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The Landlord's Warranty against Defects and the Recourses of the Tenant

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Introduction

A few things are certain: the landlord owes a warranty to the tenant against defects in the premises which prevent or diminish their use, and it matters not whether the lessor is aware or ignorant of the defects. The *Civil Code* tells us this.[1] It is also well established that the lessor's warranty is a continuing one — the landlord is liable for defects that arise during the whole term of the lease; this is in contrast to the contract of sale, in which the vendor, in the absence of an express guarantee extending the warranty, is only liable for the condition of the object sold at the time of the sale.[2]

There is no certainty about anything else — indeed there is nothing but a series of unsolved problems and a large mass of conflicting jurisprudence, evidence of a struggle on the part of the courts to render justice in the cases before them, in which task they have received all too little guidance from the relevant provisions of the *Code*.

The *vendor's* warranty against defects is treated in *twelve* specific articles.[3] They provide, *inter alia*, that the vendor is liable for *latent* defects[4] and not *apparent* defects,[5] that the buyer has the

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1 Article 1614 C.C.

2 See, *inter alia*, J. W. Durnford, *The Landlord's Obligation to Repair and the Recourses of the Tenant*, (1966), 44 Can. Bar Rev. 477, at pp. 477-478 (including n. 3).

3 Articles 1506, 1507, 1522-1531 C.C.

4 Article 1522 C.C.

5 Article 1523 C.C.

redhibitory action to cancel the sale or the *quanti minoris* action to obtain a reduction in the price,[6] and that the vendor will be liable for damages but only if he knew or was presumed to know of the defect.[7]

The *landlord's* warranty, on the other hand, is dealt with in only one article, namely Article 1614:

Le locateur est tenu de la garantie envers le locataire à raison de tous les vices et défauts de la chose louée qui en empêchent ou diminuent l'usage, soit que le locateur les connaisse ou non.

The lessor is obliged to warrant the lessee against all defects and faults in the thing leased, which prevent or diminish its use, whether known to the lessor or not.

This article leaves many questions unanswered. It speaks of "*defects and faults*". Other provisions require the landlord to *maintain* the premises,[8] and the tenant has recourses to force the carrying out of *repairs*.[9] What is the distinction between a defect or fault, and a state of disrepair? Is the distinction always practical? These are distinctions that could be of some importance, since there is a suggestion that the recourse in the event of there being a defect is not the same as for a state of disrepair.[10]

As we have seen, the vendor's warranty is against "latent" defects only and "apparent" defects are expressly excluded. The lessor's warranty, by contrast, is "against all defects and faults in the thing leased".[11] Does this mean that the landlord is liable for apparent as well as latent defects? Or is the wording of the *Code* overridden by the traditional view that the tenant is deemed to have accepted defects that are apparent and to have agreed to pay a lower rent accordingly?

As to the liability for damages caused by a defect in the premises, Article 1614 C.C. is silent.[12] The problem therefore arises as to whether the same rules as in the title of *Sale* should apply, by which

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[6] Article 1526 C.C.

[7] Articles 1527 and 1528 C.C.

[8] Such as Articles 1612 and 1613 C.C.

[9] Article 1641(1) C.C.

[10] See, for example, *Price* v. *Sigma Construction Inc.*, [1966] C.S. 412 (Mitchell, J.).

[11] Article 1614 C.C.

[12] Article 1721 C.N. differs:

«Il est dû garantie au preneur pour tous les vices ou défauts de la chose louée qui en empêchent l'usage, quand même le bailleur ne les aurait pas connus lors du bail.

S'il résulte de ces vices ou défauts quelque perte pour le preneur, le bailleur est tenu de l'indemniser.»

a knowledge or presumption of knowledge is required.[13] As we shall see, the courts are divided on this issue. Moreover, the issue is frequently avoided by the use of the delictual recourse, where no prior knowledge of the defect on the part of the owner of a building is required. A subsidiary question is whether there must be a putting in default of the landlord with respect to a defect if he is to be liable.

I. The Landlord's Warranty against Defects.

We must now examine in detail what the warranty covers. In order to do so, we must begin by defining what is meant by "defects and faults" as set forth in Article 1614 C.C.; we must at the same time attempt to establish a distinction between defects and a state of disrepair (since the obligation to maintain is separately treated in the *Code*, as seen *supra*).

