

INTERNATIONAL COUNCIL OF SHOPPING CENTRES

2001 CANADIAN LAW CONFERENCE

QUEBEC LEGAL UPDATE

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OF

**LAPINTE ROSENSTEIN
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1. LEASE REGISTRATION

1.1 Compagnie 390 St. Jacques Nova Scotia v. 268298 Canada Inc. and Maitre de la Monnaie Internationale Ltée et al; 500-05-051869-996 (Superior Court)*

Facts:

Since 1980, the respondents (the "**Tenant**") continually operated a foreign exchange bureau in leased premises (the "**Premises**") located in the building bearing civic addresses 388 to 390 St. Jacques, Montreal, Quebec (the "**Building**"). Prior to occupying the Premises, the Tenant spent a considerable sum of money to render the Premises suitable for its purposes. Pursuant to various agreements entered into between the Tenant and 164879 Canada Inc. ("**164879**"), both prior and subsequent to its incorporation, the Tenant lent to 164879 the amount of \$150,000.

On February 28, 1991, 164879 and the Tenant executed a new lease, which was registered at Montreal on May 9, 1991 under 4427386 (the "**Lease**").

As the years passed, the Tenant would find itself paying sums to Hydro-Quebec in order to ensure that electricity for the Building would not be cut off, and making payments in respect of overdue municipal taxes and payments in respect of repairs that were 164879's obligations pursuant to the Lease. All of these payments were reflected in subsequent letter agreements entered into between 164879 and the Tenant. Each time the payments made by the Tenant were deemed to constitute prepayments of rental and the parties agreed that the Lease was amended accordingly.

On July 4, 1996, the City of Montreal (the "**City**") purchased the Building at a Sheriff's Sale. The Tenant advised the City in writing as regards the numerous problems and defects affecting the Building. Pursuant to a letter dated March 10, 1997, the Tenant advised the City that the total rental payable by the Tenant under the Lease was fully paid for until at least 2013.

In February 1998, the City issued a public call for tenders to purchase the Building, and prepared a descriptive booklet in respect of the Building. Annexed to the Booklet, the City included the Lease, certain of the letter agreements that had been entered into between the Tenant and 164879, as well as two legal opinions limiting the Landlord's obligation to the Tenant to the registered Lease only. Upon the Tenant learning the identity of the bidders in respect of the Building, the Tenant's attorney furnished the bidders with additional lease amending letters. The principal of Compagnie 390 St. Jacques Nova Scotia (the "**Purchaser**") acknowledged having received same.

By the deed of sale (the "**Deed**") registered at Montreal on January 16, 1999, the Purchaser acquired the Building from the City. Pursuant to the Deed, the Purchaser "declares having taken cognizance of the Lease published under 4427386....the Purchaser reserves all of its rights in respect of such Lease and options to renew....", "Insofar as required by law, the Purchaser undertakes to respect the Lease in force" (my translation).

The Purchaser proceeded to send a demand letter the Tenant, calling upon the Tenant to pay arrears of rental as provided for in the Lease. The Tenant refused to pay same, and the Landlord instituted proceedings to obtain such rental and to declare the Lease terminated due to the Tenant's defaults.

The issue in this case relates to whether the parties are bound solely by the terms and conditions of the Lease, as registered, or the Lease as amended by the series of letter agreements exchanged between 164879 and the Tenant.

Decision:

Mr. Justice Mass, after first stating that the parties were unable to find any authority, other than by analogy, to support their respective positions, utilized the provisions of Article 2963 *Civil Code of Quebec* ("**CCQ**") and found for the Purchaser.

Article 2963 CCQ, states as follows:

"Notice given or knowledge acquired of a right that has not been published, never compensates for absence of publication."

Accordingly, the Court held that as the Tenant had every opportunity, prior to the Purchaser's acquisition of the Building, to register the alleged amending agreements, the sole contractual agreement between the Purchaser and the Tenant was held to be the Lease as registered. In virtue of this, the Court determined the amount owing by the Tenant under the Lease, and granted the Purchaser's claim to have the Lease resiliated (i.e. terminated).

1.2 Navarro Investment Company v. Meubles Design Yvonne St-Gelais Inc.; [2000] R.D.I. 104 (Superior Court)

Facts:

The defendant (the "**Tenant**"), pursuant to a Lease registered at Quebec on June 7, 1995, (the "**Lease**"), was leasing premises (the "**Premises**") in a building situated at 1240 Charest Blvd. West, Quebec City, Quebec (the "**Building**"). On November 13, 1997, the Plaintiff became owner of the Building pursuant to a judgment pronounced that day. The Plaintiff's rights flowed from a deed of hypothec entered into in 1993 between Trust Général du Canada and the former owner, the Plaintiff having acquired all of the rights of Trust Général in such hypothec.

On June 10, 1998, the Plaintiff served the Tenant with a Notice of Termination of Lease pursuant to Article 1887 CCQ, advising the Tenant that the Lease would come to an end as of December 16, 1998.

The issue before the Court was whether the aforementioned Notice was sent within the appropriate legal delays.

Decision:

Mr. Justice Godin, after reviewing the provisions of Articles 1887 CCQ and 2781 CCQ, as well as the comments of the Minister of Justice in respect of the new Civil Code, held that the six-month delay provided for in Article 1887 CCQ must be calculated as of the date of the judgment and not as of the date of the expiry of the delays to appeal such judgement. The relevant articles of the Civil Code are as follows:

Article 1887:

"The acquirer or the person who benefits from the extinction of title may resiliate the lease, if it is a lease with an indeterminate term, in accordance with the ordinary rules pertaining to resiliation contained in this section.

In the case of the lease of an immovable with a fixed term and if more than twelve months remain from the date of alienation or extinction of title, he may resiliate it upon expiry of the twelve months by giving the lessee written notice of six months. He may not resiliate the lease if it was registered in the registry office before the deed of alienation or the act by which the title is extinguished was so registered.

In the case of the lease of a movable with a fixed term, notice is of one month."

Article 2781:

"Where the default has not been remedied or the payment has not been made in the time allotted for surrender, the creditor takes the property in payment by the effect of the judgment of surrender, or of a deed voluntarily made, if neither the subsequent creditors nor the debtor have required him to proceed with the sale.

The judgment of surrender or the deed voluntarily made constitutes the creditor's title of ownership."

Accordingly, the Court held that as the aforementioned notice had been served on the Defendant on June 10, 1996, which was more than six months after the date of judgement, it was too late. As a result, the Plaintiff was obliged to respect the Tenant's Lease until the expiry of the term, being April 30, 2010.

2. MUNICIPAL BY-LAWS:

2.1 Loblaw Quebec Ltée and Provigo Distribution Inc. v. Alimentation Gérard Villeneuve (1998) Inc. and Ville de Brossard; 500-09-009388-000 (Court of Appeal)

Facts:

A food supermarket (the "**Building**") was constructed by Loblaw (Loblaw's rights in the Building being assigned to Provigo in January 2000); however, the Building did not respect the zoning requirements of the City of Brossard insofar as the floor coverage ratio was concerned. Both Loblaw and the City of Brossard claimed that the Building, as built, was merely the first phase of multi-phase project, and that therefore the issues of density should look at the project in its entirety, which would be when both phases of the project would be completed. Villeneuve operated a food supermarket under the Metro banner in an adjacent shopping centre known as Champlain Mall. Mr. Justice Tellier of the Superior Court held that the Building was not in conformity with the applicable by-laws, and thus ordered Loblaw and/or Provigo to demolish the

Building, and further stated that his judgment was executory notwithstanding appeal. Naturally, the Superior Court judgment was appealed.

Decision:

The Court of Appeal determined that it had the discretion to provide a certain cure period, within which Loblaw and Provigo could obtain a construction permit to erect one or more buildings on the land in question, in order that the minimum density be respected, unless, within that same period, the municipal by-laws would have changed. The Court of Appeal further determined that a two-year time period was reasonable in the circumstances.

3. EXPENSES PAYABLE

3.1 Consultants Industriels C.E.M. Inc. v. 2152-6579 Quebec Inc. et al; [2000] R.D.I. 1 (Court of Appeal)

Facts:

2152-6579 Quebec Inc. (the "**Landlord**") entered into an offer to lease (the "**Offer**") with Consultants Industriels C.E.M. Inc. (the "**Tenant**"), pursuant to which the Landlord would build the leased premises (the "**Premises**") for the Tenant. The Offer contained numerous clauses relating to the construction of the Premises, including provisions to the effect that should the Tenant, during the construction of the Premises, request modifications to the plans and specifications it had provided to the Landlord, the Tenant would be obliged to pay all additional costs incurred by the Landlord.

During the construction of the Premises, changes had to be made to the initial plans, as the area increased in size by over 2,000 sq. ft. Following the completion of the work, the Landlord claimed the sum of \$18,000 from the Tenant for the preparation of as-built plans.

Decision:

The Court held that although the Offer provided for the Landlord to deliver the Premises to the Tenant in accordance with the plans and specifications to be furnished by the Tenant, for the Landlord to respect the said plans and specifications, and for the Tenant to pay additional costs incurred by the Landlord resulting from modifications to such plans and specifications, these clauses could not be interpreted to impose upon the Tenant the obligation to supply, following the construction of the Premises, the Landlord with new as-built plans, especially as one of the principals of the Landlord had his own plans of the Building. Accordingly, the Landlord's claim for \$18,000, relating to the preparation of as-built plans was rejected by the Court of Appeal. However, the Court of Appeal did oblige the Tenant to pay to the Landlord an amount in excess of \$38,000 for extra costs incurred by the Landlord in constructing the Premises.

3.2 Consultants Industriels C.E.M. Inc. v. 2152-6579 Quebec Inc.; [2000] R.D.I. 4 (Court of Appeal)

Facts:

In virtue of the Offer to Lease between Consultants Industriels C.E.M. Inc. (the "**Tenant**") and 2152-6579 Quebec Inc. (the "**Landlord**"), the Tenant was obliged to pay, as

additional rent, its proportionate share of all taxes and operating expenses relating to the property, and, in addition, an administrative charge equal to 15% of such expenses. The Tenant refused to pay certain expenses claimed by the Landlord, and the Superior Court granted judgment for the Landlord in respect of certain of these claims, in the sum of \$85,000. The Tenant appeals.

