THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW

Seventh Edition

Editors

Adam Emmerich and Robin Panovka

THE LAWREVIEWS

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SEVENTH EDITION

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PREFACE

For real estate investment trusts (REITs), the covid-19 pandemic was a tale of two cities, of boom and bust, with the seismic changes in the world leading to strength in some sectors of commercial real estate and huge market dislocations and disruptions in others. In general, companies with assets that service the digital economy – cell towers, logistics and industrial properties, and data centres – benefited from the pandemic's acceleration of the digital economy. However, several traditional sectors confronted difficult issues involving liquidity, rent collection, dividend payouts, disclosure and guidance, as well as having to navigate the uncertain and sometimes shifting guidance from regulatory authorities regarding the timeline of reopening. While the distribution of the vaccine to many individuals in the United States and certain other countries has blunted the pandemic in some areas, inequitable distribution has yielded an uneven economic recovery internationally. Still, even with hopefully the worst of the pandemic behind us, we are unlikely to see a return to a pre-pandemic world, as the pandemic has changed the way that we interact with real estate, and compressed a decade or more of digitisation into a matter of months, with the new normal involving fewer, or at least different, in-person work or shopping. While vaccine rollouts have enabled many regions to fully reopen stores, offices and restaurants, we still have longer to wait to find out how many of the pandemic shifts (work from home and hybrid work arrangements, massive growth in online retail) are permanent, and which will fade with time. The eventual new normal that emerges will likely have rippling effects throughout the REIT industry for years to come. As always, strategic planning and risk management will be critical to adjust to changing times. Covid-19 aside, 2022 has brought some storm clouds, with war in Europe, rising interest rates and inflation running hot. While opportunities within real estate are unlikely to dry up, there may be increased volatility in the near term, and the complex macroeconomic backdrop will likely have disparate impacts on different subsectors and different geographies within the industry.

Stepping back from recent global events and market dislocations, publicly traded real estate companies and REITs, with help from real estate private equity, have steadily transformed the global real estate markets over the past 25 years. Their principal innovation, and 'secret sauce', has been liquid real estate. Unlike traditional property ownership, equity in publicly traded real estate vehicles is highly liquid, and can be bought and sold in large volumes, literally in minutes, on numerous global exchanges. Indeed, during the pandemic, REITs issued more than US$10 billion in public equity, taking advantage of the massive amounts of liquidity washing over financial markets beginning in the spring of 2020. In 2021, public REITs raised approximately US$27 billion in follow-on equity offerings.

Publicly traded real estate vehicles have an aggregate market capitalisation of over US$1.6 trillion globally, including over US$1 trillion in the United States and approximately

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US$200 to US$280 billion in each of Europe and Asia. As public REITs and other vehicles have aggregated these properties and grown in scale and sophistication, so too have real estate-focused private equity funds, playing an important role catalysing hundreds of billions of dollars of REIT and real estate merger and acquisition (M&A) transactions and initial public offerings.

However, despite that massive growth and despite the pandemic, potential growth is far larger both in long-standing REIT markets and in newer REIT jurisdictions, where the trend is more nascent. With increasing development and urbanisation, the world is producing more and more institutional-grade properties, and a growing percentage of this expanding pool – an estimated US$5 trillion and counting – will inevitably seek the advantages of liquidity by migrating to the publicly traded markets. The growth is expected to be both local and cross-border, with nearly 40 countries already boasting REIT regimes. Despite this potential for growth, it remains to be seen whether Russia's invasion of Ukraine and the associated energy and supply chain disruptions will spur a wider backlash against globalisation and cross-border investment.

REITs and other publicly traded vehicles for liquid real estate have grown because they are often a superior vehicle for stabilised assets. Greater liquidity and transparency – and often superior governance – are attractive to investors, resulting in a lower cost of capital and superior access to vast amounts and varieties of capital in the public markets. In addition to cheaper capital, REITs and other public vehicles benefit from efficiencies of scale, sophisticated management and efficient deal structures, to name just a few advantages. With these advantages, the global march of real estate to the public markets seems unstoppable.

This publication is a multinational guide for understanding and navigating the increasingly complex and dynamic world of liquid real estate and the transactions that mostly produce it. The sea change in the markets, sometimes called the 'REIT revolution', has meant that major real estate transactions have migrated from 'Main Street' to 'Wall Street'. They now often take the form of mergers, acquisitions, takeovers, spin-offs and other corporate transactions conducted in the public markets for both equity and debt. They have grown exponentially in complexity and sophistication, and increasingly represent cross-border multinational transactions fuelled by the now-global real estate capital markets and M&A deal professionals. And they are often intermediated by international investment banks rather than local brokers, and financed with unsecured bonds or commercial mortgage-backed securities. In a fair number of cases, they are catalysed by private equity firms or similar actors, sometimes building portfolios to be taken public or sold to public real estate companies, and sometimes through buyouts of public real estate companies for repositioning or sale.

To create this publication, we have invited leading practitioners from around the globe to offer practical insights into what is going on around the conference tables and in the markets in their jurisdiction, with an eye to cross-border trends and transactions. As will quickly become evident, the process of liquefying real estate and transactions involving public real estate companies requires a melding of the legal principles, deal structures, cultures and financial models of traditional real estate, public company M&A and private equity. None of this, of course, happens in a vacuum, and transactions often require expertise in tax, corporate and real estate law, not to mention securities laws and global capital markets. Each of our distinguished authors touches on these disciplines.

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We hope this compilation of insight from our remarkable multinational authors produces clarity and transparency in this exciting world of liquid real estate and helps to further fuel the growth of the sector.

Adam Emmerich and Robin Panovka
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Chapter 4

CANADA

Brenda Gosselin and Stephen Pincus[1]

I OVERVIEW OF THE MARKET

i The Canadian landscape

Since the onset of the covid-19 pandemic in March 2020, Canadian real estate has experienced a rocky road to recovery. Prior to the pandemic in 2019, Canadian real estate saw strong levels of large scale (i.e., greater than C$40 million) transaction volume with a total of C$21.3 billion.[2] However, the momentum came to a halt in early 2020 with the onset of the pandemic. As a result, much of 2020 was defined by market uncertainty and, as a result, transaction volumes dropped dramatically. Total investment volume dropped 21 per cent in 2020 over the prior year, equity capital issuances were down -70 per cent to C$2.2 billion from the record-breaking 2019 level of C$7.5 billion,[3] volume of property transactions (greater than C$40 million) was down to C$11.0 billion, a level not seen since 2016, and the year saw only one public M&A transaction in the sector for a total transaction value of C$4.9 billion in contrast to the six public transactions that occurred in 2019 for a total of C$10.2 billion.[4]

However, as investors and market participants adjusted to the new normal in 2021, confidence began to return to the markets and deal activity picked up within the Canadian real estate sector. Industrial and residential real estate demand continued to be strong, with multi-family making up 38 per cent of major commercial real estate transactions, and the industrial sector following closely behind at 30 per cent.[5] Multi-family transactions in 2021 were led by Dream Unlimited Corp, which acquired a two apartment building portfolio in Toronto for C$338 million and another two Toronto apartment buildings for C$378 million in partnership with Dream Impact Trust.[6] Canada Pension Plan Investment Board (CPPIB) and Tricon Residential Inc also announced early in the year a C$500 million joint venture to invest in build-to-core multi-family rental projects in the Greater Toronto area (GTA). In the

1 Brenda Gosselin and Stephen Pincus are partners at Goodmans LLP. They wish to thank Aryan Pour-Bahreini, legal articling student and Olivia Moon, legal summer student, for their assistance in the preparation of this chapter.
2 CIBC 'Canadian Real Estate Investment Banking – 2020 Year in Review' (CIBC 2020 Report).
3 CIBC 2020 Report.
4 CIBC 2020 Report.
5 CIBC 'Canadian Real Estate Investment Banking – 2021 Year in Review' (CIBC 2021 Report).
6 ibid.

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industrial sector, Blackstone's Pure Industrial Real Estate Trust accounted for 20 per cent of all industrial transactions, acquiring a 28 property portfolio in the GTA from Artis REIT for C$750 million in July 2021, among other notable transactions.[7]

Senior housing saw an uptick in 2021 as it continued to recover following the significant impacts to the sector seen during the earlier part of the pandemic. Blackstone and Selection Group acquired Revera Inc's 70 per cent interest in 13 senior housing residences in Quebec for C$750 million, which was the largest Canadian senior housing transaction since February 2017, pre-dating the pandemic.[8] While there was noted recovery in the office sector as well, it remained relatively subdued given the rise of working from home and the consequently uncertain outlook of this sector.[9] However, there were a few sizeable transactions including Oak Street Real Estate Capital's acquisition of The Bow in Calgary and the Bell Mobility Campus in Mississauga from H&R REIT for C$1.5 billion,[10] and the acquisition by Blackstone, one of the largest real estate private equity firms in the world based out of the United States, of three-building Atlantic Complex in Toronto's Liberty Village in downtown Toronto for C$240 million together with its acquisition in 2022 of the Air Canada Tower and 1100 Atwater class-A office buildings in Montreal for C$231 million, further expanding Blackstone's investment in Canadian commercial inventory. Transaction volumes within the retail and hotel sectors remain at the record low levels reported in 2020. In fact, transactions in the retail sector declined in 2021, representing only 8 per cent of total volume compared to 13 per cent of total volume in 2020.[11] The largest retail trade in 2021 was RioCan REIT and First Gulf's disposition of Kennedy Commons in Scarborough, which sold for C$215 million to a private investor in December.[12] Transactions in the hotel sector were nearly absent in 2021 with only a few modest transactions recorded throughout the year, the largest one being Northland Properties' acquisition of QUBE Hotel in Toronto for C$74 million. However, the year was capped off with the sale by Skyline Investments Inc of its Canadian resorts and development assets to Freed Corp in a C$300 million transaction.

