

2007 ICSC CANADIAN SHOPPING CENTRE LAW CONFERENCE

Thursday, March 1, 2007

9 :00 – 10 :30 a.m.

BREAKFAST ROUNDTABLES

TWO POINTS OF VIEW – COMMON LAW VS CIVIL LAW: CHANGES TO THE COMMON AREAS – BALANCING THE LANDLORD’S NEED FOR FLEXIBILITY AND THE TENANT’S EXPECTATION OF STATUS QUO.

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CIVIL LAW PERSPECTIVE

1. What is a lease under the Civil Code of Québec (“CCQ”)?

Article 1851 CCQ reads as follows: (our emphasis)

“1851. Lease is a contract by which a person, the lessor, undertakes to provide another person, the lessee, in return for a **rent**, with the **enjoyment of a movable or immovable property for a certain time**.

The term of a lease is fixed or indeterminate.”

2. What are some of the rights and obligation resulting from a lease?

Article 1854 CCQ reads as follows: (our emphasis)

“1854. The lessor is bound to 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.

He is also bound to **warrant the lessee that the property may be used for the purpose for which it was leased** and to maintain the property for that purpose throughout the term of the lease.”

Article 1856 CCQ reads as follows: (our emphasis)

“1856. Neither the lessor nor the lessee may **change the form or destination of the leased property** during the term of the lease.”

3. What is the “leased property” referred to at Article 1856 CCQ?

The leased property is, primarily, the “leased premises”, as defined in the lease (for example: “Suite 200 of the building located at 230 Masson Street, Montreal, measuring approximately 2,000 square feet of rentable area”).

However, in a typical multi-tenant, lease, the tenant is granted the right to use the common areas, in common with other tenants and visitors of the building. Such right is sometimes specified in the lease but, even if it isn’t specified, it is an implicit right. The Courts have established that “leased property”, as used at Article 1856 CCQ, also refers to the common areas, which are “accessories to the leased premises”.

4. **Does the landlord have the right to make changes to the “leased property” during the term of the lease?**

It depends on the terms and conditions of the lease, which may derogate from the provisions of the Civil Code that are not of public order. If the lease is silent on an issue, the provisions of the Civil Code apply automatically, in a “suppletive” manner.

Although landlords will rarely modify the actual leased premises during the term of the lease (except for the base building work to be done at the inception of the lease), landlords sometimes may wish to make changes to the common areas (for example, modify a lobby, close-off entrances, change the parking, etc.). This can be source of disputes between landlords and tenants. A landlord typically considers that it has the right, as owner of the property, to modify the common areas as it deems fit, as they are not specifically leased to any single tenant. A tenant, on its part, expects the common areas to remain substantially in the state they were in at the time it leased the premises.

5. **Review of recent case law.**

Recent decisions from Québec Courts have been favourable to the tenants. These decisions relied on the concepts of the “implicit content of a lease” and of the “accessories to the leased premises”.

5.1 *Pâtisserie de Gascogne Inc. et al. v. Le 4817 Sherbrooke Inc.*, C.A. 500-09-014273-049 (July 8, 2004)

Summary: A terrace is an **accessory to the leased premises**, even if not mentioned in the lease, and the new owner is bound by the verbal agreement between the original landlord and the tenant.

- A dispute arose when the purchaser of a building sought payment from a tenant for its seasonal use of a terrace because there was no reference to such a terrace in the lease (signed in 1996).
- The original landlord had verbally agreed to grant the tenant use of a terrace, which the landlord maintained at no additional cost.
- The building was sold in 2002 and the new landlord refused to allow the tenant to use the terrace unless additional rent was paid.
- The tenant refused and sought an injunction to force the landlord to allow it to use the terrace. The Superior Court refused to grant the injunction and forbade the tenant from using the terrace.
- The Court of Appeal overturned the Superior Court decision and granted the injunction, ordering the landlord to allow the tenant to use the terrace at no charge.

