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Landlords Should Reconsider Mitigating Damages with COVID-19 Relief Programs

A series of recent Superior Court decisions demonstrate that participation in the federal government's financial relief programs to help tenants and landlords in the wake of COVID-19 may not be as discretionary as landlords initially thought.

Failure to apply for CECRA may limit landlords' recourses (at least on an interim basis)

On July 13th, in *Investissements immobiliers G. Lazzara inc.* c. 9224-5455 Québec inc., 2020 QCCS 2176, the Superior Court refused to grant a landlord's safeguard order against its tenant seeking unpaid rent, termination of the lease, and eviction. In this case, the landlord's refusal to apply for the Canada Emergency Commercial Rent Assistance [CECRA], as suggested by the tenant, found little sympathy with the court.

CECRA provides assistance to a tenant: 50% of the monthly rent is subsidized by the federal government, the landlord forfeits 25%, and the tenant only pays 25%. The court found that the landlord was partially responsible for its loss of 100% of expected rent as a direct result of its unwillingness to accept only 75%, and could therefore not benefit from a safeguard order at this time.

In *Tubes et Jujubes Centre d'amusement familial inc.* c. 8937974 Canada inc., 2020 QCCS 1934, the Superior Court granted a provisional interlocutory injunction to a tenant to stop the termination of a lease. Here again, the court found that the landlord's refusal to apply for CECRA rendered it unable to terminate the tenant's lease for unpaid rent.

Finally, in *Rocco Taverne Italienne inc. c. Fiducie Marcon-Campeau inc.*, 2020 QCCS 1949, the court again granted an interlocutory injunction allowing a tenant to continue to occupy the leased premises, despite late and unpaid rent, given, among other things, the pandemic. In assessing the balance of inconveniences, the court noted that the land-

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lord's refusal to apply for CECRA had unfairly put both parties in unfavourable positions.

These decisions were all rendered on an interim basis, and while the final outcome could very well be different, they do show that although CECRA is an optional program for landlords, should they find themselves in the context of litigation, a refusal or even neglect in applying could negatively impact their ability to obtain the results sought in court.

Tenants may be able to argue against paying rent altogether

While the court ruled against landlords in these decisions, they have generally still recognised the tenants' obligation to pay rent despite reduced or restricted occupation. However, this was not the result in *Hengyun International Investment Commerce Inc. c. 9368-7614 Québec inc.*, 2020 QCCS 2251. In this case, the Superior Court found that superior force made it impossible for the landlord in question to provide the tenant with peaceable enjoyment of the premises. This was especially the case given the lease stipulated that the space could only be used as a gym, and gyms were not permitted to open in the province until late June. As a result, the court held that "no rent can be claimed from [the tenant] for the months of March, April, May and part of June, 2020." [par 94]

This decision is significant for a number of reasons. Not only does it begin to answer the question of how superior force will be considered in the context of COVID-19, it also raises issues for tenants and landlords who have set up arrangements with the federal government for CECRA and may now be questioning their obligations altogether.

The takeaways from these decisions are myriad but most importantly they serve as a cautionary message to landlords in their negotiations with tenants struggling in the current economic landscape.

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