1. *The meaning of "defects and faults" in Article 1614 C.C.*

The words "defect" and "fault", and *"vices"* and *"défauts"* appear to be, in the sense in which they are employed in Article 1614 C.C., synonymous.[14] They consist of flaws or imperfections.[15]

Where there is something wrong with the premises, the trouble may arise from a need for repairs (maintenance) or the presence of a defect. It is fairly clear that we are faced with a *defect* in instances such as the following: an improperly designed heating system which does not adequately heat the whole of a house,[16] drains that do not drain properly or back up, or are otherwise defective,[17] the presence of vermin in large quantities,[18] the failure

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[13] Articles 1527 and 1528 C.C.

[14] See, for example, *The Oxford English Dictionary, Webster, Dictionnaire Quillet de la langue française.* See also, as to the meaning of defect (*vice*), *Tellier* v. *Proulx*, [1954] C.S. 180 (Batshaw, J.).

[15] A building constructed in the normal way is not defective if a tenant hears sounds made by co-tenants: *Benoit* v. *Smith*, (1899), 16 C.S. 591 (Doherty, J.).

[16] *Price* v. *Sigma Construction Inc.*, [1966] C.S. 412 (Mitchell, J.). Other cases on defective heating installations include: *Vadboncoeur* v. *Seott*, (1940), 46 R.L. n.s. 35 (Forest, J.) (though the tenant's action was dismissed because of his failure to put the landlord in default to remedy the situation); *Pilon* v. *Saindou*, (1920), 58 C.S. 215 (Ct. of R.).

[17] *Chabot* v. *Paquin*, [1965] B.R. 425; *Dionne* v. *Roussel*, [1950] C.S. 82 (Judge Michaud); *Rublee* v. *Fortin*, [1950] C.S. 425 (Salvas, J.); *Lambert* v. *Dame Bourassa*, (1927), 33 R.L. n.s. 437 (B. Cousineau, J.); *Vyse Sons & Co. Ltd.* v. *Stephens*, (1918), 24 R.L. n.s. 222 (Ct. of R.); *Beauchamp* v. *Brewster*, (1899), 16 C.S. 268 (Doherty, J.); *Benson* v. *Vallière*, (1894), 6 C.S. 245 (Routhier, J.); *Thibault* v. *Paré*, (1894), 3 B.R. 48.

[18] *Shorter* v. *Beaufort Realties (1964) Inc.*, S.C.M. 742,366, December 27, 1968, Mr. Justice Bélanger; *Truax* v. *Murphy*, [1965] C.S. 436 (Jean, J.)

to meet the requirements of municipal by-laws,[19] undue noisiness of a heating system,[20] unhealthy dampness,[21] smells,[22] the absence of screw plugs on top of furnace oil tanks, causing an overflow,[23]

(cockroaches); *Julien* v. *Maplewood Project Inc.*, [1963] C.S. 415 (Montpetit, J.) (silverfish); *Lussier* v. *Sklavounos*, [1963] C.S. 225 (Deslauriers, J.) (cockroaches); *Mindlin* v. *Cohen*, [1960] C.S. 114 (Trudel, J.) (rats); *Thibault* v. *Dumas*, [1947] B.R. 59 (fleas); *Bélanger* v. *Lemieux*, (1940), 46 R.L. n.s. 314 (Verret, J.) (bed bugs); *Bousquet* v. *Côté*, (1933), 54 B.R. 436 (bed bugs); *Lemay* v. *McConomy*, (1932), 70 C.S. 531 (Roy, C.J.) (bed bugs — but the tenant's action was dismissed on the ground of his having accepted them); *Vezeau* v. *Siesdedos*, (1926), 32 R.L. n.s. 282 (Archambault, J.) (rats); *Dussault* v. *The H. & W. Importing Co. Ltd.*, (1925), 63 C.S. 4 (de Lorimier, J.) (bed bugs); *Bissonnette* v. *Girard*, (1923), 35 B.R. 40 (rats); *Longpré* v. *Wallwork*, (1922), 28 R.L. n.s. 114 (Ct. of R.) (rats); *Foley* v. *Baker*, (1918), 24 R.L. n.s. 185 (Ct. of R.) (bed bugs); *Fauteux* v. *Beauvais*, (1916), 49 C.S. 141 (Ct. of R.) (rats — but the tenant lost his case because the rats were not apparently sufficiently numerous to give rise to uninhabitability); *Bigonesse* v. *Bouchard*, (1915), 48 C.S. 406 (Ct. of R.) (rats); *Middleton* v. *Allard*, (1907), 13 R.L. n.s. 195 (Ct. of R.) (bugs); *Snodgrass* v. *Newman*, (1896), 10 C.S. 433 (Archibald, J.; conf. by C. of R.) (bed bugs). See also *Delimal* v. *Painchaud*, [1952] C.S. 417 (A. Demers, J.) (purchase of furniture by prospective sub-tenant from sub-lessor cancelled because uninhabitability prevented taking of possession).

