

# ONTARIO REGULATIONS AND CONSIDERATIONS

## CONDUCTING CROSS BORDER REAL ESTATE TRANSACTIONS

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**DISCLAIMER:** THE INFORMATION PROVIDED HEREIN IS OF A GENERAL NATURE, FOR INFORMATION PURPOSES ONLY AND IS NOT TO BE RELIED UPON OR CONSTRUED AS REAL ESTATE, LEGAL, TAX, ACCOUNTING OR OTHER PROFESSIONAL ADVICE OR OPINION. YOU SHOULD NOT USE ANY INFORMATION CONTAINED HEREIN AS A SUBSTITUTE FOR CONSULTATION WITH LEGAL OR ACCOUNTING PROFESSIONALS OR OTHER PROFESSIONAL ADVISORS.

### **1. Ontario Real Estate Association (OREA)**

Representing approximately 58,000 real estate brokers and salespeople members of Ontario's 40 real estate boards, OREA serves its members through a wide variety of publications, educational programs and special services. OREA's goals include promoting higher industry standards. OREA provides all real estate registration courses in Ontario.

### **2. Regulation and Regulatory Bodies in Ontario**

**The Real Estate Council of Ontario (RECO)** administers the Real Estate and Business Brokers Act, 2002 (REBBA 2002) and associated Regulations which regulates real estate brokerages, brokers and salespersons ("registrants") in Ontario.

RECO enforces a Code of Ethics (which is a regulation under REBBA 2002) that defines the conduct expected of registrants and outlines the principles upon which registrants must do business in Ontario.

**The Ontario Ministry of Consumer Services** is responsible for REBBA 2002 as well as the general oversight of RECO in accordance with the terms of an Administrative Agreement between the Ministry of Consumer Services and RECO.

### **3. Mortgage Brokers Legislation**

As with real estate brokers, mortgage brokers, lenders and administrators are subject to specific regulations in Canada. These regulations are governed by various pieces of provincial legislation. In Ontario, the *Mortgage Brokerages, Lenders and Administrators Act, 2006* requires all mortgage brokerages, administrators, brokers and agents to obtain a licence to do business in Ontario.

[http://www.fSCO.gov.on.ca/en/mortgage/Pages/fee\\_schedule.aspx](http://www.fSCO.gov.on.ca/en/mortgage/Pages/fee_schedule.aspx)

#### **4. Real Estate Brokers' Payments' Requirement**

In Ontario all contractual agreements entered into are between the buyer/seller and the brokerage, not between the buyer/seller and an individual registrant.

#### **Commissions**

Commissions are strictly a matter of negotiation between the registrant/brokerage and the seller/buyer as applicable.

#### **5. Registration**

##### **Registrant**

OREA administers registration education courses on behalf of RECO. To become registered as a salesperson in Ontario, individuals must successfully complete their registration education courses within 18 months of starting the first course of the Salesperson Registration Education Program.

A salesperson shall be eligible to become registered with RECO only if they:

- (a) complete the required courses within 18 months of starting the first course of the Salesperson Registration Education Program;
- (b) are at least 18 years of age;
- (c) are a resident of Canada for one year immediately prior to the date of application with the intention of making the person's permanent home in Canada unless at the time of the application the person is registered either as a broker or salesperson under the laws relating to real estate and business brokers of the jurisdiction in which the person last resided and has been so registered for a period of not less than one year immediately preceding the date of such application and is otherwise suitable for registration;
- (d) obtain employment with a registered brokerage and make application for registration within 12 months of successfully completing the required courses; and
- (e) complete and submit the forms approved by the Registrar under REBBA, 2002 to RECO accompanied by the relevant fee.

<http://www.reco.on.ca/section-professional/tc-311/sc-228.html>

#### **REALTOR®**

REALTOR®, REALTORS® and the REALTOR® logo are certification marks owned by REALTOR® Canada Inc., a corporation jointly owned by the National Association of REALTORS® and The Canadian Real Estate Association.

The REALTOR® trademark identifies a licensed real estate professional who is a member of The Canadian Real Estate Association ("CREA"), and as such subscribes to a high standard of professional service and a strict REALTOR® Code of Ethics and is required to meet consistent professional standards of business practice and as such is committed to:

- Professional competent service
- Absolute honesty and integrity in business dealings

- Co-operation with and fairness to all
- Personal accountability through compliance with CREA's Standards of Business Practice

Every member of a real estate board/association in Ontario is both a member of OREA and CREA.

