



# Ownership

- Ownership has three attributes - the rights to use, to enjoy and to dispose of property fully and freely, subject to the limits and conditions for doing so determined by law (art. 947 C.C.Q.).
- Ownership has two principal modes - co-ownership and superficies (art. 1009 C.C.Q.).
- Dismemberments of the right of ownership include usufruct, use, servitude and emphyteusis and are real rights (art. 1119 C.C.Q.).

# Ownership

- As a mode of ownership, superficial ownership includes the full ownership “package”: *usus*, *fructus* and *abusus*.
- This is to be distinguished from a dismemberment of the right of ownership (such as usufruct) which would only include part of the ownership “package” (*usus* and *fructus*).
- Superficial ownership is full ownership of a construction, work or plantation and permits alienation, hypothecation, leasing and dismemberment (for example, by usufruct or servitude) of such right of ownership.

While first codified in Quebec in the CCQ, the concept of superficial ownership dates back to ancient Rome.

- Roman law recognized the distinct ownership rights of the owner of underlying soil from the ownership rights of the owner of the immovable constructions situated thereon.
- Superficial ownership has also been recognized in many of the European codes, including the Napoleonic Code

Prior to codification, Quebec law relied on doctrine and jurisprudence when faced with the notion of superficies

## **Civil Code of Lower Canada:**

Art. 415 All buildings, plantations, and works on any land or underground, are presumed to have been made by the proprietor at his own cost, and to belong to him, unless the contrary is proved; without prejudice to any right of property, either in a cellar under the building of another or in any other part of such building, which a third party may have acquired or may acquire by prescription.

Art. 955 C.C.Q.

Constructions, works or plantations on an immovable are presumed to have been made by the owner of the immovable at his own expense and to belong to him.

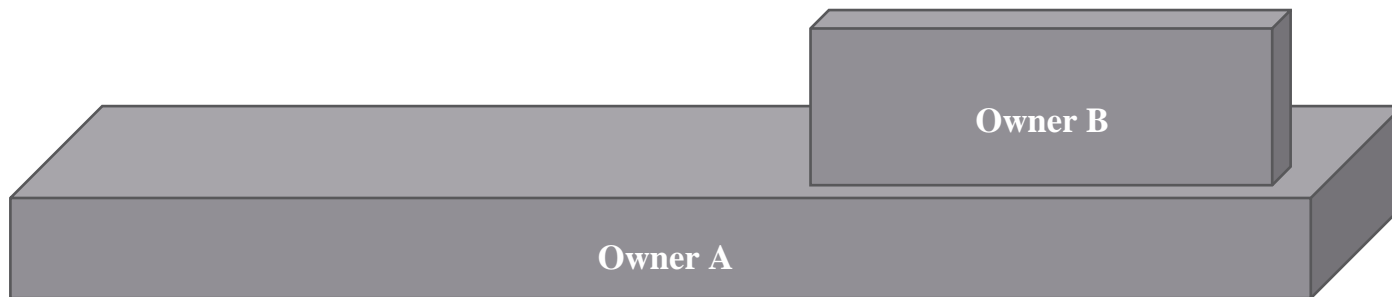
Art. 956 C.C.Q.

The owner of an immovable becomes the owner by accession of the constructions, works or plantations he has made...

# Aspects of Superficies

Superficies is ownership of the constructions, works or plantations situated on an immovable belonging to another person, the owner of the subsoil (art. 1011 C.C.Q.).

- There must be at least two distinct owners; the owner of the subsoil and the owner of the constructions, works or plantations.



# Aspects of Superficies

- If ownership of the subsoil and the constructions is merged in the same person, the superficies is extinguished.
- Superficies can be perpetual or for a term.
- Being an immovable real right, superficies is subject to the registration and publication rules set out in the C.C.Q.



