Real Estate, Municipal and Land Use Planning

Doing Business in Canada

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LEGAL JURISDICTION

Ownership of real property in Canada is governed primarily by provincial and territorial law, although there are also federal laws, such as the Goods and Services Tax, income tax, environmental protection legislation and foreign investment legislation that will apply. The laws of the nine "common law" provinces and the territories are substantially similar in their dealings with real property. Quebec, which operates under a civil law system, is the exception. Notwithstanding the many differences which exist with respect to the law of real property in Quebec, such differences are unlikely to be a major concern from a business perspective.

OWNERSHIP

In Canada, investors may obtain interests in real property in a variety of different forms, including full "freehold" ownership, joint venture co-ownership and leasehold interests. In the common law provinces, the two basic forms recognized for co-ownership by more than one individual, partnership or corporation (or any combination thereof) are "joint tenants" and "tenants in common." Both forms of ownership permit the owners to hold undivided interests in the property as a whole and, unless otherwise agreed among them, the co-owners are each entitled to the possession and use of the property. Some form of condominium legislation exists in most of the provinces. In Ontario, condominiums can be created for residential, commercial or industrial purposes.

BENEFICIAL OWNERSHIP OF REAL PROPERTY

While most jurisdictions permit the registered owner of real property to be a trustee or nominee on behalf of an undisclosed beneficial owner, there is a recent trend in some provinces, most notably British Columbia and Ontario, to require the disclosure of the name and other pertinent information of the beneficial owner to the government authority. The purpose for this new requirement is to assist governments to better understand the trends in the market, to administer and enforce the payment of land transfer tax (see discussion below regarding land transfer tax), to guard against money laundering and to address issues related to housing affordability.

TITLE TO REAL PROPERTY

Real property throughout Canada is conveyed by means of instruments in the forms prescribed by each of the provinces and territories. In Canada there are two systems of land recording. A "registry" or "registration of deeds" system is used in the Maritime provinces, Quebec, and small parts of Ontario and Manitoba. Under this system, investigation of documents filed against the property and an understanding of relevant common law (or civil law in Quebec) and statutory rules is required to determine the status of title. In the balance of the country, title is recorded under the "land titles" system under which the status of title is determined and guaranteed by the provincial or territorial recording authority.

Quebec employs a system of title conveyancing which relies in large part upon notaries, who fulfill a special role in connection with the transfer of real property under the Civil Code of Quebec. A notarial form of deed (i.e., a conveyance of land which is in a prescribed form, and which is executed before and authenticated by a notary) is prepared by a notary who keeps the original document in his or her records and deposits a certified copy in the relevant land registry office.

Over the past decade, title insurance has become the norm for residential properties throughout Canada and has replaced lawyers' legal opinions as a means to protect both purchasers and mortgagees with respect to title deficiencies. While not as common, title insurance is also frequently obtained in conjunction with the acquisition and mortgaging of non-residential properties.

SECURITY INTERESTS IN REAL PROPERTY

Most real estate financings are arranged through institutional lenders such as banks, trust companies, pension funds, credit unions and insurance companies. Credit terms will vary between institutions and will be reflective of the nature of the transaction and risks involved. Generally, lenders will not provide financing in excess of 75% of the appraised value of a property. Because many foreign lenders in Canada are subsidiaries of international banks, they frequently participate by way of syndicated loans arranged by a Canadian lending institution.

Lending institutions typically take both primary and collateral security in real property and related assets; Primary security includes: a mortgage or charge; a debenture containing a fixed charge on real property or, in some cases where multiple lenders are 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; assignment of

material contracts; general security agreements; and third-party guarantees.

Upon default in payment under any such mortgage or instrument, a creditor may sue the debtor and, in most cases, subject to compliance with legal procedural requirements of the particular jurisdiction, may sell or foreclose upon the interests of the debtor and subsequent holders of security interests in real property. As a result of the ability to register any number of security interests against a particular property, statutory rules (which are usually based on the order of registration under the applicable registry or land titles systems) exist to determine priority among lenders.

In Ontario, generally speaking, brokerage licences are required from the Financial Services Commission of Ontario before any individual or corporation can carry on the business of dealing in mortgages, trading in mortgages, mortgage lending or administering mortgages. Failure to obtain such a licence may result in penalties not only to the entity participating in such activities but also potentially to officers and directors of the offending entity. Similar legislation relating to the governance of mortgage brokers is in place in a number of other provinces, including British Columbia, Alberta and Quebec.

LAND TRANSFER TAXES

Most provinces and territories (Alberta being the exception) impose land transfer taxes upon the purchasers or long-term lessees of real property, payable at the time of acquisition. Such taxes may be levied at the provincial/territorial and/or municipal levels, depending upon the province, territories and municipality, and are typically calculated as a percentage of the value of the consideration paid to acquire the property, including land, building and fixtures.

