I. TWO TYPES OF LANDLORD REMEDIES IN QUEBEC (both adhere to different legal & statutory requirements):

A. Hypothecary Recourses

- Replace the old “landlord privilege”.
- Adhere to the provisions of the C.c.Q. related to hypothecs.
- While there is more than one hypothecary recourse available, typically, Landlords with a monetary claim will opt for a sale of the movables by court auction.
- Due to the logistical, financial and legal factors (i.e. low value of assets, often financed or leased equipment), hypothecary recourses for a defaulting Tenant are rather uncommon in Quebec.
- This is even more so when the Tenant is insolvent, since the Quebec Court of Appeal decision in *Restaurant Ocean Drive (Re)*, [1998] R.D.I. 39, [1998] R.J.Q. 30., where the Court of Appeal ruled that a movable hypothec in favour of the Landlord is not opposable to the Tenant or its creditors, since the Landlord’s rental arrears claim is ranked (collocated) in accordance with the provisions of the *Bankruptcy Act*, irrespective of the movable hypothec. Thus, when the Tenant is bankrupt or avails itself of the protection of the Bankruptcy Act, the Landlord effectively loses it secured claim.

B. Personal Recourses

There are two main categories of personal recourses (the choice is up to the Creditor/Landlord):

1. Specific Performance

- This remedy permits the Landlord to compel the Tenant to “do” or “cease to do” something in breach of the lease.
- Specific performance can be monetary (payment of rent) or non-monetary in nature (respecting exclusivity, continuous operation, relocation, repairs etc.)*.

  ***Re: Continuous Operation:** We draw your attention to the recent decision *Michael Rossy Ltd.* v. *9190-9309 Quebec Inc*. 2017 QCCS 1669, 2017 QCCA 937, where the Superior Court, relying solely on Article 1856 C.c.Q., found that a Tenant’s decision to close his store constitutes a “change of destination of the premises” and therefore granted the Landlord’s interim injunction to compel the Tenant to re-open his store until final judgment. This decision was brought to

appeal and appeared to be headed for reversal, when the parties settled out-of-court.

- Orders sought for specific performance can be interim (immediate and urgent) or final. We will deal with the powerful tool known as the "safeguard order" later.

2. Termination (Resiliation)

i. *Termination/Resiliation*

- Many judgments have been rendered in Quebec surrounding the Landlord's right to terminate a lease where a Tenant is in default.
- For a long while, even after the enactment of the new Civil Code, termination of a lease due to a Tenant's default could only be achieved by Court order.

ii. *Ipso Facto Resiliation:*

- Then, in 2003, the Court of Appeal rendered a judgment in the matter (*9051-5909 Quebec Inc.* v*. 9067-8665 Quebec Inc*. [2003] R.D.I. 225 (CA)), which flipped the state of the law upside down. Henceforth, a Landlords are now entitled to terminate the lease, where the Tenant is in default and the lease clearly provides for the right to terminate same, by way of a simple written notice to that effect (therefore, bypassing articles 1863 and 1883 of the Civil Code (not of public order), which compel the Landlord to seek termination in court).
- The decision in *9051-5909 Quebec Inc.* v*. 9067-8665 Quebec Inc*. has been followed on several occasions since it was rendered and has become well-established law in Quebec since being penned.

iii. *Resiliation is not Eviction:*

- **Practical versus Idealistic:** What has remained ambiguous in practice, has been the actual eviction (removal) of an obstinate Tenant, that refuses to vacate the premises despite receipt of the Landlord's notice of termination.
- The Civil Code (art. 1605, 1883 and 1863) does not deal specifically with eviction of the Tenant.
- It has been long held in Quebec that evicting a Tenant needs to be done by way of the writ of eviction (pursuant to the provisions of the Code of civil procedure). This implies a judicial proceeding to seek eviction, thus defeating the notion of an *ipso facto* termination by the Landlord. In fact, the Courts have been reluctant to grant interim eviction orders, on the face of a simple notice of termination arising due to a Tenant default, where the Tenant has contested such notice and the termination itself.
- However, more recently, in the matter of *Liu* v*. Le 350, société en commandite*, 2017 QCCS 447, where a Tenant sued the Landlord for damages due to wrongful termination of lease and eviction, the Court concluded that the Tenant's damage claim was unfounded because (i) the Tenant was in default to conduct maintenance and repairs obligations per the lease and (ii) because the lease contained a clear termination and eviction clause, allowing the Landlord to do both by simple notice in writing to the Tenant (rather than by judicial proceeding), the Landlord was entitled to evict the Tenant without the need for a court order.

3. Arrears, Damages, Costs & Fees

- Arrears of rent are not the same thing as damages.
- The monetary claim of a Landlord for lost rentals accruing prior to termination is qualified as arrear. The courts have concluded that a tenant continues to accumulate arrears of rent until the lease is, in fact, terminated.
- After termination of the lease the Landlord's is entitled to claim damages, not arrears.
- The distinction is not negligible, given the fact that it can be harder to prove one's damages (based on the balance of probabilities) than to prove arrears of rent and that the landlord must demonstrate that its made efforts to mitigate its damages (art. 1479 C.C.Q).
- In a decision by the Superior Court rendered in 2003 (*Tour Scotia* v*. Sproule & Pollack Inc*., 2003 CanLII, (QC CS)), the Court was compelled to establish the exact moment of termination of the lease following the tenant's default to pay rent and its eventual abandonment of the Premises. After securing a new tenant for less rent, the Landlord filed suit to secure termination of the lease and sought arrears of rent up to the date termination of the lease, which Landlord contended should be the date of final judgment on the entire claim. The court concluded that the lease had effectively been terminated by the mutual will of both parties when the Landlord filed its law suit seeking termination. In an interesting twist of legal and factual logic, the Court concluded that the tenant, having closed its business months ago, had clearly expressed its desire to terminate the lease when it abandoned the premises and gave the keys back to the Landlord. Thus, when the Landlord filed its suit that included a conclusion seeking termination, the court concluded that the parties intention to mutually terminate the lease was crystalized. The amounts claimed by Landlord prior to such date were therefore qualified as arrears of rent.
- Courts have long been reluctant to grant legal fees on an extrajudicial basis (attorney-client fees). However, in a recent decision of the Superior Court in the matter of: *Aerocom Specialty Fittings Inc.* v. *9148-8064 Quebec Inc*. 2017 QCCS 2709, the Court awarded extrajudicial legal fees to the Landlord on the basis that such right had been set out in the lease, adding that such a claim must be reasonable taking into account the nature and complexity of the conflict.