Decision:

The Court of Appeal held that an amount of \$20,672, representing 15% of accounting and management fees, could not be claimed by the Landlord, as administrative fees of 15% had already been added to operating expenses.

The Tenant was entitled to a reimbursement of the accounting fees it had incurred in performing an audit of the Landlord's books and records, as the Lease provided for this right to the Tenant in cases where the difference between actual expenses and the amount claimed by the Landlord exceeded 2%. Finally, the Court refused to grant the Tenant compensation resulting from late delivery of the Premises, as the Tenant had been a major contributor to the delay.

3.3 Maiorino v. Hallé Couture et Associés Ltée; J.E. 2000-1249 (Quebec Court)

Facts:

Pursuant to the terms of its Lease, the Tenant was obliged to pay its share of electricity costs, calculated on its pro rata share of total leasable area. The Lease was assigned by the Tenant in 1995, and following its termination in 1998, the Landlord attempted to utilize a 1994 letter from the Tenant's controller to claim from the assignee "excessive consumption" of electricity.

Decision:

The Court held that the clause of the Lease did not specify what constituted "excessive consumption" of electricity. Moreover, the Lease provided for annual adjustments in respect of this expense, something which the Landlord had never claimed in the past. Therefore, the Court held there was a *fin de non recevoir* (i.e. estoppel) in respect of the claim. The Court further held that an error can never constitute the foundation of an implicit modification of a Lease. Finally, the Court held that the theory of apparent mandate did not apply, as the Tenant's controller did not have the necessary authority to cause the Lease provisions to be modified. Mr. Justice Barbe held that the Landlord brought about the error on the part of the Tenant's controller insofar as the interpretation of the electricity clause was concerned. Accordingly, the assignee was only obliged to pay its electricity based on its pro rata share of total leasable area (rather than on the total leased area).

3.4 Skyline Holdings Inc. v. Scarves and Allied Arts Inc.; J.E.2000-1623 (Court of Appeal)

Facts:

In 1988, Skyline Holdings Inc. (the "**Landlord**") replaced the roof of the Building and divided this expense amongst the two (2) tenants of the Building (being Scarves and Allied Arts Inc. and V.T.M. Varitex Inc.) as common expenses over a three-year period, and added a 15% administration fee thereto. Each tenant's lease was for a term of five (5) years. The tenants

contested the charge as well as the 15% administrative fee thereon. The tenants' claim is that the provisions of their respective leases do not oblige the tenants to pay expenses exceeding those set forth in the Civil Code. The trial judge held that the 15% administration fee could not be billed to the tenants, as no clause in the Lease authorized the Landlord to do so. Insofar as the roof is concerned, the trial judge held that it was the Landlord's responsibility. The Landlord appealed the decision.

Decision:

The Court of Appeal held that tax jurisprudence is not a reliable guide in this particular instance, as the provision that must be interpreted is contractual, rather than statutory. The Court held that despite the fact that the leases both stated that operating costs included all reasonable costs ordinarily chargeable against income, the rules of interpretation must first flow from civil law. In reviewing the leases, the Court held that a majority of the expenses included in the operating costs clause were expenses that are current, repetitive and foreseeable during the term of the lease. The Court utilized the provisions of Article 1020 of the *Civil Code of Lower Canada* (now Article 1431 of the *Civil Code of Quebec*), to support its argument that however general contractual terms may be, their meaning must be limited to the things in respect of which it appears that the parties desired to contract. The application of this rule of interpretation would not permit the inclusion of a repair that is neither current or foreseeable during the term of the Lease. The Court rejected the tenants' claim that they were only bound to pay for expenses as set forth in the Civil Code, as each lease contained provisions that went beyond what was provided for in Article 1627 of the *Civil Code of Lower Canada* (now 1864 CCQ). However, the Court held that a replacement of the roof cannot be qualified as either as a current expense or an operating expense unless a specific clause of the lease so provides. Moreover, the leases were each for a five-year term, and the type of expenses that the tenants had obliged themselves to pay in virtue of their respective leases did not include those which would result in the Landlord benefiting, at the end of the term, from an immovable whose condition was improved at the cost of the tenants. Finally, the Court held that the 15% administration fee claimed by the Landlord had never been included in operating expenses (the Landlord only attempting to claim same as and from 1988, which is when its accountant advised the Landlord that such a fee was commonly billed to tenants) and accordingly these costs could not be claimed from the tenants. Given the fact that Scarves had been a tenant since 1980 and Varitex since 1981, the Court held that the leases could be interpreted in accordance with the conduct of the parties, and in the present case, it was obvious that the parties had never thought that such administration fees could be included in the leases.

3.5 Workman Packaging Inc. v. Bal Investments Inc.; J.E. 2000 -1792 (Court of Quebec)

Facts:

Pursuant to a lease (the "**Lease**") entered into between Workman Packaging Inc. (the "**Tenant**") and Bal Investments Inc. (the "**Landlord**"), the Tenant was obliged to pay, as additional rent, its share of real estate taxes, insurance and certain other expenses. The Lease further provided that within 60 days following the end of a year, the Tenant could request a copy of the statement of expenses in order to verify them. In 1998, the Tenant requested from the Landlord detailed statements of expenses for the years 1993 through 1996, and 1998. The Landlord only furnished the documents for the years 1995, 1997 and 1998, claiming that the Tenant had renounced its rights to request statements for the other years.

Decision:

The Court held that the Lease provided both for base rental and additional rental. Mr. Justice Longtin further stated that although the Landlord had no obligation to provide an accounting to the Tenant as regards how the Landlord spent the money, it must, however, advise the Tenant of the total amount of expenses of the property and furnish to the Tenant a statement of expenses in order that the adjustments which were provided for under Lease be effected. However, the Court held that in commercial matters, contractual relations must have a certain stability. The Lease provided a mechanism which reflects this reality, in permitting the parties to proceed, as the case may be, to certain adjustments within specified delays. Making mention of the fact that the Tenant had waited until 1998 to request statements of expenses from 1993 and the subsequent years, and as the Tenant never explained its omission to act before 1998, the Court held that the Tenant had renounced to its rights to oblige the Landlord to respect the obligation imposed upon it under the Lease. The Court held that the Tenant should have proceeded, at the very least, by way of a demand letter within a reasonable delay following the expiration of the sixty (60) days provided for in the Lease. Accordingly, the Tenant's omission to do so constituted a *fin de non recevoir* (i.e. estoppel) to its present action, and the action of the Tenant was dismissed.

4. LEGAL HYPOTHEC

4.1 Drummond Building Reg'd v. Rénovations Ancestrales Inc. et al; [2000] R.D.I. 133 Quebec Court)

Facts:

Drummond Building Reg'd (the "**Landlord**") is the owner of a building on St. Catherine Street West, in Montreal (the "**Building**"). The proceedings relate to a request by the Landlord that a legal hypothec registered against the Building be radiated. The hypothec in question was registered by Rénovations Ancestrales Inc. (the "**Contractor**") resulting from work done by the Contractor on behalf of Chaussures Bellini Inc. (the "**Tenant**").

Pursuant to a lease (the "**Lease**") entered into between the Landlord and the Tenant, the Tenant (since 1982) had leased space on the ground floor of the Building from the Landlord, and in 1997, the Lease was renewed for ten (10) years. In 1998, the Tenant decided to have important renovation work done both to the interior of its Premises, as well as the façade. The renovations, particularly those relating to the façade, necessitated alterations to the Building itself. Plans were submitted by a designer engaged by the Tenant and submitted to the Landlord for approval, as the Lease provided that if the Tenant wished to make modifications to the Building, it must obtain the prior approval of the Landlord. After reviewing the Tenant's plans, the Landlord suggested that the Tenant have them examined by an architect in order to ensure conformity with the municipal requirements. An architect was suggested by the Landlord, and the Tenant engaged the architect suggested and paid for his services.

The City of Montreal offered renovation subsidies in respect of the façade and the Tenant made a request therefor. Pursuant to the policy established by the City of Montreal, the authorization of the Landlord was required and was in fact obtained. After having prepared the plans and obtained the required authorizations, the Tenant gave the façade work contract to a general contractor, who in turn subcontracted the work to the Contractor.

As part of the negotiations, the Landlord had granted to the Tenant a \$10,000 reduction in rental, as a result of the work that was done to the Premises and the façade.

The Contractor advised the Landlord of its contract pursuant to Articles 2724 (paragraph 2) and 2727 of the CCQ, which articles state as follows:

Article 2724: **Only the following claims may give rise to a legal hypothec:**

...

(2) "claims of persons having taken part in the construction or renovation of an immovable;"

Article 2727:

"A legal hypothec in favour of persons having taken part in the construction or renovation of an immovable subsists, even if it has not been published for thirty days after the work has been completed.

It subsists if, before the thirty-day period expires, a notice describing the charged immovable and indicating the amount of the claim is registered. The notice shall be served on the owner of the immovable.

It is extinguished six months after the work is completed, unless, to preserve the hypothec, the creditor publishes an action against the owner of the immovable or registers a prior notice of the exercise of a hypothecary right."

The Landlord, through its attorney, responded to this notice, denying that the Contractor had any right to register a legal hypothec against the Building. The Contractor performed the work, and, not having been paid by the general contractor, registered its notice of legal hypothec against the Building.

Decision:

The Court noted that both the Landlord and the Contractor referred to the decision of the Supreme Court of Canada in the case of *Industries Providair Inc. v. Kolomeir* (1988) 1 S.C.R. 1132.

Mr. Justice Grammond stated that pursuant to Article 2726 CCQ, a legal hypothec can only exist for work requested by the owner of an immovable. If it is the Tenant that has requested the work, it is only exceptionally that contractors or subcontractors can register legal hypothecs.

In analyzing the facts surrounding the present case, the Court found that the Lease contained numerous provisions relating to work which might be performed by the Tenant. For example, the Lease provided that any work must be authorized by the Landlord and that the improvements would remain the property of the Landlord at the end of the Lease. However, the Court mentioned that the Lease did not provide for any specific work, nor cost, nor undertaking

on the part of the Landlord for the payment of such work, as same was simply potential work. In other words, the Lease could in no way be assimilated to a construction contract between the Landlord and the Tenant.

