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QUEBEC LEGAL UPDATE

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1. FORMATION OF CONTRACT

1.1 Dominald Inc. et al. v. Les Pétroles Roger Comeau Inc. et al., J.E. 2001-340 (Superior Court)

Facts:

Pursuant to a lease (the "**Lease**") dated April 8, 1991, Les Pétroles Roger Comeau Inc. (the "**Tenant**") leased from Dominald Inc. (the "**Landlord**") a convenience store and gas bar (the "**Premises**") for a 10-year period commencing June 1, 1991 and terminating May 31, 2001, with a minimum rent of \$72,000 per annum, together with additional rent should the number of litres sold per annum exceed 1,300,000.

In 1993, after the Tenant had ceased to honour its obligations under the Lease, the Landlord instituted proceedings against the Tenant and obtained a judgment in February 1994 terminating the Lease and reserving all of the Landlord's rights and recourses to claim rental that would become due in the future. Subsequently, the Landlord leased the Premises to a third party at a rental rate substantially less than that set forth in the Lease. The Landlord instituted proceedings against the Tenant for the difference in rental. In its action, the Landlord also sued the two directors of the Tenant, with the intent to pierce the corporate veil and to hold the individuals personally responsible.

In defence, the Tenant invoked false declarations of the Landlord concerning the number of residential units which were to be constructed in the area surrounding the Premises, claiming that these representations had led the Tenant to enter into the Lease and pay a monthly rental of \$6,000. The individual defendants claimed that there was no legal relationship between themselves and the Landlord. The Landlord, however, claimed that the actions by the individual defendants, as directors of the Tenant, had created a situation where the Tenant had been emptied of all of its assets, thus rendering it judgment proof.

Decision:

Mr. Justice Dubois of the Superior Court held that when the Lease had been executed, the Tenant had in its possession a preliminary study relating to the projections of sales of gasoline from the Premises. The provisions of the Lease had been the object of numerous negotiations relating to the amount of gasoline to be sold from the Premises. The Court held that it was the Tenant, rather than the Landlord, that was the expert in terms of the sale of gasoline products. Accordingly, the Court refused to accept the Tenant's arguments that the formation of the Lease should be set aside as a result of false representations on the part of the Landlord. Insofar as the corporate reorganization effected by the Tenant, the Court held that same was contrary to the provisions of article 34(2)(a) of the *Canada Business Corporations Act* as well as articles 317 and 1457 of the *Civil Code of Quebec*. The Court held that as the initial judgment of the Superior Court in 1994 had clearly reserved the rights of the Landlord to claim future losses from the Tenant, the corporate reorganization was simply for the purpose of creating a shell company. Consequently, the Court held that the actions taken were contrary to the provisions of the *Canada Business Corporations Act* and the *Civil Code of Quebec*. The Court specifically noted that Mr. Comeau's good faith was extremely questionable, and that as directors of the Tenant, the personal responsibility of both Roger Comeau and Claire Comeau, was found to exist. Thus, the Court lifted the corporate veil in holding the directors responsible for the damages suffered by the Landlord.

The Court further held that the actions taken by the Landlord, in attempting to reduce its losses, were reasonable, and thus the full difference in rental was awarded to the Landlord, as well as its legal costs incurred in obtaining the 1994 judgment. However, the Court did not allow the Landlord its legal fees in the present action.

It should be noted that although the judgment was appealed, an out of court settlement was reached.

1.2 Rosenberg et al. v. Industries Ultratiner Inc., [2001] R.D.I. 15 (Court of Appeal)

Facts:

On January 27, 1993, an offer to lease (the "**Offer**") was submitted by Industries Ultratiner Inc. (the "**Tenant**") to Rosenberg et al. (the "**Landlord**"). Together with the Offer, the Tenant provided the Landlord with a cheque for the first month rent, which cheque was cashed by the Landlord. However, no lease was signed at that time, as the Offer contained a provision that the Landlord was entitled to verify the solvency of the Tenant. The lease was to have been signed the following week, and was for a five-year term commencing April 1, 1993. Despite the fact that the lease was not signed, the Tenant was provided with access to the premises in order that it may commence to prepare same.

On February 8, 1993, the Appellant Weber contacted the Tenant and requested that the Tenant extend the delay period required by the Landlord to verify the Tenant's credit-worthiness until February 19, 1993, and a letter agreement in respect of same was signed by the Appellant Berger, as Vice-President of one of the entities comprising the Landlord. During this period of time, and unknown to the Tenant, the Landlord negotiated and sold the building comprising the leased premises to a third party. The sale occurred on February 17, 1993, which was the same day that Berger had advised the Tenant that the Landlord would not conclude a lease with the Tenant, given the result of the Landlord's verification of the Tenant's credit-worthiness. The Tenant proceeded to lease other commercial premises and sued the Landlord for the difference in rent and other costs the Tenant was obliged to incur in respect of the alternate premises. The Tenant's claim was accepted at trial, the trial judge specifically stating that the agreement by the Tenant to extend the Landlord's delay to verify the Tenant's credit-worthiness was null, as same had been obtained by fraudulent means. The trial judge held that the Landlord had never verified the Tenant's credit worthiness, and thus held that the Landlord was obliged to lease the premises to the Tenant. The trial judge further held Berger, as a mandatary of the Landlord, to be personally responsible with the Landlord for the damages suffered by the Tenant. The Landlord and Berger appealed the trial judge's decision in respect of (i) the damages awarded and (ii) the responsibility of Berger.

Decision:

The Court of Appeal upheld the trial judge's decision, holding that the Landlord had clearly breached its obligations to the Tenant. The terms of the Offer had not been respected by the Landlord, and the sale of the property by the Landlord effectively gave the Tenant no other choice than to claim damages from the Landlord, as specific performance of the Landlord's obligations under the Offer had become impossible. The Court of Appeal held that the Tenant had acted in a reasonable manner in attempting to mitigate its damages. Furthermore, the Court specifically held that Berger, in his capacity as mandatary of the Landlord, was not sheltered from an action taken against him based on his personal fault. In effect, the Court held that Berger had never undertaken a serious verification of the Tenant's

credit worthiness, and that the request for an extension of the delay was made by the Landlord (and signed by Berger) with Berger having full knowledge of the fact that the Landlord was attempting to sell the property to a third party. Accordingly, the knowledge of the fraud of the Landlord and its intention not to follow through with its obligations under the Offer, as well as his participation in such a scheme by drafting the letters and preparing the relevant documents, made Berger personally liable.

1.3 2621-3165 Quebec Inc. v. Corporation Financière Alpha (C.F.A.) Inc., J.E. 2001-776 (Superior Court)

Facts:

In May of 1988, 2621-3165 Québec Inc. (the "**Tenant**") leased from Corporation Financière Alpha (C.F.A.) Inc. (the "**Landlord**") premises in a corridor leading to a future passageway of several hundred feet, which was to link two shopping centres (Place Laurier and Place de la Cité). Although the offer did not mention a date for the termination of the construction of the passageway, the parties had agreed that the monthly rent would be reduced until that date. Subsequent to the signing of the offer, the Landlord provided the Tenant with false information on the status of the passageway. When it became clear, in January 1991, that the construction project of the passageway had been abandoned and that the Tenant would never profit from the promised goodwill, the Tenant left the premises and instituted proceedings in cancellation of the lease and damages.

Decision:

Mr. Justice Vézina held that the Landlord had breached its obligation to accurately advise the Tenant as regards to the construction of the passageway. The promises that had been made by the Landlord induced the Tenant, in error, to sign the, and thus the lease was terminated. However, the Court held that even if the passageway had been built, no proof was made by the Tenant that it would have profited from same. Accordingly, the Court only awarded the Tenant the return of its initial investment in the premises. Mr. Justice Vézina specifically noted the fact that the Tenant had entered into the lease without a proper business plan, that its *pro forma* was woefully incomplete and that other tenants situated in the same area as the Tenant's premises had succeeded in generating profits from their stores, whereas the Tenant had never made a profit from its operations in the premises. Accordingly, the Tenant's claim regarding loss of profits was rejected by the Court.

1.4 Bédard v. Lacombe, J.E. 2001-1863 (Superior Court)

Facts:

On October 10, 1997, a lease (the "**Lease**") was entered into between Bédard (the "**Tenant**") and Lacombe (the "**Landlord**") for a two-year period commencing November 1, 1997 and terminating October 31, 1999, at a monthly rental of \$1,000. The Lease provided that contemporaneously with its signing, the Tenant was obliged to pay the Landlord the rent for the first month and final three months of the term, and specifically stated that "the Lease will come into effect following the cashing of the four months of rent, that is to say the first and the final three months of the Lease" (my translation).

During the weeks that followed, despite attempts by the Landlord and his wife to obtain these cheques, the Tenant did not provide same. In fact, the Tenant attempted to renegotiate

the term of the Lease from two years to five years, claiming that a "lift" in the service station needed to be repaired.

Contradictory testimony was given at trial as to what then happened; the Landlord stated that it called the Tenant to assure itself that the Tenant no longer wanted the premises, which the Landlord then proceeded to lease to a third party, whereas the Tenant claimed that the Landlord had advised him of his refusal to lease the premises to the Tenant. Following this conversation, the Tenant deposited the four months rent in Court, found another premises at a monthly rent of \$2,000 (rather than the \$1,000 set forth in the Lease), and instituted proceedings against the Landlord for breach of contract.

Decision:

Mr. Justice Legris stated that Section 1 of the Lease modified article 1434 C.C.Q. by providing that the entering into effect of the Lease was subordinate to the cheques for the four months rent being delivered and cashed. The Court held that the Lease had no legal effect and that the parties were not bound by same until the fulfillment by the Tenant of this obligation. The Court held that this was not a situation where conditional obligations of the parties existed prior to the arrival of its condition; rather, in this instance, the parties' obligations did not exist at all prior to the payment of the four months rent. Therefore, the Court held that article 1597 C.C.Q. applied, that the Tenant was in default of its obligation to fulfill its obligations within the appropriate time period, and that the Tenant's attempts to renegotiate the terms of the Lease entitled the Landlord to assume that the Tenant would not fulfill its obligations set forth in the Lease. The Court stressed that contracts must be executed in good faith.

Insofar as the issue of damages was concerned, the Court noted that in any event, a difference in the rental rate payable between the leased premises and the new premises found by the Tenant was not, in the present circumstances, a convincing evaluation of damages. The Court further stated that the contrasting testimony of the parties increased the prudence with which the Court appreciated the statements of both the Landlord and the Tenant. The Court thus held that no lease exists between the parties, and that the Tenant was not entitled to any damages from the Landlord.

1.5 Tapiero et al. v. Bessette, J.E. 2001-2080 (Superior Court)*

Facts:

The three Plaintiffs and the Defendant are dentists who were operating a dental clinic in premises owned by Études de Marché C.P.M. Inc. (the "**Landlord**"). The original lease for the premises was to expire June 30, 1998. In 1997, one of the Plaintiffs had acquired from the Defendant a 25% interest in the dental clinic. During meetings held in 1997 between the Plaintiffs, the Defendant and the Landlord, the parties agreed on the terms and conditions of a new lease for five years, with a five-year option. Despite the fact that no lease was ever signed, the parties conducted themselves in a fashion consistent with the terms agreed upon, including the furnishing of post-dated rental cheques. In 1999, the Defendant advised the Plaintiffs that he was leaving the practice and setting up business elsewhere. The Plaintiffs instituted proceedings against the Defendant to oblige the Defendant to pay his share of the rent and other obligations contained in the verbal lease until the expiry of its term. The Defendant

* Case under appeal.

claimed that as no written lease was executed, the relationship among the parties, following the expiry of the prior lease in July 1998, was a lease from a month to month, terminable upon one-month notice.

Decision:

Mr. Justice Crête held that based upon the actions of the parties, it was clear that a lease for a term of five years existed. The fact that a formal written agreement entitled "Lease" was never signed did not prevent this relationship from existing. The Court held that the parties had addressed their minds and agreed on all the essential provisions of the lease. Furthermore, the actions of the parties following the commencement date of the term of the lease were consistent with its existence. In this regard, the Court made mention of article 1426 C.C.Q., stating that the conduct of the parties both during and after the conclusion of the negotiations was an important element for the Court in determining their relationship. Furthermore, the Court held that the actions by the Defendant during (i) his negotiations with Dr. Asselin leading to the Defendant's sale of 25% of the clinic and (ii) the negotiation and conclusion of the terms of the lease, coupled with his obligation to act in good faith (Article 1375 C.C.Q.), estopped the Defendant from claiming that the only relationship between the parties was a lease from month to month.

