed or increased when an extension or a renewal is exercised by a tenant. The rent payable for an extension or renewal of the lease term is either dictated by the extension or renewal provision in the lease agreement, if negotiated at the time the lease agreement was initially entered into, or, if not pre-determined, set at the market rate for a comparable property at the time of extension or renewal.

6.7 Payment of VAT

Depending on the province, goods and services tax (GST), harmonized sales tax (HST), or Québec sales tax (QST) is payable on rent for commercial real estate and must be collected by landlords. If the commercial tenant is registered for GST/HST/QST purposes and is engaged in commercial activities, up to 100% of such taxes should be recoverable by the tenant. GST/HST/QST paid by commercial landlords on their expenses is generally recoverable, whereas GST/HST/QST paid by residential landlords is not.

6.8 Costs Payable by Tenant at Start of Lease

A security deposit may be due at the commencement of a lease. In some jurisdictions, if the lease term exceeds certain thresholds then transfer tax may be triggered.

6.9 Payment of Maintenance and Repair

Tenants occupying leased premises in a multi-tenanted development will typically pay, as additional rent, a pro rata share of the costs and expenses incurred by the landlord in maintaining and repairing shared or common areas. In more landlord-friendly markets, landlords will increasingly allocate the responsibility for any and all maintenance, repair and replacement costs to the tenants, including for structural matters. That being said, major capital costs are most often allocated to the tenant on an annual amortised or depreciated basis, so that the tenant's proportionate share of such major costs are not charged to the tenant at one time.

6.10 Payment of Utilities and Telecommunications

Tenants are typically responsible for the cost of their own utilities and telecommunications services. If the premises are separately metered, the tenant may pay the landlord or may pay the utility provider directly. Where premises are not separately metered, the cost of utilities and telecommunications services are typically allocated among the tenants by the landlord proportionately based on the relative floor areas of their premises. The costs of utilities serving common areas are also typically allocated in this manner.

6.11 Insuring the Real Estate that is Subject to the Lease

It is relatively common for a landlord to insure the building, fixtures and improvements of a leased development, whereas a tenant will be responsible for insuring its fixtures, trade fixtures and personal property (and, in some cases, leasehold improvements made by the tenant). Insurance premiums paid by the landlord are typically recovered from tenants as additional rent. A landlord will typically require that the tenant carry 'all risks' physical damage insurance in respect of the property it is responsible for insuring and will also require the tenant to carry general liability insurance and possibly business interruption insurance.

6.12 Restrictions on Use of Real Estate

Generally, landlords may impose restrictions on how a tenant uses the real estate, subject to certain applicable laws such as human rights and discrimination laws. Land use, zoning and planning laws may also impose use restrictions on a tenant's use of leased premises. Moreover, the use of real estate can sometimes be affected by specific restrictive covenants (granted in favour of other tenants or neighbouring landowners) that impose use restrictions.

6.13 Tenant's Ability to Alter and Improve Real Estate

The terms and conditions of a lease will determine whether a tenant is permitted to alter or improve leased premises, or install tenant trade fixtures. Landlords often restrict tenant alterations, improvements and installations that affect the structure of the leased premises or affect or disturb other tenants. Tenants will almost always be responsible for repair and maintenance of such alterations, improvements and installations. On termination, the lease will usually indicate whether the alterations, improvements and installations have to be removed and the leased premises restored to its original state by the tenant, whether reasonable wear and tear is excepted, and whether improvements will become the property of the landlord.

6.14 Specific Regulations

All Canadian provinces and territories have residential tenancy legislation; in Québec it is included in the Civil Code. Some also have legislation governing commercial tenancies generally, without specific provisions in respect of any particular category of commercial property. Where legislation does not exist or does not address an issue, common law principles may apply.

6.15 Effect of Tenant's Insolvency

Subject to the specific terms and conditions of a lease, a tenant's insolvency would likely trigger the occurrence of an event of default under the lease and permit a landlord to terminate the lease; however, bankruptcy legislation would apply to the tenancy relationship.

In Alberta, a landlord's rights are set out in the Landlord's Rights on Bankruptcy Act (the Act). In accordance with the Act, as soon as a receiving order or assignment is made pursuant to the Bankruptcy and Insolvency Act (Canada), a landlord is no longer entitled to distrain or realise the rent by distress. However, a tenant is deemed to be a debtor to the landlord for surplus rent in excess of the three months' rent accrued due at the date of the receiving order or assignment and for any accelerated rent to which the landlord may be entitled under the lease (but not exceeding an amount equal to three months' rent). A trustee is entitled to occupy the leased premises pursuant to the provisions of the Act.