In addition, the Court held that no side agreement that could be considered to be a construction contract had been entered into between the Landlord and the Tenant, when the Tenant had decided to modernize the façade of its Premises. Although the Landlord reviewed and approved the Tenant's plans, in accordance with the provisions of the Lease, the work had been undertaken at the initiative of the Tenant and at its cost. The fact that the Landlord had consented to a reduction of the rent in the amount of \$10,000 was considered by the Court to be a fixed amount which did not depend upon the cost of construction. The Court held that the Landlord had never mandated the Tenant to carry on work the Landlord's account. Rather, the Landlord had only authorized the work. Insofar as the cost of the work was concerned, it had not been determined at the beginning and the Landlord never obligated itself to pay either the total price of the work or a percentage thereof. The sole obligation on the part of the Landlord consisted in granting a reduction in rental in the amount of \$10,000, as mentioned above, a reduction which had been granted by way of a credit. Accordingly, the Court came to the conclusion that none of the elements which would permit one to conclude that a construction contract existed between the Landlord and the Tenant were to be found in the present fact situation. Given the above, the Court determined that the right to register a legal hypothec in favour of the Contractor did not exist, and thus granted the Landlord's motion to radiate same, as well as the notice registered by the Contractor advising the Landlord that it intended to exercise its rights relating to such legal hypothec.

5. BANKRUPTCY AND LANDLORD'S CLAIMS

5.1 Le Colisée du Livre v. Jean Fortin et Associés Syndics Inc. et al; [2000] R.D.I. 185 (Court of Appeal)

Facts:

Le Colisée du Livre (the "**Bankrupt**") was a tenant of Gendis Realty Inc. (the "**Landlord**") and owed the Landlord rent for the three months prior to the bankruptcy as well as all future rent under the lease. The total amount owing by Bankrupt was in excess of \$163,000, and the value of the goods on the Premises was \$16,250. The trial judge had decided that the provision of Section 136(1)(f) of the *Bankruptcy and Insolvency Act* ("**BIA**"), when referring to the value of property on the Premises, only applies to rent to become due and not for rent which was already due, and thus the trial judge determined that the Landlord's preferred claim was \$56,619.68 (i.e. \$40,369.68 representing unpaid rental for the three months prior to the bankruptcy, plus \$16,250.00). The trustee in bankruptcy appealed the trial judge's decision.

Decision:

The Court of Appeal held that the text of Section 136(1)(f) BIA clearly limits the preferred claim to property found on the Premises under the Lease in question at the time of bankruptcy. Accordingly, the Court of Appeal reduced the preferred claim of the Landlord to the sum of \$16,250.

6. RIGHT TO GO DARK

6.1 Gordonia Ltd. and 3159531 Canada Inc. v. Provigo Distribution Inc. and Loblaw Companies Limited; 500-05-058022-003 (Superior Court)

Facts:

On December 4, 1969, an Agreement of Lease (the "**Lease**") was signed between Kirkland Plaza Inc. as landlord and Dominion Stores Ltd. as tenant for premises (the "**Premises**") having an area of 29,600 square feet, and situated in a shopping centre (the "**Centre**") located in the western part of the Island of Montreal. The term of the Lease was 25 years, to expire on November 30, 1994, and the Lease provided for four (4) options to renew for periods of five (5) years each. The base rental was fixed at \$100,640.00 per year, the payment of a proportionate share of certain additional expenses and taxes in excess of the base year was provided for, and a percentage rent clause of 1 _ % of sales in excess of base rent and additional rent existed in the Lease.

Since the signature of the Lease, Dominion Stores Limited assigned its rights to Provigo Distribution Inc. ("**Provigo**"), and Kirkland Plaza Inc.'s interest in the Centre had passed to Gordonia Ltd. and 3159531 Canada Inc. (the "**Landlord**"). Provigo raised a question as to the Landlord's interest in the Centre.

In 1994, Provigo exercised its option to renew the Lease for five years, and on May 21, 1999, Provigo exercised its second option to renew, thus extending the term of the Lease until November 30, 2004. In the month of December 1998, Loblaw Companies Limited ("**Loblaw**") acquired all of the shares of Provigo. As Provigo had in 1996 purchased a nearby tract of land, the Landlord suspected that it was the eventual intention of Provigo or Loblaw to construct on such land a new supermarket, and this suspicion was confirmed when construction of a large store having a superficial area of approximately 80,000 square feet, commenced in 1999.

On March 9, 2000, Provigo advised the Landlord that it intended to close the Premises on May 20, 2000, "for economic reasons". This date was the date that the new store operated under the name "Loblaw" on the aforementioned nearby tract of land was opened. On May 19, 2000, a provisional injunction was rendered ordering Provigo to continue to operate the Premises, and a safeguard order was granted by consent to the same effect. The parties agreed to have the litigation on its merits determined by the Court.

The principal question in issue in the case is the meaning to be given to the words "for economic reasons", which words are found in the following clause of the Lease:

"The Lessee shall have the right at any time to close the Leased Premises for economic reasons upon notice of thirty (30) days to the Lessor in which case the sole obligation of the Lessee hereunder shall be to pay rental and the other charges from time to time due."

The Landlord took the position that the words "for economic reasons" should be interpreted as relating primarily to the profitability of the business operated in the Premises, and as the business has at all times been profitable, Provigo cannot claim that it has valid economic reasons to cease operating and to leave the Premises vacant. In fact, in recent years, the percentage rent generated from the Premises exceeded \$150,000 per annum. Provigo's

position is that the words in question should be given a broader meaning, thus permitting Provigo to invoke the clause whenever it decides, in its discretion, that the business is no longer, or will no longer be, competitive enough to ensure its long-term visibility. On March 27 or 28, 2000, a meeting was held between the Landlord's representative and representatives of Provigo, and what was said at the meeting was secretly recorded by the Landlord's representative.

Decision:

Mr. Justice Gomery, after a careful review of the facts leading up to the decision on the part of Provigo to close the Premises, held that Provigo was entitled to do so.

The Court first dismissed the action against Loblaw, holding that although the new store is operated under the name "Loblaw", it was in fact owned and operated by Provigo.

The Court dealt with the admissibility into evidence of the transcript of the conversation taped by the Landlord's representative, and determined that its admission into evidence would not violate Provigo's privacy nor bring the administration of justice into disrepute (Article 2858 CCQ). The Court stated that the exclusion of the transcript would deny it the benefit of an insight into the motivation of at least one of the parties to the dispute, that being the party who was unaware that the statements of its representatives were being recorded.

The Court then analyzed the statements made by Provigo's representatives, who determined that it would be preferable to construct a new and larger store, even though this would cost Provigo millions of dollars in capital expenditures. The Court concluded that Provigo's primary purpose in renewing the Lease until 2004 was to deny to its competition the opportunity of opening in the Premises a store which would compete with the new "Loblaw". The Court stated that despite Provigo's claims to the contrary, it was probable that Provigo's decision to renew the Lease was taken concurrently with the decision to construct the new store, and that the objective to deny Provigo's competition the opportunity of using the Premises was so important that Provigo was prepared to pay base rental in excess of \$100,000 per annum and the other charges under the Lease, even though the Premises would be empty.

The Court then proceeded to determine the definition of the expression "for economic reasons". Mr. Justice Gomery reviewed the meaning given to the words in *Labour Law*; however, he then determined that in a commercial lease agreement, the expression probably has a more subtle meaning. Basing himself on the dictionary meanings of the word "economic", the Court held that there appears to be a relationship between economics and what is commonly referred to as "business". After stating that Provigo would not be entitled to close the Premises for no reason at all, or for a reason which has nothing to do with economic considerations, that the expression is not equivalent to good faith (as the reference to economic reasons imposes a greater responsibility upon Provigo than the universal duty to act in good faith and not to act abusively), the Court stated that the word "reasons" implies that the decision by Provigo to vacate may not be made irrationally and must respect economic realities. The Court further stated that the duty to act reasonably includes the duty avoid egregious errors which cause prejudice to others.

The Court then stated that a certain latitude should be allowed in commercial matters. After indicating that it is reasonable for decision makers of large corporations to project their minds into the future, and that past events are not the only thing to be taken into account, the Court went on to state that when attempting to predict the future, errors are inevitable, but so

long as the decision based upon future considerations is made in good faith and is not unreasonable, the person invoking "economic reasons" as a justification for what has been done should not be disturbed in the exercise of business discretion.

Accordingly, the Court held that as the Premises could not be easily expanded, in the judgment of Provigo's officers, and as only a new and larger store would meet customers' expectations, the older, smaller store (i.e. the Premises) would have to close. In addition, the Court stated that for Provigo to allow the Premises to be leased to a competitor would simply permit the latter to draw away potential customers who would otherwise gravitate to the new store.

The Court also refused to consider the Landlord's claim that Provigo was violating the objectives of the *Competition Act* by preventing, by the exercise of the option to renew the Lease, the Premises from being used as a supermarket in competition with the new Loblaw store. The Court specifically mentioned the fact that although Provigo intended to vacate the Premises, Provigo has offered its cooperation to the Landlord to find a new tenant, requiring only that any new tenant should not be in the same business. The Court refused to consider the Landlord as being "*fournisseurs*" (i.e. suppliers) as referred to in a certain press release issued during the time Loblaw acquired the shares of Provigo. On a final note, the Court noted that Provigo had agreed to pay rent to the Landlord and to recognize the other contractual obligations under the Lease, and that these actions may well constitute acquiescence on the part of Provigo to the Landlord's title, however, given the conclusions reached, it was not necessary for the Court to deal in detail with this allegation.

7. INTERPRETATION OF CONTRACT

7.1 2433-0243 Quebec Inc. v. The Queen; J.E.2000-1293 (Superior Court)

Facts:

Pursuant to a lease entered into in 1976, Canada Post Corporation (as assignee to the rights of Her Majesty the Queen), as Tenant, was obliged to pay its share of operating expenses and real estate taxes in excess of those paid by the Landlord in 1976. In 1996, the Tenant's new manager refused to pay certain sums that had always been paid by the Tenant in previous years.

Decision:

The Court held that it is necessary to take into account the interpretation that the parties themselves give the contract, in attempting to determine the true meaning of its various clauses. Accordingly, as a result of the Tenant having paid these expenses for over 20 years, the Court held that these payments were not in error, and thus the amounts so paid could not be claimed back by the Tenant. Furthermore, the Court held that in 1996, the Tenant had modified the Lease by enlarging, for its sole use, the fenced-in the portion of the parking lot, despite the objection by the Landlord. Accordingly, the Court held that this occupation constituted a monthly lease by sufferance pursuant to Article 1853 CCQ, with the Tenant being obliged to pay its monthly rental value as and from the date this additional parking area was first used by the Tenant.

