

REAL ESTATE LITIGATION: SUMMER HIGHLIGHTS

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Even in the summer months, the legal news does not let up. Here are some recent decisions and legislative developments as we head into the 2021 fall season.

1. *Ville de Saint-Rémi v. 9120-4883 Québec Inc. 2021 QCCA 630: disguised expropriation and calculation of the expropriation indemnity*

Overview

In *Ville de Saint-Rémi*, the Court of Appeal reiterated the principles applicable to disguised expropriation and summarized the analysis grid for calculating the expropriation indemnity. This decision also reminds us of the importance of choosing the right expert.

The facts

The City of Saint-Rémi (the "**City**") had implemented an industrial development project, divided into three phases (phase 1, phase 2-A, and phase 2-B). 9120-4883 Québec Inc. and Gestion Concorde Inc. (the "**developers**") had acquired lands in the phase 2-B area in 2010 for a real estate project. Since the land in question was part of a wetland with "high ecological value", any destruction (even partial) of the wetland had to be indemnified. Thus, the City realized, in its negotiations with the *Ministère du Développement Durable, de l'Environnement et des Parcs* ("**the Ministère**"), that it would have difficulty obtaining the Ministère's authorization to destroy the wetland in phase 2-B. This led it to change the zoning of the lands held by the developers and to offer the Ministère to protect the wetlands on the developers' lands (Phase 2-B) in order to be able to secure its request for a certificate of authorization to fill in the lands of Phase 2-A, as indemnity.

In doing so, the developers lose the industrial use of their land and are left with a very restrictive recreational use. The developers believed that this change in zoning was a disguised expropriation and that they should be indemnified by the City. The first instance judge granted the developers' request and ordered the City to pay \$480,950 in damages and \$12,874 in reimbursement of municipal property taxes, legal fees and expert fees. The City appealed the decision and the developers asked the Court of Appeal to increase the amount of indemnity. The Court of Appeal reduced the amount of indemnity awarded in first instance to \$190,400.^[1]

The concept of disguised expropriation - the impossibility of exercising the right of ownership

In this decision, the Court of Appeal reiterates the definition of disguised expropriation. It indicates that a municipality must indemnify the owner of an immovable^[2] "only if the by-law is so restrictive that it makes it impossible to exercise the right of ownership. The restriction imposed by the by-law "must amount to a suppression of any reasonable use of the lot, a denial of the exercise of the right of ownership or a 'true confiscation' or appropriation of the immovable" [our translation].^[3] In light of the facts of the case, the Court of Appeal concluded that there had been a disguised expropriation, because it considered that it was the effect of the by-law adopted by the City and the restrictions it imposed on uses and constructions that had the consequence of "definitively removing [the] owners' possibility of using the lot in question for any reasonable purpose whatsoever, other than strolling or hiking.^[4] The Court of Appeal also specified, in its reasoning, that although the presence of a wetland (such as the developers' lot) could in itself impose restrictions on uses and constructions on a lot^[5], this did not remove the totally prohibitive effect of the by-law adopted by the City with respect to any reasonable use of the lot by the developers. It was therefore the by-law adopted that had the effect of expropriating the developers' land.

Calculation of damages

The first instance judge found that the fairest value would be obtained by averaging the value on the City's property assessment roll with the value established by consensus of the two appraisers, from which he subtracted a compensation based on a 1:1 ratio proposed by the developers' expert, but without supporting rationale^[6].

However, the Court of Appeal revised the amount of indemnity downward because it considered that the first instance judge's calculation of the indemnity was not based on evidence and did not use the criteria applicable to expropriation.

The Court of Appeal reiterates the following principles for calculating the indemnity:

- a. indemnity "must be established according to the most remunerative and appropriate use of the expropriated property" [our translation];
- b. the use will be "that which, at the time of valuation, gives it the highest value, either in money or in the amenity or convenience of the property" [our translation];
- c. the expropriated party must demonstrate that the use is :
 - (1) possible (rather than theoretical);

- (2) probable (not just possible);
- (3) permitted by law or regulation;
- (4) financially possible;
- (5) achievable in the short term; and
- (6) that there is "a demand for the property valued at its best use" [our translation].^[7]

The Court of Appeal, after evaluating the evidence submitted by the developers, concluded that the use contemplated by the developers, namely an industrial use, was not possible and, consequently, that they could not be entitled to the indemnity they claimed for the industrial use. However, the Court of Appeal considered that the City's invitation to refer to the value estimated by its appraiser (i.e., \$190,400) was equivalent to an admission of the real value of the land and it awarded this indemnity to the developers.^[8]

2. *Redbourne 4150 v. Westmount Plus Inc, 2021 QCCS 1871 (leave to appeal denied, Westmount Plus Inc. v. Redbourne 4150, 2021 QCCA 1053): the obligation to pay rent and the concept of force majeure*

Overview

The case of *Redbourne 4150 v. Westmount Plus Inc.* provides another opportunity for the courts to examine the obligations governing commercial landlord/tenant relationships in this pandemic period.