Accordingly, the Court ordered the Defendant to respect all of his obligations under the unsigned lease until the full expiry of its term, and delayed the division of the assets of the medical clinic until such time.

1.6 Gestion Andage Inc. v. Corp. Financière H.D.J.M. Inc., J.E. 2001-2130 (Court of Appeal)

Facts:

In August of 1995, Gestion Andage Inc. (the "**Landlord**") concluded a verbal commercial lease (the "**Lease**") with Corp. Financière H.D.J.M. Inc. (the "**Tenant**"). The Tenant took possession of the leased premises in November of 1995. The parties met in December of 1995 to discuss a proposed written lease drafted by the notary of the Landlord. Since the Tenant did not agree to certain stipulations requiring the Tenant's principal shareholder to provide a personal suretyship and requiring the Tenant to provide a letter of security from a bank, it refused the Landlord's proposed written lease. In June of 1996, the parties met again in hopes of concluding a written lease, but the Tenant's principal shareholder refused to sign.

In July of 1996, the Tenant verbally informed the Landlord that it would be leaving the leased premises at the end of November and would continue to pay rent until said month.

According to the Landlord, the parties had agreed that the Lease would have a term of 8 years. To this regard, the Landlord cited a letter that was sent by the Tenant's attorneys where they acknowledged that the "*parties negotiated and agreed to a verbal lease with a term of eight years, to be signed (my translation)*". The Tenant acknowledged that the parties had agreed upon the rent and methods of payment when the Lease was concluded. However, with respect to the term, the Tenant alleged that the parties had agreed that a lease would have a term of eight years only if the parties agreed to all the conditions. Since the parties were unable to agree upon all the conditions of a written lease, the Tenant claimed that the term of the Lease was undetermined.

The trial judge had found in favor of the Tenant in concluding that the Lease did not have a term of eight years.

Decision:

The Court held that the Landlord had not successfully demonstrated that the trial judge had erred in holding that the Lease did not have a term of eight years.

The Court also stressed that even though the parties had never disagreed upon a term of a lease that was “to be signed”, it was not possible to conclude that the parties had agreed upon a global agreement given the parties’ failure to agree on all the other important elements the lease.

Therefore, the Court upheld the decision of the trial judge.

2. INTERPRETATION OF CONTRACT

2.1 Dallaire et al. v. Ferme Lagmel et Fils Inc. et al., JE 2001-775 (Quebec Court)

Facts:

The Plaintiffs were using the building of Ferme Lagmel et Fils Inc. (“**Lagmel**”) to house the Plaintiffs’ sows. In February of 1999, 32 sows died as a result of a break-down in the ventilation system of the building. The Plaintiff sued Lagmel and its insurance company for the loss of the sows, alleging a breach by Lagmel of its lease obligations towards the Plaintiffs. No written agreement had been entered into between the parties. Lagmel and its insurer claimed that the parties were not bound by a lease, but rather by a contract of loan of the building and that it was up to the Plaintiffs to ensure that the premises were fit for the use intended to be put thereto by the Plaintiffs.

Decision:

Mr. Justice Simard held that a verbal lease governed the relationship between the parties. He stated that the parties’ conduct, as well as the cash-in by Lagmel of a cheque with the annotation “lease of building and electricity” (my translation) was evidence of a lessor-lessee relationship.

However, in interpreting the relationship between the parties, the Court held that the acts by the Plaintiffs as regards modifications that they had made to the premises in order that same would be adopted to their business operations, and the changes made by them at their costs of the defective ventilator following the incident, led the Court to believe that the lease was one in which the Plaintiffs took the premises in the state they were found upon taking possession, and that it was the Plaintiffs’ responsibility to transform the premises for their business purposes.

Accordingly, the Court held that the parties were bound by a verbal lease, and that under the terms of this verbal lease, Lagmel, as Landlord, was in no way responsible for the ventilation system or its maintenance. Therefore, the Plaintiffs’ action was dismissed.

2.2 Entreprise Daniel Croteau Inc. v. Duchesne, J.E. 2001-227 (Quebec Court)

Facts:

In May 1991, Entreprise Daniel Croteau Inc. (the “**Tenant**”) leased from Gaston Duchesne (the “**Landlord**”) premises in the Landlord’s building. In August 1998, as a result of torrential rains, water backed up to a stop valve in washrooms located above the leased premises and ran down to the leased premises, causing damage to the Tenant’s merchandise. It was proven that the stop valve in question was defective. The Tenant sued the Landlord for damages caused by such water infiltration. The Landlord claimed that pursuant to the lease, the Tenant’s insurance obligation was consistent with a renunciation by the Tenant to pursue the Landlord in damages, and this, coupled with the exoneration clause of the lease and the Landlord claims that the water infiltration was due to *force majeure*, should result in the Landlord not being held responsible.

Decision:

Mr. Justice Bossé first reviewed the insurance provision of the lease. He stated that the clause of the lease obliging the Tenant to subscribe for business interruption insurance was extremely ambiguous as a result of the incomprehensible manner in which it was drafted. The Court held that the case of *T.E. Limited v. Smith*, (1978) 2 S.C.R. 749 was not applicable in the circumstances and that the Tenant’s insurance obligations did not provide a waiver insofar as its rights against the Landlord were concerned.

The Court then analysed the exoneration clause contained in the lease, which stated that “the Landlord can never be held responsible for any damage or inconvenience which might be caused to the Tenant by anyone, including any other tenant of the building” (my translation). The Court stated that exoneration clause was to be restrictively interpreted, and referred to the fact that the use of the word “anyone” did not include the Landlord. Finally, the Court used article 1432 C.C.Q. and held that in the event of doubt, the clause was to be interpreted in favour of the person who contracted the obligation. The Court thus held the exoneration clause to be implacable. The Court also mentioned the fact that an exoneration clause could never be used to exonerate a person from responsibility from gross fault or intentional fault. Finally, the Court held that the circumstances required to successfully argue that the water backup was the result of *force majeure* and that it did not exist in the circumstances. Therefore, the Court found for the Tenant.

2.3 2432-9096 Québec Inc. v. Petrole Crevier Inc., J.E. 2001-734 (Superior Court)*

Facts:

2432-9096 Québec Inc. (the “**Landlord**”) and Les Pétroles Crevier Inc. (the “**Tenant**”) concluded a commercial lease that was to expire in the month of April 1998 and which contained a renewal option for five years. The clauses pertaining to the renewal stated the following:

“Special agreements:

* Case under appeal.

The Landlord gives the Tenant an option to renew the present Lease according to the following terms and conditions (...)

Renewal option:

The present Lease may be renewed at its expiration for an additional period of five years (...)

For the Tenant not to avail itself of the aforementioned renewal option, it must send to the Landlord, by registered mail, a notice of its intent not to renew this Lease at least six months prior to its expiration date". (my translation)

In 1998 at the moment of conclusion of the lease the Tenant agreed with the Landlord that it would assume the costs to replace the underground fuel reservoirs located on the leased premises. During the term of the lease the Tenant subleased the leased premises to a subtenant. In the month of September 1996, the subtenant abandoned the premises, however, the Tenant continued to pay the rent. The Tenant failed to notify the Landlord in writing within the prescribed delay of its intention to not renew the lease, notifying the Landlord of same 10 days after the deadline had elapsed. Since the Tenant failed to send a notice of non-renewal within the prescribed delay, the Landlord claimed that the lease automatically renewed. The Landlord wanted to recover costs incurred in the removal of the fuel reservoirs and arrears of rent for the renewal period. As regards to the renewal, the Tenant alleged that it was clearly evident to the Landlord that it would not renew the lease. With respect to the fuel reservoirs, the Tenant stated that the only reason it replaced this equipment was due to the fact the original fuel reservoirs belonging to the Landlord were not useable.

Decision:

The Court stated that the clauses within the lease addressing the issue of renewal were clear and contained no ambiguity. Consequently, the Court ruled that the clause had to be applied literally. Since the Tenant failed to send a notice of non-renewal within the prescribed delay, the Court held that the lease was automatically renewed for an additional period of five years. However, the Court emphasised that it was important to consider the good faith of the Tenant, that it had always maintained the same position *vis-à-vis* the non-renewal of the lease and that it tried to remedy its failure to send a non-renewal notice within the prescribed delay as soon as possible. Moreover, the Court stated that the Landlord did not demonstrate that it suffered a prejudice due to the Tenant's late notice. The Court also stressed that the Landlord did not mitigate its damages between the months of November 1997 and the beginning of 1999 by trying to find a new tenant to lease the premises. As a result, the Court decided to not fully grant the Landlord's action for unpaid rent, limiting same to 12 months' rent.

With respect to the underground fuel reservoirs, the Court held that the Tenant merely replaced equipment belonging to the Landlord that had become unusable and that the Tenant's installation of the new fuel reservoirs was not to be considered as "constructions, works or plantations" as per article 1891 C.C.Q., but rather, that the fuel reservoirs were to be considered as an accessory to the leased premises, which accessory the Tenant had to remit to the Landlord at the expiration of the lease.

As regards the Landlords' claim that the soil of the premises was contaminated by the installation of the fuel reservoirs by the Tenant, the Court ruled that the Landlord did not

successfully demonstrate that it was Tenant's maintenance or installation of the fuel reservoirs that caused the contamination. The Court noted that it was possible that prior to the leasing of the premises by the Tenant, the unusable fuel reservoirs that belonged to the Landlord might have caused the contamination. Consequently, the Court ruled that the Tenant could not be held liable with respect to the ground contamination.

2.4 La Compagnie d'Assurance Missisquoi v. Desjardins, J.E. 2001-1809 (Superior Court)

Facts:

Desjardins (the "**Landlord**") and Auto Option St-Michel Inc (the "**Tenant**") concluded a commercial lease. During the term of the lease, a part of the roof of the leased premises collapsed and the Tenant was indemnified by its insurance company, La Compagnie d'Assurance Missisquoi (the "**Insurer**"). Following the collapse of the roof, the Tenant decided to move into another immovable without informing the Landlord, the Tenant assuming that it was clear that the Landlord did not intend to repair the immovable, as no contractor or expert visited the leased premises and no construction permit had been requested from the city. During the months that followed the Landlord never repaired the collapsed roof and consequently, the city ordered the demolition of the immovable. The Insurer, having paid the Tenant, was subrogated in the Tenant's rights and instituted an action against the Landlord in order to recover the insurance indemnity it had paid. In a cross-demand, the Landlord alleged that the collapse of the roof was due to the fact that the Tenant had not removed the snow from the roof. Furthermore, the Landlord argued that the Tenant had renounced to its right to sue the Landlord, for a clause in the lease expressly stipulated that the Tenant would "discharge the Landlord from any liability for any damage or loss that was not covered by the Tenant's insurance policy". (my translation)

Decision:

The Court ruled that pursuant to Article 1854 C.C.Q., the Landlord had an obligation of result in delivering to the Tenant the leased premises in good condition, and that in a commercial lease, this principle could be derogated from due to the principle of freedom of contract. However, the Court stressed that the parties had to specifically state within the lease which repairs and obligations would be assumed by the respective parties. In the reading of the lease, the Court highlighted that the wording of the clauses did not relieve the Landlord from all responsibility. The Landlord remained responsible for repairs "that were necessary for the operation of the business and rendered essential by reason of damage or cause beyond the control of the Landlord" (my translation). Therefore, since the Court concluded that the collapse of the roof was not caused by the accumulation of the snow, but due to a defect in construction which could not be imputed to the Tenant, it was a repair that had to be assumed by the Landlord.

With respect to the aforementioned non-liability clause, the Court held that the clause was not specific enough for the Court to conclude that the Tenant had renounced to all its recourses against the Landlord for repairs. The clause specifically stated that the Tenant renounced its rights to sue the Landlord for any damages or losses that were not covered by the Tenant's insurance policy. Consequently, since the Insurer was only claiming the damages that it had paid to the Tenant in accordance with the Tenant's insurance policy, the Insurer had the right, pursuant to the contractual stipulation, to sue the Landlord.