7.2 Desharnais v. Grenier et al; J.E.2000-18 (Quebec Court):

Pursuant to a commercial lease between Desharnais (the "**Landlord**") and Grenier and Lemerise (the "**Tenants**"), the Tenants had granted to the Landlord a right of first refusal in the event that the snack bar business carried on from the Premises would be sold. Following the dissolution of the partnership between the Tenants, Grenier acquired Lemerise's interest. The Landlord claimed that this was a breach by the Tenant of the Landlord's rights and thus requested that the Lease be cancelled. As well, the Landlord claimed the Tenants had committed numerous other defaults under the Lease, such as not as buying their juice for the business from the Landlord's convenience store.

Decision:

The Court stated that it was not necessary to determine if the sale of a partnership interest constituted a sale of an enterprise pursuant to the provisions of Articles 1767 et sq CCQ. Rather, it was necessary to determine if the parties had included this eventuality in the rights granted to the Landlord. Mr. Justice Bonin determined that this was not the case. As Lemerise had become a partner of Grenier several days after Grenier had taken possession of the Premises, the Court determined that the Landlord could not claim that principal consideration of the Lease was the presence of Lemerise. Moreover, the Court held that the object of the clause in question was to permit the Landlord to purchase the snack bar rather than having an undesirable tenant operating same. Moreover, the right in favour of the Landlord must be interpreted strictly, and must benefit the part who has contracted the obligation (ie. the Tenants).

The Court then stated that the breach by the Tenants of the obligation to purchase items from the Landlord's business constituted a minor and isolated breach, and was not of a nature to justify the termination of the Lease, holding that the resiliation of the Lease in these circumstances would constitute an abusive application of the provisions of the Lease, especially as no serious prejudice was caused to the Landlord, whose principal business was not juice distribution. The Court stated that the provisions of Articles 1604 CCQ, are imperative, and thus the Landlord was unable to obtain resiliation of the Lease for a default of minor importance.

7.3 Béland et al v. Ville de Saint-Jovite and Campeau et al.; J.E.2000-1884 (Quebec Court)

Facts:

Two commercial leases had entered into between the plaintiffs and Campeau (the "**Landlord**"), the first lease relating to a beauty salon and the second lease relating to the restaurant. As a result of torrential rains whose frequency could be expected only once every forty years, the basement of the building where each of the leased premises were situated was flooded as a result of a backup from the municipal sewers, causing important damage to the property of each of the tenants. The tenants claimed against the municipality and their Landlord, and the Landlord also instituted an action in warranty against the municipality. The municipality, for its part, claimed that as the Landlord had not installed a stop valve in conformity with the plumbing code and municipal regulations, the municipality was not responsible. The lease of the beauty salon contained an exoneration clause in favour of the Landlord, while the lease of the restaurant, although it did not contain an exoneration clause, provided that the tenant took the premises in the state that they were found and that the maintenance, repair and protection of the premises was the responsibility of the tenant.

Decision:

Mr. Justice Paquin first held that no proof was made which could establish the responsibility of the municipality, holding that the incorrect installation of the stop valve was the basis of the problem. The Court held that in addition to being incorrectly installed, the bolts were totally worn out, such that with the least amount of water pressure, a backup would occur. Accordingly, the Court rejected any claim against the municipality.

Insofar as the commercial lease for the beauty salon was concerned, the Court held that as a result of the existence of the exoneration clause, only a gross or intentional fault would permit the clause to be set aside (Article 1474 CCQ). Accordingly, as this could not be imputed upon the Landlord, the exoneration clause was held to be applicable by the Court, such that the action by the beauty salon tenants was dismissed. It is interesting to note that the Court arrived at this conclusion in spite of the fact that the exoneration clause did not specifically exclude negligent acts or omissions of the Landlord.

Insofar as the action of the restaurant tenant was concerned, the Court held that the poor installation of the stop valve must be considered to constitute a latent defect. The Court then held that the provision of the Lease stating that the tenant took the premises in their present state was a "*clause de style*", too vague to cover a question as technical as that of a poorly installed stop valve. Accordingly, the Court held that the Landlord had not fulfilled its obligations pursuant to Article 1854 CCQ, in that it did not "deliver the leased property to the lessee in a good state of repair in all respects and to provide him with peaceable enjoyment of the property throughout the term of the Lease". The Court further held that the rain could not be assimilated to a *force majeure*, for even though rain of this intensity only occurred every forty years, the event was not unforeseeable or irresistible. Moreover, as the Landlord had committed a fault in not installing a stop valve in conformity with municipal regulations, it could not invoke *force majeure* as a means of defence. However, the Court then held that the restaurant tenant had not fulfilled its maintenance obligation, as provided for in the Lease, as the screws holding the stop valve were rusted and totally ineffective. Consequently, the Court reduced by fifty percent the amount awarded to the restaurant tenant.

7.4 2152-1216 Quebec Inc. v. Shoghikian et al; J.E.2000-222 (Superior Court) *

Facts:

Pursuant to an offer to lease entered into between the parties in December of 1993 (the "**Offer**") 2152-1212 Quebec Inc. (the "**Landlord**") leased to Shoghikian et al (the "**Tenants**") premises containing approximately 2,400 square feet (the "**Premises**") at a rental rate of \$18.50 per square foot. Under the Offer, the Landlord was to perform all leasehold improvement work required in order that the Premises be operated as a first-class dental clinic.

The Landlord's work was seriously delayed due to numerous reasons and the Tenants were obliged to perform certain work themselves, deducting the cost thereof from rental otherwise payable to the Landlord. The Landlord instituted proceedings to cancel the Offer and to obtain from the Tenants the payment of amounts claimed to be due. The Tenants counter-claimed in damages and for the reimbursement of amounts allegedly overpaid to the Landlord.

Decision:

Pursuant to the Offer the parties had agreed that the Premises would be measured in accordance with BOMA standards, however, the Court held that only the useable portion of the Premises should be the object of the BOMA calculation, as a reference to BOMA does not necessarily signify that one must measure and include the common areas as well. The Court reviewed the negotiations preceding the signature of the Offer, noted that the parties had fixed the monthly rent at \$3,700 without any mention that it was an approximate amount, and stated that the addition of 279 sq. ft. (to the actual useable area of 2,410 sq. ft.) would bring about an increase in rental of more than \$5,000, thus constituting a substantial divergence which did not fit with the rental rates that had been proposed by the parties prior to the Offer. Accordingly, Justice Verrier determined that rental should be calculated solely on the useable (not leasable) square footage.

The Offer was silent in terms of the responsibility for payment of GST and QST. However, it did state, at the end of Article 3 (which dealt with rental), that "The Tenants are not therefore held to the payment of additional sums with respect to Rent" (my translation). The Court referred to the provisions of the *Excise Tax Act* and the *Quebec Sales Tax Act*, and held that same had not been satisfied by the Landlord. Finally, the Court held that the terms of the Offer must be interpreted in favour of the Tenants, in accordance with the Article 1432 CCQ, which states as follows:

Article 1432:

"In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated. In all cases, it is interpreted in favour of the adhering party or the consumer."

Insofar as the Tenants claim for reimbursement for amounts paid towards the surtax on non-residential immovable property was concerned, the Court held that article 3 of the Offer, which provided that the surtax was the responsibility of the Landlord, was in no way ambiguous and required no interpretation. As the business tax had been abolished in January 1993, the Landlord should have provided that the responsibility for the surtax would be transferred to the Tenants, however, it failed to do so. Accordingly, the Court held that the Tenants claim for reimbursement of amounts so paid (the Tenants thinking that these payments were in respect of business tax) should be granted.

The Court then dealt with the issue of the Tenants having entrusted the completion of the leasehold improvement work to the Premises to a contractor of the Tenants choosing. The Court stated that the Landlord was in default of its obligations, had remained in default despite numerous notices it had received from the Tenants, and thus the Tenants were entitled to proceed as they had, in accordance with Article 1868 CCQ, which states as follows:

Article 1868:

" Where the lessee had attempted to inform the lessor, or has informed him but the lessor has not acted in due course, the lessee may undertake repairs or incur expenses, even without the authorization of the Court, provided they are urgent and necessary to ensure the preservation or

enjoyment of the leased property. The lessor may intervene at any time, however, to pursue the work.

The lessee is entitled to reimbursement of the reasonable expenses he incurred for that purpose; he may, if necessary, withhold the amount of such expenses from his rent".

The Court further granted the Tenants a certain sum in terms of loss of revenue suffered due to the defaults of the Landlord, as well as the costs of the Tenants' expert. However, the Tenants were not entitled to claim back from the Landlord the interest paid to finance the execution of the work performed by the Tenants' contractor, as the Court held that same did not constitute "an immediate and direct consequence of the debtor's default" (Art. 1607 CCQ).

The Court further held that this was not a case where the Offer should resiliate, and that in any event, in lease matters, the tribunal has a discretionary power to decide whether or not to resiliate a lease. Finally, the Court held that given the complexity of the issues raised, the proceedings taken by the Landlord could not be held to be abusive, and thus declined to condemn the Landlord to pay the extra judicial fees and expenses of the Tenants.

8. PEACEABLE ENJOYMENT

8.1 142883 Canada Inc. v. 9037-8068 Quebec Inc.; [2000] R.D.I 273 (Superior Court)

Facts:

142883 Canada Inc. ("the **Landlord**") is an owner of a shopping centre (the "**Centre**") in the City of Rosemere and 9037-8068 Quebec Inc. (the "**Tenant**") occupies premises (the "**Premises**") in the Centre, in accordance with the terms of a lease dated August 11, 1997 (the "**Lease**").

The Lease provides for a term of five (5) years, from June 1, 1997 to May 31, 2002, for the payment of \$70,000 per annum in net net rent, states that the Premises comprise approximately 5,000 sq. ft. and stipulates that the Premises are to be used solely for purposes of a beauty centre. The Tenant spent approximately \$140,000 for its leasehold improvements and equipment, and operated a high quality beauty centre both men and women. In the summer of 1998, the Landlord leased the large empty premises beside the Tenant's beauty centre to a restaurant tenant, and the transformation was brought about by way of work performed six days per week over a three month period. As a result of the construction work, the Tenant refused to pay the rent for the aforementioned period of three months, thus causing the Landlord to institute the proceedings for non-payment of rent, and the Tenant counter-claiming for diminution for rent, indemnity for lost profits and a payment for loss of goodwill.

