

Focus REAL PROPERTY

The Quebec due diligence rules of the game



Richard Burgos

Due diligence reviews in real estate transactions in Quebec are similar to the reviews required in other jurisdictions in Canada. That said, because of certain considerations, there are a number of distinctions and points to consider. Further, Quebec has certain provisions to note in the context of a sale transaction, both legal and conventional, and warranties and limitations or exclusions thereof.

Introduction

Under the *Civil Code of Québec*, Articles 1723 CCQ and 1726 CCQ generally provide that a seller must warrant title and that the property being sold is free of defects, which could also include zoning restrictions. There is no

warranty that applies to a defect that is known to the buyer or a defect that could otherwise be perceived by a prudent and diligent buyer. A Quebec Court of Appeal decision in *Marcoux c. Picard* [2008] J.Q. no 713, is a good illustration of the prudence and diligence needed by any purchaser.

Title review

Title review is one area of due diligence that is significantly different in Quebec. While many other jurisdictions have gone to a system whereby the registration upon the land registry confirms in and of itself title and any other rights that may be registered, in Quebec a review of the chain of title and all related deeds is required to ensure a good and marketable title. In many instances, deeds which are not on title but on neighbouring lots must also be reviewed. The process may be time-consuming and not always straightforward. The level of review will depend on a number of factors such as:

- importance of transaction

- existing title reviews and location

- statute of limitations (known as "prescription" in Quebec) as to possible title defects

- title insurance

A basic standard as to the review required of the chain of title would be for a period of 51 years, which would cover the possible period of limitations in Quebec and a more complete review to the cadastre (the actual coming into effect of the lot) for matters such as easements (in Quebec, known as servitudes). While no doubt becoming a common element in Quebec real estate transactions, title insurance does not eliminate all requirements to proceed with some form of title review. Indeed in some cases in Quebec, title insurers will require complete title reviews.

Off title

The Quebec system for review of off-title matters is similar to other jurisdictions. An authorization to access most of the applicable governmental authorities is required.

Under access to information laws in Quebec, a statutory delay of 30 days is allowed before any governmental authorities are required to respond. This is important to note as many due diligence periods are generally 30 days in agreements. While many governmental authorities do respond within 30 days or less, many others (notably municipalities) generally take longer.

In matters of compliance, the following government authorities are the most important:

- The building code, as to infractions and work orders.

- The Quebec Ministry of Environment.

- Municipalities, as to work orders (including fire department) and zoning. Montreal in particular has a patchwork of authorities to address as the island is separated into individual municipalities and boroughs. These authorities will very rarely provide certifications as to compliance, and will typically only provide whatever documents they may have on file to inspections, complaints or actual work orders. Further, compliance with work orders on file is also not that simple to confirm, as it is common that once a work order, complaint

or infraction is issued or noted, the closing thereof is not on file or properly documented.

- Realty Taxes. Confirmation as to amounts outstanding is typically easy to obtain and confirm. Such confirmations would also include transfer taxes, special taxes or water taxes. Typically, each municipality has a different report or statement to cover each element, so some attention is required to confirm that all of the needed information is obtained for each jurisdiction.

- Rental Board, in the case of the transaction involving a residential property. Of particular concern are limitations in selling individual buildings within a development. Therefore, confirming whether the building is part of a development is a key item. Consent may be required from the rental board if in fact it is determined the building is part of a development.

- Heritage properties. Typically, properties of or in an area of historic significance may have limitations imposed as to developments or improvements.

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Requisition: Owner has rights

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Among the owners, any owner may apply to the Superior Court for an order appointing an administrator of the corporation (sec. 131). The order appointing the administrator will specify the particular powers of the board to be entrusted to the administrator. It will then be up to the administrator, under court supervision, to re-establish a sound fiscal, administrative and physical basis for the condominium.

In protecting his rights and his investment, an owner may want access to the financial and other information held by the corporation, such as the corporation minutes, all agreements, and all reserve-fund studies. He has a right to view such records and obtain copies (sec. 55(3) and (6)). If the corporation fails to produce the requested records, the owner may apply to the Small Claims Court for an order for production (sec. 55(10)).

An owner in a non-functioning or dysfunctional condominium will likely be one of modest means who owns a unit in a development where the owners are having a difficult time meeting their ongoing costs. He or she will not likely have the means or the inclination to hire a lawyer and seek a remedial order from the Superior Court. Self-help through the courts is fine for those with deep pockets but is irrelevant for most people.

Short of legislative changes to create some sort of oversight body or ombudsman for unit owners, the existing legislation will leave many, if not most owners passive victims of whatever befalls them in a non-functioning or dysfunctional corporation.

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