Within the financial markets, the S&P/TSX Capped REIT Index returned 35 per cent over the course of 2021 with all subsectors within the Index making positive returns. This outpaced both the S&P/TSX Composite Index as well as the S&P 500 index, which returned 25 and 29 per cent respectively in 2021. Stock market gains within the index were led by the industrial sector, which saw a 50 per cent gain, followed by retail at 35 per cent and residential at 32 per cent. Although weaker, office, hotels and senior housing still saw double-digit returns of 22, 21 and 13 per cent respectively.[13]

Within the residential sectors, Canada's real estate market topped new records as low interest rates and constrained supply fuelled a home-buying frenzy in Canada's largest markets. Demand remained at fever-pitch as it continued to outpace supply, thereby driving prices up dramatically. Approximately 667,000 houses are estimated to have changed hands in 2021, representing the second-highest ever volume of residential real estate transactions across the

7 ibid.
8 ibid.
9 ibid.
10 ibid.
11 ibid.
12 ibid.
13 ibid.

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country in a single calendar year.[14] In response to this near unprecedented level of demand from home purchasers, new constructions have also rapidly increased in Canada. As such, it is expected that the added supply will lead to a moderate cooling effect on the growth of the residential housing market within the country for the coming year. The Canadian federal budget released in April 2022 set out a number of key actions that the federal government will be taking in the coming year to support affordability in the residential housing market.[15] These federal measures are in addition to existing and planned measures that have been proposed and implemented at the provincial and municipal levels and include an intention to propose restrictions that would prohibit foreign commercial enterprises and people who are not Canadian citizens or permanent residents from acquiring non-recreational, residential property in Canada for a period of two years.

Overall, the national MLS Home Price Index finished the year with a record 25.3 per cent increase from 2020.[16] Increases were most strongly felt in the largest Canadian cities. In Toronto, home prices soared 28.3 per cent while condominium prices were up 21.7 per cent from the previous year, and among the provinces, Nova Scotia has seen the largest year over year increase in house prices with growth levels of 37 per cent year over year.[17]

With respect to borrowing, the Bank of Canada maintained its overnight lending rate at 0.25 per cent for the duration of 2021 – however, rates have begun to increase in early 2022 and are currently at 1.50 per cent as of June 2022.[18] The Bank has signalled that it plans to continue increasing rates through 2022 and 2023 to combat rising inflationary pressures.

From a capital markets perspective, the real estate sector saw robust activity in 2021 by all measures. Issuance activity saw major recoveries in 2021 as issuers flocked to the highly active debt and equity markets. Total issuance volume for 2021 was a total of C$4.8 billion, which was more than double the C$2.4 billion in issuance activity in 2020.[19] Issuances were spread across various asset classes with 31 issuances of equity, 19 issuances for public unsecured debt, three convertible debenture issuances and one senior hybrid debenture. One notable area of reduced activity was in the Canadian market for unsecured debentures, which saw C$6 billion being raised across 19 separate transactions.[20] This represented a 30 per cent decline from activity levels in 2020. While public debt issuances as a whole declined in 2021, green bond issuances continued to show strength throughout the year as the focus on environmental, social and governance (ESG) mandates continue to gain traction. Specifically, there were eight green bond issuances from REITs throughout 2021 raising an aggregate amount of C$3.35 billion. Of note within the green bond spaces was RioCan REIT's C$450 million unsecured debentures with a 2.8929 per cent coupon rate and seven-year term. Much of the 2021 equity issuance activity was centred around industrial and residential real estate issuers with the largest issue of the year coming from Tricon Residential Inc's US$513 million US IPO.[21]

14 RBC Economics 'The fever breaks: Canada's housing market will cool but stay strong in 2022' (RBC Real Estate Report).
15 Government of Canada 'Budget 2022, Chapter 1 – Making Housing More Affordable'.
16 Chartered Professional Accountants Canada 'Canada's housing market is breaking records at an alarming rate'(CPA 2021 Report).
17 WOWA 'Canadian Real Estate Market Overview' (WOWA Report).
18 Bank of Canada 'Policy Interest Rate'.
19 CIBC 2021 Report.
20 CIBC 2021 Report.
21 CIBC 2021 Report.

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Public M&A transaction activity for Canadian real estate issuers increased in 2021, with three transactions totalling C$100.1 billion, as compared to the C$4.9 billion seen in 2020 across one transaction, yet distinct from the 2019 activity that saw C$10.2 billion of value across six transactions. The largest of such transactions was the privatisation of Brookfield Property Partners LP by Brookfield Asset Management for C$90.6 billion.[22] The year continued with the acquisition of WPT Industrial REIT by Blackstone Real Estate Income Trust Inc in an all-cash transaction valued at approximately C$4.2 billion, and the acquisition of Cominar REIT by a consortium of Canderel Real Estate Properties Inc, Koch Industries Inc, Artis REIT, FrontFour Capital Group LLC and the Sandpiper Group in an all-cash deal valued at approximately C$5.7 billion.

Commercial real estate transactions (greater than C$40 million) saw very high levels of activity with C$18.8 billion in transaction value being recorded in 2021, up 70 per cent compared to 2020, led by the multi-family and industrial sub-sectors.[23] Although covid-19-related disruptions were prevalent for many commercial real estate matters, low interest rates and constrained supplies continued to fuel the commercial real estate deal space, resulting in increased deal activity despite the uncertainties of the pandemic.

The relatively slower recovery of the office sector is undoubtedly linked directly to the pandemic. While some companies are beginning to bring their employees back to physical workplaces, full-scale returns to the office remain limited. As such, there continues to be uncertainty as to how the office real estate market will evolve post-pandemic.[24] Many employees continue to express a desire to retain the ability to work from home or in a hybridised environment. To maintain competitiveness for new talent, many employers have begun implementing flexible working arrangements for employees that allows them to work remotely for all or a part of their employment. In 2020, office vacancy rates sat at 10.2 per cent in the second quarter of 2020,[25] with this figure increasing to 15.8 per cent in 2021.[26] While this is concerning for the office sector, office space tenants are continuing to demand more flexible arrangements for their spaces. This includes movements towards shorter-term leases and the use of suburban office spaces. If such demands are met, office vacancy rates may see a corresponding decline. What is clear is that the office sector will have to continuously evolve in response to the ongoing effects of the pandemic.

Covid-19 also accelerated shifts in the retail sector that were already in progress pre-pandemic as many retailers were moving away from brick-and mortar locations in favour of an e-commerce environment. Over the past few years, several large Canadian retailers have shut their doors in Canada or are in the process of significantly downsizing their businesses. Examples of such include the liquidation of Le Chateau, the closure of National Sport and the downsizing or shuttering of the Canadian operations of brands such as J Crew, Bed Bath and Beyond, Moores and the Disney Store, among others. As such, demand for larger retail properties such as shopping malls has had to evolve given the growing demand for online shopping. Despite dwindling demand for traditional retail spaces, certain essential retailers

22 CIBC 2021 Report.

23 CIBC 2021 Report.

24 PwC 'Commercial Real Estate Outlook' (2021 PwC Report).

25 2021 PwC Report.

26 CBRE Canada Market Outlook 2022.

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such as grocery stores saw some of their most successful years during the pandemic. It is expected that large commercial properties that have been anchored by grocers are best poised to succeed in the retail real estate sector post-pandemic.[27]

In the industrial real estate sector, the impact on demand over the past year was also coloured by the covid-19 pandemic. With in-person activities and shopping continuing to remain closed for large stretches of the year, consumers increasingly turned to online alternatives. As a result, industrial real estate properties focused on logistics, and warehousing and fulfilment were in high demand and saw continued resilience throughout the past year.[28] Availability rates for industrial real estate properties in 2021 continued to remain low at 3.5 per cent (compared to the 10-year average of 5.1 per cent), putting increased pressure on rental rates, with the national average rent for industrial properties increasing almost 10 per cent on a year over year basis.[29]

Forecasts predict that the outlook for real estate in 2022 is positive. Despite setbacks due to the pandemic, the consensus is that the Canadian commercial real estate industry has recovered relatively well and will continue to do so. Q1 2022 indicates that investors' interest in senior housing has continued to grow. It is predicted that the multi-family sector will also continue the trend upwards due largely to loosening pandemic restrictions and the consequent migration to urban centres.[30] The industrial space has similarly started 2022 with increasing demand due to the impacts of e-commerce. While Q1 2022 saw an uptick of office vacancy since the end of 2021,[31] the outlook remains positive due to office workers returning to in-person work, albeit hybrid, paired with the expansion of US-based technology companies in Canada that will create demand for office spaces.[32] The retail sector has also shown signs of improvement in the first quarter of 2022. Hotel investment trends are also predicted to point upwards due to easing of travel restrictions and increasing mobility. While covid-19 undoubtedly disrupted the Canadian real estate market in the past two years, forecasts predict that the market is resilient and capable of adapting.

ii Investors

Real estate investors in Canadian real estate can be broadly categorised as being one of three types: institutional investors, consisting primarily of Canadian pension plans and life insurers; public real estate entities, most significantly in the form of REITS with a smaller number of listed real estate operating corporations; and private entities, including family-owned businesses, that develop or manage their own properties of varying scale, and, increasingly, large-scale Canadian and foreign private equity investors or other institutional capital funds.

