

A close-up photograph of gold and silver coins. The top portion shows a gold coin with a maple leaf design and the words "FINE GOLD". The bottom portion shows a silver coin with the words "FINE SILVER". The coins are set against a dark red background with a diagonal split.

Canada: Real Estate Law Overview

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Canada: Real Estate Law Overview

General

The sale and development of real estate is essentially a matter of provincial jurisdiction. With the exception of Quebec, each of the provinces and territories has enacted statutes that govern the acquisition, ownership, use and development of real estate (all of which are similar in content and scope). In Quebec, the law relating to real estate is based on civil law and is for the most part enshrined in the *Civil Code of Quebec*.

Restrictions on Ownership of Real Estate

As a general principle, natural persons other than those under a legal disability are capable of acquiring, holding and disposing of real estate in Canada, and a Canadian non-resident can generally acquire, hold and dispose of real estate in the same manner as a Canadian resident or citizen. That notwithstanding, the federal *Citizenship Act* permits each province to enact laws restricting ownership of real property within the province by non-residents. These restrictions on ownership vary from province to province: Prince Edward Island, for example, has enacted legislation which significantly restricts the amount of land that may be held by persons (whether corporations or individuals) not resident in the province. Alberta and Quebec have legislation prohibiting the acquisition of interests in certain types of real property by non-residents without the prior consent of the province or an applicable exemption (both restrict ownership of agricultural land and Quebec also restricts ownership of classified cultural objects). Further, some provinces have provincial licensing or registration requirements that must be complied with if a corporation is to hold land in that province. There is also federal legislation on foreign ownership that provides for notification to, or review by, the federal government in certain circumstances involving acquisitions by non-resident purchasers.

Types of Real Property Rights

There are various rights over land recognised under Canadian real estate law in the common law jurisdictions. An “estate” indicates an interest in real property of a particular type or duration, and is either “freehold” (which is one of indefinite duration), or “leasehold” (which is one the maximum duration of which is fixed or capable of being fixed in time). Among the various types of freehold estate, the fee simple is by far the most common and is, for all but the most theoretical of purposes, equivalent to ownership. Some other types of rights frequently encountered in the common law jurisdictions include easements, profits-a-prendre and restrictive covenants (all of which constitute rights in land), and licences (which are purely contractual).

Quebec law distinguishes between personal rights (rights enforceable against a person) and real rights (rights in property). Real rights include rights of ownership, rights in a thing belonging to someone else, and rights in the form of a claim over another's property. Some are perpetual (e.g. the right of ownership and servitudes), and others are temporary (e.g. emphyteusis).

Title Registration

All privately owned (as opposed to crown owned) real property in Canada is registered. Each province administers its own system for the registration of interests in land, both with respect to title to land and encumbrances thereon. The two major systems in use in Canada are the registry system and the land titles (or "Torrens") system. Each province uses a modified system of either one or both of these systems.

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 government pursuant to detailed legislation, and title to land within the system is, subject to certain statutory limits, effectively guaranteed by the government (see below).

Government Guarantee of Title

The register or certificate of title produced for properties registered under the land titles system may be relied upon implicitly by all persons as constituting the true and accurate status of title. In those relatively rare cases in which a person is wrongfully deprived of an interest in property by virtue of an error on the register or certificate, access may be had to a government-administered assurance fund for compensation.

There is no government guarantee of title in provinces and territories using the registry system of recording title (for example, Quebec). Under the registry system, quality of title is determined by the individual searching the file and is based on priority in time of registration.

Taxes on Real Property

Transfers of real estate in most Canadian jurisdictions are subject to a land transfer tax, which is imposed at both the provincial and municipal levels. In some provinces, municipalities (such as the City of Toronto in Ontario and various municipalities in Quebec) 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) to no tax at all in Alberta, Newfoundland & Labrador and parts of Nova Scotia. In Ontario and Quebec, unregistered transfers of beneficial interests in real property are also taxed, subject to some exceptions. In

most jurisdictions, the buyer is liable for the payment of land transfer tax, although in Quebec, the seller may also be liable in certain circumstances.

The provinces of British Columbia and Ontario also impose a tax of 15% on the transfer of certain residential properties to foreign nationals, foreign corporations or trustees for a beneficial owner that is a foreign national or foreign corporation.

In addition, the transfer of commercial and new residential buildings is subject to the Goods and Services Tax (GST) (or the Harmonized Sales Tax (HST) in Nova Scotia, Newfoundland & Labrador, New Brunswick, Ontario and Prince Edward Island), in addition to Quebec Sales Tax (QST) if the property is located in Quebec. The seller is responsible for collecting the GST/HST and QST (as applicable) from the buyer, other than for buyers who are entitled to self-assess under the appropriate tax legislation.

Income taxes are normally payable on profits or gains from the disposition of land. If real estate constituting capital property is sold at a capital gain, 50% of the gain is treated as taxable income. To the extent that the property was used in carrying on a business and is subject to capital cost allowances and these capital costs are also recovered through the sale, the amount of such recovery will be fully taxable. Disposal of a real estate property included in the inventory of the seller is treated as business income, 100% of which is subject to tax. In addition, if the seller of a property is a non-resident of Canada, the buyer must withhold a percentage of the sale proceeds on behalf of the Canadian tax authorities unless the seller can produce a clearance certificate issued by the tax authorities.

