

2004 CANADIAN LAW CONFERENCE

QUEBEC LEGAL UPDATE

**STEVEN L. CHAIMBERG
JOYCE CARESTIA
OF
LAPOINTE ROSENSTEIN
MONTREAL, QUEBEC**

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1. FORMATION OF CONTRACT

1.1 Société de gestion Place Laurier inc. c. 3336140 Canada inc.

(January 13, 2003), Longueuil, [2003] J.Q. 72, (C.S.)

Facts:

Pursuant to a lease (the "**Lease**") dated November 19, 1997, 3336140 Canada inc. (the "**Tenant**") leased from Place Laurier (the "**Landlord**") a store (the "**Premises**") for a 9-year period commencing December 12th, 1997.

In 1998, upon the realization that the sales volume for tenants situated in the same corridor as the Tenant was not as high as expected, the Landlord proposed to the tenants situated in such corridor a reduction of rent. The Tenant signed two agreements that reduced the minimum rent payable from \$1,534.17 in 1998 and \$1,972.50 in 1999 to \$917.76/month from July 1, 1998 until August 31, 1999, with the exception of the months of November and December 1998. In March 1999 after several negotiations that proved to be fruitless, the Tenant decided to pay a bulk sum, corresponding to 8% of its sales, in lieu of the rent previously agreed upon.

The Landlord instituted proceedings against the Tenant for non-payment of the rent. After termination of the hearing on September 17, 2002, the parties agreed to the cancellation of the Lease as of October 31, 2002.

Decision:

Mrs. Justice Borenstein of the Superior Court held that Madam O'Brien, the representative of the Landlord, falsely described the situation when trying to convince Alain Quintal, the president and shareholder of the Tenant, to sign the Lease. She stated that a cinema project was in the works, that a footbridge was going to be built, and that a connection would be built between the east and west entrance to the Bay, all of which would increase the traffic flow to the corridor where the Tenant is situated. The Court held that these false promises had resulted in the formation of the contract, such that 1401 of the *Civil Code of Quebec* is applicable. The Tenant would probably not have contracted had it known that none of the speculated projects were going to occur. Consequently, the formation of the Lease was the result of an error and must be annulled. The Court stated that the Tenant had the right to receive an indemnity equivalent to its operating costs, which the Court determined was equal to the rent paid by the Tenant from June 2000 until September 2002. The Court also awarded the Tenant an amount with respect to its losses relating to its leasehold improvements.

1.2 Smart c. Ralph

(February 24, 2003), Montreal, AZ-50163784, J.E. 2003-786, (C.S.)

Facts:

The Defendants are the principal shareholders, directors and officers of two related companies, Medique Medical Supplies (MGBR) Inc. and Medi-Bloc Santé Inc. (hereinafter collectively referred to as "**Medique**"). The lease for the premises occupied by Medique was set

to expire on September 30, 1999. The Defendants realized that the growth of Medique's business required them to move to a more spacious premises, and thus, sought the counsel of their landlord, one of the Plaintiffs, who was an expert in real estate matters. He suggested that they consider purchasing a building, using the services of his son, a real estate agent. As a result of their personal relationship and the Plaintiff's expertise, it was envisaged that the Plaintiffs would become joint owners of the building with the Defendants, and that the building would be leased to Medique. As a result of the Plaintiff's unwillingness to negotiate, the parties were unable to come to an agreement on the rent that would be paid by Medique and the allowance needed for household improvements. They nonetheless made an offer to purchase a building, which was accepted.

On July 15 1999, the parties signed a written agreement attesting to the partnership. Soon afterwards, the cordial relationship between the parties ended. The Plaintiff instructed the Defendant that Medique must accept his terms and that he will take over. Accordingly, both parties then sought to acquire the property themselves. Subsequently, the Plaintiffs sent a letter to the Defendant stating that they must vacate the premises on or before the expiry date. This letter led the Defendants to believe that they must act quickly in order to protect their interests. On September 2nd, the Defendants gave notice to the representative of the vendor that they were exercising the purchaser's option to cancel and annul the accepted offer to purchase, as per the terms of the contract. The following day, the Defendants signed a new offer to purchase, that was immediately accepted. By signing the joint offer to purchase, and the July 15th agreement, the parties had formed a joint venture and as a result, they owed each other duties of good faith and loyalty. The Plaintiffs allege that the Defendants failed to fulfil these obligations by cancelling the accepted offer to purchase and by immediately purchasing the building for their exclusive use and benefit, thereby depriving the Plaintiffs of their right to profit from the exploitation of the building.

Decision:

The Court held that the Plaintiff's argument was unfounded. When the Defendants cancelled the offer to purchase, they were no longer bound by the obligations of good faith and loyalty that result from a joint venture agreement given that the joint venture agreement was no longer in existence. Due to the fact that an essential condition of the joint venture, the successful negotiation of a lease with Medique, did not materialize, the joint venture was dissolved, and the obligations of the parties arising from it ceased to bind them as of and following August 24, 1999. The Superior Court's decision stems from the application of article 2230 of the *Civil Code of Quebec*, which confirms that a partnership is dissolved by the impossibility of accomplishing its object.

1.3 D'Urfé Plaza (1986) inc. c. Isabelle Fontaine et Jean-Guy Fontaine

(March 4 2003), Quebec, 200-09-000581-949, REJB 2003-39164, (C.A.)

Facts:

On March 26, an agreement to lease was entered into by and between D'Urfé Plaza (the "**Landlord**") and Madame Monique Fontaine (the "**Tenant**"), wife of Jean-Guy and mother of Isabelle Fontaine. They agreed that the lease would be signed for a five-year term. An offer to lease (the "**Offer**") was then prepared but was not formally accepted. The Tenants invoke

section eight of the Offer as a means of unilaterally terminating the occupation of the premises. Section eight stated the following:

...If the tenant did not execute and deliver the lease to the owner for execution, at the earlier of the following dates: the day where the leased premises will be open for business or thirty (30) days after receipt of the commercial lease, the owner can, at his option, send a written notice to the tenant terminating the agreement. As a result, the agreement as well as the obligations resulting therefrom, will be declared null and void... (My translation)

The trial judge concluded that the Tenant was able to cease occupation of the premises unilaterally.

Decision:

The Court stressed that although the parties did agree upon the price and the term, there were still certain conditions to be negotiated. As a result, the agreement between the parties was incomplete. Consequently, pursuant to clause eight of the Offer, either party may terminate the agreement provided for in the Offer, namely, either party may terminate the occupation of the premises.

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

1.4 Sports Extrêmes Surf 66 Inc. c. Brunet

(April 30, 2003), Montreal 500-05-072543-026, J.E. 2003-1279 (C.S.)

Facts:

Petitioners Hébert and Jolicoeur are shareholders of Sports Extrêmes Surf 66 Inc. ("**Surf 66**"), a sports store. As of 2001, Petitioner Hébert has been considering opening up a skate park, with his friends, the Oslers, who are owners of a sporting goods store and who were interested in investing in this project. In April 2002, the Petitioners noticed that the premises adjacent to Surf 66 was for rent. The Petitioners contacted the owners of the property, 9108-5324 Quebec Inc. (the "**Landlord**"), and visited the premises on April 8. On April 11, Mr. Brunet, the Landlord's only shareholder, sent an offer to lease (the "**Offer**") to the Petitioners. The Petitioners were obliged to reply quickly, given that another party was interested in leasing the premises. As a result, the Petitioners immediately signed the Offer on April 11 and sent a cheque to the Landlord corresponding to the rent for the last month.

When signing the Offer, the Petitioners were aware of the fact that the leased premises was located in an industrial zone, and that the skate park could only be situated in a commercial zone. The Petitioners informed themselves on the procedure required to modify the zoning by-laws. They were informed that it was a very complex procedure and that a modification was not easily granted. On April 16, a lease (the "**Lease**") was sent to the Petitioners, however, they refused to sign it. Instead, they proposed, that they, along with the Oslers, re-visit the premises. During the visit, the Oslers expressed many reservations, such as problems with the high ceilings, the floor and the pillars. Consequently, the Petitioners refused to sign the Lease, and demanded that the Offer be declared null as a result of an error concerning an essential element of the contract. Accordingly, they requested the restitution of the amount paid when the Offer was signed as well as the reimbursement of their lawyer fees.

In their defence, the Respondents claim that the Petitioners were aware of the existing zoning by-laws when they signed the Offer. Therefore, the Offer was binding on the parties and thus, the Respondents allege that they have a right to receive the rent due pursuant to the terms of the Offer.

Decision:

The Court held that the Respondents were aware of the fact that the Petitioners intended on using the Premises as a skate park. Moreover, the Respondents told the Petitioners that the modification of zoning by-laws would only take a few weeks, and that in the meantime, they would be able to discretely use the leased premises as a skate park. The Court stated that once an offer is accepted it is a bilateral promise to lease which is equivalent to a lease. The essential elements of a lease are the enjoyment of property in exchange for the payment of rent, for a determinate or indeterminate amount of time. In the present case, the Offer contains all of these essential element. The Petitioner's signature is not an essential condition in order for an agreement to be valid.

With respect to whether the representations of the Respondent are enough to entail the resolution of the Offer, the Court concludes that the Respondents remarks cannot be qualified as false representations. A promise relating to a future situation, that implies a third party's participation, can never be considered fraudulent. The Petitioners could have inquired as to whether the information given to them by the Respondents was correct. It was not the Respondents' responsibility to ensure that their opinion was correct.

The Petitioners also claim that they were pressured to sign the Offer and therefore their consent was vitiated. The Court held that the Offer was signed quickly because of the Respondents' possibility of contracting with a third party; the Respondents' actions were not meant to be deceptive.

The Court concluded that the Respondents should be compensated for any loss incurred as a result of being deprived of a potential profit, that is, \$41,177.67. These damages can only be those that are a direct and immediate result of the non-execution of the contract.

1.5 1467-9062 Quebec Inc. c. Centres Commerciaux Régionaux du Québec Limitée

(March 31, 2003), Hull 550-05-012302-025, 550-05-012362-029 (C.S.)

Facts:

On September 13, 1994, 1467-9062 Quebec Inc. (the "**Tenant**") and Les Galeries de Hull (the "**Landlord**") signed an offer to lease (the "**Offer**") for the period commencing on October 1, 1994 and terminating on October 31, 2002. The Offer specified that the leased premises would be used and occupied exclusively for the sale of natural and artificial flowers, gift balloons, plants and personalized baskets. The parties agreed that the Offer to lease would be the only document signed by the parties and would be considered as the lease. The Tenant sent the Landlord a series of twelve post-dated cheques, for the period of January 1 until December 31, 2002.

On December 10, 2001, the Tenant complained to the Landlord that another "important" tenant was also selling flowers in the shopping center, which was a violation of the exclusivity

clause provided for in the Offer. Subsequently, the Landlord insisted that the Tenant sign a lease (the "**Lease**") and informed it that it would later tend to the situation. Prior to sending the Lease to the Landlord, the Tenant made several modifications, namely, modifications to the exclusivity and renewal option clauses. However, the Landlord did not accept the proposed modifications and threatened that the Lease would be terminated if said Lease was not signed by August 23, 2002. The Landlord then proposed a new lease for a term of five years, this time however, without an exclusivity clause. The Tenant did not reply, and on October 1, 2002 the Landlord informed the Tenant that they had to vacate the premises by the end of the Lease, that is, by October 31, 2002.

Given that the Tenant did not vacate the premises, the Landlord instituted proceedings demanding that the Tenant be expelled from the premises.

Decision:

The Court held that the Offer to lease was accepted by the parties and thus, constituted an agreement binding the parties. However, in this case, Justice Plouffe ruled that the Lease did not bind the parties given that it was unilaterally modified by the Tenant, without the consent of the Landlord. In light of the fact that the parties were unable to agree as to the terms of the Lease, the rights and obligations of the parties are governed by the Offer. The Offer provided a fixed term and did not provide a renewal option. Consequently, the Lease was terminated upon the arrival of the term given that no renewal option was available.

In the present case there was no renewal, because the Landlord even informed the Tenant that he wanted them to leave the premises. The Tenant argued that the Landlord's silence constituted acceptance of the modifications made to the Lease. However, the Court held that silence can only equal acceptance in the cases provided for in article 1394 C.C.Q. The present case is not one which falls within the scope of said article, and accordingly, this argument could not be retained.

