INTERNATIONAL COUNCIL OF SHOPPING CENTRES

2018 CANADIAN LAW CONFERENCE

QUEBEC LEGAL UPDATE

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1. CONTINUOUS OPERATION

1.1 *Michael Rossy Ltd. v. 9190-9309 Quebec Inc.* (2017 QCCA 937)

June 8, 2017, Montreal, 500-09-026790-170 (C.A.)

Facts:

In 2008, Michael Rossy Ltd. (the "**Tenant**") and 9190-9309 Quebec Inc. (the "**Landlord**") executed a two-page letter of intent relating to leasing premises (the "**Premises**") in Galeries Jonquière (the "**Shopping Centre**") for a term of ten (10) years (the "**Letter of Intent**").

The Tenant sought to close the store due to continued financial loss, particularly during the year ending in January 2017, where the Tenant incurred a loss of $233,241.00. Despite closing the store, the Tenant intended to continue paying rent to the Landlord. The Landlord, alleging a financial loss from the departure of the Tenant, sought an interlocutory injunction to force the Tenant to continue operating in the Premises.

The Superior Court of Quebec (the "**Superior Court**") granted the injunction, forcing the Tenant to continue operating in the Premises until the end of the term. According to the Superior Court, the Landlord had the right to force the Tenant to continue operating the store, despite the absence of a contractual provision to that effect in the Letter of Intent. The Superior Court based its decision on Article 1865 of the *Civil Code of Quebec* (the "**CCQ**"), stating that "[*translation*] the Courts have repeatedly acknowledged that the failure to occupy a space may constitute a change in its destination".

Decision:

A single judge of the Quebec Court of Appeal (the "**Court of Appeal**") granted the Tenant's application for leave to appeal the decision of the Superior Court and stayed the interlocutory injunction pending the appeal hearing.

The Court of Appeal specifically noted that the Letter of Intent did not contain a positive obligation for the Tenant to continuously occupy and use the Premises, nor did it contain a provision stipulating the type of use to be carried out therein. Furthermore, the Superior Court had not cited any case law in support of its decision, and upon examination of the case law presented as part of the appeal, the Court of Appeal noted that in the majority of cases where it was ruled that a tenant's failure to continuously operate constituted a change in destination, there was, at the very least, an implied obligation contained in the agreement to that effect. Furthermore, in the majority of such cases, the tenant in question was a major or anchor tenant, and said tenant was often a supermarket. In the case at hand, the total leasable area of the shopping centre was 375,788 square feet, while the total leasable area of the Tenant's Premises was 26,254 square feet. Canadian Tire and Metro, two larger tenants in the Shopping Centre, leased 99,696 square feet (i.e. 26.5% of the total leasable area of the Shopping Centre) and 44,266 square feet (11.8% of the total leasable area of the Shopping Centre), respectively. Accordingly, the Court of Appeal determined that the Tenant was not a major or anchor tenant like Canadian Tire and Metro. Therefore, the Court of Appeal concluded that Article 1856 CCQ, which restricts a commercial tenant's ability to change the destination of the leased premises, does not impose upon the Tenant an implicit obligation to continue operating despite continued financial loss.

The Court of Appeal suggested that the percentage rent clause in the Letter of Intent could have been an indication of an implicit continuous operating obligation. However, the Court of Appeal noted that in the case at hand, the Tenant's volume of sales was too low to trigger the application of said clause, and therefore no loss would be incurred by the Landlord on that account.

The Court of Appeal did not conclude that the right to an injunction was inexistent, but rather, that it was, at best, weak. The Court of Appeal then reviewed the prejudice that the parties would suffer by the granting or refusal of the injunction, and the balance of inconvenience.

The Court of Appeal held that while the assertions of the Landlord's representative were vague and based on conjecture, the Tenant's prejudice in terms of losses was clearly established. Accordingly, the Court of Appeal stayed the interlocutory injunction pending appeal.

2. INTERLOCUTORY INJUNCTION

2.1 *Boulevard Shopping Centre (Montreal) v. Metro Richelieu Inc.* (2017 QCCS 1901)

May 12, 2017, Montreal, 500-17-095552-165 (S.C.)

Facts:

The Boulevard Shopping Centre (Montreal Limited Partnership) (the "**Landlord**") and Métro Richelieu Inc. (the "**Tenant**") each sought interlocutory injunctions in the context of a dispute arising from a commercial lease (the "**Lease**") between the parties for premises located in "The Boulevard" shopping centre. The Lease, which was originally signed on June 1, 1977 with Steinberg's Limited as tenant, was taken over by the Tenant in 1992, and was set to expire on December 31, 2017 (subject to renewal). The Tenant operated a grocery store under the "Metro" banner in the Premises.

In the context of a prior dispute between the parties, *Boulevard Shopping Centre (Montreal), l.p. v. Métro-Richelieu inc., 2016 QCCS 5421,* the Tenant had requested the Landlord's consent (as required under the terms of the Lease) in February 2016 to carry out certain alterations to the exterior of the Premises in order to implement a new online shopping service. Despite the Landlord's categorical refusal with respect to the implementation of such a service, the Tenant performed the alterations, which included modifying a wall, breaking up a sidewalk for access purposes, modifying parking space configuration, and placing electric charging stations for the Tenant's trucks in the parking lot.

The Landlord therefore applied to the Superior Court of Quebec (the "**Court**") for a provisional injunction in order to stop the Tenant from operating its online business, which application was denied due to the Court's finding that the criteria required for such an order had not been met. Specifically, the Landlord failed to convince the Court of the urgency and irreparable prejudice inherent in the circumstances. Despite the Court's refusal, the Tenant undertook not to carry out any further alterations in the context of its online shopping service without explicit written consent by the Landlord or the Court.

Following the judgment, the Landlord demanded that the Tenant remove the electric charging stations used for the refrigeration of the Tenant's trucks. The Tenant refused, and promptly applied for a provisional injunction from the Court in order to prevent the Landlord from

proceeding with the removal. The provisional injunction was granted on November 19, 2016 for a period of ten (10) days. The Landlord in turn filed an application for a provisional injunction in order to force the Tenant to suspect its online shopping service and remove the charging stations, on the basis that the Tenant had not obtained its consent prior to allegedly transforming the grocery store into an online business. At the same time, the Tenant sought an interlocutory judgment under the same terms of the provisional injunction granted to it on November 18, 2016.

Decision:

The Court analyzed the Landlord's application in light of Article 511 of the *Code of Civil Procedure* (Quebec), which provides the conditions necessary for the granting of an interlocutory injunction.

First, the Court considered whether or not the Landlord appeared to have a right to an interlocutory injunction. In doing so, the Court gave considerable weight to the fact that the Tenant had proceeded with the establishment of its online shopping service without obtaining the prior consent of the Landlord, as required under the terms of the Lease. It was clear that the Landlord had never accepted the project itself, nor the alterations to the exterior building carried out for its implementation. Therefore, the Court was convinced that the Landlord appeared to have a right to the injunction.

The Court then turned to the second condition necessary for it to grant the interlocutory injunction, prevention of serious or irreparable harm. However, the Court found that the Landlord had failed to allege strong enough evidence to that effect. Due to the absence of irreparable harm, the Court did not look at the third condition (balance of inconvenience), and therefore, dismissed the Landlord's application.

The Court granted the Tenant's application for an interlocutory injunction, thereby extending the terms of the provisional injunction of November 19, 2016, pending final judgment.

3. IPSO FACTO TERMINATION CLAUSE

3.1 *Liu v. 350* (2017 QCCS 447)

February 10, 2017, Terrebonne, 700-17-007047-102 (S.C.)

Facts:

Mr. Qian Wang (the "**Initial Tenant**") and 2847-0136 Quebec Inc. (the "**Initial Landlord**") entered into a commercial lease on July 11, 2002 (the "**Lease**") for premises located at 130 Castonguay Street, Saint-Jerome (the "**Premises**"). On December 16, 2004, the Initial Tenant assigned the Lease to Ms. Yu Jie Liu (the "**Tenant**"; note that the Tenant originally also included Ms. Wei Wang, however, Ms. Yu Jie Liu bought out her interest in the business in March 2006), who began operating a convenience store in the Premises.

The Lease contained an *ipso facto* termination clause, pursuant to which the Landlord could take back possession of the Premises as a result of the Tenant's default.

In 2010, the building in which the Premises were located was sold by the Initial Landlord's successor in title to Le 350, S.E.C. (the "**Landlord**"), who intended to demolish the

building in order to construct an office building (as part of a project which included two (2) neighbouring buildings).

