While there are many similarities between civil law in Québec and common law jurisdictions when it comes to the rules that apply to commercial leases, there are also a number of differences. This article discusses some of the main discrepancies.

The Civil Code of Québec (the “CCQ”) offers much more protection to the tenants, but most of these protections are routinely contracted out of by the parties.

**Distinction between real right and personal right**

The civil law system in Québec, like the common law system, makes a distinction between a real right (i.e. a right in the object itself or in rem) and a personal right (i.e. a right that can be exercised against one or more persons).

**Definition of a lease**

The CCQ, in effect since January 1, 1994, defines “lease” as a contract by which a person, the landlord, undertakes to provide another person, the tenant, with the enjoyment of a movable property or real estate for a certain time, in return for a rent (Article 1851, CCQ).

Thus, a commercial lease in Québec, unlike in common law jurisdictions, does not give the tenant any right in the real estate, strictly speaking. It gives only personal rights in favour of the parties, i.e. the right to require certain benefits from the other party.
The CCQ applies to the extent that it is not contracted out of

As a result of the codified approach used in Québec, the provisions of the CCQ apply to commercial leases if and to the extent that they are not contracted out of by the parties. There are, however, certain provisions of the CCQ that cannot be contracted out of as well as exceptions with respect to rules of public order (but there are not many in the area of commercial leases).

Thus, subject to the above noted exceptions, if a situation covered by the CCQ is not subject to an explicit agreement to the contrary, the relevant provision of the CCQ is presumed to form part of the lease.

**Formal requirements**

In Québec, there are no formal requirements in respect of commercial leases. A commercial lease between the parties will be valid provided it includes all the essential information, namely the identity of the landlord and the tenant, a sufficiently precise description of the leased property, and the rent.

Commercial leases can even be **oral**; however, that creates the difficulty of providing proof of them.

**Enforceability of lease against third parties**

If a tenant would like the lease to be **enforceable** against a prospective buyer of the leased property or a mortgage creditor, the lease must be in writing and the tenant must ensure that it is **registered** against title.

**Registration of lease**

For a commercial lease to be registered in Québec, it must include an appropriate **cadastral description** of the leased property (Article 2981, CCQ).

It may be registered by presenting the lease itself in **full**, by presenting a **summary** of the lease or simply by means of a **notice** (Article 2982, CCQ).

If it is registered in full, it must be signed before a Québec notary (who certifies, through his or her signature, that he or she has verified the identity, status and capacity of the parties, and that the document reflects the intention expressed by them), or it may be signed without the presence of a notary, before two witnesses, one of which is under oath (Article 2995, CCQ). If the lease was notarized, the notary who drew it up may produce an excerpt of it, deliberately
omitting more “sensitive” information (such as the rent) that the parties do not necessarily wish to make public. If the lease is not notarized, it cannot be produced as an excerpt and, consequently, must be registered in full, including such “sensitive” information.

A lease may also be registered by presenting a summary of same (Article 2982, CCQ). However, there is a drawback: a person requiring registration in the land register must provide the lease itself, in addition to the summary, for conservation and consultation purposes (Article 2985, CCQ); this poses the same problem with respect to more “sensitive” information that the parties do not necessarily wish to make public.

It is therefore by means of a notice (i.e. the third method indicated above) that most commercial leases are registered in Québec (Article 2999.1, CCQ). The notice refers to the lease in question, identifies the landlord and the tenant, and includes a description of the real estate in which the leased premises are located; it also indicates the date the lease comes into effect and, where applicable, the date it terminates, the particulars needed to determine such dates, as well as any rights in respect of renewal of the lease. The accuracy of the notice must, in all cases, be certified by a notary or a lawyer.

One of the provisions of the CCQ that cannot be contracted out of is Article 2936. More specifically, in Québec, the parties cannot contract out of their right to register the lease. The majority of common law jurisdictions do not have such provisions, so a commercial lease in those jurisdictions can restrict the tenant’s right to register the lease.

Registry office searches

Under the Québec land registry system, it can be difficult to identify the actual owner of the property, the mortgage creditors and servitudes that may affect a property.

