2022 ICSC + CANADIAN LAW CONFERENCE

QUEBEC LEGAL UPDATE

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1. DAMAGES FOR BREACH OF CONTRACT

1.1 *Centre Sportif St-Eustache Inc.* v. *9004-2243 Québec Inc.,* 2020 QCCA 317

February 18, 2020, Montréal 500-09-027571-181 (QCCA)

Facts:

Centre Sportif St-Eustache Inc. (the "**Landlord**") entered into a commercial lease with 9004-2243 Québec inc. (the "**Tenant**"), for the purpose of a family restaurant, for a 5 year period starting on May 11, 1994. In 1998, Groupe Mathers (the "**Shareholder**") acquired control of the shares of the Landlord. The directing mind (*âme dirigeante*) of the Shareholder is the intervener (mis en cause) to the proceedings (the late Mr. Jean-Guy Mathers). With this began a war between the parties. The Landlord refused to renew the lease with the Tenant, as the Landlord wanted to use the space for its own restaurant, and began an intimidation campaign against the Tenant in the hopes of forcing the Tenant to relinquish the leased premises. The events culminated with a criminal fire that seriously damaged the Tenant's restaurant and forced its temporary closure. Despite this, the Tenant obtained a judgment from the court allowing the lease to be renewed for another 5-year period. The Landlord continued its intimidation tactics and the Tenant ended up relinquishing the leased premises, as the Tenant and its shareholders found themselves financially exhausted from the actions of the Landlord. This allowed the daughter of Mr. Mathers to open a restaurant in the leased premises.

In the Superior Court judgment, Mr. Justice Mongeon concluded that there was *in solidum* responsibility of the defendants. He concluded that the defendants breached their contractual obligations to procure the peaceable enjoyment of the leased premises and also contributed to the threats and intimidation tactics against the Tenant. Finally, the Superior Court held that even though the intervener was not personally a shareholder of the Landlord, he was the directing mind and will of the Landlord and was liable and could not be protected by the principle of the corporate veil.

The Landlord appealed the decision.

Decision:

The Quebec Court of Appeal (the "**Court**") found that the fire was a criminal fire that was started by the Landlord and the mis en cause. Evidence by presumption established this, since the Landlord and the intervener were trying by any means possible to regain control of the leased premises.

The Court found that the Superior Court judge did not err in the allocation of damages. There was no double compensation because the amount received from the insurer was far less than the value of the damaged goods. The Court determined that it should not intervene in this portion of the Superior Court decision.

The Court also found that the damages for disturbance and inconvenience were valid, even though they were attributed to a moral person, because they included damages for loss of peaceful enjoyment. These damages did not compensate for a moral prejudice but rather for the impact that the actions of the Landlord had on the activities of the Tenant.

The Court held that the Superior Court had not erred in its decision to order payment for extra-judicial fees. The history of the procedures demonstrated a tendency for the Landlord to start proceedings in order to abandon them later. The Tenant had to engage in multiple proceedings following the Landlord's disregard for the orders issued against it.

Finally, the Court determined that the Superior Court had not erred in attributing punitive damages. There was no need to reduce the amount of the damages because of Mr. Mathers' death. Even though the Supreme Court of Canada and the Quebec Court of Appeal have held that there is no solidarity between the co-authors of a prejudice when it comes to punitive damages, the Landlord was not challenging the *in solidum* nature of the order for punitive damages. Since this was not a means of appeal used by the Landlord, there was no need to analyze this question further, except to say that Mr. Justice Mongeon's conclusion relied on the contextual fact that the Landlord and the intervener's attitudes were one united front. Furthermore, the Superior Court did take into account Mr. Mathers' death, but also noted that the Shareholder continued to exist under the direction of the intervener's daughter. As such, the possibility of recurrence of such actions remained open.

The Court granted the appeal solely insofar as the calculation of interest and the additional indemnity payable by the Landlord and the intervener were concerned, and dismissed the other elements of the appeal.

2. SURETYSHIP

2.1 *Brisebois* v. *9093-1767 Québec Inc.*, 2021 QCCA 1044

June 18, 2021 Montreal 500-09-028855-203 (QCCA)

Facts:

On May 28, 2015, GIPIR Inc. (the "**Tenant**") then represented by the appellant Denis Brisebois ("**Brisebois**"), entered into a commercial lease (the "**Lease**") with 9090-1767 Québec Inc. (the "**Landlord**") for a term of 5 years. The Tenant's total minimum rent for the term was $600,000.00, payable by way of equal consecutive monthly instalments of $10,000.00 each. As well, the Tenant was required to pay, as additional rent, the property taxes and surtaxes, insurance fees as well as maintenance costs. Brisebois intervened into the Lease, to agree to act as surety for the Tenant's obligations, including the rent and all additional charges for which the Tenant was responsible and to fulfil all of the Tenant's obligations under the Lease. The suretyship clause contained a handwritten addition, signed by both the Landlord and Brisebois, stating "Surety limited to the equivalent of six months' rent" (our translation).

In first instance, Mr. Justice Denis Le Reste of the Quebec Court determined that the limitation signed by the parties did not exclude the balance of the suretyship clause but only limited Brisebois' liability as regards the rent for a period up to an equivalent of 6 months. The limitation did not change the rest of the clause. Moreover, the incomplete payment made by the Tenant did not release the surety of his debt. Finally, the transfer by Brisebois of his undivided portion of his residence to his wife was not seen as enforceable against the Landlord since the transfer was not made in exchange for its true value and Brisebois' wife knew that Brisebois was insolvent.

Only the questions regarding the suretyship were raised on appeal.

Decision:

The Quebec Court of Appeal (the "**Court**") found that the Quebec Court judge did not err in the question of the solidarity of the surety. Whether the surety is in solidarity or the surety is a solidary co-debtor, the principles of solidary debt apply as long as they are compatible with the principle of surety in solidarity. In this case, article 1523 of the Civil Code of Quebec ("**C.C.Q.**"), which states as follows: "*An obligation is solidary between the debtors where they are obligated to the creditor for the same thing in such a way that each of them may be compelled separately to perform the whole obligation and where performance by a single debtor releases the others towards the creditor*" and article 1528 C.C.Q., which states as follows: "*The creditor of a solidary obligation may apply for payment to any one of the co-debtors at his option, without such debtor having a right to plead the benefit of division.*", allow the creditor of a solidary obligation to turn to the debtor of his choice to claim the entirety of the obligation.

The Court also found that Mr.Justice Le Reste did not err as regards the payment. The Court confirmed the principles according to which, as long as the entirety of the debt has not been paid, the surety remains liable up to the amount for which it has obligated itself.

Concerning the extent of the suretyship, the Court applied the principles found in *Uniprix inc.* v. *Gestion Gosselin et Bérubé Inc.*, 2017 SCC 43 (i.e. both the interpretation and characterization of the contract are questions of mixed fact and law), and Housen v. Nikolaisen, 2002 SCC 33 (i.e. because the trial judge's interpretation and characterization of the contract are based on a particular set of circumstances that are unlikely to have any precedential value, they may not be overturned absent a palpable and overriding error).

The Court found that the suretyship clause was not invalidated by the parties but only modified. The modification was only limited to the amount of monthly rent for which the surety was liable. However, the surety remained liable for the entirety of the other obligations. Indeed, the written modification did not mention specifically the other obligations whereas the original clause did. An ambiguous clause is interpreted in light of the other stipulations made in a contract and the analysis in this case led the Court to conclude that the modification only applied to the rent portion of the obligation.

Accordingly, the Court dismissed the appeal.

3. OPTION TO RENEW

3.1 *Investissements SAQPRO Inc.* v. *Restaurants McDonald du Canada Limitée*, 2021 QCCA 1478

October 1, 2021 Montréal 500-09-028849-206 (QCCA)

Facts:

In July 2002, A.L Raymond Limitée ("**Raymond**") leased a plot of land to Les Restaurants McDonald du Canada Limitée ("**McDonald**") for the purpose of the construction and operation of a McDonald restaurant for a duration of 20 years. The lease contained, in Section 15.01 thereof, a 10 year renewal clause as well as a sentence therein that stated "In the event that the Centre is redeveloped as part of a larger project and there are no plans to have fast food restaurants on the site of the project, the renewal option would become void." In November 2005, Investissements SAQPRO Inc. ("**SAQPRO**") acquired from Raymond the immovable leased to McDonald. In January 2016, McDonald asked SAQPRO to remove the cancellation of renewal clause. McDonald stated that if SAQPRO were to exercise that right, McDonald would suffer significant losses in light of the costly investments it intended to make to the leasehold improvements. SAQPRO refused to remove the clause. In response, 7 years before the end of the lease, McDonald gave notice to SAQPRO that it intended to renew the lease. SAQPRO maintained its right to cancel the renewal if it would choose to redevelop the Center, and instituted proceedings before the Superior Court to obtain a declaratory judgment in its favour. Mr Justice Stéphane Lacoste of the Superior Court held that McDonald had the right to exercise the renewal option from the time the lease came into effect until 12 months before it expired, and that once McDonald exercised the option to renew, SAQPRO could not terminate the lease. The Superior Court also concluded that in order to counter the renewal option, the Landlord would have had to have not only contemplated redevelopment, but would have also had to have initiated its project and taken serious steps to do so. SAQPRO appealed the Superior Court decision.