27 2021 PwC Report.
28 2021 PwC Report.
29 2021 PwC Report.
30 CBRE Canada Market Outlook 2022.
31 CBRE Canada Office Figures, Q1 2022 (CBRE Canada Office Figures).
32 CBRE Canada Market Outlook 2022.

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Institutional investors

Those Canadian pension plans and life insurers that invest in real estate typically comprise large, recognisable public pensions, which make direct investments in both domestic and global real estate; smaller public plans that rely on funds and external managers for their investments; and private corporate pensions or insurers that partake in both direct and indirect investing.

Over the past three decades, Canadian pension plans and life insurers have commenced, and subsequently increased, their investments in real estate, driven in part by low interest rates, changing demographics and longer life expectancy.[33] The real estate allocation targets of Canadian pension funds was projected to increase anywhere from 1 to 3 per cent from 2017 to 2022,[34] fuelling speculation that the trend towards continued investment by these pension plans in real estate, including Canadian real estate, will continue at a steady pace. Canadian pension funds remain one of the largest real estate owners in Canada.

These large Canadian pension funds and insurers have assets across all real estate classes, with prominent investment historically focused on Class A office space, premier urban shopping centres and office tower retail spaces in the major metropolitan areas of Canada, with some indirect engagement in development activities. A number of the large public pension plans that invest on behalf of various public sector employees significantly increased their allocation to real estate by privatising several of Canada's largest real estate companies and continue to invest significantly in the real estate sector.[35] While these investments have become increasingly global in scope, the Canadian pension plans have continued to demonstrate a heavy inclination to invest in Canadian real estate. This may be in part due to the ability of pension plans to generally hold Canadian real property assets on a basis free from Canadian income tax under specific tax exemptions for certain Canadian pensions and Crown entities (such as CPPIB), or the favourable market conditions for promising returns in the Canadian real estate space.

Public real estate companies and REITs

Public real estate entities in Canada commonly exist in the form of a REIT. A REIT is a trust that, upon meeting the criteria outlined in Canada's Income Tax Act (ITA), acts as a flow-through vehicle for Canadian income tax purposes. The first Canadian public REITs emerged in the 1990s as a solution to the collapse of Canada's real estate market. In 1996, there were five publicly traded REITs on the Toronto Stock Exchange (TSX). As of 31 December 2021, there were 40 TSX listed REITS with a total market capitalisation of just over C$100 billion. While the Canadian REIT market remains small in comparison to its comparator market in the US, it is a continually evolving sector of the Canadian real estate landscape.

In 2021, the S&P/TSX Capped REIT Index (REIT Index) delivered an approximate 35 per cent total return, which firmly outpaced the 25 per cent return generated by the S&P/TSX Composite Index.[36] Many of these gains were made on the back of the recovery that began in late 2020 as the vaccine roll-out was initiated and a return to normality was thought

33 JLL, 'Canadian pension funds eye further real estate allocations' (29 January 2018).

34 ibid.

35 Specific examples include the privatisation of Oxford by OMERS; and of Cadillac Fairview by Ontario Teachers' Pension Plan.

36 CIBC 2021 Report.

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to be on the horizon. All sub-sectors of the REIT Index saw positive returns throughout 2021, but the industrial and retail sectors saw the most outsized growth, with returns of 50 and 35 per cent respectively during 2021.[37] Almost all REIT issuers listed on the TSX saw returns to pre-pandemic levels as market sentiments shifted towards reopening society and returning to normal conditions.

As previously noted, issuers capitalised on the strength of the equity and debt markets in 2021, producing a strong level of issuance activity. There was approximately C$4.8 billion in issuance volume, which represents more than double the 2020 total of C$2.2 billion.[38] While issuance activity saw a strong comeback in 2021, it still fell short of the 2019 record-breaking year of C$7.5 billion.

Equity capital markets for real estate issuers saw a flurry of activity as 31 equity offerings raised over C$4.4 billion throughout the year. While the vast majority of these issuances were follow-on offerings, two significant IPOs also launched in 2021. Tricon Residential Inc's US$513 million IPO, which was completed in October 2021 and Starlight US Residential Fund's C$311.7 million IPO, which closed in November 2021. Most of the remaining issuances came from a broad range of Canadian REITs who completed offerings between C$100 million to C$300 million, the largest of which was Granite REIT's C$316 million issuance in June of 2021. Also of note was Dream Industrial REIT, which completed four separate offerings throughout 2021 raising a total of just over C$1 billion.

The debt capital markets for real estate issuers also saw robust activity in 2021. Total public debt issuances for 2021 came in at just over C$6 billion across 18 unsecured debt issuances. Of particular note in 2021 was Granite REIT's C$500 million seven-year note offering and the C$450 million green bond issuance by RioCan REIT referred to earlier. Also of note was Allied Properties REIT raise of C$1.1 billion throughout 2021 across two separate issuances in February 2021 and August 2021.

The majority of Canadian REITs are the product of smaller IPOs (typically under C$300 million) as compared to their US counterparts. Interestingly, this has had the effect of attracting a number of US-based cross-border REITs to the Canadian capital markets over the years. Canadian REITs own a full range of asset classes, such as office, retail, industrial and multi-residential. However, among the office investments, relatively few REITs own Class A office towers (which, as discussed above, are typically held by large institutional investors). REIT activity in the retail class remains largely concentrated within regional and local shopping centres. More recently, investment in multi-use developments has increased among the greater capitalised REITs.

The management of a REIT can be internally conducted through a trust's own executives and employees, or externally conducted by way of a manager under contract. A number of Canadian REITs are externally managed and do not have their own employees. In these situations, the terms of the management agreement between a REIT and an external manager can be an important consideration in structuring an M&A transaction. Any acquirer of a REIT will have to be prepared to either assume those functions (if the management agreement is to be terminated) or make arrangements with the manager to continue in some capacity after a transaction closes. The Canadian real estate capital market tends to favour internalised arrangements, while sponsors typically prefer the fees flowing to them from an external management arrangement.

37 CIBC 2021 Report.

38 CIBC 2021 Report.

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Whereas REITs make up a significant portion of public real estate entities, there are comparatively fewer public real estate companies in Canada. This is in part attributable to the fact that public real estate corporations, in order to compete with REITS in terms of cost of capital, require large-scale and sufficient tax attributes to defer taxes over an extended period of time. Consequently, real estate corporations tend to partake more actively in the development of real estate, particularly in the residential class.

Private entities

Family-based private investors in real estate have significant industrial, retail and multi-residential holdings, but tend not to hold Class A offices or premium retail properties. Canadian private equity funds (other than pension plans or life insurers) that partake in real estate investing tend to focus their investments solely on real estate, and generally do not invest across all economic sectors. Moreover, the equity raised by these private equity funds tends to be in the hundreds of millions, as opposed to the billions seen with public pension plans, although there continues to be an upward trend of private equity dominating acquisition volume. Specifically, in contrast to public issuer activity, which represented approximately 21 per cent of overall acquisition activity in 2021, private equity capital continued to dominate the commercial real estate investment market, being behind 69 per cent of overall acquisition activity (an increase from the 58 per cent of overall acquisition volume in 2020 and an average of 47 per cent over the prior three-year period), the majority of which was made in the multi-family space and industrial assets.[39]

Large-scale Canadian private equity investors in real estate still remain fewer in number and tend to manage funds that have a significant pension plan backing. For example, in 2019 RBC Global Asset Management announced a partnership with pension fund manager British Columbia Investment Management Corp (BCI) and real estate developer QuadReal Property Group. The partnership has a portfolio of over 40 assets worth over C$7 billion and launched the RBC Canadian Core Real Estate Fund (Fund). In 2021, the Fund also added 12 new assets to its portfolio.[40] Historically, these pension-backed private equity investors invested in real estate that requires active management or repositioning, or that are in the office asset class (although it continues to be rare for them to hold Class A offices) or in the commercial asset class. However, the increased development of condominiums seen across Canada in the past decade has largely been driven by private equity capital and pension funds. In recent years, the Canadian real estate market has also seen an increased level of activity from foreign-based private equity investors as evidenced by Blackstone's privatisation of Dream Global REIT in 2019 for an implied value of C$6.2 billion, becoming the largest-ever Canadian REIT M&A transaction; and, more recently, in 2021, Blackstone's acquisition of three office buildings in downtown Toronto, known as the Atlantic complex, for C$240 million, its acquisition in 2022 of the Air Canada Tower and 1100 Atwater class-A office buildings in Montreal for C$231 million and its recent announcement in May 2022 of its opening of a Toronto office to further drive investment and enhance its presence in Canadian real estate.[41]

39 CIBC 2020 Report and 2021 Report.

40 QuadReal, 'RBC Canadian Core Real Estate Fund Adds Twelve New Assets to its Portfolio' <https://www.quadreal.com/rbc-canadian-core-real-estate-fund-adds-twelve-new-assets-to-its-portfolio/>.

