

BUYING COMMERCIAL REAL ESTATE IN CANADA



Miller
Thomson
lawyers | avocats

Added experience. Added clarity. Added value.



Miller Thomson is one of Canada's most respected national business law firms, committed to delivering what matters most - added experience, added clarity, added value. With more than 470 professionals in 11 offices across the country, we offer a complete range of business law, advocacy and personal legal services to assist domestic and international decision-makers with all of their Canadian legal needs, providing advice on Canadian common and civil law, in both English and French.

Our Real Estate Group provides a broad range of expertise on all transactions, contracts and other matters involving real estate and land development. Our lawyers have extensive experience derived from many years of acting for clients ranging from individuals and small family owned businesses to large public corporations, pension funds, banks and trust companies. We represent vendors, purchasers, landlords, tenants, developers, lenders and other financial institutions, on all manner of real estate related matters, including commercial, retail, industrial, residential leasing, mortgage enforcements, joint ventures, development approvals, financings, acquisitions and dispositions.

To find out more about how we can assist you, visit:

<http://www.millerthomson.com/en/our-services/real-estate>



OVERVIEW

JURISDICTION

Under the Canadian Constitution, property rights in land are regulated by each of the 10 provinces. The provinces enact their own laws regarding ownership, registration systems, planning controls, financing, and leasing of property. All of the provinces, with the exception of Quebec, base their property laws on English common law. Quebec property law is based on the Civil Code of Quebec which originates from French civil law.

In Canada, ownership of land can only be held by one or more individuals and/or corporate entities. An extension of this principle is, for example, a partnership cannot hold title to land (except in Quebec), but the individual partners constituting the partnership can. Each province has the right to restrict ownership of real estate interests within its provincial jurisdiction to Canadian citizens or permanent residents, but most provinces have not implemented such a restriction. With respect to corporate entities, some provinces require that a foreign corporation extra-provincially register in that province's corporate registry before they are permitted to hold title to land in that province.

REGISTRATION SYSTEMS

There are two basic types of registration systems in Canada: the older registry system and the "Torrens System". The registry system provides an orderly means of registering documents affecting land. It is used in Quebec, parts of Ontario and some eastern provinces. The other parts of Ontario as well as the western provinces employ the Torrens system.

Under the Torrens system (the land titles system), a limited guarantee of title is provided through a current statement of interests in that property. There is also an assurance fund to compensate purchasers who rely on the guarantee to their detriment. Under the registry system, no guarantee of title is provided and a review of all documents relating to that property must be reviewed to determine the state of title.

ACQUIRING REAL ESTATE INTERESTS

The main categories of the interests in land that can be acquired include the following:

A. Freehold / Fee Simple

This is the highest estate in land that can be held in Canada. Practically speaking, a freehold interest is synonymous with ownership.

* This work was produced from Miller Thomson LLP & Max Maréchaux, *Business Laws of Canada*, 2012 Edition (Eagan: Thomson Reuters 2012), Chapter 18, with the consent of Thomson Reuters.

B. Leasehold

The owner of a leasehold estate is a tenant whose interest in land is not only limited to a term but is also subject to the payment of rent and performance of other obligations. In Quebec, a lease, though registrable, is not an interest in land, but merely a personal right.

C. Mortgage

A mortgagee can have a mortgage over freehold, leasehold, or any other estate in land. A mortgage serves as a security for performance of obligations. Failure to perform those obligations can result in the sale of the land to a third party or foreclosure by the mortgagee. The Quebec equivalent is a hypothec.

D. Easement

The holder of an easement has a right in land but not the ownership of it. For an easement to be valid, it requires lands benefited by the easement and those burdened by it to be owned by separate persons (unless the requirement is excepted by statute).

There are many other interests in land but they generally fall into one of the categories listed above. For example, the ownership of a condominium unit is considered to be a freehold interest even though the ownership is only with respect to the airspace within the condominium unit.

NOTICE OF REAL ESTATE INTERESTS

In order to secure an interest in real property, it is important to register notice of that interest in the applicable registry system for that province. Unless an interest in real property is registered, it will be subject to all registered interests.

ELECTRONIC REGISTRATION

In some provinces, online title searching and registration have been introduced. The ability to do online title searching and registration means that a solicitor or paralegal can search title to and register documents from a computer without attending the land registry in person. This has greatly improved the efficiency of the land registration system in some provinces.

REAL ESTATE BROKERS

Most real estate transactions begin through the marketing expertise and efforts of qualified brokers. A vendor of real estate may engage a broker to list the property for sale and a prospective purchaser may employ a broker to find suitable properties. Both may employ brokers to advise during the negotiation. In each case, a prospective seller or purchaser should enter into an agreement with the broker that clearly defines the terms of the engagement including the fee or commission to be paid. A broker is subject to certain duties (depending on the province) to protect the interests of the party they represent.