# Case 1: Airport Lands

## Facts:

- Company X enters into a lease with the Aéroports de Montréal (“ADM”) for part of the airport lands.
- The lease permits Company X to build a hangar on this land.
- The ADM, in the lease, renounces to the benefit of the right of accession with respect to the hangar and expressly acknowledges that Company X will be the owner of the hangar, once built.
- Company X requires financing in order to build the hangar.

# Case 2: Towers

## Facts:

- Company Y is in the business of owning and operating towers (telecommunication towers, wind energy towers...).
- Company Y leases land from various third parties (private owners, the Crown).
- Company Y wants to finance its “fleet” of towers.



# Creation of Superficies



There are 3 methods of creation of superficies:

- Division of the right of ownership
- Transfer of the right of accession
- Renunciation of the benefit of accession

# Division of the Right of Ownership

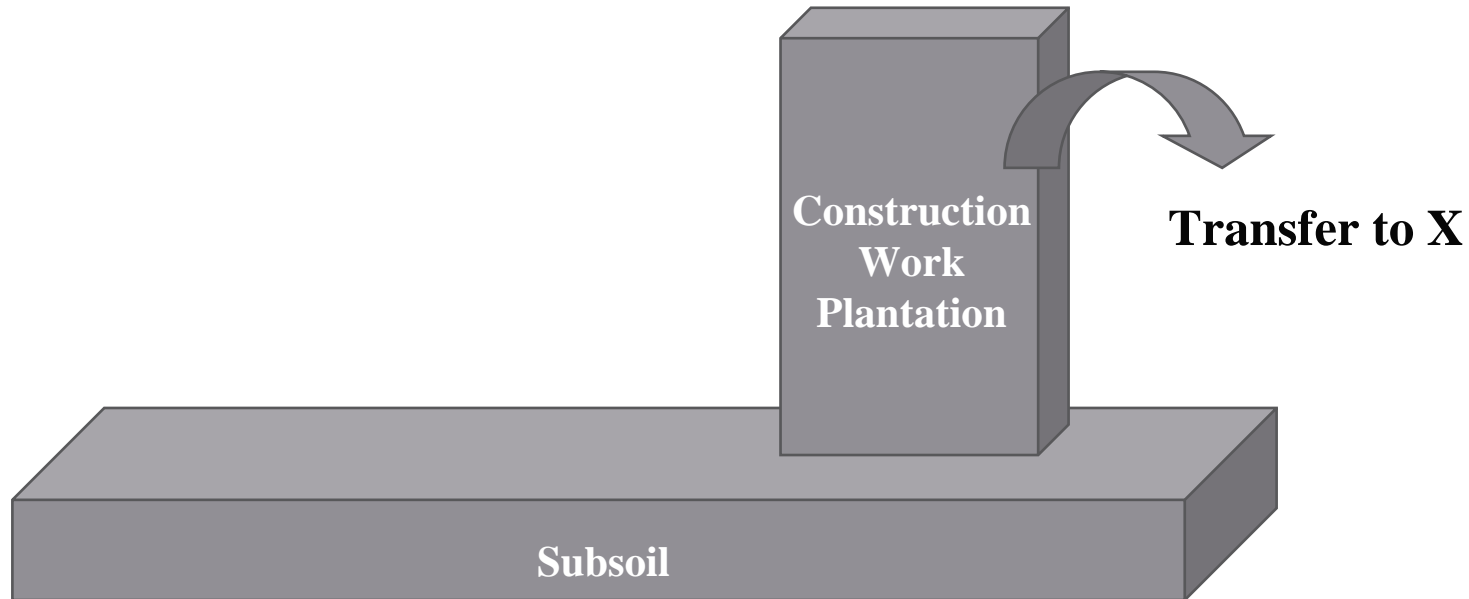


Dividing the right of ownership typically involves detailed, written plans and a detailed agreement (including a physical description of the property's metes & bounds).