## **6. Property Listing & Transaction**

### **MLS® - Multiple Listing Service®**

MLS®, Multiple Listing Service®, and the associated logos are all registered certification marks owned by CREA and are used to identify real estate services provided by brokers and salespersons who are members of CREA.

CREA's Rules provide that an MLS® System is a co-operative selling system operated and promoted by a real estate board in association with the MLS® trademarks. An MLS® System includes an inventory of listings of participating REALTOR® members, and ensures a certain level of accuracy of information, professionalism and co-operation amongst REALTOR® members to affect the purchase and sale of real estate.

### **REALTOR.CA**

REALTOR.ca is a website that is owned and operated by the Canadian Real Estate Association. This website is open to the general public. Property listings and other data available on this site are intended for the private, non-commercial use by individuals.

It is not a MLS® System, but an advertising tool that helps REALTORS® market property. The site allows real estate boards to update their property listings.

### **OREA Standard Forms**

OREA is the owner of certain standardized forms which may be used in real estate transactions ("OREA Standard Forms") and a set of standard clauses ("Clauses") for use therewith.

Every year, OREA reviews requests and recommendations from REALTORS®, real estate boards, and other interested stakeholders regarding OREA Standard Forms and Clauses in the interest of keeping the forms current and up to date with the dynamic nature of real estate and the forms are revised accordingly.

OREA registers copyright in the OREA Standard Forms and Clauses with the Canadian Intellectual Property Office upon each annual revision of the OREA Standard Forms. These forms are for use by OREA members only and by certain licensees.

### **Agreement of Purchase and Sale/Offer**

This document is used to state the Buyer's desire to purchase the property and to negotiate the terms of the sale. It contains business terms for the transaction, including, without limitation, the description of

the land, purchase price, deposit(s), closing date, title and/or due diligence periods, representations and warranties, and any other special terms and conditions that the parties agree to. The Agreement of Purchase and Sale determines your client's rights and obligations throughout the transaction and after closing.

## **Deposit**

A deposit for the purchased property is typically provided in the form of a bank draft, a certified or certifiable cheque, or money order and will form part of the closing statement. It is ultimately the decision of the buyer and seller as to who will hold the deposit, unless there is a specific statutory provision dealing with that issue, such as for new condominiums.

## **7. Taxes**

In Canada, an income tax is levied at the federal and provincial levels, and a variety of other taxes, including federal and provincial value-added and sales taxes, are also imposed.

### **Canadian Taxation to Non-residents**

The Canadian federal government imposes income tax under the Income Tax Act (“ITA”) on a taxpayer's income for each taxation year. Residents of Canada are taxed on their worldwide income. With a few minor exceptions, non-residents are only subject to Canadian income tax on their Canadian source income.

Non-residents who were employed or carried on a business in Canada during the year or disposed of “taxable Canadian property” are liable to pay income tax on their taxable income earned in Canada, which will be comprised solely of their income from those three sources. Non-residents are also subject to withholding tax on passive income such as dividends, rent and royalties from Canadian sources (withholding tax is discussed further under “Withholding Tax on Passive Income of Non-residents.”) A non-resident of Canada who resides in a country with which Canada has entered into a tax treaty may benefit from exemptions or reduced rates of tax in Canada under that treaty.

### **Taxable Canadian Property**

Capital gains realized by a non-resident on the disposition of “taxable Canadian property” are usually taxed in the same way as a capital gain realized by a Canadian resident. “Taxable Canadian property” includes real or resource property located in Canada.

Subject to certain exceptions, the ITA provides, in general terms, that a non-resident person who disposes of taxable Canadian property must notify the Canada Revenue Agency (CRA) of the disposition either before or after the disposition (within 10 days of the disposition). These rules are largely covered in Section 116 of the ITA. Along with the notice, a non-resident vendor will also be required to remit to the CRA either an amount to cover the Canadian taxes owing on the gain or appropriate security. Once the non-resident has provided the notice and payment, the CRA will issue a certificate of compliance (commonly known as a “Section 116 certificate”) to the non-resident vendor. If such a certificate is not obtained, then the purchaser must remit to the CRA 25 per cent of the purchase price within 30 days of the end of the month in which the transfer of the taxable Canadian property occurs, and has the right to

withhold this amount from the purchase price or otherwise recover such amount from the non-resident vendor.