- The Court of Appeal concluded that the occupation of the terrace was an accessory to the leased premises and that the new owner was bound by the original landlord's commitment to provide the tenant with a terrace.
- Interesting detail: the new owner pleaded that it was not aware of the verbal agreement regarding the terrace when it purchased the building. However, it did not help his case that the marketing materials prepared by the broker featured a picture of the building, taken on a lovely day, showing the tenant's clients sitting on the terrace as they drank their coffees.

5.2 *Khoury v. Mounayar*, J.E. 2006-160, S.C. (November 16, 2005)

Summary: It can be **implied from a commercial lease** that a tenant's owner or manager is entitled to park in front of the leased premises.

- Riad Khoury, a real estate agent with Century 21 and Aliment Vaneli, operating a "dépanneur" (convenience store), leased premises in a small shopping centre in Laval.
- The shopping centre has 21 parking spaces for the 8 tenants of the building.
- In 2004, Johnny Mounayar, a dentist, purchased the shopping centre and set up his clinic in the building. He notified the tenants that they would no longer be allowed to park in front of the building given that there were not enough spaces for the clients of the shopping centre.
- A towing company, hired by the landlord, started removing cars parked in front of the building, with a special focus on Mr. Khoury's car and on the car of the manager of the Vaneli convenience store.
- The Court found that the landlord had abused his rights and acted in bad faith, especially given proof (by video) that the plaintiffs' cars were being towed when the parking lot was not full, that the wife, father and mother of the landlord often parked their cars in front of the dental clinic, and that the landlord, one day, gave orders to remove the plaintiffs' two cars only, even though there were other cars contravening the landlord's regulations on that day and several vacant spots where clients could park.
- The court stated that it can be implied from a commercial lease that a tenant is entitled to park in front of his business.
- The Court granted the two tenants the injunction they sought and ordered the landlord to stop towing away their cars.

5.3 *MDS (Canada) Inc. v. Groupe Accueil International Ltée*, C.S. 500-17-028257-056 (September 28, 2006)

Summary: Free use of the parking lot adjacent to the building is an **accessory to the leased premises** and the landlord's imposition of fees for the parking constitutes an unwarranted change of the terms of the lease. The landlord's obligation to provide the tenant with the peaceful enjoyment of the leased property includes their accessories.

- This case involved a conflict between the landlord's obligation to efficiently operate and manage his building's parking lot and the tenant's desire not to have the terms and conditions of its lease modified.
- MDS, the tenant, operated a clinic for clinical research of pharmaceutical products since 1998. Its visitors (mostly its employees and the people the products were being tested on) used the parking area outside the building, without cost, since the inception of the lease.
- The landlord faced a classic problem: the parking lot was close to a subway station and was being used by people who have no business in the building but use it to "Park and Ride". As a result, there was an insufficient amount of parking spaces to satisfy the needs of the tenants and visitors to the building.
- The landlord hired a consultant to fix the problem. They implemented a new system whereby visitors would have to pay to use the parking lot.
- MDS sought an injunction against the landlord.
- The Court determined that the landlord had an obligation to provide for the peaceful enjoyment of the premises and their accessories.
- The Court determined that the parking lot was necessary to the leased premises. Even though the landlord had the right to exercise control over the parking lot, given its obligation to properly manage the building and to guarantee all tenants the peaceful enjoyment of the building, the landlord was not entitled to unilaterally start charging for the use of the parking lot without having obtained the agreement of the tenant. The Court stated that the landlord's decision was a substantial and unwarranted modification of the lease.
- The Court granted the injunction requested by the tenant and ordered the landlord to make the parking accessible to all tenants and their visitors without cost and to reimburse the tenant for parking fees paid.
- This decision is currently being appealed.