41 *The Globe and Mail*, 'Blackstone targets Canadian real estate, opens office in Toronto' <https://www.theglobeandmail.com/business/article-blackstone-targets-canadian-real-estate-opens-office-in-toronto/>.

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II RECENT MARKET ACTIVITY

Activity in the real estate market driven by REITs, private equity firms, institutional investors and foreign investors has continued to be a characteristic of the Canadian market for the past few years. While the beginning of the pandemic was not promising for real estate acquisition activity, it rebounded rapidly throughout 2021. In 2021, the deal space was robust with over C$18.8 billion in real estate property transactions (over C$40 million) occurring throughout the year, representing a significant jump from 2020.[42] Private equity continued to dominate the property-level real estate transaction market in 2021 in the same manner as 2020 where, as noted earlier, it represented approximately 69 per cent of total acquisition activity throughout the year.[43] Whereas private equity activity in 2020 was focused on multi-family and office assets, preferences shifted slightly in 2021 with multi-family and industrial assets becoming the preferred targets of private equity buyers. Specifically, 2021 saw C$4.4 billion and C$3.5 billion in private equity investment flow into multi-family and office assets, respectively.[44] The effects of the pandemic were also evident in the private equity real estate space as retail and hotel assets saw far less investment when compared to other asset classes. Multi-family and industrial continued to dominate the level of activity in Canadian real estate, accounting for 38 and 30 per cent of overall transaction volume, respectively, in 2021.[45] In addition to the two acquisitions made by Dream Unlimited Corp, previously noted, Starlight Investments was also an active participant in the multi-family space, acquiring 2,131 multi-family units for C$687 million across seven separate transactions. On the industrial side, in addition to the 28-property portfolio purchased by Pure Industrial from Artis REIT for C$750 million, Pure Industrial also acquired an industrial property for C$90 million and a 10-property portfolio for C$280 million, each in Mississauga.[46] Although the office sector experienced some downturn in 2020 as the impact of the pandemic continued to be uncertain, 2021 showed modest signs of recovery. Oak Street Real Estate Capital acquired the Bow Office Tower in Calgary and Bell Mobility Campus in Mississauga from H&R REIT for gross proceeds of approximately C$1.47 billion and Groupe Mach and Groupe Petra acquired two Montreal office buildings – one for C$486 million from Ivanhoe Cambridge and one for C$196 million from BentalGreenOak.

As previously discussed, there was also increased activity in the public M&A space, with three transactions in 2021 aggregating C$100.1 billion, as compared to the one transaction that occurred in 2020 at a value of C$4.9 billion. Despite the high transaction value in 2021, which was mostly attributed to the privatisation of Brookfield Property Partners, the level of activity in 2021 lagged behind 2019, which saw six public M&A real estate transactions aggregating C$10.2 billion in value. Nevertheless, the public real estate M&A transaction market in 2021 was reflective of increased confidence, as in the issuance markets.

Canadian real estate equities underperformed the broader market during 2020, with the S&P / TSX Capped REIT Index returning -13 per cent, which was in line with the MSCI US REIT Index's return of -8 per cent, but which was below the S&P/TSX Composite Index and the S&P 500 Index with returns of 6 and 18 per cent, respectively, evidencing the disproportionate impact that the pandemic had on the real estate sector throughout

42 CIBC 2021 Report.
43 CIBC 2021 Report.
44 CIBC 2021 Report.
45 CIBC 2021 Report.
46 CIBC 2021 Report.

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2020. However, as previously noted, returns made a significant comeback in 2021. The S&P/TSX Capped REIT Index returned approximately 35 per cent in 2021, which outpaced the 25 and 29 per cent returns seen in the S&P/TSX composite and the S&P 500 Index, respectively. South of the border, the MSCI US REIT Index, which tracks the vast majority of US REIT issuers, retuned approximately 43 per cent in 2021. The strong 2021 returns seen by the MSCI US REIT Index followed on from a weaker year in 2020 where the index had returns of -7 per cent.[47]

In the past five years, Canadian real estate entities have increased their focus on real estate development opportunities, as opposed to solely being engaged on acquisitions of existing properties. In recent years, several large public REITs and pension funds, either directly or indirectly through their corporate real estate arms, began or completed the building of office towers or mixed-use projects throughout the downtown Toronto core. Cadillac Fairview, which is controlled by the Ontario Teachers' Pension Plan, began construction of its expected C$1 billion downtown Toronto office tower, and Allied Properties REIT and RioCan REIT continue to proceed with full development of The Well, a mixed-use residential, commercial and retail development located in Toronto. As of a February 2022 progress update published by RioCan, the construction of the commercial component (which includes office and retail) is approximately 82 per cent complete. Retail leasing at The Well has also gained momentum with 79 per cent of the retail space being leased.[48] Office leasing has moved more quickly, with 90 per cent of the office component of the space being leased. Construction of the residential building is also advancing and is expected to be complete in 2023, where 90 per cent of the condo component has been sold by Tridel.[49]

Over the years we have seen an increased presence of US investors in Canadian commercial real estate. In 2020, NASDAQ-listed Equinix REIT made two large acquisitions in the GTA for a total of C$342 million. Furthermore, Americold Realty Trust acquired the assets of Canadian Nova Cold for C$337 million in January 2020.[50] Foreign interest in Canadian commercial real estate continued in 2021 with the significant acquisition of WPT Industrial REIT by Blackstone in August of 2021 for US$3.2 billion. In addition, the previously mentioned acquisition of Cominar REIT by a Canderel-led consortium included numerous US and foreign investors. It would appear on all accounts that continued foreign investment in the Canadian real estate landscape is here to stay.

As the Canadian real estate market continues to evolve, one important factor that will undoubtedly affect market activity is ESG considerations, as it becomes more important among the investment criteria of institutional investors. In fact, an RBC survey of institutional investors reported that 81 per cent of Canadian respondents already use ESG factors as part of their decision-making process.[51] Consequently, the issuance of green bonds has increased more recently. For example, in November 2021, Choice Properties Real Estate Investment Trust announced an inaugural green bond offering with the issuance of C$350 million of

47 MSCI US REIT Index Fact Sheet.
48 Real Estate News Exchange, 10 May 2022.
49 ibid.
50 CIBC 2020 Report.
51 CBRE Canadian Real Estate Market Outlook (2022) (CBRE Canada Market Outlook 2022).

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senior unsecured debentures.[52] To further the focus on ESG, Canada's federal government indicated in its April 2021 budget its plans to require federally regulated pensions to disclose ESG considerations they use in their portfolio construction.

i M&A transactions

Canada's REIT market remains robust, with over 40 publicly traded REITs with an aggregate market capitalisation in excess of C$100 billion,[53] fuelling a significant portion of M&A activity in the Canadian real estate space over the past few years. In 2021 alone, there were three notable real estate M&A transactions, namely the privatisation of Brookfield Property Partners by Brookfield Asset Management, Blackstone REIT's acquisition of WPT Industrial REIT, and the privatisation of Cominar REIT by Iris Acquisition II LP.

2020 gave us the acquisition by Starlight Investments and KingSett Capital of Northview Apartment REIT in a C$4.9 billion cash and stock transaction pursuant to which Starlight and KingSett would acquire the outstanding units (other than Starlight's existing interest) of Northview for C$36.25 per unit.

2021 saw the acquisition of Great Canadian Gaming Corp by HPS Investment Partners and Apollo Global Management. The deal closed in September 2021 and was structured as an all-cash acquisition worth approximately C$3.3 billion. Great Canadian Gaming Corp operates a number of gaming, entertainment and hospitality facilities across Ontario, British Columbia, New Brunswick and Nova Scotia.

ii Capital markets activity – public offerings

The REIT IPO market in 2021 remained slower, with only two IPOs that launched during the year, namely, Tricon Residential Inc's C$513 million IPO, which was completed in October 2021, and Starlight US Residential Fund's C$311.7 million IPO, which closed shortly after in November 2021.

As previously discussed, 2021 also saw a strong comeback for non-IPO issuances with C$4.8 billion in deal value. The strong equity markets, however, produced fewer debt issuances throughout the year. Overall, the 2021 issuance volume included 31 issuances of equity, 19 unsecured public debentures, three issuances of convertible debentures and only a single issuance of a senior unsecured hybrid debenture. The largest non-IPO equity issuance was Granite REIT's C$316 million treasury offering of trust units in June 2021. The largest debt issuance in 2021 was Allied Property REIT's C$600 million green bond issuance in February of 2021.

iii Investor activism

As previously noted, most publicly listed real estate entities in Canada exist in the form of a REIT. Most REITs, because they are trusts, do not provide to their unit holders those same rights and remedies as would be typically available to a corporate shareholder. However, the inability of unit holders to access such things as the oppression remedy, dissent rights, and rights to call meetings or make proposals, has not gone unnoticed. Institutional governance groups have and continue to pressure REITs to adopt more uniform trust declarations with

52 Choice Properties.
53 CIBC 2021 Report.

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rights comparable to those of a corporate shareholder. In light of this mounting pressure, some REITs are adopting some of those rights; however, a majority of REITs still have not moved to do so.