[19] *Athanasiou* v. *Palmina Puliafito Co. Ltd.*, [1964] S.C.R. 119; *Riel Investment Corp.* v. *Kithala*, [1964] C.S. 223 (Brossard, J.); *Houle* v. *Desrosiers*, [1960] C.S. 709 (M. Cousineau, J.); *Lemcovitch* v. *Daigneault*, [1957] C.S. 178 (Collins, J.); *Greenberg* v. *Germain*, (1941), 71 B.R. 17.

[20] *Liquornik* v. *Turret Construction and Housing Co.*, [1962] C.S. 423 (A. I. Smith, J.); *Craig* v. *Brown*, [1965] C.S. 274 (Collins, J.); a noisy circulating pump is included: *Rabow* v. *Labrecque*, (1938), 76 C.S. 204 (McDougall, J.).

[21] *Mayer* v. *Pelletier*, [1960] C.S. 455. (A. Demers, J.); *Fabian* v. *Therriault*, [1951] R.L. 558 (Jean, J.); *Brisebois* v. *Bertrand*, [1944] R.L. 547 (Décary, J.) — the tenant's action was dismissed on the ground of the defect being apparent; *Moreau* v. *Gagné*, (1940), 46 R.L. n.s. 370 (Prévost, J.) — but the tenant's action was dismissed because of there not being a defect; *Chartrand* v. *Brunet*, (1932), 70 C.S. 142 (Martineau, J.) — but the state of dampness was unproved in this case; *Masson* v. *Gratton*, (1929), 35 R.L. n.s. 115 (de Lorimier, J.); *Nadeau* v. *Gratton*, (1929), 67 C.S. 63 (de Lorimier, J.); *Maillet* v. *Roy*, (1897), 12 C.S. 375 (Doherty, J.); *Peatman* v. *Lapierre*, (1890), 18 R.L. 35 (Tellier, J.) — the tenant's action was dismissed on the ground of the defect being apparent.

[22] *The Great-West Life Assurance Co.* v. *Raby*, [1960] C.S. 505, at p. 511 (Desmarais, J.); *Boudreau* v. *Marcotte*, (1926), 32 R.J. 398 (Archambault, J.) — the tenant's action was dismissed since the defect was an apparent one; *Beardmore* v. *Bellevue Land Co.*, (1906), 15 B.R. 43; *Benson* v. *Vallière*, (1894), 6 C.S. 245 (Routhier, J.); *Thibault* v. *Paré*, (1894), 3 B.R. 48; *Daigneau* v. *Levesque*, M.L.R., (1886), 2 B.R. 205.

[23] *W. H. Thornhill Co. Ltd.* v. *Avmor Ltd.*, [1959] C.S. 116 (Perrier, J.).

the contamination of water in a well,[24] floods,[25] a water pipe which bursts when it is only four years old,[26] the absence of a washer in a gas pipe leading to a stove, resulting in an explosion,[27] a step which breaks because the wood is unsuitable,[28] poisonous weeds,[29] a gallery or its railing which gives way due to improper construction,[30] a garage included in the lease of a dwelling to which access is unreasonably difficult,[31] a building that collapses due to defective construction[32] or is unsafe on account of not being strong enough for the purposes for which it was leased,[33] a culvert that collapses for unknown reasons,[34] badly fitting doors and windows,[35] a chimney which does not draw properly,[36] a refrigerator in a butcher shop

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[24] *Peters* v. *Baribeau,* [1953] C.S. 451 (Ferland, J.). The failure of the water supply is a cause for resiliation of the lease even where it was not the landlord's fault: *McKillop* v. *Tapley,* (1907), 32 C.S. 380 (Ct. of R.); *Lemonier* v. *De Bellefeuille,* (1882), 5 L.N. 426 (Jetté, J.).

[25] *Coutu* v. *Carozzo,* [1948] C.S. 455 (Archambault, J.); *Bertrand* v. *Noël,* (1904), 10 R.J. 367 (but the tenant's action was dismissed since the defect was apparent); *Rae* v. *Phelan,* (1898), 13 C.S. 491 (Ct. of R.).

[26] *Mallette* v. *Schwartz,* [1945] C.S. 212 (A. Décary, J.). See also *Mongeau* v. *Sylvestre,* [1944] C.S. 276 (P. Demers, J.); *Dodick* v. *Learmonth,* (1933), 54 B.R. 321.

[27] *Bourgoin* v. *Sullivan,* [1942] B.R. 593.