It is usually advantageous for the non-resident to obtain a Section 116 certificate from the CRA, since a certificate will be issued on payment of tax based on the gain arising from the sale of the taxable Canadian property. Without the Section 116 certificate, the tax withheld by the purchaser is based on the gross selling price of the property. These withholding obligations and notification requirements apply even if a loss arises on the disposition. However, they do not apply to certain dispositions of taxable Canadian property that would otherwise be exempt from Canadian tax under Canada's tax treaties.

### **Carrying on Business in Canada - Income Tax**

Whether a non-resident is considered to be carrying on business in Canada for income tax purposes depends on all of the facts. The courts generally use a two-pronged test to determine whether a business is being carried on in Canada, taking into consideration the place where the contract is concluded and the place of operations from which profits arise.

Additionally, a non-resident will be deemed to be carrying on business in Canada for the purposes of the ITA if the non-resident does any of the following:

- Produces, grows, mines, creates, manufactures, improves, packs, preserves or constructs, in whole or in part, anything in Canada, regardless of whether the non-resident sells it or exports it from Canada without selling it;
- Solicits orders or offers anything for sale in Canada; or
- Disposes of timber resource property, Canadian real property (other than capital property) or, in certain circumstances, Canadian resource property.

If a non-resident does carry on business in Canada in a year, the ITA may require that the non-resident file an annual Canadian income tax return. For example, a non-resident corporation that carries on business in Canada in a taxation year must file a return for the year, regardless of whether it has realized a profit in Canada or whether its income is exempt from Canadian tax under an applicable income tax treaty. If such an exemption is available, it is claimed when filing the Canadian tax return. However, a non-resident individual is generally only required to file a return if tax is payable under the ITA, or if he or she has a taxable capital gain on certain property or disposes of certain taxable Canadian property.

In addition to Canadian federal income tax, income tax may be imposed by one of Canada's provinces and territories pursuant to the applicable provincial or territorial statute.

### **Withholding Tax on Passive Income of Non-residents**

The ITA imposes withholding tax at a rate of 25 per cent on the gross amount of certain payments made by a resident of Canada to a non-resident, including management fees, dividends, rents and royalties, although this rate may be reduced pursuant to an applicable tax treaty.

Withholding tax is not imposed on interest paid to a non-resident with whom the payer deals at arm's length unless the interest is "participating debt interest" (being, in general, interest determined by reference to receipts, sales, income, profits or cash flow of the debtor or a related person).

The exemption from withholding tax on interest, other than participating debt interest, is extended to interest paid to a non-arm's-length recipient, if the recipient is entitled to the benefit of the Canada-U.S. Income Tax Convention (1980), commonly referred to as the Canada-U.S. Tax Treaty.

### **Value-added Taxes (VAT) and Harmonized Sales Tax (HST)**

A non-resident that carries on business in Canada may be liable to pay, collect or remit a Goods and Services Tax (GST) or Harmonized Sales Tax (HST). In addition, a non-resident that carries on business in Canada may be required to register for GST/HST purposes. A non-resident that is required to register, but that does not have a permanent establishment in Canada, is required to post a recoverable security with the CRA on registering for GST/HST purposes.

The GST/HST applies to most supplies of property and services made in Canada, and the GST applies to most importations of goods into Canada. The GST applies at a rate of 5 per cent and the HST, in Ontario, at a rate of 13 per cent.

Because GST/HST is intended to be a consumption tax and, therefore, is not intended (in general) to be borne by businesses, GST/HST paid by a business is generally recoverable if the business is registered for the GST/HST and makes GST/HST-taxable supplies. Certain supplies are considered to be exempt from GST/HST, including certain supplies of financial services and residential real property. Businesses that make exempt supplies may not be permitted to fully recover GST/HST paid or payable on property and services acquired for related purposes and, therefore, will bear the burden of the tax as a cost of their business activities.

Individuals should seek advice from a specialist, accountant, tax lawyer.

### **Land Transfer Tax or LTT**

As a general rule, if you buy land or an interest in land in Ontario, you must pay Ontario's provincial LTT whether or not the transfer is registered at one of Ontario's land registry offices. Land includes buildings, buildings to be constructed and fixtures.