Decision:

The Court stated that the case revolved around the obligation of peaceable enjoyment owed by the Landlord to the Tenant throughout the term of the Lease, in accordance with Article 1854 CCQ. Mr. Justice Fournier stated that the proof clearly indicates that the inconvenience caused by the construction work of the adjacent restaurant was major, and clearly exceeded the inconvenience which a tenant of a commercial premises could expect when renovation work is

effected in adjacent premises. Furthermore, the Tenant had communicated numerous times with the Landlord to request that the Landlord minimize the inconvenience resulting from the construction; however, nothing was done by the Landlord. Accordingly, the Court held that the omissions by the Landlord constituted gross negligence on its part, entitling the Tenant to claim damages from the Landlord. The Court refused to allow the Landlord to take advantage of Section 63 of the Lease, which provided that the Tenant would not hold the Landlord responsible for any damage suffered as a result of the fault of other tenants and that the Tenant specifically renounced to any claims which it may have against the Landlord pursuant to Article 1855 CCQ and Article 1861CCQ. Mr. Justice Fournier held that the Landlord was liable for damage resulting from the disturbance of the enjoyment suffered by the Tenant, in accordance with the provisions of Article 1859 CCQ.

In attempting to quantify the damages suffered by the Tenant, the Court specifically stated claims relating to lack of enjoyment and loss of revenue and goodwill are impossible to determine with certainty; rather, they can only be determined in a reasonable manner. The Court granted the Tenant a certain sum based on lack of peaceable enjoyment, loss of revenue and loss of goodwill. However, the Court also obliged the Tenant to pay a portion of the rent due during the three-month construction period, as the Tenant had continued to operate during this time.

8.2 Sinto Laurentides Inc. v. Brennan; J.E. 2000-1488 (Superior Court)

Facts:

In May, 1998, six months after the execution of a commercial lease (the "**Lease**"), the Landlord agreed to take the measures necessary to remedy the problems relating to water entering into the Premises. Despite numerous calls by the Tenant, the Landlord did not fulfil its obligations, causing the Tenant to be obliged to close a section of its restaurant at certain times. The Tenant was obliged to replace certain tiles on its ceiling and after the Landlord did not respond to a demand letter, the Tenant effected certain urgent repairs itself. In January, 1999, the Tenant once again advised the Landlord of water infiltrating the Premises through the electrical distribution box. From January through April 1999, inclusive, the Tenant had not paid the rent due pursuant to the Lease. Following a fire in the Premises on April 8, 1999, the Tenant sued for cancellation of the Lease as well as damages.

Decision:

The Court held that pursuant to the Lease, the obligations of maintenance and repair of the Premises were the responsibility of the Tenant, while the Landlord was responsible for repairs to the structure of the building. The Landlord confirmed its responsibility with respect to the maintenance and repair of the HVAC unit, which was at the origin of the water infiltration problems. Mr. Justice Plouffe stated that the exoneration clause in the Lease did not seem to cover contractual obligations, and that even if he would have reached the contrary conclusion, he would have judged the clause to be abusive pursuant to Article 1437 CCQ, as it prevented the Tenant from invoking the principle relating to the mutuality of contractual obligations.

The Court further held that the Landlord had the obligation to provide the Tenant with peaceable enjoyment (Article 1854 CCQ) and that it had deliberately breached this obligation for many months. Accordingly, the Landlord thus breached its obligation of good faith (Article 1375 CCQ) and had committed an abuse of rights (Article 7 CCQ). The Court held that the Landlord

had acted negligently, carelessly and in an unreasonable manner insofar as the exercise of his contractual rights were concerned.

The Court refused to allow the Landlord to invoke the provision of the Lease pursuant to which the Tenant had undertaken to insure the Premises, to relieve the Landlord of its liability. The Court held that the Landlord's legal and contractual obligation to provide the Tenant with peaceable enjoyment of the Premises is not an insurable risk. Even if it were, the Court held that the provision would not exonerate the Landlord from its faulty acts.

As a result of the Landlord's negligence, the Tenant was entitled to defer its obligation to pay rent, as a preventive measure. The provision of the Lease pursuant to which the Tenant had renounced to invoke its right to compensation against the punctual payment of rental does not constitute an impediment to the exercise of this right by the Tenant. Mr. Justice Plouffe refused to allow the Landlord to claim that the Tenant could never stop paying rent, no matter what the reason, holding that this is contrary to the provisions of Article 1591 CCQ, which states as follows:

Article 1591

"Where the obligations arising from a synallagmatic contract are exigible and one of the parties fails to perform his obligation to a substantial degree or does not offer to perform it, the other party may refuse to perform his correlative obligation to a corresponding degree, unless he is bound by law, the will of the parties or usage to perform first."

Accordingly, Mr. Justice Plouffe awarded the Tenant damages for loss of revenue (both past and future), as well as an amount for inconvenience suffered. The arrears of rent owing by the Tenant were held to be deductible from the amounts owing to the Tenant by the Landlord.

9. OPTION TO RENEW

9.1 Les Entreprises Gilles Leblanc Ltée v. Claude Lachance et al; [2000] R.D.I. 199 (Court of Appeal)

Facts:

In September, 1991, Les Entreprises Gilles Leblanc Ltée (the "**Landlord**") sold to Lachance et al (the "**Tenant**") a business known as "Quincaillerie Papineau Enr." and entered into a five-year lease (the "**Lease**") for Premises in the Landlord's property situated at 148 Papineau Street, Papineauville, Quebec. The Lease contained two specific areas, Section "A" comprising 7,432 sq. ft., whose destination was restricted to the operation of a hardware business, and Section "B" with an area of 1,980 sq. ft., whose use was not restricted to any particular purpose. The Lease contained an option to renew (four options of five years each), on the same terms and conditions, provided that the Tenant notify the Landlord in writing six months prior to the expiration of the term of the Lease or the renewal period in question.

On December 18, 1995, which was prior to the final date that the Tenant had to advise the Landlord in respect of the exercise of the first option to renew (the final date being

December 31, 1995), the Tenant advised the Landlord that it would be renewing the Lease in respect of Section "A" but not in respect of Section "B". On January 9, 1996, the Landlord acknowledged receipt of the aforementioned notice, advised the Tenant that the Landlord did not consider the said notice to constitute a proper exercise of the renewal option, and thus advised the Tenant that it must vacate the Premises by July 1, 1996. Ten days later, the Tenant's attorney advised the Landlord that as a result of the Landlord's refusal to accept the Tenant's suggestion, the Tenant would exercise the option with respect to both Sections "A" and "B". The Landlord instituted proceedings in order to obtain a declaratory judgment confirming its right to expel the Tenant as of July 1, 1996.

At first instance, Madame Justice Trudel of the Superior Court held that the Landlord had exercised its rights in an unreasonable manner and accordingly, it could not request the resiliation of the Lease. The Court held that the renewal clause of the Lease could in no way be deemed confusing, and that the first notice sent by the Tenant (i.e. December 18, 1995) was insufficient. However, it was the other elements of the proof that justified the Court's conclusion.

The Court held that in the present case, it was not the faulty inexecution of its obligations by the Tenant which was in question, but rather a confused situation created by the repeated demands of the Landlord in attempting to take back the space occupied by the Tenant. The trial judge held that the Landlord claimed to be following the letter of the Lease, however, the proof demonstrated that the Landlord did not respect its spirit. Therefore, the trial judge rejected the Landlord's claim, thus the appeal.

Decision:

The Court of Appeal upheld the decision of the trial judge. It noted that the provisions of the Lease dividing the Premises into parts "A" and "B" could reasonably allow the Tenant to think that its undertaking was divisible. The Court further noted that after the Landlord's initial response, the Tenant had elected to renew the Lease for the entire Premises and thus the Court of Appeal determined that the Landlord had suffered no prejudice. The Court referred to the trial judge's analysis of the proof before her, and thus refused to intervene to overturn the trial judge's decision, holding that no error of law therein had been proven by the Landlord.

10. ABUSE OF RIGHTS

10.1 Ménard v. Superclub Videotron Ltée et al; [2000] R.J.Q. 1906 (Quebec Court)

Facts:

This case involves an action by Ménard (the "**Landlord**") in arrears of rent and damages. In November, 1997, 9049-4352 Quebec Inc. ("**9049**") subleased from 2950588 Canada Inc. certain premises (the "**Premises**") governed by a commercial lease expiring November 30, 1998. Superclub Videotron Ltée ("**Videotron**") was a guarantor of 9049's obligations. In March, 1998, 9049 advised the Landlord of its intention not to renew the Lease and to leave the Premises prior to the termination date. 9049 vacated the Premises on September 23, 1998, and refused to pay in advance the rental for the following two months, as the Landlord had not agreed to discharge 9049 from all of its obligations flowing from the Lease and to permit 9049 to indicate (on the Premises) the address of its new location. The next day, the Landlord changed the locks and refused to allow 9049's employees into the Landlord's shopping centre to distribute discount coupons advising its clients of the change of address.

Decision:

The Court held that pursuant to the Lease, 9049 was obliged to carry on its business in a continuous and active fashion. Accordingly, the contention of 9049 and Videotron that no such obligation existed was groundless and was made in bad faith. The Landlord had agreed to discharge 9049 from this obligation on the condition that the rental for the months of October and November, 1998 were paid as of 9049's departure and that 9049 renounced to all of its rights in the Premises. The Court held that as the Landlord's building was a shopping centre offering complementary goods and services, the premature abandonment of the Premises could have a negative effect on the goodwill and businesses of other tenants, even though Videotron was not an anchor tenant. Accordingly, the Court held that both 9049 and Videotron breached their continuous operating obligation.

The Lease entitled the Landlord to prevent 9049 to have access to the shopping centre to publicize its other location, as the Landlord was simply protecting its business, and that of its other tenants of the shopping centre.

Mr. Justice Barbe held that 9049 and Videotron were obliged to pay the Landlord a certain sum in arrears of rent and damages caused by the unlawful removal of equipment. However, the Court refused the Landlord's claim relating to the cost the Landlord had incurred in removing certain leasehold improvements that had been left in the Premises, as the Landlord had never required the defendants to remove same, in whole or in part.