1.6 2172-0644 Québec Inc. c. Corporation Financière Alpha (CFA) Inc.

(November 13, 2003), Québec, 200-05-000541-917, (C.S.)

Facts:

On July 11, 1988, a lease was signed between 2172-0644 Québec Inc. (the "**Tenant**") and Immeubles Cominar Inc. (the "**Landlord**"), which, in April, 1999, became Corporation Financière Alpha (CFA) Inc. The Landlord was opening a new shopping center, Place de la Cité, situated across the street from an already successful mall, Place Laurier. The Tenant took possession of a local in Place de la Cité and began operating his business on May 3, 1988.

The Tenant agreed to enter into the lease due to the Landlord's promise to build a footbridge connecting the two shopping centers. Construction of the proposed bridge had not begun on opening day, however, the Tenant was certain that once the bridge would be built, that its store would be located in a busy part of the mall. The offer to lease sent to the Tenant made no mention of this promise, however, one of the schedules annexed to the offer included an architectural plan of the mall which clearly showed the entrance to the proposed footbridge.

However, such a bridge was never built. The part of the mall where the Tenant's store was located was not busy. The Tenant informed the Landlord of this on several occasions, demanding to know what the plans were for the footbridge. On March 7, 1990, the Tenant gave the Landlord two (2) options. He asked that either (i) the lease be terminated and each party grant a release to the other or (ii) that it continue to operate its store without paying rent until another tenant would be found. Given that both options were rejected, in February 1991, the Tenant abandoned the premises claiming that every nearby business was doing the same.

The Landlord alleged that during and after this period, it tried to build the footbridge but was unable to proceed for several reasons. In addition, it claimed that the lack of business was not due to the lack of a footbridge, but rather, a result of a difficult economic period. However, by 1992, much of the locals on the second floor of the mall were leased out as office space. The landlord had been forced to prematurely terminate many of its leases.

The Tenant instituted proceedings soon after demanding 296,656\$ for loss of revenue, cost of repairs, moving and damages. The Tenant also demanded the cancellation of the lease claiming that it would never have leased the premises if it hadn't been for the promise of a footbridge connecting the two (2) shopping centers. According to the Tenant, the Landlord had clearly misrepresented the project. In its defence, the Landlord argued that it had never agreed to a particular date for the building of a footbridge. Moreover, it alleged that could not be held responsible for the economic hardships that the Tenant faced nor for its decision to lease a premises in the mall. Finally, the Landlord claimed that section 49 of the lease rendered all proof with regards to promises made, prior to the signing of the lease, inadmissible. The aforementioned section stated the following:

"Le présent bail incluant ses annexes contient l'intégralité de l'accord conclu entre les parties aux présentes à l'égard de l'objet du présent bail, le présent bail et ses annexes remplacent et annulent toutes négociations, ententes, lettres d'intention, offre de location, approbations de bail, brochures, contrats, représentations, promesses, garanties, accords ainsi que toutes informations communiquées verbalement ou par écrit entre les parties aux présentes ou leurs représentants ou toute personne se déclarant l'être".

Decision:

The Court did not accept the Landlord's objection based on section 49 of the lease. In addition, it concluded that the schedule depicting the architectural plan annexed to said lease was incomplete and that said schedule constituted a commencement of proof in accordance with section 2863 C.C.Q., allowing the Tenant to vary the terms of the lease.

Justice Benoît Moulin held that the lease was based on an error provided in section 1400 C.C.Q. The Court concluded in this manner for the following reasons: (i) the Tenant would not have chosen that premises if it hadn't been for the promise of a footbridge; (ii) the Tenant's demand that he not be forced to move for ten (10) years after the signing of the lease; and (iii) a letter dated May 11, 1988 written by the Landlord and sent to another tenant stating that if the footbridge was not built within two (2) years that the tenant could put an end to its lease and that certain other tenants would receive a reduction of rent. In addition, the Court ruled that the error was not inexcusable due to the fact that the public was aware the proposed footbridge due to the pamphlets distributed as well as the public declaration by the Landlord. Furthermore, the

Tenant had negotiated with an experienced real estate developer which gave him no reason to doubt his good faith.

Finally, the Court held that the Landlord had withheld information from the Tenant on the difficulties it faced with regards to building a footbridge. The fact that the Landlord was not forthcoming on such an important part of the lease led the Court to conclude that this was a case of fraud. Therefore, damages were also awarded to the Tenant and the lease was cancelled.

2. INTERPRETATION OF CONTRACT

2.1 2152-1216 Québec inc. c. Lucie Shoghikian, Serge Clément et Maurice Fortier

(February 12, 2003), Montreal, 500-09-010366-003, REJB 2003-39015, (C.A.)

Facts:

The three Respondents are dentists who are among a group of twelve dentists working at a dental clinic, operated by the company Experdent (the "**Tenant**"). The clinic is situated in the premises owned by 2152-1216 Québec Inc. (the "**Landlord**"). The lease between the parties was set to expire on December 31, 1994. In 1993, the Respondents informed the Landlord that they did not wish to renew their agreement with the Tenant, and that upon the termination of the lease, they wished to personally lease the premises. On December 15, 1993, the Respondents submitted an offer to lease (the "**Offer**") to the Landlord. The Offer provided for a term of ten years commencing on January 1, 1995 and ending on December 31, 2004. Article 8 of the Offer stated that the Landlord promised to assume the expenses pertaining to all the renovations necessary for the operation of a functional and high quality dental clinic.

However, the Respondents were not satisfied with the way the work was proceeding, and they sent a letter to the Landlord informing him that he had until February 1st, at midnight, to terminate the work. The Landlord disregarded the warning and continued the construction several days after. The Landlord sent the Respondents a letter informing them of the amounts owed. The Landlord requested that the rent for the months of January and February 1995, as well as the business taxes appurtenant thereto be paid. However, on January 19, 1995, the Respondents informed the Landlord that they were completely unsatisfied with the result of the work.

The Landlord instituted proceedings for the arrears of rent which included the sales and service taxes in the amount of \$18,090.68. The Landlord then modified the declaration to include the rescission of the lease. In their defence and cross-demand, the Respondents invoked that pursuant to Article 8 of the Offer, the Landlord had the obligation to carry out all the renovations. However, the renovations were not completed within the delay agreed upon by the parties and furthermore, the work did not conform to the plans nor did it respect the high quality requirement. The Respondents argue that they have the right to be compensated for the amount they spent to adjust the renovations the Landlord had executed. In addition, they claim for loss of revenue incurred as a result of the delay in completing the work. Lastly, the Court must determine what area of the premises must be considered in order to calculate the rent due.

The trial judge found that the sales tax and the service tax must be included in the rent, as a result of the application of Article 1432 of the *Civil Code of Quebec*, which states that in the case of an ambiguity, the terms of the Offer must be interpreted in favour of the person who contracted the obligation, that is, in the Respondents' favour.

With respect to clause 8 of the Offer, the renovations were not yet completed almost two months after the date set for the completion of the work. The dental clinic was in such a terrible state, that the Respondents had no choice but to continue the renovation themselves. Consequently, the Respondents alleged that the Landlord should compensate them for the sums disbursed in order to finish the work.

As regards the claim for loss of revenue, the trial judge held that the loss of revenue was a direct and immediate consequence of the Landlord's fault. As a result, the Landlord was ordered to indemnify the Respondents for the amount of revenue lost.

The trial judge concluded that the area consisted solely of the space used exclusively by the tenant and that the parties had agreed upon, that is, 2,410 square feet. In addition, it was decided that the sales and service taxes were to be included in the calculation of rent per square foot.

Finally, the trial judge concluded that there was no reason why the lease should be resiliated.

Decision:

The Court upheld the trial judge's decision in concluding that the terms of the Offer regarding the area of the premises used to calculate the rent, were ambiguous. Consequently, the Offer must be interpreted by taking into account the negotiations, the circumstances and the testimony, so as to determine the common intention of the parties.

In addition, the Court concluded that the Landlord did not successfully demonstrate that the trial judge had erred in ruling that the sales and service taxes should be included as part of the rent.

2.2 Brault et Martineau inc. c. Centre Perspective Décor C.P.C. inc.

(January 29, 2003), Montreal, 500-09-011632-015, REJB 2003-37052, (C.A.)

Facts:

On March 30, 1995, the parties agreed to extend the existing lease from February 1, 1996 until January 31, 1998 with the same terms and conditions, except for a clause which provided for a five year renewal option.

Article 16 of the lease stated that:

"If the Lessee abandons or evacuates the leased premises, if he is in default of paying rent, or if he doesn't respect one of the clauses or conditions of the lease, the Lessor can cancel the present contract on the spot, by notifying the Lessee. In this case, the Lessee must pay the Lessor damages equivalent to the rent that

has accumulated until the Lessor occupies the premises as well as an additional three months rent".

On October 17, 1997, further to a clearance sale, the Appellant closed its business, but continued to store its equipment in the premises, until the expiry of the lease on January 31, 1998. The Respondent sued the Appellant for the rent of the months of December 1997 and January 1998, for damages equivalent to three months rent given that the premises was no longer being used. Furthermore, the Respondent claimed additional rent as well as the replacement of the air conditioning and heating systems. While the trial judge held that the claims for additional rent and the replacement of the heating and air conditioning systems were unfounded, the claims for the payment of rent for the months of December 1997 and January 1998 and the claims for damages pursuant to section 16 of the lease were deemed lawful.

Decision:

The Court concluded that Article 16 of the lease was subject to several interpretations. The words "In this case" referred solely to the situation where the lessor exercised his option to cancel the lease pursuant to the lessee's default. Article 16 is ambiguous as is the intention of the parties when they signed the lease. Consequently, the trial judge retained the interpretation that was favourable to the Appellant in accordance with Article 1432 of the *Civil Code of Quebec*. In addition, the right to damages provided for in Article 16 can only be claimed if the lessor decided to cancel the lease as a result of the lessee's default. Although the Appellant did not fulfil his duty of continuous exploitation, the Respondent did not take advantage of his option to cancel the lease, and as such, he has no right to benefit from the application of Article 16.

2.3 Les Pétroles Crevier inc. c. 2432-9096

(April 29, 2003), Montreal 500-09-010783-017, REJB 2003-43161 (C.A.)

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 five year renewal option. The clauses pertaining to the renewal stated the following:

"Special agreements:

The Landlord grants 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 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 premises to Les Pétroles Léger until September 1996, at which time, the sublessee abandoned the premises. In spite of this, the Tenant continued to pay the rent until the end of the term of the lease, that is, until April 30, 1998.

However, the Tenant failed to notify the Landlord in writing within the prescribed delay of its intention not to renew the lease. The notice was sent to the Landlord of some 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 was 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 fit to be used.

The trial judge stated that the clauses within the lease addressing the issue of renewal were clear and unambiguous. Consequently, the judge 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 judge held that the lease was automatically renewed for an additional period of five years. However, the judge emphasized that it was important to consider that the Tenant acted in good faith and that it had always maintained the same position vis-a-vis the non-renewal of the lease. In addition, Justice Sévigny deemed that the Tenant attempted, as soon as possible, to remedy to the failure of sending a non-renewal notice within the prescribed delay. Moreover, the judge stated that the Landlord did not demonstrate that it suffered a prejudice due to the tardiness of the notice.

In addition, 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 trial judge decided to not fully grant the Landlord's action for unpaid rent, limiting same to 12 months' rent, that is, from May 1, 1998 to April 30, 1999.

With respect to the underground fuel reservoirs, the judge held that the Tenant merely replaced equipment belonging to the Landlord which had become unfit for use and that the 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, 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 a result, the Tenant did not breach section c) of the lease (See par 22 of judgment).

As regards the Landlord's claim that the soil of the premises was contaminated by the installation of the fuel reservoirs, the judge ruled that the Landlord did not prove that it was Tenant's maintenance or installation of the fuel reservoirs which caused the contamination. The Court noted that it was possible that said contamination was caused prior to the leasing of the premises by the Tenant, given the poor condition of the fuel reservoirs. Consequently, the judge ruled that the Tenant could not be held liable with respect to the ground contamination.