Canadian corporate law allows shareholders with a 5 per cent stake in a company to call for a special meeting, compared to the 10 per cent required under US law. Furthermore, in Canada, a shareholder can solicit votes from 15 other investors without issuing a proxy circular under what is referred to as the quiet solicitation exemption under the applicable rules. This allows a relatively small shareholder to gather powerful allies behind closed doors. Taken together, these circumstances give activists a more accessible basis from which to launch their campaigns. Canada's friendliness to shareholder activism helps explain why activism within the real estate market has been undergoing a paradigm shift in recent years.

Historically, the REIT market has seen a limited amount of unit holder activism, and it is driven largely by private equity where it has occurred.

With activism continuing its ramp up in the Canadian marketplace in recent years, there continue to be a number of prominent public unit holder activist campaigns launched against REIT management. For example, in January 2019, Sandpiper Group announced it had identified five publicly traded Canadian real estate entities that it plans to actively pursue. While Sandpiper Group did not announce the names, or even identify the type of real estate entities that it intends to pursue, it did make clear that it was prepared to bridge the value gap created by underperforming REITs and further highlighted the expected level of activist activity REITs may face in the coming years. It followed up on this announcement by negotiating to have two of its nominees, including Sandpiper's CEO, appointed to the board of Extendicare Inc, and in November 2020, Artis REIT announced a settlement agreement with Sandpiper, which saw a retirement of the REIT's CEO and CFO and a refreshment of a majority of its board of trustees. Sandpiper Group also announced in February 2020 that it had acquired a 10 per cent position in Dream Office REIT, citing its belief that the units of Dream Office are undervalued and represent an attractive investment opportunity. There has not been any notable investor activism activity in 2021.

Another form of activism that has been utilised in Canada involves institutional investors joining forces to demand higher prices in takeover bid transactions. For example, in 2019, a proposal by the executive chair of Hudson's Bay Company (which owns Saks Fifth Avenue and other department stores) to take the company private came under heavy criticism from activist investors (including Land & Buildings Investment Management), who believed that the offer price of C$9.45 per share was inadequate and did not properly recognise the value of the company's significant real estate holdings. Hedge fund Catalyst Capital mounted a public challenge opposing the transaction. Catalyst's tactics involved amassing shares, complaining to the Ontario Securities Commission about the process and ultimately launching its own bid at C$11 per share. Ultimately, Catalyst's efforts paid off, resulting in a privatisation of the company in March 2020 by a consortium of certain continuing shareholders at C$11 per share.

REITs are vulnerable to activists in part because they are not governed by corporate statutes, but rather by their own declaration of trusts. Consequently, in response to increased shareholder activism in recent years, a large number of REITs have adopted an array of important corporate governance enhancements. REITs need to continue to take particular proactive measures to ensure they are prepared to deal with activist investors.

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III TRANSACTIONS

i Legal frameworks and deal structures

There are numerous methods by which a public Canadian company can be acquired. With respect to M&A transactions in the real estate market, the two most commonly seen are structured either as a plan of arrangement or a takeover bid. An overview of these transaction structures, which are not unique to public real estate M&A, is provided below.

Plans of arrangement

A statutory plan of arrangement is a voting transaction that can be effected by a Canadian corporation according to the laws of the jurisdiction in which the company was incorporated. A plan of arrangement is unique in that it can permit a buyer to acquire 100 per cent of the shares of a target company without having to require a buyer to make an offer, or enter into a share purchase agreement, with each and every shareholder of the target company. Instead, the purchaser is required to enter into an arrangement agreement with the target company, and when the plan of arrangement is completed, the purchaser acquires all of the outstanding securities of the target company in a single step. As such, it is unsurprising that a plan of arrangement is frequently utilised in friendly, non-hostile acquisitions.

The arrangement agreement is first negotiated with a target company's board of directors. Once the board of directors approves it, the target will apply to a court to begin the process of approving and effecting the arrangement. The initial appearance before a court will be to secure an interim order, which sets the procedural rules for the arrangement, including the manner in which the meeting of security holders will be called and held, setting out those classes of security holders that are entitled to vote and the requisite levels required to approve the arrangement. The interim order is usually uncontested.

Once an interim order is provided, the plan of arrangement is presented to the target company's shareholders for their approval. The details of the transaction, including the specific steps contemplated by the plan of arrangement, are set forth for shareholders in an information circular, the content and form of which are governed by applicable securities laws. Although the requisite shareholder approval threshold is determinable by a court under an interim order, acquirers typically propose that they be obliged to seek the same approval threshold as would be required under the applicable corporate law statute governing the target company involved in the transaction if the transaction were effected outside the arrangement process. In most Canadian jurisdictions, the relevant corporate law statutes set out a threshold of two-thirds of the votes cast at the meeting of the target company's security holders. Convertible securities, such as warrants and convertible debentures, are typically not given the right to vote in a plan of arrangement, unless the rights of these securities holders are being altered by the arrangement in a manner that is unfair or is unreasonable.

If the requisite majority of shareholder approval is obtained, then the arrangement is presented to the court for its final approval. Disaffected stakeholders can, at this time, appear before the court to challenge the arrangement, although practically speaking, the vast majority of arrangements are presented to a court without opposition. The court, in reviewing the plan of arrangement, is guided by considerations of fairness and reasonableness, with respect to the effect of the transaction on shareholders. If the plan of arrangement is approved by the court, it then becomes binding on all shareholders of the target company.

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Given that plans of arrangement are voting transactions effecting corporations, the REIT-to-REIT M&A context necessitates the presence of a corporation somewhere in the REIT structure. To date, courts have been accommodating in the flexible use of the plan-of-arrangement structure, even where a transaction is primarily a REIT-to-REIT M&A transaction. Moreover, a unique feature of REIT-to-REIT mergers is that to achieve a tax deferral, the requirements in Section 132.2 of the ITA must be met, which is generally facilitated by structuring the transaction to be implemented with a plan of arrangement.

Takeover bid

A takeover bid, the substantive equivalent of a tender offer under US securities laws, is a transaction in which a purchaser makes an offer for the securities of a target company directly to the target company's securities holders. As the support of the target directors is not legally required, a takeover bid is the only practical means to effect an unsolicited or hostile acquisition.

Each Canadian province and territory has adopted a uniform regime under which takeover bids are regulated. The relevant legislation requires that a takeover bid be made to all registered holders of the class of voting or equity securities being purchased, and that the offer be sent to all registered holders of securities convertible into or exercisable for such voting or equity securities. Additionally, the offeror must make the same purchase offer to each securities holder in the class.

A takeover bid circular, delivered to all requisite security holders, must contain prescribed information about the offer, the offeror and the target company. Where the consideration offered in exchange for the solicited securities consists, in whole or in part, of the securities of the offeror, the disclosure document must also include prospectus-level disclosure about the offeror. While the uniform regime adopted by the securities regulators in Canada sets out the minimum standards relating to the conduct of the bid, including disclosure requirements, it is generally unnecessary for an offeror to present the contents of its disclosure documents to securities regulators; nor is it likely that the takeover bid circular, unless a complaint is made, will be reviewed by the regulators once filed.

Once a takeover commences, the board of directors of the target company, or the trustees of the target REIT, have a duty to consider the offer and an obligation to make a recommendation to security holders regarding the adequacy of the offer. However, the ultimate determination as to whether to accept or reject a takeover bid is made by the securities holders.

The determination as to whether a triggering event for a takeover bid has occurred is based on objective factors. The most important factors, however, are the percentage of voting or equity securities beneficially owned or controlled by the offeror (and any of its joint actors) and the number of additional securities subject to the takeover bid. The threshold for triggering a takeover bid is 20 per cent of any class of voting or equity securities. When determining whether the threshold for triggering a takeover bid will be met, the number of securities beneficially owned by the offeror is interpreted to include both those securities that the offeror has a right or obligation, through options, warrants or convertible securities, to acquire within 60 days, as well as any securities held by affiliates or joint actors in the takeover bid.

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Effective 9 May 2016, changes were made to the Canadian takeover bid regime. Under this new regime, all non-exempt takeover bids (including partial bids) are subject to the following requirements:

a a mandatory, non-waivable minimum tender requirement of more than 50 per cent of the outstanding securities of the class that are subject to the bid, excluding those that are beneficially owned, or over which control or direction is exercised by the bidder and its joint actors (the minimum tender requirement);

b following the satisfaction of the minimum tender requirement and the satisfaction or waiver of all other terms and conditions, takeover bids will be extended for at least an additional 10-day period (the 10-day extension requirement); and

c takeover bids must remain open for a minimum of 105 days, unless the target agrees to a lesser period for the bid or another transaction.

These updated provisions, by increasing the amount of time afforded to a target company to respond to a takeover bid, have important implications for strategic shareholder rights plans and will likely continue to influence how M&A activity is structured.

Takeover bids are infrequently utilised for friendly transactions in Canada. Among REIT-to-REIT transactions, they are even rarer. This is because most REIT-to-REIT transactions involve equity consideration, and cannot be effected on a tax-deferred basis unless they meet the requirements of Section 132.2 of the ITA, which is generally facilitated by structuring the transaction to occur by way of a plan of arrangement. As a result, nearly all REIT-to-REIT transactions occur by way of a plan of arrangement. Even the rare M&A deal that starts out being hostile generally ends up becoming a negotiated plan of arrangement transaction, albeit for an increased price.

ii Acquisition agreement terms

The overwhelming majority of real estate transactions and deals take place by way of a plan of arrangement. Conditions in public real estate mergers are typically similar to any public merger transaction.