After a series of visits and inspections of the Premises by the Landlord during the month of April 2010, an inspector from the Fire Safety Service of the City of Saint-Jerome issued the Tenant a notice to cure within thirty (30) days for non-compliance with various by-laws.

On May 7, 2010, the Landlord sent the Tenant a default letter for certain contractual obligations under the Lease, giving the Tenant five (5) days to remedy such defaults (the "**Notice**"). The Tenant responded to the Notice on May 11, 2010, contesting the alleged breaches. The Landlord responded on May 14, 2010 with written notice of termination of the Lease on the basis of the Tenant's failure to remedy the defaults set forth in the Notice, ordering the Tenant to cease its operations and to vacate the Premises within eight (8) days. On May 21, 2010, the Landlord notified the Tenant that it had applied for a demolition permit and that the building would therefore soon be demolished. The same day, the Tenant served the Landlord an originating application for an interlocutory and permanent injunction set for presentation on May 28, 2010 (the "**Originating Application**").

The Landlord evicted the Tenant on May 27, 2010, and the next day, the Originating Application was postponed until July 8, 2010. Despite the pending judicial proceedings, the Landlord demolished the building on July 6, 2010.

Decision

The Court considered each of the Landlord's allegations with respect to the Tenant's defaults under the Lease, such as the poor state of cleanliness of the Premises, the non-payment of taxes, and violations of fire safety provisions. Of particular interest, however, was the Court's analysis with respect to the issue of whether or not the Landlord required a notice of expulsion in order to evict the Tenant from the Premises, and whether or not the Landlord had been abusive in the manner it proceeded in that regard. The Court ruled that the *ipso facto* termination clause contained in the Lease was valid and therefore the Landlord had acted within its rights when it terminated the Lease and evicted the Tenant without any judicial intervention.

Additionally, the Court considered whether it was an abuse on the Landlord's part to demolish the building despite the pending proceedings instituted by the Tenant opposing same. Despite the rather aggressive actions of the Landlord, the Court ruled that it has not abused its rights, given that the Landlord had respected all the time delay provisions of the Lease. The Court also based its finding on the fact that the Tenant was uncooperative in correcting the defaults leading to the termination.

4. CONDITIONAL OBLIGATION

4.1 *2998939 Canada Inc. v. Hydropothecary Corporation* (2017 QCCS 5090)

November 7, 2017, Gatineau, 550-17-007915-141 (S.C.)

Facts:

In July of 2013, The Hydropothecary Corporation, a marijuana production and sale business (the "**Tenant")** met with 2998939 Canada Inc. (the "**Landlord**") in order to discuss the possibility of renting space (the "**Premises**") in one of the Landlord's buildings which was in the process of being built. During this first meeting, the parties discussed the fact that the Tenant

had recently applied to Health Canada to obtain a marijuana production license under the new regulations, and anticipated obtaining such license by the end of January 2014, which coincided with the date set for the completion of the building construction. The Tenant made it clear that obtaining such a license was a lengthy and rigorous process.

During the month of August 2013, the Tenant sent the Landlord two letters of intent relating to the signature of a lease upon obtaining the license from Health Canada. Attached thereto was a list of work to be carried out by the Landlord in order to render the Premises compliant with Health Canada's strict requirements and a timeline outlying the licensing process. The Landlord refused to sign the letters of intent, not wanting to be responsible for the installation and implementation of the security measures. At the same time, the Tenant obtained written confirmation from the City of Gatineau to the effect that the research and development of cannabis was a permitted use under applicable zoning regulations. In September 2013, meetings took place with the Landlord's architect and certain sub-contractors, for the purpose of modifying the Premises in accordance with the Tenant's requirements. The Tenant would pay the professionals directly for the preparation of the plans and specifications providing for the modifications to the building and the build-out of the Premises.

In October 2013, after continued negotiations, the parties visited a notary with the intention of concretizing a draft lease agreement (the "**Lease Agreement**"). which provided for, among other things, that the Tenant was to remit a non-refundable deposit in the amount of $40,000 to be held in trust and used towards the cost of renovations to the Premises, as well as an indemnity payable by the Tenant to the Landlord in the event the lease was not signed by April 31, 2014. The parties instead signed a deposit agreement dated October 22, 2013 (the "**Deposit Agreement**") before the notary, which made reference to the Lease Agreement and specifically provided that two conditions had not yet been realized at that time, namely: (i) obtaining the necessary permits required for the Tenant to operate in the Premises, and (ii) the signature of a commercial lease. Finally, the Deposit Agreement provided that in the event the Tenant did not obtain the required permits or refused to sign the lease, it would remit $25,000 to the Landlord.

Meanwhile, the Tenant continued to actively pursue obtaining a license from Health Canada, and learned, at the end of October 2013, that its application had reached the second stage of the process, in which inspection of the security measures would soon take place. Over the next couple of months, the Tenant and Landlord exchanged multiple e-mails concerning the status of the Premises construction. It is at this time that the City of Gatineau refused to grant the Tenant a business permit, prompting the Tenant to hire a consultant in hopes of reversing the City's refusal. The City agreed to allow the Tenant to operate as a research and development facility, but limited the production and cultivation of cannabis to 300 kg/year. Nonetheless, on January 28, 2014, the Tenant requested that the Landlord begin the renovations of the premises as quickly as possible in preparation of the inspection by Health Canada.

In April 2014, the Tenant acquired the shares of a newly-licensed cannabis producer and began operating out of its greenhouse. The Tenant promptly informed the Landlord of the merger while it refused to sign the lease, given that it still had not receive a license permitting it to operate out of the Premises. The Tenant requested that the Landlord suspend the electrical, security, and building mechanics work and allow it to delay the execution of the Lease for an additional 60 days, in hopes that it would obtain the license by the time. The Landlord agreed, and the parties therefor postponed until June 1, 2014. Several days later, the Tenant requested another extension from the Landlord, this time to July 1, 2014. The Landlord refused,

suggesting the parties terminate their agreement upon payment of $750,000 by the Tenant to the Landlord. The Tenant suggested instead that the Landlord simply keep the $40,000 deposit being held in trust. On July 16, 2014, the Landlord put the Tenant on formal notice to sign the Lease Agreement within 5 days. Subsequent to the Tenant's refusal to do so, the Landlord entered into a lease for the Premises with a new tenant.

The Landlord sought damages from the Tenant in the amount of $1,177,169.06 (broken down by way of loss of rent, costs to put the Premises into a state fit to be leased, and loss of profit in respect of the Tenant's construction contract) as a consequence of the Tenant's refusal to sign the lease on June 1, 2014 in accordance with the agreements existing between the parties, as well as the payment of an invoice in the amount of $12,810.51 for the design and construction of a scale model (which amount was paid by the Tenant during the trial). It considered the Lease Agreement to be a bilateral promise to contract, containing all the essential elements of a lease. The Landlord also argued that the Tenant made false representations and acted in bad faith in the context of the negotiations.

Decision:

The Superior Court of Quebec (the "**Court**") examined the Lease Agreement and the Deposit Agreement in order to qualify the contractual relationship between the parties. The Court noted that the Deposit Agreement incorporated the terms of the Lease Agreement. Specifically, the Deposit Agreement provided that the signature of the Lease Agreement by the Tenant was conditional upon two events: (i) obtaining the necessary permits and (ii) the signature of a commercial lease by May 1, 2014. The Lease Agreement did not provide for such conditions.

The Court then examined the conduct of the parties in an effort to uncover their common intention, pursuant to Article 1425 of the *Civil Code of Quebec* (the "**CCQ**"). The Court noted that from the beginning of their relationship, the parties negotiated the duration, price and other conditions of the Lease. The Lease Agreement, according to the Court, was therefore an offer to lease, accepted by the Tenant in October 2013.

The Court reiterated the principle that an offer to contract becomes a promise to contract from the moment the recipient of the offer expresses to the offeror its intention to accept. The offer becomes a bilateral promise when, in the context of a pre-contract, the parties make a commitment to each other to conclude the proposed agreement. When the agreement contains all the essential elements of a contract, it binds the parties.

In this case, however, the existence of two agreements between the parties, required the Court consider the interaction between them. According to the Court, the Deposit Agreement clearly expressed that the Lease Agreement was conditional upon the fulfillment of certain conditions and therefore, the Lease Agreement was subject to the realization of the conditions provided for in the Deposit Agreement, despite same not being mentioned in the Lease Agreement. Additionally, the court noted that condition of the Tenant obtaining the required license and permits was clearly established as early as the first meeting between the parties. Therefore, the agreements between the parties became null and void as of May 1, 2014 when the Tenant had not yet obtained the required license and permit.