Decision:

The Appeal Court upheld the decision of the trial judge regarding the exercise of the option to renew the lease. The Court stated that the Tenant did not succeed in proving that the judge erred in his interpretation of the clause providing for the option to renew. Moreover, the Tenant's proposed interpretation would deprive the clause of its purpose.

With respect to the amount awarded for unpaid rent, the Court held that it appeared to adequately penalize the Tenant for the breach committed.

With respect to the underground fuel reservoirs, given the facts of the present case, the Court ruled that the trial judge was correct in concluding that they were considered to be part of the leased property and not additions or improvements. However, the Appeal Court did not agree with the trial judge's refusal to condemn the Tenant to pay the Landlord for costs incurred to decontaminate the soil. The Appeal Court held that the proof clearly demonstrated that the contamination of the soil was a result of the occupation and use of the premises by the Tenant. Therefore, the Tenant was ordered to pay an additional \$10,299.32 to the Landlord.

2.4 Aéroports de Montréal c. Hôtel de l'aéroport de Mirabel inc.

(August 12, 2003), Montréal 500-09-012560-025 et 500-09-012561-023, AZ-50187476, J.E. 2003-1606 (C.A.)

Facts:

On June 26, 1975, a lease (the "**Lease**") was entered into between Her Majesty (the "**Landlord**") and Canadian Pacific (the "**Tenant**") for an initial period of twenty five (25) years with two renewal options, each for a period of 10 years. The agreement stipulated that the Tenant had to build a two hundred fifty (250) room hotel on the leased premises for the minimum cost of nine million dollars (\$9,000,000). Furthermore, it was agreed that at the expiration of the lease, the hotel would become the property of the Her Majesty without compensation or indemnity. At the time, the development plans for Mirabel Airport issued by the Ministry of Transport, indicated that Dorval Airport would continue to co-ordinate flights to the United States until 1980 and domestic flights until 1985. On November 29, 1975, Mirabel Airport officially began to operate and welcome all international flights. In early October, 1977, the Tenant inaugurated a twenty two million dollar (\$22,000,000) hotel which included three hundred and sixty (360) rooms. Contrary to their expectations, the airport traffic did not increase. In August of 1978 and May of 1980, the Tenant tried to renegotiate the contract, however, to no avail.

In addition, the Tenant felt increasingly pressured given that the flights to the United States remained in Dorval after 1980 and that in 1982, the Ministry of Transport decided to maintain the separation between Mirabel and Dorval. Moreover, a particularly long strike in 1982 and 1983 did not better the situation.

On August 1, 1988, the Tenant assigned its rights to the Lease to Placements Jacor inc. (the "**Tenant**"), which later became Hôtel de l'Aéroport de Mirabel inc., for an amount of six million dollars (\$6,000,000). The new Tenant was not more successful than the last and it declared annual deficits in 1989, 1990 and 1992. On April 1, 1992, the Landlord assigned the exploitation and operation of the two (2) Montreal area airports to ADM (the "**New Landlord**")

and on July 31 of the same year, it assigned its rights and obligations toward its tenants as well. On that same day, the New Landlord informed the Tenant of this change.

On September 15, 1997, the New Landlord instituted a new policy of "liberalization" allowing all transporters (with the exception of chartered flights and a few regular flights) the freedom to operate at either Dorval or Mirabel Airport. The Landlord did this knowing that every transporter would choose Dorval due to easier access to passengers in transit.

On December 10, 1997, the Tenant instituted proceedings demanding seventy million dollars (\$70,000,000) claiming that false representations were made by the Landlord in 1972 with regards to airport traffic; which representation were subsequently abandoned. It was also alleged that the New Landlord decided to shut down Mirabel in 1997 given its decision to implement the liberalization policy and that such decision justified the resiliation of the lease as well as damages. On June 25, 2000, while the case was still pending, the initial lease came to an end and the Tenant exercised his first ten (10) year option declaring that it did so to minimize its damages. On May 1, 2002, the trial ended. However, it was later reopened to investigate a statement made by the New Landlord at its annual assembly. The New Landlord announced the transfer of all passenger flights to Dorval by Spring 2004 which would represent an eighty percent (80%) loss of clientele for the Tenant. On June 27, 2002, the Superior Court rendered judgment. The New Landlord appealed and asked that the Tenant be ordered to continue the operation of the hotel during the appeal, which request was denied on August 6, 2002. On September 1, the hotel was shut down and the premises was handed over to the New Landlord.

The trial judge held that the maintenance of regular commercial flights at Mirabel Airport was an implicit part of the Lease, and that according to section 1863 C.C.Q., the Tenant had the right to demand resiliation of the agreement based on the non-performance of an obligation. The trial judge stated that the unilateral removal of half of the Tenant's clientele is not a normal business risk and that the decision made in 1997 to do so, as well as the decision in 2002 to transfer chartered flights to Dorval, justified the resiliation of the agreement. Thus, the judgment ordered the resiliation of the lease as of July 29, 2002 and declared the remittance of the premises valid. The trial judge also awarded the Tenant two million seven hundred fifty five thousand dollars (\$2,755,000) for the loss of revenue incurred between September 15, 1997 and April 30, 2002 as well as fifteen million dollars (\$15,000,000) for future losses for the period commencing April 30, 2002 and ending June 30, 2020. Both the Landlord and the New Landlord (Her Majesty and ADM) were deemed solidary due to the absence of novation and thus, were ordered to pay.

Decision:

The Appeal Court held that while there was no clause in the contract that expressly guaranteed airport traffic, it was clearly implied by the nature of said contract. All contracts encompass not only what is specifically mentioned but also everything that it entails by its nature and in accordance with practice, usage and the applicable legislation.

With regards to novation, the Court held that there was no proof that demonstrated a specific intention to effect novation by Her Majesty and ADM. In fact, ADM was but a tenant of Her Majesty and thus, the solidarity of the Landlord and the New Landlord was maintained. With regards to the resiliation of the lease, the Court confirmed that said resiliation was effective on July 29, 2002 given that in 2002 ADM announced that it would be transferring its chartered flights to Dorval. However, it stated that the Tenant could only claim damages for lost profits due

to the transfer of regular flights in 1997. The prejudice caused to the Tenant by ADM's decision in 1997 was not substantial enough to entail the resiliation of the lease. The premature resiliation of the lease was also upheld due to the difficulty of a business to continue its normal operations while knowing the date of its imminent demise.

With respect to the calculation of damages, the Court held that no error was made in the period between 1997 and the resiliation. It also held that the damages for the period after the resiliation should include the second ten (10) year option due to the profitability of the business. While the Court did not necessarily agree with the trial judge's assessment of these damages, it found them to be adequate and upheld them as well.

In addition, the Appeal Court dismissed the incidental appeal of the Tenant who had claimed damages for the costs related to layoffs and to the marketing investment made in 1997. With regards to the layoffs, the Court found the Tenant's argument to be unpersuasive and the proof inadequate. As for the marketing investment, the Court stated that such costs and the benefits attached thereto were included in the calculation of the principal damages, and thus, already compensated.

2.5 Staubach, Léonard, McKeague inc. c. Hypothèque C.D.P.Q. inc.

(August 27, 2003) Montréal 500-05-052880-992, AZ-50190029, B.E. 2003BE-679 (C.S.)

Facts:

On November 30, 1995, PURKINJE (the "**Tenant**") mandated Staubach, Léonard, McKeague inc. (the "**Broker**") to negotiate the relocation of its offices in the building in which it already occupied as a tenant. The contract stated that the Broker's commission would be paid by the future landlord, seller or developer. Letters exchanged between the Broker and Hypothèque C.D.P.Q. inc. (the "**Landlord**") between December, 1995 and January, 1996 stated that while the Broker's commission would be excluded for the lease of additional office space on the third floor of the building, it would be included for any extensions and renewals. In 1996, the Broker negotiated further expansion of the Tenant's office space. The lease stated that the Landlord would pay the Broker fees.

During the negotiations relating to the extension of the Tenant's lease, the Broker sent two (2) letters to the Landlord's mandatary, Scott, Trudeau et Associés. The letter, dated June 18, 1998, indicated that the Broker's commission which was due on February 18, 1998, totalled seventy eight thousand seven hundred forty six dollars (\$78,746).

The negotiations continued into 1999 and the Tenant's demands changed drastically. The Landlord, at this point, considered the negotiations to be a new lease agreement altogether and stated that it would not pay the Broker commission. The offers made by the Landlord in February, 1999 continued to reiterate same and stated that the Tenant would be responsible for paying the commission. In March 1999, the Broker proposed a compromise whereby he would negotiate the reduction of the rent off approximately three (3) months rent. As a result, this would allow the Tenant to pay the Broker's commission and not be penalized given that the reduction of rent would suffice to pay the commission. However, the Landlord only agreed to a two (2) month reduction. The lease was signed by the Tenant on the April 16 and by the Landlord on April 28, 1999.

Sections 15 and 24 of the lease stated that:

"15) COMMISSION DE LOCATION

Aucune commission de location ne sera payable à un agent ou courtier extérieur, le Locataire prendra seul à sa charge, s'il y a lieu, la responsabilité du paiement de la commission du courtier et ou de conseiller mandaté par lui.

(...)

24) Gratuités

Le Locataire bénéficiera de deux (2) mois de loyer nets gratuits, soit les mois de juillet 1999 et août 1999. Cependant, durant ces mois, le Locataire devra assumer sa quote-part des frais reliés aux frais d'exploitation, les taxes foncières, surtaxes et autres frais qui concernent les lieux loués".

It is only in May, 1999 that the Broker was informed that the Tenant had accepted a modification to section 24 which reduced the three (3) month rent reduction to two (2) months. The Tenant respected its commitment and paid the Broker the equivalent of two (2) months rent, that is, twenty nine thousand one hundred seventy dollars (\$29,170.00). As a result, the Broker is claiming that the remainder of its commission be paid by the Landlord.

Decision:

Justice Morneau held that the clause relating to the payment of a commission by the Tenant was clear and that consequently, it need not be interpreted. Furthermore, the Broker was unable to prove that with regards to the negotiation of leases, there is a common practice where the broker commission is paid by the Landlord. The judge ruled that the Landlord was in no way constrained by such a practice given that its intentions were clearly expressed in the lease.

2.6 Rheault c. Ferme Laco inc.

(September 30, 2003) Québec 200-09-004024-029, AZ-03019173, B.E. 2003BE-813 (C.A.)

Facts:

In November 1993, René Heroux (the "**Landlord**") agreed to lease his land for a fifteen (15) year period to Ferme Laco inc. (the "**Tenant**"). The agreement provided an annual rent of one thousand five hundred dollars (\$1,500) as well as the adequate maintenance of the land. Furthermore, the Tenant agreed to enhance the land with regards to yield capacity, drain said land as well as build a fence at the behest of the neighbour. The lease was never registered in the registry office. However, in the Fall of 1998, the Landlord decided to put the land up for sale for one hundred fifty five thousand dollars (\$155,000). Raymond Rheault (the "**Purchaser**") contacted the president of the Tenant and was informed by him that he had no intention of purchasing the land at that price.

Further to a number of telephone conversations, an agreement was reached between the Purchaser and the Landlord. The offer to purchase was sent to the Tenant, who demonstrated a disinterest in exercising its right of first refusal. Moreover, he sent a copy of section 1887 C.C.Q. to the Landlord. On May 25, 2000, the Landlord sold his land to the Purchaser. The contract contained the following clauses:

"Sujet les immeubles susdécrits au bail consenti par M. René Héroux à Ferme Laco Inc. et/ou M. Jean-Pierre Lacommande, par acte sous seing privé daté de l'année 1993, ledit bail commençant avec la saison 1993.

Sujet à la servitude consentie par M. Dominique Héroux à Gaz Inter Cité Québec Inc. suivant acte publié sous le numéro 299339.

(...)

Advenant le cas où l'acquéreur aurait des ennuis et trouble avec le locataire des terres, il n'aura aucun recours contre le vendeur, l'acquéreur devant régler ces ennuis et troubles à ses frais".