Practical example:

- Farmer A owns a large piece of land with several buildings constructed thereon;
- Farmer A gifts one building to each of his children to use as their family home;
- By division of the right of ownership as between the subsoil and the individual homes, the children have superficial rights of ownership in their respective homes.

# Division of the Right of Ownership



The Owner of the Subsoil transfers ownership of the construction, work or plantation to a third party while maintaining ownership of the subsoil

# Division of the Right of Ownership



## Extract from Deed of Sale:

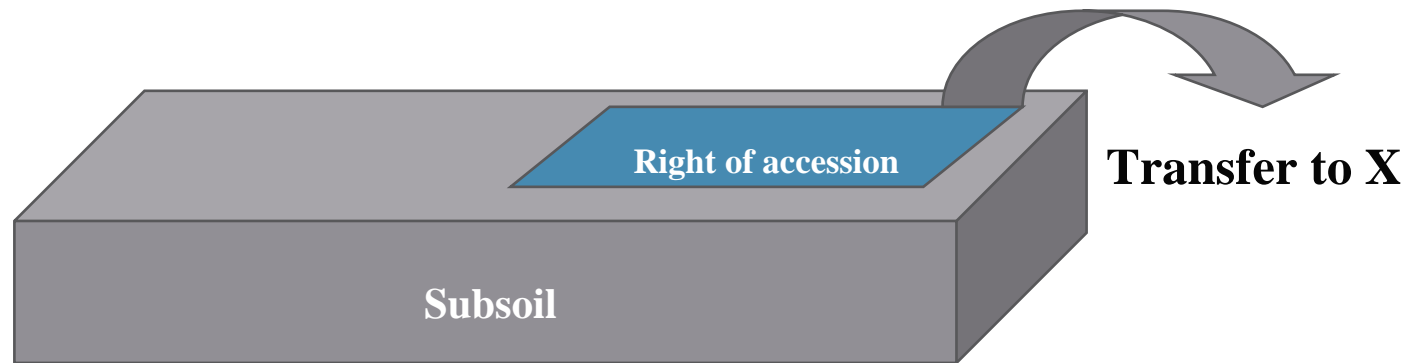
*“Le Tréfoncier cède au Superficiaire, qui accepte, un droit de propriété superficiare tel que défini à l’article 1011 du Code civil du Québec sur les constructions et ouvrages situés sur l’immeuble ci-haut désignés au paragraph 1.3 – appartenant au Tréfoncier, permettant au Superficiaire de maintenir cette base de transmission et ses accessoires ci-dessus énumérés, de façon perpétuelle, tant et aussi longtemps que cette base subsistera sur le tréfonds.”*

# Transfer of the Right of Accession



- The creation of superficies through the transfer of the right of accession is typically formalized in an agreement made prior to when the constructions, works or plantations are built on the subsoil which forms the subject of the agreement.
- An attribute of the right of ownership, namely, the right of accession, is dismembered from the right of ownership and transferred to a third party.

# Transfer of the Right of Accession



The right of accession (with respect to either the whole surface of the subsoil or only a part thereof) is transferred to a third party.