The Court stressed that despite the fact that the Tenant had not respected the provision in the lease obliging it to give the Landlord a 60 day delay in order to effectuate the repairs, the Tenant was well founded in finding a new premises, for the Landlord did not successfully demonstrate that it fulfilled its obligation to obtain and transmit, within the prescribed 15 days following the event, an expert's opinion which would state that the repairs could be effectuated within 60 days. Therefore, since the Landlord could not prove that the repairs would have been completed within the said 60 days, the Court concluded that the Landlord did not prove that the Tenant's moving to another premises caused a prejudice to the Landlord. As a result, the Court would not grant damages for the Tenant's abandonment of the premises.

2.5 Standard Life Insurance Co. v.. Phytoderm Inc., J.E. 2002-2168 (Court of Appeal)

Facts:

In January of 1994, Phytoderm Inc. (the "**Tenant**") and Devonshire Properties Limited (the "**Landlord**") had agreed to terminate a commercial lease that had been concluded between them on condition that the Tenant would pay the Landlord the sum of \$40,000.00, which sum was left in escrow. In February 1995 the parties agreed to reduce the said sum to \$20,000.00. In November 1994, Standard Life Insurance Company (the "**Creditor**") a hypothecary creditor of the Landlord, withdrew its authorization for the Landlord to collect the rent from the immovable wherein the leased premises were located, and the Tenant received notice of same. In May of 1995, when the Creditor was declared owner of the immovable of the Landlord, the Creditor notified the Tenant that it would be collecting the sum of \$40,000.00 foreseen in the termination agreement concluded between the Landlord and the Tenant in January of 1994. Moreover, the Creditor told the Tenant that it would be cashing the cheque of \$20,000.00 that it had received as a partial payment for the termination indemnity that the Landlord and Tenant had originally agreed upon. The Tenant claimed that the cashing of the cheque (which stated that it constituted "full and final payment") was to be considered as a full and final payment. In response, the Creditor claimed that the Landlord had no right to reduce the termination indemnity from \$40,000.00 to \$20,000.00 and as a result, claimed the additional \$20,000.00 from the Tenant. The trial judge concluded that since the Creditor had cashed the cheque, this was to be considered as a final payment.

Decision:

Mr. Justice Maihot and Mr. Justice Vallerand held that the trial judge did not commit an error by deciding that the cashing of the \$20,000.00 cheque should be considered as constituting final payment. The judges made mention of the extremely short (27 hours or 4 hours, depending on the judge) period of time afforded by the Landlord to the Tenant to put a stop payment order on the \$20,000 cheque, and held this to be insufficient. Mr. Justice Vallerand specifically approved the trial judge's view that in order to have been able to claim \$40,000.00 from the Tenant, the Creditor should have first returned the \$20,000.00 cheque and then have requested the issuance of another cheque for \$40,000.00.

Mr. Justice Chamberland (dissident) concluded that the Creditor had never accepted that the cheque of \$20,000.00 constituted a final payment and that it informed the Landlord and the Tenant in April of 1995 of this fact. Moreover, the Creditor had reiterated its position on two other occasions. Given those circumstances, it was not reasonable to conclude that the cashing of the cheque by the Creditor should constitute a renunciation on its part to recover the \$40,000.00 that was due to it. In this regard, Mr. Justice Chamberland cited *Balcano Inc. v.*

Blackword Hodge Ontario Sales Limited, [1978] C.A. 199. Finally, the judge concluded that the Landlord and the Tenant did not have the requisite capacity to reduce the termination indemnity they had originally agreed upon, for the Creditor, prior to that time, had withdrawn the Landlord's right to collect the rent from the Tenant, and this also had the effect of withdrawing the Landlord's capacity to modify the termination indemnity. Therefore, Mr. Justice Chamberland was of the opinion that the agreement between the Landlord and the Tenant reducing the termination indemnity to \$20,000.00 was unenforceable as against the Creditor.

3. LANDLORD'S OBLIGATIONS

3.1 Basili v. Québit Logiciel Inc., J.E. 2002-15 (Court of Appeal)

Facts

The Appellant Arnaldo Basili (the "**Landlord**") instituted an action claiming arrears in rent and surtax. Québit Logiciel Inc. (the "**Tenant**") contested the Landlord's action and initiated a cross-demand in which it alleged that it was led into error since the leased premises were in fact 666 square feet less than what was stipulated in the lease. Therefore, the Tenant's cross-demand requested reimbursement of the amount of rent that it believed it had paid in excess. The trial judge concluded that a guarantee of the area of the leased premises was stipulated in the lease and therefore granted the Tenant's cross-demand. The Landlord appealed.

Decision

The Court concluded that the difference in area was explained by the fact that the Tenant's architects calculated the square footage of the leased premises on the interior usable area; whereas the Landlord based himself on dimensions that were on the certificate of location, where the surveyor had not taken into account certain interior renovations, such as the stairwell. Therefore, the Court held that there was no fraud on behalf of the Landlord and that the Tenant was not able to prove that the Landlord knew that the measurements were incorrect.

With respect to the error invoked by the Tenant, the Court ruled that this could not lead to a reduction of obligations, for the error was a result of the omission of the Tenant's representative to inquire about the description of the leased premises, which it admitted that it did not understand. Furthermore, the Court pointed out that the Tenant's representative had not measured the dimensions of the leased premises at the beginning of the original lease entered into between the parties in 1987, seven years prior to the litigation, even though it estimated that the leased premises were too small. The Court also took into consideration that the Tenant had subsequently entered into a new lease in 1989 containing the same formulation for the determination of the area of the leased premises. These actions led the Court to conclude that the Tenant had accepted the leased premises as they were offered. The Court concluded that the trial judge had erred in interpreting the description of the leased premises as a guarantee of its area. The rent provided for in the Lease did not refer to the area of the leased premises. Moreover, in the section of the Lease describing the leased premises, the area is specifically stated to be approximate. On a final note, the Court stated that if it would have been necessary, it would have considered the Tenant's action to be prescribed, as the proof clearly demonstrated that the Tenant had complained regarding the area of the leased premises as early as 1987, and thus could not subsequently claim that it was unaware of the actual dimensions of the premises. Therefore, the Court granted the appeal and overturned the trial judge's decision.

3.2 Hypertec Systèmes Inc. v. Antoine Morin & Associés Inc., J.E. 2001-169 (Superior Court)

Facts:

Hypertec Systèmes Inc. ("**Tenant**") instituted an action requesting the Court to cancel a commercial lease it had concluded with Antoine Morin & Associés Inc. ("**Landlord**"). The Tenant claimed that the Landlord modified the designation of the immovable wherein the leased premises were situated by allowing another tenant to carry on the business of a pornographic video rental store as well as viewing rooms offering "hostess services". The Tenant claimed that its environment was polluted and its image adversely affected by such tenant's activities. In contrast, the Landlord alleged that the Tenant knew the existence of the video club when it signed the lease and that the opening of the viewing rooms had not changed the Tenant's situation nor did it cause the Tenant a prejudice. Moreover, the Landlord argued that the zoning regulations in force allowed the exploitation of such a business.

Decision

The Court held that the Tenant had not succeeded in proving its allegations. Although the Court stated that the obligations of a landlord can extend beyond the clauses of a lease, as is foreseen by 1861 CCQ, it remains a question of degree. In order to determine the compatibility between the business exploited by the Tenant and the tenant exploiting the video club, the Court decided to verify the laws and regulations relating to the types of activities available to businesses and industries in the area of the premises. Since the activity of the video club was permitted by the zoning regulations in force, the Court concluded that it would be very difficult to limit the business. The Court stated that since public order was no longer only perceived through the concept of good morals, the relationship between the Landlord and the Tenant had to be examined through the perspective of freedom of contract. Therefore, the Court concluded that given the absence of a sufficient reason for the cancellation of the lease, the Tenant's motion for cancellation had to be rejected.

4. TENANT'S OBLIGATION

4.1 Grzywacz v. Robin Palin Public Relation Inc., JE 2001-732 (Court of Quebec)

Facts:

Mr. Grzywacz (the "**Landlord**") acquired an immovable in the year 2000 in which the leased premises were located. The leased premises were governed by a commercial lease that had been concluded in 1992. The Tenant did not fulfil its obligation contained in the lease to remit to the Landlord a series of post-dated cheques for the rent. In addition, the Tenant deducted \$160.00 from its monthly rent for the cleaning of the leased premises, as the Landlord, upon acquisition of the immovable, refused to perform same (despite the fact that same had been performed by the previous owner of the immovable). As a consequence of the Tenant's actions, the Landlord asked the Court to cancel the lease, to award it the penalty of six months rent that was provided for in the lease and to be reimbursed for extra-judicial fees and the sums of money that had been wrongfully deducted by the Tenant from the monthly rent for a duration of nine months, as well as interest at a rate of 18% on all of the sums due.

Decision:

The Court held that pursuant to article 1864 C.C.Q., a tenant was subject to certain obligations, namely, those which dealt with repairs that had to be performed to the leased premises, which were of three kinds: (i) lesser maintenance repairs, (ii) repairs that were necessary due to the fault of the Tenant and (iii) works regarding the cleanliness and security of the leased premises. The Landlord's claim was based on the last category of repairs, which it stated was the Tenant's responsibility, since there was no contractual stipulation that provided otherwise. After examining the lease, the Court stressed that the lease foresaw that it was the Tenant's obligation to maintain the leased premises in a good and clean state; the fact the previous landlord provided the cleaning services gratuitously did not have the effect of modifying the lease, for the lease itself specifically provided that all modifications be evidenced in writing.

Since the Tenant only partially paid its monthly rent and refused to remit a series of post-dated cheques to the Landlord and since the terms of the lease were clear, the Court decided to cancel the lease as of April 1, 2001 and to give effect to the penal clause that was provided for therein.

With respect to the extra-judicial fees claimed by the Landlord, the Court decided that the Landlord did not have right to be reimbursed in total for such fees. The Court reasoned that although article 1617 C.C.Q. allowed damages for the delay in the execution of an obligation to pay a sum of money, it was imperative that the Landlord justify its claim. Finally, the Court held that all sums due were to bear an interest rate of 18%, as foreseen in the lease, from the day they became exigible.

4.2 Guardian du Canada, Compagnie d'Assurance v. Belley, J.E. 2001 - 1976 (Superior Court)*

Facts:

An immovable containing three residential dwellings and two commercial premises was damaged by a fire. Three actions were joined in the case. In two actions, two insurance companies were suing a group of four tenants exploiting a floral business (the "Tenants") on the premise that the fire was caused by the heat emitted from an electrical light bulb located in basement of the leased premises, which was in the immediate proximity of combustible materials that belonged to them. In the third action an insurance company alleged that the cause of the fire was due to an electrical problem that was a result of the immovable owner's failure to maintain the immovable.

Decision:

The Court concluded that the circumstances surrounding the fire created a presumption that the light bulb was the cause of the fire, namely: the fact that it was on, the presence of a great of quantity of combustible materials in its immediate environment, the fact that the combustible materials were organized in a certain fashion, the fact that the light bulb was situated in the zone where two experts had determined that the fire had started and the fact that one of the Tenants went down to the basement on the day of the fire. The Court ruled that since the fire occurred in 1993, article 1643 C.C.L.C. applied and that the insurance companies

* Case under appeal.

had to prove the fault of one of the Tenants or persons to whom they had permitted access to the leased premises. Moreover, since the Tenants had control to the access of the basement where the light bulb was situated coupled with the fact that the lease described the leased premises as including the basement, the Court held that it was only with permission of the Tenants that anyone could have access to the basement.

Additionally, even though a simple light bulb did not normally present a fire hazard, the fact that the fire was started by such a cause did not lead the Court to presume that it was *force majeure*. The Court stressed that considering the configuration of the premises, the power of the light bulb (100w) and the objects that were in the basement, the Tenants should have taken some preventive action against such an eventuality. The Court concluded that the fault resulted from the negligent actions of the Tenants, namely that they stored items within the basement and that the fire was a logical, direct and immediate consequence of this fault. Moreover, the Court stated that the fact that one of the Tenants did not turn off the light bulb did not have the effect of imputing responsibility to that Tenant alone. Finally, since all the Tenants were held at fault, the action against the owner of the immovable was rejected.

