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Navigating pre-emption agreements in the sale of immovable property in Quebec

It is not rare for the seller of an immovable property to be compelled to respect a right of first refusal found in a sale, lease or other agreement. The present article considers the extent of the obligations of an agreement establishing a right of first refusal in the sale of immovables.

The characteristics of a right of first refusal or pre-emption agreement

A right of first refusal or a pre-emption agreement¹ in Quebec law is a promise by which the owner of a property undertakes to give priority on a sale to the beneficiary of the holder of the right. When the owner, upon receiving an offer from a third party, wants to sell its property, the owner would have to provide a copy of the offer to the beneficiary who is then free to accept it or not.

The pre-emption agreement is personal; it does not create any real rights on the property, such as a servitude, for example. The only remedy in case of a violation of a right of first refusal is an action in damages against the seller and a buyer acting in complicity and in bad faith². The beneficiary of a right of first refusal who is deprived of its right cannot take an action to cancel the sale or an action to compel the transfer of title³.

The beneficiary of a right of first refusal can assign or transfer the right to its heirs unless the parties had agreed on the *intuitu personae* (strictly personal to the beneficiary) nature of the right with the clear intention that the right would not be assigned or transferred⁴.

Regardless of the wording of the clause, a right of first refusal is always subject to a strict interpretation because it limits the seller's freedom to contract⁵. Indeed, a seller is not free to sell the property as it wishes because of the obligation to the beneficiary.

Some pre-emption agreements include a fixed price; such that when the seller intends to put the property on the market, it would have to be offered by priority to the beneficiary at a set price. Others provide that the price will be fixed by the third party's offer; the seller who receives an offer would then be required to forward a copy of the offer to the beneficiary⁶. In such a case, it is not rare for the agreement to state that the beneficiary has to make an offer at the same price and the same terms and conditions as the offer received from the third party, in order to be able to exercise the right. The conditions referred to in an offer could include the right to carry out an inspection or obtaining financing, to name some common examples.

When the seller informs the beneficiary about a third party's offer, the beneficiary has two options: manifesting a serious intention to exercise the right of first refusal or to waive this right. If the right is waived, the beneficiary no longer has the right of first refusal and the seller can sell to a third party⁷.

Once the beneficiary answers the offer positively, diligent follow-up is required and concrete acts must be taken, like drafting a sales contract, not to delay the sale indefinitely⁸. The beneficiary has to act within the delays provided for in the agreement. If such delays are not indicated in the agreement, the beneficiary must then act within a reasonable time. The case law has interpreted a reasonable delay as the same period that is offered by the third party offeror⁹. But, the courts have discretion to decide according to the circumstances of each case¹⁰. If the beneficiary omits to follow up on the offer, the beneficiary would then be considered to have tacitly waived its right of first refusal¹¹. The absence of concrete action following a beneficiary's expression of interest to match the third party's offer, in order to proceed to the closing, was considered a tacit waiver in *St-Laurent*¹², cited by the judge¹³.

What is the importance of advising the beneficiary of any changes in the third party's offer?

One would ask this question if the parties to the sale renegotiate the price in the initial offer after an inspection or a due diligence. Some authors suggest that a right of first refusal that is not exercised is lost once the beneficiary refuses to match the third party's offer in accordance with the agreement.¹⁴ This is not confirmed by any case law on point.

In the absence of a jurisprudential confirmation, it would be more prudent for the seller who has obligations under a right of first refusal to warn the beneficiary of a change in the initial offer, even if the beneficiary has foregone the right by not matching the third party's offer. If the seller omits to do so, it could be interpreted as a violation of the pre-emption agreement and may give right to a claim in damages. This is the conclusion that can be drawn from the case of *Nault v. Turcotte*¹⁵, appeal dismissed¹⁶.

In this matter, plaintiff and defendant were parties to a pre-emption agreement, allowing the beneficiary of the right, who was the plaintiff, to purchase the immovable property in priority, provided they matched any offer from a third party¹⁷. Not being able to acquire the property in time, plaintiff sued the sellers and the buyer to cancel the sales agreement and to compensate it in damages. After expressing its intention to match the third party's offer, the beneficiary failed to follow up with a sales agreement and made false representations regarding obtaining financing. Thus, the seller, defendant in this case, sold the property to a third party.

According to Justice Crête S.C., by signing an act of sale at the price of \$154,500, when the offer that was forwarded to the beneficiary of the pre-emption agreement was at \$169,500, the sellers violated the pre-emption agreement. Indeed, in an agreement between the seller and the buyer, the terms refer to a reduction of the selling price "in order to take into account damages suffered by the buyer"¹⁸ who's occupancy of the premises was delayed. This reduction in the price violated the rights of the beneficiary of the first refusal agreement, entitling it to damages and interest¹⁹.

Although such damages were not granted in this case, because of the actions of the plaintiff, who had kept the buyer from moving in and of the absence of bad faith in the buyer²⁰, the judge nonetheless wrote that the violation of the agreement would have entitled plaintiff to damages in other circumstances. Therefore, if the first refusal agreement included for example a penal clause, it would have applied²¹.