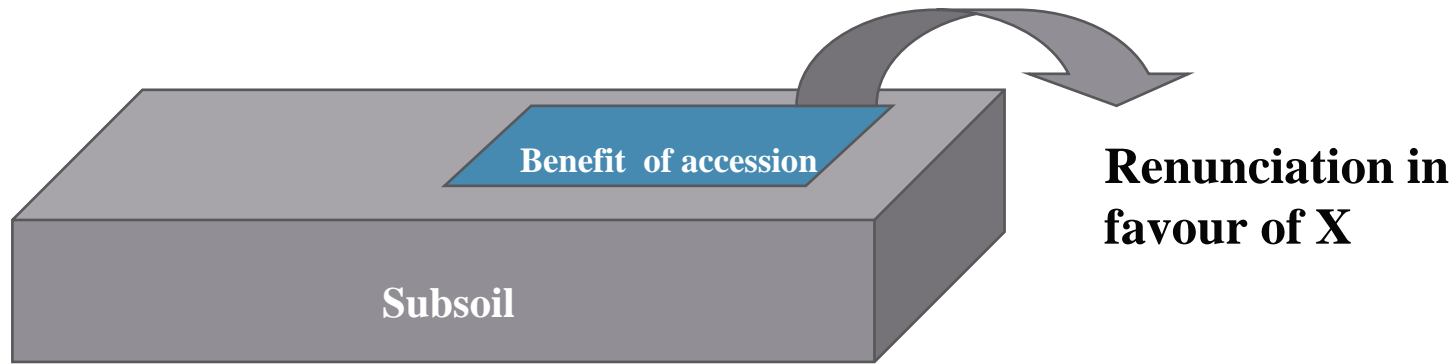
The constructions built upon that portion of the subsoil with respect to which the right of accession has been transferred will not become the property of the owner of the subsoil by accession.

# Renunciation of Benefit of Accession



- The creation of superficies through renunciation of the benefit of accession can be created tacitly or expressly through an agreement between parties prior to construction.
- This renunciation can be onerous or gratuitous on the part of the owner of the subsoil and is often demonstrated by the tolerance of a construction being built.
- This method of formation typically does not involve physical descriptions of the constructions in question.
- Examples include:
  - Lease with permission to build immovables; and
  - Simple permission to build immovables on subsoil.

# Renunciation of benefit of accession



The owner of the subsoil renounces the benefit of accession in favour of X

Only where X builds on that part of the subsoil will superficies be created

# Lease with Superficies Clause

## ARTICLE 3

### CREATION OF A RIGHT OF SUPERFICIES

- 3.1 Ownership of the Improvements**– The Lessor agrees to defer the application of the provisions regarding its right to become the absolute owner of the building (s) and Improvements erected on the Land. Therefore, the Lessee will remain, during the Term of the present Lease, the absolute owner of the building (s) and Improvements erected or installed as well as of all others Improvements to be erected or done on the Land until the termination of the present Lease. Notwithstanding any provision to the contrary and to avoid any doubt, it is agreed that, at the end of this Lease, the Lessor’s right of accession over and with respect to the Improvements will be executed in compliance with the provisions of Articles 3.2 and 3.3 hereof.
- 3.2 Assignment of Right of Accession** - The Lessor hereby assigns to the Lessee, as and from the Lease Commencement Date and for the duration of the Term, the benefit of Her Majesty’s renunciation to Her right of accession in respect of the Improvements, which shall remain the full and entire property of the Lessee for the entire Term.

The Lessor represents and warrants that it has the capacity, by good and valuable title, to assign to the Lessee the benefit of Her Majesty’s renunciation to her right of accession in respect of the Improvements.



# Necessity of Publication

- **Article 2941 C.C.Q.:**

Publication of rights allows them to be set up against third persons, establishes their rank and, where the law so provides, gives them effect. Rights produce their effects between the parties even before publication, unless the law expressly provides otherwise.

# Basis of Publication

- The acquisition, creation, recognition, modification, transmission or extinction of an immovable real right requires publication (art. 2938 C.C.Q.)
- Publication of rights allows them to be set up against third persons (art. 2941 C.C.Q)

# Publication: Division

Superficies *created* by the division of the object of the right of ownership

- Requires publication at all times, subject to specific legal provisions to the contrary
- Donation shall be made by notarial act *en minute* (art. 1824 C.C.Q.)
- Exchange or sale shall be made in writing (art. 2982 C.C.Q.)