Decision:

The Quebec Court of Appeal (the "**Court**") found that Mr. Justice Lacoste's decision did not take into account the fact that his conclusions also created a situation where, if McDonald decided to renew the day the lease began, then it could effectively block SAQPRO from exercising its option for the redevelopment plan, even though this was dutifully negotiated between the parties. The Court held that the contract was unclear and ambiguous as to the respective timelines during which each party could exercise its option. The Court further noted that SAQPRO was asking the Court to complete the contract with terms that it considers fair and just but did not supply the Court with any evidence as to the intention of the parties at the time the lease was concluded. As such, the Court, while it recognized the errors committed by the Superior Court in rendering its judgment, was forced to dismiss the appeal.

3.2 *Entreprises L. et C. Arsenault Inc*. v. *Entreprises Tri-Fruits Inc. (Restaurant Le Stonehouse)*, 2021 QCCS 2269

May 26, 2021, Quebec 200-17-031113-202 (C.S.)

Facts:

Les Entreprises L. et C. Arsenault Inc. (the "**Landlord**") sought to evict its tenant, Les Entreprises Tri-Fruits Inc. (the "**Tenant**"), which was allegedly occupying a commercial premises without right, since the Landlord claimed that the lease (the "**Lease**") was not renewed within the applicable time limit.

The renewal clause in the Lease read as follows: "*The option to renew is conditional upon the Lessee giving written notice to the Lessor within two (2) months immediately preceding the expiration of the Initial Term*." (our translation)

In its lease renewal notice submitted to the Landlord on June 4, 2020, the Tenant noted that the COVID-19 epidemic had suspended the deadlines for establishing the date of transmission. The Landlord responded that the Lease was not renewed within the allotted period, and informed the Tenant that it would expire on July 10 of that same year.

The Tenant argued that the lease had been renewed until July 10, 2025, since the notice of renewal had been sent within the time limits stipulated in the Lease. This case essentially raisesd the issue of the interpretation of a renewal clause in the Lease.

Decision:

In this case, Mr. Justice Jacques Blanchard of the Superior Court of Quebec (the "**Court**") observed that the terms of the Lease, particularly those pertaining to its renewal, were explicit and unambiguous. Under these terms, the Tenant was allowed to exercise its option by giving notice within the two months prior to the initial term expiration date. At the time of the 2020 renewal, the Court noted that the words of the Tenant's lawyer were unequivocal when he sent the renewal notice. The Tenant's' counsel knew that the notice was late and provided an explanation for the lateness of the transmission.

The actions taken by the parties at the lease renewals in 2010 and 2015 were significant because they were of a nature to manifest the common intention of the parties, in that they demonstrated and embodied the parties' understanding of their contract. The Court stated that it had no doubt that the parties understood and made sure the renewal notification was delivered within two to three months of the expiration date of the Lease and not outside of that window. The Court determined that this behavior demonstrated the parties' comprehension of their lease and was consistent, unequivocal, and repeated. Therefore, the Tenant had to give notice of its intention to renew the Lease no later than two months before its expiry, which in this case was May 10.

The Tenant had the option of renewing the lease or not, but even though it had run out of time to do so in June 2020, it nonetheless issued the notification to the Landlord with a justification

for the delay. In light of the foregoing, the Court ruled that the Tenant had sent its 2020 renewal notification after the deadline. As a result, on July 10, 2020, the parties' Lease officially expired.

4. NON-COMPETE COVENANTS

4.1 Provigo Distribution Inc. v. Complexe commercial de l'Île Inc., 2020 QCCA 970

July 23, 2020, Montréal 500-09-028014-181

Facts:

In the early 1980s Provigo Distribution Inc. (**"Provigo**") began the exploitation of a supermarket in a mall owned by Ivanhoe Cambridge ("**Ivanhoe**"). The commercial lease (the "**Lease**") between the parties contained an exclusivity clause pursuant to which the Landlord was forbidden to lease a space for another food market, without the consent of Provigo.

In 1993, Provigo purchased some vacant lots in front of the mall and granted a purchase option and a right of first refusal to Ivanhoe.

In 2002, Ivanhoe sold the mall to 9109-6552 Québec Inc. ("**El-Ad**").

In 2004, Provigo attempted to sell one of its vacant lots but was faced with El-Ad's opposition, who invoked the right of first refusal. The litigation between Provigo and El-Ad concluded with the signature of several contracts. In 2016, Complexe Commercial de l'île Inc. (the "**Respondent**") acquired the mall and agreed to respect the agreement El-Ad had entered into, which included the exclusivity clauses. A year later the Respondent informed Provigo that the exclusivity clauses were not valid and that the Respondent would not comply with them.

In first instance, Mr. Justice David Collier of the Quebec Superior Court concluded that the restrictive non-competition clause was against public order because it did not contain a term. The judge found that the wording of the clause entailed its execution by the sole will of its beneficiary, which gave it a perpetual character equivalent to an absence of term. Consequently, he declared it null and void.

Provigo appealed, claiming that Superior Court had erred in imposing a burden of proof that did not fall upon Provigo, by concluding that the restrictive non-competition clause had no term and failing to take into account the circumstances in which it had been negotiated.

Decision:

The Quebec Court of Appeal (the "**Court**") stated that in commercial leases a restrictive non-competition clause was legal unless it is shown, by a balance of probabilities, that it is unreasonable in its scope. The Court found that although the Superior Court did not err in its determination of the burden of proof when examining the clause in question, Mr. Justice Collier erred in concluding that a restrictive clause which has an indeterminable term is equivalent to a lack of term. The clause provided that it would apply as long as Provigo operated a food market, which is a temporal limit in itself. This was a business decision and each party was in a position

to know, based on objective facts, when this clause would expire. This is still the case today. As such, the term is determinable. The fact that the arrival of the term depends on one party's will, does not make the clause invalid or against public order. This is in line with the judgment of the Supreme Court of Canada in the case of *Uniprix* Inc. v. Gestion Gosselin et Bérubé Inc., 2017 SCC 43.

The Court also found that the Superior Court erred in not taking the factual commercial context into consideration. The circumstances around which the agreement was entered between the parties, shows that it was concluded between experts in their field who do not hesitate to become partners in business when their commercial goals aligned. When the parties entered the agreement, they were represented by professionals of their choosing and had the opportunity to discuss and negotiate all the details of their agreement. There was no automatism in the way this deal was concluded. Moreover, the Respondent knew of the agreement entered between Provigo and the previous owner of the mall when the property was acquired by the Respondent, and thus was then able to negotiate the purchase price and the conditions of the sale.

The Court held that the reasonability of a restrictive non-competition clause had to be measured in light of the legitimate interests of the parties who benefit from it. Here, the duration of the clause was directly linked to the commercial interest of Provigo. The parties planned that this clause would survive in the case of a sale of the mall. This was a legitimate interest that Provigo wanted to protect. As such, the Court found that the clause was reasonable and respected public order.

The Court allowed the appeal.

4.2 *Société immobilière Duguay Inc.* v. *547264 Ontario Limited*, 2020 QCCA 571

April 14, 2020, Québec 200-09-009787-182 (QCCA)

Facts:

The respondents (547264 Ontario Limited and four other corporations) were the owners (the "**Landlord**") of a mall known as Les Galeries du Cap (the "**Centre**") and they lease the premises contained therein to various stores and businesses. Through the years, the Landlord sold various lots in the vicinity of the Centre, including two parcels of land (the "**Land**") which were sold to Clause Croteau et Filles Inc. ("**Croteau**") in 1998 and 2000. In the deeds of sale between the Landlord and Croteau, the parties included a restrictive use servitude in which they agreed that the Land could not be used for the purposes of a business which would compete with various uses being carried on in the Centre (e.g. food store, pharmacy, sporting goods, gas station, cinema and restaurant), and that the Centre could not be used for the purposes of a family clothing store of greater than 8,000 square feet (i.e. a use which would compete with Croteau). Croteau proceeded to construct a building on the Land and carried on its business therein.

In 2011, Croteau decided to sell the Land to Société immobilière Duguay Inc. ("**Duguay**") (a property management company), who agreed to buy the Land for the price of $3,750,000.00, conditional on entering into a lease with a future tenant. Duguay eventually found a potential

tenant who would carry on a business similar to that of Croteau, but for a rent that was lower than the rate that Duguay had hoped to obtain. As a result, the sale between Croteau and Duguay was for $3,000,000.00, and the deed of sale stated that it was "Subject to… all active or passive, apparent or hidden servitudes that may affect it) (i.e. the Land), and referenced the 1998 and 2000 deeds of sale.