On the same day, the Purchaser sent a notice to the Tenant, informing it of the sale and of the termination of the lease on May 24, 2001, in accordance with section 1887 C.C.Q. On May 27, 2000, the Tenant contacted the Landlord to discuss the reimbursement of all the costs incurred with respect to the draining of the land. These discussions proved to be fruitless. As a result, the Tenant instituted proceedings for damages against both the Purchaser and the Landlord. The Tenant claimed, among other things, that the Purchaser was well informed of the lease agreement when he purchased the land despite the fact that said lease was not registered. Thus, the Tenant alleges that the Purchaser should be held solidarily liable with the Landlord for not recognizing the lease.

The trial judge concluded that the Purchaser had assumed the obligations that resulted from the lease. Thus, the Purchaser was held liable for a part of the incurred damages such as: the fees related to the development of new land given that the profitability appurtenant the Tenant's new business were unforeseeable. The damages were thus arbitrarily set at twenty thousand dollars (\$20,000) due to the loss of revenue. Furthermore, an additional one thousand six hundred dollars (\$1,600) was awarded for the Tenant's expert fees. The Landlord was held liable for the damages with regards to the draining of the land. He was ordered to pay thirteen thousand eight hundred sixty three dollars (\$13,863) to the Tenant.

The Purchaser appealed this ruling shortly after arguing that the aforementioned clauses were misinterpreted by the trial judge.

Decision:

The Court of Appeal held that the trial judge committed a clear and manifest error in ruling that the Purchaser had agreed to assume the obligations set forth in the lease for its entire duration. In fact, the Court found that the parties intentions were entirely contrary. The Tenant had manifested its interest in using the land for an additional year and attempted to convince the Purchaser of its right provided in section 1887 C.C.Q. The Purchaser also wanted to invoke section 1887 of C.C.Q. to his benefit and had informed all parties of his intention. For

these reasons, the Court granted the appeal and annulled the damages awarded to the Tenant in the trial decision.

2.7 9104-5666 Québec Inc. c. Guy Lemire et Corporation Virtual Data Inc.

(October 31, 2003), Québec, 200-05-015990-018 (C.S.)

Facts:

On April 10, 2001 a lease took effect between Corporation Virtual Data Inc. (the "**Tenant**") and 9104-5666 Québec Inc. (the "**Landlord**"). The lease was for a one thousand (1,000) square foot room in a building comprising of eighteen thousand one hundred fifty three (18,153) square feet. Furthermore, it provided the following progressive rent:

- 0.50\$ per square foot from April 15 to July 14, 2001 (500\$ per month);
- 0.75\$ per square foot from July 15, 2001 to April 14, 2002 (750\$ per month); and
- 1.00\$ per square foot from April 15, 2002 to April 14 2004 (1,000\$ per month).

The Tenant took possession of the premises on April 15, 2001. However, soon after, the Tenant was given permission to move to another room of similar size within the building. On July 15, 2001, the Landlord discovered that the Tenant had taken possession of a six thousand (6,000) square foot room and had changed the locks and had installed an alarm system. Moreover, a portion of the premises had been turned into residential space. Despite several written and oral requests for payment of rent for this larger local, the Tenant never paid. On January 22, 2002, given that the Landlord was never compensated, the Landlord was forced to leave the premises.

The Landlord instituted proceedings for unpaid rent which totalled twenty nine thousand six hundred sixteen dollars and forty six cents (\$29,616.46). An additional amount of ten thousand dollars (\$10,000) was requested for damages. The Landlord justified his claim by arguing that the Tenant had benefited from a six thousand (6,000) square foot room which was comprised of a 3,450.75 square foot ground floor and a 2,549.25 square foot mezzanine. The Landlord justified its claim by stating that the rent per square foot was one dollar (\$1.00) and that the applicable municipal taxes must be tacked on.

The Tenant on the other hand, had instituted a counter-claim but was unable to justify both the non-payment of rent or the counter-claim itself. The claim was consequently rejected.

Decision:

Basing itself on paragraph 2 of section 1853 C.C.Q., the Court ruled that while the Tenant should be held responsible for the unpaid rent, this rent should be set at the agreed amount. This amount was set at 0.75\$ per square foot for the period comprising July 15, 2001 to January 22, 2002. Thus, the Court awarded 23,417.98\$ to the Landlord for the unpaid rent and municipal taxes. Damages were not awarded.

2.8 Minco-Division Construction Inc. c. 2964-2253 Québec Inc.

(November 6, 2003), Montréal, 500-17-013840-031 (C.S.)

Facts:

On November 23, 2000, Minco-Division Construction Inc. (the "**Landlord**") acquired four buildings in Downtown Montreal. One of these buildings had several tenants one of which was 2964-2253 Québec Inc. (the "**Tenant**"). The Tenant occupied a two thousand two hundred (2,200) square foot area on the ground floor and had been operating a restaurant since November 8, 1994, pursuant to a ten (10) year lease with a renewal option which had been signed by the Tenant and the original owner of the building. Section 10.05 of the lease stated the following:

*"Dans l'éventualité où le Propriétaire désirerait démolir ou rénover l'Édifice dans lequel se trouvent les lieux loués, il aura une option irrévocable de mettre fin au présent bail et/ou à tout renouvellement en en donnant un avis écrit à cet effet au Locataire et celui-ci devra remettre la possession des lieux loués au Propriétaire au plus tard cent quatre-vingts (180) jours de la date de réception de cet avis, le tout sans réclamation, indemnité ou droit de quelque nature que ce soit contre le Propriétaire et le présent bail sera résilié à toutes fins que de droit à compter du 180^{ème} jour suivant la réception de l'avis susmentionné. **Cependant, si le Propriétaire décide de rénover l'édifice, alors le Propriétaire convient, une fois la rénovation terminée, d'en donner avis au Locataire qui aura l'option, dans les trente (30) jours de la réception de cet avis, de réintégrer les lieux loués, à ses frais, le présent bail se poursuivant pour le reste du terme à courir, aux termes, et conditions prévus aux présentes, comme s'il n'avait jamais été résilié, sauf pour la période de rénovation. Passé le délai de trente (30) jours, l'option prévue aux présentes en faveur du Locataire, pour réintégrer les lieux, sera nulle et de nul effet et le présent bail continuera d'être résilié à toutes fins que de droit, conformément aux dispositions à cet effet prévues dans le présent paragraphe**".*

On July 1, 2003, the Landlord sold the four (4) buildings to Sleb 1 (the "**Purchaser**"), a company managed by the same person who manages the Landlord. The Purchaser had purchased the buildings with the intention of demolishing them and rebuilding condominiums. However, a municipal regulation did not permit this due to the buildings' architectural importance. Thus, the Purchaser was forced to change his plans and only demolish the interior of the building, leaving the outer shell intact. All the tenants who had not already left were notified of the resiliation of their leases. However, the Tenant refused to leave the premises despite the Purchaser's permission to demolish the roof of the building as well as a municipal permit allowing such transformation.

Prior to the construction, many legal proceedings were instituted. By basing itself on the aforementioned clause, the Landlord had tried to evict the Tenant, who had categorically refused. The Landlord and the Purchaser continuously requested the resiliation of the lease and the expulsion of the Tenant. On April 8, 2003, the Tenant notified the Landlord and Purchaser of its intention to renew the lease for another ten (10) years. The Landlord and Purchaser alleged that the project was an actual demolition despite the fact that the exterior walls would remain intact. As a result, they claimed that they had a right to demand the expulsion of the Tenant

according to section 10.05 of the lease. In response, the Tenant claimed that the project was in fact, a renovation and that therefore, he had a right to return to the building when the construction would be complete.

Decision:

The Court held that while the Tenant had to leave the building during the construction period, he had a right to return according to the lease. It was found that the project was in fact a renovation and not a demolition. The Superior Court based itself on the following facts:

- the building's outer shell would remain intact;
- the City of Montreal had granted the Landlord and the Purchaser a permit to transform and not to demolish; and
- the demolition of the interior could not be considered as a demolition of the building.

Hence, the Tenant was expelled from the building for the duration of the renovation. The Landlord and the Purchaser were ordered to notify the Tenant within thirty (30) days of the end of construction in order to allow the reintegration into the building if it so desired. Finally, the Court held that the Tenant had had the right to remain in the building despite the numerous expulsion notifications sent by the Landlord and Purchaser.

2.9 Assurance-vie Desjardins laurentienne inc. et S.I.R.R. Desjardins inc. c. 3458296 Canada inc. and 3458296 Canada inc.

(July 31, 2003), Montreal, 500-05-073248-021, REJB 2003-47641, (S.C.)*

In July 2001, 3458296 Canada inc., (the "**Tenant**"), operating under the "Cohoes" banner, ceased paying rent and requested that the rent be considerably reduced.

Section 24.6 of the lease provided that both the Tenant and the landlord could resiliate the lease after three years, in the event that the sales did not surpass \$125.00 per square foot provided that the resiliating party give a 120 day notice to the other party. However, the party who exercised said option would have to reimburse the non-amortized portion of the allowance to the other party. On June 20, 2001, the Tenant's President and Secretary sent a notice to the landlord, advising it that their sales had not reached \$125.00 per square foot and that as a result, they requested a rent reduction. Furthermore, Cohoes Fashions inc. (the "**Guarantor**") had guaranteed the obligations of the Tenant.

As a result, the landlord instituted proceedings against the Tenant and the Guarantor with respect to the unpaid rent which totalled approximately \$300,000, alleging that the Tenant was the alter ego of the Guarantor. In addition, the landlord requested that the lease be resiliated and that the Tenant be evicted. The landlord alleged that, although the Tenant did not possess any assets, the Guarantor was extremely solvent.

Decision

Justice Morneau of the Superior Court ruled that the Tenant could have resiliated the lease but instead, chose to cease paying rent in order obtain a rent reduction. The Court held

that the Tenant simply did not want to resiliate the lease given that the Guarantor would then have been forced to pay the allowance to the Landlord. By ceasing to pay rent, the Tenant was of the view that the landlord would be forced to resiliate the lease. The Court analyzed the Guarantor's corporate structure as well its related companies. It concluded that the assets were controlled by the Guarantor, but the debts on the other hand, were spread out in various shell companies which served to protect the Guarantor's assets from creditors.

The Court was of the opinion that the Tenant simply did not want to resiliate the lease but rather, wanted to provoke the landlord to effect said resiliation. The Tenant's actions were considered as blatant acts of bad faith which could not be condoned. The Guarantor essentially created an elaborate corporate structure to intentionally protect itself from creditors. Given that the Tenant was considered to be the alter ego of the Guarantor in accordance with section 317 of the C.C.Q., it was considered to be solidarily liable with the Tenant and was hence ordered to reimburse the unpaid rent as well as the allowance. Also, the lease was resiliated and the Tenant was evicted from the premises.

3. LANDLORD'S OBLIGATIONS

3.1 Sabir c. Leiriao

(January 8, 2003), Quebec, AZ-50157885, B.E. 2003BE-331, (C.S.)

Facts:

The Plaintiffs operate a restaurant in the premises owned by the Defendant. However, the Plaintiffs encountered certain difficulties regarding the exploitation of their enterprise as a result of problems with the hot water, the electricity as well as the telephone. They were of the opinion that the difficulties were a result of the Defendant's malicious behaviour, particularly, given the fact that the Defendant did not give them access to the service box in order to enable them to make the necessary reparations . The Plaintiffs obtained a provisional injunction ordering the Defendant to abstain from interfering with these services. On November 18, 2002, the Plaintiffs obtained an interlocutory injunction ordering the Defendant to install a door, giving them direct access to the water heater as well as the service box. In addition, the injunction ordered the Defendant to install hot water, telephone as well as electricity services to the benefit of the Plaintiffs. The Plaintiffs are of the opinion that the Defendant did not comply with interlocutory injunction ordered on November 18, 2002.

Decision:

Mrs. Justice Blondin stated that the purpose of the injunction was to oblige the Defendant to give the Plaintiffs' access to the service box at all times. The Defendant was supposed to install a door in order to facilitate said access. However, the Defendant did not comply with the order given that it locked the door, thereby preventing the Plaintiff from accessing the service box. Since the injunction was ordered, the Plaintiffs were deprived of hot water on certain occasions, and were unable to remedy the problem due to a lack of access to the service box.