# Publication: Transfer

## Superficies by transfer of the right of accession

- Superficies are not *created* by transfer of the right of accession in the absence of its object
- The dismemberment and *transmission*/transfer of the right of accession requires publication
- Exchange or sale shall be made in writing (art. 2982 C.C.Q.)
- No further publication required when the object of superficies is created

# Publication: Renunciation

## Superficies by renunciation of the benefit of accession

- No acquisition, creation, recognition, modification, transmission or extinction of an immovable real right
- Personal right neither requiring nor admissible for publication
- Practically speaking, may be published if it accompanies another right required or admissible for publication, based on the current guidelines of the Registre Foncier
  - Ex: Lease with permission to build

# Legal Framework

- **Art. 3030 C.C.Q.**

“Except where it pertains to an immovable situated in territory without a cadastral survey, no right of ownership may be published in the land register unless the immovable concerned is identified by a separate lot number on the cadastre. (...)”

# Legal Framework

- **Art. 3054 C.C.Q.**

Rights set forth in an application evidencing the acquisition of a part of a lot may not be registered in the land register until a cadastral amendment assigns (i) a separate cadastral number to the acquired part and to the remainder; or (ii) a separate cadastral number, where the acquired part is amalgamated with a contiguous lot, to the immovable resulting from the amalgamation and to the immovable resulting from the partition.



# The Cadastral Renovation

- Initiated in 1992 by the Ministry of Natural Resources and Wildlife (MNRW)
- The objectives of the reform
  - Maintenance of complete, accurate, reliable and at all times up-to-date cadastral plan
  - Elimination of confusion created by parts of lots
- Today: most urban areas have been cadastrally renovated

# Superficies Before Cadastral Renovation



- Prior to the cadastral renovation, publication of superficies without any requirement of a separate lot number on the cadastre

# Superficies Before Cadastral Renovation

DAVIES

## INDEX DES IMMEUBLES

LIVRE DE RENVOI **4986**

No 144

Déposit: le **SUITE DU VOLUME 2 PAGE 144**

Faillet No 1 destiné au No 144  
 du cadastre Paroisse de **STE-ROSALIE**  
 de l'index des Immeubles pour le Bureau de la Division d'enregistrement  
 de  
 Actuels à **SAINT-HYACINTHE** le 19  
 Par Jeanne Hébert 1989-04-06  
 Régistrateur-adj.

NOMS DES PARTIES	TITRE DE L'ACTE	ENREGISTREMENT		REMARQUES	RADIATION
		DATE	NO		
Tout Général du Canada de Radio St-Hyacinthe (1970)	Fiducie	89-06-13	246798	Ptie, 156 000 000 (2750)	1102792
Claude McDermott et Denise Lanchette	Marriage	88-08-08	230273	Ptie	
Claude McDermott à Christian McDermott	Testam.	89-07-11	247624	Ptie	
C. Pop. Desj. Ste-Rosalie (Bagot) de Gérard Giard	Hyp.	93-06-06	30453	Pties, 20 000 000 (2750)	
C. Pop. St-Joseph St-Hyacinthe de Christian McDermott	Hyp.	93-11-24	281811	Ptie, 40 000 000 (28108)	1122452
Christian McDermott et Christian McDermott	Testam.	93-11-24	286912	Ptie, composit	
C. POP. DESJ. STE-ROSALIE (BAGOT) et NICOLAS GIARD	HYP.	96-04-09	301857	Pties, 537 000 000 (28208)	
Gérard Giard et Nicolas Giard	Vente	96-04-10	301869	Pties, 350 000 000	
Gérard Giard et Nicolas Giard	Hyp.	96-04-10	301869	Pties, 110 000 000 (31269)	
Gérard Giard	Cession Rang	96-04-10	301869	Pties,	
Crossco Radio-Télévision Inc et 3145069 Canada Inc	Transf.	96-05-01	302263	Ptie, 71800 000 composit	
C. Pop. Spirit. Hyacinthe et 3145069 Canada Inc	Hyp.	96-05-14	302704	Ptie, 211 149 000 (28200)	111959
C. POP. DESJ. DE STE-ROSALIE (BAGOT) et NICOLAS GIARD	HYP.	96-06-20	303881	Pties, 140 000 000 (28308)	
Colby Day, du Radio Bagot et Nicolas Giard	Hyp.	96-06-12	306928	Ptie, 40 000 000 (28308)	
3145069 Canada Inc et Nicolas Giard	Fiduc.	96-07-16	307028	Ptie, 500000 composit	
Nicolas Giard et 3145069 Canada Inc	Part indivisibles	96-12-16	307028	Ptie, -	
Nicolas Giard et 3145069 Canada Inc	Cession Indiv.	96-12-16	307028	Ptie, -	
Comex Cooperative (Bagot) et Nicolas Giard	Hyp.	97-01-15	307391	Pties, 58 663 500 (28308)	
Gérard Giard	Cession Rang	97-01-15	307391	Pties, re: 301869	
C. POP. DESJ. STE-ROSALIE BAGOT et NICOLAS GIARD	HYP.	97-07-04	311169	Pties, 250 0000 (28308)	
3145069 Canada Inc et Vincent Desjardins Inc	Part	97-12-30	314490	Ptie, 500000 composit	
C. POP. DESJ. STE-ROSALIE (Bagot) et NICOLAS GIARD	HYP.	98-02-24	314490	Pties, 40 000 000 (28308)	
Banque Royale Canada et Diane Delisle	Hyp.	98-08-10	316535	Ptie, 34 081 250 (28308)	