Insofar as the Landlord's claim for extra-judicial legal fees was concerned, the Court held that the Landlord did not have to prove malicious intent on the part of the defendants. Rather, it was sufficient for the Landlord to prove that 9049 and Videotron had committed a fault in acting as they did and thus causing the Landlord damage (Article 7 CCQ). The Court stressed that despite the continuous occupancy provision of the Lease, 9049 and Videotron had obliged the Landlord to retain the services of an attorney and to institute the present proceedings. Accordingly, the Landlord was entitled to obtain the reimbursement of its extra-judicial expenses, which were however limited to the sum of \$4,887 (i.e. 50% of the amount claimed), the Court taking into account the fact that the Landlord had equally exaggerated its claim in terms of the leasehold improvements (in respect of which the Landlord's claim was rejected).

11. RELOCATION

11.1 Les Centres d'Achat Beauward Ltée v. Keuylian; [2000] R.D.I. 484 (Superior Court)*

Facts:

In 1992, during the renewal of their Lease, the Landlord added a clause which permitted it to redevelop the Premises and thus relocate the shoemaker and cleaning business of the Tenant within the shopping centre. The first draft of this clause provided that the costs of relocation were to be paid by the Tenant; however, after negotiation, the Landlord agreed to pay for the suspended ceilings sprinklers and doors. In 1994, the Landlord exercised its relocation right and contrary to the Lease, paid a large portion of the improvements of the new Premises. In addition, the Landlord provided a larger area for the Tenant at the same rent. The Lease between the parties was extended until April 30, 1999. In 1998, as a result of a substantial vacancy rate, the Landlord once again re-organized the shopping centre and advised the Tenant that it would be relocated. Although the Landlord was prepared to pay for a large part, if

not all, of the improvements to the "new new Premises" and had started to do the work as per the Tenant's design, the Tenant refused to relocate, and instead vacated the new Premises eleven months prior to the expiration of the Lease. The Tenant claimed that the work undertaken by the Landlord had had the effect of obliging the Tenant to close its business and added that the Landlord had acted in bad faith and thoughtlessly. The Tenant further claimed that the "new new Premises" had less window space, thus creating a loss of visibility, and that the relocation clause could only be exercised once during the term of the Lease.

Decision:

Mr. Justice Wery, after reviewing the facts, came to the conclusion that the Landlord had not acted in an abusive manner and thus granted the Landlord's action in terms of unpaid rent and the costs it had incurred in improving the "new new Premises". The Court stated that the situation in 1998 was similar to that in 1994, and that the Landlord in no way attempted to get rid of its small tenants. The Court held that had the Landlord desired to be more demanding of the Tenant, the Landlord could have utilized the provisions of the Lease, which were much less advantageous to the Tenant. The Court further noted the fact that the Landlord would have obtained no advantage in causing its tenants' businesses to be adversely affected by construction work, as the Landlord obtained a portion of its revenue from percentage rent of the tenants. Furthermore, the Court held that the Lease did not provide the Tenant with any exclusivity in respect of its business nor did it guarantee the Tenant a particular frontage. In fact, the "new new Premises" would have provided the Tenant with an entry to the mall of the shopping centre as well as with an exterior entrance door.

The Court noted that the Tenant's attorneys had, in a letter to the Landlord, stated that the Tenant would be prepared to sign the addenda for the "new new Premises" if certain additional work would be performed by the Landlord. This caused the Court to state that the Landlord had not taken advantage of the Tenant. Mr. Justice Wery refused the Tenant's claim that a reduction in his business allowed him to withhold rent, or cancel the Lease, stating that even if such a reduction could be proven, the wording of the Lease specifically excluded these remedies.

On a final note, the Court held that the relocation clause could be used at any time and at more than one time during the term of the Lease.

12. INJUNCTION

12.1 Carrefour Langelier v. Cineplex Odeon Corporation et al; J.E. 2000-64 (Superior Court)

Facts:

Pursuant to a lease entered into in April, 1991 (the "**Lease**"), Carrefour Langelier Inc. (the "**Landlord**") leased to Cineplex Odeon Corporation ("**Cineplex**") for a term of twenty years, movie premises (the "**Cinema**") to be constructed in the Landlord's shopping centre (the "**Centre**"). Prior to Cineplex even occupying the Cinema, Cineplex decided that it no longer wished to operate the Cinema. Cineplex approached the Landlord with representatives of Cinéma Langelier Inc. ("**Langelier**"), a company controlled by Angelo Guzzo, asking that the Landlord consent to the assignment of the Lease, and subsequently thereto, various agreements were entered into among the Landlord, Cineplex, Langelier, Mr. Guzzo and other

companies controlled by him (collectively “**Guzzo**”), including an Operating Agreement, an Assignment of the Lease, a Sale Agreement and a Booking Agreement (collectively the “**Matrix Agreements**”). The Booking Agreement provided that the Cinema would be operated by Guzzo under the Cineplex banner, Guzzo would obtain the films it would show at the Cinema from Cineplex, which had considerable buying power, and that Cineplex would book all films on behalf of Guzzo and advertise the Cinema as a Cineplex theatre in the same newspaper space as it advertised its other Montreal area theatres (the “**Franchise Conditions**”). It was further agreed that in the event of a default by Guzzo, the operating equipment in the Cinema would be sold to the Landlord for \$1.00, and that Cineplex would take over the Cinema at the Landlord’s request and operate it if Guzzo failed to cure a default within the delay provided for under the Lease or the Operating Agreement.

The Landlord instituted the proceedings following the modification by Cineplex and Guzzo of the Matrix Agreements, which resulted *inter alia*, in Guzzo substituting its own advertising for that of Cineplex, ceasing to operate under the Cineplex name, and no longer booking movies through Cineplex, the whole without the prior consent of the Landlord. The injunction proceedings initiated by the Landlord had as their primary conclusion the obligation on the part of Cineplex to once again enter upon and fulfil its contractual obligations contained in the Lease, and for Guzzo to vacate the Cinema. Subsidiarily, the Landlord requested that the *status quo ante* be restored, and that Guzzo and Cineplex be obliged to comply with all of the Franchise Conditions. In both instances, the Landlord asked to be declared owner of the Cinema equipment.

Guzzo claimed that its consent should be deemed viciated, as it had been obliged to conclude the Matrix Agreements as a result of false representations of the Landlord and Cineplex. Guzzo also claimed that the Booking Agreement pursuant to which it was obliged to obtain its films from Cineplex was contrary to the provisions of the *Competition Act*.

Both Cineplex and Guzzo argued that since the essential objective of the Matrix Agreements had been attained, even if their terms had not been literally complied with, the Landlord had suffered no damage and is very unlikely ever to do so, and thus the Landlord is acting in bad faith by insisting on a remedy completely out of proportion to any prejudice it has suffered or can anticipate.

Decision:

The Court held that the commercial position of Guzzo was the reason for it to have formed an alliance with Cineplex, in the same manner as had been done by Guzzo in two other movie theatres. These conditions had not been imposed upon Guzzo by the Landlord. Mr. Justice Fraiberg stated that Guzzo had been unable to prove, even by a balance of probabilities, any conspiracy on the part of the Landlord and Cineplex, and that in any event, the *Competition Act* required such proof beyond all reasonable doubt.

The Court held that the Landlord’s insistence with respect to specific performance of the obligations set forth in the Matrix Agreements was in conformity with the intention set out therein. The Court held that the commercial success which Guzzo had enjoyed subsequent to the signing of the Matrix Agreements does not constitute a factor which could relieve Cineplex and Guzzo of the obligations they had undertaken. The Matrix Agreements had, as their goal, the Landlord being furnished the same benefits as if Cineplex had itself operated the Cinema, in the manner that it was obliged to do so pursuant to the terms of the Lease. The Court held that

the absence of prejudice suffered by the Landlord does not prevent the Landlord from requiring specific performance, as the only thing which the Landlord must prove is that Cineplex and Guzzo have not respected the obligations set out in the Matrix Agreements.

Insofar as the claim of bad faith on the part of the Landlord is concerned, the Court noted that good faith is presumed, and that the burden of proof is on Cineplex and Guzzo to show otherwise (Article 2805 CCQ). The Court stated that the burden is not satisfied by simply establishing that the Landlord has not yet suffered any prejudice, as the primary purpose of specific performance is preventive and not reparative. No issue of past, present or future prejudice other than the loss of the performance alone of the obligations whose performance the Landlord demands can be germane to the issue of its good faith. Mr. Justice Fraiberg held that the promisor (Cineplex and Guzzo) has a heavier burden than simply establishing that the promisee (Landlord) cannot prove any present or future loss, stating that the promisee's lack of good faith would be satisfied by showing that no rational person placed in the same circumstances as the promisee would likely insist on the performance at all, or when and how the promisee does so, without creating a presumption that he is acting abusively.

The Court then stated that under Quebec law, the balance of convenience is no longer relevant at the stage of a request for final injunction. The Civil Code does not require any proof of any degree of prejudice, other than the deprivation of the performance of the obligation itself. The only restraint on the granting of the remedy is that performance of the obligation be possible, not that it be free of expense or difficulty, and that it not contravene public order. The Court referred to the original reluctance of Quebec courts to grant mandatory final injunctions, as the injunction was in origin a common law remedy, and that under common law principles, it was not to be granted if some other useful remedy was available to the creditor, or the balance of convenience favoured the debtor. However, Mr. Justice Fraiberg then stated that a creditor need not exercise other recourses in preference to specific performance, even if they are available, or even if the remedy would cause relative hardship for the debtor and none for itself. The Court stated that specific performance is presumed to be the remedy of choice in enforcing a contract of successive performance, limited only by considerations of possibility and public order, whereas the two alternate remedies, damages and resiliation, require proof of prejudice in addition to the breach.

However, Mr. Justice Fraiberg refused to order Guzzo to vacate the Cinema in order for same to be operated by Cineplex, given that the parties had only foreseen this eventuality in the event where Guzzo would no longer be capable of operating the Cinema. Moreover, this solution, insofar as Guzzo would be concerned, would be equivalent to resiliation of the Lease. The Court held that even if Article 1604 CCQ permitted such resiliation in the cases of repeated minor omissions, Article 1863 CCQ provides that the injury suffered by the Landlord must be serious in order to entitle the Landlord to avail itself of this right.