6. Conclusion.

The “leased property” is larger than the perimeter of the four walls of the premises leased by a tenant, as they included those elements, which are considered to be “accessories to the premises”. It is not always necessary for the lease to set-out what the accessories are, given the principle of the “implicit content of a lease”, which is derived from the intent of the parties, as indicated by the following elements, namely:

- (i) the wording of the lease;
- (ii) how the parties applied the lease in practice; and
- (iii) the customs in the industry (for example, placing a sign on the exterior of premises in a strip mall or the space occupied by cabling to connect a tenant’s telecommunications equipment to an outside supplier).

Examples of “accessories” to the leased premises include the following (depending on the circumstances): entrance hall, roof, heating and ventilation system; furnace; parking areas; elevators, escalators; storage rooms, other common areas and facilities

From a landlord’s perspective, it is crucial to be able to properly manage his property, to make the changes required to adapt his property to changing circumstances, and to expand, improve, renovate and re-merchandise his shopping centre.

If a landlord wants to modify the parking lot, modernize the entrance or change other common areas, there is a risk that these changes will come into conflict with his obligations to guarantee his tenants the peaceful enjoyment of the accessories to the premises. It may also cause a breach of his obligation not to change the form or destination of the property.

Accordingly, a landlord must strive to include in his lease a “Control Clause”, which provides that landlord may, for example: (i) make repairs, replacements, changes or relocations by any part of the property, including the common areas; (ii) make additions to the property; (iii) terminate or amend the tenant’s right to use common areas.

From the tenant’s perspective, it should seek to amend these clauses to ensure that the landlord, in exercising his rights, will not duly interfere with the tenant’s peaceful enjoyment of the premises and their accessories, and will not interfere with access to, or block the visibility of the premises, or act in a manner that discriminates against the tenant.

COMMON LAW PERSPECTIVE

Landlord's and Tenant's Respective Express Rights over Common Areas and Common Facilities typically found in Leases– See Schedule "A" Attached

Rights to Use Common Areas in the Absence of Express Terms Found in the Lease

Statutory Rights e.g. Legislation, regulations and bylaws e.g. parking spaces, exits and entrances.

Easement of Necessity – E.g. access such as roads, walkways, elevators, and stairs (must be the only way to have to access)

Implied Easements or intended easements e.g. parking, ventilation but processed air?
Continuous and Apparent

Implied Terms e.g. covenant for quiet enjoyment and non-derogation of grant

Representations

Landlord Answers to Foregoing (or Tenant Hurdles)

Entire Agreement Clause

No Waiver Clause

Amendment in Writing Clause

Parol Evidence

Causes of Action

Breach of Contract e.g. covenant of quiet enjoyment or non-derogation of grant

Fundamental Breach

Tort – Negligence, Nuisance, Trespass and Misrepresentation

Remedies

Damages, including punitive

Injunction including Specific Performance

SCHEDULE “A”

**2007 ICSC CANADIAN SHOPPING CENTRE LAW CONFERENCE, March I, 2007
BREAKFAST ROUND TABLE**

TWO POINTS OF VIEW – Common Law vs. Civil Law: Changes to the Common Areas

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**Landlord’s and Tenant’s Respective Express Rights over Common Areas and Common
Facilities typically found in Leases**

Landlord’s Rights over Common Areas – Example Clauses (Underlining Added)

The Tenant has the non-exclusive and non-transferable right (except in accordance with Article ____) to use the Common Areas in common with others entitled to do so, for the purposes for which they are intended and during those hours that the Shopping Centre is open for business, subject however, to this Lease.

The Landlord will operate the Shopping Centre in a first class and reputable manner having regard to size, age and location. The Common Areas and those portions of the Shopping Centre which are not leased to tenants and are under the exclusive control of the Landlord.