5. EXPENSES PAYABLE

5.1 G. E. Capital Realty Management Inc. v. Zellers Inc. J.E. 2001-1044 (Court of Appeal)

Facts:

The Appeal involved the interpretation of clauses no. 6 and 7 (b) of a commercial lease that was concluded between the parties on March 20, 1997. The respective clauses contained the following:

"6. Net Net Lease

It is the intention of the parties that the Minimum Net Net Rental set out in Article 4 of the Lease shall be net net to the Landlord and the Tenant shall pay for its own account, to the complete exoneration of the Landlord, all costs and expenses affecting the Property by the business carried on therein, and all the Property taxes and costs other than that which is otherwise provided in this lease and other than any interest or amortization charges of Landlord in respect of mortgages, hypothecs, or other securities and other than any capital gain or income tax due by the Landlord.

7. Payment of taxes, assessments, etc.

Without limiting the generality of the foregoing paragraph 6, Tenant shall, throughout the Term and any renewal thereof, be responsible and pay to the complete exoneration of Landlord the following taxes, costs and expenses:

(...)

b) All taxes, properties taxes, municipal taxes, tax on capital, school taxes, ecclesiastical taxes, Montreal Urban Community taxes, rate including local improvement rates, duties and

assessments that may be levied, rated charged or assessed against the Property and/or all equipment and the facilities thereon or therein, and/or any property on or in the Property owned or brought thereon or therein by Landlord, and any and every of its assignees or subtenants and it and their respective officers, agents, employees, servants, visitors or licensees and/or against Landlord or Tenant in respect thereof, whether such taxes, rates, duties or assessments are charged by a Municipal, Parliamentary, school, or any other body of competent jurisdiction"

J.E. Realty Management Inc. (the "**Landlord**") claimed that pursuant to clauses 6 and 7(b) of the lease, it was the responsibility of Zellers Inc. (the "**Tenant**") to pay the taxes on capital. The trial judge had rejected the Landlord's attempt to obtain a declaratory judgment confirming the Tenant's obligation to pay for capital taxes.

Decision:

The Court ruled that a capital tax could not be collected by the Landlord from the Tenant unless the lease contained a specific text providing for same, and it also ruled that in this particular case such a specific text or clause was absent. According to the Court, the taxes were to be established by examining the characteristics of the owner of the immovable, namely, its juridical status, its financial statements and the location of its head office or of its principal establishment. Furthermore, the Court stated that the portion of the corporation's capital relating to the building under lease was not specified in the lease and that the portion of capital was not taxed in a distinctive manner. As the entirety of a corporation's capital is subject to tax on capital, the data required in order to determine the taxable capital can vary during the term as a result of unilateral decisions of the Landlord. Accordingly, the Court held that in order to determine the exact amount of tax on capital applicable to the immovable, this had to be specifically provided for in the lease. In virtue of the fact that the lease did not contain a specific clause establishing the proportion of tax on capital to be assumed by the Tenant, the Landlord was not allowed to claim any tax on capital from the Tenant.

5.2 Télémedia Radio Inc. v. La Société Immobilière en Propriété Marine Limitée: 500-05-05373-992 (Superior Court)*

Facts:

By way of motion for declaratory judgment, Télémedia Radio Inc. and Les Entreprises Radiomédia Inc. (the "**Tenants**") requested that the Court determine if their leases entered into on July 15, 1997 (the "**Leases**") with La Société Immobilière en Propriété Marine Limitée and Elliot Aintabi (the "**Landlord**") entitled the Landlord to claim from the Tenants, as a management fee, 5% of the total revenue of the building wherein the leased premises were situated, although this percentage was nowhere to be found in the leases.

The Landlord referred to a previous lease that had been entered into with a related entity of the Tenants, Télémedia Communications Inc. ("**Telemedia**"), alleging that in 1991 the matter had been resolved by Telemedia having agreed to pay a 3% management fee in addition to a 15% administration fee. The Landlord claimed that operating costs implied the existence of

* Case under Appeal

management fees. The Tenants claimed that Telemedia constituted a different entity, and denied having agreed to pay the 5% management fee.

Decision:

Madame Justice Morneau noted that the question relating to the differences between Telemedia and the Tenants would not impact the decision of the case, and that the point was not stressed at trial. The Court reviewed the various provisions of the Leases, including the entire agreement clause and the clause terminating all prior leases and agreements, and then held that these provisions would not necessarily prevent the Court from looking at the past conduct of the parties, in its attempt to determine the meaning of the Leases, the Court citing articles 1425 and 1426 C.C.Q. The Court also noted that there may well exist situations where no common intention of the parties exists in respect of certain ancillary clauses of a contract.

The Court indicated that the Leases set out, in great detail, the operating expenses payable by the Tenants, unlike the situation that existed in the prior leases. The Leases provided the following:

- 8.3 “Operating Costs - The words “Operating Costs” mean all expenses and all costs and disbursements of whatsoever nature...the whole without duplication and in accordance with generally accepted accounting principles. Without limiting the generality of the foregoing, the term Operating Costs includes the following:
- (a) salaries, including fringe benefits of Landlord’s employees exclusively involved in the operation...of the Property;

Notwithstanding the generality of the foregoing paragraph, it is understood that the following expenses shall not be included in “Operating Costs” and shall not be paid by the Tenant:

...management costs not related to maintenance or operation, particularly expenses related to promotion, advertising, leasing, inducement payments to tenants and free rent periods” (my translation)

The Court stated that the above would oblige the Tenants to pay for expenses without duplication, and that the employees must exclusively be performing services for the building. The Court held that management fees equal to 5% of the total revenue of the building would be justified by a management contract granted to companies related to the Landlord, however, the Court went on to say that in the case at hand, the employees did not devote themselves exclusively to the building. The Court noted that the management contract was only disclosed to the Tenants in 1999 (although it was dated in 1996), and that Marine Industries Limited, the supposed manager, was inactive according to its financial statements for the years ending December 31, 1997 and 1998. The Court went on to state that the management fee of \$225,000 per annum was in no way justified by the services rendered, and that there was a consistent duplication of charges, the whole in contravention of the Leases. Finally, the Court also noted that the Tenants had been kept in the dark as regards the billing for management fees by the Landlord until the summer of 1999.

In view of the foregoing, the Court held that the Landlord had not proven the existence of management fees falling within the conditions of the Leases. The Court thus concluded that only fees reasonably and actually incurred by the Landlord for the management of the building

could be charged to the Tenants, and that the Landlord had no right to claim from the Tenants, as a management fee, their proportionate share of an amount corresponding to 5% of the total revenue of the building, which the Court classified as being a "fictitious amount". Accordingly, the Landlord was ordered to repay the Tenants \$67,391 and \$23,986 respectively, together with interest and costs.

6. LEASE REGISTRATION

6.1 2682982 Canada Inc. v. Compagnie 390 Saint Jacques Nova Scotia, J.E. 2001 - 1225 (Court of Appeal)

Facts:

In 1998, 2682982 Canada Inc. (the "**Tenant**") loaned a sum of money to the then landlord. In February of 1991 the parties concluded a new commercial lease (the "**Lease**") that was duly registered. The term of the Lease was for one year, with nineteen consecutive one year renewal options, which were automatically exercised unless the Tenant would give notice to the contrary thirty days prior to the expiry of any such one year period. In virtue of a separate document, the parties had agreed that the capital and interest of the loan would be transformed into prepaid rent. Following the conclusion of the Lease, it was the Tenant who paid the electricity bills, repairs and taxes for the landlord, who was in default of its obligation to pay same. The Tenant also installed a separate electrical meter in order to cease to be threatened from being cut off from electricity. Each time the Tenant paid said sums it would sign with the landlord a document establishing that these sums would be transformed into prepaid rent. On July 8, 1996, the City of Montreal bought the immovable at sheriff's sale. The City admitted that it received, at the time of the sale, a copy of all documents that the previous landlord possessed and acknowledged that the sums paid by the Tenant were done in order to remedy the landlord's default and that the parties had transformed such payments into prepaid rent. The Tenant declared to the City that in its opinion said sums were transformed into prepaid rent, and thus it did not have to pay rent for the next 17 years.

In February of 1998 the City put the immovable up for sale. On June 1, 1999, Compagnie 390 Saint Jacques, Nova Scotia (the "**Landlord**") purchased the immovable from the City. Prior to the purchase of the building, the Tenant forwarded the Landlord a copy of documents demonstrating its position *vis-à-vis* the prepaid rent. The Landlord acknowledged in the deed of sale to have taken cognizance of the commercial lease that was concluded by the original landlord and the Tenant in February of 1991. The Landlord invoked article 2963 C.C.Q. and claimed that it was not bound by the terms of any of the subsequent amendments and instituted proceedings to recover all arrears of rent. Moreover, the Landlord also requested that the Lease be cancelled. In contrast, the Tenant claimed that the Landlord was bound by all subsequent agreements that it had concluded with the previous owner of the immovable as regards the prepaid rent, for it had informed the Landlord the existence of such documents prior to the signing the deed of sale. The issue of the case was to determine the rights of the Tenant, considering that the Lease was published and the subsequent agreements were not.

Decision:

Mr. Justice Nuss and Mme. Justice Rousseau-Houle concluded that in order for a commercial lease to be enforceable against a new acquirer of an immovable, it must be published. The fact that the Landlord was aware of the existence of subsequent agreements relating to the Lease did not have the effect of making them have the same enforceability as a

published lease. Moreover, since the subsequent documents were not published, a subsequent acquirer of the immovable had the discretion to cause them to be resiliated with respect to the period subsequent to the twelve months after the date such subsequent acquirer became the owner of the immovable, as per Article 1887 C.C.Q. This had been done by the City of Montreal in its December 18, 1997 notice to the Tenant (the City's ownership having definitively occurred on July 4, 1997). Therefore, the Tenant was not able to enforce such agreements against the Landlord. The Court held that that trial judge correctly fixed the rent at \$5,825 per month by basing himself solely on the Lease and by crediting the amounts that were paid by the Tenant for electricity.

With respect to the agreements acknowledging the prepaid rents, such writings had to be proven by the Tenant. The Court stated that the ordinary rules of evidence applied and that it was not necessary for the agreements evidencing prepaid rents to be published in order for such payments to be invoked against the Landlord. The Court noted that it was only concerned with alleged pre-payments of rent for the period commencing on June 1, 1999, the date the Landlord had purchased the immovable, and that whether or not rent was prepaid for prior periods of time was irrelevant. The Court stated that in order for the Tenant to take the position that rents had been paid in advance, the Tenant would have had to unequivocally renounce its right to cancel the remaining one year options and, by doing so, put an end to its right to cancel the Lease in any given year prior to its expiration date in 2011. As the Tenant had not done so, the Court held that the Tenant had never definitively leased its premises until 2011. The Court referred to Articles 1553 C.C.Q. and 1554 C.C.Q., dealing with the payment of a debt, and stated that there could be no payment in advance unless there was an obligation to satisfy. The Court further stated that the Tenant at no time had an obligation beyond the payment of rent for the one year periods during which it had chosen to exercise its option. Accordingly, the Tenant had failed to prove that it had committed itself prior to the acquisition of the immovable by the City of Montreal to lease its premises for the year commencing March 1, 1999, and the same result would apply for rent payable for all subsequent years for which an option was granted. The Court held that the Tenant had failed to discharge its burden of proving that it had, in fact, paid in advance any rents that would become due under the Lease for the period commencing June 1, 1999. The Court then went on to modify the trial judge's decision by striking the conclusions which had provided for the cancellation of the Lease, damages and expulsion, and held that the Tenant should not be precluded from the possibility of remaining in the premises, subject to respecting the conditions of the Lease.

Mr. Justice Beaugard, while subscribing to the above reasoning, expressed no opinion on the issue of whether a tenant could set up against a new purchaser of an immovable the fact that it had lent money to the previous owner of such immovable with the right to set off same from future rentals, without such an agreement being indicated in the registered lease.

