



COVID-19 in the Québec commercial leasing context

# SHOULD THE LESSEE **PAY RENT?**



M<sup>re</sup> Antonietta Melchiorre



M<sup>re</sup> Nicholas Backman

The COVID-19 pandemic has profoundly destabilized the Québec economy. The effects of the pandemic on the commercial and industrial leasing sectors across the province are severe. This unprecedented global health crisis represents a challenge for both lessees (tenants) and lessors (landlords).

**While lessees fight to avoid catastrophic consequences and to stay afloat, lessors are under pressure to act in the greater public interest**, even though they may experience serious cash flow issues if rent collection is delayed or compromised. Prominent local politicians have made public appeals to lessors, asking them to be lenient with respect to the payment of rent.<sup>1</sup>

Some lessors have already taken measures to alleviate the financial pressures on their lessees. On March 19, 2020, **Ivanhoé Cambridge**, rather than responding to each specific request made by its lessees, announced that it would grant a **deferral of the rent payable by all lessees of its retail properties**.<sup>2</sup> Moreover, many lessors have assumed **additional day-to-day responsibilities and expenses** in order to protect the health and safety of the occupants of their buildings, such as increased maintenance and sanitization of doors, elevators, and common areas.

As a result of the COVID-19 pandemic, both lessees and lessors will need to review their current situation with a view to understanding their rights and obligations under their lease. We expect that in some cases, **a lessee may take the position that** due to the unforeseen COVID-19 pandemic and the ensuing economic conditions, **the performance of its lease obligations (especially the payment of rent) have become costly and unfair**.

This article explores whether there is **any legal basis for taking such a position**, in virtue of general lease rights and obligations under the *Civil Code of Québec* and under the doctrine of *force majeure / superior force*.

## Lease Rights and Obligations in General

It is helpful to review the provisions of the *Civil Code of Québec* with regard to the obligations applicable to commercial leasing.

**Under a commercial lease for premises**, the lessor undertakes to provide the lessee with the use and enjoyment of all, or part of, an immovable property for a specified time, in exchange for the payment of rent.<sup>3</sup> The lessor is bound to warrant to the lessee that the property may be used for the purpose for which it was leased throughout the term of the lease.<sup>4</sup> Furthermore, neither the lessor nor the lessee can change the form (the physical layout<sup>5</sup>) or the destination (the purpose or usage) of the leased premises during the term of the lease.<sup>6</sup> For example, the lessor is prohibited from taking certain actions such as transforming a shopping centre into an office building during the term of a lease<sup>7</sup>.

**The non-performance of these obligations** entitles a lessor or a lessee to apply to the court for remedies such as specific performance, termination of the lease or reduction of rent.<sup>8</sup>

In light of the recent government and ministerial decrees ordering the temporary closure of many businesses in order to contain the contagion, **we expect that many lessees may argue that they are entitled to suspend rent payments based on a violation of their lease rights.**

For instance, lessees may take the position that they are denied the enjoyment of the leased premises, or that the



form or destination of the leased premises have been changed as a result of interruptions to their businesses or changes to the leased premises. They may even contend that diminished business in neighbouring premises constitutes a change of destination, for instance, in a shopping centre where lessees rely on each other to generate business.<sup>9</sup> Notwithstanding the foregoing, **it is conceivable that a lessor could justify its inability to perform these obligations based on the doctrine of *force majeure*.**<sup>10</sup>

In principal, under Quebec law, **nothing obliges the lessor to renegotiate the terms of the lease based on the fact that the obligations incumbent upon the lessee have become more onerous.**<sup>11</sup> As a consequence thereof, both lessors and lessees have an interest in considering the application of the doctrine of *force majeure* which, in certain circumstances, may justify a party's non-performance or termination of its legal obligations.

## Force Majeure

A *force majeure* is defined as **an unforeseeable and irresistible event**.<sup>12</sup> In essence, when it becomes impossible for a party to perform a contractual obligation due to a *force majeure*, unless such party has assumed the risk of a *force majeure*, the obligation may be suspended or the party may be released from such obligation.<sup>13</sup>



We refer you to our firm's [March 2020 newsletter](#) from our Civil and Commercial Litigation Group on whether the **COVID-19 pandemic** constitutes a *force majeure*. Moreover, it is also important to seek legal advice regarding both the application and the consequences of a *force majeure* event on both the lessee and the lessor, especially since the parties may renounce to its application. A case by case analysis may be required.

In the commercial lease context, a party may invoke the occurrence of a *force majeure* event notwithstanding the absence of a specific provision included in the lease. Commercial leases often include the possibility that certain events such as strikes, labour troubles, power failures, riots, insurrections, acts of terrorism, rebellions, wars, floods, earthquakes, and explosions may constitute *force majeure* events. Under such a standard *force majeure* clause, a delay or failure to perform a lease obligation may be excused or postponed.