In this decision on an application for a safeguard order, the Superior Court gives us some indication of the elements it would consider as exonerating (or not) a tenant from his obligation to pay rent in a context of force majeure, until the case can be heard on the merits. In the decision refusing leave to appeal, the Court of Appeal analyzed, on a preliminary basis, the force majeure clause contained in the commercial lease, which contained a provision to the effect that even in the event of force majeure, the parties were not released from their obligation to make payments under the lease.

The facts

Westmount Plus leases commercial premises from Redbourne 4150. It uses it for its business centre and subleases approximately 60 offices to third parties.

Due to the pandemic, Westmount Plus received emergency assistance from the government and paid a reduced rent from April 1st 2020 to September 30, 2020. In addition, many of its sub-tenants were essential services and continued to operate during the pandemic. Upon termination of the government's emergency assistance program, Westmount Plus stopped paying rent, resulting in rent, utilities and taxes in arrears in the

amount of \$277,201.82.

In its judgment, the Superior Court ordered Westmount Plus to pay 2 months of rent within 10 days of the judgment being rendered and to continue to pay, on the first day of each month, the rent due for the next 6 months.

The defence of *force majeure*: unforeseeable and irresistible character

The crux of this case is the manner in which the defence of *force majeure* (in this case, the COVID-19 pandemic) can be raised by a commercial tenant in order to avoid its obligation to pay the commercial rent due to its landlord.

In this case, the Superior Court ruled that this defence was not available to Westmount Plus, because it had not succeeded in demonstrating the "*irresistible*" nature of the pandemic, simply its "*unforeseeable*" nature. Both characteristics must be met to constitute a *force majeure* under the *Civil Code of Québec* (art. 1470, al. 2).

According to the Superior Court, in order for Westmount Plus Inc.'s defence to work, it should have proven that, due to the pandemic, it was impossible for it to pay its rent and that it could not operate its business centre and generate revenues. Instead, the evidence showed a simple decrease in revenue.

A tenant who is dissatisfied with the management of the building is not necessarily deprived of its peaceful enjoyment

Westmount Plus also justified its refusal to pay rent because of the landlord's "gratuitous and arbitrary actions" in managing the building and providing access to the building during the pandemic.

The Superior Court took the opportunity to remind tenants that they may, in certain exceptional circumstances, withhold payment of rent, particularly when they do not have peaceful enjoyment of the leased premises or when other substantial issues arise under the *Civil Code of Québec* (through the combined effects of articles 1854 and 1591 CCQ).

However, Westmount Plus Inc. had not offered sufficient evidence to support its vague and general allegations of arbitrary decisions allegedly taken by Redbourne 4150, and there was no basis for any right to withhold the rent due.

The *force majeure* clause in the commercial lease

The Court of Appeal, supporting the reasoning of the first instance judgment, added that the wording of the *force majeure* clause, which provided that in no case were the parties released from the obligation to make a payment, tended to increase the appearance of right in favor of the payment of rent. However, it will be

interesting to see how the Superior Court interprets the clause in the contract, in light of all the evidence adduced on the merits.

3. Legislative Change

3.1 Bill 67^[9]

Bill 67, which concerns development in flood-prone areas, brings changes that go well beyond the issues surrounding Québec's lakes and rivers. This bill has a significant impact on real estate practices even if the enactment of an application regulation is still pending to precisely delimit its consequences. Here are some provisions that already affect real estate in Québec.

Exemptions granted in flood-prone areas^[10]

Under the terms of Bill 67, the government reserves the right to repeal the Flood Protection Plan. This means that a municipality will no longer have the same leeway to amend its land use plan to include an exemption for real estate projects in flood-prone areas. Provincial regulations will also replace municipal regulations for zoning and subdivision, making the exemptions provided for in the municipal regulations obsolete. In the absence of provincial regulation, the status of exemptions granted to real estate projects prior to the coming into force of Bill 67 under the municipal by-law remains uncertain and will need to be clarified following the coming into force of the provincial regulation.