One common deal protection, typical to most public merger transactions, is a non-solicitation (no shop) provision. By adopting this provision, a target company not only is obliged to recommend a transaction to its securities holders, but also agrees not to solicit or negotiate other acquisition offers and to pay a break fee if the agreement is terminated in certain circumstances. In accordance with the exercise of its fiduciary duties, however, a board of directors is permitted, despite the existence of a non-solicitation provision, to change its recommendation, engage with a rival bidder that makes an unsolicited acquisition proposal that is likely to result in a superior offering or enter into an agreement that supports a superior offering. The determination as to what constitutes a superior offering is a matter of negotiation, although it is almost invariably defined according, at least in part, to whether the proposal is more favourable from a financial perspective to securities holders than is the existing transaction. Break fees are permissible in Canada, provided that they permit a reasonable balance between their negative effect as an auction inhibitor and their potential positive effect as an auction stimulator (including if the fee was necessary to induce a bid). Reasonable break fees are typically understood to range from 1 to 5 per cent of deal equity value.

When a target board of directors seeks to defend a company from a takeover bid, a number of defensive tactics are available. The most common is the use of a poison pill or

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shareholders' rights plan. However, as discussed above, under the new legislation these types of plans will be void after 105 days. Additional defensive tactics include issuances of securities to dilute the bidder or potential bidder (often by placing the securities in friendly hands), a sale of assets, recapitalisations, the acquisition of a white knight and asset lock-ups.

iii Financing considerations

Considerations and conditions in public real estate transactions are typically similar to other public merger transactions. One distinct difference often found in real estate transactions, which would not be found in non-real estate transactions, is the potential presence of a condition addressing the necessary percentage level of mortgagee consents to the assumption of mortgages.

To finance their real estate merger transactions, private equity acquirers will often draw from the equity commitments of their limited partnerships. Pension funds, however, often finance the equity portion of their real estate transactions by drawing on their vast reserves of liquid securities and assuming underlying mortgages. For the most part, mortgagers tend to consent to the assumption of their mortgages, particularly where the acquirer is well regarded as a significant player in the real estate market. Where mortgages have a provision requiring repurchase upon a change of control, which is common, credit lines or fresh mortgage alternatives must be available to the acquirers.

The nature of the Canadian bought deal underwriting structure, in which underwriters agree to purchase all the offered securities under a prospectus, offers certainty of funding to a public REIT acquirer. As a result, a publicly traded REIT acquirer will often arrange a bought deal financing concurrently with the announcement of their acquisition transactions. Because bought deals can be through a subscription receipt structure, the acquirer's financing becomes contingent on the closing of the corresponding acquisition.

Public REIT-to-REIT merger transactions are typically in the form of unit-for-unit deals, with an assumption of the underlying mortgages of the target REIT. The equity portion of such a transaction can be sourced by way of available liquid funds, or can be financed through a bank facility, which would be subsequently repaid through a public debenture or the issuance of equity.

iv Directors' duties

Canadian corporate statutes impose two duties on directors: a duty of care and a duty of loyalty.

The Canada Business Corporations Act (CBCA) requires every director of a corporation, in exercising his or her powers and discharging his or her duties, to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The applicable standard utilised by courts to determine whether a director has satisfied his or her duty of care is both objective and subjective in nature. Objectivity is used to determine how a reasonably prudent person ought to have acted; however, the circumstances surrounding the exercise of a director's duties modify the objectively reasonable person standard to account for the specific facts of a situation, as well as the subjective knowledge and experience of the particular director.

The duty of care imposed upon directors does not rise to the level of perfection. Rather, courts have generally deferred to the business decisions of directors where they have been satisfied that the directors exercised an appropriate degree of prudence and diligence. This deferential approach to directors' decisions has become known as the business judgement

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rule (BJR). The BJR is a legal presumption that insulates directors from legal liability, so long as they act in an informed, prudent and diligent matter. In instances where the BJR is challenged, the onus is on the claimant to show that a director's decision is fraudulent or illegal, or represented a conflict of interest. Some of the factors that courts have considered to determine whether a director's decision should be reviewed are whether:

a an independent committee was used;
b an outside valuation was obtained;
c professional advice was sought;
d the decision was made over a sufficient amount of time;
e alternatives were considered;
f the transaction was negotiated; and
g proper documentation was prepared.

The theme behind these factors is that they reflect the court's tendency to focus on the processes behind, rather than the outcome of, directors' decisions. The courts have maintained that the judiciary should not seek to substitute its judgment for that of a board of directors, unless the circumstances surrounding a decision are so unusual and extreme as to warrant such intervention. Consequently, if a director can demonstrate that his or her business decision was reasonable, in light of all the circumstances about which he or she knew or ought to have known, it is unlikely a court will have found him or her to have breached his or her duty of care. In fact, a director's failure to meet his or her duty of care often arises in situations where the director shows passivity to, and inattention towards, the business' activities.

The statutory duty of loyalty requires directors to 'act honestly, in good faith, and with a view to the best interests of the corporation'. A director's duty of loyalty is owed exclusively to the corporation, as a whole, rather than any individual group of stakeholders. In fact, the Supreme Court of Canada has held that directors, in determining what is in the best interests of a corporation, may look to the interests of, among others, shareholders, employees, creditors, consumers and governments. While this approach encourages directors to consider the effect of their decisions on different groups of stakeholders within a corporation, it continues to remain the case that the interests of equity security holders are given significant weight. Accordingly, the determination of whether an acquisition proposal delivers the best value reasonably available to equity security holders remains a central focus in director deliberations.

Directors cannot contract out of their duties and can be held personally liable for a breach of their duties. Although REITs are trusts, and therefore not governed by the CBCA or its provincial equivalents, it is the case that common law applies a similar, if not higher, standard of care and loyalty to a REIT's trustees than it does to corporate directors. Moreover, REITs, in their trust instruments, have generally adopted similar standards of care and loyalty to those in Canada's corporate legislation. Furthermore, although no definitive decision on the matter has been made, Canadian courts have typically held trustees of public REITs to the standards expected of the directors of public companies.

v Income tax considerations

Carrying on business in Canada

Income taxation in Canada is governed primarily by the ITA, a federal statute, as well as by sales and goods and services tax, and provincial and territorial tax laws. The ITA imposes an annual income tax on the taxable worldwide income of every person resident in Canada

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(including corporations). Non-residents of Canada are also subject to income tax under the ITA if, among other things, they are carrying on business in Canada. The determination as to whether an activity constitutes carrying on a business in Canada is a question of fact, generally determined by the types and the amount of activity carried on in Canada by the non-resident.

As of January 2022, the basic Canadian combined federal and provincial tax rate for income earned by a corporation ranged from 23 per cent (Alberta) and 26.5 per cent (Northwest Territories, Ontario and Quebec) to 31 per cent (Prince Edward Island (PEI)).

Disposing of taxable Canadian property

Non-residents of Canada are also subject to tax under the ITA if they dispose of taxable Canadian property. Taxable Canadian property generally includes:

a Canadian real property;

b shares of corporations that are not listed on a designated stock exchange that derive (or derived at any time in the previous 60 months) more than 50 per cent of their value, directly or indirectly, from Canadian real property; and

c shares of corporations listed on a designed stock exchange or units of a mutual fund trust (including REITs) if, at any time in the previous 60 months, a non-resident (together with persons with whom it does not deal at arm's length and partnerships of which the non-resident or a non-arm's-length person are a member) owned 25 per cent or more of the issued shares of any class or series of the corporation or units in the trust, and more than 50 per cent of the value of the corporation or trust was derived from Canadian real property.

Rental and other non-business income

Under the ITA, certain payments by Canadian residents to non-residents are subject to withholding tax at a rate of 25 per cent (subject to applicable treaty relief). In particular, payments received by a non-resident from renting real property in Canada are subject to 25 per cent withholding tax on the gross rent received. There generally is no reduction to this rate under Canada's treaties. In certain circumstances, it is possible for a non-resident who is earning income from renting real property in Canada to elect to be taxed as if it were carrying on business in Canada in lieu of being subject to withholding tax on the gross rental revenue. This allows the non-resident to pay tax on net income rather than being subject to withholding tax on the gross rental revenue. Other payments to non-residents that are subject to withholding tax include interest paid to non-arm's length parties, participating interest, interest subject to the thin-capitalisation or proposed anti-hybrid rules in the ITA, certain administration or management fees, royalties and dividends.

The applicable rate of withholding is often reduced under a treaty. Many treaties reduce the withholding tax rate on dividends to 15 or 5 per cent in situations where a non-resident recipient that is a corporation holds at least 10 per cent of the voting shares of the dividend-paying corporation. Most interest payments payable under a traditional loan held by an arm's-length non-resident lender are exempt from withholding tax under the ITA. However, loans between non-arm's-length parties are subject to withholding tax under the ITA. The rate of withholding tax on non-arm's-length interest is reduced to 10 or 15 per cent under many of Canada's tax treaties, and withholding tax on non-arm's-length

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interest is eliminated under the Canada–US Tax Treaty. Interest that is subject to Canada's thin-capitalisation or proposed anti-hybrid rules may also be deemed to be a dividend and subject to withholding tax as described above.