In 2015, Duguay instituted proceedings before the Superior Court of Quebec, asking that the restrictive use clauses of 1998 and 2000 deeds of sale be declared unenforceable against them on the premise that they are not servitudes but rather personal obligations.

Mr. Justice Guy de Blois of the Superior Court concluded that advantage conferred upon the Centre was economic in nature and meant to insure a "commercial mix" in the area.

The Superior Court determined that these rights related to the benefit of the dominant land (i.e. the Centre) and not to the personal benefit of any specific business. The restriction on the use of the servient land (i.e. the Land) would be of such a nature as to be capable of benefiting all subsequent owners of the dominant lands (the Centre) in that it would confer stability and permanence on the dominant lands (the Centre) in light of the restrictions on the use of the servient lands (the Land).

Duguay appealed the Superior Court decision.

Decision:

The Court of Appeal of Quebec (the "**Court**") stated that, as per article 1119 of the Civil Code of Quebec ("**C.C.Q.**"), a servitude is a real right which follows the immovable to which it is attached, regardless of the owner of said immovable. In contrast, a non-competition clause is a personal obligation between the contracting parties. In the past, Quebec courts have recognized the validity of non-competition servitudes, but this was seriously put into question by doctrine, specifically following the 1976 *Zigayer* v. *Ruby Foo's* decision. Since then, Quebec courts have been cautious about recognizing the validity of non-competition easements, concluding rather that these types of agreements create a personal obligation.

For a non-competition restriction to be considered a servitude, it must relate to the immovable used as part of the physical development of the premises, such as, for example, a restriction on the height of buildings erected there, a prohibition on the construction of certain types of buildings or the development of the premises as a park or parking lot. Thus, a simple restriction of use prohibiting certain commercial activities cannot be constituted as a servitude, since it does not relate to the building itself or to the physical development of the premises.

The Court analyzed whether the restrictions on commercial use at issue here were intrinsically linked to the situation of the dominant and servient lands so as to qualify them as real rights and servitudes within the meaning of the C.C.Q., as the Landlord maintained, or were they rather personal obligations in the nature of non-competition stipulations, as Duguay maintained. The Court concluded that the restrictions claimed by the Landlord to constitute real rights did not

guarantee "the" commercial diversity of the shopping center, but rather "a" commercial diversity based on a balance that the Landlord wished to establish in order to achieve their commercial vision, and this, according to the businesses that were at the time operating within the Center and the adjacent land owned by the Landlord, the whole established according to the commercial activities that were at the time being carried out within other shopping centers in Trois-Rivières. As such, the clauses could not be said to constitute a real right but rather a personal obligation.

However, the Court needed to assess whether Duguay had personally agreed to assume the personal non-competition obligations. The notarial deed of 2012 did not contain any stipulation by which the purchaser undertook in a personal capacity to respect restrictions of use with respect to the property acquired. According to the Court's decision in *Provigo Distribution Inc.* v. *9173-1588 Québec Inc.*, *2012 QCCA 241*, the mere statement in a deed of sale of the existence of published servitudes is insufficient in itself to conclude that the purchaser will assume them as personal obligations. Similarly, the Court has confirmed on numerous occasions that, in the absence of a clear and unequivocal indication to the contrary, the mere mention of a servitude in a deed of sale or in a certificate of location does not amount to an acknowledgement of the validity of the servitude, allowing, among other things, the conclusion that extinctive prescription has been waived. Applying the foregoing, the Court determined that the statement of non-use servitudes in the description of the property in the 2012 notarized deed of sale was insufficient to conclude that Duguay clearly and unequivocally undertook to assume these non-use stipulations as personal obligations. Moreover, the circumstances surrounding the conclusion of the deed of sale confirmed this conclusion. The representative of Duguay, in his testimony, said that he had never meant to take on, on behalf of the company, the non-competition clauses. Moreover, although the witnesses to the discussions confirmed that the non-use stipulations did play a role in the renegotiation of the sale price, it cannot reasonably be inferred from this fact that Duguay thereby undertook to personally assume the obligations set out in these stipulations. At most, it can be concluded that this was a clever negotiating tactic to reduce the sale price, but nothing more.

In the absence of a clear and unequivocal undertaking to that effect in the 2012 deed of sale or in a document ancillary to that deed, the Court determined that it cannot be concluded from the evidence in the record that Duguay undertook personally to assume the non-use stipulations. Finally, the Court noted that while a validly constituted real right is binding on third parties with its essential components as soon as it is published (with some exceptions), the elements constituting a personal obligation are not binding on a third party who does not clearly express the intention to bind himself personally.

The Court allowed the appeal.

5. CECRA

5.1 *YMS Properties Inc.* v. *9347-9285 Québec Inc.*, 2022 QCCS 115

January 11, 2022, Montreal 500-17-114804-209 (C.S.)

Facts:

A semi-basement commercial space was leased by YMS Properties Inc. (the "**Landlord**") to 9347-9285 Québec Inc. (the "**Tenant**") on October 20, 2016, with the lease (the "**Lease**") term beginning on November 1 and ending on October 31, 2031.

On April 1, 2020, the Tenant stopped paying its rent. On October 30, 2020, it received a demand letter demanding the unpaid rent and threatening eviction. According to the Lease, the Tenant's failure to pay the rent constitutes an "Event of Default". The Lease further stipulated that if there is a breach, there will be liquidated damages of two years' worth of rental. On December 9, 2020, the Landlord sued the Tenant, requesting the resiliation of the Lease and seeking an amount of $105,423.01 after deducting a deposit in the amount of $36,000.

The Tenant claimed that the Landlord refused to lessen its damages by neglecting to apply for the Canada Emergency Commercial Rent Assistance (CECRA) program. This program was established by the federal government to aid small businesses affected by Covid-19. Furthermore, on March 10, 2020, a new tenant who ran a restaurant in the same building blocked access to the restrooms from inside the building, denying the Tenant use of the leased premises. The Tenant asserted that it was entitled to rent reductions of 75% for the months of April through August 2020 and 50% for the months of September through December 2020, respectively, because of the Landlord's failure to participate in the CECRA program and its default to provide peaceful enjoyment of the leased premises in failing to provide the use of toilets.

The Tenant, who is also a cross-plaintiff, initially claimed it was entitled to $186,000 from the Landlord: $150,000 representing indemnity for total loss of their business; and $36,000 representing the refund of its security deposit. The Tenant withdrew its claim of $150,000 for lost business on the first day of the hearing.

Decision:

Mr.Justice Louis Lacoursière of the Superior Court of Quebec (the "**Court**") determined that the Landlord did not breach its obligation to mitigate its damages by refusing to participate in the CECRA program for small businesses; participation in this program was voluntary and the application for rent reduction on this ground was rejected. However, a reduction of rent by 20% was granted due to the decline in the peaceful enjoyment of the leased premises after the loss of use of the bathroom facilities. The Court also limited the amount of rent owed to the Landlord by estimating that it was fair and reasonable to expect that the leased premises would be rented on May 1, 2022. The Court's analysis revolved around the following two questions:

Should the amount of rent owed by the Tenant be decreased because of the lack of access to bathroom facilities and because of the failure of the Landlord to mitigate its damages by neglecting to apply for the CECRA program?

The Court determined that due to the absence of access to restroom facilities, the Tenant was entitled to a reduction in the amount of rent owed to the Landlord. While the *Regulation Respecting Occupational Health and Safety of Quebec*, the *National Building Code of Canada* and the *Règlement sur la Construction et la Transformation de Bâtiments* of the City of Montréal did not apply in the current case, the sources of the Tenant's argument that it was entitled to a

reduction of rent are the Civil Code of Quebec and the Lease. Indeed, the Lease provided, at article 1.1, that the "tenant hereby undertakes to use and occupy the premises for the purpose to operate and oriental supermarket". In the Court's view, providing access to sanitary installations in the context of the Lease corresponded to meeting the obligation to deliver the accessories necessary for the operation or use for which the leased premises was intended.

The Landlord indicated that the ground-floor restroom was accessible when the Tenant toured the property before signing the lease. Even though the bathrooms are on the ground floor, they can be regarded as common areas of the property because they were used by both the Tenant and the upstairs tenant, and neither lease contained a restriction on their usage.

The Court determined that a decrease in the peaceful enjoyment of the leased premises, which can justify a reduction in rent, was evidently shown by the loss of use of such facilities at least one day each week, as well as in May 2020 when the restaurant closed for two weeks and in September 2020 when it closed for 14 days. Accordingly, the Court held that it was appropriate to reduce the rent by 20%, so that the arrears of rent for the period of April to December 2020 were reduced to $31,836.31 from $39,795.39.