7. ABANDONMENT OF PREMISES

7.1 Corporation d'Hébergement du Québec v. Gestion V.S.P. (1982) Inc., J.E. 2001 - 960 (Superior Court)*

Facts:

A commercial lease with an expiration date of December 1999 had been entered into between the parties. In 1992 the hypothecary creditors of the landlord/owner repossessed the immovable. One of the creditors instituted an action to recover arrears of rent that Gestion V.S.P. (1982) Inc. (the "**Tenant**") refused to pay on the pretext that the immovable was in bad

condition. In 1993 the hypothecary creditor and the Tenant signed a settlement in order to end the proceedings regarding the arrears of rent. According to the settlement, there would be a important reduction in the unpaid rent claimed to have been owing by the Tenant due to the lamentable state of the immovable. It also contained a clause by which the Tenant acknowledged that the immovable would be sold in the near future, that the buyer would effectuate repairs and that the Tenant had received compensation for the inconvenience that such repairs might cost. Centre d'Hébergement du Québec (the "**Landlord**") acquired the building and was subrogated in the rights of the hypothecary creditor. In the month of June 1993 there was an exchange of letters between the Landlord and the Tenant by which the Tenant proposed to cancel the lease, whereas the Landlord stated that it was satisfied with the Tenant and affirmed the possibility of considering cancellation, conditional upon finding a new tenant and that the Landlord would not incur any costs. In the month of August 1993, the Tenant accepted an offer to lease premises in a neighbouring immovable and relocated thereto near the end of January 1994. The Landlord sent a notice of termination of the Lease to the Tenant on July 15, 1994, -and the Tenant responded that it considered the Lease to have expired on January 31, 1994. Subsequently, the Landlord instituted proceedings for non-payment of rent and damages.

Decision:

The Court pointed out that, in fact, the Landlord never refused nor neglected to effectuate the repairs. Immediately upon acquiring the immovable, the Landlord put out a call for tenders for the work. By May of 1994, 80% of the repairs and work had been terminated. The Landlord had acquired the immovable in April 1993, and the settlement as well as the deed of sale indicated that the Landlord had until the end of January 1994 to terminate the repairs. However, the Court stressed that it was clear from the Tenant's actions that it had the intention to abandon the premises prior to knowing if the work would be terminated by the end of January. Moreover, pursuant to the settlement, the Tenant had accepted to be patient and to suffer a certain amount of inconvenience due to the poor state of the immovable. Therefore, the Court concluded that the Tenant did not respect what it had agreed to in the settlement, for it did not give the Landlord a reasonable delay to execute the repairs. As a result, the Tenant did not meet all the necessary criteria to legally abandon the premises.

Although a clause in the lease stipulated that the Tenant and its directors would be responsible for the obligations and conditions of the lease, the Court concluded that since the actions of the Tenant's director (who happened to be an attorney) were not fraudulent or abusive, his personal responsibility could not be invoked.

On a final note, the Court held that the Landlord's claim for damages from the months of February through June 1994 and liquidated damages for a further period of one year should be reduced to an amount equivalent to six months rent only. The Court held that as the Landlord had indicated in its July 15, 1994 letter that the Lease was terminated, the provision of the Lease dealing with the damages payable by the Tenant in such circumstances, being one year's rent, prevented the Landlord from claiming unpaid rent for the months from February through June 1994. In addition, the Landlord, by occupying the premises a few days following the Tenant's departure and effecting repairs thereon rendering the premises untenable, together with its delay until July 15 to send the notice of termination of Lease, was only granted damages in the amount of six months rent.

7.2 Station de service Gaston Boucher Inc. v. Ménard, J.E. 2001 - 1083 (Superior Court)*

Facts:

Station de service Gaston Boucher Inc., the owner of an immovable containing a service station (the "**Landlord**") concluded a commercial lease with Luc Ménard (the "**Tenant**"), which contained an option to purchase. The lease also contained a clause whereby the Tenant was entitled to perform an analysis of the ground, and that regardless of the results the Tenant would not be able to cancel the lease prior to the expiration of the term. Another clause stipulated that in the event that the Tenant availed itself of the purchase option, the deed of sale would contain a clause excluding any environmental guarantees on behalf of the Landlord. Prior to the end of the lease the Tenant abandoned the premises, claiming that false declarations had been made by the representatives of the Landlord, namely, that the land was not contaminated, that the underground fuel reservoirs were in good working order and that annual income of the service station was between \$40,000 and \$50,000. In its action the Landlord claimed arrears of rent, heating and electricity fees, municipal and school taxes, environmental characterization fees, the costs incurred for the removal of the fuel reservoirs, legal fees and damages for inconvenience and stress.

Decision:

According to the Court, there existed no evidence that the Landlord's representatives made any declaration regarding the good working order of the fuel reservoirs, that the ground was not contaminated and that the figures on the financial statements of the business were not correct. Moreover, even if the Tenant had learned after the conclusion of the lease of the necessity to remove one of the fuel reservoirs, this did not authorize the Tenant to abandon the premises prior to the end of the lease. The Court stressed that the real reason that the Tenant abandoned the premises was the fact that the operating costs were much higher than it expected and that the profits from the business were not sufficient. As these were not a consequence of the Landlord's actions, the Court granted the Landlord the right to recover the arrears of rent, as well as the heating, electricity, municipal and school tax fees it had paid.

With respect to the environmental characterization costs, the Court concluded that it was an obligation that was attached to the purchase option and not to the lease. Moreover, since the Landlord did not proceed with an analysis of the ground, it had sustained no loss and could not recover any disbursements it made. As regards the removal of the reservoir, the Court stated that the lease foresaw that the Tenant would assume the costs for any major repairs that had to be done. The Court also pointed out that the diesel fuel reservoir was not usable at the moment the lease was concluded. Therefore, the Tenant was not liable for the costs incurred in the removal of same, for the Landlord had the obligation to deliver it in a good state. The Court also mentioned that the lease did not provide any clause relating to the Tenant assuming the legal fees of the Landlord in the event of a problem arising due to the lease. However, the lease provided that the Tenant would pay interest of 15% on all sums disbursed by the Landlord to remedy any of the Tenant's obligations. Hence, the Court allowed the Landlord to claim interest of 15% for any such disbursements. Finally, since the Landlord was not able to successfully demonstrate that it had right to an indemnity for inconvenience or stress, the Court did not grant such damages.

* Case under Appeal

8. TESTIMONY

8.1 Chatel Votre Nettoyeur Inc. v. 2616-9136 Québec Inc., J.E. 2001-2179 (Court of Appeal)

Facts:

The trial judge did not allow testimonial evidence in order to clarify the circumstances surrounding why the last sentence of Article 30 of a commercial lease signed by Chatel Votre Nettoyeur Inc. (the “**Tenant**”) was deleted from the executed lease. The deleted sentence of Article 30 of the lease stated: “*If the Tenant does not obtain such permits or licenses, it will nevertheless remain bound by the terms of the present lease and shall execute all the other obligations therein (my translation)*”.

Decision:

Even though the Court held that the trial judge had erred in not allowing testimonial evidence in order to clarify the deletion of the last sentence of Article 30 of the lease, the Court rejected the Tenant’s appeal. In effect, the Court ruled that the trial judge had analysed all the evidence (including that given under reserve of the objection) and concluded that the president of the Tenant, contrary to the testimony that he had given, knew, prior to signing the lease, that the zoning regulations did not permit the envisioned business.

The Court also stated that an equally compelling reason for the deletion of the clause was that the Tenant intended to leave every possibility open and take a chance in operating its business while at the same time attempting to obtain a modification to the zoning regulations, which would enable it to eliminate its competitors. Finally, the fact that the Tenant abandoned the premises without notice was not favourable for the Tenant and not compatible with the Tenant’s allegation that a modified agreement had been entered into between the parties allowing it to abandon the premises at its own discretion. Accordingly, the Court rejected the Tenant’s appeal, thus condemning the Tenant to pay the Landlord an amount in excess of \$280,000 and costs.

8.2 Pierret Industries Canada Inc. v. Gilbert, J.E. 2001-821 (Québec Court)*

Facts:

In November of 1995, Pierret Industries Canada Inc. (the “**Landlord**”) and Gilbert (the “**Tenant**”) concluded a commercial lease (the “**Lease**”) for a monthly rent of \$2,000.00. According to the Tenant, on the same day, the parties concluded a verbal agreement whereby the Landlord accepted to reduce the monthly rent to \$1,000.00. Pursuant to the verbal agreement, the vice-president of the Landlord signed a document where it obliged itself to reimburse \$1,000.00 every month to the Tenant. However, when a new vice-president of the Landlord took office, he presumed that the agreement had only been concluded for a period of one year and in November of 1996, stopped reimbursing the Tenant. Beginning in February 1997, the Tenant started paying \$1,000.00 per month for the rent, effecting compensation for the amounts no longer reimbursed by the Landlord. In August of 1998, even though the Landlord had sent a notice of demand asking the Tenant to leave the premises, the Tenant

* Case under Appeal

continued to occupy the premises and pay \$1,000.00 per month. The Landlord claimed that the verbal agreement concluded in November of 1995 could not be used as evidence because it contradicted an entire agreement provision contained in the Lease.

Decision:

The Court stressed that the signed document by the then vice-president of the Landlord in November 1995 did not have the effect of modifying the Lease. The document signed by the then vice-president of the Landlord only foresaw that the Landlord would pay the Tenant \$1,000.00 per month. Moreover, the Court held that the signed document constituted a commencement of proof, which tended to confirm the existence of the verbal agreement with respect to the monthly rent being reduced. As a result, testimonial evidence was allowed by the Court in order to establish the verbal agreement as per article 2862 C.C.Q. The Court made mention of the fact that the Landlord had cashed, for a period of 18 months without protest, the cheques for \$1,000.00 that the Tenant had issued in respect of the rent, and that this would confirm that the previous vice-president of the Landlord had accepted a monthly rent of \$1,000.00. Moreover, even though such person no longer worked for the Landlord, the Landlord could not disavow his actions, for they had been done within the scope of his mandate. Accordingly, the Landlord's claim for unpaid rent for the period from February 1, 1998 onward was rejected.

9. SERVITUDES

9.1 Épicerie Unie Métro-Richelieu Inc. v. Standard Life Insurance Co., [2001] R.D.I. 235 (Court of Appeal)

Facts:

In 1991, the Standard Life Insurance Co. (the "**Creditor**") obtained a hypothec on the shopping centre belonging to Centre Commercial Victoriaville Limitée (the "**Landlord**"). In May of 1996, the Landlord granted to 3105555 Canada Inc. ("**310**"), an entity related to the Landlord which had acquired from Canadian Tire land adjacent to the shopping centre, a servitude charging the centre, which specifically prohibited the operation of a supermarket as well as the sale of certain products in the centre. The servitude was intimately intertwined with the lease by Épicerie Unie Métro-Richelieu Inc. ("**Metro**") for premises situated on the adjacent land, and specifically provided that the servitude would come to an end in the event that (i) Metro's lease would cease to be in full force and effect, (ii) the day Metro would voluntarily permanently close its premises, (iii) the date upon which Metro would cease using at least 60% of its premises for a supermarket operation. In March of 1997, the Creditor served the Landlord with a notice indicating that it was exercising its hypothecary right. In the month of May 1997, the Landlord signed a document whereby it voluntarily surrendered possession of the centre in favour of the Creditor. In May 1997, the Creditor instituted proceedings before the Superior Court, in order to have the servitude declared unenforceable.

The trial judge considered that the agreement concluded between the Landlord and the Tenant was an exclusivity clause rather than a real servitude, because it did not have all the attributes of a real servitude. Moreover, the trial judge emphasized that the purpose behind the agreement between the parties was to provide a commercial advantage for the Tenant and was not enforceable against the Creditor. Metro claimed that the agreement between the Landlord and the Tenant constituted a real servitude under the *Civil Code of Quebec*, and that the trial judge erred in interpreting article 1177 C.C.Q. Metro further submitted that the Creditor's

recourse founded on articles 1631 C.C.Q. and 2734 C.C.Q. was extinguished by the fact that it had taken the centre in payment.