REITs

REITs are designed to act as flow-through entities. Generally, a REIT will not be liable for Canadian income tax as long as it distributes all of its income to its unit holders. Distributions of REIT income to non-residents are subject to withholding tax at a rate of 25 per cent (subject to applicable treaty relief). Distributions by a REIT that are returns of capital may also be subject to withholding tax at a rate of 15 per cent. Generally, the gain realised upon the disposition of REIT units is not subject to Canadian tax so long as the unit holder (together with persons with whom it does not deal at arm's length and partnerships of which the non-resident or a non-arm's length-person are a member) hold less than 25 per cent of the units of the REIT (see 'Disposing of taxable Canadian property', above).

Value added taxes

The federal government imposes a value-added tax, known as the goods and services tax (GST), at a rate of 5 per cent on goods and services purchased in Canada. GST generally applies to the sale and rental of non-residential real estate. Sales of never-before-occupied residential real property are also subject to GST. Long-term residential rent is not subject to GST. Special rules require owners of residential real property held for rent to pay GST on the fair market value of the property when it is first occupied by an individual as a place of residence. Sales of previously occupied residential real property are not subject to GST. If GST is levied on the construction, sale or rental of real estate, the builder, buyer or tenant may be able to recover the GST through input tax credits if the real estate was acquired in connection with a commercial activity (generally, a business) and the builder, buyer or tenant is registered for GST. Generally, no input tax credits are available after residential real property has been occupied as a place of residence.

Several provinces, including Ontario, have harmonised their provincial sales tax with the GST. The combined tax is called the harmonised sales tax (HST). In 2022, the rate of HST in Ontario is 13 per cent (which includes the 5 per cent GST). Generally, the application of HST mirrors that of GST. In those provinces and territories where HST is not applied, provincial sales tax is not applied to the purchase of real estate.

A non-resident of Canada who carries on business (which, for GST purposes, includes renting real estate on a regular basis) in Canada, and who makes taxable supplies in the course of that business, is required to register under Canadian GST legislation and to collect and remit GST. Moreover, if the non-resident does not have a permanent establishment in Canada, it must post security with the Canada Revenue Agency in respect of its collection and remittance obligations.

Other transfer taxes

Land transfer tax is a form of provincial (and in some cases municipal) tax payable by the purchaser of real property. The purchase of real estate in Ontario is generally subject to land transfer taxes of various forms. Subject to certain exemptions, land transfer tax in Ontario is payable on every conveyance of land tendered for registration in the provincial land registry systems and every unregistered disposition of a beneficial interest in land. The rate of land transfer tax is determined according to the type of property being transferred and the total

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value of consideration paid. Generally, the maximum rate of tax is 2 per cent on the value of the consideration in excess of C$400,000. However, in certain circumstances, including transactions involving leases with an unexpired term of 50 years, land transfer tax is payable on the fair market value of the real property, rather than on the total value of the consideration paid. Purchases of land in the city of Toronto are generally subject to an additional land transfer tax. The maximum rate of the Toronto tax is generally also 2 per cent on the value of the consideration in excess of C$400,000. Exemptions from Ontario land transfer tax include, but are not limited to, certain transfers between spouses, between an individual and his or her family business corporation, between family members whose farmed land is being conveyed, and between affiliated corporations.

Ontario and British Columbia have introduced a foreign buyer land transfer tax. Generally, this surtax is paid by non-Canadian purchasers of Canadian residential property. British Columbia's 20 per cent foreign buyer land transfer tax applies to properties purchased in the Metro Vancouver area, and certain other regions of British Columbia. In Ontario, the 20 per cent non-resident speculation tax applies to certain residential property purchased in Ontario by non-Canadians. British Columbia has also instituted a speculation and vacancy tax that applies to certain owners of residential property in certain regions of British Columbia, including Metro Vancouver. This tax generally applies at an annual rate of 0.5 per cent of the value of the property for Canadians, and 2 per cent for non-residents. Vancouver has also instituted an empty homes tax of 3 per cent annually, which was introduced to return empty or under-used properties to the rental market in Vancouver.

Property tax

In Ontario, municipalities are entitled to levy annual property taxes under the Municipality Act. In exchange for these taxes, municipal governments provide many city-based services. The calculation of municipal tax is dependent on the value of the property compounded by the 'mill rate', which is determined annually and based on the financial needs of the municipality. In the past decade, some municipalities such as Toronto and Montreal have introduced a municipal land transfer surtax. This municipal land transfer tax is paid, by the purchaser of real property, in addition to provincial land transfer taxes.

Underused Housing Tax Act

The Canadian federal government has substantially enacted the Underused Housing Tax Act (UHTA). Generally, the UHTA will impose a tax equal to 1 per cent of the value of vacant or underused residential real property directly or indirectly owned by non-resident non-Canadians.

Investment in real estate in Canada (whether directly or indirectly, by a Canadian resident or non-resident) will have significant tax implications that vary depending on the individual or specific circumstances relevant to the particular situation. Investors (and real estate entities) are advised to seek independent tax advice in connection with any potential investments or dispositions.

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vi Regulatory considerations

Foreign ownership

Property ownership falls under provincial, rather than federal, jurisdiction in Canada. Newfoundland, Nova Scotia and New Brunswick are the only remaining provinces in which there are no restrictions on foreign ownership of land.

Manitoba, Saskatchewan, Alberta and Quebec have legislation restricting foreign ownership of parcels of farm land. Manitoba restricts foreign ownership of farmland to 40 acres. Saskatchewan restricts the purchase of farmland by non-residents to 10 acres. Alberta legislation caps foreign ownership of agricultural land at two parcels containing 20 acres; however, the legislation does not apply to certain commercial uses of land. Quebec's legislation, the most restrictive of the bunch, prohibits non-Quebec residents from acquiring more than four adjacent hectares of farmland (roughly 10 acres). PEI restricts non-PEI residents (defined as persons who have not lived in PEI for at least 365 days over 24 months) from purchasing more than five acres of land, or 165 feet of shoreline. In 2016, British Columbia implemented an additional property transfer tax of 15 per cent on Metro Vancouver homes purchased by foreign buyers. When this foreign buyers' tax was initially introduced, however, there were concerns that it was too sweeping, penalising those recruited to Vancouver on work permits. As a result, the tax was amended in 2017. Since then, it has also been raised to 20 per cent. In 2017, Ontario, following in the footsteps of British Columbia, introduced a 15 per cent non-resident speculation tax on residential property purchased in the Greater Golden Horseshoe Area by anyone who is neither a citizen nor permanent resident of Canada.

Competition Act

Under Canada's Competition Act, mergers and acquisitions of all sizes and in all sectors of the economy are subject to review by the Commissioner of Competition. The Competition Act requires companies to notify the Commissioner of Competition, by way of a pre-acquisition filing, if a proposed transaction meets, or exceeds, certain asset size or revenue criteria. Generally, a pre-acquisition filing must be submitted if:

a the aggregate value of target's assets in Canada or revenues from sales in or from Canada exceeds C$93 million (in 2022); and

b the parties to the transaction, together with their affiliates, have either assets in Canada, or annual gross revenues from sales in, from or into Canada, exceeding C$400 million.

Upon receipt of the filing, the Commissioner of Competition has 30 days, although extensions are common, to review the filing so as to narrow and refine issues and to determine what, if any, additional information is required from the parties to assess anti-competition concerns. In particular, the Commissioner will consider what additional information is required to determine whether the proposed transaction is likely to lessen or prevent competition substantially. Real estate, historically, has not been a sector in which the Commissioner has given refusals or divestiture orders.

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Investment Canada Act

Under Canada's Investment Canada Act (ICA), certain acquisitions by non-Canadians of Canadian businesses are subject to pre-closing review. The application of the ICA is limited to those investments made by non-Canadians that involve an acquisition of control over a Canadian business. Whether a pre-closing filing for a control transaction will need to be submitted to the Minister of Industry will depend on:

a the enterprise value of the Canadian business (if the acquirer is not a state-owned entity);
b the book value of the Canadian business (if the acquirer is a state-owned enterprise, or is not a World Trade Organization (WTO) Member State); and
c whether the business is in a sensitive sector.[54]

For acquirers who are not a state-owned entity, the financial threshold that triggers the requirement for a pre-closing review under the ICA depends on the nationality of the investor. Nationals of a specified free trade party[55] that directly acquire control of a Canadian business are only subject to a pre-closing review under the ICA if the enterprise value[56] of the Canadian business exceeds C$1.711 billion (in 2022). Investors who hail from WTO Member States are subject to a pre-closing review under the ICA if the enterprise value of the Canadian business exceeds C$1.141 billion (in 2022).

For acquirers who are state-owned entities, the book value threshold required to trigger a pre-closing review will depend on the nationality of the state-owned entity. State-owned entities from WTO nations are only required to file a pre-closing review under the ITA if the book value of the Canadian business that they are acquiring meets or exceeds C$454 million (in 2022). Non-WTO Member States directly purchasing Canadian businesses are required to submit a pre-closing review if the book value of the Canadian business exceeds C$5 million. An indirect control transaction by a non-WTO Member State for a Canadian business will require a pre-closing review only if the book value of the business exceeds C$50 million.

In those transactions where a non-Canadian investor gains control of a Canadian business that does not meet or exceed the financial threshold required to trigger the submission of a pre-closing filing, a notice of investment must be filed within 30 days of closing.