By choosing not to apply for the CECRA programme, the Landlord did not, in the opinion of the Court, fail to attempt to lessen its damages. As part of that initiative, the Canadian government agreed to finance 50% of the rent, with the other 25% to be split equally between the lessor and lessee. The CECRA initiative was optional. The Landlord was under no obligation to take part. The Landlord stated in testimony that it was unwilling to take part in the program because of the high fixed costs associated with its mortgage, property taxes, school taxes, and insurance.

Does the Tenant owe rent for a period of 24 months as per section 24.3 of the lease from October 30, 2020, the date of the demand letter?

The Lease provided that the Tenant must pay two years' rent as liquidated damages to the Landlord in the event of default, since this was the estimated time for the Landlord to find a new tenant. The Court believed that limiting the amount of rent owed to the Landlord under article 24.3 of the lease was appropriate. The Court found it was fair and reasonable to expect that the premises would be rented on May 1, 2022, even if it was impossible to predict whether or when it would be rented again, and thus awarded the Landlord 6 months' rent from November 2021 to April 2022 inclusively, being $19,212.48. Additionally, the Tenant's obligations must be reduced by $36,000 paid in lieu of a deposit and by $6,500, which represented the value of the equipment remaining at the leased premises as of December 1, 2020. The sum due after the deduction of $42,500 was therefore $38,757.59.

5.2 *9098-5722 Québec Inc. v. 9302-6573 Québec Inc. (Bar Lucky 7), 2022 QCCQ 1473*

March 9, 2022 Montreal 500-22-262206-207 (C.Q.)

Facts :

By way of a lease signed March 22, 2012 (the "**Lease**"), 9098-5722 Québec Inc. (the "**Landlord**") leased premises at 3207 Jarry Street, Montreal, to 9258-8227 Quebec Inc. ("**9258**") for the operation of a bar. By way of assignment agreement entered into on January 15, 2015, 9258 assigned its rights under the Lease to 9302-6573 Québec Inc. (the "**Tenant**") and Mr. Sikder (the "**Guarantor**") intervened therein to guarantee all of the obligations of the Tenant. In March 2020, the Tenant was obliged to temporarily close its bar due to the Covid-19 pandemic. Unable to pay rent, the Tenant tried to convince the Landlord to register for the *Canada Emergency Commercial Rent Assistance* program ("**CECRA**"), a program whereby if the participating landlord would agree to reduce the rent by 25%, the government would cover 50% of the rent the Tenant would cover the remaining 25%. On June 1, 2020, the Tenant sent 3 cheques for the April, May and June 2020 rent payments, which represented 25% of the agreed-upon rent and was the portion the Tenant would remain liable for based on its understanding of CECRA. In June 2020, the cheques were returned to the Tenant by the Landlord, who refused to participate in the CECRA program and sent the Tenant and the Guarantor a demand letter to pay the rent in full.

The Landlord claimed $29,451.08 in rent for the period between April 2020 and July 2021, in addition to $10,665.04 in legal fees. The Tenant asked the Court of Quebec (the "**Court**") to reduce the Landlord's claim by $11,294.17, since in the Tenant's view, the Landlord did not respect its obligation to minimize its damages by refusing to register for CECRA. The Landlord also requested that the Guarantor be jointly and severally ordered to pay the rent owed as a result of the guarantee provided for in the assignment of Lease. The Guarantor argued that the surety given for the original lease was not valid for its renewal, basing himself on article 1881 of the Civil Code of Quebec ("**C.C.Q.**") which states as follows: "*Security given by a third person to secure the performance of the obligations of the lessee does not extend to a renewed lease*."

Decision:

Mr. Justice Shamie of the Quebec Court (the "**Court**") granted the Landlord's request.

First, the Court explained that the obligation to minimize one's damages provided for in article 1479 C.C.Q. stems from the duty to act in good faith in the exercise of one's rights (articles 6, 7 and 1375 C.C.Q.). In this case, the Landlord was asked to accept a loss of 25% of its income for a certain period of time while its obligation to pay back its loans and other debts related to its immovable property was maintained. The Court determined that there was no reason to conclude that the refusal to make a gift to the other party in the context of a commercial relationship, and this for strictly economic reasons, constituted bad faith. Nothing suggested that the Landlord's choice was motivated by an intention of causing harm. It was not abusive to refuse to enroll in a voluntary program in order to avoid a financial loss. Furthermore, the Tenant had not acquired the right to pay only 25% of the rent and was still obligated to pay the full amount of the rent provided for in the Lease. The Landlord's claim was therefore well founded. As for the termination of the lease, the Court found that the failure to pay almost $29,500 constituted a material breach that caused serious prejudice to the Landlord, given the importance of the loss of earnings. The claim in this regard was therefore well founded.

Second, in civil matters, the principle is that the parties must assume their own legal fees. However, in accordance with article 1617 C.C.Q., parties may provide for the obligation of one party to pay the legal fees of the other by virtue of a penalty clause. That being said, the Lease did not contain any penalty clause to this effect; the clause the Landlord based itself on was too imprecise and did not provide for a means of calculation. As such, the Court rejected this claim.

Finally, as to the Guarantor`s argument that his guarantee was not applicable to the renewal of the Lease, the Court explained that there's a distinction to be made between a lease that is renewed pursuant to a renewal option provided for therein and one that is renewed by express agreement between the parties. In the first case, the guarantor knows that the tenant can exercise the renewal option and therefore that the term of the suretyship can be extended. In the second case, the guarantor is usually not a party to the renewal discussions and therefore does not have to assume the consequences of such. Therefore, the Court found that the Tenant and the Guarantor must solidarily pay $29,451.08 to the Landlord, ordered the termination of the Lease and ordered the Tenant's eviction from the premises.

6. UNJUSTIFIED TERMINATION

6.1 *Vassiliou* v. *Charette*, 2021 QCCS 5070 (CanLII)

December 7, 2021, Terrebonne 700-17-014196-173

Facts:

Vassiliou (the "**Landlord**") and Charette (the "**Tenant**") signed a commercial lease (the "**Lease**") for the operation of a restaurant. The Tenant announced that he was leaving the premises before the end of the term of the Lease because of his dissatisfaction with the Landlord and the condition of the leased premises. Among other things, the Tenant claimed reimbursement for work and expenses incurred, as well as damages for loss of profits. The Landlord claimed unpaid rent and moral damages for disturbances and inconveniences.

Decision:

Mr.Justice Christian Brossard of the Superior Court of Quebec (the "**Court**") partially granted the Landlord`s claim for recovery of rent, compensation for the restoration of the leased premises and moral damages. The Tenant`s numerous claims were rejected and the claim for a declaration of abuse of counterclaim and for non-pecuniary damages was rejected. The Court's analysis revolved around the following three questions:

Was the Tenant allowed to resiliate the Lease for breach of the Landlord's contractual obligations? Or was the Tenant in breach for vacating the premises and failing to pay the rent?

The Tenant blamed the Landlord for the state of the premises. However, the Lease provided that the Tenant accepted the premises, including the equipment and fixtures, in the condition in which they were found, and that the Tenant would be responsible for maintenance and repairs. Most of the repairs that the Tenant claimed dated back to before the Lease was even signed and the money the Tenant claimed from the Landlord in the Tenant's letter to the Landlord were exaggerated. None of the Tenant's complaints justified the resiliation of the Lease

for a serious prejudice. As such, the Court found that the Tenant had no right to resiliate the Lease.

*Can the Tenant make a claim for the damages suffered because of the heating unit and the air conditioning (the "**HVAC**") on the roof?*

The Tenant claimed that the Landlord owed him $16,400.00 because of the Landlord`s refusal to allow the Tenant to remove and take with him the HVAC units upon his departure from the premises. The Tenant claimed that these devices were part of the furniture and equipment purchased by him as mentioned in the Lease.

The Court found that the clause in the Lease listing the equipment available for purchase was ambiguous and made it unclear whether HVAC units were included. While a price was listed for most of the movables, the total price to be paid was significantly inferior to the total of the sums listed. As such, the Court analyzed the common intention of the parties and determined that the Landlord`s contention that the HVAC units were not part of the equipment sold to the Tenant was more likely than the Tenant's contention.

First, the equipment sold was equipment listed as serving the operation of the restaurant. The heating unit and air conditioning are not restaurant equipment. Second, the Court stated that it was unlikely that the Landlord meant to allow the Tenant to remove from the building an essential component for the entirety of the building (not just the restaurant). The circumstances surrounding the Lease negotiations and the conclusion of the Lease did not demonstrate nor did they allow one to believe that the parties could have agreed on the HVAC unit being sold to the Tenant, or, even if the Tenant himself could have understood it that way, that this was the Landlord's intention.

Is the counterclaim of the Tenant or the Tenant's behaviour in the proceedings abusive?