Without limitation, the Landlord may, in its operation of the Shopping Centre:

- (a) (i) close parts of the Common Areas to prevent their dedication or the accrual of rights in them in favour of Persons or the public; grant, modify and terminate easements and other agreements pertaining to the use and operation of the Shopping Centre or any part of it, and temporarily obstruct or close off or shut down parts of the Shopping Centre for inspection, maintenance, repair, construction or safety reasons;
- (ii) employ personnel, including supervisory personnel and managers, for the operation, maintenance and control of the Shopping Centre. The Shopping Centre or parts of it, may be managed by The Cadillac Fairview Corporation Limited or by another Person or Persons that the Landlord designates in writing from time to time;
- (iii) use parts of the Common Areas for merchandising, display, decorations, entertainment and structures, permanent or otherwise, designed for retail selling or special features or promotional activities;
- (iv) regulate, acting reasonably, all aspects of loading and unloading, delivery and shipping of fixtures, equipment and merchandise, and all aspects of garbage collection and disposal. The Tenant is responsible for pick-up and disposal of its garbage at its cost. If the

Landlord provides facilities or designates a commercial service for the pick-up and disposal of garbage instead of, or in addition to the service provided by the local municipality, the Tenant will use such facilities and commercial service at its cost;

- (v) prohibit the Tenant and its employees from parking in the Shopping Centre; and
 - (vi) impose or permit to be imposed reasonable charges upon any Person (including the general public) for the use of parking facilities that may at any time be part of the Common Areas;
- (b) (i) change the area, level, location, arrangement or use of the Shopping Centre or any part of it;
- (ii) construct other buildings, structures, or improvements in the Shopping Centre and make alterations of, additions to, subtractions from, or rearrangements of the Shopping Centre, build additional stores in any part of the Shopping Centre, and construct additional storeys, buildings or facilities adjoining or near the Shopping Centre;
 - (iii) install kiosks and other installations, permanent or otherwise, in or on the Common Areas;
 - (iv) diminish, expand, alter, relocate or rearrange the buildings, parking facilities and other parts of the Shopping Centre and, with the consent of the Tenant, which consent will not be unreasonably withheld, relocate or rearrange the Premises from that shown on Schedule "B", the purpose of which Schedule is solely to show the approximate location of the Premises; and
 - (v) do and perform such other acts in and to the Shopping Centre as, in the use of good business judgment, the Landlord determines to be advisable for the proper operation of the Shopping Centre.

Despite anything else in this Lease, the Landlord has no liability for diminution or alteration of the Common Areas that occurs as the result of the Landlord's exercise of its rights under this Section _____ or elsewhere under this Lease and the Tenant will not be entitled to compensation or a reduction or abatement of Rent, and no such diminution or alteration of the Common Areas shall be deemed to be a constructive or actual eviction of the Tenant or a default by the Landlord of any obligation for quiet enjoyment contained in this Lease or provided at law.

Tenant's Rights over Common Areas – Example Clauses (Underlining Added)

1. The Landlord hereby grants to the Tenant the full, free, and unlimited right, liberty, and irrevocable easement for the Tenant at all times by day and by night in common with the Landlord and the other tenants and their respective invitees of the Development to enter, go, pass, and repossess upon, along, and through and otherwise use the Parking Area for the purposes of parking cars of the Tenant's employees, guests, and customers in the Parking

Area while visiting in the Demised Premises. The Tenant shall have the right throughout the Term to advise its customers and all persons having business with the Tenant that the parking stalls in the Parking Area are available for parking for the customers of the Tenant.