The ICA reserves a residual right to review any non-resident acquisition of a Canadian business on nation security grounds. This right of review is unique in that it is not conditional on value or quality thresholds being met. As such, even investments that do not involve high asset values, or an acquisition of control over a business, may be subject to review on national security grounds.

The ICA defines a Canadian business to mean:

a a business carried on in Canada that has a place of business in Canada;
b an individual, or individuals in Canada who are employed or self-employed in connection with the business; and
c assets in Canada used in carrying on the business.

Whether Canadian real estate assets can be considered a Canadian business for this purpose is a question of fact, determined primarily by the second criterion – specifically, whether there

54 Real estate is not a sensitive sector under the Investment Canada Act.

55 The European Union, the United States, Mexico, Chile, Colombia, Honduras, Panama, Peru, South Korea, Japan, Vietnam, Singapore, Australia or New Zealand.

56 The enterprise value of a business is calculated differently.

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are individuals employed in connection with the real estate. Consequently, a hotel that has employed staff in Canada to render their services would be considered to be carrying on a business, whereas an office tower that has outsourced all of its services would not.

IV OUTLOOK

Towards the end of 2021 and into 2022, economic growth surged past expectations as many public health measures and restrictions eased and business returned to relative operative normality. It is generally expected that this momentum will carry on in 2022 and result in another strong year for economic growth in Canada. The Bank of Canada expects Canadian GDP to grow by around 4 per cent in 2022 and approximately 3.5 per cent in 2023. Of course, this is largely contingent on the current rate of the pandemic recovery continuing and no unexpected roadblocks appearing in the coming months, such as a major virus variant of concern necessitating the widespread reintroduction of public health measures.[57]

While 2020 was undoubtedly a difficult year for the real estate sector, 2021 proved that the sector is resilient. By all accounts, 2021 represented a strong recovery for real estate business activity as issuances, M&A activity and commercial investment all saw year-over-year increases when compared to 2020. Many of the recoveries brought the markets closer to the more familiar levels seen in 2019 when the real estate sector was active and thriving. Assuming that future waves of covid-19 are less disruptive than the waves seen in 2020 and early 2021, economic growth was expected to reaccelerate in the coming year. At the same time, we have seen significant inflationary pressures in recent months, which along with global events such as the war in Ukraine, are having a major economic impact. Central banks in North America and throughout the world are taking strong action to reduce inflation and interest rate increases are expected to have a material effect on the real estate sector.

There also are a number of other trends that are expected to underscore the real estate market landscape in 2022 and beyond. Perhaps one of the most prominent such trend is the growing business demand for ESG investments in the real estate space.[58] As previously noted, for many institutional investors, ESG factors are becoming important criteria for making investment decisions. Much of the value creation for real estate companies and other real estate industry players in the coming years will centre on their ability to meet ESG demands. As an example, in Canada and North America more broadly, the real estate ESG push has been seen quite prominently in the office sector. Traditional steel and concrete office buildings contribute significantly to greenhouse gas emissions and are often less energy efficient. New developments in building technology in recent years have seen a growing number of environmentally sustainable timber-based developments within the office sector. As the challenge of combating climate change continues to be omnipresent in all aspects of business and our individual lives, it is expected that the coming years will see increased investment activity in sustainable real estate assets and projects.

57 CBRE Canada Market Outlook 2022.

58 PricewaterhouseCoopers, 'Emerging Trends in Real Estate 2022' (2022) (PWC 2022 Report).

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In the retail real estate sector, recovery is also expected to accelerate as restrictions and other public heath restraints begin to fall away and life returns to a more familiar sense of normality. Although the pandemic precipitated a strong shift towards e-commerce for many retailers, the return of foot traffic to many retail, office, and urban spaces is expected to allow for brick-and-mortar stores to regain some of the lost market share. While it is true that tenants are increasingly seeking more flexible leasing arrangements, it is also expected that the return of many businesses to physical retail spaces and the reintroduction of new business will spur demand in the coming months and years.

In contrast, the strong growth of e-commerce throughout the pandemic has also spurred demand for industrial real estate spaces throughout the past year., particularly those industrial real estate spaces that are tailored towards warehousing and logistics operations. However, supply chains also saw widespread disruptions throughout the end of 2021 and continuing into 2022, which may continue for the foreseeable future as global supply chains have been slow to adapt to shortages and logistical disruptions. This is expected to have a countering influence on the growth of industrial real estate, at least in the immediate term.

As the pandemic continues to diminish with respect to its impact on our everyday lives, we have also seen a ramping up of plans for returns to the office. Many employers began moving towards hybrid work plans in 2021, and heading into 2022 employers are increasingly looking towards more a permanent return to office plans. Virtual work arrangements that first appeared during the pandemic may have gained some permanent market share, resulting in an increase in office vacancy rates throughout major cities around the world – a trend that will be monitored as employers look to adopt flexible working arrangements in order to attract and retain talent. In Canada, it is expected that real estate space that was previously allocated to retail strips and lower quality office buildings may give way to high-density housing and other residential projects.[59] Accordingly, many institutional investors and REITs are increasingly looking to diversify away from the office sector. An example of this is the previously discussed divestiture by H&R REIT of the Bow Office Tower in Calgary and the Bell Mobility Campus in Mississauga.

From an M&A perspective, 2021 was largely characterised by high levels of property transactions (greater than C$40 million), up 70 per cent from 2020, and three public M&A transactions in the sector. It is expected that as recovery continues, larger asset sales and increased volume will continue into 2022 and beyond. Many large institutional investors and pension funds have also stated their intentions to diversify their assets in the coming years and invest in larger real estate projects.

Growth in the capital markets in 2022 and beyond is expected to be driven by the office and retail sectors.[60] While these sectors presented limited growth in 2020 and 2021 as a result of broad pandemic-related restrictions, the easing of such restrictions is expected to fuel renewed investor demand for assets within these sectors. Although demand and volume are still expected to be greatest for the multifamily and industrial sectors, their portions of market share are expected to remain similar to those seen in 2021. Growing market confidence and sustained liquidity are expected to ensure that demand for real estate assets will remain throughout 2022 and beyond.

While the pandemic continues to be a very prominent element of our lives, it appears that it is increasingly transitioning to a more manageable phase in which normality is

59 CIBC 2021 Report.

60 CBRE Canada Market Outlook 2022.

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returning on a broader scale. Barring any exceptional resurgences in the strength of covid-19 or other unexpected issues, the upward trends seen in 2021 are expected to continue. Nonetheless, as interest rates continue to rise amid a high inflationary environment, real estate owners and buyers will need to carefully manage the relative impact on valuations, financings and the Canadian capital markets. While many economists are predicting that the Canadian economy will slip into a recession by 2023, some of Canada's largest banks, including the Royal Bank of Canada, are expecting that it will be moderate and short-lived.[61] If investor confidence continues to return to pre-pandemic levels and the economic pressures can stabilise, the trend of recovery and growth seen in 2021 and the early parts of 2022 might be here to stay in the years ahead.

61 *The Globe and Mail*, 'Canada to enter 'moderate and short-lived' recession in 2023, RBC economists warn': https://www.theglobeandmail.com/business/article-canada-to-enter-moderate-and-short-lived-recession-in-2023-war ns-rbc/.

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Appendix 1

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Brenda Gosselin is a partner at Goodmans and a member of the firm's capital markets and REITs practices as well as the shareholder rights and activism practice. Her practice is transaction-based, involving all areas of corporate and securities laws, with particular emphasis on corporate finance, corporate governance, mergers and acquisitions, private equity, shareholder rights and activism and corporate recapitalisations and restructurings. Brenda regularly represents market participants, issuers and investors in public financings and private investments of debt and equity, including with respect to initial public offerings and follow-on financings, and on behalf of US and offshore funds and institutional investors in Canadian transactions, together with buyers and sellers in merger and acquisition transactions and dissident shareholders and boards of directors. Brenda is recognised as a leading lawyer in numerous publications including the Lexpert Special Edition: *Finance and M&A 2022*, *Chambers Canada* (REITs: nationwide – Canada), *Best Lawyers in Canada* (corporate law), *The Legal 500 Canada* (corporate mergers and acquisitions), *IFLR1000* (capital markets: debt and equity and corporate/M&A) and the 2022 *Canadian Legal Lexpert Directory* (corporate finance and securities). She has been featured as a capital markets expert in Euromoney's *Guide to the World's Leading Women in Business Law*, in 2021 and 2020. In 2016, Brenda was honoured as one of Lexpert's 'Rising Stars: Leading Lawyers Under 40'. She was admitted to the Ontario Bar in 2003.

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Stephen Pincus is a partner, executive committee member and chair of Goodmans capital markets practice. Widely recognised as one of Canada's leading lawyers he is well known for leadership of many complex and innovative domestic and cross-border transactions, including Canada's first cross-border income fund, first cross-border REIT, first offering of income participating securities, first cross-border high dividend common share IPO, first non-US IPO in the world of a US REIT and first cross-border special purpose acquisition corporation. He also advises boards of directors and activist shareholders on corporate governance and proxy fights. In 2020, Stephen was recognised by *IFLR1000* as Canada's capital markets lawyer of the year at the inaugural IFLR1000 Canada awards. He is also recognised as a leading lawyer by Lexpert, *The Best Lawyers in Canada*, *IFLR1000*, *The Legal 500 Canada*, Euromoney and Law Business Research.

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