Commercial Leasing

Leasing of business premises in most provinces in Canada is governed by provincial statute. For example, Ontario's *Commercial Tenancies Act* regulates most aspects of the landlord-tenant relationship in a commercial context. In addition to specific legislation, there is an abundance of common law that has developed in this area, which is relied upon by both landlords and tenants in the common law jurisdictions when enforcing their respective rights and/or remedies under commercial leases.

Although generally not prescribed by statute, different forms of leases specific to the nature of the use of the property (for example, retail, industrial and warehousing or office property) have evolved. In general, commercial leases may be classified as (i) "net leases" (where the tenant pays a fixed rent as well as its proportionate share of all expenses relating to the ownership, operation and maintenance of the property); (ii) leases where, in addition to the costs associated with the net lease, the tenant also pays for structural repairs; (iii) "semi-gross leases" (where the landlord assumes certain expenses out of the base rental that it receives); and (iv) "gross leases" (where the tenant only pays a fixed amount).

GST (or HST in applicable provinces) is imposed on rent payable by tenants under a commercial lease. If the tenant is registered for GST/HST purposes and exclusively

engaged in commercial activity, it is subsequently recoverable by the tenant, but the landlord is responsible for collecting it on behalf of the tax authorities. In some provinces, provincial sales tax may also apply. Rent received by the landlord is subject to income tax.

Buying and Selling Real Estate in Canada

Generally, real estate is listed for sale and marketed through a real estate broker. The agent acting for the buyer will often prepare the offer and submit it to the listing agent, although sophisticated buyers (particularly with respect to commercial real estate transactions) will typically negotiate the offer to purchase directly with the seller, often with assistance from their lawyers.

When acting for buyers, lawyers will perform the task of examining title to the subject property as well as conducting various “off-title” enquiries regarding issues ranging from the status of realty taxes to environmental matters. A buyer’s lawyer will then negotiate resolutions to any issues raised as a result of such investigations and prepare closing documents.

Financing Matters

A mortgage must generally be in writing, duly executed and registered against title to the property in order to protect the lender’s priority. Registration of a mortgage is typically required by lenders in order that their mortgages will have priority over subsequent or unregistered mortgages. The lender will often take additional security such as a general assignment of rents and/or a general security agreement, notice of which it may register against the borrower’s name under the personal property security legislation of the applicable province. Lenders may also require recourse to the borrower personally and/or require an indemnifier or guarantor of the mortgage. In Quebec, the security will take the form of a hypothec registered against title to the property (referred to as an “immovable”). An immovable hypothec must be granted by notarial *acte en minute* and it must describe the hypothecated property in a precise manner. Similarly to other provinces, the hypothec may also be granted in respect of movable property, as well as on the present and future rents produced by the immovable.

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 (e.g. Ontario, New Brunswick, Prince Edward Island and Quebec), 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 (e.g. British Columbia, Ontario and Quebec) the lender will be able to sue for foreclosure, a court order that results in title to the property passing to the lender in full satisfaction of the debt. 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 will have multiple remedies available to it.

Non-residents should also consider any tax issues that may arise with financings, particularly in non-arm's length situations.

Land Use Planning

Each province has planning legislation which governs the use and development of land and buildings. Although provincial governments are responsible for land use planning, many planning functions are delegated to municipalities. Much of the regulation of real property is in the form of zoning by-laws (informed by overarching provincial policies and plans and municipal official plans or *plans d'urbanisme*) and building by-laws. Zoning by-laws regulate virtually all aspects of the use of land, the nature of buildings and structures thereon, the size of parcels of land and the permissible development of land among other things.

Building permits are required for the construction of, additions to or alterations to buildings. Permit fees vary widely from municipality to municipality, but are generally calculated based on the floor area of the proposed building and the type or use of the building (residential or non-residential). Building by-laws, including building permit requirements and building code standards, govern such matters as building materials, heating and ventilation systems, electrical systems, sewage 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 toward national uniformity in building regulation.

Other Matters

Other provincial legislation to be considered in appropriate circumstances includes environmental legislation (particularly with respect to properties that might be environmentally sensitive or contaminated, or for environmental assessment of infrastructure, permits for water or air emissions, water taking and noise control), residential rent control legislation, floodplain control legislation and heritage protection legislation.

About the Firm

When Heward Stikeman and Fraser Elliott first opened the firm's doors in 1952, they were united in their pledge to do things differently to help clients meet their business objectives.

In fact, they made it their mission to deliver only the highest quality counsel as well as the most efficient and innovative services in order to steadily advance client goals.

Stikeman Elliott's leadership, prominence and recognition have continued to grow both in Canada and around the globe. However, we have remained true to our core values.

These values are what guide us every day and they include:

- Partnering with clients – mutual goals ensure mutual success.
- Finding original solutions where others can't – but they must also be grounded in business realities.
- Providing clients with a deep bench of legal expertise – for clear, proactive counsel.
- Remaining passionate about what we do – we relish the process and the performance that results from teamwork.

A commitment to the pursuit of excellence – today, tomorrow and in the decades to come – is what distinguishes Stikeman Elliott when it comes to forging a workable path through complex issues. Our duty and dedication never waver.

This is what makes Stikeman Elliott the firm the world comes to when it counts the most.

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