Presumption of lease

A lease of real estate is presumed where a person occupies the premises and his or her occupancy is tolerated by the owner. The lease goes into effect upon occupancy and includes the obligation for the tenant to pay a rent corresponding to the rental value (Article 1853, CCQ).

Obligations of landlord

The landlord is required to deliver the leased property to the tenant in a good state of repair in all respects and to provide the tenant with the peaceful enjoyment of the property throughout the term of the lease (Article 1854, CCQ).
The landlord is also required to guarantee the tenant that the property can 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 1854, CCQ).

It should be noted that these provisions may be contracted out of, so the parties can always stipulate otherwise.

Thus, unless stipulated otherwise, the landlord guarantees the tenant that the municipal by-laws in respect of zoning allow the tenant to use the property for the purpose set out in the lease.

**Obligations of tenant**

The tenant is required to pay the agreed-upon rent and to use the property with prudence and diligence (Article 1855, CCQ).

**Use of the property**

Neither the landlord nor the tenant may change the form or **permitted use** of the leased property during the term of the lease (Article 1856, CCQ).

**Right of landlord to carry out work**

The landlord has the right to check the condition of the leased premises, to carry out work on them and to show them to a prospective buyer or tenant; the landlord must, however, exercise this right in a reasonable manner (Article 1857, CCQ).

**Legal and de facto disturbances**

The landlord is required to indemnify the tenant against disturbances affecting or interference with the tenant’s enjoyment of the leased premises (Article 1858, CCQ).

The landlord is also required to remedy the injury that results from de facto disturbances by another tenant affecting the enjoyment of the leased premises (Article 1858, CCQ).

The tenant is required to conduct himself or herself so as not to disturb the normal enjoyment of the other tenants, in the case of a multi-unit property; if the tenant breaches this obligation, the landlord may apply for the termination of the lease.

A tenant who is disturbed by another tenant may, depending on the circumstances, obtain a reduction of rent or the termination of the lease, provided the tenant notified the common landlord of the disturbance and the disturbance persists. The tenant may also obtain damages
from the common landlord, unless the landlord proves that he or she acted with prudence and
diligence (Article 1861, CCQ).

**Damage to or destruction of the property**

When it comes to losses affecting the property, the tenant is required to remedy the injury
sustained by the landlord, unless the tenant proves that such losses were not his or her fault or
the fault of persons he or she allowed to use or access the property (Article 1862, CCQ).
However, in the case of a fire, the burden of proof is reversed, and it is the landlord who must
prove that the fire was the fault of the tenant or that of persons he or she allowed to access the
property (Article 1862, CCQ).

**Non-performance of obligations**

The non-performance of an obligation by one of the parties entitles the other party to apply for,
in addition to damages, specific performance of the obligation in cases that so permit. If the
non-performance causes the party or other occupants serious injury, the party may apply for the
termination of the lease (Article 1863, CCQ).

Such non-performance also entitles the tenant to apply for a reduction of rent; when the court
grants such a reduction, the landlord who is remedying the breach is nonetheless entitled to re-
establish the rent for the future (Article 1863, CCQ).

In common law jurisdictions, the landlord benefits from the right to distrain, which can be
exercised against the tenant’s property if the tenant fails to pay his or her rent. The landlord
does not benefit from a similar right in Québec.

**Repairs**

The landlord is required to make all necessary repairs to the leased property, during the lease,
except minor repairs; such minor repairs are the responsibility of the tenant, unless they result
from the normal aging of the property or force majeure (Article 1864, CCQ).

The tenant must allow urgent and necessary repairs to be made to ensure the preservation and
enjoyment of the leased property (Article 1865, CCQ).

A landlord who makes such repairs may require the tenant to vacate or be dispossessed of the
property temporarily but, if the repairs are not urgent, he or she must first obtain the
authorization of the court, which also sets the conditions required to protect the rights of the
tenant (Article 1865, CCQ).
The tenant nonetheless maintains, depending on the circumstances, the right to obtain a reduction of rent, to apply for the termination of the lease, or to require compensation, if he or she vacates or is dispossessed of the property temporarily (Article 1865, CCQ).