The Court then turned to the question of whether or not the Tenant prevented the fulfilment of the conditions, as alleged by the Landlord. According to Article 1503 CCQ, an obligation becomes absolute when the debtor whose obligation is subject to the condition

prevents it from being fulfilled. However, in this case, the Court was convinced that all the evidence showed that the Tenant made every effort to obtain the necessary license and permit from Health Canada and the City of Gatineau. Even after the Tenant purchased all the shares of the licenced cannabis grower's business, it was diligent in continuing with the application process both with Health Canada and the City of Gatineau. Nothing in the Tenant's behaviour demonstrated it acted in bad faith, and in fact, it was the Landlord's refusal to extend the time for signing the lease that put an end to the obligations between the parties.

The Court granted the Landlord's action solely insofar as the payment of the said sum of $12,810.51 was concerned, and dismissed the Landlord's claim for both the $1,177,169.06 and $119,485.75 in legal fees (holding that the criteria of *Viel v. Entreprises immobilières du terroir ltée* (2002 CanLII 41120 (QC CA)) were not satisfied).

5. RIGHTS AND OBLIGATIONS RESULTING FROM LEASE

5.1 *Fauteux* v. *Hunter* (2017 QCCS 203)

January 11, 2017, Laval, 540-17-010264-140 (S.C.)

Facts:

The landlord of a commercial building, Normand Fauteux (the "**Landlord**"), applied to the Superior Court of Quebec (the "**Court**") to terminate the lease entered into with Louise Hunter, who was carrying on a fitness centre business under the trade name Kilo Santé (the "**Tenant**"), and for an interlocutory injunction on the basis of multiple noise complaints filed by another tenant in the building, Pré-maternelle les Oiselets Inc. (the "**Daycare Centre**"). According to the Daycare Centre, the Tenant produced excessive noise levels throughout the day, specifically during the Tenant's spinning classes.

At the beginning of the proceedings, the Tenant complied with the injunction request, and ceased all spinning classes during the operating hours of the Daycare Centre. However, the Tenant filed a cross-application for damages against the Landlord in the form of a rent reduction and moral damages, alleging an abuse of procedure by the Landlord. According to the Tenant, the Landlord had not presented any evidence to prove that the noise produced by its activities exceeded the levels normally produced by a fitness centre.

Decision:

The Court examined an expert's report carried out in the building, which concluded that the noise emanating from the fitness centre during the spinning classes varied between 76 and 77 decibels, noting that the usual standard for similar activities is 90 decibels. The report further revealed that the noise produced by the Daycare Centre was approximately 74 decibels; a level of noise similar to the levels produced by the Tenant.

At the hearing, the Landlord offered no evidence to contradict the findings of the report, save for its ambiguous and contradictory testimony in which it claimed that the bond of trust with the Tenant had been severed. The Court could not find any evidence to support this claim, noting specifically that the Tenant had demonstrated exemplary behaviour, such as paying its rent in a timely fashion, despite the restrictions placed on its spinning classes.

The Court then turned to the issue of the deficient soundproofing between the two units, despite a clear provision in the Tenant's lease providing that the necessary work to limit noise between units was to be carried out by the Landlord. It was also revealed that the lease entered into by the Landlord and the Daycare Centre contained a provision whereby the Daycare Centre acknowledged the existence of a loud fitness centre operated by the Tenant, and agreed to carry out the necessary soundproofing between the units at its own expense.

It was apparent to the Court that the Landlord was in breach of its own obligations under the lease while attempting to have its tenants assume same. As a result of the Landlord's bad faith in this regard, the Tenant was deprived of the peaceable enjoyment of its premises.

The Court therefore dismissed the Landlord's injunction application as well as its application for the termination of the Lease, and ordered the Landlord to carry out the necessary soundproofing work within ninety (90) days. The Court also ruled that the Landlord had been abusive by instituting procedures for which it did not have a claim in order to avoid carrying out its own obligations under the Lease. Pursuant to Article 51 of the *Code of Civil Procedure* (Quebec), the Landlord was ordered to pay the Tenant $23,915.00 as compensation for such procedural abuse.

Insofar as the Tenant's cross-application for diminished use of the premises was concerned, the Court found the Landlord had breached its fundamental obligation to deliver the leased property to the Tenant in a good state of repair and to ensure the peaceable enjoyment of the property throughout the term of the lease, pursuant to Article 1854 of the *Civil Code of Quebec*. The Court explained that it was the Landlord's responsibility to properly insulate the Tenant's premises as to allow the fitness centre to conduct its business without restriction.

Finally, the Court granted the Tenant a reduction in rent for the time it was deprived of the full enjoyment of the premises, as well as an amount of $5,000 in moral damages as compensation for the stress caused by diminished use of the premises.

5.2 *Aerocom Specialty Fittings Inc. v. 9148-8064 Quebec Inc.* (2017 QCCS 2709)

May 25, 2017, Montreal, 500-17-076476-137 (S.C.)

Facts:

On April 1, 2010, Aeorocom Speciality Fittings Inc. (the "**Tenant**") entered into a five (5) year commercial lease (the "**Lease**") with 9148-8064 Québec inc. (the "**Landlord**") for premises measuring approximately 3,545 square feet (the "**Premises**").

The Tenant endured multiple issues with the Premises from the beginning of the Lease and throughout occupancy, such as water leaks and damage therefrom, flood and sewer backups, heating deficiencies, delays in the removal of snow, and overall inadequate maintenance (the "**Alleged Inconveniences**").

The Tenant had advised the Landlord of the Alleged Inconveniences on an informal basis as they arose, but after a continued lack of remedial action on the Landlord's part, on February 25, 2013, the Tenant gave the Landlord formal notice of its intention to vacate the Premises on May 1, 2013 and terminate the Lease on the basis of the Landlord's failure to provide peaceable enjoyment of the Premises.

On March 22, 2013, the Tenant signed a new lease for other premises with a third-party and, immediately served the Landlord with an application for a safeguard order, termination of the Lease, and damages in the form of loss of profits, expenses incurred as a result of the Landlord's default in carrying out the necessary repairs within the Premises, and loss of peaceable enjoyment, totaling $36,002.52. The Tenant vacated the Premises on May 1, 2013, with twenty-four (24) months remaining in the term of the Lease.

On July 19, 2013, the Landlord served the Tenant with its defense and counterclaim for termination of the Lease, unpaid rents and damages, totaling $181,018.49. The Landlord argued that the Tenant had abandoned the premises without just cause, and that the Alleged Inconveniences had been dealt with by it in a timely manner.

On July 22, 2013, the Landlord signed a lease with a third-party for the Premises for a term of ten (10) years, which meant the Premises had remained vacant for a total of three (3) months since the Tenant's departure.

Decision:

The Superior Court of Quebec (the "**Court**") reiterated the principle that a tenant is entitled to terminate a lease in the event of a serious and enduring interference with the tenant's substantial enjoyment of the premises. In this case, however, the Court found that the Alleged Inconveniences were not serious and persistent enough to be considered a substantial impairment of the Tenant's right to peaceable enjoyment justifying the abandon of the Premises. In this regard, the Court did not consider that the Tenant's formal notice letter had the effect of *ipso facto* terminating the Lease, as the letter itself did not actually put the Landlord on formal notice to execute its obligations, and the Landlord had undertaken to remedy its defaults after its reception. The Tenant therefore could not invoke the Landlord's substantial failure in performance of its obligations in order as justification for the termination of the Lease as of right and subsequent abandon of the Premises.

However, the Court granted damages to the Tenant for loss of profit regarding the time he had spent on cleaning and repairing the Premises, following the water leaks and sewer backups. In this regard, the Lease provided that the Landlord should not be liable for any damages caused by water (including the discharge of sewers). However, the Court discarded this limited liability clause on the grounds that the lack of action and due diligence by the Landlord was equivalent to gross negligence.

With respect to the Landlord's application for termination of the Lease, the Court considered that the Tenant had abandoned the Premises as of May 1, 2013 and therefore granted the request as of that date. Regarding the unpaid rent, the Lease contained a penalty clause in favor of the Landlord. The clause provided that in the event of a default by the Tenant, six (6) months' rent in addition to the current month should become payable immediately. In light of this, the Court ordered the Tenant to pay the Landlord an amount equivalent to three (3) months of rent for the period of time the Premises remained vacant following the Tenant's abandonment of the Premises, in order to avoid awarding the Landlord a double compensation. In the same vein, this amount was reduced by the amount of security deposit already submitted by the Tenant.