Accordingly, the Court found the Defendant guilty of contempt of court, and condemned him to pay a five hundred dollar fine. In addition, the Superior Court ordered the Defendant to remove the locks which would give the Plaintiff's access to the service box.

3.2 Bourkas Furs Ltée c. ADT Canada inc. et Joseph S. Drazin et David Honig

(February 5, 2003), Montreal, 500-09-009829-003, REJB 2003-38824, (C.A.)

Facts:

The Appellant's premises is situated in a building owned by Drazin and Honig (the "**Landlords**"). The building had an alarm system which was created by the defendant, ADT Canada. On October 20, 1992, the Appellant's premises was robbed. The Appellant claims that the Landlords did not fulfil their obligation given that they did not increase the protection of the alarm system. The Landlords categorically denied having consented to such an increase.

Justice Courville of the Superior Court found that the Landlords fulfilled their obligations. The lease did not specify that the Landlords were responsible for the installation of an alarm system. However, they were nonetheless obliged to respect the obligations imposed by the *Civil Code of Quebec* which require them to allow the tenant (Appellant) the peaceable enjoyment of the property. The lease contained a non-liability clause which stated that the Landlord shall not be liable for the theft of any property. However, pursuant to Section 1474 of the *Civil Code of Quebec*, the Landlords can still be held liable if they acted with gross negligence.

In the present case, whether the Landlords did, in fact, promise to install an alarm system is irrelevant, given that nothing in the lease forced the Landlords to install an alarm, and more particularly, nothing compelled them to install one of the highest quality. Indeed, they did install an alarm system which they have even improved throughout the years. This demonstrates that they did not act with gross negligence, and as such, they fulfilled their obligations in accordance with the Civil Code of Quebec.

Furthermore, the Court ruled that the tenant extracontractual recourse against ADT was unfounded given that ADT had no obligation toward the tenant.

Decision:

The Court held that the Appellant did not successfully demonstrate that the trial judge erred in his appreciation of the facts. Consequently, the Landlords fulfilled their obligations resulting from the lease concluded with the Appellant.

4. RENEWAL OF LEASE

4.1 Béliveau c. Gardner

(February 13, 2003), Arthabaska 415-05-000081-942, REJB 2003-37390, (C.S.)

Facts:

On April 26, 1979, the Plaintiff was authorized to exploit a maple grove jointly with his brother for a period of five years, with a possibility of a yearly renewal. In 1982, the Plaintiff purchased his brother's share and continued to operate the maple grove on his own. However, in 1992, an undivided co-owner of the maple grove passed away, and the Plaintiff, in order to exploit the maple grove, was obliged to do business with the liquidators of the successions. On January 7, 1994, the Plaintiff received a demand letter from the Defendant ordering him to remove the equipment from the lot. He claimed that the Plaintiff had no right to exploit the forest, and he warned the Plaintiff that if the equipment was not removed, that the Defendant would remove the equipment himself. However, the Plaintiff argued that the Defendant was not the sole liquidator of the succession, and consequently he could not make a decision on his own. Accordingly, the Plaintiff alleged that the Defendant should refrain from removing the equipment until the issue was resolved. On March 19, 1994, the Defendant took it upon himself to remove the equipment and left it on the ground. As a result, the Plaintiff instituted proceedings claiming damages given that the Defendant had no right to remove his equipment in light of the fact that he is the tenant of the maple grove. In his defence, the Defendant argued that the contract concluded on April 26, 1979 was not a lease.

Decision:

The Court held that the contract was in fact a lease given that it granted the Plaintiff enjoyment of the maple grove despite the fact that there existed certain restrictions as to the use of the land.

Accordingly, it must be determined whether the lease was in force in 1994. There was, in fact, tacit renewal of the lease for the years of 1985 until 1993 inclusively, because the rent was paid and the maple grove was exploited without complaint. However, in 1994, the Defendant manifested his opposition to the exploitation of the maple grove, and consequently, the lease cannot be considered as being tacitly renewed. In this case, opposition manifested by only one liquidator of the succession is sufficient given that the other liquidator is the Plaintiff's wife, who did not participate in decisions relating to the maple grove due to her conflict of interest. As a result, in 1994, the Plaintiff illegally exploited the maple grove. For that reason, the Defendant was entitled to remove the equipment, and the Plaintiff, by continuing to operate the maple grove, even after the opposition manifested by the Defendant, clearly demonstrated his unwillingness to conform to the demand letter.

4.2 Immobilier Soltron Inc. c. 162980 Canada Inc.

(April 30, 2003), Montreal 500-05-062012-008, 500-05-062569-015, 500-05-064065-012 (C.S.)

Facts:

On November 6, a lease (the "**Lease**") was signed between the then owner of Les Cours Mount-Royal shopping centre (the "**Shopping Centre**") and 162982 Canada Inc. (the "**Tenant**"), owners of a restaurant. The Lease was signed for a ten-year term and contained an option to renew that read as follows:

"Provided that they are not in default with respect to their obligations as per the Lease, the Tenant will have one (1) option to renew the Lease, for a period of five (5) years, with conditions that will be negotiated by the parties". (My translation)

Immobilier Soltron Inc. (the "**Landlord**") purchased the Shopping Centre on May 3, 1997. The Landlord consistently maintains that as a result of various defaults by the Tenant, namely the failure to remain open during the hours as set by the Landlord, it could not by the terms of the Lease, renew it. As a result, said Lease expired on January 31, 2001. Consequently, the Landlord seeks to resiliate the Lease, due to the Tenant's alleged defaults, as well as receive a declaration by the Court stating that the Lease was not renewed when the original term expired. In addition, the Tenant seeks a renewal of the original Lease.

Decision:

The Court held that the evidence demonstrated that the Tenant was in default under the Lease as a consequence of his failure to remain open during the hours set forth by the Landlord and as adhered to by the other Tenants in the Shopping Centre. This occurred over a period of several years and constituted a breach such that it prevented the right to automatically renew the Lease in accordance with section 1.4. Given that the Court found that the failure to remain open precluded the automatic right of renewal of the Lease, the Lease was deemed to no longer be in effect.

As regards the Landlord's claim for a penalty for closing against the Landlord's requirements, the Court held that by applying the terms of the Lease, which explicitly provide for a penalty in the case of non-respect of the obligation of continuous exploitation, the Landlord had a right to the penalty provided for in the Lease. The Landlord was therefore awarded \$56,888.87 as a penalty and \$14,671.11 as additional rent for the operating costs for the Shopping Centre.

4.3 9118-5504 Québec inc. c. Magdy Daoud

(September 25, 2003), Montréal, 500-05-075411-023 (C.S.)

Facts:

On May 12, 1998 a lease was signed between 9118-5504 Québec inc. (the "**Tenant**") and Magdy Daoud (the "**Landlord**"). The lease was for a five (5) year period, beginning on

January 1, 1998 and ending on December 31, 2002. It included the possibility for the Tenant to renew the lease three (3) times in accordance with the following clause:

"Le bailleur accorde au Locataire trois (3) options de renouvellement pour des périodes additionnelles et consécutives de cinq (5) années chacune soit du 1er janvier 2003 au 31 décembre 2007, du 1er janvier 2008 au 31 décembre 2012 et du 2013 au 31 décembre 2017. Le Locataire devra pour se prévaloir de telle option en signifier son intention par écrit au Bailleur au moins six (6) mois avant l'expiration du bail. Advenant tel renouvellement, les stipulations du présent bail demeureront inchangées mis à part le loyer qui sera conforme aux dispositions du paragraphe 4 des présentes, SUPRA".

On July 9, 2002, the Tenant gave notice to the Landlord by registered mail stating that he intended to renew the lease for the period running from January 1, 2003 to December 31, 2007. The notice was nine (9) days late given that, according to section 3.2 of the lease, it had to be sent six (6) months before the expiration of the lease. The Tenant had however, attempted to give the Landlord the required notice in person on the previous day, however said notice was refused given that the Landlord required that it be sent by mail so as to be in a position to prove the tardiness of the notice.

On July 16, 2002, a letter was sent to the Tenant stating that the lease would be terminated on December 31, 2002. The Landlord alleged that although said letter was dated May 29, 2002, it had only been received on July 9, 2002.

As a result, the Tenant instituted proceedings arguing that the term mentioned in the lease agreement was not peremptory. Moreover, it argued that by demanding the notice be sent by registered mail, the Landlord implicitly renounced to invoking the delay stipulated in the lease. The Landlord responded by arguing that for a term to be peremptory, it does not have to be stipulated in the contract. Furthermore, he argued that one cannot invoke one's own negligence in order to escape the obligations set forth in a contract. In light of this, he demanded the expulsion of the Tenant in a counter-claim.

Decision:

Justice Grenier of the Superior Court was asked to determine whether or not there was a tacit renewal of the lease. The Court held that despite the verbal notice given to the Landlord by the Tenant, there was no tacit renewal. The contract clearly stipulated that a written notice was required in order to effect renewal of the lease. Furthermore, it was ruled that by requesting that the notice be sent by registered mail, the Landlord had acted diligently. The notice was dated "May 29" however, the notice was only handed to the Landlord on July 8. In requesting that the notice be sent by registered mail can in no way be interpreted as a waiver by the Landlord of its right to invoke section 3.02 of the lease. The Court concluded that the requirement of written notice was more than a formality and that the Tenant acted negligently. The motion was dismissed and the Tenant was expelled from the building.

4.4 Cité Nordelec inc. c. 9087-0593 Québec inc.

(October 30, 2003), Montréal, AZ-03019193, J.E. 2003-2133, (C.A.)

Facts:

On July 1, 1997 a lease was signed between la Société de développement industriel de Montréal and Joël Derville for a premises of three thousand (3,000) square feet on the ground floor of a building in Pointe St-Charles. The lease stipulated a five (5) year period and was registered on November 30, 1999. On February 11, 2000, Joël Derville assigned his rights with respect to the lease to a restaurateur, 9087-0593 Québec inc. (the "**Tenant**"), who accepted to be bound by the lease agreement. On May 5, 2000, the building was sold to Cité Nordelec inc. (the "**Landlord**").

On December 4, 2001, the Tenant informed the Landlord that he intended to renew the lease for an additional five (5) year period pursuant to the lease agreement which stated the following:

"Dans les soixante jours de la réception de l'avis de renouvellement, le BAILLEUR avisera le LOCATAIRE que le présent bail sera renouvelé aux mêmes conditions, à l'exception du loyer de base qui sera au taux du marché pour des espaces similaires dans l'Édifice.

À défaut d'une entente sur ce nouveau loyer de base ou d'entente sur toute autre modification ou modalité, trois (3) mois avant la fin du terme le bail prendra fin à la fin du terme sans autres représentations".

The Landlord responded that he would accept the renewal of the lease only if an agreement could be reached on a new rent. The Landlord proposed a rent of eighteen dollars (\$18.00) per square foot per annum, net net. In response to this, the Tenant proposed a rent of four dollars and twenty five cents (\$4.25) per square foot, the same rent as before the renewal. The negotiations continued to be fruitless up to the three (3) month period prior to the end of the lease.

Soon after, the Tenant instituted proceedings demanding that the lease be renewed and stating that the Landlord had negotiated in bad faith. The trial judge held that the Landlord had disregarded the lease when negotiating with the Tenant and was therefore presumed to have negotiated in bad faith. The lease stated that the rent would be based on the market value of similar space in the building. Thus, in comparison to the rent of similar spaces in the building, the proposed four dollars and twenty five cents (\$4.25) per square foot was deemed reasonable. Justice Crêteau dismissed the Landlord's argument that the market value should be evaluated on the basis of other offers submitted by other interested parties; which offers reflected the rent that the Landlord was asking.

The trial judge concluded that by ignoring the lease, the Landlord had negotiated in bad faith. As a result, there was no way that the Tenant could respect the three (3) month deadline provided in section 9.1 of the lease. Consequently, the rent was set at four dollars and twenty five cents (\$4.25) per square foot and the lease was renewed for an additional five (5) years.

Decision:

The Court of Appeal overturned the trial judge's decision, stating that the Landlord had never disregarded the lease agreement while negotiating. In fact, the numbers brought forward by the Landlord were far more reflective of the market value of the premises than the ones invoked by the Tenant given that the Landlord's numbers were based on offers made by restaurant operators for the premises in question. The amount of rent brought forward by the Tenant was based on similar premises located on higher floors in the building which were not used for the restaurant business. The Court concluded that the Landlord had negotiated in good faith and that the three (3) month deadline set forth in section 9.1 of the lease had elapsed. As a result, the lease was terminated.