In Ontario and some other jurisdictions, land transfer tax is payable on both the transfer of registered title and beneficial ownership, in the latter case even when there has been no title registration. In Ontario, for example, a graduated provincial land transfer tax rate is imposed starting at 0.5% and increasing to 2.0%, or 2.5% for residential property. For properties located within the City of Toronto, an additional graduated land transfer tax is payable starting at 0.5% and increasing to 2.0%, or 2.5% for residential property. Since October 2022, a 25% non-resident speculation tax has been imposed upon the purchase or acquisition of an interest in residential property located anywhere in Ontario by individuals who are not citizens or permanent residents of Canada, or by foreign corporations (foreign entities) or taxable trustees. This tax is in addition to Ontario's (and Toronto's) current land transfer tax. In 2016, British Columbia introduced a similar tax on the purchase by foreign nationals, entities and taxable trustees of residential properties, currently at 20% within the Vancouver and Victoria regional districts, as well the Fraser Valley Regional District, the Regional District of Central Okanagan and the Regional District of Nanaimo.

There are certain exemptions and rebates which may be claimed to avoid, postpone or reduce land transfer tax in appropriate circumstances.

GST AND HST

The GST is a federal value-added tax imposed at the rate of 5% on goods sold or rented and services provided in Canada. As a general rule, the sale or lease of real property is taxable unless there is a specific exempting provision in the legislation. For example, subject to specific qualifications, exemptions exist for: (a) the sale of used residential property (houses, condominiums, apartment buildings); (b) the sale of vacant land by an individual; (c) farmland sold to family members; and (d) residential rent for lease terms greater than one month. The provinces of Ontario, Quebec, Nova Scotia, Prince Edward Island, New Brunswick and Newfoundland and Labrador all apply a single tax which combines the provincial sales tax and the GST to create a single HST. In Ontario, the combined HST rate is 13%. The HST generally applies to all purchases and leases of non-residential real property. Sales and leases of real property that were exempt under the GST rules continue to be exempt for the purposes of HST. Sales of new residential real estate in Ontario are subject to the HST, but rebates are available for some of the provincial sales tax portion of the HST. For example, the province introduced an enhanced rebate in 2023 to remove the provincial portion of the HST on new purpose-built rental housing, such as apartment buildings, student housing and seniors' residences for projects that begin construction between September 14, 2023, and December 31, 2030, and complete construction by December 31, 2035.

FOREIGN INVESTMENT IN REAL ESTATE

In response to recent housing supply and affordability issues, the federal government has enacted the Prohibition on the *Purchase of Residential Property by Non-Canadians Act* intended to prohibit the purchase of residential real estate by non-residents, directly or indirectly,

for a two-year period beginning January 1, 2023. This federal Act was recently extended to January 1, 2027. The definition of a non-Canadian within the Act includes individuals who are not Canadian citizens or permanent residents, corporations that are incorporated otherwise than under the laws of Canada or a province, and Canadian corporations not listed on a Canadian stock exchange that are controlled by a foreign individual or corporation. Recent regulations have clarified that a corporation is deemed a non-Canadian if it is controlled by more than 10% of non-Canadians.

Exceptions to the non-Canadian restrictions exist for publicly traded Canadian corporations and Canadian REITs, and amendments to the regulations have introduced a further exception for the acquisition by a non-Canadian of residential property for the purposes of "development" if there exists a good faith intention to develop at the time of purchase.

VACANT HOME TAXES

Also in response to housing supply and affordability issues, federal, provincial and municipal governments have developed various forms of vacancy tax on underused residential properties. Federally, the Underused Housing Tax is an annual 1% tax on the ownership of vacant or underused housing in Canada that applies mostly to non-resident, non-Canadian owners. Some provinces, including British Columbia, have further imposed a speculation and vacancy tax that again is intended to apply to property owners with foreign income. At the municipal level, both Toronto and Vancouver apply a 3% tax on the assessed value of underused and vacant homes, regardless of the resident status of owners. Ottawa also has a vacant home tax, but at 1%.

In all cases, these vacancy taxes are based on declarations made by the property owners and require timely disclosures to determine if the tax is applicable.

PROPERTY TAXES

Unless expressly exempted by legislation, all real property in Canada is subject to assessment and taxation. Each province has its own property assessment and taxation framework, whereby the assessment valuation process is generally carried out by an "assessing authority" and the taxation process is carried out by the municipality itself. The assessment value of a property will be dictated by a province's specific assessment legislation, which is usually based on the market value of the property determined as of a fixed base year date. In many cases, properties will be classified in a particular property tax class. Municipalities set tax or mill rates to be applied to the assessment values of each tax class. Property taxes are calculated by multiplying the tax or mill rate to the property's assessed value. Updates to the base year date used for property assessment values vary by province. All provinces have an appeal process for property owners to dispute the assessment value of their properties, usually with very strict appeal deadlines. Property taxes fund municipal services such as fire, police, public schools, parks and roads.