The Court also ordered the Tenant to pay for the damages arising directly from the unjustified abandon of the Premises, namely the renovations the Landlord had to carry-out in order to accommodate the new tenant. However, the Court denied the Landlord's claim for the

cost of the repairs, administrative expenses and inconveniences, either because it was not the Tenant's liability under the Lease or because the Landlord did not meet his burden of proof.

Finally, since the Lease provided for extra-judicial fees in favor of the Landlord as a remedy for the Tenant's default, the Court granted same to the Landlord, ruling they were reasonable and in accordance with the principle of proportionality. As for the legal fees, the Court ordered each party to pay their own fees, considering the mixed outcome of the decision.

6. ESTIMATE OF OPERATING EXPENSES

6.1 *Shawi-Pharma Inc. v. Crombie Property Holdings Limited* (2017 QCCA 1675)

October 26, 2017, Quebec, 200-09-009295-160 (C.A.)

Facts:

A commercial lease was entered into on July 23, 2010 (the "**Lease**") by Shawi-Pharma Inc. (the "**Tenant**") and 9103-3522 Quebec Inc. (a corporation related to Sobeys Developments Limited Partnership) ("**9103**") for premises (the "**Premises**") in a shopping centre known as Carré-Trudel (the "**Property**").

In the Lease, the property taxes for the first fiscal year were indicated as being $5.00 per square foot, and the operating expenses for the first lease year were indicated as being $1.35 per square foot.

On September 15, 2011, 9103 sold the Property to Crombie Property Holdings Limited (the "**Landlord**").

On March 28, 2013, in accordance with the terms of the Lease, the Landlord provided the Tenant with a statement of adjustment for the property taxes and operating expenses owing by it, the total of which amounted to $33,568.68. Following the Tenant's refusal to pay, the Landlord delivered a notice of default on August 22, 2014.

One month later, the Tenant filed an originating application with the Superior Court of Quebec (the "**Superior Court**"), seeking a declaratory judgment to the effect that the property taxes and operating expenses would be in the amount estimated pursuant to the Lease, namely $5.00 per square foot for property taxes, and $1.35 per square foot for operating expenses, the whole increased annually during the term of the Lease and any extension periods thereof by fifteen percent (15%) and the applicable Consumer Price Index.

The Landlord filed a cross-application to recover the unpaid $33,568.68 from the Tenant.

The Superior Court examined the method employed by the Landlord in reaching its estimates and noted that the Tenant had not made any verifications as to the accuracy of same. It was ruled that the Landlord had been reasonable in calculating the annual estimate and therefore had properly executed its obligations under the terms of the Lease.

The Tenant appealed to the Court of Appeal of Quebec (the "**Appeal Court**"), arguing that the judge at first instance erred with respect to his interpretation of the Landlord's obligations under the Lease, specifically in that the Superior Court failed to consider the false

representations made by the Landlord with respect to the property taxes and operating expenses.

Decision:

The Appeal Court analyzed the relevant provisions of the Lease to ascertain what the Landlord's obligations were in connection with the estimate of the Tenant's share of property taxes and operating expenses, and found that the Superior Court judge was reasonable in concluding that the Landlord had fulfilled its obligation in that respect, noting that "[translation] a serious exercise was undertaken by qualified individuals".

Specifically, it was maintained that nothing contained in the Lease provided any indication that adhering to the Landlord's estimate constituted an obligation of result, and therefore the Landlord was not obliged to deliver a precise and determinable result.

Furthermore, the basic mechanics of the Lease were summarized as follows: (i) the Landlord provides an annual estimate of the amount of taxes and operating expenses, (ii) the Tenant pays, in advance, the amount estimated in equal installments on the first day of each month, (iii) the Landlord remits to the Tenant a statement of account outlining the actual amounts paid, and (iv) the adjustment, whether an increase or decrease, is effected within thirty (30) days of the statement.

Attention was brought to the fact that the very meaning of the word "estimate" denotes the idea of an approximation, and that the fact that the estimation was to be made annually reinforced the idea that the expenses were subject to a fluctuation in the form of an increase or decrease. Finally, the Appeal Court noted that the provision of the Lease stipulating the annual adjustment of the property taxes and operating expenses further reinforced the idea that the Tenant was to pay its proportionate share of the actual expenses and not of those estimated by the Landlord.

Therefore, it was ruled that there was no maximum amount with respect to such expenses, as the Tenant had submitted, and the appeal was dismissed.

7. FALSE REPRESENTATIONS IN ESTOPPEL CERTIFICATE

7.1 *Tadros v. Gestion Elm Bishop Inc.* (2017 QCCA 304)

February 23, 2017, Montreal, 500-09-025504-150 (C.A.)

Facts:

Gestion Elm Bishop Inc. (the "**Plaintiff**") was the property manager of a commercial building (the "**Building**") owned by 1429-1433 Rue Bishop Inc. (the "**Owner**"). The Plaintiff, as agent of the Owner, sought damages against Mr. Tadros and Ms. Farias (the "**Couple**") for alleged misrepresentations with respect to the term of a lease entered into by one of their corporations, 9201-5072 Québec Inc. (the "**Tenant**") in an estoppel certificate (the "**Estoppel Certificate**").

The Couple had purchased the Building on July 18, 2007 through one of their corporations, Les Residences Bishop Inc. (the "**Landlord**"). Prior to the acquisition, the Couple obtained a loan for 3.35 million dollars (the "**Loan**"), guaranteed by them personally. On November 25, 2008, the Couple, on behalf of the Landlord, signed a lease drafted in French,

with the Tenant. Several years later, on March 16, 2012, the Couple sold the Building to the Owner.

The Estoppel Certificate in which the alleged misrepresentation was made had been provided to the Owner's hypothecary creditor in 2012, prior to the acquisition of the Building by the Owner. The Estoppel Certificate, signed by Mr. Tadros, indicated that the term of the lease between the Landlord and the Tenant was eight months longer than the lease which was actually in force. It came to light that the Plaintiff and the Couple were operating under leases with different terms; the English version and the French version. Therefore, the Court had to decide which of the leases was the one in force at the time of the sale.

Decision:

The Superior Court of Quebec (the "**Superior Court**") concluded that the French lease, which was signed on November 25, 2008 by both the Landlord and the Tenant, was the one that was in effect at the time the Owner purchased the Building. An email from the Tenant's accountant referred to the base rent found in the French lease, and a copy of the English lease was only first sent to the Tenant's accountant over a month later.

Regarding Mr. Tadros' liability for false representations regarding the term of the lease, the Superior Court found that he had committed a fault by signing an Estoppel Certificate which he knew or should have known contained false information and that this information would be relied upon by others, particularly concerning the termination dates of the lease for the Tenant's restaurant. He was familiar with the French lease, which had a different termination date than the English lease, as evidenced by the fact that he had signed the lease itself as well as the corresponding Notice of Lease.

Although Mr. Tadros claimed that all documents were signed on behalf of his corporation, the Superior Court found he was personally liable for the extra-contractual fault due to the fact that he had not signed the Estoppel Certificate in his capacity as director of the Tenant, but rather had done so believing that it would release the Couple as personal guarantors for the Loan. Furthermore, Mr. Tadros had signed the Estoppel Certificate as the Tenant's President, which he himself admitted was false; such position being occupied by his wife.

As an experienced commercial landlord, the Court held that Mr. Tadros knew or should have known not to sign an Estoppel Certificate "[translation] out of complacency". He knew or should have known that the indication of the longer term of lease provided in the English lease would inflate the value of the Building. Therefore, the Owner suffered a prejudice either due to the willful blindness or inexcusable error on the part of Mr. Tadros.

The Superior Court awarded damages in an amount equivalent to the uncollected rent for the eight (8) month period following the end of the term provided in the French lease, totaling $108,103.84.

The Quebec Court of Appeal dismissed Mr. Tadros' appeal, stating that it only raised questions of fact and was an attempt to retry the case, which is not the role of the court.

8. ABANDONMENT OF PROPERTY IN PREMISES

8.1 *Gestion 5255-75 Ferrier Inc. v. Produits Canvyl Inc.* (2017 QCCQ 7128)

June 8, 2017, Montreal, 500-22-234111-162 (C.Q.)

Facts:

The Royal Bank of Canada ("**RBC**") sought an order for the delivery of the proceeds from the sale of the movable property of Produits Canvyl Inc. (the "**Tenant**"), which sale occurred during its eviction as a tenant of commercial premises.

Pursuant to a lease (the "**Lease**") with Gestion 5255-75 Ferrier Inc. (the "**Landlord**"), the Tenant was leasing premises (the "**Premises**") in a commercial building owned by the Landlord. RBC held a hypothec without delivery in the amount of three hundred fifty-four thousand dollars ($354,000.00) on the assets of the Tenant.