A tenant who becomes aware of a serious defect or deterioration in the leased property is required to inform the landlord within a reasonable period (Article 1866, CCQ).

When a landlord fails to make the repairs or improvements he or she is required to make under the lease or by law, the tenant may apply to the court for authorization to carry them out himself or herself (Article 1867, CCQ).

If the court grants authorization for such repairs or improvements, it determines the amount and sets the conditions to be observed in carrying them out. The tenant may then withhold from his or her rent the expenses incurred to carry out the authorized work, up to the amount set by the court (Article 1867, CCQ).

Needless to say, all the provisions of the CCQ in respect of repairs may be contracted out of by the parties; consequently, commercial leases very often include provisions rendering them inoperative.

**Assignment of lease**

The assignment of a commercial lease relieves the tenant (i.e. the assignor) of his or her obligations, unless the parties agree otherwise (Article 1873, CCQ). Consequently, from the landlord’s point of view, it is important to include a provision in the lease specifying that the tenant will remain jointly and severally liable for his or her obligations under the lease, and subsequently under any assignment.

The general rule in Québec is that the tenant is required to obtain the consent of the landlord for any assignment of the lease or sublease of the leased premises (Article 1870, CCQ).

The landlord may not refuse to give such consent without serious reason (Article 1871, CCQ).

If the landlord refuses to give such consent, he or she must inform the tenant thereof within 15 days after receiving the notice of assignment or sublease, otherwise he or she is deemed to have consented to the assignment or sublease (Article 1871, CCQ).

**Termination of lease**

A lease with a fixed term ends on the expiry of the term. A lease with an indeterminate term ends when it is terminated by one of the parties (Article 1877, CCQ).
A commercial lease with a fixed term may be renewed; such renewal may be tacit (Article 1878, CCQ). A commercial lease is renewed tacitly when the tenant continues to occupy the premises for more than 10 days after the expiry of the lease, without opposition from the landlord. In that case, the lease is renewed for one year, or for the term of the initial lease if it was less than one year, under the same conditions. The renewed lease is also subject to tacit renewal (Article 1879, CCQ).

The term of a commercial lease may not exceed 100 years and, if it does exceed that limit, it must be reduced to 100 years (Article 1880, CCQ).

The security given by a third party to secure the performance of the tenant's obligations does not extend to a renewed lease (Article 1881, CCQ).

A party who intends to terminate a lease with an indeterminate term must give the other party notice to that effect (Article 1882, CCQ).

The term of the notice is of the same duration as the term fixed for payment of the rent, but may not be more than three months (Article 1882, CCQ).

**Termination of lease due to non-payment of rent**

A tenant against whom legal action is brought due to non-payment of rent may avoid the termination of the lease by paying, before judgment, the rent owing as well as costs and interest at the rate set in accordance with section 28 of the Tax Administration Act (chapter A.6.002) or at any lower rate agreed with the landlord (Article 1883, CCQ).

**Transfer of the property by the landlord**

Voluntary or forced transfer of the leased property, or extinction of the landlord's title for any other reason, does not terminate a lease (Article 1886, CCQ).

The buyer or the person who benefits from the extinction of title may terminate a lease, if the lease has an indeterminate term, in accordance with the usual termination rules mentioned above (Article 1887, CCQ).

If there are more than 12 months remaining from the date of the transfer or extinction of title, the buyer may terminate the lease upon expiry of the 12 months by giving the tenant six months' prior written notice (Article 1887, CCQ). If the lease was registered at the registry office before registration of the deed of transfer or the deed by which the title is extinguished, the buyer may not terminate it (Article 1887, CCQ)
Generally speaking, in common law jurisdictions, if the lease is not registered, the tenant’s protection varies depending on whether the property is in the registry system or in the land titles system.

Part 2 to follow

In our next newsletter, we will discuss more specific cases, such as the consequences of an expropriation of the leased premises, the handing over of leased premises upon expiry of the lease, some specific considerations concerning lenders, taxes on capital, transfer duties, exclusivity provisions and purchase options.

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