CONVEYANCING

FORMS OF CONTRACTS

There are many standard forms of purchase and sale contracts. However, the standard forms require substantial amendments in order to address the requirements of most commercial transactions. Many agreements involving land often involve other assets as well, making the use of standard forms impractical.

CONSIDERATION AND ISSUES IN CONTRACTS

As with any contract, agreements for the purchase and sale of land have certain basic requirements. The requirements for a binding agreement include a sufficiently clear written description of the parties, the price, and the property. In addition to these requirements and those of contract law more generally, there are a number of specific provisions that are unique to a contract involving the sale of land. These include:

A. Deposit

Most contracts provide for a deposit, usually paid by the purchaser at the time of contract execution. It is customary for the deposit to be held in trust by a third party such as a broker or a solicitor. The contract sets out the terms pursuant to which the deposit is held. The deposit must be fully refundable until conditions have been satisfied or waived and a binding agreement is formed.

B. Title Investigation

Title and title-related searches are the purchaser's responsibility. A purchaser usually requires, as a condition of the contract, a period of time to satisfy itself with respect to title of the property. If no objections to title are raised within the specified period of time, the purchaser is deemed to have accepted the vendor's title (few exceptions).

C. Survey

The vendor is statutorily obligated to provide a registrable description of the land being conveyed, but the vendor may be required to provide a survey as a contracted requirement.

D. Fixtures and Chattels

In most provinces, the distinction between a fixture (a thing affixed to land or the building which is treated as land) and a chattel (treated as personal property) is not always clear. For that reason, it is prudent to list items intended to be included with the sale of land.

E. Conditions

It is customary to allow a purchaser a period of time to carry out due diligence with respect to a number of matters. These include environmental investigations, planning and zoning concerns, review

of operating expenses, review of leases, obtaining financing and other approvals, and so on. A vendor may also have conditions such as board or regulatory approvals to be satisfied within this time period.

F. Adjustments

It is common for parties to agree that the purchaser will be responsible for all costs relating to land commencing on the closing date.

Adjustments typically include taxes, utilities, rents, and tenant deposits and will be applied to the purchase price as of this date.

G. Damage

There are different rules in each province for who is at risk for property damages while that property is subject to a purchase and sale agreement. To avoid the standard rules, it is prudent to allocate this risk to the appropriate party in the purchase and sale agreement.

H. Nonresidents

If the vendor is a non-resident, the purchaser can be liable for any of the vendor's unpaid income tax resulting from the sale. To protect the purchaser, the vendor is often required to provide a certificate of disposition issued by Canada Revenue Agency certifying that all applicable taxes with respect to the sale has been paid or alternatively a holdback of a portion of the purchase price can be employed.

I. Commission and Agents' Fees

It is not unusual for both purchaser and vendor to have their own agents. The contract should clearly set out their respective responsibilities regarding the payment of the agents' fees.

CLOSING

Closing is carried out on behalf of the purchaser and the vendor by their respective solicitors, notary public or civil notaries in Quebec. Electronic registration has effectively made attendances at land registry offices a relic of the past and most closings do not occur face-to-face. It is important to set out the desired closing procedure in the purchase and sale agreement. In some provinces, even standard closing procedures must be contractually agreed to or they cannot be employed.

CLOSING COSTS

It is customary in most, if not all, provinces, for each party to pay its own legal costs and consultants' fees. Registration costs are typically paid by the registering party.

LAND TRANSFER TAXES

The purchaser is also required to pay provincial land transfer taxes in some provinces on the transfer of title.

DUE DILIGENCE

TITLE

As a practical matter, it should be realized that title and title-related searches are not carried out by title insurers (as in the U.S.) but rather by solicitors, notaries public, paralegals or civil notaries in Quebec.

Online title search capabilities have greatly improved the efficiency of title searching in many provinces. In many cases, it is possible to initiate a title search by using a municipal address to obtain a legal description or by entering the owner's name for a list of all properties owned by such owner in a particular area.

Under the Torrens system, state of title is guaranteed. There are, however, exceptions to this guarantee. Private title insurers offer coverage for some of these exceptions but not for all of them. With respect to properties registered under the old registry system, there is no title guarantee.

TITLE-RELATED SEARCHES

In addition to searching title as described above, it is also necessary to carry out other searches (statutory, municipal and governmental authorities). Failure to comply with certain statutory requirements may result in a lien or other encumbrance on title without the requirement of registration. In other words, the title search itself would not disclose the existence of these liens or encumbrances but they still bind the land, and therefore, future purchasers.