On October 18, 2016, a safeguard order was granted against the Tenant ordering it to pay the Landlord the rent for the month of October 2016, as well as all subsequent rent, on the 1st day of each month.

On November 9, 2016, the bailiff in the file (the "**Bailiff**") seized the Tenant's movable property situated in the Premises (the "**Movable Property**") and set the date of the sale to be December 20, 2016. On November 18, 2016, the minutes were served upon RBC, in accordance with article 707 of the *Code of Civil Procedure* (Quebec) (the "**CCP**").

The Tenant did not abide by the safeguard order and a judgment by default was rendered against it on December 16, 2016 with the following conclusions:

- order the resiliation of the Lease;
- order the Tenant to leave the Leased Premises within ten (10) days of the judgment, failing which, order the expulsion of the Tenant, in accordance with the law; and
- order the Tenant to pay to the Landlord a sum of sixty-six thousand two hundred eleven dollars and forty-five cents ($66,211.45).

The Bailiff was unable to sell the Movable Property and indicated in the collocation scheme an amount of zero (0). Therefore, the Movable Property was no longer under seizure.

On January 5, 2017, the Bailiff modified its notice of execution by adding the conclusions of the judgment and notified the Tenant that the Movable Property had to be removed from the Premises within five (5) days, failing which, the Movable Property would be deemed abandoned.

On January 11, 2017, the Bailiff executed the modified notice of execution for the purpose of evicting the Tenant. Considering the Tenant's absence, the Movable Property was deemed to have been abandoned by the Tenant and was sold to the Landlord for an amount of ten thousand one hundred dollars ($10,100.00). The proceeds of the sale were given to the Landlord after payment of the legal costs.

The issue raised in this decision was the following: under article 693 CCP, did the Bailiff have to remit the net proceeds of the sale to RBC which held a movable hypothec on the

Tenant's Movable Property rather than to the Landlord, when it sold the property left behind and deemed abandoned in the context of the expulsion of the Tenant?

Decision:

The Court of Quebec (the "**Court**") analysed articles 692 and 693 CCP, which apply to situations where a debtor abandons its property in the leased premises following an eviction:

> 692. *If the party ordered to deliver or surrender property fails to do so within the time set by the judgment ordering the eviction of the debtor or the removal of property or by a subsequent agreement between the parties, the judgment creditor may be placed in possession of the property by the notice of execution. If it involves eviction, the notice must be served at least five days before it is to be executed. It orders the debtor to remove all movable property within a specified time limit or pay the costs incurred for its removal and informs the debtor that if the debtor fails to comply, the movable property will be deemed to have been abandoned. No eviction may be carried out on a holiday or during the period extending from 24 December to 2 January.*
>
> 693. *Any movable property left on the premises on eviction of the debtor is deemed to have been abandoned by the debtor and the bailiff may sell it for the benefit of the creditor, give it away to a charity if it is not likely to be sold or otherwise dispose of it as the bailiff sees fit if it cannot be given away.*

The Court made the following distinction between abandoned property with little or no value and abandoned property that can be sold:

- Abandoned property of little value

Abandoned property of little or no value belongs to the person who appropriates it for himself/herself by occupation or if no one appropriates it for himself/herself, the abandoned property belongs to the municipality that collects it in its territory, or to the State (article 935 of the *Civil Code of Quebec* (the "**CCQ**")).

The Court found that the intent of the legislator is to facilitate, for the owner, the disposal of the property of little value left by the tenant in the leased premises without risk of a suit by the tenant. The Court concluded that the occupation of property of little value, by the person who appropriates them, has the effect of discharging all real rights on the said property as provided for by the CCQ, since its disposal does not have negative consequences for creditors.

- Abandoned property that can be sold

The situation is different when it comes to abandoned property that can be sold. In such a scenario, if the sale generates positive net proceeds, the rights of the creditors are affected and the Landlord would then enjoy a benefit if the sale discharges the real rights as suggested by the Bailiff.

The legislator specifically provides for cases where a sale discharges real rights, with the exception of certain rights mentioned, and puts in place a more onerous process of sale than the one provided for in article 693 CPC. The Court inferred from the silence of the legislator that it did not want this sale to discharge real rights, otherwise it would have said so expressly.

The court concluded that in this case, the Bailiff was entitled to give the net proceeds of the sale to the Landlord. Therefore, RBC's request was dismissed.

9. SAFEGUARD ORDERS

9.1 *9210-7580 Quebec Inc. (Librairie Raffin) v. Librairie Renaud-Bray Inc.* (2017 QCCS 1961)

May 11, 2017, Montreal, 500-17-096878-163 (S.C.)

Facts:

9219-7580 QuebecInc. (the "**Tenant**") sought a provisional injunction against Librairie Renaud-Bray Inc. and Groupe Archambault Inc. (collectively "**Renaud-Bray**"), a competitor of the Tenant, and a provisional injunction against Fonds de placement immobilier Cominar (the "**Landlord**").

The Tenant was occupying premises (the "**Premises**") in a shopping centre owned by the Landlord and known as Galeries Rive-Nord, in Repentigny (the "**Shopping Centre**"), for a term ending on October 31, 2016 (the "**Term**") under a lease agreement and its subsequent amendments (collectively the "**Lease**"). The Lease contained an option to renew in favour of the Tenant, which was subject to the condition that the Tenant generate a gross revenue of at least two million six hundred thousand dollars ($2,600,000.00) from the Premises.

As of April 2016, the Landlord and the Tenant started negotiating the terms of a lease renewal, mostly through email exchanges. The Tenant wanted to provide for a new Term of ten (10) years and the possibility to expand its Premises. The Landlord then informed the Tenant that it could not exercise its option to renew, as it did not meet the condition regarding the gross revenue. During the negotiations, the Landlord informed the Tenant that the Landlord had other leasing projects on the table. Before deciding on the Tenant's request, the parties agreed to extend the Term until January 31, 2017. However, during a meeting held on November 15, 2016, the Landlord informed the Tenant that it did not want to extend the Term.

The Tenant later found out that Renaud-Bray was opening a new store in the Shopping Centre during the summer of 2017.

As regards Renaud-Bray, in April 2015 the Tenant had approached it in order to launch a project together. The project was never completed.

In April 2016, new discussions between the Tenant and Renaud-Bray were undertaken for the sale of the Tenant's assets to Renaud-Bray. In order to allow confidential information to be exchanged between the parties, a confidentiality agreement was signed on May 2, 2016 (the "**Confidentiality Agreement**").

The Tenant was seeking the following orders:

- An order against Renaud-Bray to cease using the confidential information obtained during its negotiations with the Tenant and to cease its negotiations with the Landlord.

- An order against the Landlord to allow the Tenant to stay in the Premises and to cease its negotiations with Renaud-Bray.

Decision:

- Order against Renaud-Bray

When it comes to a provisional injunction or a safeguard order, the Tenant had to demonstrate it had a right, the urgency of the matter, that it would suffer an irreparable prejudice if it fails to obtain the order and, depending on the quality of its right, it may have to show that the balance of inconvenience was in its favour.

Even though the Court of Quebec (the "**Court**") recognized the Tenant's right to protect its confidential information under the Confidentiality Agreement, the Tenant needed to prove that Renaud-Bray was in default of its obligations.

Considering the definition of confidential information set out in the Confidentiality Agreement, the Court concluded that the said information could not have been useful in the negotiations between Renaud-Bray and the Landlord. The Lease did not seem to be included in the said definition.

Moreover, the Court analyzed the confidentiality clause contained in the Lease, and concluded that as the said clause was in favour of the Landlord, it did not help the Tenant's case.

Furthermore, the Confidentiality Agreement did not prevent Renaud-Bray from negotiating with the Landlord. Therefore, the Tenant did not have a right to obtain an order to have Renaud-Bray cease its negotiations with the Landlord.

The Court was also of the opinion that the urgency criteria was not met, since the Tenant took over a month to serve its proceedings once it became aware of the negotiations between Renaud-Bray and the Landlord.

As regards irreparable prejudice, the Court concluded that this criteria was not met, as the Tenant failed to prove that it had the right to stay in the leased premises to the exclusion of all other parties.

Finally, the court considered that the balance of inconvenience favoured Renaud-Bray.

- Order against the Landlord

The Court concluded that the Tenant did not have a right to stay in the Premises, since it did not meet the gross revenue condition contained in the option to renew. Therefore, the Tenant could not prevent the Landlord from negotiating with third parties or from signing a lease with Renaud-Bray.