Decision:

The Court noted that a real servitude was a charge imposed on an immovable in favour of another immovable and that its definition had not changed in the *Civil Code of Quebec*, as compared with the *Civil Code of Lower Canada*. The Court made mention of the fact that charges such as servitudes are to be restrictively interpreted, as the law does not favour the dismemberment of the right of ownership. Moreover, article 1177 C.C.Q. did not expressly state that the charge on the servient land had to be a restriction on use, it only stated that a charge could oblige the owner of the servient land to tolerate certain acts of use by the owner of the dominant land. In addition, the Court stressed that even if the clause in question described the land in detail, it could not be considered as a real servitude because it was not established in favour of the dominant land. Rather, the restriction imposed on the servient land conferred a direct benefit on Metro, the tenant of the dominant land. The Court noted that the benefit would end at the expiration of Metro's lease or following the closure of its business. According to the Court, an essential component of a servitude is that it be perpetual. Furthermore, the Court emphasized that it is not because a servitude has a term that it will be prevented from attaining the status of a real servitude. Rather, it was that the term, in this case, was attached to the personality of the occupant of the dominant land (i.e. Metro). For these reasons, the Court concluded that the servitude was not perpetual and could therefore not be considered as a real servitude.

In deciding if the agreement in question could be held to constitute a personal servitude, the Court stated that the real right had to be exercised directly on the property and not through an intermediary such as an individual. Moreover, regardless of the fact of whether it was a real or personal servitude, a servitude in general could not impose, primarily on the owner of the dominant land, the duty to play an active role. Thus, the Court concluded that the advantages conferred upon Metro under the so-called servitude were merely personal rights, similar to a non-competition clause, and accordingly such agreement was not enforceable as against the Creditor.

It is to be noted that leave to appeal the decision of the Court of Appeal was refused.

10. CORPORATE VEIL

10.1 Cité de l'Île Shopping Centers Inc. v. 2425-9434 Québec Inc., J.E. 2001-2093 (Superior Court)

Facts:

Cité de l'Île Shopping Centers Inc. (the "**Landlord**") and 2425-9434 Québec Inc. (the "**Tenant**") entered into a commercial lease on April 19, 1993, with the term being from October 1, 1992 until September 30, 2002. In the fall of 1996, the Tenant had requested a reduction of rent due to the fact that its business income no longer allowed it to pay the rent that had been agreed upon. In response, the Landlord had agreed to study the matter and had requested the financial statements of the Tenant. From this moment on, the Tenant paid, on its own initiative, a lower rent than foreseen in the lease and remitted all financial documents to the Landlord. Up until March of 1999, the Landlord continued to accept the reduced rent without ever confirming in writing its acceptance of this reduced amount as rent. Rather, each month the invoice

transmitted to the Tenant would indicate the amount of outstanding rent that it owed to the Landlord. Believing that it would never obtain any confirmation from the Landlord, the Tenant ceased to operate its business. The principals of the Tenant created a new company and signed a 10-year lease in a neighbouring immovable. The Tenant moved all the furniture and equipment (including certain items that had become immovable) that had been found in the leased premises into the new leased premises. In May of 1999, the Landlord instituted an action against the Tenant, its directors as well as the new company they had formed and its new directors. A short time afterwards, the Tenant made an assignment in bankruptcy and the Landlord filed evidence of its claim. Considering that the Tenant had gone bankrupt, the Tenant alleged that the Landlord's claim had become null. However, the Landlord continued to pursue its recourse against the directors and against the new company.

Decision:

The Court stated that even though the new company carried on the same type of business as the Tenant, had the same personnel and the same managers, this did not automatically make it responsible for the debts of the Tenant. Although this eventuality could permit the lifting of the corporate veil, the Court stressed that it was very common for many companies to go bankrupt and their directors to start up new companies carrying on the same type of business. With respect to the goods that belonged to the Tenant, the Court held that the Landlord failed to exercise its hypothecary right on same and to attack the sale made by the trustee; as a result, these goods validly belonged to the new company that had purchased them. As regards the movables on the premises that had been attached to the immovable, the Court considered that the directors of the Tenant had illegally removed them. As a result, the directors of the Tenant were held responsible for the damages that such actions had caused to the Landlord. Moreover, since the new company and its administrators were accomplices to these illicit acts, they were also held responsible. Consequently, the Court awarded \$7,000.00 to the Landlord for damages that had been caused to the leased premises as well as the value of the goods that had been illegally removed.

11. INSURABLE INTEREST

11.1 Paquette v. Prévoyance Compagnie d'Assurance, R.E.J.B. 2001-26430 (Court of Appeal)

Facts:

The issue of the case was to determine if a Tenant had an insurable interest to subscribe to an insurance policy on the immovable containing the leased premises.

Decision:

Mr. Justices Proulx, Fish and Rochette concluded that it was evident that Paquette (the "**Tenant**") and Roy (the "**Landlord**") disclosed to the insurance broker the fact that they were respectively the Tenant and Landlord. It was also evident that the broker communicated this information to Prévoyance Compagnie d'Assurance (the "**Insurer**"), and the Insurer then mentioned that the Landlord and Tenant should obtain a notarized act (i.e. a promise of sale).

The Court also noted that a notarized act reproducing all the essential elements of the initial agreement concluded between the Landlord and the Tenant had been filed. Moreover, the fact that the notarized act foresaw that the Tenant had an option to purchase rather than a

promise of sale did not have any impact on the validity of the insurance policy. The Court reminded the parties that it had previously decided that an insured party did not have to be the owner of the building in order to have an insurable interest in it. Thus, the Tenant was ruled to have an insurable interest in the building.

Finally, the Court held that the trial judge had not erred in granting the Landlord's action for damages against the Tenant; however, the trial judge did err by not granting the Tenant's action in warranty against the insurance company. Therefore, the Court ordered the Insurer to reimburse the Tenant all the sums that it had paid to the Landlord.

12. OPTION TO PURCHASE

12.1 Agropur Coopérative Agro-alimentaire v. Anjou (Ville de), J.E. 2001-439 (Superior Court)

Facts:

In June of 1964, Grenache Inc. ("**Grenache**") sold a portion of land to the City of Anjou (the "**Landlord**"). On the same day, Grenache and the Landlord concluded a lease for 20 years on the land in consideration of a total rent of \$1,230,160, payable over the term of the lease. The sale proceeds of the land were to serve as prepaid rent or to be imputed on the sale price of the immovable in the event that Grenache decided to exercise its purchase option. Eventually, Grenache merged with Agropur thereby becoming one entity (the "**Tenant**"). Meanwhile, the City adopted a municipal regulation that authorized the purchase of the land, the lease and the construction of an industrial plant on the land. In November of 1985, the Landlord confirmed to the Tenant that it had fully paid the rental owing, which was also the sale price for the land. In the spring of 1992, the Tenant decided to sell the immovable and in doing so discovered that it had never become the registered owner thereof. Consequently, the Tenant sent a draft deed of sale for the immovable to the Landlord. In March of 1993, the Landlord notified the Tenant that it would not renew the lease and that in the absence of any new agreement, the Landlord would take back possession of the immovable. Since then, the Tenant had refused to leave the premises and the Landlord had asked the Tenant repeatedly to conclude a lease, failing which it would repossess the immovable. The Tenant instituted the present action in order to oblige the Landlord to sign a deed of sale transferring the ownership of the immovable. The Landlord alleged that the purchase option was void on the grounds that it contained no sale price and that the Tenant had renounced to its right to exercise the purchase option. Lastly, the Landlord argued that the powers conferred to the Landlord, as a public administration, were insufficient to allow the Landlord to conclude a deed of sale.

Decision:

The Court ruled that the initial deed of sale/lease concluded between Grenache and the Landlord constituted an indirect way for the Landlord to self-finance the construction of an industrial plant. Pursuant to the purchase option, Grenache had a right to become owner of the immovable after having provided for all the sums paid by the Landlord and by manifesting its intention to acquire the immovable. No delay for the purchase option was foreseen within the lease. The Court ruled that upon termination of the lease the Landlord had to assign the immovable to the Tenant without any consideration and at the request of the Tenant. Thus, the Court stressed that it was not in the Tenant's interest not to exercise the purchase option and that the Tenant simply had forgotten to do so.

Additionally, the Court ruled that the purchase option was not an accessory of the lease, but a principal right linked to the initial deed of sale by which Grenache had sold the land to the Landlord. Consequently, the Court ruled that the time period between 1984 and 1992 did not extinguish the Tenant's purchase option. Moreover, the Court stressed that since the Tenant reimbursed all sums due in virtue of the purchase option and because the Landlord recognized in its letter of January 1984 that the Tenant had made all payments, both parties had acted tacitly in order to confirm their intention to make the Tenant the owner of the immovable. In other words, the Court concluded that the Tenant did not renounce to its right to exercise the purchase option and that it exercised this right within a reasonable delay.

Finally, the Court held that the Landlord did not have any right to recover arrears of rent, since the lease ended in December 1984 and was not renewed. This meant that for a full period of nine (9) years the Tenant paid no rent and the Landlord claimed nothing from the Tenant. Moreover, the Landlord's allegation that the lease had been tacitly renewed was not accepted by the Court, for such a claim was incompatible with the purchase option, the object of the contract signed by the parties and the fact that the Tenant was occupying the immovable as a buyer.

13. TRANSFER OF RIGHTS

13.1 167363 Canada Inc. v. W.R. Grace and Co. Ltd., J.E. 2001-230 (Court of Appeal)

Facts:

On April 12, 1965, a lease had been entered into between W.R. Grace & Co. Ltd. (the "**Tenant**") and the predecessor in title to 167363 Canada Inc. (the "**Landlord**"). The Tenant proceeded to sublease the premises to various subtenants. The term of the lease expired on April 30, 1990. In 1991, the Landlord invoked certain stipulations of the lease in order to recover from the Tenant the costs of repairs that it had to perform to put the leased premises back in its original condition. In 1997, a hypothecary creditor of the Landlord notified the Tenant and the subtenants that it held all the rights resulting from the commercial lease. The trial judge rejected the Landlord's action for damages after having concluded that the Landlord no longer possessed the necessary juridical interest.

Decision:

The Court noted that the hypothecary loan that the Landlord had signed stipulated the following:

"9.1 The Borrower assigns to the Lender all of his rights under existing leases and assigns and undertakes to assign to the Lender all his rights under future leases, as they come in force.

9.2 The Borrower may, however, provided that he is not in default hereunder, exercise these rights himself until the Lender serves this assignment upon the tenants with a notice of its intention to avail itself thereof, at which time only the Lender can exercise the Borrower's rights as a lessor.

9.3 In the event that the Borrower collects money while in default and before the service of the notice herein before mentioned, the

Lender may demand from him the immediate reimbursement thereof.

9.4 The Lender may, even in the absence of any default on the part of the Borrower, serve the assignment upon the tenants."

The Court concluded that the expression "all his rights under existing leases" included the right to claim any damages in virtue of the lease that had been entered into by the Tenant. Therefore, since the claim of the Landlord had validly been assigned and the creditor had properly served the assignment notice on the Tenant, the Court found that the Landlord had lost its quality as a creditor and consequently its status as a plaintiff against the Tenant.

14. SURETY

14.1 Société de Gestion Michel Tellier Inc. v. Le Groupe Parijac Inc., J.E. 2001-1043 (Court of Appeal)

Facts:

Pursuant to a lease signed October 29, 1993 (the "**Lease**"), Société de Gestion Michel Tellier Inc. (the "**Tenant**") leased commercial premises belonging to Le Groupe Parijac Inc. (the "**Landlord**"). The Lease provided for two sureties to guarantee the Tenant's obligations, however, only one of the persons signed the Lease. The Tenant abandoned the premises with 36 months remaining in the term. The trial judge rejected the Landlord's action against one of the sureties due to fact that she had not signed the Lease, and ordered the Tenant as well as the second surety to pay the Landlord damages due under the Lease.

Decision:

The Court reviewed a provision of the Lease which stated as follows:

"14.3: "It is however agreed that if the Tenant has respected each and every of the terms and conditions set forth in the present Lease, and if it is not in default to respect same following a period of 24 months, the Landlord shall discharge Michel Tellier from his aforementioned suretyship." (my translation)

The Court concluded that the Tenant had respected its lease obligations during said period, since the abandonment of the premises only occurred after the 24-month period.