Accordingly, the Court granted a permanent injunction in accordance with the terms of the subsidiary conclusions, such that the Franchise Conditions would be fully respected.

13. ASSIGNMENT AND SUBLEASE

13.1 La Société en Commandite Place P.J.C. Fiset v. Pepsi Cola Canada Ltée; J.E. 2000-869 (Superior Court)*

Facts:

On April 7, 1997, Pepsi Cola Canada Ltée (the "**Tenant**") assigned its rights and obligations contained in a lease (the "**Lease**") entered into with Société en Commandite Place P.J.C. Fiset (the "**Landlord**") to 3286444 Canada Inc. (the "**Assignee**"). The Assignee advised the Landlord in writing that day of the assignment and the fact that the Assignee "will be bound by and observe all of the obligations of the Tenant under the terms of the Lease".

One month later, the Landlord advised the Tenant in writing of its refusal to discharge the Tenant from its obligations contained in the Lease. After the Assignee vacated the Premises prior to the expiration of the Lease, the Landlord claimed an amount in excess of \$600,000 in respect of arrears of rental as well as all future sums due under the Lease (alleging that there was a forfeiture of term). The Tenant alleged that the letter of the Assignee (pursuant to which the Assignee had undertaken to respect the conditions of the Lease) was sufficient to liberate the Tenant from its obligations under the Lease, that the response by the Landlord was too late, and that the acceptance of rent cheques from the Assignee also confirmed the lack of any future liability on the part of the Tenant.

The section in the Lease that was at the heart of the dispute read as follows:

Section 13.01

"The Tenant shall have the right to assign this Lease, or sublet the whole or any part of the Building without the prior written consent of the Landlord. The Tenant will not be relieved of the obligations to perform any of the terms and conditions of this Lease unless the assignee or sublessee covenants in writing directly with the Landlord to be bound by all the terms and conditions of this Lease as if such assignee or sublessee had originally executed the Lease as tenant, in which event the liability of the Tenant shall thereupon cease and terminate."

Decision:

The Court held that the right to assign or sublet the Lease must be distinguished from the right of the Tenant to be discharged from its obligations flowing therefrom. Mr. Justice Melançon stated that the Lease clearly provided for the continuation of the Tenant's obligations in the event of an assignment of the Lease, unless a written agreement between the Landlord and the assignee provided otherwise. In addition, the Landlord had established that the Tenant's representatives had, in respect of another lease containing a clause identical to that of Section 13.01, interpreted it in a manner such that the Tenant was not discharged of its obligations without the intervention and express acceptance of the landlord under such other lease, and the Court thus held that it is difficult to conclude that the Tenant was in good faith in the circumstances of the present case. Accordingly, the Court rejected the Tenant's claim that following the assignment it was discharged from its future obligations contained in the Lease.

The Court was not prepared to agree to the Tenant's claim that as the Landlord had taken more than ten days to respond to the Assignee's letter, this constituted consent on the part of the Landlord. The Court held that the provisions of Section 1.12 of the Lease (deemed consent if no response within 10 days) related to relations between the parties during the term of the Lease, while Section 13.01 of the Lease concerned its assignment. Moreover, the Court held that the depositing of rent cheques by the Landlord from the Assignee did not constitute an acceptance of the discharge of the Tenant from its future obligations. However, insofar as the Landlord's claim for all rental due until the expiry of the term of the Lease was concerned, the Court refused to grant this, stating that as the Lease contained no clause of forfeiture of term, the Tenant should not be condemned to pay these sums. Moreover, the Court stated that such a clause might be deemed abusive, as a landlord would receive from its tenant all rental due in the lease, in addition to that which might be paid to a landlord by an eventual occupant of the premises.

13.2 Jean-Paul Malouin v. Ferme Guy Bonin Enr.; [2000] R.D.I. 384 (Court of Appeal)

Facts:

In July, 1996, Ferme Guy Bonin Enr. (the "**Landlord**") and Jean-Paul Malouin (the "**Tenant**") entered into a lease (the "**Lease**") for agricultural land comprising 105 acres, with a term of five years at a rent of \$20. per acre. Insofar as the ability of the Tenant to sublet or assign was concerned, the Lease stated that the Tenant agreed to:

"b) not assign its rights, in whole or in part, in the present lease, without the prior written consent of the Landlord;

c) not sublease a part or the whole of the leased land, without the prior written consent of the Landlord." (my translation)

In the springtime of 1999, the Tenant sold its agricultural machinery, and attempted to sublease the Premises to Pierre Cardin for a period of one year at a rent of \$170.00 per acre. The sublease was conditional upon the Landlord accepting same. The consent of the Landlord was never obtained, and the Landlord instituted proceedings in resiliation of the Lease.

At trial, the Superior Court granted the Landlord's claim and ordered the Lease to be resiliated. The Tenant appeals from the Superior Court decision.

Decision:

The Court of Appeal, in a two-to-one decision, granted the Tenant's appeal and quashed the motion in resiliation of lease. The majority decision of the Court of Appeal held that the provisions of Articles 1870 and 1871 CCQ were at the heart of the issue. These articles read as follows:

Article 1870 CCQ

"A lessee may sublease all or part of the leased property or assign his lease. In either case, he is bound to give notice of his intention and the name and address of the intended sublessee or assignee to the lessor and to obtain his consent."

Article 1871 CCQ

"The lessor may not refuse to consent to the sublease of property or the assignment of the lease without a serious reason.

If he refuses, he is bound to inform the lessee of his reasons for his refusing within fifteen days after receiving the notice; otherwise, he is deemed to have consent to the sublease or assignment."

Justices Rousseau-Houle and Biron stated that the wording of the Lease reproduced the text of Article 1619 of the *Civil Code of Lower Canada*, which stated that: "The lessee cannot sublet all or part of the thing or assign his lease without the consent of the lessor, who cannot refuse it without reasonable cause." The majority judges stated that although the words "who cannot refuse it without reasonable cause" are not reproduced in the Lease, the conditional prohibition to sublet or assign which is found in the Lease cannot depend on a purely protestative condition. In other words, the Landlord cannot refuse to grant its consent simply because it so wishes. The Landlord must provide reasonable reasons. The majority further stated that Articles 1870 and 1871 CCQ have not modified the prior law in this regard. Article 1870 CCQ always requires the consent of the lessor to any sublease and assignment of lease, as a lease is a contract *intuitu personae* insofar as the person of the lessee is concerned. The restriction of Article 1619 of the *Civil Code of Lower Canada* is to be found in Article 1871 CCQ, which prohibits a lessor refusing its consent without "serious reason". The majority decision stated that the Landlord had not offered any serious reason to justify his refusal to sublease. The judges made mention of the fact that all of the parties are farmers who are aware of the market price for the leasing of agricultural land in the area. Furthermore, the Landlord did not allege that the Tenant breached its other contractual obligations, nor did the Landlord invoke any such claim against the subtenant. Accordingly, the majority reversed the Superior Court decision and ordered the Lease not to be resiliated.

Mr. Justice Beauregard dissented in this matter, and would have upheld the trial judge's decision. In the view of Mr. Justice Beauregard, neither Article 1870 nor 1871 CCQ apply, as the parties had agreed that there would not be any subleasing allowed. Mr. Justice Beauregard was of the opinion that a provision in a lease pursuant to which the lessee cannot sublease the premises except with the consent of the lessor does not mean that the lessee may sublease on the condition that the sublessee is acceptable to the lessor. Rather, the words "except with the consent of the lessor" must not be read in relation to the quality of the sublessee, but rather in respect of the sublease itself. Accordingly, Mr. Justice Beauregard would have rejected the appeal.

13.3 Fairview Pointe-Claire Leaseholds Inc. v. Café Supreme F. et P. Ltée and Café Supreme Fairview Inc.; [2000] R.J.Q. 2052 (Superior Court) *

Facts:

A commercial lease (the "**Lease**") was entered into between Fairview Pointe-Claire Leaseholds Inc. (the "**Landlord**") and Café Supreme F. et P. Ltée (the "**Tenant**"), which Lease was renewed in September 1997 for a term to expire August 31, 2002. The Tenant subleased the Premises to Café Supreme Inc. (the "**Subtenant**"). Shortly after the renewal of the Lease in September 1997, the Landlord relocated approximately six tables and twelve chairs that had

been situated in the common corridor in front of the leased premises (the "**Premises**"), which table and chairs had been used by clients of the Subtenant and other tenants of the shopping centre (the "**Centre**"). In March 1998, the Landlord put into place a non-smoking policy in the Centre and as of July 1998 the Tenant and Subtenant ceased making their rental payments.

The Landlord seeks recovery of arrears of rent, reimbursement of its legal fees, the rescission of the Lease and the expulsion of the Subtenant from the Premises. The Subtenant, after numerous modifications in the proceedings, seeks damages it claims it has suffered, or alternatively a reduction of rent and damages.

Decision:

Mr. Justice Bishop first dealt with the issue of the Subtenant's claim against the Landlord in light of Article 1876 CCQ, which states as follows:

Article 1876:

"Where a lessor fails to perform his obligations, the sublessee may exercise the rights and remedies of the lessee to have them performed".

The Court concluded that Article 1876 CCQ would not permit a sublessee to attack the principal lease in requesting its rescission or a reduction of the rental payable thereunder. Rather, Article 1876 CCQ, would permit a sublessee to institute proceedings against the lessor in order to obtain specific performance by the lessor of its contractual obligations towards the lessee. Should the lessor default to do so, the sublessee could execute, or have executed, these obligations at the lessor's cost. In the present case, the Subtenant was claiming compensatory damages or alternatively, a reduction of rental payable to the Landlord under the Lease and a storage lease that had also been executed with the Tenant. Mr. Justice Bishop thus concluded that the Subtenant's claim exceeded the scope of the exceptional rights afforded under Article 1876 CCQ, and thus rejected same.