Since July 2016, any reasonable business person would have known that the Tenant's future at the Shopping Centre was in jeopardy, and would have begun to look for alternatives. Moreover, if the Tenant thought that it had the right to renew the Term for a period of five (5) years, upon communication that the Landlord was looking at other lease proposals, an application for a provisional injunction should then have been instituted. The urgency criteria was therefore not satisfied.

The Court dismissed the Tenant's request for a provisional injunction but reserved the Tenant's other recourses, such as the possibility to obtain damages on the merits of the case.

9.2 *Investors Group Trust Co. Ltd. v. Electrum AU/AG Inc.* (2017 QCCS 187)

January 23, 2017, Montreal, 500-17-097069-176 (S.C.)

Facts:

Electrum AU/AG Inc. (the "**Tenant**") occupied the leased premises (the "**Premises**") pursuant to a lease dated September 2, 2006 (the "**Lease**") entered into with Investors Group Trust Co. Ltd. (the "**Landlord**").

The Landlord claimed that the Tenant was in default to pay certain relatively small amounts dating back to January 2016, as well as the full rent for the months of July, November and December 2016 and January 2017, amounting to $101,968.11 including interest. The Tenant did not respond to the Landlord's requests for payment sent on August 24, 2016, November 11, 2016 and December 5, 2016, and therefore, the Landlord instituted proceedings claiming the unpaid rent and the termination of the Lease before the Superior Court of Quebec (the "**Court**") on January 11, 2017.

The Landlord also sought a safeguard order requesting that: (i) the Tenant be ordered to deposit the amount of $101,968.11 for arrears within five (5) days of the judgment, (ii) the Tenant be ordered to pay the amount of $19,796.74 in rent to the Landlord on the first day of each month beginning February 1, 2017; and (iii) the Tenant be foreclosed from contesting the action in the event of non-payment of any amounts under the safeguard order.

Decision:

The Court outlined the conditions governing safeguard orders in the context of unpaid rent under a commercial lease, namely: (i) an appearance of right, (ii) serious or irreparable harm, (iii) the balance of convenience and (iv) urgency. In light of the conditions and the absence of contestation by the Tenant, the Court issued the safeguard order in connection with the future rent. With respect to the arrears in rent, the Court found no risk to the Landlord of suffering irreparable harm, stating that if there had been any risk of same, it had already occurred when the Tenant failed to pay. Additionally, the Court noted there was no urgency inherent in the situation; rather, it found that the Landlord was in the same position as any other creditor who brought a legal action to recover a sum due to it. The fact that the indebtedness arose from a lease was irrelevant, according to the Court. The issuance of a safeguard order in such circumstances would be equivalent to granting a seizure before judgment without requiring the conditions necessary for a seizure before judgment. In light of the foregoing, the Court did not extend the safeguard order to the arrears.

With respect to the future rent, the Court maintained that instances where a landlord's right to receive rent payments is uncontested, the rent should be paid to the landlord. Conversely, if there is contestation, the rent should be held by a third party. In cases where the contestation relates to only part of the rent or where it is not serious, the Court will determine the portion of the rent to be paid to the landlord and how much should be held by a third party. Being that the action had been served only a few days prior and that it was known the Tenant had the intention of filing a counterclaim for damages and a reduction of rent, the Court ordered that the full amount of the future rent be held by the Tenant's lawyers in trust, while reserving

the Landlord's right to ask that all or part of the rent be paid to it once the counterclaim had been filed.

The Court refused to order that the Tenant be foreclosed from contesting the action in the event of it failing to pay any amounts under the safeguard order, noting that such a sanction would be inappropriate in the circumstances. Rather, the Court maintained that the sanction of foreclosure to plead will rarely, if ever, be the appropriate sanction for a monetary default. According to the Court, there is no link between failing to pay an amount of money and not being allowed to defend an action.

The Court therefore ordered the Tenant to pay to its lawyers, an amount of $19,796.74 on the first day of each month from February 1, 2017 to July 1, 2017, pending a further order of the Court.

9.3 *9268-4257 Quebec Inc. (Realco Realties) v. 9174-9598 Quebec Inc.* (2017 QCCS 3765)

August 18, 2017, Montreal, 500-17-094269-167 (S.C.)

Facts:

The Superior Court of Quebec (the "**Court**") was seized with a request from 9167-1057 Quebec Inc. (Realco Realties) (the "**Landlord**") to declare 9268-4257 Quebec Inc., Kutuojo Guzoraky and Margaret Guzoraky (the "**Tenants**") foreclosed from pleading in an upcoming trial, on the grounds that they had failed to pay the amounts due for rent and their share of taxes on time, pursuant to a safeguard order (amounting to $9,614.50 and $3,002.14 respectively).The Landlord was also requesting $5,000 in damages for abuse of procedure pursuant to Article 51 and following of the *Code of Civil procedure*.

Decision:

The Court found that although the Tenants had failed to pay the rent and taxes on time pursuant to the safeguard order, they had nevertheless made multiple payments, albeit late, to cover the outstanding rent and taxes, and had proposed a payment schedule in order to cover the outstanding rent and taxes. Therefore, the Court opined that the Tenants had not been grossly abusive of the situation.

Citing the decision *Investors Group Trust Co. v. Electrum AU/AG Inc.* (2017 QCCS 187), the Court ruled that granting the Landlord's request would be too drastic given the circumstances, in that it would prevent the Tenants from asserting their arguments as well as their rights and recourses before the judge who would hear the matter on its merits. The Court determined that the prejudice that the Tenant would suffer in this case far outweighed the prejudice suffered by the Landlord, and therefore, denied the Landlord's request, and dismissed the Landlord's application.

10. CONSENT

10.1 *Dollarafruits Inc. v. 9080-2059 Quebec Inc.* (2017 QCCQ 3565)

April 25, 2017, Montreal, 500-22-230690-169 (C.Q.)

Facts :

A commercial lease (the "**Lease**"). was entered into by Dollarafruits Inc. (the "**Tenant**") and 9080-2059 Quebec Inc. (the "**Landlord**") for the operation of a fruit and vegetable store on St. Denis Street, Montreal (the "**Premises**"). Several months later, the City of Montreal began carrying out major road work near the Premises, which had a negative impact on the Tenant's customer traffic, and therefore on its profit.

The Tenant put the Landlord on formal notice to terminate the Lease, claiming that the Landlord had failed to advise the Tenant of the road work which was to be undertaken by the City over the following two years. Despite negotiations between the parties resulting in the execution of a lease amendment (the "**Amendment**") providing for the continuation of the Lease in exchange for a rent reduction, the dispute was not settled, and the Lease was subsequently terminated by the Superior Court of Quebec on application by the Tenant. The judgment reserved each of the parties' rights to claim damages.

The Tenant sought the following: (i) damages from the Landlord in the amount of $68,958.00 as a result of the termination of the Lease; and (ii) the annulment of the Lease on the basis of a defect of the Tenant's consent. The Landlord sought damages from the Tenant in an amount of $75,057.41 as a result of the termination of the Lease, and $10,000 for abuse of right.

Decision:

The Court of Quebec (the "**Court**") first examined the Tenant's claim that its consent was vitiated on the basis that it had not read the Amendment prior to signing it. According to the Tenant, it would have never signed the Amendment had it taken the time to properly read it. The Court was clear on this point; omitting to read a legal document prior to signing it, as the Tenant had done, constitutes an inexcusable error. The Court reiterated that an inexcusable error under Article 1400 of the *Civil Code of Quebec*, could never be considered a defect of consent giving rise to the annulment of a contract. The Court specifically noted that the Amendment was merely one page long, contained only one important provision, and that the Tenant was in no way pressured by the Landlord to sign it immediately. Furthermore, the Court found it unlikely that the Tenant would have signed the Amendment based solely on the Landlord's verbal representations as to its content, given that the Tenant's formal notice made specific reference to Landlord's alleged misrepresentations at the time of signing the Lease.

In light of the circumstances, the Court ruled that the Amendment entered into between the parties was a valid agreement, adding that the evidence did not demonstrate that the Tenant was not informed of the work that was to be carried out by the City of Montreal prior to the signature of the Lease. In any event, it was clear to the Court that the Tenant had certainly been aware of same at the time it signed the Amendment. The Court therefore dismissed the Tenant's claim in damages and application for the annulment of the Lease.

The Court granted the Landlord's cross-application, and awarded it damages in the amount of $55,867.05 for the termination of the Lease, such amount representing the security deposit which should have been given by the Tenant, the unpaid rent, as well as the reimbursement of the Landlord's lawyer fees in light of the abuse of procedure on the Tenant's part.