6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations

A landlord may require a tenant to pay a security deposit prior to possession of the leased premises and may require that the tenant grant to the landlord security over the tenant's personal property realisable on a tenant default. A landlord may also include self-help remedies in the lease to allow the landlord to step in and perform the obligation, which cost of said remedy would be forwarded on to the tenant as additional rent. In the event that the landlord requires additional security, a landlord may require a third-party indemnity or guarantee from a parent company or subsidiary.

6.17 Right to Occupy After Termination or Expiration of a Lease

Commercial tenants generally do not have the right to continue to occupy the relevant real estate after the expiry or termination of the lease term. However, leases often contain an 'overholding' clause that provides for the possibility that a tenant may remain in possession of leased premises after expiration or termination, but stipulates that in such event, the tenant is deemed to be a monthly tenant and, as a deterrent, that the rent will be increased for such overholding period, often equal to 120% to 150%, and even up to 200% of the monthly rent payable during the term. Overholding periods are generally terminable by notice given by either party to the other. Some provincial commercial tenancies statutes also provide that rent doubles in the event of overholding in the face of valid notice to quit.

To ensure that a tenant leaves on the date originally agreed, a landlord will typically make arrangements with the tenant for end-of-term inspections of the leased premises and provide ample notice of tenant repair and maintenance obligations expected by the landlord prior to surrender.

6.18 Right to Terminate Lease

A landlord will typically have the right to terminate a lease in the event of failure to pay rent or other material breach that is not cured within a specified grace period, the tenant's bankruptcy or insolvency and the occurrence of damage to or destruction of the leased premises or the commercial complex exceeding specified thresholds. While exceptions may apply for anchor retail tenants or other tenants with significant bargaining power, tenants typically have no right to terminate a lease or may only do so in limited circumstances, such as upon damage or destruction of the leased premises or the commercial complex exceeding specified thresholds. In most circumstances where a tenant negotiates an early termination right, fees will be payable, often based on the unamortised value of leasehold improvements paid for or contributed to by the landlord, as well as the remaining term.

6.19 Forced Eviction

A tenant may be forced to vacate leased premises in the event of default prior to the date agreed to under the lease. Leases often provide that a breach must be material and go uncured beyond a specified grace period before the tenant can be dispossessed. In addition, in most jurisdictions a landlord is required to serve notice specifying the breach and allowing a reasonable period to remedy the breach before it may re-enter the premises. The process and duration are largely determined by the terms of the lease.

6.20 Termination by Third Party

A lease may be terminated by a third party, such as a government authority, a municipal authority or a jurisdictional court pursuant to legislative authority, such as those relating to expropriation or condemnation of land. In such cases, compensation will depend on the legislation the government authority, a municipal authority or a jurisdictional court is acting in accordance with. In cases of expropriation, it is possible for both a landlord and tenant to be compensated for their interest in real estate being expropriated. Calculation of the compensation and the length of the process will be dependent upon the principles of compensation set out by the expropriation legislation.

Apart from terminations caused by a government authority, municipal authority or court, in some jurisdictions a lease for a term longer than three years may become invalid and therefore terminated if a bona fide third party acquires a landlord's interest for value without notice of the lease.

7. Construction

7.1 Common Structures Used to Price Construction Projects

Canadian construction contracts generally adopt one of the following structures:

- *Fixed price* – predetermined, stipulated or lump-sum price.
- *Cost-plus* – based on the contractor's actual costs, plus a percentage or fixed fee applied to actual costs, and in some cases subject to an overall guaranteed maximum price.
- *Unit price* – predetermined fixed amount for each specified unit of work performed, which amounts are multiplied by the measured quantity of work performed for each specified unit.

7.2 Assigning Responsibility for the Design and Construction of a Project

The allocation of responsibility for the design, construction and other aspects of Canadian construction projects is determined by the project delivery model, and ultimately the applicable form of construction contract(s), used by the owner. These models generally include the following:

- *Design-build* – the owner engages a single design-builder who assumes overall responsibility for the design and construction of the project (including price, schedule and performance) provided that the owner generally retains the risks associated with changes or unexpected conditions. Should the owner elect to enter into separate contracts with the designer and the general contractor, the owner will assume the risk associated with co-ordina-

tion and conflict issues that may arise between those two counterparties.
- *Owner and multiple contractors* – the owner enters into separate contracts with different contractors for each portion of the work to be completed. This assigns the risk evenly amongst the contractors and creates a direct contractual relationship with each. However, responsibility and risk associated with co-ordination and conflicts remains with the owner. Accordingly, an owner may engage a construction manager to enter into direct contracts with the contractors on the owner's behalf to help to manage better, and in some cases reallocate, such risks.

Ultimately, the objectives of the owner – whether control, scope, schedule, quality or risk allocation – must be identified and prioritised in determining the proper model and contract to be used for a particular construction project.