Access to water bodies^[11]

Access to water bodies has long been demanded by nature lovers, fishermen and water sports enthusiasts. Bill 67 responds to this demand by allowing municipalities to require the transfer of land giving access to water for any cadastral operation approval, in addition to a financial contribution for the establishment of a public access to water. The surface area of the land to be transferred may not exceed 10% of the total surface area of the land involved in the cadastral operation.

New municipal taxation powers with regard to COVID-19^[12]

Under Bill 67, a local municipality may, by a by-law that does not require ministerial approval, authorize the borrowing of money available in its general fund or working capital fund to finance expenses attributable to the COVID-19 pandemic and incurred in the fiscal year 2020 or 2021 or to compensate for a decrease in its revenues attributable to the pandemic and recognized in those same fiscal years. The by-law shall provide, among other things, for the reimbursement, for a maximum term of 10 years, which may be derived from a special tax imposed on all taxable properties in the territory of the municipality.

Property assessment roll freeze^[13]

Prior to the coming into force of Bill 67, the *Act respecting municipal taxation* ("**AMT**") required the municipal assessor to amend the property assessment roll to reflect the decrease in value of a property resulting from the imposition of a legal restriction on the possible uses of the property. The COVID-19 pandemic brought about such legal restrictions by, for example, forcing the closure of non-essential businesses, which in the past would have resulted in a decrease in property assessment under the provisions of the AMT.

However, Bill 67 amends the AMT to provide that a rule imposed by the government, a minister or a municipality to protect the health of the public during the COVID-19 pandemic, which has the effect of restricting all or part of a business's operations, is not a legal restriction under the AMT. This measure is currently in effect and is retroactive to March 13, 2020.

3.2 Bill 78^[14]

Enacted on June 3, 2021, Bill 78 is expected to fulfill the government's commitment to prevent and combat tax evasion and corruption. For property owners, who often employ fiscal and organizational strategies involving the use of third parties or nominees, these new measures impose significant disclosure obligations.

Ultimate Beneficiaries and Access to Information^[15]

Bill 78 requires, with certain exceptions, a person or group of persons voluntarily registered, or any person, trust or partnership required to be registered (a "**Registrant**"), to report certain information relating to the natural persons who are their ultimate beneficiaries, including their name, domicile and date of birth as well as any other name they use in Québec and under which they identify themselves and, according to the terms and conditions determined by government regulation (to come), the type of control exercised by each of them or the percentage of shares or units they hold or of which they are beneficiaries. All such information will be available to the public and will be enforceable against the ultimate beneficiaries^[16].

The Registrant shall provide, with respect to each of its directors, their name, domicile, date of birth and a copy of an identification document issued by a governmental authority in support of any declaration or update of the information relating to them.

[1] *Ville de Saint-Rémi v. 9120-4883 Québec Inc.* 2021 QCCA 630, para 78 ("**Ville de Saint-Rémi**").

[2] Art. 952 CCQ.

[3] *Ville de Saint-Rémi*, para 25 citing several decisions rendered by the Superior Court, namely *Ville de Québec v. Rivard*, 2020 QCCA 146; *Municipalité de Saint-Colomban v. Boutique de golf Gilles Gareau Inc.* 2019 QCCA

1402, paras. 64-66; *Wallot v. Québec (Ville de)*, 2011 QCCA 1165, para. 47, but curiously omitting the Supreme Court's decision in *Lorraine (Ville) v. 2646 8926 Québec Inc.* [2018] 2 SCR 577, which provides a more flexible definition of the concept of disguised expropriation.

[4] *Ville de Saint-Rémi*, paras 28-30, 39.

[5] Under the *Environment Quality Act*, c. Q-2.

[6] *City of Saint-Rémi*, para 52.

[7] *City of Saint-Rémi*, para 66.

[8] *City of Saint-Rémi*, para 77.

[9] An act to establish a new development regime for the flood zones of lakes and watercourses, to temporarily grant municipalities powers enabling them to respond to certain needs and to amend various provisions.

[10] See sections 9, 10 para. 1 paragraph 1 a), and sections 14 to 16 of Bill 67 which amend the Act respecting land use planning and development.

[11] See sections 10 para. 1 subsection 1 (c) and subsection 2, sections 11 and 12 of Bill 67 which amend the Act respecting land use planning and development.

[12] See sections 128 and 129 of Bill 67.

[13] See section 133 of Bill 67 which amend the Act respecting municipal taxation

[14] An Act mainly to improve the transparency of enterprises

[15] See section 8 of Bill 78

[16] See section 17 of Bill 78

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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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