[28] *Belbin* v. *Tarte,* [1961] C.S. 234 (A. I. Smith, J.); *Richer* v. *Normandin,* (1940), 78 C.S. 85 (McDougall, J.); *Brazeau* v. *Mourier,* (1934), 72 C.S. 503 (Guibault, J.).

[29] *Bergeron* v. *Bastarache,* (1938), 44 R.L. n.s. 463 (Fortier, J.) (the tenant's action was dismissed because of the notoriety of the noxious weed in question (poison ivy)).

[30] *Guaranteed Pure Milk Co. Ltd.* v. *Cane,* (1933), 54 B.R. 473; *Allan* v. *Fortier,* (1901), 20 C.S. 50 (Larue, J.); *Elliott* v. *Simmons,* M.L.R., (1890), 6 B.R. 368.

But where a tenant's wife throws herself against a railing in order to pass a dog over to a neighbour she is alone responsible for her death resulting from the collapse of the railing under the impact: *Gariépy* v. *Jekell,* (1932), 70 C.S. 508 (de Lorimier, J.).

[31] *Morrissette* v. *Fortier,* (1931), 50 B.R. 42.

[32] *Granger* v. *Muir,* (1910), 38 C.S. 68 (Lafontaine, J.); *Central Agency, Ltd.* v. *Les Religieuses de l'Hôtel-Dieu de Montréal,* (1905), 27 C.S. 281 (Ct. of R.); *Stanton* v. *Donnelly,* (1898), 13 C.S. 306 (Tellier, J.). See also *St. Lawrence Realty Co. Ltd.* v. *Maryland Casualty Co.,* (1913), 22 B.R. 451.

[33] *Therrien* v. *Paquet,* (1926), 32 R.L. n.s. 389 (Pouliot, J.); *Larocque* v. *Freeman's Ltd.,* (1916), 50 C.S. 231 (Bruneau, J.); *Wright* v. *Galt,* (1883), 6 L.N. 42 (Torrance, J.).

[34] *Thaddée Brisson, Ltée* v. *Desbiens,* (1924), 37 B.R. 539.

[35] *Lechien* v. *Quentier,* (1923), 61 C.S. 367 (Sévigny, J.).

[36] *Lair* v. *Siminovitch,* (1914), 20 R.L. n.s. 109; *Lair* v. *Simonovitch,* (1914), 45 C.S. 341 (Bruneau, J.).

The tenant must, of course, establish that the failure of the chimney to draw is due to a defect and not his own fault: *Canada Newspaper Syndicate, Ltd.* v. *Gardner,* (1907), 32 C.S. 452 (Pagnuelo, J.).

which is not cool enough due to defective construction,[37] possibly the absence of a hand-rail on a staircase leading to an upstairs flat,[38] the absence of fumigation measures being taken on the departure of a previous tenant where members of his family had typhoid,[39] the erection of a wall by the lessor which removed part of the light required by a photography studio.[40]

The element that seems to characterize the foregoing examples is the presence of an imperfection that does not result from a failure to repair or maintain, but is instead inherent in it due to poor design, inadequate construction, a bad location, unsuitability for the purpose for which use was intended, the infringement of municipal by-laws, and suchlike. It is concerning defects in this sense, presumably, that Article 1614 C.C. provides that the landlord is obliged in warranty.

We have, on the other hand, the landlord's obligation to "maintain the thing in a fit condition for the use for which it has been leased",[41] which involves him in having to make repairs,[42] which obligation is enforceable by the tenant under Article 1614(1) C.C. It would seem that the state of disrepair dealt with by these provisions is distinguishable from defects in that, in the former case, we are faced with an obligation on the part of the landlord to restore to their original or equivalent condition premises that were originally properly designed and constructed, and satisfactory in all other relevant respects as well.

From the foregoing distinction between defects and a state of disrepair results the suggestion that the codifiers had in mind separate recourses for the two situations, namely that, a condition of uninhabitability aside, when faced with a state of disrepair a tenant's only recourse is to sue for repairs under Article 1641(1) C.C.,[43] whereas where a defect is involved, the tenant's rights are to sue for the resiliation of the lease or a reduction in the rent, depending on the gravity of the defect.[44]

There is a certain theoretical logic to having a distinction between a state of disrepair and a defect, with separate recourses for each.

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[37] *Desautels* v. *Préfontaine*, (1912), 42 C.S. 401 (Saint-Pierre, J.).

[38] *Cartier* v. *Durocher*, (1902), 22 C.S. 255 (Langelier, J.) (the tenant's action was dismissed on the ground of the defect (if it was such) being apparent).

[39] *Laurier* v. *Turcotte*, (1896), 9 C.S. 86 (Ct. of R.).