7.3 Management of Construction Risk
Generally, construction risks are managed through the provisions that are negotiated and incorporated into the construction contract. Those provisions typically relate to indemnities, warranties, retention, liquidated damages, termination rights, exclusions, limitations and waivers of liability, force majeure and insurance requirements. Depending on the jurisdiction, there may be statutory or other legal limitations on the scope of some of these provisions, most commonly in relation to liquidated damages, waiver of lien rights and timing of payments.

Risk may also be managed through the use of additional forms of security such as bonds, letters of credit or guarantees.

7.4 Management of Schedule-related Risk
Schedule-related risks are generally managed through the contractual risk allocation whereby the construction contract will stipulate which party bears responsibility for different types of schedule impacts and delays. The parties are free to incorporate liquidated damage provisions that provide that an owner is entitled to monetary compensation or rights of set-off if certain milestone and completion dates are not achieved, subject generally to certain excusing events such as force majeure and owner-caused delays. The amount of the monetary compensation to which the owner is entitled must represent a genuine pre-estimate of the actual cost or loss to the owner attributable to such delay and not a penalty to the contractor, as Canadian law may limit the enforcement of penalty clauses. Payment incentives and early-completion bonuses are also common features of construction contracts.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance
While ultimately dependent on the nature and scope of the applicable construction project, as well as the parties involved, it is common for owners to seek additional types of security from a contractor. That security is most commonly in the form of labour, material and performance bonds, and letters of credit, although in some cases an owner may insist on some form of corporate guarantee.

7.6 Liens or Encumbrances in the Event of Non-payment
Each of the Canadian provinces gives those providing work, materials and/or services supplied to a construction project with statutory construction, builders' or mechanics' lien rights (known in Québec as 'legal hypothecs'). Since construction liens are statutorily created at the provincial level, the legislation in the province where an applicable construction project is located must be reviewed to confirm the applicable rights and procedures. At the most general level, however, construction liens are registered against the project lands, with owners having the ability to remove the lien in either of two ways:

- by discharging the lien, which requires the lien claimant to deliver and register a release (typically following payment of the amount owing under the lien) or the owner to obtain a court order that the lien is invalid (ie, because the lien claimant has failed to meet the prescribed time periods for preserving and/or perfecting the lien); or
- by vacating the lien, which requires the owner to pay, or to provide a bond or letter of credit for, the full amount of the claim for lien to the court – if this is done, such monies will stand as security for the claim in lieu of the property and the lien will be removed from title to the project.

Most provincial construction lien statutes protect owners who abide by the holdback provisions of the statute and retain the specified percentage (usually 10%) from each progress payment under the construction contract. These holdback funds can be paid into court if a lien is registered against an owner's lands in order to have the lien discharged from title to the lands. If this is done, the owner will not bear any further liability in respect of the lien provided the owner had no direct contractual obligations to the lien claimant that are in dispute.

In Québec, construction liens (legal hypothecs) are governed by the Civil Code and subsist without registration for 30 days after the end of the work, after which they must be registered in order to be preserved. There are no holdback provisions in the Civil Code and such legal hypothecs secure the value added by the work, services or supplied materials.

7.7 Requirements Before Use or Inhabitation
In most cases, an occupancy permit or final approval, based on compliance with building codes and other applicable regulations/standards, must be issued by the local municipality before a project can be inhabited or used for its intended purpose.

8. Tax

8.1 VAT

GST, HST and QST constitute all applicable value added tax (VAT) in Canada; rates range from 5% to 15%, depending on the jurisdiction within Canada in which the transfer takes place.

GST/HST/QST generally apply to the transfer of commercial real property, as well as new residential real property. The seller is responsible for collecting the applicable VAT from the buyer, except in certain circumstances where the buyer is entitled to self-assess VAT (ie, buyers that are registered for VAT purposes and that acquire real estate in the course of their commercial activities). Used residential real estate is generally exempt from VAT. Additionally, transfers of real property in the context of the sale of a business may be exempt from GST/HST/QST.

8.2 Mitigation of Tax Liability

Where land transfer tax is imposed, it typically applies to the transfer of real estate and not to transfers of shares of a corporation or (with exceptions, such as in Ontario) interests in a partnership that owns real estate. In some jurisdictions, land transfer tax is payable on the conveyance of a leasehold interest in land if the term of the lease exceeds specified thresholds.

In British Columbia, property transfer tax is currently only payable on registered transfers of real property. Transfers of a beneficial interest in real estate do not trigger payment of property transfer tax. As a result, owners of commercial real estate often structure their ownership as a bare trust with a nominee company holding the legal or registered title to the real estate in trust for the 'real' or beneficial owner of the real estate. At closing of a sale transaction, the seller transfers the shares of the nominee company and transfers the beneficial interest in the property to the buyer, thus avoiding the need to register a transfer of title in the Land Title Office. However, such transactions are anticipated to incur tax in the future. Also, certain disclosures are required and on 20 June 2018, the British Columbia government released draft legislation that will establish a publicly accessible registry of beneficial owners in British Columbia that is intended to be shared with federal and provincial tax and law enforcement authorities. Also, given the broad anti-avoidance provisions embedded in the new foreign buyer tax, certain unregistered transfers of interests in title could trigger the tax, despite the foreign buyer tax being structured as a registration tax.