5. CANCELLATION OF LEASE

5.1 Développement Métro-Montréal Canada Corp. c. 9027-1586 Québec inc.

(April 7, 2003), Montréal 500-09-012771-028, AZ-03019572 (C.A.)*

Facts:

Pursuant to a lease (the "**Lease**") dated July 13, 1989, and two assignments, dated July 27, 1989 and October 27, 1995 respectively, Wang et als. (the "**Tenant**") occupied the premises owned by Développement Métro-Montréal Canada Corporation (the "**Landlord**"). In 1996 there was a dispute between the parties that was settled out of court. It was decided that the rent would be reduced for a period of three years, ending on September 30, 1999. However, as of October 1, 1999, the Landlord complained that the Tenant has not paid all of its rent, and the Landlord alleges that a statement of account was sent to the Tenant to that effect prior to sending them a demand letter dated March 21, 2001. The Tenant maintained the position stating that they never received a statement of account.

On or about April 25, 2001, the Landlord instituted proceedings to obtain payment of the rent and the cancellation of the lease. The Tenant filed a cross-demand claiming that an agreement took place between the parties providing for the cancellation of the Lease and the payment of an indemnity of \$151 500 to the Tenant. On May 16, 2001, an offer (the "**Offer**") was prepared by the Landlord to terminate the Lease whereby, a clause in said Offer specified that the Tenant shall receive an indemnity of \$150 000. The following day, the Tenant sent a letter to the Landlord accepting the Offer, while requesting confirmation to the effect that the Offer was still valid. On May 18, 2001, an agreement was entered into between Provigo and the Landlord, whereby Provigo agreed to lease the premises occupied by the Tenant. However, the Tenant never received the confirmation demanded in the letter. On November 6, 2001, the Landlord sent a letter to the Tenant informing it that no final agreement had taken place between them and that only a preliminary agreement existed which would depend on whether the Landlord and Provigo would come to an agreement.

The trial judge held that on May 16, 2001, the Landlord did indeed offer the Tenant a sum of \$151 500 in return of the cancellation of the Lease. In addition, the proof demonstrated

that two days later, the Landlord signed an agreement with Provigo, whereby they agreed to free the premises for September 30, 2001 (later changed to November 15, 2001), and whereby Provigo promised to reimburse the Landlord for fees incurred as a result of the cancellation of the Tenant's Lease. Consequently, the Lease should be cancelled, and an indemnity of \$151 000 should be paid to the Tenant pursuant to the terms of the Offer.

Decision:

The Appeal Court upheld the decision of the trial judge, ruling that the Lease should be cancelled.

5.2 9051-5909 Québec inc. c. 9067-8665 Québec inc.

(February 27, 2003), Quebec 200-09-003559-017, REJB 2003-39652 (C.A.)

Facts:

On September 1, 1998 a lease (the "**Lease**") was entered into between 9067-8665 Québec inc. (the "**Tenant**") and 9051-5909 Québec inc. (the "**Landlord**") for a five year term commencing on October 15, 1998. However the Tenant was permitted to occupy the premises on September 1, 1998 in order to complete certain preparations necessary for the opening of a restaurant. On February 9, 1999, the Landlord sent a demand letter to the Tenant requiring full payment of the rent due on January 15 and February 15, 1999 as well as the payment of certain taxes. On May 15, 1999, the Tenant still owed part of the rent and the taxes. On May 17, 1998, the Landlord instituted proceedings demanding the cancellation of the Lease, the expulsion of the Tenant and a sum corresponding to the rent and taxes which remained unpaid. On May 20, 1998, the Landlord sent the Tenant a notice informing them of the cancellation *ipso jure* of the Lease and their expulsion from the premises the next day. The right to cancel the Lease *ipso jure* is provided for in the Lease which states that if the rent is not paid when due, the Lease may be cancelled *ipso jure* at the landlord's option. In July 1999, the Tenant contested the motion introduced by the Landlord. The trial judge held that the Landlord had no right to cancel the Lease without the Court's authorisation, despite the clause in the Lease providing for cancellation *ipso jure*. Consequently, the Landlord had no right to expulse the Tenant from the premises. As a result, the Landlord committed a fault and was ordered to pay the Tenant an indemnity for damages incurred as a result of the expulsion. The trial judge also ordered the cancellation of the Lease given that it was requested by both parties.

Decision:

The Appeal Court held that a clause providing for the cancellation *ipso jure* in a commercial lease is perfectly valid. However, in the present case, the Landlord cannot claim that the Lease was cancelled *ipso jure*. This is due to the fact that the claim for cancellation *ipso jure* occurred only after the Landlord instituted proceedings to cancel the Lease. Article 1883 C.c.Q. provides that a tenant against whom proceedings for the cancellation of the lease are instituted can avoid the cancellation, if, before a judgement is rendered, he pays the rent owed and any additional sums and interest relating thereto. In this case, the Landlord's claim that the Lease was cancelled *ipso jure* deprived the Tenant of said right, which is not permitted, despite the fact that such right is not specifically mentioned in the Lease. As a result, the Landlord could not invoke the right to cancel the Lease *ipso jure* and thus, the expulsion of the Tenant was

therefore illegal. Consequently, the Landlord committed a fault forcing it to indemnify the Tenant for the damages incurred.

The Court held that even if the Lease had been cancelled *ipso jure*, the Landlord would still have been considered as having committed a fault, given that the expulsion of the Tenant was excessive and abusive.

Therefore, the Appeal Court upheld the trial judge's decision.

5.3 Robertson c. Beauvais

(September 8, 2003), Longueuil 505-05-001042-925, AZ-50192098, J.E. 2003-1910, (C.S.)

Facts:

On July 1, 1988, Raymond Viateur Beauvais (the "**Landlord**") leased his quarry to Charles J. Robertson (the "**Tenant**") for a monthly rent of three thousand dollars (\$3,000). On April 1, 1989, the Tenant signed an agreement with the Mohawk Council of Kahnawake whereby he agreed to pay royalties to the tribe as well as take out an insurance plan. This agreement was signed for a ten (10) year period and gave the Tenant an operating permit. Given that the quarry was unprofitable, the Tenant never paid the rent and in 1990, he stopped paying the royalties.

Further to The Landlord's several attempts to obtain payment, he sent a letter to the Tenant on April 3, 1991, demanding that he vacate the premises and that he remove his equipment. The Landlord subsequently repossessed the quarry and on April 19, 1991 and the Mohawk Council resiliated its agreement with the Tenant.

The Tenant instituted proceedings against the Landlord for damages, arguing that he had resiliated the lease in bad faith. The Tenant claimed that no rent was due, that the Landlord had continued to operate the quarry after the resiliation of the lease despite the fact that it was the Tenant who possessed the operating permit. In addition, the Tenant claimed that the Landlord sold stones that had been crushed by the Tenant the Mohawk Council. Furthermore, proceedings were also instituted against the Mohawk Council with regards to the resiliation of the agreement concluded with the Tenant.

Decision:

The Court held that the Tenant's arguments were unfounded. The Landlord's bad faith was never proven given that he had not continued to operate the quarry and that no stones were sold to the Council. Furthermore, it was proven that the rent had never been paid by the Tenant despite many verbal notices from the Landlord. The Tenant's arguments stating that he had never received a demand letter was rejected. The Court held that pursuant to section 1069 C.C.B.C, the mere lapse of time was sufficient to constitute default. The Court also held that a verbal notice of default was valid and that the provisions with regards to written notices in section 1067 C.C.B.C. were merely a question of formality and not a condition of validity.

The Superior Court ruled that the non payment of rent by the Tenant was considered to be a repetitive and major breach of a contract and thus, equivalent to a refusal of payment.

Moreover, it was clear to the Court that the Tenant was in substantial financial difficulty as a result of his numerous debts and therefore, had no intention of paying rent until the quarry became profitable.

Thus, according to section 1628 C.C.B.C., the Landlord found himself in the exceptional situation where he was entitled to resiliate the lease *ipso jure*. The Tenant's argument stating that he had been unable to benefit from his right to pay the rent before judgment was also rejected due to the fact that he had never paid rent and it was not probable that he ever would.

The Tenant appealed the ruling on October 8, 2003.

6. CHANGE IN DESTINATION

6.1 Parent c. Gariépy

(February 28, 2003), Frontenac 235-02-000017-010, AZ-50164642, J.E. 2003-800 (C.Q.)

Facts:

In 1996, Mr. Parent (the "**Tenant**") leased a maple grove from Mr. Gariépy (the "**Landlord**"). At this time, the surrounding lands were uncultivated and unoccupied. However, immediately after the conclusion of the lease (the "**Lease**"), the Landlord allowed people to walk around the roads near the Tenant's land. Motorcycles and skidoos were also permitted to pass through said roads. In addition, in 1997, the Landlord leased premises to the enterprise "Paint-ball extrême" ("**Paint-Ball**"), which operated near the leased premises. In 1998, its activities extended to the exterior of the immovable. In 1999 the Tenant complained to the Landlord of the lack of peaceful enjoyment of the premises. Pursuant to the complaint, the Landlord spoke to Paint-Ball and to the motorcycle and skidoo clubs so as to ensure that they would not permit their clients to trespass onto the maple grove. In 2000, Paint-Ball's activities extended even closer to the Tenant's maple grove. As a result, the Tenant instituted proceedings to cancel the Lease and to obtain compensation for damages incurred. The Landlord filed a cross-demand alleging that the Tenant failed to pay the rent for 2001 and 2002 and failed to pay certain other fees as well.

Decision:

Mr. Justice Cloutier held that the fact that the Landlord allowed people to cross on his land without interfering with the Tenant's maple grove does not constitute a violation of the Tenant's rights. However, allowing the maple grove to be completely surrounded by paint-ball games all weekend from the month of May through October, constitutes a modification of the destination of the premises, which is prohibited pursuant to article 1856 C.c.Q. The prohibition mentioned in article 1856 C.c.Q. consists of any hindrance in the physical occupation of the leased premises and also includes any change in the conditions as existed at the time of the conclusion of the lease. The obligation to not modify the form or destination of the property extends beyond the actual property extending to all its accessories and advantages. The Landlord changed the destination of the premises and the destination of the conditions which existed at the time of the signature of the Lease, in 1996. Consequently, the Lease should be cancelled.

On the other hand, the Landlord is not responsible for damages incurred by the Tenant given that the Landlord is not responsible for damages caused by a third party, particularly when it has not been proven that the damages are due to the fault of one of the Landlord's tenants, or one of the tenant's clients (article 1859 C.C.Q.). With respect to the claim for loss of peaceful enjoyment, the Tenant did not speak to the Landlord again after his initial complaint, nor did he give the Landlord any indication that he was still unhappy, therefore, pursuant to article 1858 C.C.Q. the Landlord cannot be held liable. The Court awarded the Landlord the payment of rent due up until the date of cancellation of the Lease.

7. OPTION TO PURCHASE

7.1 Roussel c. Rodrigue

(February 25, 2003), Quebec 200-09-002064-985, REJB 2003-39117 (C.A.)

Facts:

Pursuant to a lease (the "**Lease**") dated May 10, 1993, Mr. Roussel (the "**Tenant**") leased from Mr. Rodrigue (the "**Landlord**") a piece of land which included a barn constructed on the land (the "**Premises**") for a one-year period commencing on June 1, 1993 and terminating on June 1, 1994. The Lease included an option for the Tenant to renew annually for the following five years, as well as an option to purchase the leased property within the same five year period. On January 27, 1996, the barn burned down and damages equivalent to 70% of its value were incurred. The Landlord informed the Tenant on April 29, 1996, that he did not intend to renew the Lease for the period of June 1, 1996 until May 31, 1997. The following day, the Tenant informed the Landlord that he intended on repairing the damages and continue to operate the Premises from June 1, 1996 until May 31, 1997. On May 10, 1996, the Landlord notified the Tenant that he did not permit the reconstruction of the barn. On May 17, 1996, the Tenant wrote a letter to the Landlord informing him that he intended to exercise his option to purchase the Premises, and that he expected the Landlord to give him the proceeds obtained under the insurance policy as a result of the damage sustained by the barn. The Landlord replied that due to the damages caused to the barn, the parties were liberated of any obligations resulting from the option to purchase and therefore informed the Tenant that he must remove all of his belongings from the Premises. However, the Tenant prepared a deed of sale, which the Landlord refused to sign. In October 1996, the Landlord completely demolished the barn. On October 28, 1998, the Tenant instituted an action in execution of deed against the Landlord.