11. ARBITRATION

11.1 *March Salamon v. Congrégation des observants de la Loi de la Torah Machzikei de Montréal* (2017 QCCS 1474)

April 3, 2017, Montreal, 500-17-093690-165 (S.C.)

Facts:

March Salamon is the owner (the "**Owner**") of a property located in Montreal, Quebec (the "**Premises**"), which was rented over 25 years ago to Congrégation des observants de la Loi de la Torah Machzikei de Montreal (the "**Tenant**") by the previous owners of the Premises (the "**Landlord**").

Prior to the year 2001, the Tenant had stopped paying its rent, which led the Tenant and the Landlord to agree on having the dispute mediated by a Beth Din (court) located in New York City. Based on the Tenant's lack of collaboration, the Beth Din authorized the Landlord to institute proceedings before the civil courts, which resulted in the Superior Court of Quebec (the "**Court**") declaring the termination of the lease on May 15, 2001. On September 10, 2001, the Tenant and the Landlord entered into an agreement allowing the Tenant to continue occupying the Premises until April 10, 2002, despite the judicial termination of the lease several months earlier. Five months later, on February 13 and 14, 2002, the parties entered into three more agreements (the "**February Agreements**"). The agreement entered into on February 14 (the "**February 14 Agreement**") provided that the Tenant could continue occupying the Premises until May 1, 2003, on the condition that it pay the stipulated rent and vacate the Premises on such date. The February 14 Agreement also contained an arbitration provision which provided that in the event of the Tenant's default of its obligations, the Landlord could "execute the decision order and stipulation of May 15, 2001 pursuant to approval by the Beth Din". The two other agreements provided, more generally, that the parties would refer any disputes arising between them to the Rabbinical Court of Yeshiva Beth Joseph of New York City (the "**Rabbinical Court**"), which they did on at least one occasion between the years 2002 and 2011.

In May 2016, the Owner filed an application with the Superior Court, requesting the eviction of the Tenant, on the basis that the Tenant was no longer paying its rent. The Tenant argued that on the basis of the arbitration provisions of the February Agreements, the matter should be referred to the Rabbinical Court. According to the Owner, the February 14 Agreement was not a lease, but merely the authorization subject to a simple notice of termination, allowing the Tenant to continue occupying the Premises. Therefore, the Owner argued that because no lease existed between the parties, it was incorrect to conclude the parties had agreed to submit all disputes to arbitration. The Owner further argued that even if the February 14 Agreement was a lease, it would have expired on May 1, 2003 (the "**Expiry Date**").

Decision:

The first issued the Court was called upon to decide was whether or not the February 14 Agreement was a lease. Citing article 1851 of the *Civil Code of Quebec* (the "**CCQ**"), the Court reiterated that a contract by which a person (the landlord) agrees to provide another person (the tenant) with the enjoyment of immovable property during a certain period of time in exchange for rent, constitutes a lease. Therefore, even though the initial lease was terminated by the Superior Court on May 15, 2001, the parties concluded a new agreement allowing the

Tenant to remain in the Premises until April 10, 2002, and then again until May 1, 2003. The Court noted that pursuant to article 1879 of the CCQ, a lease is renewed tacitly where the tenant continues to occupy the Premises for more than ten (10) days after the expiry thereof without opposition from the landlord. Therefore, given that the Tenant was never asked to leave prior to the originating application filed in May 2016, the Court ruled that the February 14 Agreement had been tacitly renewed for one (1) year periods, year after year.

The second issue analyzed by the Court was whether the mandate granted to the Rabbinical Court as part of the February Agreements continued to exist after the Expiry Date and after the Landlord sold the Premises to the Owner. The Court responded in the affirmative, stating that article 1879 of the CCQ provides that a tacitly renewed lease is renewed "on the same conditions", and therefore the yearly renewal of the February 14 Agreement also triggered the renewal of the arbitration agreement which was an accessory thereto, and allowed same to survive the sale of the Premises by the Landlord to the Owner.

On the basis of the above, the Court ordered that the matter be transferred to the Rabbinical Court, in accordance with the relevant provisions of the February Agreements.

12. GUARANTEE

12.1 *Montreal Construction Centre Inc. v. 9214-2041 Quebec Inc.* (2017 QCCS 852)

March 2, 2017, Montreal, 500-17-077360-132 (S.C.)

Facts:

In 2009, Montreal Construction Centre Inc. (the "**Landlord**") and 9214-2041 Quebec Inc. (the "**Tenant**") entered into a ten (10) year lease for a commercial space located in Longueuil, Quebec (the "**Lease**"), for the operation of an Amir restaurant franchise ("**Amir**").

The Lease contained a corporate guarantee from Amir for all the obligations under the Lease for a period of twenty-four (24) consecutive months, beginning on December 1, 2009, and ending November 30, 2014, as well as a personal guarantee for fifty thousand dollars ($50,000) from Arminee Yaghejian ("**Yaghejian**"), who was the co-shareholder and director of the Tenant at the time.

On March 5, 2010, Yaghejian and her then partner and co-shareholder sold their entire stake in the Tenant to Joseph Eid, the principal director and representative of Amir, and Houssam Masri. Following the sale, Yaghejian sent a registered letter to the Landlord informing it of the sale and of the fact that Joseph Eid, as new owner, was now the personal guarantor and that Yaghejian was therefore released from any liability for the Tenant's obligations. The Landlord did not recall ever having received this letter.

Three (3) years after entering into the Lease, the Landlord and the Tenant, represented by Renée Daou, entered into a Lease Amendment, effectively terminating Amir's corporate guarantee and naming Mrs. Renée Daou as personal guarantor for the Tenant's obligations under the Lease.

The Landlord sought the amount of $88 127,88 plus interest from Yaghejian, Amir, and Renée Daou, pursuant to their guarantees, for the Tenant's breach of the Lease.

Decision:

The Court found that pursuant to article 2662 of the *Civil Code of Quebec* (the "**CCQ**"), the "suretyship attached to the performance of special duties is terminated upon cessation of the duties". Yaghejian contracted her guarantee in connection with her duties as the then shareholder and officer of the Tenant, therefore, her suretyship terminated upon cessation of the performance of her duties on March 5, 2010. There was no need to send any notice or to establish that the Landlord was aware of the cessation of her duties. The action against Yaghejian was therefore dismissed.

With respect to the corporate guarantee of Amir for $50,000, the Landlord argued that the Lease Amendment was null and void because it lacked common law "consideration" at the time of its conclusion. Amir had argued that under Quebec law, the concept of "consideration" is not a requirement, and the Court concurred; no "consideration" was needed, and even if it had been required under Quebec law, the release of Amir by the Landlord in exchange for Renée Daou's personal guarantee would have constituted a sufficient consideration. The Court therefore dismissed the Landlord's claim against Amir as well as its application for a declaration that the Lease Amendment was null and void.

Insofar as the Landlord's claim for damages from the Tenant was concerned, the Court concluded that the Lease entered into by the parties was valid and that the Tenant had breached its obligations thereunder, and ordered the Tenant to pay $32,939.88 to the Landlord, representing amounts owing in rent and taxes.

The Landlord was also seeking damages in the amount of $55,188.00 for breach of contract representing 12 months of unpaid rent, as it claimed was customary in similar situations (breach of a 10-year lease). The Court disagreed, stating that it is not "customary to order payment of 12 months of rent as damages in situations where a 10-year is breached. There is nothing customary in the granting of damages in this case".

Furthermore, the Court reiterated the principle that the plaintiff in a civil action must take steps to mitigate damage, and found that while the Landlord had made efforts to mitigate its damages until the beginning of September 2013 by signing a contract with a brokerage firm on September 4, 2012, it had not demonstrated that it took any other steps to mitigate its damages after that date. Therefore, considering that the brokerage firm contract was in effect for three months after the lease was terminated, the Landlord was entitled to the additional sum of $13,797.11.

The Court therefore dismissed the actions against Yaghejian and Amir, and ordered the Tenant to pay to Montreal Construction the sum of $46,736.88 plus interest at the legal rate from May 23, 2013.

As part of its counterclaim, Amir was seeking a total of $20,000.00 in damages from the Landlord for extra judicial fees and for loss of time, pursuant to Article 51 of the *Code of Civil Procedure*, concerning abuse of procedure. Amir contended that regardless of intent, the filing of a claim to hold it responsible for damages in the face of the clear language of the Lease Amendment was abusive. The Court agreed, stating that "The fact that [the Landlord] is of the view that the Lease Agreement is subject to annulment on the basis of "*lack of consideration – a principle of the common law*" is unsubstantiated and unsupported under Quebec law". The Court therefore ordered the Landlord to pay Amir $5,000.