Furthermore, the omission on the part of the Tenant to give a copy of the insurance documents and to maintain the air filters was of no consequence to the Landlord, since it did not suffer any prejudice. Therefore, the Court held that this was not a breach of the Tenant's obligations pursuant to the Lease. The Court also noted that the Tenant had always paid its additional rent during this 24-month period. Consequently, because of all these factors, the Court stated that the second surety was liberated from his suretyship. With respect to the first surety, the Court concluded that the trial judge had not been in error in concluding that she was not liable, as she never personally signed the Lease. Therefore, the Court held that no claim lay against either of the sureties.

15. CONTINUOUS OCCUPANCY

15.1 3390152 Canada Inc. v. 3056309 Canada Inc., J.E. 2001-288 (Superior Court)

Facts:

In the month of October 1997, 3056309 Canada Inc. (the “**Landlord**”) and 3390152 Canada Inc. (the “**Tenant**”) entered into a lease. Pursuant to the terms of the lease, the Tenant was to exploit a restaurant in the hotel of the Landlord and obliged itself to exercise its commercial activities in a continuous manner. Clause 4.1 of the lease stated as follows:

“4.1 From and after the commencement date, Tenant shall open and keep the premises opened for business during the maximum hours permitted by law and this in a continuous and active manner, employing an appropriate number of staff and stocking an appropriate supply of merchandise. Notwithstanding the foregoing, Tenant shall be entitled to close its operations during the Christmas and New Year’s Holiday. During the term of the lease and for any renewal or prolongation thereof, as the case may be, Tenant shall abstain from operating, contributing to or participating, either directly or indirectly, in any other business that is identical or similar to the one Tenant operated in the premises, and this within a radius of three miles from the premises.

(...) in addition to the aforementioned rent and to all other rentals and sums that it may collect hereunder, institute proceedings for the granting of an injunction, apply for the cancellation of this lease and exercise all other rights and recourses provided for hereunder or by operation of the law.

The Tenant shall, at all times during the term of the lease (and any renewal or extension thereof, if any) keep in the Premises a quantity of movable effects sufficient in value to secure all payment of annual rent for one year and such movable effects shall at all times be the absolute property of the Tenant and be exempt from any lien, privilege, pledge, conditional sale, charge under a trustee or any other charge or encumbrance whatsoever.”

Pursuant to clause 4.1, the Tenant claimed that it had the right to close the restaurant between the 24th of December and January 2nd. The Landlord, for its part, alleged that clause 4.1 of the lease only covered January 1st and December 25th of every year. In January of 1991, the Superior Court declared that the lease was an adhesion contract and annulled certain clauses that it judged abusive, notably, the clause stating that the Tenant have a duty to exploit its commerce in a continuous manner. (**Note:** *The initial clause which was the subject of such litigation was then replaced by clause 4.1 above.*)

Decision:

The Court ruled that article 1432 C.C.Q. only allowed the Court to interpret a lease in favour of the Tenant if a doubt remained on the intention of the parties and after all the other rules of interpretation have been applied. The Court held that by stipulating in clause 4.1 of the

lease "during the maximum hours permitted by law", this was a direct reference to *An Act Respecting Commercial Establishments Business Hours*. Moreover, the word "during" did not necessarily indicate a long period of time. The Court reasoned that since the aforementioned law only prescribed certain days that businesses should be closed (January 1 and 2 and December 25), and it did not prescribe a complete week in which a business must be closed, the clause within the lease could not logically cover the entire end of the year holiday period. The Court also stressed that the Tenant's business was never closed for a whole week during the holiday period. Moreover, it emphasized the fact that the Tenant and the Landlord did not specifically foresee that the business of the Tenant would be closed on Christmas and New Year, for the lease only made a reference to the Christmas and New Year's holidays. The Court noted that Article 1426 C.C.Q. provided that reference may be had to usage in the interpretation of contracts, that judicial notice thereof may be taken pursuant to Article 2806 C.C.Q., and stated that the days immediately following both Christmas Day and New Year's Day are days of holiday for the general working population. Accordingly, the Court held that the Tenant was allowed to close its business on the 25th and 26th of December as well as the 1st and 2nd January of each year.

15.2 Banque Nationale du Canada v. Place Bonaventure Inc., J.E. 2001-1865 (Court of Appeal)

Facts:

The issue in appeal was the decision of the Superior Court condemning Banque Nationale du Canada (the "**Tenant**") to pay damages to Place Bonaventure Inc. ("the **Landlord**").

Decision:

The Court concluded that the trial judge had erred in concluding that the Tenant was no longer using the leased premises for its banking activities in conformity with the provisions of the lease. The Court stated that the trial judge confused the Tenant's duty to use the lease premises for its banking activities with the duty to operate a bank branch with all the services related thereto. The Court stated that, in fact, the Tenant maintained its branch banking activities and advisory services between noon and 3:00 P.M. and also offered an automatic teller machine service. However, the Court held that the Tenant had breached its obligations contained in the lease by not respecting the operating hours therein provided. Consequently, the Court ordered that the Tenant pay damages to the Landlord, in addition to interest, due to the Tenant's failure to respect its operating hours covenant set forth in the lease.

16. ASSIGNMENT AND SUBLET

16.1 Complexe Futur Inc. v. M.D.S. Pharmaceutical Services Inc., J.E. 2001-1866 (Superior Court)*

Facts:

Complexe Futur Inc. (the "**Landlord**") and M.D.S. Pharmaceutical Services Inc. (the "**Tenant**") were bound by a commercial lease executed in 1995. After having learned that the

* Case under Appeal

Tenant could possibly cease its activities, a representative of the Landlord noticed that people were removing boxes and equipment from the leased premises. Upon communicating with the Tenant, the Landlord was informed that the Tenant was in the process of negotiating a sublease with a Nexia Biotechnologies ("**Nexia**"), a potential subtenant. The Landlord concluded that the leased premises had, in violation of the lease, become vacant and, not wanting the leased premises to be sublet to a third party, the Landlord sent a notice of cancellation to the Tenant on May 3, 2001, which notice was received by the Tenant the next day. On May 4, 2001, the Tenant informed the Landlord that it was ceasing its activities; however, the Tenant also advised the Landlord that Nexia was prepared to sublease the leased premises. Several days later, prior to the Landlord instituting its procedures in cancellation and eviction, Nexia commenced occupying the leased premises.

Decision

The Court concluded that the leased premises had never become vacant. Although the primary activities of Tenant had ceased, the Court noted that there still remained workers and security guards in the leased premises. Moreover, there were still people entering and leaving the leased premises. The Court also noted that a stipulation in the lease provided that in the event that a party was in default of one of the obligations of the lease, a notice of ten (10) days would be given to the defaulting party in order to allow it to remedy the situation. The Court took note of the fact that the Landlord never sent such a notice; rather, the Landlord decided to take the position that the lease was automatically terminated by the alleged vacancy, claiming that this was an event of default that could not be remedied. The Court also concluded that the Landlord's attempted justification for refusing the sublease, namely that the amount of rent it was receiving from the Tenant under the lease was not financially advantageous to the Landlord, was not considered to be a valid reason for the Landlord to refuse the sublease. Consequently, the Court refused the Landlord's action to cancel the lease, and held that the sublease by the tenant to Nexia was opposable to the Landlord.

It is interesting to note in this case that the attempt by the Landlord to improve its cash flow by claiming the lease was terminated and then (presumably) entering into a new lease, at a higher rent (one would presume) with Nexia, was not sanctioned by the Court.

16.2 2957259 Canada Inc. v. Banque Nationale du Canada, J.E. 2001-120 (Superior Court)

Facts:

2957259 Canada Inc. (the "**Landlord**") and Banque Nationale du Canada (the "**Tenant**") concluded a commercial lease commencing November 1, 1993 and expired October 31, 2003. On May 1, 1998, the Tenant ceased its banking operations from the premises, leaving an automatic teller machine available for use, the whole without advising the Landlord. The Landlord instituted injunctive proceedings against the Tenant, and on March 17, 1999, Mr. Justice Frenette rendered a judgment pursuant to which, inter alia, Tenant had to continue carrying on reduced banking operations until it found a subtenant whose activities were similar to the Tenant's. Furthermore, Mr. Justice Frenette stated that if the Tenant was not able to find such a subtenant within a reasonable delay, the Tenant would then be allowed to offer the leased premises to an entity carrying on an enterprise in the financial field, and, failing this, it would be permitted to an entity whose activities were not incompatible with the activities of the other tenants of the immovable. On a final note, Mr. Justice Frenette specifically indicated that the activities of the Gatineau Memorial Hospital Centre ("**Hospital**") would be permitted within the scope of the foregoing. In June of 1999, an interlocutory injunction enjoined the Tenant to

keep the premises operating unless it was able to sublease the leased premises as per the terms of the declaratory judgement or Mr. Justice Frenette. A short period later, the Tenant presented a sublease agreement with the Hospital as the proposed subtenant, which the Landlord refused. In the month of December, the Tenant ceased in a definitive manner to carry on its banking operations and only left an automatic teller machine on the leased premises. The Landlord requested that the Court grant a permanent injunction in order to force the Tenant to open the leased premises and carry on its operations therein, whereas the Tenant requested the Court to authorize the cancellation of the lease.

Decision:

The Court concluded that by allowing the Hospital or the local CLSC (local community health centre) to occupy the leased premises, this would considerably increase the amount of water used to the extent where the septic system in the immovable could not maintain such a use. However, the Court concluded that the issue surrounding the water capacity of the system, in order to determine if the Hospital was an acceptable subtenant, should have been raised before Mr. Justice Frenette.

The Court also noted that Mr. Justice Frenette's decision in the motion for declaratory judgement, which had now become *res judicata*, modified the provisions of the lease with respect to the obligation of continuous occupation and the conditions regarding the assignment and sublet of the lease. In effect, the Court stated that declaratory judgement had modified the terms of the lease so as to allow the Tenant to reduce its banking activities, so long as it did not close down its banking establishment. Moreover, the declaratory judgement eliminated the necessity, which had previously been provided for in the lease, for the Landlord to consent to any sublease, for, the trial judge permitted, as a last option, the Tenant to sublet the leased premises to the Hospital, having judged that the Hospital was an acceptable subtenant. The Court held that the separate legal personalities of the Hospital and the CLSC were irrelevant, for the services to be offered by either in the leased premises would have been identical. Therefore, due to the effects of the said judgement and because of the insufficiency of the septic system of the immovable, the Landlord had to bear the consequences of the Tenant's decision to no longer continue its banking operations from the leased premises. However, the Court also rejected the Tenant's attempt to have the lease cancelled, noting that the proposed sublease by the Tenant would not have been for the full term of the lease and that the rental payable was less than that payable by the Tenant under the lease. As a result, the Tenant remained responsible for its rental obligations under the lease.

17. RENEWAL OF LEASE

17.1 Trust Général du Canada v. Bourque, Pierre et Fils Ltée, J.E. 2001-733 (Court of Appeal)

Facts:

In 1985 Bourque, Pierre et Fils Ltée (the "**Landlord**") leased a building it had built to the Minister of Justice (the "**Tenant**"). In 1991 during the renegotiations of the lease, the parties decided to conclude a purchase-lease agreement of the building (the "**Lease**"). Pursuant to the terms of the Lease, the Landlord was only responsible for the capital tax whereas the Tenant was responsible for every other aspect of the building. The rent was established by a sum of capital amortised over 25 years bearing an initial interest rate for five years (the "**Initial Term**"), from August 1, 1991 to October 31, 1996. The Lease also stipulated a mechanism to establish

the rent upon the expiration of the Initial Term (the “**Subsequent Term**”). During the Initial Term the rent had been established in a manner so that the rent paid by the Tenant was equivalent to the reimbursements that the Landlord had to make for a loan it had concluded with Trust Général du Canada (the “**Creditor**”) to finance the building. Moreover, in December of 1991 the Landlord assigned the rent payable by the Tenant in favour of the Creditor.

After having received a notice from the Tenant that it wanted to establish the rent for the Subsequent Term, the Landlord, after communicating with the Creditor, was informed that it would not renew the loan at an interest rate reflecting the market rate. Rather, by basing itself on the precarious financial situation of the Landlord, the Creditor proposed a financing rate of 12%. The Landlord then proposed to the Tenant that a 12% rate should be the “Financing Rate” used in the mechanism to establish the rent for the Subsequent Period.