The Court found that the Tenant`s counterclaim involved unreasonable demands and excessive claims. Furthermore the Court found that this abuse was intensified by the fact that the Tenant made multiple accusations and claims in an attempt to pressure the Landlord into negotiating a settlement.

The Court found that not only were none of the Tenant`s grounds well-founded, or at a minimum they do not justify a Lease termination, but a reasonable and prudent person apprised of the situation and circumstances would have concluded that there was no basis for such termination.

Even after the Court pointed out the deficiencies in its evidence, the Tenant did not present precise, serious or reliable evidence to support the amounts claimed, such amounts being arbitrary and given without any explanation.

Accordingly, the Court held that the Tenant could not demonstrate that his counterclaim was not abusive within the meaning of article 51 of the Code of Civil Procedure of Quebec.

7. LEASE INTERPRETATION

7.1 *7235313 Canada Inc.* v. *Sobeys Capital Incorporée*, 2020 QCCS 4190

December 7, 2020, Montreal 500-17-110460-196 (C.S.)

Motion to dismiss appeal granted (CA. 2021-03-08) 500-09-029280-211, 2021 QCCA 400

Facts:

The plaintiff, 7235313 Canada Inc. (the "**Landlord**"), was seeking a declaratory judgment to confirm the expiration date of a lease between it and Sobeys Capital Incorporated (the ‘’**Tenant**").

The only issue in dispute was the scope of an amendment to the offer to lease that would allow the Tenant to terminate the lease prior to its fifteen-year term. The Landlord claimed that this amendment was rendered null and void by the subsequent execution of the lease. On the contrary, the Tenant contended that the offer to lease, as amended, was incorporated into the lease and, therefore, that the amendment retained all its effect.

In order to facilitate its financing, the Landlord requested a fifteen year lease. The Tenant’s practice was to sign ten-year leases with renewal options, but it agreed to the fifteen-year term, provided it was given the option to terminate the lease after ten years if sales were not satisfactory. The Landlord agreed, but requested that the right be set out in a separate document.

On December 7, 2009, the Tenant sent the Landlord two documents confirming the parties' agreement:

a) an offer to lease (the "**Offer to Lease**") for an initial term of fifteen years; and
b) an amendment (the "**Amendment**") which allows Sobeys, subject to certain conditions, to terminate the Lease as of the tenth year following the commencement date of the lease.

On April 12, 2010, the parties signed the fifteen (15) year lease (the "**Lease**"), which included an interpretation clause entitled "Entire Agreement" (the " **Ambiguous Clause**").

In accordance with the Lease's right of first refusal, the Landlord received a bid to buy the leased property and informed the Tenant of the offer. Instead of using its right of first refusal, the Tenant informed the Landlord that it was using its right of termination.

Decision:

The Superior Court of Quebec (the “**Court**”) was called upon to decide whether the parties' shared intent was to include the right of termination in the Lease since, in the opinion of the Landlord, the Ambiguity Clause rendered the right of termination unlawful. Mr. Justice Martin Sheehan determined that the parties intended to agree to a right of termination after considering the events leading up to the conclusion of the Offer to Lease and the Lease as well as the behaviour of the parties.

The Court determined that from the very beginning, it was apparent that the intention of the parties was that the Offer to Lease and the Amendment, although signed in two separate documents, would together form a single contractual agreement. This was evidenced by the reference in the subject line of the Amendment to the "Offer to Lease made this day" and by the fact that the Tenant signed both documents on the same day. This intention was also consistent with the testimony of the Tenant’s representatives who personally negotiated the agreement with the representatives of the Landlord.

The Court revisited the rules of contractual interpretation. Thus, it was clear from reading the Lease that the parties intended to incorporate into the Lease certain portions of the Offer to Lease, as amended, which would "form part of this Lease as if reproduced in full, for all purposes'' [Our translation]. An external clause like the one included in the Lease was perfectly valid. The phrase "as amended" was used in the Lease text to reference the offer to lease. Nothing in the text suggested that the Tenant and the Landlord intended to challenge the agreement they had made about the right of termination just a few months earlier. Therefore, the interpretation put out by the Tenant was supported by a reading of the text that considers the clauses in connection to one another and tries to give meaning to each word.

The Court held that no conclusion as regards the existence or non-existence of the resiliation right could be drawn from the fact that the notice of lease registered by the Tenant did not mention the resiliation right. The Court noted that the notice of lease stated that the termination date of January 31, 2026 was “subject to the other provisions of the present Lease”, and that as the purpose of the notice was to protect the rights of the Tenant in the event of the sale of the leased premises, it was not necessary to mention the resiliation right.

The Court noted that the terms of the Lease and its conclusion also lent credence to the Tenant’s view. Regarding the behaviour of the parties, none of the factors cited by the Landlord amounted to consistent, repeated, and unambiguous behaviour that would lead one to believe that the Tenant acknowledged that its right to terminate was extinguished when the Lease was signed. Accordingly, the Court found that the Tenant’s right to terminate must consequently be deemed to have remained valid and to have been properly exercised.

7.2 *Rochefort* v. *9329-7653 Québec Inc.*, 2021 QCCS 3165

July 23, 2021, Longueuil 505-17-011328-194 (C.S.)

Facts:

Daniel Rochefort (the “**Landlord**”) sued his former tenant, 9329-7653 Québec Inc. (the “**Tenant**”) for additional rent which he claims was owed to him under the terms of the lease (the “**Lease**”). The Tenant denied owing money to the Landlord and presented a counterclaim for damages resulting from its decision to leave the building at the end of the Lease.

The parties negotiated and entered into a five-year lease in August 2015, effective October 1, 2015, which ran until September 30, 2020 and included two renewal options. A disagreement between the parties about the amount of additional rent that must be paid under the Lease is what caused the conflict. There is no question that the Lease obligated the Tenant to pay additional rent relating to operating costs in respect of the premises, Mr. Justice Alexander Pless of the Superior Court (the “**Court**”) qualifying the Lease as being “net net net”. The difference between the amounts charged and what the Tenant anticipated to pay gave rise to the disagreement.

The Landlord assured the Tenant that the additional rent would not be substantially more than the estimate in the Lease, but the Tenant claimed that this was false information, and that if it were not for this false information, which it viewed as fraudulent, it would never have agreed to the Lease. In addition to asking the Court to deny the Landlord's request for an increase in rent,

the Tenant also requested that the Lease be terminated and that it be given damages to make up for the investment it made in the leased premises.

The 2,400 square foot space's rent was split into two portions under the Lease. First, base rent of $60,000.00 at a rate of $25.00 per square foot. Secondly, an additional variable rent of $7.50 per square foot, or a total of $18,000.00, based on the actual costs of maintaining the property (taxes, insurance, snow removal, rubbish collection, etc.). The issue of additional rent was important to the Tenant. Up to the day of signing, it sought assurances that it would not significantly exceed the estimate.

Decision:

In its analysis, the Court stated that the amounts claimed by the Landlord were actually incurred by him. The Court also accepted the testimony of the Landlord as credible: he did not lie to the Tenant and did not give any specific guarantee that the amount of $7.50 was a firm estimate. The amount given in the Lease by the Landlord was specifically qualified as an approximation.

It was the underestimation of municipal and school taxes that led the parties to underestimate the additional rent. The Court stated that it is well established that there is a duty to inform in the contractual area. In the leading case on the matter (*Bank of Montreal v. Bail Ltée, [1992] 2 S.C.R. 554*), the Supreme Court of Canada found that a party who knows or ought to know information that would have a significant influence on the willingness of a co-contractor to contract has a duty to disclose it. The Court found that the Landlord had a duty to disclose a realistic estimate of the additional rent with the information at his disposal.

The Landlord also acknowledged that he anticipated a rise in municipal taxes to reflect the fact that the building had sold for more than the municipal appraisal and that the parties had made investments in it. This information was important because municipal taxes made up a sizable portion of the additional rent, especially since the Tenant had expressed serious doubts about the reliability of the estimate.

The Court held that the lack of information led the Tenant to accept terms that it would not have accepted had it had the correct information. Had the additional costs had been more accurately predicted, the Tenant would not have signed the contract, or it would have tried to negotiate a lower base rent. The Tenant was aware that the estimate was not a set sum and acknowledged that there was a chance that the actual costs would exceed the estimate.

The Court determined that the Landlord`s breach of the duty to disclose was comparable to committing fraud. In the event of a fraud-related error, the Court may lower the responsibilities in accordance with article 1407 of the Civil Code of Quebec, which states as follows: "*A person whose consent is vitiated has the right to apply for annulment of the contract; in the case of error occasioned by fraud, of fear or of lesion, he may, in addition to annulment, also claim damages or, where he prefers that the contract be maintained, apply for a reduction of his obligation equivalent to the damages he would be justified in claiming*".

