

JULY 22, 2020

# Québec Superior Court Renders First Decision on the Impact of COVID-19 on Commercial Leasing

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The Québec Superior Court recently handed down a decision stating that the mandatory closure of businesses ordered by the Québec government on March 24, 2020, due to the COVID-19 pandemic constitutes force majeure. The Court also interpreted a clause of the lease providing that the tenant must pay the rent even in the event of force majeure and held that it did not apply to the parties' situation.

This is one of the first decisions in the context of the COVID-19 health crisis explaining which party, the lessor or the tenant, can rely on force majeure and the effect of force majeure clauses, which are ubiquitous in commercial leases.

## Background

Hengyun International Investment Commerce Inc. (Hengyun) rents space to 9368-7614 Québec inc. (Québec inc.) to operate a gym. Hengyun sued Québec inc. for unpaid rent. Québec inc. claimed that it did not owe any rent for March to June 2020 due to the mandatory closure of the gym by the government. The tenant argued force majeure.

The lease contains the following clause:

[I]f the Landlord or the Tenant is delayed or hindered in or prevented from the performance of any obligation [...] by reason of superior force [...], then the performance of such obligation is excused for the period of the delay, and the party so delayed shall be entitled to perform such obligation within the appropriate time period after the expiration of such delay, without being liable in damages to the other.

However, the provisions of this section [...] shall not operate to excuse the Tenant from the prompt payment of the Base Rent or Additional Rent or any other payments required by this Lease.

## Decision

In its decision released on July 16, 2020, the Court confirmed that the mandatory closure of businesses due to the COVID-19 pandemic constitutes force majeure, an event that the debtor could not foresee, resist and that made the performance of its obligation impossible. The Court held that the forced closure of the leased premises was unforeseeable by the parties when they signed the lease.

However, the Court added that only the lessor was in a force majeure situation, not the tenant. Despite its inability to generate revenue, the tenant could not rely on force majeure to justify not paying the rent. To be considered "irresistible", the event must be such that it prevents any tenant from paying its rent, regardless of its financial situation. The Court held that, theoretically, a tenant with sufficient financial means can fulfil that obligation.

On the other hand, 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. Moreover, although the tenant's property was still on the premises, it was the commercial activity, as defined in the lease, that was prohibited by the government order. The Court therefore held that the lessor's failure to provide peaceful enjoyment should be excused.

Although in theory the lessor cannot demand the payment of rent if it cannot provide peaceful enjoyment of the premises, Hengyun argued the force majeure clause in the lease to claim payment of the rent. The Court dismissed its claim.

First, the Court held that, as written, the force majeure clause allows one party to be released from its default if it results from the *delayed performance* of the obligation due to force majeure, not if it results from the *failure to perform* the obligation. The Court considered that the lessor's obligation to provide peaceful enjoyment was not delayed by the pandemic – it was simply never performed.

Second, the Court added that even if the clause were interpreted differently, a lessor cannot be completely released from this essential obligation. The Court held that although parties can limit the impact of a lessor's failure to provide peaceful enjoyment of the premises, they cannot exclude it altogether.

The Court held that the tenant did not have to pay the rent due during the mandatory closure of the gym.

## Consequences

This decision could have a significant impact on future litigation resulting from the forced closure of businesses. The issue of the lessor's exoneration from its obligation to provide peaceful enjoyment, as mentioned by the Québec Superior Court in this judgment, will undoubtedly be the subject of much debate. Whether one is the lessor or the tenant, it is important to carefully read the force majeure clause in a lease to find out what it covers.

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