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Changes to the Divided Co-ownership Regime in Québec: Impact on Real Estate Developments

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The Québec National Assembly has adopted Bill 16 (Act¹), which amends various provisions of the *Civil Code of Québec* relating to divided co-ownership and adopts measures to protect deposits paid by buyers of a unit.

This Act, which was assented to on December 11, 2019, will come into force on January 10, 2020, with some exceptions.

One aspect of the Act that will have a significant impact on real estate development projects in Québec involves deposits and can be summarized as follows:

- developers must henceforth protect the deposits paid for a unit under divided co-ownership; and
- the deposit must be returned to the promisor if the unit under divided co-ownership is not delivered on time.

We will discuss these provisions in greater detail below.

Protection of Deposits

Any deposit paid to a builder or developer for the purchase of a fraction of an immovable under divided co-ownership must be protected by one or more of the following means: a guarantee plan, insurance, suretyship or a deposit in a trust account of a member of a professional order determined by government regulation. The deposit may also be protected by other means prescribed by government regulation, which has not yet been enacted. Note that a buyer may not waive this requirement, which is of public order.

This requirement will apply as of January 10, 2020, with the exception of a deposit in a trust account, which will apply when the regulation to such effect comes into force. The *Chambre des notaires du Québec* has issued the following statement (translated here): "A deposit paid into a notary's trust account constitutes sufficient protection to meet the requirements of article 1791.1 *C.C.Q.* provided the amount received does not exceed, for each prestation, the maximum indemnity payable by the Indemnity Fund (\$100,000). If it exceeds the maximum indemnity, the deposit must be covered by another means (a guarantee plan, other insurance or suretyship)." However, such deposits may not be given to the developer in the absence of a guarantee plan, insurance or suretyship.

The Act does not clearly state that this obligation to protect deposits will not apply to deposits paid by buyers before January 10, 2020. We hope the government will act quickly to clarify the Act in this regard.

As of January 10, 2020, a promisor's deposit must be returned if the unit under divided co-ownership is not delivered on the agreed date. In practice, this provision could be problematic for developers.

Other Important Changes

The Act also sets out several obligations and restrictions involving divided co-ownership, such as provisions relating to budget forecast and the memorandum attached to the preliminary contract signed with a buyer of a unit.

The developer will be required to reimburse the syndicate the difference (if more than 10%) between (i) the amounts incurred by the syndicate during the first full fiscal year after the developer loses control of the syndicate and (ii) the amounts provided in the budget forecast.

A promisor will also have the right to withdraw from the contract until receipt of the required memorandum and may apply for the annulment of the sale and claim damages if the contract contains errors or omissions. If the buyer prefers that the contract be maintained, he or she may apply for a reduction of the purchase price. These actions are available within 90 days of the sale or within 90 days of the special meeting of co-owners after the developer loses control of the syndicate.

The developer will be required to provide several documents, including the maintenance log for the immovable and the contingency fund study, to the syndicate of co-owners within 30 days of the special meeting of co-owners.

Lastly, the sums to be paid into the contingency fund for a co-ownership will henceforth be based on the recommendations made in the contingency fund study. The board of directors of the syndicate of co-owners must have such a study performed every five years. This represents a significant change compared to the way contingency funds are currently managed in Québec.

¹ *An Act mainly to regulate building inspections and divided co-ownership, to replace the name and improve the rules of operation of the Régie du logement and to amend the Act respecting the Société d'habitation du Québec and various legislative provisions concerning municipal affairs.*

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