LAND USE REGULATIONS

General

All land in Canada is subject to some form of regulation respecting its use and development. The scope of such regulation can vary from the simple to the complex and can involve regulation by the federal, provincial/territorial and municipal (local) levels of government, including special purpose bodies. The construction and use of buildings is likewise subject to public regulation in all parts of Canada. With minor exceptions, one or more public permits or licences must be obtained before constructing, occupying or making changes to the use of commercial and industrial buildings as well as residential properties. Public regulations of land use across Canada are generally put in place following consultation with stakeholders, including property owners, in an orderly and open fashion. The existence and details of the regulations (be they province-wide or area-specific) are publicly available and generally well known or readily accessible to all whose interests are touched by them, including landowners, project proponents, architects, contractors and the like.

Generally speaking, land use regulation across Canada has elements of flexibility and is subject to review and reconsideration to meet changing needs and objectives. Land use regulation is intended to produce an outcome that protects and balances private and public interests without officious or unfair interference in the use and enjoyment of land. Land use regulations are normally not retroactive, though new policies often do come into force immediately upon approval and apply on a go-forward basis. The regulatory frameworks of Canada and the provinces and territories generally provide appeal or review opportunities for persons who seek exceptions or changes to the regulations applying to their properties or influencing their property interests. The nature and extent of these rights of appeal

and review vary from the simple (e.g., a request to a municipal building official to allow a variation in the use of building materials that is a satisfactory substitute for the literal requirements of a building code) to the complex (e.g., a request to change the land use provisions on a large area of agricultural land to permit its development as a new urban community). The latter may involve administrative, political and quasi-judicial tribunal decisions at several government levels, possibly extending over a period of several years. Guidance and advice from professionals such as land use planners, environmental and traffic engineers and/or market research consultants will often be necessary.

Municipal Zoning

All but the most sparsely populated areas of Canada are governed by local municipal governments or planning boards which, in most cases, exercise through zoning and other controls the most influential powers over land use. These powers are exercised in accordance with senior government policy as well as master policy plans (often known as Official Plans) as determined and laid down by the relevant municipal council. These regulations are unique to each municipality, based on local preference and enacted with public notice and citizen input. Zoning regulations typically implement the policies contained in the relevant master policy plan. These regulations may often be amended on a general or site-specific basis based upon a successful application by a landowner or owner's agent. Appeal rights may also be available for unsuccessful applications. However, some jurisdictions (Ontario, for example) may impose a multi-year "freeze" on development applications that seek to amend planning instruments (master policy plans, zoning by-laws, etc.) that have only recently been adopted. Whether these development freezes apply often depends on the status of the local planning instruments. A professional with knowledge of the local planning regime will frequently be needed to assist.

Subdivision of Land

The division of parcels of land or interests in land or buildings is generally controlled in relation to all lands under provincial and territorial jurisdictions. When land is divided to create separate building lots, to add land to an existing ownership, to create rights such as rights-of-way, easements, or mortgages over parts of land parcels or to divide buildings into separate condominium units, one or more government approvals are almost always required. Decisions on applications to subdivide land will be based on applicable statutory and local policy tests (for example, will the proposed new lot comply with the prevailing zoning standards for lot size or frontage?) and may include a public hearing or other form of input from interested landowners and stakeholders.

Development Agreements

Development agreements between a landowner and a municipality are used to ensure that adequate infrastructure is available or will be made available to accommodate the proposed development without adversely affecting the surrounding area. A development agreement can require that a landowner fulfill certain obligations imposed by a municipality as a condition of granting approval of an application. These obligations can include the provision of technical studies to the satisfaction of the municipality, the requirement to obtain relevant permits, the gratuitous conveyance of land for road widenings or transit infrastructure, or the completion of sanitary works, for example.

Despite the fact that some provinces do not provide the statutory authority for municipalities to enter into development agreements, the courts have upheld such agreements as necessary to control and direct development. Courts have also interpreted development agreements as being forms of land use regulation as opposed to commercial contracts between the developer and the municipal authority.

Heritage Conservation

Buildings may be subject to prohibitions against modification or demolition as a result of their architectural or historical significance. Such controls may be absolute or temporary. Lands and buildings of cultural heritage interest are often identified and listed on individual inventories that exist at the municipal, regional, provincial and/or national level. The criteria by which cultural heritage properties are identified typically focus on materials, design, historical associations and/or contextual value.