In many cases, it is necessary to obtain the consent of the owner before a municipality or other governmental authority will release any information concerning the property to a third party. This is a provision that should be included in the purchase and sale agreement.

SURVEYS

Surveys not only show the location of the property boundaries, but they also show the location of all buildings and other structures in relation to the boundaries. Although many title insurance policies will provide coverage to insure against any deficiencies or defects that a survey may reveal, the coverage itself does not remedy any defects or deficiencies. The coverage provides an indemnity of the loss that might arise from that defect, up to the limit of the policy.

NEW DEVELOPMENTS

In the event a transaction involves the acquisition of property for a proposed new development, there should be a greater level of due diligence with respect to zoning, planning, and other approvals. Prospective purchasers,

their solicitors, and other consultants need to carry out a careful review of the municipal zoning by-laws to ensure that any proposed building falls within the permitted uses of the site, the setback requirements, density allowance, and other by-law requirements.

The approval process for the proposed development can be a lengthy one, especially if it involves a rezoning or other variation of by-law application. While a solicitor can help on many aspects of this process, a buyer should consider retaining the services of knowledgeable architects, planners, and other experienced consultants in order to facilitate the approval process.



MORTGAGE FINANCING

INSTITUTIONAL LENDERS

Financing to acquire property is usually arranged through banks, trust companies and similar large institutions. These institutions are governed by federal and provincial legislation. The terms of any financing are usually set out in a loan commitment issued by the financial institution and accepted by the borrower. The various fees required to be paid by a borrower are not insignificant. Generally, the borrower is required to pay commitment fees, processing fees, legal fees, and disbursements of the lender's counsel (as well as the borrower's own counsel), the cost of environmental and other due diligence reports, insurance and property appraisals, surveys, and, as mentioned earlier, loan policy premiums.

SECURITY

The main security for any loan involving real property is commonly referred to as a charge or mortgage of land. In Quebec, the security on immovable property is a hypothec.

In addition to the charge or mortgage of land, there is additional security that is often required by the lender. This additional security is often referred to as collateral security and, in many cases, it involves more than real property. The collateral security required will often vary in each transaction, and may include assignment of rents, assignment of leases, estoppel certificates, non disturbance agreements, guarantees, general security agreement or assignment of contracts.

TITLE INSURANCE

Title insurance has become increasingly popular in real estate transactions in some provinces. Traditionally, the parties to a real estate transaction have relied on solicitors' opinions with respect to title and related matters. Solicitors' opinions cover a wide range of matters in a transaction that usually extend far beyond title or title-related matters. However, with respect to title and title-related matters, a title insurance policy can provide coverage with respect to certain items that a solicitor cannot provide such as fraud, forgery, specified losses and a duty to defend the insured in the event of a claim.

Title insurance is widely used by both owners and lenders in residential transactions where the premiums charged by insurers make it very cost-efficient. In addition to low premiums, the level of due diligence required by insurers is considerably less than would normally be required to provide a solicitor's opinion. In commercial transactions, the use of title insurance is varied. Not only are the premiums considerably higher than they are in a residential context, the level of due diligence required by title insurers can also be significantly more depending on the coverage required.

Title insurance policies boldly set out the covered title risks on the first page of the policy. The remaining several pages of the policy set out in fine print the many exclusions, exceptions, conditions, and stipulations. It is important to note that there are differences among the various title insurers and these differences should be carefully reviewed.



LEASING

IN GENERAL

A lease is not only a contract between a landlord and a tenant but it is also a conveyance of a leasehold estate from a landlord to a tenant (except in Quebec). It is the conveyance of the leasehold estate that distinguishes a lease from a license. A license is merely a personal contract between a landlord and a tenant and does not create any interest in land. The leasehold estate aspect of a lease creates the following implications:

- (a) Land Transfer Tax. The registration of a long-term lease may attract transfer tax.
- (b) Registration Requirement. The registration of a lease may be required to protect the holder of a lease to ensure that future purchasers acquire the property subject to the leasehold interest.

RENT

Leases can generally be classified under three headings — gross, semigross, and net. In a gross lease, all the tenant pays is a fixed amount as rent. A gross lease is typical in a residential lease situation. In a net lease, the tenant pays a base rent and, in addition, pays a share (usually based on the proportionate area being rented) of property taxes, operating costs, utilities, and similar costs. This is typical in commercial and industrial lease situations. A semigross lease falls somewhere between a gross lease and a net lease.

