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COVID-19 and Commercial Rents: The Court Decides. Amicable Resolutions are Recommended.

The COVID-19 pandemic has infiltrated all spheres of our daily lives since March 2020; the landlord-tenant relationship being no exception.

With some landlords collecting as little as 15% of commercial rents during certain months of the pandemic,¹ as well as the limited success of Canada's emergency commercial rent assistance program,² it is not surprising that Quebec courts have been asked to adjudicate landlord - tenant disputes.

The Superior Court recently rendered three decisions on this matter. One on the merits stage, the other two at the interlocutory stage.

As discussed in further detail below, we recommend that landlords and tenants attempt to resolve their disputes outside of court in order to control the parameters of their contractual relationships.

¹ *Canadian malls collect just 15 per cent of May rent from tenants*, Rachele Younglai, The Globe and Mail, May 12, 2020.

² *De petites entreprises québécoises oubliées par l'aide d'urgence pour le loyer commercial?*, Fanny Samson, Radio-Canada, May 23, 2020 – For more detail on the program, see the bulletin *Rent Relief on its Way for Small Businesses and Commercial Landlords*, Janet L. Derbawka, Partner, McMillan.

The *Hengyun International Investment Commerce Inc. v. 9368-7614 Québec Inc.*³ decision rendered on July 16th is, to our knowledge, the first decision on the merits on the effects of the pandemic on landlord-tenant relations.

In a case involving a multitude of issues between the parties, the Honorable Peter Kalichman, s.c.j., rendered a detailed judgment, the essence of which was the importance of the concept of peaceful enjoyment.⁴ Through this angle, Justice Kalichman determined that the tenant was relieved from the payment of rent from March 24 to June 22, 2020.⁵

9368-7614 Québec Inc., the tenant, operates a fitness center on the Hengyun International Investment Commerce Inc. premises. However, on March 24, 2020,⁶ the Government of Quebec ordered the closure of fitness centers until their eventual reopening on June 22, 2020.⁷

In applying an objective approach, the Court concluded that the Government Decree constituted a *force majeure*⁸ that prevented the landlord from fulfilling their obligation to provide their tenant with peaceable enjoyment of the premises to operate a fitness center. Consequently, the Court determined that the tenant was relieved of their correlative obligation, that is, the payment of rent.⁹

N. B.: the lease in question included a clause found in many commercial leases that provided for the payment of rent despite an unavoidable delay caused by superior force or any event beyond the control of the parties. Justice Kalichman found that this clause dealt with situations where execution of the obligation would be delayed,

³ 2020 QCCS 2251, (« *Hengyun* »). This decision has not been appealed to date and the suspension of the delays in civil proceedings make it unlikely that the deadline for appeal will expire before October 1, 2020.

⁴ Article 1854 *Civil code of Québec* (« **C.c.Q.** »).

⁵ See paragraphs 90-108 of *Hengyun* for the full reasoning of Justice Kalichman.

⁶ Decree 223-2020 of the Government of Quebec dated March 24, 2020.

⁷ Ministerial Order 2020-047 of the Minister of Health and Social Services dated June 19, 2020.

⁸ Article 1470 C.c.Q.

⁹ Article 1694 C.c.Q.

but not entirely prevented. In addition, Justice Kalichman reiterated that peaceable enjoyment is at the heart of a landlord's obligation. Thus, while the parties may modulate the intensity of the landlord's obligations, they cannot agree on a complete exemption regarding the consequences of failing to provide peaceable enjoyment.

Consequently, the Court relieved the tenant from paying three months rent between March 24 and June 22, 2020.

In two other recent decisions,¹⁰ the Superior Court ruled in favor of tenants who sought interlocutory injunctions to prevent their landlords from resorting to extrajudicial resiliation of the lease, as well as to force landlords to allow tenants to reopen their business as part of the deconfinement process.

In both cases, the landlords had resiliated the leases because of the tenants' failure to pay rent during the pandemic. The Court, however, appears to draw a negative inference from the landlords' refusal to allow tenants to access Canada's emergency commercial rent assistance program. As a result, the court questioned the good faith and reasonableness of the extrajudicial resiliation.¹¹

It seems clear that the Quebec courts, aware of the economic pressure caused by the pandemic, wish to avoid irreparable harm caused to the parties they consider weaker or who have more to lose by the resiliation of their lease.¹² We conclude from the reported decisions that the courts are exercising caution in this period of uncertainty.

Thus, rather than allowing a third party to interfere with their leases, even when the contractual terms seem clear to them, landlords and

¹⁰ *Tubes et Jujubes Centre d'amusement familial inc. c. 8937974 Canada inc.*, 2020 QCCS 1934 and *Rocco Taverne italienne inc. c. Fiducie Marcon-Campeau inc.*, 2020 QCCS 1949.

¹¹ However, it should be remembered that this is an interlocutory decision. The final decision on this matter will be taken by the judge deciding on the merits.

¹² See also *Technispect 2000 inc. c. Laberge-Ayotte*, 2020 QCCQ 2291 in the context of a commercial lease for rental on Airbnb where the court holds that the consequence of the eviction would weigh more heavily on the tenants and that the court must take into account the exceptional situation caused by the pandemic.

tenants have an interest in finding common ground to navigate together through the COVID-19 trepidation.

The author thanks Catherine Burrogano, articling student, for her help with the English translation of this bulletin.

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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