As for the counterclaim, it was not proven and was thus rejected by the Court. At the end of the lease, the Tenant vacated the space and reoriented its activities. The Tenant's testimony left the impression that it changed the focus of its business for reasons other than the rent problems. The Tenant simply found a more profitable approach. With respect to the other claims of the Tenant, for example, regarding snow removal or garbage collection, since these were services that were included in operating costs, if these services had been improved, it would only have increased the costs to the Tenant. Accordingly, the Court dismissed the Tenant's counterclaim.

8. FORCE MAJEURE

8.1 *Hengyun International Investment Commerce Inc.* v. *9368-7614 Québec Inc.*, 2020 QCCS 2251 (CanLII)

July 16, 2020, Montreal 500-17-103037-183

Notice of Settlement (CA. 2021-03-29) 500-09-029155-207 – case settled on appeal

Facts:

Hengyun International Investment Commerce Inc. (the **"Landlord"**) is the owner of a building on Cavendish Blvd. in Montreal (the **"Building**"). VitalMaxx Fitness Centre Inc. (**"VFC"**) entered into a lease with the Landlord on November 3, 2017 (the "**Lease**), to operate a gym in premises located on the entire second floor of the Building (the **"Premises"**). Soon after signing, VFC asked the Landlord to change the tenant`s name on the Lease to 9368-7614 Quebec Inc. (the **"Quebec Inc.**"). The change was never made. On December 5, 2017, VFC made an assignment in bankruptcy. As of January 2018, after completing renovations, Quebec Inc. began operating in the Premises under the name NDG Fitness Center (the "**Gym"**).

Since that time, the parties had been in constant conflict over a variety of issues and have each presented numerous requests for injunctive relief before the Superior Court of Quebec (the "**Court**") . From the Landlord's perspective, Quebec Inc. had no right to occupy the Premises. It sought eviction as well as compensation for its loss of revenue. Quebec Inc. claimed that the Lease was assigned to it and that it had every right to occupy the Premises. It sought a declaration to that effect. In addition, it sought damages and a reduction in rent for a number of problems, including the Landlord's failure to provide adequate air-conditioning and heating.

Decision:

Mr. Justice Peter Kalichman (then of the Superior Court; the "**Court**") determined that according to paragraph 10.01 of the Lease, VFC was entitled to transfer its rights in the Lease provided the Landlord provided its written consent. This provision is similar to the general rules set out in the Civil Code of Quebec ("**C.C.Q.**"). In the Court's view, the Landlord's consent to the assignment of the Lease has been established. Indeed, when VFC sent a text message notifying the Landlord to change the name, the Landlord sent back a "thumbs up" symbol which signified

"okay". Moreover, the Landlord had an opportunity to signify its opposition to the name change but never did. It was the Court's view that Ms. Chen, on behalf of the Landlord, accepted that Quebec Inc. had become the tenant under the Lease. At any rate, she certainly understood that a transfer had been requested, she did not refuse it and was presumed to have accepted it.

Quebec Inc. was forced by government decree to close the gym as of March 24, 2020 due to the Covid-19 pandemic. Fitness facilities were not on the list of services that were deemed essential and were thus unable to operate. Quebec Inc. argued that its inability to operate and, thus to generate revenue, was caused by superior force (*force majeure*) and that it should therefore be relieved of its obligation to pay rent for this period. The Landlord did not agree that the situation in which Quebec Inc. found itself qualified as superior force. At any rate, it argued that such a situation was contemplated by paragraph 13.03 of the Lease which required Quebec Inc. to pay rent notwithstanding an event of superior force. The Landlord added that Quebec Inc. applied for and received a government emergency loan of $40,000 in the context of the Covid-19 pandemic, and could not therefore argue that it was prevented by superior force from paying the rent.

Superior force is defined in Article 1470 C.C.Q. as follows: "*A person may free himself from his liability for injury caused to another by proving that the injury results from superior force, unless he has undertaken to make reparation for it. Superior force is an unforeseeable and irresistible event, including external causes with the same characteristics*."

An event is unforeseeable if it could not reasonably have been foreseen at the time the obligation, in this case, the Lease, was contracted. In the context of the Covid-19 pandemic, the Court was satisfied that this criteria was met. In order to qualify as superior force, the event at issue must have prevented any tenant in Quebec Inc.'s situation from paying its rent and not just those who lack sufficient funds. The Court held that the Landlord was prevented by superior force from fulfilling its obligation to Quebec Inc. to provide it with peaceable enjoyment of the Premises. While Quebec Inc. still had access to the Premises, continued to store its equipment there and benefited, to some extent, from services, the lease provided that the Premises were to be used "solely as a gym" and this activity was prohibited by virtue of the government decree. As a result, Quebec Inc. had no peaceable enjoyment of the Premises during this period. The Landlord correctly pointed out that in commercial leasing, the provisions of the C.C.Q., including the obligation to provide peaceable enjoyment, are not of public order and the parties are therefore free to limit their impact. However, the Court found that the *force majeure* clause contained in the lease contemplated obligations whose performance was delayed, not obligations that could not be performed at all. The Landlord's fulfilment of its obligation to provide peaceable enjoyment of the Premises from March through June of 2020 had not been delayed—it simply could not be performed. Consequently, the Landlord could not insist on the payment of rent for that period.

Under the circumstances, the Court reduced the rent for the months of March through June 2020 and deducted $26,950.65 from the Landlord's claim.

In an obiter, The Court noted that while it was not raised, the said decree may have constituted a legal disturbance within the meaning of Article 1858 C.C.Q. which states as follows: "*The lessor is bound to warrant the lessee against legal disturbances to enjoyment of the leased property. Before pursuing his remedies, the lessee shall notify the lessor of the disturbance*.", and which the Landlord also had the obligation to warrant. However, the Court went on to state that even if this were the case, it would not have changed the Court's analysis.

Note that this case was settled on appeal.

9. GOOD FAITH

9.1 Jardins Deslauriers Inc. v. Deslauriers, 2021 QCCS 1901

May 5, 2021, Saint-Hyacinthe 750-17-002043-127 (C.S.)

Facts:

Les Jardins Deslauriers Inc. (the ''**Tenant**'') is a gardening company while Jardins JD Inc. (the ''**Landlord**'') is a land owner. In January 2008, the parties signed a lease (the "**Lease**") for an initial fixed term of one year, starting on the date of the Lease and ending on November 30, 2009, and tacitly renewed from year to year for a total period of five years. The Lease provided for the lease of the land, buildings, machinery and equipment for the cultivation and operation of the land by the Tenant, which it also committed to acquire after two years. The Lease also contained a right of first refusal in favor of the Tenant. In the fall of 2009, the Landlord received an offer to purchase from a third party, namely Jean Overbeek. As the Tenant did not exercise its right of first refusal to purchase under the Lease, the Landlord sold part of the leased land to that third party. However, the Landlord failed to include a non-competition clause in favor of the Tenant in the deed of sale, as was provided for in the Lease. It was at this point that the relationship between the parties began to deteriorate. On December 1, 2009, in accordance with the Lease, the Tenant acquired the machinery, the farming equipment and accessories as well as the inventory of the Landlord for the exploitation of the land. On April 14, 2010, the Landlord notified the Tenant that the Lease would not be renewed.

The Tenant claimed that the non-renewal of the Lease was abusive and asked the Superior Court of Quebec (the "**Court**") for compensatory damages and punitive damages because of the Landlord's bad faith. The Tenant also claimed an amount equivalent to the increase in value added to the leased land. In addition, the Tenant exercised a seizure before judgement on equipment it considered its property and that the Landlord was using and refusing to return. The Landlord asked the Court to undo the seizure before judgment, declare it abusive and condemn the Tenant to compensatory damages for abuse of process and loss in value of the land.

Decision:

Mr. Justice Jérôme Frappier partially allowed the claims of each party and ordered the Landlord to pay a sum of $14,579.26 to the Tenant.

The Court was of the opinion that although the Lease provided for the possibility of termination with a six months' notice, the Landlord had exercised its right contrary to the requirements of good faith. Since the Tenant had just acquired the inventory for $48,000 and the machinery and equipment used in the operation of the land and the business for $202,518.21 from the Landlord, it was clear that a premature termination of the Lease would cause irreparable damage to the Tenant. Thus, the Court concluded that the Landlord's actions were not an honest exercise of their right to terminate the lease.

On the question of the increase/decrease of value of the land, the Court accepted the theory proposed by the Landlord's expert and concluded that there was no increase in the value of the land due to the Tenant. As for the Landlord's claim concerning a loss of value, the Court considered that the actual loss was too small to constitute any violations on the part of the Tenant.

Finally, the Court concluded that the Tenant did not own the seized equipment and that the seizure before judgement was illegal. However, because it sincerely believed that it had an interest in the equipment, its conduct did not constitute abuse of process.