# The Cadastral Renovation

- Initial 1997 MNRW policy
- Principle: Superficies are not immatriculated as part of cadastral renovation
- Immovables held in full ownership that are defined by vertical and horizontal boundaries may be immatriculated subject to MNRW's consent

# The Cadastral Renovation

- Policy softened by notice in April 2002
- Immatriculation of superficies if the property is fully and precisely described in a registered deed:
  - Technical Description prepared by a surveyor;  
or
  - Detailed description specifying measures, metes and bounds

# The Cadastral Renovation

Practical consequence of MNRW policy:

- No creation of lots to designate property held by way of superficies which were created by deeds that did not set out the exact metes & bounds of the property held in superficial ownership.



# Case 1: Airport Lands

## Facts:

- Company X enters into a lease with the Aéroports de Montréal (“ADM”) for part of the airport lands;
- The lease permits Company X to build a hangar on this land;
- The ADM, in the lease, renounces to the benefit of the right of accession with respect to the hangar and expressly acknowledges that Company X will be the owner of the hangar, once built;
- The hangar was not separately immatriculated.

# Case 1: Airport Lands

## Facts:

- Company X requires financing in order to complete the construction of the hangar;
- Company X's hypothecary creditor is not comfortable with the risks associated with an inability to publish ownership rights after a taking in payment (due to absence of a new lot);
- Commitment letter provided for a closing within 90 days

# Case 2: Towers

## Facts:

- Company Y is in the business of owning and operating towers (telecommunication towers, wind energy towers...);
- Company Y leases land from various third parties (private owners, the Crown);
- Company Y wants to finance its “fleet” of towers

# Possible Solutions

- Cadastral operation;
- Title insurance (financing context);
- Undertakings;
- Alternative structures;
- Legislative reform.

# Possible Solutions

Cadastral operation to separately immatriculate the hangar from the ADM lands.

- Art. 3043 C.C.Q:

Any person may submit a plan, signed by him, to the minister responsible for the cadastre in order to amend, by subdivision or otherwise, the plan of a lot he owns or to amend, by parcelling, the plan of a lot the ownership of which he has acquired otherwise than by agreement; he may also request the numbering of a lot, the striking out or replacement of the existing numbering or obtain a new numbering. The acceptance by the minister of a plan the purpose of which is to amend, by parcelling, the plan of a lot the ownership of which has been acquired by a person otherwise than by agreement compensates for the absence of the signature of any other person having rights in the lot represented on the plan. (...) Upon the dividing up of a lot, the parts resulting therefrom shall be immatriculated simultaneously.