Properties determined to be of significant heritage value or interest may be designated under provincial statute and thereby gain legal protection against future alterations or demolition. Designation is not essential for protection but is often undertaken to enhance the listed property's prospect for long-term survival. Permission to alter or demolish a heritage designated property is often at the discretion of the local municipal council or planning board, which often takes direct advice from a local heritage advisory committee. In most jurisdictions, there are limited rights of appeal to a provincially-appointed administrative tribunal should an application be refused.

Significant Natural Areas, Flood Plains

As a general rule, government regulations do not sterilize land by prohibiting all land uses or prohibiting the construction of all buildings. The exceptions to this general rule occur when health and safety risks are significant – for example, in the case of flood plains and erosion prone lands, or when the lands are in an area of scientific or natural interest. In the latter circumstances, regulatory control is often exercised by special purpose bodies such as watershed commissions or conservation authorities established by statute. While development within these highly protected areas may still be possible, additional approvals will be required from the commissions and/or authorities tasked with protecting the area.

Municipal Infrastructure, Community Benefits and Development Charges

Municipal governments in all provinces plan for and provide various forms of infrastructure for their residents, such as water and sewers, roads and streets, solid waste collection and disposal, and parks and recreation. Municipal governments in urban contexts also often provide police and fire protection, public transit, tourism bureaus, libraries and economic development services. The primary means by which these services are paid for is taxation on land. However, the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia, as well as the Yukon and Northwest Territories, also impose a formalized system of levies applicable to the development of land.

Development charges are one-time payments, usually collected prior to the issuance of building permits, that local and regional governments may collect from land developers to offset costs related to increased services that are incurred as a direct result of new development. Developers pay development charges for these increases rather than the costs being borne by the existing taxpayers who are not creating the demand for the new infrastructure or services. The demand created by new development also does not always relate to physical works or services that are provided adjacent to the lands being developed. For example, new development may be required to pay a development charge related to increasing the size of arterial roads or water infrastructure elsewhere in the municipality in anticipation of future development.

Local school boards may also impose a similar development charge of their own, termed an "educational development charge." These charges may be imposed if a school board needs to acquire a new school site(s) to accommodate students resulting from new growth, although the levy may apply to both residential and non-residential development.

The imposition of a new development charge is typically preceded by a public process, including notice and input from the affected community, and the completion of a detailed background study. There is often an ability to challenge the imposition of a new development charge, either directly with the municipal government or on appeal to the courts or an administrative tribunal.

Recently in Ontario, changes to provincial legislation have created a new "community benefits charge" that acts as a companion to development charges. The community benefits charge is intended to allow municipalities to recoup increased costs related to growth where such costs are not covered by development charges. These costs include buying new lands for parks or other local municipal initiatives. The charge in Ontario is capped at 4% of the value of the land being developed as of the day before the first building permit is to be issued, thereby allowing the municipality to benefit from the increase in the land's value arising from the development approval.

Several provinces, including British Columbia and Ontario, also require developers to contribute land, or cash in lieu of land, towards parkland acquisition. Typically, the development of institutional and industrial uses is exempt from parkland dedication requirements, but commercial and residential uses can be required to convey between 2% and 5% of land for parkland purposes, or an alternative rate of up to 20% can be paid, depending on the size of the development site.

Affordable Housing

Municipal governments in a number of provinces across Canada are increasingly requiring the provision of affordable housing units within new residential developments and redevelopments. Some municipalities, including Toronto, Vancouver and Montreal, have inclusionary zoning policies either proposed or in place which would require a certain percentage of units within a proposed development to be set aside as long-term affordable units. The goal of these programs is to locate affordable units within market-rate developments, although many of these programs have provisions for locating affordable units off-site.

Expropriations

From time to time, public authorities need to acquire private lands in order to construct or maintain public works or provide public benefit. Where an amicable sale of land is unable to be negotiated, many public authorities, including all levels of government, school boards and utilities, have the statutory authority to acquire these lands through expropriation. The process to acquire public lands and determine the appropriate compensation is set out in provincial and federal legislation. The Supreme Court of Canada has determined that the overriding principle of any expropriation regime is to fully and fairly compensate a land owner whose property has been taken. This includes compensation for the fair market value of the land as well as damages naturally resulting from the expropriation and any legal or consulting fees incurred by the owner that are reasonably necessary to determine the compensation.

In some cases, land owners may be entitled to compensation even when their land has not been directly taken by an expropriating authority, but where the value of their land has been reduced as a result of the construction of public works (e.g., highway construction that prevents access to a local business). Additionally, where the actions of an expropriating authority have the effect of sterilizing the use of private land, compensation may be owed for the constructive or *de facto* expropriation of those lands, even if no land is acquired by the authority.

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