SUBDIVISION

Long-term leases may require regulatory approval as they are often treated as being tantamount to a subdivision of land.



CONDOMINIUMS

IN GENERAL

The term “condominium” is a reference to a unique system of real property ownership and administration, although many provinces employ its own term to refer to the concept.

Typically, the condominium property is comprised of units and common elements or common property. The units are individually owned and the common property is owned by all the unit owners collectively. A condominium corporation is created for the purposes of administering the condominium property as a whole. Each province has its own separate legislation governing condominiums.

OWNERSHIP

Owners in a condominium have many of the same rights associated with sole ownership of real property; however, some of those rights are subordinated to the will of the majority in light of the co-ownership of property. The law will not permit individual owners to disrupt the integrity of the common scheme of a condominium.

In a condominium, there is a balance between the independence of the individual owners and the interdependence of all of them in a co-operative community. In exchange for the advantages gained through common ownership, a certain degree of control over what can be done with the common property is given up, the details of which are set out in the condominium documents (such as the by-laws). It is both the right and the obligation of unit owners to see that these governing documents are obeyed. It is prudent that prospective purchasers review these documents thoroughly.



MILLER THOMSON REAL ESTATE PRACTICE GROUP

For further details on any information outlined in this guide, please contact a member of our group, or visit millerthomson.com to view comprehensive practice area profiles for our Real Estate group.

Key Contacts



Michael Walker
National Leader
Vancouver
mwalker@millerthomson.com



Roberto Noce
Edmonton
rnoce@millerthomson.com



John A. Cross
Edmonton
jcross@millerthomson.com



William S. Dahms
Kitchener-Waterloo
wdahms@millerthomson.com



Leonard A. Gangbar
Toronto
lgangbar@millerthomson.com



Michael J. Wren
Toronto
mwren@millerthomson.com



G. Scot Diamond
Montréal
sdiamond@millerthomson.com

© Miller Thomson LLP, 2013. All Rights Reserved. All Intellectual Property Rights including copyright in this publication are owned by Miller Thomson LLP. This publication may be reproduced and distributed in its entirety provided no alterations are made to the form or content. Any other form of reproduction or distribution requires the prior written consent of Miller Thomson LLP.

This information is not meant as legal opinion and readers are cautioned not to act on information provided in this publication without seeking specific legal advice with respect to their unique circumstances.

VANCOUVER

Robson Court
840 Howe Street, Suite 1000
Vancouver BC V6Z 2M1 Canada
T: 604.687.2242
vancouver@millerthomson.com

CALGARY

700 - 9th Avenue SW, Suite 3000
Calgary AB T2P 3V4 Canada
T: 403.298.2400
calgary@millerthomson.com

EDMONTON

Commerce Place
10155 - 102 Street, Suite 2700
Edmonton AB T5J 4G8 Canada
T: 780.429.1751
edmonton@millerthomson.com

SASKATOON

Princeton Tower
123 - 2nd Avenue South, Suite 600
Saskatoon SK S7K 7E6 Canada
T: 306.665.7844
saskatoon@millerthomson.com

REGINA

Bank of Montreal Building
2103 - 11th Avenue, Suite 700
Regina SK S4P 4G1 Canada
T: 306.347.8300
regina@millerthomson.com

LONDON

One London Place
255 Queens Avenue, Suite 2010
London ON N6A 5R8 Canada
T: 519.931.3500
london@millerthomson.com

KITCHENER-WATERLOO

Accelerator Building
295 Hagey Boulevard, Suite 300
Waterloo ON N2L 6R5 Canada
T: 519.579.3660
waterloo@millerthomson.com

GUELPH

Ontario AGRICentre
100 Stone Road West, Suite 301
Guelph ON N1G 5L3 Canada
T: 519.822.4680
guelph@millerthomson.com

TORONTO

Scotia Plaza, 40 King Street West
Suite 5800, P.O. Box 1011
Toronto ON M5H 3S1 Canada
T: 416.595.8500
toronto@millerthomson.com

MARKHAM

60 Columbia Way, Suite 600
Markham ON L3R 0C9 Canada
T: 905.415.6700
markham@millerthomson.com

MONTRÉAL

CIBC Tower, 31st Floor
1155 René-Lévesque Boulevard West
Montréal QC H3B 3S6 Canada
T: 514.875.5210
info@millerthomson.com

Added experience. Added clarity. Added value.

Miller Thomson LLP
millerthomson.com

**Miller
Thomson**
lawyers | avocats

VANCOUVER CALGARY EDMONTON SASKATOON REGINA LONDON KITCHENER-WATERLOO GUELPH TORONTO MARKHAM MONTRÉAL