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# THE LAW COLUMN

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## **INSPECTION PRIOR TO PURCHASE : SHOULD BUYERS BE SATISFIED WITH A BASIC VISUAL INSPECTION BY AN EXPERT BEFORE PURCHASING A HOUSE THAT MAY HAVE A DEFECT?**

By : *Nora Papazian*, lawyer

Before purchasing a house, most buyers check the condition of the building. Many use the services of experts who carry out more or less detailed inspections of the house. Sometimes the inspector only does a visual inspection without moving or opening anything.

What happens when a buyer purchases a building based on the report of an expert who completed only a basic visual inspection, and then discovers a defect after purchasing the building? Did the buyers act with prudence and diligence when purchasing their house?

The courts ruled on this question in a decision of the Appeals Court, *St-Louis vs. Morin*<sup>1</sup>. The appellants in this affair visited the vendor's house because they were thinking of purchasing it. Following this visit, an expert technologist visited the house.

After inspecting the house, the technologist made a note in his report to the effect that he had been unable to check the attic space in the sloped parts of the ceiling and in the knee walls because there was no access to these spaces. In spite of this basic inspection, the purchasers signed the deed of sale.

When the weather became very cold, the purchasers tried various means but found the house very hard to heat. They also noticed an accumulation of ice and condensation on the windows. As they sought the cause of the problem, the purchasers discovered a crack at the bottom of a bedroom wall. When they pressed on the wall they found the contour of a hidden access to the space behind the knee wall.

Once the trap door was opened, they found traces of excessive humidity and called for a second inspection of the house which showed that the house was contaminated with mould. The Superior Court rejected the purchaser's case against the

vendor because the court found that although the defect was serious, it was apparent.

However, the Appeals Court reversed this decision and concluded the following:

Access to the attic spaces was only possible through trap doors that were not visible. One of these doors was located behind a gyproc panel that was screwed on, plastered and painted, and the other was hidden by a bat of fibreglass insulation covered with wallpaper. The Appeals Court judges concluded that the inspector was not shown these access points during the pre-purchase inspections even though he had asked the real estate agent if there was any way to access the attic. Therefore, because there were no indications of where the access points to the attic were located, he had no obligation to guess at where the access was, or to move the insulation or destroy the gyproc panel.

Based on these facts, although the purchasers relied on a basic visual expert inspection prior to purchasing, they had nonetheless acted with prudence and diligence. They had used the services of an expert even though they had no obligation to do so. The court stated that the only case in which a buyer must ask for a detailed inspection or even ask for the services of an expert is when a building shows signs of having a potential defect.

The court concluded that there had been no reason to suspect the presence of a major defect in the attic because the roof had been recently renovated and the exterior appearance was sound. The Court ordered the cancellation of the sale, the repayment of the purchase price of \$90 000 and ordered the vendor to pay \$10 000 in damages and interest.

As the honorable Judge Crête says so well in another decision<sup>2</sup>, we must remember that we are evaluating the behaviour of the buyers, and not the expert who made the inspection:

“Instead of focusing on the lack of prudence and diligence of the buyer, we should enlarge the debate to look at the lack of competence of the buyer's

expert who should have examined the building more closely.

[...]

In this regard, the test of article 1726 of the Civil Code of Quebec is about whether the buyer, is careful and diligent, not the expert, and the obligatory type of “result” rests with the buyer.”

<sup>1</sup> 200-09-005239-055, Court of Appeal (Quebec), 2006-12-13; Judges Thibault, Rochette and Vézina

<sup>2</sup> *Savoie vs. Lirette*, 755-17-000210-016, Superior court, 2003-12-15

## THE RIGHT TO A REFUND OF INCOME TAX CREDITS MAY BE THE OBJECT OF A MORTGAGE

By : *Jean-François Mallette*, lawyer

In a recent decision, the Quebec Superior Court<sup>1</sup> ruled that a debtor’s right to a refund of income tax credits may be the object of a movable hypothec on all accounts receivable. In a case where a debtor is bankrupt, the receivable is therefore guaranteed under the *Bankruptcy and Insolvency Act* and the income tax credits are excluded from the common pledge of the group of creditors.

The mortgage creditor appealed the decision of the trustee to refuse to recognize that he had a right to be refunded from research and development income tax credits granted to the bankrupt debtor. The court concluded that the movable hypothec registered against the universality of the ‘pledger’s accounts receivable’ (hereinafter called the mortgage), under the terms of the primary obligation, included ‘all tax credits’. Under these circumstances, in theory, the said income tax credits should be excluded from the common pledge of the group of creditors in the bankruptcy. The court continued their analysis by specifying that in this context, the standard of inaccessibility of Crown debts does not cover income tax refunds due and payable under federal and provincial income tax laws.

However, to be enforceable against either Revenue Canada or Revenue Quebec, the mortgage must be:

- published by registering in the register of personal and movable real rights (R.D.P.R.M.) before the date of the bankruptcy: and
- an abstract of the material parts of the deed of mortgage must be sent to Revenue Canada and/or Revenue Quebec and, this last may be done even after the date of the bankruptcy.

In these circumstances, if you are the beneficiary of a movable hypothec charged against the universality of a debtor’s accounts receivable, be sure that the mortgage includes potential income tax credits and that the mortgage has been properly published. Do not hesitate to call us to verify the validity of your mortgages and whether or not they can be enforced against third parties.

<sup>1</sup> *Satcom Télécom Sans fil inc. (Syndic)*, J.E. 2007-1410 (C.S.)

### NEWS FROM OUR FIRM

- On September 29<sup>th</sup> **Me Stéphane Sansfaçon** will again lead a conference at the annual congress of the Fédération Québécoise des Municipalités which is attended by approximately 2000 elected representatives. Me Sansfaçon will speak to English-speaking municipal representatives on two subjects, regulations regarding the protection of lakes and watercourses and recent developments in laws and jurisprudence.



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S.E.N.C.

**Lawyers**  
Barristers and solicitors  
Trade marks and patents agents

**Saint-Jérôme**  
55, Castonguay Street  
Office 400, J7Y 2H9  
**(450) 436-8244**  
Fax: (450) 436-9735

**Blainville**  
370, de la Seigneurie Ouest  
Office 100, J7C 5A1  
**(450) 979-9696**  
Fax: (450) 979-4039

**Montréal**  
1240, Beaumont Avenue  
Office 100, H3P 3E5  
**(514) 735-0099**  
Fax: (514) 735-7334

**Sainte-Agathe**  
124, St-Vincent Street  
J8C 2B1  
**(819) 321-1616**  
Fax: (819) 321-1313

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