# Cadastral Operation

- Minister of Natural Resources and Wildlife responsible;
- Art. 3043 C.C.Q. requires the intervention of the owner of the subsoil (note that in our practical example, the owner of the land is the Federal Crown...);
- Plan of lot must be prepared by a surveyor and approved by the Minister;
- Implies additional costs and delays (generally 3 months);
- Municipality may impose restrictions and other conditions by virtue of *An Act Respecting Land Use Planning & Development* (“**Land Use Planning Act**”)

# Negative Implications

Park tax / contribution respecting parks, playgrounds and natural areas:

- The creation of a new lot in order to obtain a distinct lot number for the superficies constitutes a cadastral operation according to the definition of 3043 C.C.Q.;
- The owner of the lot would therefore have to pay the park tax unless such contribution has already been paid in the past for said lot (s. 117.2 Land Use Planning Act);
- The park tax is a contribution of land or a payment of a certain quantum of money to the municipality in consideration for the redevelopment of a lot (i.e. sub-division).

# Park Tax

## Section 117.4, Land Use Planning Act:

- The area of the land to be transferred and the amount paid shall not exceed 10% of the area and value of the site, respectively.
- However, where the owner is to make **both an undertaking and a payment**, the total of the value of the land to be transferred and of the amount paid shall not exceed 10% of the value of the site.

# Park Tax

Section 117.6, Land Use Planning Act:

- The value of the land is determined **on the date of receipt by the municipality** of the application for a building permit or of the plan relating to the cadastral operation.
- The value is established, **at the owner's expense**, by a chartered appraiser commissioned by the municipality or by the property assessment roll of the municipality.

# Title Insurance

When acting for borrowers, we have been able to give the lender comfort by obtaining title insurance for the property (generally an immovable structure benefiting from the renunciation to the benefit of the right of accession set out in a land lease or equivalent agreement between the owner of the subsoil and the owner of the building structure). The negotiated endorsement reads as follows:

*The Company hereby insures the insured against loss or damage sustained or incurred by reason of the land not being designated as a separate lot in accordance with the rules of the Land Registry Office or by an inability to publish a right of ownership or a transfer of ownership following the exercise of the insured's hypothecary rights.*

# Undertakings

Combined with title insurance, additional comfort can be given to a lender by having the borrower give an undertaking to use best efforts to pursue a cadastral operation:

“The Debtor shall use its best efforts to make all necessary filings in order to ensure the successful deposit of a plan of subdivision of the Lands to limit the Immovable upon which the improvements constructed thereon are located to the said subdivision and, thereafter, shall take all reasonable steps necessary to file and ensure the deposit of a vertical cadastre with respect to the said improvements, as built.”

# Alternative Structures

- Divided co-ownership
- Pro's:
  - Avoidance of park tax;
  - Avoidance of the intervention of the municipality pursuant to the Land Use Planning Act
- Con's:
  - Requires the deposit of a declaration of co-ownership
  - Formalities to be respected with respect to the co-ownership and the formation of a syndicate
  - Sharing of certain “common expenses”

# Legislative Reform

- While the aim of the cadastral renovation was: (i) the maintenance of complete, accurate, reliable and at all times up-to-date cadastral plan; and (ii) the elimination of confusion created by parts of lots.
- By forcing the owners of superficiary rights to undertake a lengthy and costly process to have their real (and full) rights of ownership recognized, the MNRF's policy has had the unintended effect of rendering certain real rights less marketable (both in terms of selling these rights and hypothecating them).

# Legislative Reform

- If superficies are created through (i) division of the right of ownership; (ii) transfer of the right of accession; and (iii) renunciation to the benefit of accession, then the legislature should enact additional provisions to the publication section of the CCQ in order to preserve the equality of the three methods of creation of this real right.
- However, allowing individuals to publish their rights of superficies without separate lot numbers may simply create the same confusion as the previous system (prior to cadastral renovation).