4. Penalty Clauses/Liquidated Damages:

- The Courts have recognized the validity of liquidated damages clauses.
- However, rightly or wrongly, the Courts have assimilated "liquidated damages" clauses to "penalty clauses", thus subjecting such clauses and their application to Article 1622 C.C.Q.
- Pursuant to Article 1622 C.c.Q., where a creditor invokes a liquidated damage clause (ex. 6 months future rent), then he is precluded from seeking additional damages of the same category (lost rent to the end of the term). Therefore, by qualifying liquidated damages clauses as penalty clauses, some Courts have concluded that the Landlord must choose between invoking the liquidated damages clause, or seeking and proving a different quantum of damages. See: *Aerocom Specialty Fittings Inc.* v. *9148-8064 Quebec Inc*. 2017 QCCS 2709; See also: *Riocan Holdings (Quebec) Inc.* v*. April Canada Inc*. 2014 QCCS 3967.
- There is even some case law that has concluded that the Creditor (Landlord) does not have a choice in the matter. If the clause exists in the lease and is clearly drafted, the quantum of damages set out in the clause is deemed to be a genuine pre-estimate of the parties of the damages sustained by the landlord due to termination of the lease, leaving the Landlord no option to seek to prove it suffered another (greater) quantum of lost

rental damages. See: *Placements Bord de l'eau inc.* c. *Du Quoy-Chartrand* ; *9085-9638 Québec inc. (Comspec)* v. *Harvey, 2006 QCCS 4978 (CanLII); Francoeur* v. *Ouimet, 2014 QCCS 3903 (CanLII).*

- Ultimately, much of how the Courts adjudicate on these clauses, will depend primarily on how clearly the liquidated damage clause is drafted (i.e. translates the intent of the parties).

II. SAFEGUARD ORDERS

- An important and useful weapon in the Landlord's arsenal.
- The order can be achieved on an interim basis and allows the Landlord of a defaulting Tenant to receive payment of rent during the litigation process.
- To obtain an interim safeguard order, the plaintiff must demonstrate:
  i. appearance of right (the right to receive rent in the lease);
  ii. irreparable harm (the accumulation of rental debt will make it highly improbable that the Landlord will be able to recover all the accrued rent at trial);
  iii. balance of inconveniences (who stands to lose most).
- The Court can decide to order the safeguarded rent to be paid to the Landlord directly, or into the Court, or some combination of the above. This option is a matter of Court's discretion and usually depends on whether the rental amount is contested and how serious such contestation is.
- Courts have overwhelmingly ruled that safeguard orders are not appropriate for secure the payment of rental arrears. See: *Investors Group Trust Co. Ltd.* v. *Electrum AU/AG Inc*. 2017 QCCS 187.

ABOUT DE GRANDPRÉ CHAIT

De Grandpré Chait is a leader in real estate law in Quebec and comprises more than 75 lawyers who practise in various areas, including business law, taxation, construction law, municipal law, environmental law, intellectual property, labour and employment law, litigation, insurance, banking law, bankruptcy, insolvency and restructuring, and debt recovery. We are thus capable of responding to your legal needs in areas other than those expressly covered by the present mandate. De Grandpré Chait is also a member of two international lawyer networks, Interlaw and Lexwork International, which puts us in an advantageous position to execute national and international mandates.

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Kevin O'Brien is specialized in commercial real estate law. With his diversified background, covering many fields of practice, such as business law, public-private partnerships, transportation, commercial litigation and environmental law, Mr. O'Brien has structured, overseen and negotiated a wide range of commercial transactions. His professional skill-set and experience, combined with his in-depth knowledge of the North American commercial real estate market, enable Mr. O'Brien to deliver tangible and positive results for his clients.

Furthermore, his five plus years as Senior Legal Counsel of a real estate division of a major public company (TSX) in road transport have given him a first-hand perspective of the real and practical issues that matter for his clients, allowing him to better understand and execute on their expectations in a more efficient manner.

Representing a myriad of provincial and national property developers and owners, consortiums, REITs, real estate trusts, and tenants involved in numerous sectors, Mr. O'Brien skilfully manages a broad range of commercial transactions.

Whether the matter involves real estate developments, real estate sales and acquisitions, or commercial leasing, Mr. O'Brien works closely and proactively with his clients to identify the real business issues and to find optimal solutions for them. Mastering the fine art of negotiation and drafting, Mr. O'Brien carefully plans and executes his files to ensure the complete success and satisfaction of his clients within the planned budget.

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2003 – Admission to the Barreau du Québec
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International Council of Shopping Centres (ICSC)
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PUBLICATIONS

Common Sense Applied to Property Insurance Clauses in a Lease, Espace Montréal, volume 26, No. 1, 2017
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