The Court condemned the Landlord to pay to the Tenant an amount of $50,000 for abuse of rights. However, it rejected the Tenant's claim for punitive damages, considering that it had not demonstrated the Landlord's intentional infringement. The Court partially granted the Landlord's counterclaim and condemned the Tenant to pay the amount of $6,529.61 for the restoration of the land following its departure and the Landlord's expert fees. Operating compensation between the claims of the parties, the Court determined that the Landlord owed $14,579.26 to the Tenant.

9.2 *Wagner* v. *GPEKS Constructions Inc.*, 2021 QCCS 1004

March 17, 2021 Gatineau 550-17-011306-196 (C.S.)

Facts:

Jason Wagner and Rosemarie Templonuevo (the ''**Tenants**'') operated a restaurant in premises owned by GPEKS Construction Inc. (the ''**Landlord**''), of which Frederik Pouyot was the largest shareholder and Frederik's wife Mary was the second-largest shareholder. The parties had signed a commercial lease on March 16, 2017 for a total term of 12 years, beginning on April 1, 2017 and expiring on March 31, 2029 (the "**Lease**").

The Tenants asked the Superior Court of Quebec (the "**Court**") to find the Lease with the Landlord terminated as of September 25, 2018, on the grounds that the Landlord has maliciously, substantially, and persistently failed to provide the Tenants with peaceable enjoyment of the leased premises. They sought both compensatory and punitive damages, claiming, among other things, that the Landlord published defamatory messages on the internet, made unannounced visits, sabotaged locks, and vandalized the alarm system. The Landlord, for its part, without denying the alleged facts, contested the termination and claimed unpaid rent and damages.

Decision:

The Court, by way of the decision of Mr. Justice Michel Déziel, granted the motion, pronounced the termination of the Lease in favor of the Tenants and ordered to the Landlord to pay compensatory and punitive damages, while also rejecting its counterclaim.

First, the Court explained that article 1854 of the Civil Code of Quebec ("**C.C.Q.**") provides that a landlord must provide the tenant with peaceful enjoyment of the leased premises, and this is an obligation of result. The evidence provided in this case revealed that after the parties had reached an agreement to put an end to the first dispute (regarding the unauthorized removal by the Landlord of 16 of the Tenants' outdoor patio chairs), the Landlord continued to disturb the enjoyment of the leased premises in a significant and persistent manner, in particular by harassing the Tenants and interrupting the activities of their restaurant. Furthermore, it was shown that the Tenants had been prevented from using the terrace, even though the use of the terrace was an essential condition of the Lease. Due of the Landlord's harassing behavior, the Court found that the Tenants were entitled to resiliate the Lease as of September 25, 2018, the date they vacated the premises. As such, the Tenants were entitled to recover from the Landlord the deposit of $31,250. Finally, the Court found that a tenant who vacates its premises due to the landlord's fault is entitled to compensatory damages. Therefore, the Court ordered the Landlord to pay to the Tenants the sum of $14,960.49, which represented the value of the improvements made by them to the premises.

Harassment is recognized as an infringement of the right to peaceable enjoyment of the leased premises and considered an abuse of the landlord's right of ownership. The Court stated that every person is required to exercise his or her rights in good faith and to avoid acting in a manner that is harmful to others or excessive and unreasonable (article 6, 7 and 1375 C.C.Q). In this case, the Landlord damaged the Tenants' reputations by posting defamatory accusations against them on the building in question and by publishing messages on the internet inviting the Tenants' customers to stop using their restaurant. The Landlord`s behavior was also found to constitute an extra-contractual fault that gives rise to damages under article 1457 C.C.Q. The Court considered the Landlord's actions unacceptable and awarded the Tenants $12,500 for damage to reputation, disturbance, stress and inconvenience. Finally, convinced that the infringement was intentional, the Court condemned the Landlord to pay $7,500 in punitive damages.

Note: by way of judgment rendered May 18, 2022 (*GPEKS Constructions Inc. v. Wagner, 2022 QCCA 738*), the Court of Appeal rejected the Landlord's attempt to reverse the Superior Court's judgment, stating that an appeal was not an opportunity to retry the case. The Court of Appeal further stated that its role was not to review all of the evidence evaluated by the trier of fact in order to substitute its assessment for that of the trial judge, unless the trial judge's assessment was tainted by palpable and overriding error.

trial judge's findings of fact will not be overturned absent palpable and overriding error principally in recognition that only the trial judge observes witnesses and hears testimony first hand and is therefore better able to choose between competing versions of events.

10. LEASE TERMINATION

10.1 *International Development Corporation (Industrial) Ltd.* v. *Astral Media Outdoor*, 2021 QCCS 4438

October 21, 2021 Montréal 500-17-108422-190 (C.S.)

Facts:

On November 1st, 1995, Astral Media Outdoor LP (the "**Tenant**") entered into a commercial lease (the "**Lease**") with International Development Corporation (Industrial) Ltd. (the "**Landlord**") whereby the Tenant was granted the right to construct a two-sided billboard in a parking lot near a highway. On January 26th, 2018, following work carried out by the Ministry of Transport of Quebec that moved the westbound lane of the highway, the Tenant sent a notice to the Landlord that the Tenant was discontinuing the operation of the east side of the billboard due to a 94.2% reduction in westbound motorist traffic. The Tenant also mentioned that, effective February 1st, 2018, it would be reducing the rent it was paying to equal 52.9% of the amount previously paid. According to the Tenant, the relocation of the highway resulted in a loss of its peaceful enjoyment of the premises. On December 17, 2018, the east lane of the highway was also moved approximately 200 meters further away from the billboard. On the same day, the Tenant whitewashed the west side of the billboard, and ended all advertising from the billboard. On January 14, 2019, the Tenant sent notice to the Landlord that the Tenant was terminating the Lease.

The Landlord brought forth a motion for declaratory judgement and claim for arrears of rent.

Decision:

Mr. Justice Paul Mayer of the Superior Court (the "**Court**") rejected the motion.

The Court explained that peaceable enjoyment is assessed according to the nature of the Lease and the premises leased. It is not a rigid concept independent of the circumstances. Under article 1434 of the Civil Code of Québec (C.C.Q.), a contract is binding on the parties not only by virtue of what is expressly written, "*but also as to what is incident to it according to its nature and in conformity with usage, equity or law*." The Court noted that there are several circumstances in which it can be determined that matters not expressly provided for in a lease may cause a loss of peaceable enjoyment of the leased premises or reveal the essential elements of the Lease.

The Tenant leased the premises for the purpose of advertising. Logically, in order for the lease to be of any value to the Tenant, the billboard must be visible to passers-by. This type of lease perfectly reflects the famous saying "*location, location, location*"; if no one can see the billboard, the lease would be deprived of its purpose.

The Lease also contained a non-obstruction clause, which the Court stated was an important indication of the value the parties placed on the visibility of the billboard. Even if they did not expressly mention traffic in the Lease, the visibility and legibility of the billboard are essential elements of the Lease. Therefore, the sign must not be hidden. The work on the eastbound lane of the highway made it almost impossible for traffic to see the billboard. Given the nature of the Lease, the relocation of the westbound lane of the highway caused a loss of peaceful enjoyment of the premises.

The Court noted that this loss was caused by a third party, and therefore, for these reasons, the second paragraph of article 1859 C.C.Q., which states that "… if the enjoyment of the property is diminished by the disturbance, the lessee retains his other remedies against the lessor" applied. The Tenant was therefore entitled to a 52.9% reduction in the rent for the period from February 1, 2018 to January 31, 2019, and the Court found that the Tenant had the right to terminate the Lease.

Finally, the Court determined that the Tenant could terminate the Lease under a clause in the Lease entitled "Early Termination by Tenant". This clause covered anything that blocks the view of the billboard if it is the result of an act committed by a municipality, a provincial authority or a federal authority. According to the Merriam-Webster dictionary, the definition of "obstruct" is "to block or close up by an obstacle". Thus, as of December 17, 2018, the two lanes of the highway were moved more than 200 yards from the billboard. Mounds of dirt and vegetation blocked the view of the billboard. In other words, this constituted an obstruction of the billboard. Since this was caused by a provincial authority, the clause applied and the Tenant could terminate the Lease.

11. TENANT BREACHES

11.1 *Lechter (Montreal Professional Building)* v. *Keurig Canada Inc.*, 2022 QCCS 1649

May 9, 2022 Montréal 500-17-114328-209 (C.S.)

Facts:

John E. Lechter (the ''**Landlord**''), instituted legal proceedings against both Keurig Canada Inc. ("**Keurig**") and MTY Franchising Inc. ("**MTY**) for the payment of rent and taxes due for the period of time between March 31, 2020 and March 31, 2021.

MTY operated a Van Houtte Coffee shop in the Landlord's building pursuant to a lease (the "**Lease**") that had initially been entered into between the Landlord and Keurig (as tenant) and then subsequently assigned by Keurig to MTY (Keurig remained guarantor of MTY's obligations under the Lease until its expiry on March 31, 2021).