The beneficiary had also requested the amount equivalent to the difference between the price that had been offered and the actual value of the property as compensation. This was dismissed because of a lack of evidence of said actual value²².

Consequently, it would be wise to warn the beneficiary of the right of first refusal of a change of price in the offer that was initially supposed to be matched, even if the right had been waived.

Indeed, in *Nault*, despite Justice Crête S.C.'s interpretation that the beneficiary had tacitly waived exercising its right of

first refusal; he concluded that there had been a violation of the pre-emption agreement.

However, in an interesting *obiter*, Justice Crête S.C. suggests a possible solution when the parties have to renegotiate certain elements of the sale price in the face of pre-emption agreement. He writes:

"It would have been preferable, in these circumstances, to maintain the price of sale at \$169,500 and to agree, concurrently, by means of an independent agreement, on the given damages, even if, ultimately the amount of damages could be drawn as compensation during the payment of the purchase price before the notary, by way of adjustments that are regularly done in these types of transactions."²³ (Our translation and emphasis)

Although this is merely an *obiter*, the solution suggested by Justice Crête S.C., as long as the parties are in good faith, follows the predominant doctrine according to which the beneficiary of a pre-emption agreement loses its right, when the beneficiary refuses to match the third party's offer following the terms of the agreement²⁴.

Once this opportunity to match the third party's offer is rejected, the seller can proceed to sell to the third party, even if some conditions, such as a due diligence, lead to an adjustment during closing. This proposed creative solution, using adjustments at signing, has some support both in the doctrine and by way of an *obiter* from the Quebec Superior Court that could help to resolve an impasse in the event a seller and a prospective buyer in good faith are faced with changes to an original offer.

1. "Droit de premier refus", Pierre-Gabriel Jobin, *La vente*, 3rd ed., Cowansville, Éditions Yvon Blais, 2007, n° 35, p. 46 [Jobin].
2. *Civil Code of Quebec*, art. 1397 al. 2 [C.C.Q.]; *Nault v. Turcotte*, 2010 QCCS 3753, par. 110 [Nault]; *Jacol Realty Holdings Inc. v. Conseil d'expansion économique d'Argenteuil*, [1986] R.D.I. 559 (C.A.), p. 5 (Judge Rothman) [Jacol]; *Jobin*, *supra* note 1, n° 36, p. 50; Jean Pineau and Serge Gaudet, *Théorie des obligations*, 4th ed., Montreal, Éditions Thémis, 2001, n° 62.1, p. 142-143 [Pineau].
3. C.C.Q., art. 1397 al. 2; *Jacol*, *supra* note 2, p. 5; *Jobin*, *supra* note 1, n° 36, p. 50, cited in *Nault*, *supra* note 2, par. 53; *Pineau*, *supra* note 2, n° 62.1, p. 142-143.
4. *St-Laurent v. Ouellette*, [1984] C.A. 124, p. 12 [St-Laurent].
5. *Ibid.*, p. 13; *Gryselier v. Grand'Maison*, [1991] R.D.I. 622, 626 (C.S.), appeal dismissed *Mouradian v. Gryselier*, 1993 CanLII 3490 (QC CA) [Gryselier]; *CST Canada Co. (aux droits Ultramar ltée) v. Pétroles Crevier inc.*, 2014 QCCS 3936 [CST]; Vincent KARIM, *Les obligations*, vol. 1, 4th ed., Montreal, Wilson & Lafleur, 2015, n° 888, p. 396 [Karim].
6. *Jobin*, *supra* note 1, n° 35, p. 46.
7. *Ibid.*, n° 35, p. 47; *Karim*, *supra*, note 5, n° 882, p. 394; *Pineau*, *supra*, note 2, p. 142.
8. *St-Laurent*, *supra* note 4, p. 13,14.
9. *Gryselier*, *supra* note 5, 628, cited in *Nault*, *supra* note 2, par. 85; see also *9143-7285 Québec inc. (Village de Chine) v. Immeubles Chartrand-Morneau inc.*, 2009 QCCS 14, par. 27-28.
10. *CST*, *supra* note 5, par. 45.

11. *St-Laurent*, *supra* note 4, p. 14.
12. *Ibid.*
13. *Nault*, *supra* note 2, par. 84.
14. *Supra* note 7.
15. *Nault*, *supra* note 2.
16. *Nault v. Turcotte*, 2010 QCCA 2333, par. 3.
17. *Nault*, *supra* note 2, par. 7.
18. *Ibid.*, par. 106 (our translation).
19. *Ibid.*, par. 108.
20. *Ibid.*, par. 110.
21. *Ibid.*, par. 113.
22. *Ibid.*, par. 118.
23. *Ibid.*, par. 107.
24. *Supra* note 7.

The content of this newsletter is intended to provide general commentary only and should not be relied upon as legal advice.

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