The Landlord's claim for unpaid rent was contested and the Landlord also claimed an additional sum in excess of \$24,000 pursuant to Article 16.01(b) of the Lease, which states in the event that a default, a penalty of three months rent and other charges is due by the Tenant. The Court held that pursuant to Article 16.01 (b) of the Lease and Article 1863 CCQ, the Landlord was entitled to rescind the Lease. Mr. Justice Bishop then dealt with the issue of the reimbursement of legal fees, for Article 16.03 of the Lease provided for a reimbursement to the Landlord of certain expenses, including legal fees (on a solicitor and client basis). However, in view of the fact that the Tenant had not contested the Landlord's claim, the substantial costs incurred by the Landlord (which represented 44% of its monetary claim), were attributable to the prolonged contestation by the Subtenant. Accordingly, the Court held that Article 16.03 of the Lease could not be interpreted to oblige the Tenant to reimburse to the Landlord its legal costs, which were attributable to the intervention in the case at hand by a third person (the Subtenant). The Court did not agree that the provisions of the sublease, as drafted, were sufficient to engage the Subtenant's responsibility.

Insofar as the non-smoking policy of the Landlord was concerned, the Court noted that Article 17 of the Lease permitted the Landlord to adopt rules and regulations "acting reasonably", which rules and regulations could "differentiate between different types of business". Furthermore, Article 6.01 (b) (i) and (v) of the Lease allowed the Landlord to change

the use of any part of the Centre and to do any other thing that the Landlord judged appropriate in its operation of the Centre. The Court held that the Landlord had the right, in virtue of the Lease, to adopt a regulation or otherwise put its non-smoking policy into force, insofar as the common areas of the Centre were concerned. The Court noted that save for restaurant premises, all leasable premises within the Centre were already subject to a non-smoking by-law passed by the municipality. The Court held that the Landlord had not exercised its rights in an abusive or discriminatory fashion, nor was this policy unreasonable.

Mr. Justice Bishop dealt with the removal by the Landlord of approximately six tables and twelve chairs from the common corridor in front of the Premises by stating that pursuant to Articles 1.01 and 6.01 of the Lease, the Landlord was entitled to make changes or otherwise alter "common elements", and that these articles further provided for a renunciation of all claims against the Landlord as a result thereof. The Court noted that the Premises of the Subtenant did not form part of the food court, and that the Subtenant did not pay the additional expenses which were imposed upon food court tenants, although its customers did use the tables and chairs of the food court. The Court distinguished the situation of the Premises with the premises of another tenant of the Centre (Café Dépôt), and determined that not only had the Subtenant failed to establish that the Landlord had exercised its relocation rights in a discriminatory or malicious fashion, the Subtenant did not prove that it had suffered any real prejudice as a result of this relocation. The Court further dismissed the allegations of the Subtenant in respect of an alleged tacit agreement to force the Subtenant to leave the Centre, as well as the Subtenant's claim to the effect that the electrical invoices sent by the Landlord were a form of intimidation.

Accordingly, the Court terminated the Lease and storage lease, ordered the payment of overdue rent and the penalty thereon, together with interest, to be paid to the Landlord, and ordered the Premises to be surrendered, the whole notwithstanding appeal. It is to be noted that as a result of the appeal of this case, provisional execution has been suspended for the moment.

14. LANDLORD'S LIABILITY

14.1 Zurich Compagnie d'Assurances and Laboratoires Griffith Limitée v. 161163 Canada Inc. et al. J.E.2000-1333 (Superior Court)

Facts:

As a result of work done by Proseal Concrete Floor Care Systems Inc. ("**Proseal**") to resurface, by way of a water-based epoxy, the floor of premises in a building, the food products found in the premises (the "**Premises**") of Laboratoire Griffith Limitée (the "**Tenant**") were contaminated and had to be destroyed. The Tenant received payment of its loss from Zurich (less the deductible). Both the Tenant and its insurer Zurich then instituted proceedings against 161163 Canada Inc. (the "**Landlord**"). Divco Limitée ("**Divco**") and 141958 Canada Inc. (the action against this latter entity being dismissed as it had been interpleaded by error), with the Landlord and Divco in turn claiming against the Tenant, Zurich and Proseal.

Decision:

The Court noted that Divco had built the building for the Landlord, and as contractor for the Landlord, had engaged Proseal to perform the work. In addition, Divco had chosen the product which was used by Proseal, and despite the manufacturer's warnings regarding the product, had not advised the Tenant of the precautions to be taken. Moreover, Divco had not

advised Proseal of the fact that the Premises contained food products, that the ventilation system in the building was defective and that air would enter into the Premises. In the circumstances, the Court held the Proseal could not be held liable for the damages suffered by the Tenant, especially as it was Proseal who had forwarded to Divco the Safety Sheets in respect of the product. Madame Justice Bornstein held that both Divco and the Landlord had committed a fault in the circumstances and that the exoneration clause contained in the Lease did not apply in the circumstances, as negligence was explicitly excluded therefrom.

The Court further held that the obligation on the part of the Tenant to take out liability and property damage insurance for the mutual benefit of itself and the Landlord, as well as a waiver of all subrogation rights of its insurers against the Landlord, did not afford the Landlord protection from the claims made against it, citing the case of Commerce & Industry et al v. Ville de Montréal et Alexis Nihon (Québec) Inc. (see case comment in 2000 Quebec Legal Update). However, the Court reduced the Tenant's claim for loss of profit, as no proof was furnished in respect thereof.

15. FORMATION OF CONTRACT

15.1 Institute des messageries de Notre-Dame-de-L'Assomption de Québec v. Pouliot et al; J.E. 2000-1977 (Quebec Court)

Facts:

The Landlord owned a building where, for the past twenty-nine (29) years, it would have elderly people visit for short or long term stays. The Landlord put the building up for sale, and the real estate agent indicated that the property was an "Old Age Home". The Tenants agreed to lease the building for one year, with a conditional promise to purchase. As the Landlord had told the Tenants that no permit was necessary, the Tenants immediately began to carry on their business. Five months later, the municipality advised the Tenants of the fact that the municipal by-laws did not allow the operation of an old-peoples home in the building. The Tenants subsequently vacated the building, the Landlord retook possession and sued the Tenants for unpaid rent, while the Tenants requested cancellation of the lease due to a lack of consent, as well as damages.

Decision:

The Court held that the Landlord, through its real estate agent, had falsely declared to the Tenants that they could carry on in the building an old-peoples home. The use of the property was, to the parties' knowledge, an essential consideration to the entering of the commercial lease (Article 1400 CCQ). However, the Court held that this error was not the result of any fraud on the part of the Landlord, as it had not been established that the Landlord was aware of the municipal zoning by-laws, nor did the Landlord have the intention to deceive the Tenants. The Court held that as a result of this error, the Lease was resiliated and each party was bound to restore to the other the prestations it had received (Article 1422 CCQ). The Court thus rejected the Landlord's claim.

Insofar as the Tenant's claim for cancellation and damages was concerned, the Court noted that such a claim could lie pursuant to Article 1858 CCQ, which states as follows:

Article 1858:

"The lessor is bound to warrant the lessee against legal disturbances of enjoyment of the leased property.

Before pursuing his remedies, the lessee shall notify the lessor of the disturbance."

Mr. Justice Gobeil then stated that none of the damages claimed by the Tenants were sufficiently proven, holding that the operating deficit suffered by the Tenants was due to their own management. Accordingly, the Court annulled the Lease, and, as restitution in kind was impossible, held that it must be made by equivalence (Article 1700 CCQ.). Thus Court ordered the Tenants to pay rent for the final three and one-half months of the Lease, during which time they had occupied the Premises but had refused to pay rent.

15.2 2928116 Canada Inc. et al v. 9012-9842 Québec Inc. et al; J.E. 2000-2125 (Court of Appeal)

Facts:

The Tenant (Restaurant Chez Kal's) had paid to the Landlord the sum of \$7,880 in order to guarantee the execution of its obligations contained in a commercial lease (the "**Lease**") for premises situated in "Les Galeries Taschereau" shopping centre. The Tenant subsequently claimed that the Landlord, through its leasing representative, had made false representations concerning major renovations that would be made to the shopping centre as well as the increase in traffic flow the Tenant would benefit from as a result thereof. The Tenant claimed that as a result of these false representations on the part of the Landlord, which had caused the Tenant to enter into the Lease, the Tenant was entitled to the reimbursement of the aforementioned amount. The trial judge accepted the Tenant's version of the facts and granted the reimbursement claimed, reserved to the Tenant its right to demand the cancellation of the Lease, and dismissed the Landlord's cross-demand for arrears for rental and future rental.

Decision:

The Court of Appeal noted that as the trial judge's decision was based on the appreciation by the trial judge of the facts and evidence before the Court, it was not appropriate for the Court of Appeal to intervene. Mr. Justice Rothman, on behalf of the Court, stated that as the Lease had been signed as a result of false representations of the Landlord, the Landlord could not invoke the clause in the Lease pursuant to which the parties acknowledged it to have been freely negotiated. The Landlord was further prevented from relying on the clause of the Lease which provided that the sole representations of the Landlord were those contained therein. Accordingly, the Landlord's appeal was rejected.

16. SERVITUDES

In the 1999 Quebec Legal Update, the case Léveillé v. Coopérative funéraire d'Autry (1998) R.D.I. 404 (Superior Court) was reviewed. In that case, the Court held that a servitude prohibiting the use of a certain piece of land for the purposes of a funeral home or funeral business constituted a personal obligation and not a real servitude, and thus was not binding upon any future acquirer of the land. Subsequent thereto, two decisions of the Superior Court have come down on opposite sides of the fence insofar as the issue of the validity of a servitude

prohibiting property to be used for specific purposes is concerned. The issue relates to whether such a restriction is merely a personal right, thus binding only the parties to the contract, or if it is a real right, and thus would be binding upon subsequent acquirers of the servient land. In the case of The Standard Life Assurance Company v. Centre Commercial Victoriaville Ltée (1999) R.J.Q. 795, Madame Justice Courville of the Superior Court held that a restriction “prohibiting a food supermarket or grocery store or the sale of food items...” did not constitute a real servitude. However, in the case of Placements P.H.C. Inc. v. 163696 Canada Inc.; 500-05-046061-980 (Superior Court), Mr. Justice Viau stated that a clause providing that “Except the existing leases, no part of the original property or any buildings erected thereon shall be used for the purposes of a pizzeria or other type of restaurant and, without limiting the generality of the foregoing, be used as a restaurant selling pizza, submarine sandwiches and/or pasta products as a principal product” did indeed constitute a real servitude and thus was opposable upon subsequent acquirers of the servient land. It is to be noted that the latter two cases have both been appealed; however, as of the present time, the Court of Appeal has not yet rendered its decision in either case.

Note: “*” indicates 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 chaimbergs@lapros.qc.ca.