On March 13, 2020, the Quebec Government declared a state of health emergency for the entire province via decree #177-2020. This was followed by a series of other decrees and

ministerial orders instituting sanitary measures. On March 25, 2020, MTY ceased its operations and stopped paying the rent due to the Landlord.

MTY and Keurig were of the opinion that the rent was not due because of the exception of non-performance as provided for in article 1591 Civil Code of Quebec ("**C.C.Q.**"), which states as follows: "*Where the obligations arising from a synallagmatic contract are exigible and one of the parties fails to perform his obligation to a substantial degree or does not offer to perform it, the other party may refuse to perform his correlative obligation to a corresponding degree, unless he is bound by law, the will of the parties or usage to perform first*."

They also argued that the sanitary measures constituted legal disturbances within the meaning of article 1858 C.C.Q., which states as follows: "*The lessor is bound to warrant the lessee against legal disturbances to enjoyment of the leased property. Before pursuing his remedies, the lessee shall notify the lessor of the disturbance*", thus justifying the non-payment of rent. They also invoked the Landlord's failure to respect its implicit obligation to ensure goodwill of the premises to the tenant. Finally, they were of the opinion that the property/business taxes were not payable under the terms of the Lease and that the penalty clauses provided for therein were abusive.

Decision:

Madam Justice Silvana Conte of the Quebec Superior Court (the "**Court**") granted the motion, and, in order to avoid serious or irreparable prejudice to the Landlord in the event of an appeal, the Court ordered provisional execution of the decision as regards the sum of $154,488.87, which represented rent, property/business taxes and interest due as of January 31, 2022 (the total monetary amount determined to be owing by the Court being $222,463.96).

The Court explained that the sanitary measures did not constitute legal disturbances within the meaning of article 1858 C.C.Q. The concept of legal disturbance referred to in this provision was defined as the loss of enjoyment incurred by a tenant because of the exercise by a third party of a right it has or claim to have in the leased property. That being said, the Court was of the opinion that the government did not claim a right in or on the leased property when it imposed sanitary measures. The sanitary measures were not directed at the leased property and its use, but rather at the public's activities.

With respect to the Landlord's obligation to ensure a certain level of goodwill, the Court confirmed that, in some cases, the nature of the premises combined with the terms of the lease may give rise to an implicit obligation on the part of the landlord to maintain a certain occupancy level. For example, courts tend to impose an implicit obligation to maintain a certain occupancy level in the case of a shopping center. However, in the case at hand, the terms of the Lease and the nature of the premises did not support a claim that the maintenance of goodwill was an implicit obligation of the Landlord. It was therefore not in default of providing the tenant with peaceable enjoyment of the premises.

The Court rejected the Tenant's argument regarding the Landlord's failure to mitigate its damages as the evidence showed that it had made reasonable efforts to rent the premises without success. Finally, the Court found that the combination of the two penalty clauses (each of which provided for the Tenant to pay 20% of the amount due by the tenant to the Landlord) was not abusive in this case, given that the clauses had been negotiated by the parties 32 years earlier, and repeated in subsequent lease amendments. The Court also noted that the clauses fulfil the two objectives of a penalty clause, the first being its compensatory character and the second being its comminatory (i.e. dissuasive) character.

11.2 9745866 Canada Inc. v. 9518002 Canada Inc., 2021 QCCA 1530

October 13, 2021 Montreal 500-09-028743-193 (C.A.)

Facts:

On January 22, 2016, a lease (the "**Lease**") was entered into between 9518002 Canada Inc. (the "**Landlord**") and 9347160 Canada Inc. ("**9347160**"). 9347160 assigned all of its rights in the Lease in May of 2016 to 9745866 Canada Inc. (the "**Tenant**"). The Lease provided that the leased premises (the "**Premises**") were to be used for the purposes of a commercial pharmacy. The building (the "**Building**") in which the Premises were to be located had not yet been built when the Lease was signed, but it was to contain the first medical super clinic in the Outaouais area and to bring together various tenants working in the health field. The objective was to develop a synergy between the various services offered in the Building. No specific date for the commencement of the pharmacy operations in the Premises was set out in the Lease, however, the parties agreed that the Tenant would commence paying rent three months after taking possession of the Premises.

On May 1, 2017, the Tenant took possession of the Premises and in November 2017, after few improvements, the Premises were finally ready to be used for the purposes of a commercial pharmacy by the Tenant (all that was needed was to install shelving and stock the Premises). Yet, as the Building slowly filled up with tenants, the Premises remains unoccupied. The Landlord repeatedly contacted the Tenant to ask about its intentions, but the Tenant remained vague. The Landlord's concerns were

On July 26, 2018, more than a year after taking possession of the Premises, the Landlord sent a notice to the Tenant, alleging various defaults and formally demanding that the Tenant operate a pharmacy in the Premises within 10 days or face termination of the Lease. The Tenant responded on August 3, 2018, providing some of the required information regarding proof of insurance and payment of electricity costs. However, the Tenant did not propose any date for the opening of the pharmacy or request any additional time to do so. It merely pointed out that the Lease did not provide a specific date for the opening of the pharmacy and that the time allowed in the July 26, 2018 notice was unreasonable.

Furthermore, the Landlord's confidence in the Tenant was shaken by the financial difficulties of the principal shareholder and director of the Tenant, Mr. Jean-François Graillon. Mr.

Graillon was also associated with another pharmacist, Mr. Michel Quesnel, who was opposed to the super-clinic project from the outset, since he had a similar project in mind. As well, while the Premises remained unoccupied, Mr. Graillon participated in the opening of two other pharmacies in the region with Mr. Quesnel.

On August 20, 2018, seeing as the situation had not changed, the Landlord transmitted a notice of lease resiliation and gave the Tenant 10 days to vacate the Premises. On the same day, the Landlord replaced the Premises' locks, thus depriving the Tenant of the ability to access the Premises. On following August 24, 2018, the Tenant filed a motion for injunctive relief to challenge the resiliation of the Lease, to obtain access to the Premises, and to seek compensatory and punitive damages.

Madam Justice Carole Therrien of the Quebec Superior Court declared the extrajudicial termination of the Lease between the parties legal and valid and ordered the Tenant to pay to the Landlord the rent and other charges due under the Lease up to the date of the judgment.

Dissatisfied, the Tenant appealed the decision. The Tenant argued that the trial judge erroneously equated the lack of operation of the pharmacy with a change of use of the Premises under the terms of the Lease in order to justify the termination of the Lease. The Tenant also considered that it had not been provided with a notice of default and that the notice time of 10 days granted by the Landlord was insufficient to allow the pharmacy to open.

Decision:

The Quebec Court of Appeal granted, in part, an appeal of the Superior Court judgement, declaring legal and valid the extrajudicial resiliation of the Lease and ordering the Tenant to pay rent and other charges due under the Lease. However, the Court of Appeal overturned the Superior Court`s decision ordering the Tenant to pay rent until the date of the judgment.

First, the Court of Appeal confirmed the trial judge's analysis of the change of use of the Premises. In fact, even if the Landlord's project was not financially dependent on the pharmacy, its operations remained a crucial element of it. In addition to affecting the project's synergy, the vacancy of the Premises was likely to raise doubts about the viability of the concept and discourage both potential customers and tenants. Thus, the fact that the pharmacy was still not in operation more than a year after taking possession of the Premises amounted to a change of destination and a significant default causing serious prejudice to the Landlord and thus, justifying the extrajudicial termination of the Lease.

Second, the Court of Appeal confirmed the trial judge's analysis of the issue of insufficient time. While it was true that the time given by the Landlord to the Tenant to perform was short (10 days), it did not matter in the end since the Tenant was already in default by operation of law. In fact, the Tenant repeatedly violated its obligation to operate a pharmacy on the Premises. Additionally, by its behavior, it had manifested its intention of not ever respecting its obligations. Accordingly, the Court determined that as the Tenant was in default by the sole operation of law, it could not complain about the insufficiency of time granted to act.

Finally, the Court noted that between the filing of the claim and the Superior Court's judgment, a safeguard order forbidding the Landlord from changing the conditions of the Premises in order to rent it to a third party was issued. Thus, pursuant to this order, the Tenant continued to pay rent into a trust account without having access to the Premises from which it had been evicted, while the Landlord was deprived of the possibility of renting the Premises to a third party. The trial judge had ordered the Tenant to give the rent paid in trust to the Landlord. The Court of Appeal overturned this decision, holding that since the Landlord had chosen to proceed by way of extrajudicial termination and eviction on its own initiative and had thus deprived the Tenant of the enjoyment of the Premises, there was no justification for the Tenant to pay rent after the date of eviction.

2022 QUEBEC LEGAL UPDATE AUTHORS:

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