In Ontario, land transfer tax is calculated on the "value of the consideration" as defined in subsection 1(1) of the *Land Transfer Tax Act* (Ontario). It includes the purchase price, liabilities assumed, benefits conferred, soft costs and the cost of upgrades. In some instances, the value of the consideration is deemed to be the fair market value of the land, for example, leases over fifty years and transfers between corporations and shareholders.

Buyers of real estate in Ontario are required to pay the Land Transfer Tax at the time of closing— when the instrument conveying the interest in land (for example, a transfer or deed) is tendered for registration. The LTT is calculated by way of an affidavit, which is in a prescribed electronic form, setting out the value of consideration. Under the *Land Transfer Tax Act* (Ontario), fixtures constitute land, and, as a result, a distinction is often necessary whether a certain component of a building is a fixture or chattel.

The *Land Transfer Tax Act* (Ontario) imposes LTT upon any disposition of beneficial interest in land even though a transfer or deed of land is not tendered for registration. The tax for the disposition of beneficial interest in land is calculated at the same rates as for registered disposition of land and is payable 30 days after the date of disposition.

The tax rates on the value of the consideration are as follows:

- Amounts up to and including \$55,000 - 0.5 %
- Amounts exceeding \$55,000 up to and including \$250,000 - 1.0 %
- Amounts exceeding \$250,000 (for property other than residential) - 1.5 %
- Amounts exceeding \$250,000 up to \$400,000 (for residential property) - 1.5 %
- Amounts exceeding \$400,000 (for residential property) where the land contains one or two single family residences - 2.0 %

For further information about calculating land transfer tax, please see information from the Ministry of Finance (Ontario) website at [http://www.fin.gov.on.ca/en/bulletins/ltt/2\\_2005.html](http://www.fin.gov.on.ca/en/bulletins/ltt/2_2005.html)

### **Municipal Land Transfer Tax**

In the City of Toronto, buyers are subject to a Municipal Land Transfer Tax (MLTT). The MLTT applies when you purchase real property within the limits of the City of Toronto.

It should be noted that buyers pay MLTT in addition to the provincial LTT.

Currently, the City of Toronto is the only municipality in Ontario that has the authority to levy the MLTT in addition to the provincial Land Transfer Tax.

The MLTT rates are the same as provincial rates of LTT.

### **Municipal Property Tax**

In Ontario, municipalities impose a yearly municipal property tax on land within the municipality.

### **8. Other Expenses when buying or selling real estate (not limited to)**

- Appraisal fees
- Legal fees
- Survey fee
- Title insurance fee
- Home inspection fee
- Varied other Inspection fees
- Condominium Status Certificate fee
- Property insurance
- Mortgage application fee
- Service utility hook-up fee(s)
- Moving expenses

### **Legal Fees**

In Ontario, a lawyer oversees various aspects of a transaction including, but not limited to, reviewing the Agreement of Purchase and Sale, searching the title, drafting mortgage documents and tending to the

closing details. Searches investigated by the lawyer include but, are not limited to, utility, property tax, building and zoning. Legal fees are a matter of negotiation with the lawyer.

## **9. Mortgage**

A lender may take security over real property by way of a charge/mortgage of land, on a debenture. All provinces have an electronic land registry system to record interests in real property.

The mortgage amount, rate, terms and conditions are determined by various factors. Working with a mortgage specialist acquainted with non-resident financing would be wise.

## **10. Helpful Websites**

1. Canadian Real Estate Association

[www.crea.ca](http://www.crea.ca)

2. Canada Mortgage and Housing Corporation

[www.cmhc-schl.gc.ca/](http://www.cmhc-schl.gc.ca/)

3. Citizenship and Immigration Canada

[www.cic.gc.ca](http://www.cic.gc.ca)

4. Ontario Bar Association; Real Property Law Section

[www.oba.org/sections](http://www.oba.org/sections)

5. Advice on Moving to Canada

[www.canada.gc.ca/home/](http://www.canada.gc.ca/home/)

6. Investing in Canada

[http://www.ic.gc.ca/eic/site/icgc.nsf/eng/h\\_07042.html](http://www.ic.gc.ca/eic/site/icgc.nsf/eng/h_07042.html)

7. Taxes for Non-Residents - Canada Customs and Revenue Agency

<http://www.cra-arc.gc.ca/tx/nrsdnts/menu-eng.html>

8. Ontario Real Estate Association

[www.orea.com](http://www.orea.com)

9. Real Estate Council of Ontario

[www.reco.ca](http://www.reco.ca)