**Depending on the seriousness of the *force majeure* event, there may also be grounds for the termination of the lease.** The wording of such a clause may or may not be sufficiently broad to apply to the circumstances of the COVID-19 pandemic. As well, the parties may have agreed to completely exclude a specific type of event from the application of a *force majeure* clause. **The application of *force majeure* must be analyzed based on the specific obligation which a party is unable to perform.**

Furthermore, some commercial leases specifically provide that a *force majeure* event will not excuse the lessee from paying all of the amounts due pursuant to the lease, including rent. This type of provision has been declared valid in the past.<sup>14</sup> In general, **if the lease provides that the occurrence of a *force majeure* event does not excuse the non-payment of rent, the lessee must continue to pay rent even if it is prevented from accessing its premises and operating its business** due to the event.

In such a case, the lessee has arguably assumed the risk of a *force majeure* event. However, a Court may decide otherwise if it considers that the lease constitutes an adhesion contract<sup>15</sup> and that such a clause is abusive in the given circumstances.<sup>16</sup> Finally, we emphasize that both parties are subject to the **duty of good faith**.<sup>17</sup>

## Conclusion

Once again, we strongly encourage commercial lessors and lessees to **review the terms and conditions** of their leases with professional assistance. On occasion, a lessee or a lessor may benefit from the application of implicit obligations which do not form part of the lease. We also emphasize the importance of **proactive communication** between lessors and lessees in any temporary relief or renegotiation of key lease provisions. To the extent possible, it is critical for lessors to avoid unpleasant surprises on the date that rent payments are due, such as the non-payment of rent, the payment of rent under protest, or rent payments accompanied by disclaimers or conditions. This risk can be mitigated by communicating with the lessee as early, as often and as clearly as possible.

**The information and commentary set forth herein are for the general information of the reader and are not intended as legal advice or as an opinion to be relied upon in relation to any particular circumstances.**

We would like to extend our sincere thanks to [Marissa Carnevale](#), [Sara Korhani](#), [Julien Dubois](#), and [Mathilde Delorme](#) for helping us with this article.

---

**If you have questions with respect to the interpretation of your commercial lease, please contact one of our attorneys, who will be pleased to advise.**

### Antonietta Melchiorre

☎ 514 925-6355

✉ [antonietta.melchiorre@lrm.com](mailto:antonietta.melchiorre@lrm.com)

### Nicholas Backman

☎ 514 925-6417

✉ [nicholas.backman@lrm.com](mailto:nicholas.backman@lrm.com)

---

<sup>1</sup> Leavitt, Sarah. "The Rent Is Due: Quebecers Worry about Paying for Roof over Their Heads." *CBCnews*, CBC/Radio Canada, 25 Mar. 2020, [www.cbc.ca/news/canada/montreal/quebec-tenants-worry-about-paying-rent-in-pandemic-1.5508578](http://www.cbc.ca/news/canada/montreal/quebec-tenants-worry-about-paying-rent-in-pandemic-1.5508578);

<sup>2</sup> Ivanhoé Cambridge. "COVID-19: Tenants of Ivanhoé Cambridge Shopping Centres in Quebec Will Be Granted Support Measures." *Press Release*, 19 Mar. 2020, [www.ivanhoecambridge.com/-/media/files/website/media/pdf-news/2020/03/press-release-mitigating-measures-tenants-final.pdf](http://www.ivanhoecambridge.com/-/media/files/website/media/pdf-news/2020/03/press-release-mitigating-measures-tenants-final.pdf).

<sup>3</sup> Section 1851 of the Civil Code of Québec (the "C.C.Q.")

<sup>4</sup> Section 1854 C.C.Q.

<sup>5</sup> 3553230 *Canada Inc. v. Turcôt*, 2005 QCCA 300 (CanLII)

<sup>6</sup> Section 1856 C.C.Q.

<sup>7</sup> *J.B. Lefebvre Ltée v. Val d'Or Properties Inc.*, 1980 CarswellQue 842 (QC CS).

<sup>8</sup> Section 1863 C.C.Q.

<sup>9</sup> See 9142-9134 *Québec Inc. v. 9180-9293 Québec Inc.* (2010 QCCS 4397 – appeal rejected in 2013 QCCA 1829) and the court's discussion of synergies created by other lessees and the effects of a co-tenancy clause to provide relief in the event that business declines in the neighbouring premises.

<sup>10</sup> Baudouin, Jean-Louis, Pierre-Gabriel Jobin and Nathalie Vézina, *Les obligations*, 7e ed. by P-G Jobin and N. Vézina, 2013, par 843.

<sup>11</sup> *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46 (CanLII), [2018] 3 SCR 101.

<sup>12</sup> Section 1470 C.C.Q.

<sup>13</sup> Section 1693 C.C.Q.

<sup>14</sup> *Pierre Village Inc. v. Construction 649 Inc.*, 1999 CanLII 11136 (QC CS).

<sup>15</sup> Section 1437 C.C.Q.

<sup>16</sup> Section 1379 C.C.Q.

<sup>17</sup> Sections 6, 7, and 1375 C.C.Q.