

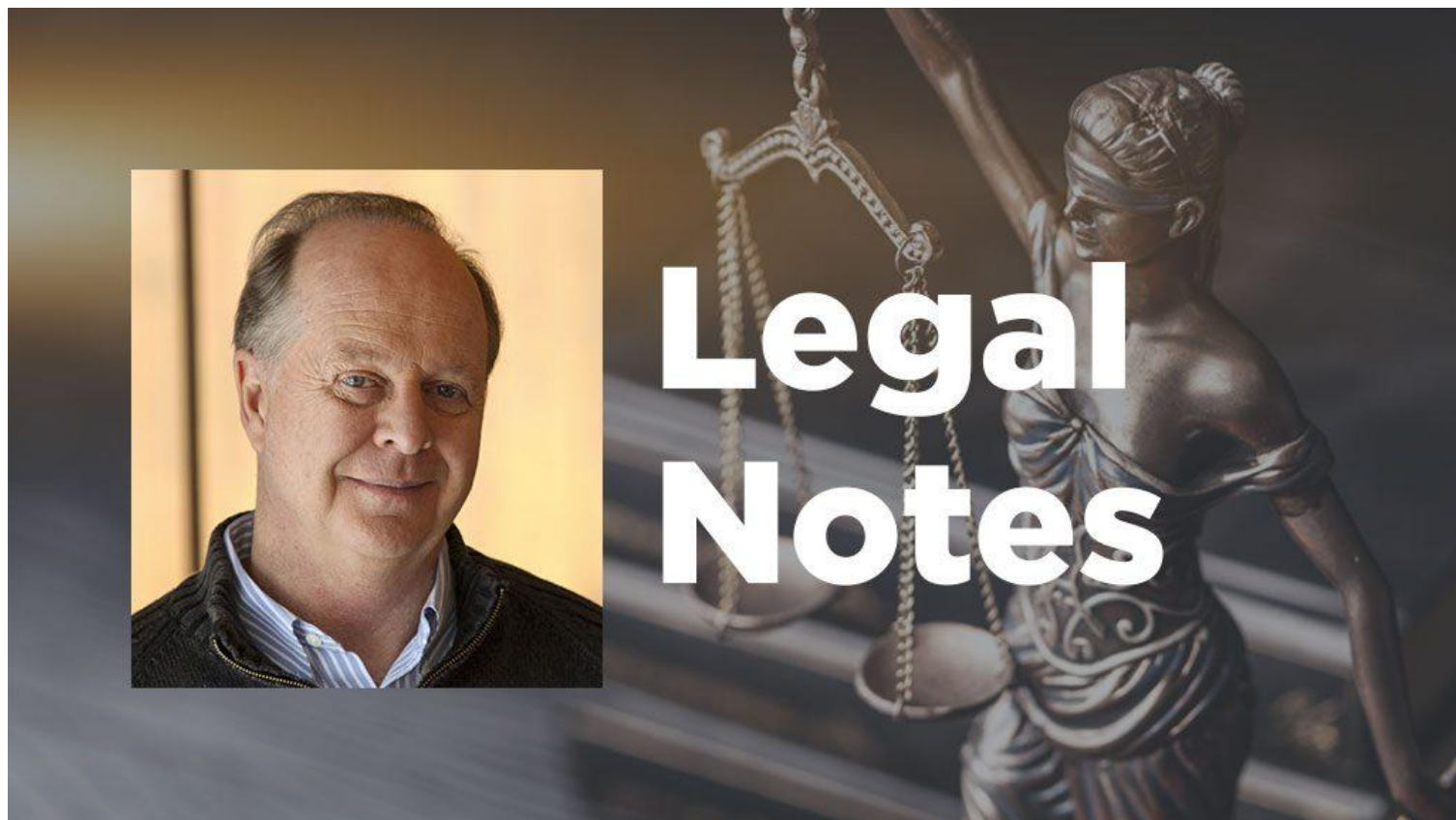
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GOVERNMENT

## Legal Notes: Quebec issues Canada's first known COVID-19 force majeure ruling

John Bleasby August 5, 2020



After months of speculation concerning how the courts in Canada would view force majeure in light of COVID-19, the Canadian legal community now has a little insight.

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On July 16, Quebec Superior Court Judge Peter Kalichman issued a judgment speaking to the matter of force majeure in the context of commercial landlord-tenant relations. In this case it was a tenant unable to pay rent as a result of a government-ordered business closure.

The tenant in question operated a fitness facility in rented premises. On March 24, the Government of Quebec ordered the closure of fitness centres. They were forced to remain closed until June 22. The court ruled that the tenant did not have to pay rent during the mandatory closure period.

Key to the court ruling was a clause common to most commercial leases that excuses either the landlord or the tenant from performing an obligation if prevented or delayed by force majeure without being liable to the other party.

As pointed out by lawyers from Fasken, “while the tenant still had access to its equipment within the premises, the lease provided that the premises are to be used ‘solely as a gym,’ and that such an activity was prohibited by the Decree.”

As a result, “the Court concluded that the Government Decree constituted a force majeure that prevented the landlord from fulfilling their obligation to provide their tenant with peaceable enjoyment of the premises to operate a fitness centre,” writes Andrei Pascu of McMillan LLP.

Catherine Guertin , Line Abecassis and Raphael Roditi of Borden Ladner Gervais LLP, describe the preconditions required for force majeure as an event that could not be foreseen when an obligation was contracted. Furthermore, the event must be “irresistible” - one that prevents the performance of an obligation by anyone, not just the debtor.

However, the court ruled that in this instance, a force majeure event affected the lessor, not the tenant, write Marc-Andre Boutin , Elias Benhamou and Pierre Lantoin of Davies Ward Phillips & Vineberg.

“Despite being unable to generate revenue, that alone did not constitute justification under force majeure for not paying the rent.”

The court felt that, in theory, a tenant with sufficient resources might be able to continue paying rent. It was the event was not “irresistible.”

“On the other hand,” continue Boutin, Benhamou and Lantoin, “a lessor affected by the government order had to close its building. It was therefore impossible for the lessor to provide to its tenant peaceful enjoyment of the premises.”

Although this is the first known force majeure decision directly referencing COVID-19, Pascu places it alongside two other recent Quebec Superior Court decisions regarding tenant rights and expectations related to the pandemic.

In these other cases, the court ruled in favour of tenants seeking interlocutory injunctions preventing their landlords from resorting to extrajudicial resiliation of their leases — termination without court intervention — as well as forcing landlords to allow tenants to reopen their business as part of the deconfinement process.

There are various points of interest that can be derived from these rulings.

First is the attitude of the courts.

“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,” write Boutin, Benhamou and Lantoin.

Second, Gowlings speaks to the matter of extrajudicial resiliation clauses in leases, saying, “The lessor must be cautious. Indeed, the wrongful or abusive use of such a clause can have serious consequences. Applied in a negligent or abusive manner, the lessor may be liable to the lessee.”

“This decision could have a significant impact on future litigation resulting from the forced closure of businesses,” write Boutin, Benhamou and Lantoin.

However, in practise, McMillan’s Pascu recommends, “that landlords and tenants attempt to resolve their disputes outside of court in order to control the parameters of their contractual relationships.”

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