The trial judge held that an option to purchase is a promise made by the seller for the benefit of the buyer and only becomes binding once the buyer exercises the option. The buyer must accept the property offered at the price agreed upon. If he imposes a condition, he is considered as not exercising the option given that an element was added to the original offer. Accordingly, the deed of sale must substantially conform to the agreement. In the present case, the deed of sale did not conform to the original promise because the conditions concerning the transfer of the proceeds of the insurance, the ploughing equipment and the servitude were added to the deed and were not present in the promise. As a result, the Tenant did not exercise the option. Consequently, the Tenant did not possess a real right on the property before the date of the fire; he was merely a tenant. The action in execution of title is thus unfounded given that the Landlord cannot be considered to be in default of executing a title which does not exist.

Decision:

The Appeal Court upheld the decision of the trial judge stating that the deed of sale proposed by the Tenant did not conform to the promise. The deed dealt with equipment, the creation of a triple servitude as well as subrogation in the buyers' favour with respect to the product of insurance obtained; which elements, did not exist in the promise.

8. FRANCHISE AGREEMENTS

8.1 Ahsan c. Second Cup Ltd.

(April 1, 2003), Montreal 500-09-010866-010, REJB 2003-39565 (C.A.)

Facts:

On June 26, 1995, the Respondent, a Second Cup franchisor, rented a premises for a ten year period. Concurrently, it entered into a franchise agreement and a sublease with 9021-4743 Quebec Inc. (the "**Tenant**"). In 1996, the Respondent adopted a smoke free environment policy applicable to all new Second Cups and urged existing Second Cups to adhere to the same policy. In 1998, the Appellants acquired the capital stock of the Tenant. On May 28, 1998, a new franchise agreement and a new sublease were entered into between the Appellants and the Respondent.

The Appellants allowed customers to smoke on the terrace and on the second floor of the premises despite the fact that this was a direct breach of the non-smoking policy. In October 1998, the Respondent began sending the Appellant various default notices with respect to arrears in rent payable to the landlord, arrears in royalties, non-compliance with the non-smoking policy, non-payment of suppliers, sale of unapproved goods, etc. On March 18, 1999 the Respondent sent a termination notice to the Appellants and also instituted a motion so as to obtain the resiliation of both the franchise and sublease agreements, in order to evict the Appellants from the premises and to condemn them to pay the "arrears of rental and damages" for early termination of the sublease as well as outstanding royalty fees.

The trial judge held that given the ongoing and repeated breaches of the agreement, the proceedings were well-founded. The Appellants did not respect the specific operating formula, system and standards of Second Cup. As a result, they could not benefit from the trademark, banner and reputation of Second Cup. Thus, the sublease and franchise agreements were resiliated and the Appellants were ordered to vacate the premises and to ordered them to pay the Respondent an indemnity corresponding to damages incurred upon the resiliation of the sublease.

Decision:

The Appeal Court held that while certain faults invoked by the Respondent were rather minor, the non-compliance with the smoking policy, the failure to provide statements and the failure to pay royalties were quite serious. The franchise agreement is the Respondent's standard agreement, which is signed by all the franchisees and cannot be negotiated.

Therefore, the obligation to comply with the non-smoking policy is an obligation imposed uniformly upon all the Respondent's franchisees in Canada and not solely upon the Appellant. In addition, when the Appellants purchased the capital stock of the Tenant, they were fully aware of the non-smoking policy. As a result, the Respondent did not abuse his right by asking the Appellant to comply with the non-smoking policy and hence, respected its obligation to act in good faith and with loyalty pursuant to article 1375 C.c.Q.

Also, the Court concluded that the Appellants' failure to supply the statements and pay the royalties were serious breaches of their obligations. Accordingly, the trial judge was correct in concluding that the Respondent had the right to the rescission of the sublease as well as the franchise agreement.

The Appeal Court upheld the decision of the trial judge except with regards to the amount of damages payable to the Respondent, where the Appeal Court decided that an amount equal to three months of normal royalty fees was sufficient.

9. TESTIMONY

9.1 Pierret Industries Canada Inc. c. Gilbert

(May 1, 2003), Montreal 500-09-010813-012, REJB 2003-41889 (C.A.)

Facts:

On November 30, 1995, Pierret Industries Canada Inc. (the "**Landlord**") and Gilbert (the "**Tenant**") entered into a commercial lease (the "**Lease**") for a monthly rent of \$2,000.00. According to the Tenant, the parties concurrently concluded a verbal agreement whereby the Landlord accepted to reduce the monthly rent to \$1,000.00. Pursuant to said 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 (the "**Agreement**"). 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 therefore stopped reimbursing the Tenant in November of 1996. As a result, as of the month of February 1997, the Tenant began paying \$1,000.00 per month for the rent, effecting compensation for the amounts no longer reimbursed by the Landlord. In August of 1998, although the Landlord had sent a demand letter to the Tenant asking him to leave the premises, the Tenant continued to occupy the premises and continued to pay a monthly \$1,000.00. The Landlord claimed that the verbal Agreement concluded in November of 1995 was inadmissible given that it contradicted section 19 of the Lease which stated:

"Le présent document constitue le contrat intégral entre les parties et il n'existe aucune autre entente, promesse, au (sic) représentation relative aux lieux loués, écrite ou verbale et s'il en eut, elles sont révoquées".

The trial judge stressed that the signed document by the former Vice-President of the Landlord in November 1995 did not modify the Lease. Said document simply stated that the Landlord would pay the Tenant a monthly rent of \$1,000.00. Moreover, the judge 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 judge in order to establish the verbal Agreement in accordance

with article 2862 C.C.Q. Justice Longtin noted that, for a period of 18 months, the Landlord had cashed the \$1,000.00 cheques issued by the Tenant without protest. According to the Court, this would confirm that the former Vice-President of the Landlord had accepted a monthly rent of \$1,000.00. Moreover, although the former Vice-President was no longer there, the Landlord could not disavow his actions, given that they were performed within the scope of his mandate. Accordingly, the Landlord's claim for unpaid rent for the period from February 1, 1997 to October 1, 1998 was rejected.

Decision:

The Appeal Court upheld the decision of the trial judge. It concluded that the circumstances surrounding the Agreement clearly indicated that the intention of the parties was to ensure that the rent be set at \$1,000 plus the applicable taxes. The former Vice-President and the Tenant's testimonies both demonstrated that the parties agreed upon a rent of \$1,000 for the entire duration of the Lease. The Court ruled that it was on account of the Landlord that the Lease and the Agreement were separated in two distinct documents.

Also, the Tenant only exercised the option to renew the Lease thinking that the duration of the Agreement was the same as that of the Lease, and that, the two contracts were linked. Moreover, the Court held that irrespective of above interpretation, by cashing in the cheques, the Landlord accepted a rent of \$1,000 for 18 months.

10. ABANDONMENT OF PREMISES

10.1 Gestion V.S.P. (1982) inc. c. La Corporation d'hébergement du Québec

(March 5, 2003), Quebec, 200-09-003620-017, REJB 2003-39151, (C.A.)

Facts:

The parties entered into a commercial lease which was to expire on December 1999. In 1992, the hypothecary creditors of the landlord/owner repossessed the immovable. One of the creditors instituted an action to recover arrears of rent owed by Gestion V.S.P. (1982) Inc. (the "**Tenant**"). Said 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. The settlement stated that there would be a considerable reduction in the amount of unpaid rent claimed given the poor state of the immovable. The settlement also contained a clause whereby the Tenant acknowledged that the immovable would be sold in the near future and that the buyer would have to assume the necessary costs to carry out the repairs and that the Tenant had thereby been duly compensated for the inconveniences that such repairs may have caused.

On April 1, 1993, the Centre d'Hébergement du Québec (the "**Landlord**") purchased the building and was thus, 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. In these letters, the Tenant proposed to cancel the lease whereas the Landlord affirmed its satisfaction with the Tenant and only considered the possibility of cancellation if a new tenant was found without the Landlord having to incur any costs. In the month of August 1993, the Tenant accepted an offer to lease a 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 alleged that it considered the lease to have expired on January 31, 1994. Subsequently, the Landlord instituted proceedings for non-payment of rent and damages.

The trial judge pointed out that the Landlord had never refused nor neglected to effect the repairs, as a result, it did not diminish the Tenant's enjoyment of the premises. Also, immediately upon purchasing the immovable, the Landlord put out a call for tenders. By May of 1994, 80% of the repairs and work had been terminated. The Landlord purchased 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 trial judge stressed that it was clear from the Tenant's actions that it had the intention to abandon the premises even prior to knowing whether the repairs would be terminated by the end of January. Moreover, pursuant to the settlement, the Tenant had accepted to be patient and to wait a certain amount of time before the immovable would be repaired. Therefore, the judge 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 judge concluded that since the actions of the Tenant's director, who was an attorney, were not fraudulent or abusive, his personal liability could not be invoked.

Lastly, the judge held that the Landlord's claim for rent for the months of February through June 1994 and damages equivalent to one year rent, should be reduced to an amount equal to six months rent. The judge 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 of February through June 1994. In addition, the Landlord, by occupying the premises a few days following the Tenant's departure and effecting repairs thereon, did make a concerted effort to rent the premises. Given the foregoing coupled with the fact that it waited delay until July 15 1994 to send the notice of termination of lease, the Landlord was only granted damages equal to six months rent.

Decision:

The Appeal Court allowed the appeal and held that by way of the settlement, the Tenant accepted the inconveniences related to the renovations, but not any inconveniences related to the failure to upkeep the immovable after April 1, 1993. The Tenant had a right to expect the urgent renovations to have been done within a reasonable delay. However, on January 31, 1994, when the Tenant moved to new premises, no work had begun. The Landlord had neglected to effect the urgent repairs. Although the Landlord did not promise that the work would be completed by a specific date, the discussions between the parties gave the Tenant reason to believe that the work would have substantially commenced by the end of January 1994.

Consequently, the abandonment of the premises was justified.

10.2 Groupe Cliffton inc. c. Solutions réseau d'affaires Meta-4 inc.

(October 7, 2003), Montréal 500-09-011062-015, AZ-50195832, J.E. 2003-1954, (C.A.)

Facts:

In the Fall of 1998, Solutions Réseau d'affaires Meta-4 inc. (the "**Tenant**") signed separate leases with the manager of five (5) independently owned shopping centers, Groupe Cliffton inc. (the "**Landlord**"). Said leases came into effect on January 15, 1999. The Tenant leased a small premises in each center for the installation of automatic tellers. However, business was not going exceptionally well for the Tenant given that the volume of transactions was quite low. As a result, the Tenant stopped paying the rent as of January, 2000. After several fruitless discussions with the Landlord, the Tenant removed its tellers from the centers.

In July, 2000, the Landlord instituted proceedings, claiming the unpaid rent as well as an amount needed for the repair of damages caused by the removal of the tellers. In response to this, the Tenant demanded the resolution of the leases arguing that "*the prospect of profitable operations did not materialize*". In other words, that its consent was vitiated due to an error on an essential aspect of the agreement. Furthermore, the Tenant claimed that the Landlord did not minimize its damages.

The trial judge refused to order the resolution of the leases stating that an economic error did not constitute a valid ground to justify the resolution. Consequently, nine thousand seventy three dollars and sixty cents (\$9,073.60) was awarded to the Landlord which represented the first four (4) months of rent of the year 2000. As a result, the leases were resiliated as of May 1, 2000. However, the Court held that the Tenant's argument that the Landlord had not minimized its losses, was well-founded, given that it had made no effort to lease the vacated premises.

Both parties appealed the ruling. The Landlord demanded the full amount of the unpaid rent while the Tenant demanded the resolution of the leases as of January, 2000.