As discussed in **1.3 Proposals for Reform**, the British Columbia government has recently introduced an annual 'speculation tax'. Purchasers of residential properties in the geographic regions subject to the tax will need to consider whether the tax is payable or whether exemptions are available. Exemptions exist for property under development or construction if reasonable steps are being taken to develop the property.

8.3 Municipal Taxes

Municipal property taxes are payable by the owner of the property and are generally passed on to tenants. These taxes are typically calculated based on the use and assessed value of the property. Some municipalities provide exemptions from municipal property taxes for public and/or non-profit organisations, or for geographical areas in which the municipality wishes to provide an incentive for development.

8.4 Income Tax Withholding for Foreign Investors

Payments such as dividends, interest, royalties and rent made by a Canadian resident to a non-resident will be subject to Canadian withholding tax. Pursuant to Part XIII of the Income Tax Act (Canada) (ITA), withholding tax at the rate of 25% will apply. However, in many instances, the 25% withholding tax will be reduced by virtue of an applicable provision in a tax treaty between Canada and the state of residence of the non-resident to whom the payment is made.

The taxation of Canadian rental income for a non-resident of Canada depends, in part, on whether such income is characterised as income from property or income from carrying on a business in Canada. In general, the more effort expended in respect of the property, the higher the likelihood that it would constitute a business.

If the rental income constitutes carrying on business in Canada then the non-resident will generally be subject to Canadian income tax on its net income attributable to that rental business. The rate of tax paid is generally the same as that which is paid by Canadian resident corporations (approximately 26.5%). In addition to the mainstream Canadian tax on Canadian-source income, the non-resident will also be liable to pay a branch tax at the statutory rate of 25% on its after-tax Canadian profits that are not reinvested in its Canadian business. Under the Canada-US Tax Treaty, the branch tax can be limited to 5% provided that its members are corporations that are entitled to the benefits of the Canada-US Tax Treaty (with the first CAD500,000 of earnings being exempt from the branch tax). If the rental income is passive then the non-resident of Canada will generally be subject to Canadian withholding tax under Part XIII of the ITA. The ITA provides for a withholding tax at a rate of 25% on the gross rental income. Canada's tax treaties generally do not reduce the rate of withholding tax on passive rental payments in respect of the use of Canadian real property. The payor making the payment or crediting the amount of rent to the non-resident is required to withhold and remit this tax to the Canadian tax authorities and may be held responsible for the tax if it fails to do so.

As an alternative to the 25% gross withholding tax regime under Part XIII, a non-resident of Canada can make an election in respect of its passive rental income that will allow it to file a Canadian income tax return and be taxed on a net basis (ie, after deducting its expenses associated with property). The rate of tax payable is the same as that which is paid by Canadian resident corporations.

Non-residents are subject to Canadian income tax under the ITA if, amongst other things, they dispose of taxable Canadian property (TCP). For these purposes, TCP includes a direct interest in real property or an interest in a private corporation, partnership or trust where, at any time in the last 60 months prior to the date of disposition, more than 50% of the value of the interest is derived primarily from real property situated in Canada. Relief may be available under an applicable income tax treaty if the sale of an interest in a corporation, partnership or trust does not, at the time of sale, derive more than 50% of its value primarily from real property situated in Canada.

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Where a non-resident of Canada proposes to sell TCP, the purchaser may be required to withhold 25% (for non-depreciable capital property) or 50% (for depreciable property) from the purchase price, unless a clearance certificate is applied for and granted. In addition, a non-resident must notify the Canadian taxing authorities about a disposition of TCP before they dispose of the property or within ten days following the disposition.

For a discussion of VAT on rent, see **6.7 Payment of VAT**.

8.5 Tax Benefits

In computing net rental income – that is, where income is earned by a resident entity, where rental income earned by a non-resident constitutes business income, or where a Section 216 election has been made by a non-resident earning property income – expenses incurred in earning such income may generally be deducted, including operating expenses, reasonable financing costs and tax depreciation.

Tax depreciation may be claimed on buildings and other depreciable property used to earn rental income. Tax depreciation is allowed generally at rates varying from a 4% to 10% declining balance rate on buildings and other structures. The amount claimed is discretionary and claims may be made in whole or in part, although tax depreciation generally cannot be used to create or increase a rental loss. The rate in the year of acquisition is generally one half of the rate otherwise available.