2. The Landlord shall reserve for the Tenant's exclusive use those [number] parking spaces cross-hatched on Schedule ___ ("Reserved Parking Area"). The Tenant shall have the right to mark those spaces "Reserved Parking [name] Only". The Tenant shall have the right, if necessary, to post signs in order to enforce those parking provisions as well as the right to tow cars. Furthermore, the Landlord shall not permit, except to the extent required by law, any fire lane, loading zone, or other restrictive parking to be located in the vicinity of Tenant's storefront and entrance to the Demised Premises.
3. The Landlord shall not at any time during the Term use, allow, suffer, nor permit the Parking Area to be used for any purpose other than the parking of cars belonging to the tenants of the Development and their respective employees, guests, and customers, and other than a maximum of [number] parking stalls at any one time for promotional purposes such as displaying a prize car for a lottery.
4. The Common Areas as shown on site plan Schedule ___ are a material consideration for the Tenant entering into this Lease, and no change, alteration, or addition shall be made to the site plan or the Development, including but not limited to the configuration of the Common Areas, methods of ingress and egress, direction of traffic, lighting, curbing, building heights and stories, the Landscaping (which would affect access or visibility to the Demised Premises), and parking. Should any change in the location and arrangement of the Common Areas materially and adversely affect the Tenant's operation of its business, the Tenant, in addition to any remedy it may have in law or equity, shall have the right to terminate this Lease or at its option receive an abatement of all Rent and payment obligations hereunder for the total period of the interference. The Landlord may make changes to the Common Areas which do not affect Tenant's access, visibility, or parking with the Tenant's consent, which consent shall not be unreasonably withheld, provided that if any such agreed-to changes interfere with the Tenant's business, all Rent and other charges shall abate in proportion to the degree of interference.
5. Without the Tenant's consent, no public telephones, newspaper machines, vending machines, or signage shall be affixed by or on behalf of the Landlord or any other tenant on the exterior walls of the Demised Premises or placed on the Common Areas including sidewalks in front of or surrounding the Demised Premises.
6. The Landlord agrees to provide adequate lighting of the Common Areas including the parking lot from 30 minutes before dusk until the Demised Premises closes for business, which lighting shall include the illumination of any pylon or monument sign advertising the Tenant's business conducted in the Demised Premises, as well as lighting for the other signage and awnings utilized by Tenant in the advertising of the business conducted by Tenant in the Demised Premises if same is not separately metered and controlled by the Tenant. The Tenant has the right, but not the obligation, to operate the Tenant's business in

the Demised Premises 24 hours per day subject to the laws of British Columbia or the Municipality regarding the operation of business on holidays, Sundays, or otherwise.

7. The Landlord shall provide adequate security with respect to the Development, in accordance with good business judgment applicable to similar developments. The Tenant shall have the right to provide its own security should it wish.

OTHER: Sight Lines, Interior Signage, Kiosks, Displays, pedestrians' entrances and exits, vehicle access and egress, and tenant mix.

8. Without restricting the generality of the Easements and Restrictive Covenants, the Tenant, its employees, servants, contractors, agents, and invitees shall have the following full and unrestricted licence during the Term to use, as required for operating the Tenant's business, the following parts of the Development:

- (a) external and internal roadways and pedestrian walkways built and designed for access to and from the Parking Area and the Building entrance and the exterior entrance to the Demised Premises; and
- (b) the Common Areas.

9. The Landlord covenants that at no time during the Term shall it allow or permit any of the access routes described in this Article nor any of the Easement Areas to be obstructed, other than for purposes of the Landlord carrying out its obligations and duties under this Lease and so long as such obligations and duties are being diligently carried out, without the prior written consent of the Tenant. The Landlord shall compensate the Tenant for any loss or damage suffered by the Tenant as a result of access to and egress from the Demised Premises being obstructed or changed or the Tenant's signs being obstructed or changed which is not an obstruction for purposes of the Landlord carrying out its obligations and duties under this Lease and so long as such obligations and duties are being diligently carried out.

10. The Landlord covenants that at no time during the Term shall it allow or permit any Common Areas such as the Parking Areas, courtyards, or open areas which are visible from the entrance to the Demised Premises or any windows from the Demised Premises to be obstructed, other than for purposes of the Landlord carrying out its obligations and duties under this Lease and so long as such obligations and duties are being diligently carried out, without written consent of the Tenant. In addition, the Landlord shall compensate the Tenant for any loss or damage suffered by the Tenant as a result of such obstruction which is not an obstruction for purposes of the Landlord carrying out its obligations and duties under this Lease and so long as such obligations and duties are being diligently carried out.