Finally, even though Yaghejian had not claimed any compensation pursuant to article 51 of the *Code of Civil Procedure*, the Court ordered the Landlord to pay to Yaghejian the amount of $5,000. The Court was of the view that Article 2363 CCQ and the Supreme Court's decision in *Épiciers Unis Métro-Richelieu* v. *Collin [2004] 3 R.C.S. 257, 2004 CSC 59* "ought to have been clear and conclusive enough authority for [the Landlord] not to have pursued its claim against Yaghejian personally in the first place".

13. RENEWAL CLAUSE

13.1 *9266-3798 Quebec Inc. v. Agence de développement de réseaux locaux de services de santé et de services sociaux de la Mauricie et du Centre-du-Québec* (2017 QCCA 118)

January 26, 2017, Quebec, 200-09-009070-159 (C.A.)

Facts:

In 2005, the *Centre de santé et de services sociaux de l'énergie* (the "**Tenant**") signed a lease with a term of ten (10) years (the "**Lease**") with *Société immobilière Lemieux Inc.*,the owner of the building, which was eventually acquired by 9266-3798 Québec inc. (the "**Landlord**").

The Lease contained a renewal clause (the "**Renewal Clause**"), which was at the center of the dispute before the Quebec Court of Appeal (the "**Court**"). The Renewal Clause was as follows:

> [*translation*]
>
> "3.1 Term
>
> The present lease is entered into for a term of ten (10) years (120 months); it comes into force on April 1, 2005 and ends March 31, 2015.
>
> 3.2 Renewal
>
> 1st option: on April 1, 2010, namely 5 years after the signature of this lease, in accordance with contract's tender letter transmitted on February 18, 2004, the establishment undertakes to render the 5-year extension option effective, therefore bringing the termination date of the lease to March 31, 2010.
>
> At the end of the lease and of option 1, the latter will be renewed on a year-to-year basis, unless one of the parties notifies to the other by certified mail a notice of non-renewal in whole or in part at least 1 year (12 months) before the termination date of the lease or of the renewal."

The trial judge dismissed the Landlord's contention that the term of the Lease was 15 years, with an initial term of ten (10) years after which a mandatory five (5) year option was triggered. According to the trial judge, this argument was inconsistent with the existence of article 3.1 of the Lease, which provided for a term of tem (10) years. The trial judge also refuted the Landlord's argument that the option to extend the lease was automatically triggered on the date set out in the Lease, on April 1, 2010, without any other formality.

On appeal, the Landlord was no longer requesting that the Court declare that the term of the Lease was for fifteen (15) years. Rather, the Landlord argued that the Lease was extended

on April 1, 2010 for an additional five (5) year period ending in 2020. According to the Landlord, the trial judge did not take into account the parties' common intention, conduct, or the circumstances that led to the signing of the lease. The Landlord argued that the trial judge ignored Article 1426 of the *Civil Code of Quebec* ("**CCQ**"), which reads as follows:

> "1426. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account".

Decision:

The Court found that the trial judge could not be criticized for not having considered Article 1426 CCQ since the evidence did not reveal or help identify a common intention of the parties regarding the scope of the Renewal Clause. In fact, the Landlord believed that the renewal option would be triggered automatically on April 1, 2010, while it had always been clear to both parties that the authorization of the *Agence de développement de réseaux locaux de services de santé et de services sociaux de la Mauricie et du Centre-du-Québec* (the "**Agency**") was required in order to exercise the renewal option. In the absence of a common intention as to the meaning of the Renewal Clause, the trial judge was justified in seeking the interpretation that best reconciled with the rest of the contract and the circumstances surrounding its conclusion.

In this case, the Lease was an administrative contract signed by a public authority as part of its public service mission. Given the sanction of absolute nullity expressly provided for in Article 264 of the *Act respecting Health Services and Social Services* (the "**Act**") in the case of a contract entered into by an institution without the authorization of the Agency, the trial judge was well founded in giving the Renewal Clause an interpretation that was in accordance with the Act and which ensured its validity.

The trial judge also concluded that, even if the Tenant had not respected the April 1, 2010 deadline to request authorization from the Agency to extend the lease, its tardiness was justified in that at that time, litigation was active between the parties in connection with a disagreement over rent. The litigation was settled by the judgment of the Court on May, 26, 2011.

This was a question of fact or, at best, a mixed question of law and fact, and the Landlord failed to show an manifest and decisive error that alone would have justified the intervention of the Court.

As for the second judgment in appeal, which refused to hold a second hearing on damages, the Landlord raised no argument justifying the intervention of the Court. In light of the foregoing, the Court held that this dispute was not founded.

14. DAMAGES AND EXPULSION

14.1 *Développement Meloche Street Inc. v. Axion Réaction Inc.* (2017 QCCS 477)

February 1, 2017, Montreal, 500-17-095238-161 (S.C.)

Facts:

Développement Meloche Street Inc. (the "**Landlord**") was the owner of a building located at 505-525 avenue Meloche in Montreal (the "**Building**").

On February 9, 2011, a lease agreement (the "**Lease Agreement**") was entered into between the Landlord and Axion Réaction Inc. (the "**Tenant**") for a commercial space located in the Building (the "**Premises**"), for a period of five years, commencing on February 1st, 2011 and terminating on January 31, 2016 (the "**Term**").

On November 20, 2012, the parties signed a lease amendment agreement for the modification of the provision relating to the parking area used by the Tenant (the "**First Lease Amendment**").

On October 29 and 30, 2015, the Landlord and Tenant signed a lease amendment and extension agreement (the "**Second Lease Amendment**", collectively with the Lease Agreement and the First Lease Amendment, the "**Lease**"), extending the Term for an additional period of five (5) years, ending on January 31, 2021 and providing for the leasing of an additional space located at 515 Meloche Avenue (the "**Additional Space**") for a period of three (3) months, commencing November 1st, 2015 and terminating January 31, 2016.

On August 16, 2016, after having put the Tenant on formal notice, the Landlord instituted proceedings for the payment of the rent for the months of May to August 2016. The proceedings were modified on September 8, 2016 to provide for the eviction of the Tenant and to update the amount of the suit.

On September 16, 2016, the Superior Court of Québec (the "**Court**") rendered a judgment on a draft consent submitted by the parties. The Court took note of the Tenant's undertaking to pay the Landlord the rent accruing per month as of October 1, 2016, within five days of judgment. The Tenant also agreed to leave the Additional Space no later than September 30, 2016.

The day prior to the hearing, the Tenant informed the Landlord that it no longer intended to contest the termination of the Lease but it needed two (2) months to leave the Premises during which the rent would be paid.

Decision:

The following issues were in dispute:

- Was the Landlord entitled to claim the cost for repairs to the loading and unloading dock?
- Was the Landlord entitled to claim its judicial and extrajudicial fees, including its legal fees?
- Was the Landlord entitled to claim six (6) months of accelerated rent?
- When did the Tenant have to leave the Premises?

1. Cost for repairs to the loading and unloading dock

According to the Landlord, the repairs to the dock was an operating expense under the terms of the Lease.

The Tenant argued that said work should be considered to be structural work. Therefore, the amount charged to the Tenant should have been amortized in accordance with generally accepted accounting principles, as per the Lease.

According to the Court, the Landlord had the burden of proof to demonstrate the nature of the work. In the absence of proof to that effect, the Court retained the most advantageous clause for the Tenant and concluded that it was structural work.

2. Judicial and extrajudicial fees

The Tenant alleged that the claim for judicial and extrajudicial fees were exaggerated and abusive and that the Landlord did not act in good faith during the discussions to settle the matter. For its proof, the Court allowed the Tenant to use documents relating to the discussions for the settlement of the case. The Court determined that the Landlord had not acted in bad faith and awarded partially its claim for judicial and extrajudicial fees. The failure to reach a settlement was due to the Tenant's refusal to furnish personal guarantees and to agree on the contentious issues.

3. Accelerated rent

The Tenant did not comply with the provisions of the Lease relating to the payment of rent. Therefore, the Landlord was entitled to terminate the Lease and to claim the liquidated damages provided for in the Lease in case of its termination.

4. The delay to leave the Premises

The Landlord wanted the Tenant to leave the Premises within forty-eight (48) hours from the service of the judgment whereas the Tenant wanted a period of two (2) months. The Court noted that the Tenant had been negligent in failing to take the necessary steps to relocate. However, in the absence of proof of urgency, the Court granted the Tenant a period of one (1) month to leave the Premises.

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