Decision:

The Court of Appeal dismissed the Tenant's incidental appeal stating that an economic error is not cause for resolution of the lease under section 1405 C.C.Q. Furthermore, the Court did not accept the Tenant's argument that the parties were partners, and that, for that reason, the contracts should be resolved due to the error. The Court found that while both parties needed each other to ensure the profitability of their respective businesses, they were not business partners in this case.

The Court also held that the Landlord did not minimize its damages. It found no error in the trial judge's decision with regards to this. It based itself on the Landlord's uncompromising and callous attitude towards the Tenant's economic difficulties. Moreover, the Tenant's honesty and openness was also held as a sign of good faith in accordance with section 1375 C.C.Q. Consequently, the trial judge's decision to grant the Landlord four (4) months of unpaid rent was upheld. The Court also concurred with the trial judge's decision to resiliate the leases as of May 1, 2003 despite the fact that it was not explicitly requested by either party.

10.3 Fortin c. Houde

(November 3, 2003), Chicoutimi, 150-05-002921-023 (C.S.)

Facts:

Dominique Fortin and Louise Painchaud (the **'Landlords'**) are owners of a building situated in Laterrière. In December 2001, Pascal Houde and Marie-Anne Pelletier (the **'Tenants'**) leased part of said building (which was a restaurant) for a sixty one month (61) month period. The Tenants paid the three thousand dollar (\$3,000) monthly rent for December, 2001 and January, 2002. However, on January 18, 2002, the Tenants abandoned the premises and stopped paying rent. The Landlords were only able to sign a new two (2) year lease with new tenants beginning on October 1, 2002 for a rent of one thousand five hundred dollars (\$1,500) a month.

The Landlords instituted proceedings demanding full payment of the rent for the sixty one (61) month period and the resiliation of the lease. Consequently, the Landlords claimed one hundred seventy seven thousand dollars (\$177,000) for unpaid rent. They also claimed two thousand five hundred seventy five dollars and thirty three cents (\$2,575.33) for payment of inventory and six hundred seventy one dollars and eighty eight cents (\$671.88) for an unpaid electricity bill. However, in their claim, they took into account the two (2) year lease they signed afterwards.

In their defence, the Tenants argued that no lease had ever been signed due to the fact that both parties had been unable to reach an agreement on numerous essential elements of the lease agreement. They argued that the Landlords had allowed them to use the premises on a monthly basis while the negotiations were taking place. According to them, the lease was for an undetermined period. In addition, the Tenants claim that it was the Landlords who had put an end to the agreement given that they had called the police and had the locks changed. In a counter-claim, the Tenants claim for three thousand seven hundred forty two dollars and fifty five cents (\$3,742.55) for payment of inventory, one hundred thirty seven dollars (\$137.00) for an amount left on the counter of the premises and six hundred seventy five dollars and twenty three cents (\$675.23) which had been deposited in the Landlords' account.

Decision:

The Court held that the Landlords had met their burden of proof insofar as proving that a lease had in fact been concluded. The proof showed that an agreement had been reached on November 15, 2001 and that the Landlords' had mandated someone to draft said lease and send it to the Tenants' proxy; which lease was drafted on December 19, 2001. The Tenants made three (3) minor requests none of which pertained to rent. as a result, the Superior Court rejected the Tenants' claim which alleged that there were many things left to discuss.

Justice Moreau ruled that a lease was in fact concluded for a number of reasons, namely given that:

- the Tenants took possession of the premises;
- they managed a restaurant on these premises;

- they installed an neon sign advertising the new management;
- they obtained their liquor license and permit to operate;
- they obtained their G.S.T. and T.V.Q. numbers, etc.

The Court thus concluded that the Tenants were liable for the totality of the rent up to the point of the new lease. To support this conclusion, the Court cited Professor Jobin who stated:

"Le locataire qui abandonne les lieux alors que les conditions ne sont pas remplies s'expose grandement. Ayant manqué sans justification à son obligation d'habiter les lieux loués, à laquelle dans les faits s'ajoute presque toujours le refus illégitime de payer le loyer, il a commis une faute très souvent deux fautes, dont le locateur pourra tirer les conséquences qu'il désire: notamment, à son choix, il pourra réclamer le paiement du loyer jusqu'à la fin du bail, ou demander la résiliation, le paiement du loyer jusqu'à la date de cette dernière et des dommages-intérêts pour perte de loyer pendant la période de relocation".

It was held that the Landlords minimized their damages and that the Tenant was held liable for the difference between the rent obtained from the new lease in comparison to the rent obtained from the original lease. As for the rent which will become due in the future, the Court reserved the Landlords' right to claim said rent, due to the fact that the damages were not yet certain, according to section 1611 C.C.Q and that a new Tenant could be found by October 2004. However, the Court noted that if no new tenants were found by October 2004, the obligation to minimize damages set forth in section 1479 C.C.Q. could be taken into account.

The Court awarded all the other Landlords' claims and the lease was resiliated.

11. BANKRUPTCY

11.1 91133 Canada Ltée (Faillite de)

(February 11, 2003), Montreal 500-09-009576-000, REJB 2003-37337 (C.A.)

Facts:

Pursuant to a lease (the "**Initial Lease**") dated June 26, 1989, 91133 Canada Ltd.. (the "**Tenant**"), leased a premises from 2617-5786 Quebec Inc. (the "**Landlord**") where it would operate a pharmacy. The pharmacy operated under the Uniprix banner, and obtained its supplies from Médis Services Pharmaceutiques et de Sante Inc. ("**Médis**"). On August 13, 1998, a second lease (the "**New Lease**") was entered into between the parties, providing for the expansion of the pharmacy and certain other renovations (The Initial Lease and the New Lease are hereinafter collectively referred to as the "**Lease**"). The Lease specified that in the case of the Tenants' bankruptcy or insolvency, the Lease will be resiliated automatically.

In order to expand the pharmacy, the Tenant asked Uniprix to provide it with the financing required for the work, however, Uniprix refused. Subsequently, Beaudoin, the Tenant's owner and pharmacist, bought shares in the Landlord company. With respect to he expansion and renovations, they proved to be too expensive for the Tenant and it tried to negotiate a deal

with its two principle creditors, Uniprix and Médis. On February 5, 1999, Médis suspended its business relationship with the Tenant and even refused to deliver the merchandise that was already ordered. Consequently, the Tenant began having major difficulties and Beaudoin began to search for solutions which would enable him to continue to run and operate the pharmacy.

In light of the financial difficulties, Beaudoin met a trustee in bankruptcy and discussed the possibility of a transfer of property. On May 11, 1999, Beaudoin negotiated with McMahon Distributeur Pharmaceutique Inc. ("**McMahon**"), for them to take over the Lease, and operate a pharmacy, hiring Beaudoin as a pharmacist. On May 16, 1999, McMahon and the Tenant signed an offer to lease (the '**Offer**') where McMahon took over the Tenants' rights in the premises. The same day, McMahon and the Landlord signed an agreement whereby McMahon would indemnify the Landlord for the expansion and renovation made by the Tenant for an amount not exceeding \$20,000. In addition, McMahon also agreed to purchase the shares held by the Beaudoin in the Landlord company. However, this agreement was conditional upon the assignment of goods made by the Tenant and Beaudoin; which assignment was effected on May 17, 1999. On the following day, the Landlord sent the Tenant and the trustee a notice confirming the automatic resiliation of the Lease.

On May 21, 1999, McMahon signed an employment contract with Beaudoin as well as an agreement allowing Beaudoin to purchase the pharmacy two years following his bankruptcy. Due to the fact that McMahon controlled and managed the premises, the trustee sent a motion to the parties requiring them to hand over control of everything considered to be part of the Tenant's active assets. The Tenant's creditors instituted proceedings, claiming that the tenant's bankrupt status should be annulled and that, as a result, the creditors should be paid.

The trial judge held that the Landlord's exercise of the clause in the Lease allowing the Lease to be resiliated was abusive, illegal and contrary to public order given that it could have consented to a lease assignment or sub-lease. Consequently, the lease concluded between McMahon and the Landlord should be cancelled and the Lease between the Tenant and the Landlord shall subsist.

Decision:

The Appeal Court upheld the decision of the trial judge in holding that the Tenant and Beaudoin acted for their benefit and to the detriment of the Tenant's creditors. The Court ruled that in lease matters, Quebec legislation should prevail over bankruptcy laws. Therefore, if the lease stipulates that in the case of bankruptcy, the landlord can request the automatic resiliation of the lease, the trustee cannot claim to exercise rights pursuant to the lease. However, the clause may be rendered inapplicable when, as in the present case, the application of said clause constitutes an abuse of right. In the case at bar, the clause is valid, but its application is invalid. Consequently, the resiliation of the Lease was illegal and without effect and the lease between the Landlord and McMahon could not be opposed against the Tenant's creditors. As a result, the Tenant still possesses the rights it held under the Lease, and the creditors are entitled to payment.

12. DESTINATION OF PREMISES

12.1 Nadeau c. Rousseau

(April 11, 2003), Drummond 405-05-001355-015 (C.S.)

Facts:

On March 30, 1995, Mrs. Nadeau (the “**Tenant**”) leased from Mr. Rousseau (the “**Landlord**”) land for the operation of a dairy farm, with a term commencing on January 1, 1995 and terminating on December 31, 2009 (the “**Lease**”). The Tenant received financing from the Société de financement agricole (the “**Société**”). For several years, the Tenant cultivated hay, grain maize and corn silage on the leased premises. In 2000, the Tenant sold part of its quota, its dairy herd and its machinery. On May 4, 2001, the Tenant sold the rest of its dairy herd and the site that it had purchased from the Landlord on April 13, 1995. On May 9, 2001, the Landlord sent the Tenant a demand letter stating that the main purpose of the leased premises and an essential condition for the Tenant to receive the financing from the Société, is that the land be cultivated in order to provide the dairy herd with food. Given that there would be no more dairy production and given the sale of the business, the Landlord requested that he be entitled to repossess the premises. The letter goes on to say that the Tenant is no longer allowed to use the premises. However, the Tenant argued that none of the provisions of the Lease refer to any of the conditions mentioned in the demand letter.

The provision of the relating to the destination of the premises reads as follows:

The leased premises cannot be used by the tenant unless it is for agricultural and cultivation purposes (My translation)

Moreover, the Tenant stated that the Landlord hindered his sowing process, and therefore, threatened to file injunction procedures in the event that the Landlord did not allow the Tenant to continue the work. Subsequently, the Tenant instituted proceedings to obtain an injunction against the Landlord’s prohibition. In his defence, the Landlord asks the court to refrain from granting the injunction, but rather, to order the resiliation of the Lease and to award an indemnity to the landlord, for damages incurred due to the work executed by the Tenant.

Decision:

The Court held that the Landlord’s testimony, regarding the Lease’s objective, was not permitted, as testimony is only permitted in order to determine the circumstances surrounding the conclusion of a contract, or to interpret or complete it. In the present case, the Lease contained clauses designating the leased land, establishing the destination of the lands, establishing the amount of rent and the term. The fact that the Lease does not contain a clause providing for the resiliation of the Lease in the event that the Tenant ceases to exploit a dairy farm, does not cause the Lease to be considered incomplete. Consequently, the Lease is not incomplete and testimonial proof cannot be permitted.

The Court added that a judge may only interpret the terms of a contract in the case of an ambiguity. If the contract is clear, the judge’s role is to apply the contract and not to interpret it. The fact that there exists a divergence in the party’s interpretations of the contract, does not automatically denote that an ambiguity exists. The present Lease is clear, and does not contain

any clause that is illegible, abusive or difficult to comprehend, and that would require the intervention of the Court.

Therefore, the Court ordered the Landlord to allow the Tenant to have unrestricted access to the premises, and to allow the Tenant to proceed with any agricultural or cultivation works on the premises given that the clause in question did not prohibit such activity.

Note: “*” means that the case has been appealed. Steven Chaimberg is a partner with the Montreal firm of Lapointe Rosenstein. He can be reached at (514) 925-6342, or through his internet address at steven.chaimberg@lapointerosenstein.com. Joyce Carestia is an articling student at Lapointe Rosenstein. She can be reached at (514) 925-6300, ext. 4288, or through her internet address at joyce.carestia@lapointerosenstein.com.