Pursuant to the Lease, the Tenant had the right to refuse the financing rate proposed by the Landlord, which it did; however, in doing so, the Tenant was obliged to find other means of financing for the Landlord. Unable to obtain any financing for the Landlord, the Tenant unilaterally established a financing rate that it deemed to reflect the market rate in force as of November 1996, which was to be used in the mechanism to calculate the rent for the Subsequent Period. The rate chosen by the Tenant was 7.75% per annum. As this rate was lower than the rate proposed by the Creditor, the rent that the Tenant would pay would no longer be equivalent to the loan reimbursements that the Creditor would receive.

The Creditor alleged that the rent mechanism in the Lease was clear insofar as the financing rate to be used in calculating the rent was to be established by using a subjective criterion, such as the financial situation of the Landlord. The Tenant claimed that an objective criterion, which took into account the market rate that was in force when the rent had to be established, had to be used in establishing the financing rate.

The trial judge concluded that the financing rate was to be determined by looking at objective criterion such as the financing market rate of an immovable, and not subjective criterion based upon the financial situation of the owner of the immovable. Consequently, the judge of first instance established the interest rate at 7.75%, and held that as the Landlord could not fulfil this obligation, the Lease should be terminated.

Decision:

The Court held that there was no reason to modify the interest rate established by the trial judge of first instance. In effect, it concluded that the trial judge used the correct method as prescribed by the Lease. Thus, the Court ruled that to establish the financing rate prescribed by the Lease, an objective criterion had to be used and not one that was based on a subjective criterion, such as the financial situation of the owner.

The Court also stated that the trial judge should not have cancelled the Lease for the reason that the Tenant failed in its obligation to obtain financing of the immovable at a market rate as per the Lease. In effect, the Court held that the Creditor and the Landlord knew or should have known the risks related to the financing of an immovable where the rent was equivalent to the capital and interest that had to be reimbursed for the loan, and as a result they had to suffer the consequences of assuming such a risk.

It is to be noted that both the Creditor and the Tenant had stated to the Court that they would prefer that the rental rate under the Lease be fixed in accordance with the objectively

determined financing rate, rather than having the Lease cancelled. As well, the Court specifically "invited" the parties to submit their differences in the future with respect to the determination of the financing rate to the arbitration process set forth in the Code of Civil Procedure of Quebec.

Accordingly, the Court held that the Lease remained in force, at the interest rate determined by the trial judge.

18. ABUSE OF RIGHTS - BAD FAITH

18.1 Agropur Coopérative Agro-alimentaire v. Réjean Boulais Inc., J.E. 2001-687 (Superior Court)*

Facts:

In 1980, Agropur Coopérative Agro-alimentaire (the "**Landlord**") offered Réjean Boulais Inc. (the "**Tenant**") premises within its factory in the City of Granby, so that the Tenant could exploit a grocery and ice-cream store. At the same time the commercial lease was concluded, the Tenant concluded a franchise agreement with Québec-Lait Inc, which was subject to the same term and renewal option as the lease. In 1987, the Landlord and Tenant, signed a new lease (the "**Lease**") terminating on April 30, 1997, which specified that a notice of non-renewal had to be sent 90 days prior to the end of the Lease, failing which it would be renewed for additional periods of five years each. Attached to the Lease was a new franchise agreement that the Tenant had concluded with La Crémère (in whom the Landlord was a majority shareholder), terminating on May 31, 1997, which would be renewed annually unless a notice of non-renewal was sent 180 days prior to the end of the franchise agreement.

In February of 1995, the Landlord had verbally informed the Tenant that it would not be renewing the Lease. The Tenant then proceeded to inform a representative of La Crémère of this fact, who in turn told the Tenant that he would speak to the Landlord about the renewal of the Lease. Three (3) months prior to the expiration of the Lease, the Landlord sent a notice informing the Tenant of its intention not to renew the Lease. However, the Tenant, who had believed that the renewal was possible due to the representations made by La Crémère's representative, failed to send a notice of non-renewal to the franchisor and was therefore still bound under the franchise agreement. The Tenant, after not hearing anything from the Landlord, ceased its operations in the premises and opened a similar business elsewhere in Granby on November 27, 1996. The Landlord instituted proceedings against the Tenant, claiming arrears of rent and damages. Although the Tenant admitted that there were arrears in rent, it claimed that it had been the victim of bad faith on behalf of the Landlord and thus instituted a counter-claim in damages.

Decision:

The Court stressed that the testimony of the Landlord revealed that it was a majority shareholder in La Crémère, that it knew that the Tenant was bound by a franchise agreement and that it expected the Tenant's business to display its products in addition to La Crémère's. The Court also pointed out that both leases entered into between the Landlord and Tenant were

* Case under appeal.

conditional upon the Tenant concluding a franchise agreement with a franchisor of the Landlord's choice; that the Lease and the attached franchise agreement concluded in 1987 were interrelated, but that their respective delays for non-renewal notices were incompatible. As a result, the Court held that the Lease was, in reality, a lease-franchise agreement whereby the Tenant obliged itself to sell the products of the Landlord and those of La Crémère. In view of the foregoing, coupled with the contradictory testimony of the Landlord and La Crémère's representative as to what they had said to the Tenant, the Court concluded that the Landlord had abused its right to terminate the Lease. Consequently, the Landlord was ordered to pay the Tenant \$10,000.00 in damages to cover the penalties that the Tenant had paid La Crémère for violating the franchise agreement as well as additional damages to cover the Tenant's loss of business and the cost of its experts.

Finally, the Court refused to grant the Tenant exemplary damages, as the Tenant had not submitted any grounds under which same could be granted.

18.2 9055-5095 Quebec Inc. v. 2956-9092 Quebec Inc., J.E. 2002-777 (Superior Court)*

Facts:

In 1992, 2956-9092 Quebec Inc. ("**2956**") leased its enterprise comprising a service station, mechanic bay and car-wash to Shell Canada ("**Shell**") in consideration for a monthly rent of \$1.00 and additional rent which was to be calculated in accordance with the number of litres of gas sold. Immediately following the conclusion of the principal lease, Shell subleased the leased premises and the enterprise to 2956. In 1997, 2956 sold its enterprise to 9055-5095 Quebec Inc. ("**9055**"), with the consent of Shell, and Shell also accepted that the contract for the retail sale of gas be assigned to 9055. Between the period of November 1997 and October 2000, 2956 continued to receive the additional rent in virtue of the lease concluded in 1992. 9055 alleged that it was not aware of the existence of the lease and argued that the additional rent collected by 2956 was revenue derived from the sale of gas, which it had right to receive, claiming that when it had bought the enterprise from 2956 it had also been assigned the contract for the retail sale of gas. Furthermore, 9055 requested the Court to reduce its monthly rent in proportion to the sums that had been paid by Shell to 2956.

Decision:

The Court concluded that the assignment of the contract for the retail sale of gas had no effect on the principal lease binding Shell and 2956, especially with respect to the payment of any additional rent taking the form of rebates. The Court noted that Shell paid rent to 2956 in order to ensure that it would be the exclusive supplier of gas and to maintain on the leased premises underground fuel reservoirs as well as signs and other accessories. For those reasons, the Court held that the additional rent could not be reimbursed to 9055 and was not to be considered as revenue derived from the retail sale of gas. However, because 2956 did not mention to 9055 the existence of such additional rent, 9055 did not have the necessary information to determine what the actual rent was. As a result, the Court ruled that 2956's actions demonstrated that it breached its duty of good faith, and granted 9055 the right to reduce the annual rent payable under its lease by 20%.

18.3 Langevin-Fournier v. W.C.I. Canada Inc., J.E. 2001-2180 (Court of Appeal)

Facts:

The parties had concluded an agreement by which one of them would exploit a cafeteria located in the factory belonging to the other party.

Decision:

The Court ruled that even though the agreement concluded between the parties regarding the exploitation of a cafeteria within a factory could be qualified as an innominate contract, it was really a type of lease. Moreover, the Court pointed out that Langevin-Fournier (the “**Tenant**”) considered the agreement to be a lease with a term of three years that was renewed tacitly each year. Therefore, the Court ruled that since the Tenant considered the agreement to be a lease, W.C.I. Canada Inc. (the “**Landlord**”) was allowed to terminate the lease, at the expiration of the each lease year. The Court also noted that the lease could be terminated at any time, by way of 30 days’ notice. Consequently, the Court ruled that the termination of the lease by the Landlord did not constitute an abuse of rights.

18.4 9051-5909 Québec Inc. v.. 9067-8665 Québec Inc., J.E. 2001-822 (Superior Court)*

Facts:

On September 25, 1998, 9067-8665 Québec Inc. (the “**Tenant**”) concluded a lease with 9051-5909 Québec Inc. (the “**Landlord**”) in order to operate a restaurant within the immovable of the Landlord. The site where the Tenant’s restaurant was situated had previously been operated as a restaurant; however, it had gone bankrupt and the assets had been acquired by the Landlord from the trustee. The Landlord assisted the Tenant (the shareholders of which were all recent arrivals to Canada) in obtaining a loan to acquire such assets. From the start, there existed problems between the Landlord and the Tenant. The Tenant’s restaurant had opened without a liquor permit, for the delay to obtain same was approximately 30 days, and not 48 hours as the Landlord’s representative had stated. Numerous pieces of equipment which the Landlord had undertaken to put into working order broke down and needed to be repaired by the Tenant. On May 13, 1999, the shareholders of the Tenant sent a demand letter to the Landlord, claiming a reduction in rent and a partial reimbursement of the sale price of the restaurant as a result of false representations of the Landlord. On May 17, 1999, in view of the fact that the Tenant was in default in respect of its payment of rent and municipal taxes, the Landlord filed a motion for juridical resiliation of the lease. On May 21, 1999, before any decision had been rendered regarding the motion for juridical resiliation, the Landlord informed the Tenant that it would repossess the leased premises the following day. On the following day, the Landlord and a bailiff presented themselves at the restaurant of the Tenant; since the Tenant was not able to pay the arrears, the Tenant was forced to leave the leased premises. In doing so, the shareholders of the Tenant were unable to take with certain personal items that had been left on the leased premises. The Tenant claimed that the Landlord did not have the right to cancel the lease *de*

* Case under appeal.

plein droit, that by doing so the Landlord caused the Tenant a prejudice, and thus counter-claimed for damages.

Decision:

After cancelling the lease (both the Landlord and the Tenant requesting same at trial), the Court ruled that the Landlord had the right to recover the arrears in rent and taxes that were due as of May of 21, 1999. However, the Court held that the Landlord did not have right to receive an indemnity for the re-leasing costs that it claimed. In effect, the Court stated that after the Landlord repossessed the leased premises, it did not mitigate its damages by actively attempting to re-lease same to a third party; rather, it carried out repairs in order to continue the operation of a restaurant.

The Court reminded the parties that the general rule was juridical resiliation of a lease, and cited *Place Fleur de Lys v. Tags Kiosk Inc.*, [1995] R.J.Q. 1659. Moreover, the Court stressed that the general rule applied even in the case where a lease contained a resolatory clause, as was the case in the lease that had been entered into between the Tenant and Landlord. The Court held that by evicting the Tenant three days after filing its motion for juridical resiliation, the Landlord had acted in an abusive manner. The abusive exercise of the Landlord's right had the consequence of making the Tenant lose its rights afforded by law and prevented the Tenant from selling its business. The Court stated that the Landlord did not have the right, in the month of May, to resiliate the lease *de plein droit*. The Court held that the Landlord's action demonstrated its bad faith and had also triggered its liability. Consequently, the Court ordered the Landlord to pay damages to the Tenant covering (i) the Tenant's loss of business on May 21 1999 and the value of its inventory of perishable items, (ii) the personal items that the individual shareholders of the Tenant were forced to leave in the leased premises, (iii) the closure of the Tenant's business and (iv) exemplary damages. It is to be noted that the Court, in determining the amount of damages to be awarded to the Tenant, ordered the Landlord to repay to the Tenant the exact amount of rent that had previously been paid by the Tenant to the Landlord, and that exemplary damages of \$5,000 were awarded as a result of the Landlord's bad faith.

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