[40] *Rémillard* v. *Cowan*, (1880), 6 Q.L.R. 305 (Casault, J.).

[41] Article 1612 C.C.

[42] Article 1613 C.C.

[43] See, *inter alia*, J. W. Durnford, *The Landlord's Obligation to Repair and the Recourses of the Tenant*, (1966), 44 Can. Bar Rev. 477.

[44] See *infra*, under heading II, 1. *The cases of uninhabitability or diminution of enjoyment*, at p. 373 *et seq.*

Practical difficulties arise, however, out of the concept of separate recourses. It might be, for example, that a tenant who is faced with a state of disrepair would prefer a reduction in rent instead of having to sue his landlord to oblige him to repair; the more likely occurrence is that the tenant whose premises are affected by a defect would prefer to have them rectified rather than get a reduction in his rent.

Moreover, in a large number of cases, it will not be clear whether the tenant is faced with a defect or a state of disrepair. Very little defining of the concept of "defect" has been done beyond labelling it a flaw or imperfection. Indeed, the very opposite has occurred, in that so little distinction has generally been made by the courts between a defect and a state of disrepair, that very often the latter is referred to as constituting a defect.

This raises a question of some interest: can it be said that we are faced with a defect when we have a condition that results from age or lack of maintenance of premises that were originally well designed and constructed? For example, a pipe which leaks soon after its installation is clearly defective; if it only starts to leak after a normal life span of perhaps thirty years, the cause is age. Similarly, a building which collapses soon after its erection evidently suffers from a defect; if it collapses many years later, the cause will probably be lack of maintenance. Can the old pipe and the old house be said to be affected by defects? The answer is in the negative insofar as the manufacturer or builder is concerned.

Is the answer to be given from the point of view of a tenant who takes possession of an old house different? Is the old pipe which has served its normal life span and is now leaking to be considered a defect for him? In a broad sense, the question can be answered in the affirmative, for the tenant is faced with a flaw or imperfection. Nevertheless, is it not true to say that what we are really faced with is a state of disrepair? The question is not wholly academic — the tenant's recourses may differ; moreover, it has been suggested that a tenant only has a recourse with respect to a defect if it prevents the use of the premises or *seriously diminishes* it, whereas Article 1613 C.C. provides that the premises must be delivered in a good state of repair *in all respects*, so that the most minor type of repairs must be done.[45]

In any event, an examination of the jurisprudence discloses that the courts have often used the word "defect" in the broad sense of covering conditions that might technically be labelled as states of

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[45] P. B. Mignault, *Le droit civil canadien*, t. 7, (Montreal, 1906), p. 256.

disrepair,[46] though, as we shall see, this by no means results in the application of any general rule by which the tenant would be obliged to exercise the recourses that have sometimes been considered as appropriate for defects, as distinct from those to enforce repairs.[47]

It may be that one reason for the loose application of the term "defect" in the jurisprudence is that, as we shall see later,[48] the courts frequently grant recourses against landlords on a delictual basis in their quality of owner under article 1055 C.C., in the third paragraph of which the owner of the building is responsible for the damage caused by its "ruin" whether it result from a want of repairs or a defect. This provision renders the distinction unnecessary insofar as many actions are concerned. It is rather ironical at the same time, however, that this particular article, which is in the domain of delicts, does make the distinction between a lack of maintenance and a defect in construction:

Art. 1055: ... Le propriétaire d'un bâtiment est responsable du dommage causé par sa ruine, lorsqu'elle est arrivée par suite du *défaut d'entretien ou par vice de construction.*[49]	Art. 1055: ... The owner of a building is responsible for the damage caused by its ruin, where it has happened from *want of repairs or from an original defect in its construction.*[49]

Indeed, the English version sharpens the distinction by speaking of an "original" defect in construction; and while the French version does not have this additional word, the word "vices" no doubt embodies the same concept since a *"vice de construction"*[50] can only refer to an original defect.

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[46] For example: *Peate Musical Supplies Ltd.* v. *Lazarus Realty Corp.*, [1957] R.L. 109 (Montpetit, J.) (toilet washer had "become defective from the daily and normal use thereof..."); *Julien* v. *Julien*, [1945] B.R. 189; *Bois* v. *Décarie*, (1941), 47 R.L. n.s. 114 (Forest, J.); *Verrier* v. *Daragon*, (1925), 63 C.S. 202 (Archambault, J.); *Lair* v. *Siminovitch*, (1914), 20 R.L. n.s. 109, *Lair* v. *Simonovitch*, (1914), 45 C.S. 341 (Bruneau, J.); *Mergeay* v. *Redon*, (1910), 16 R.J. 354 (Ct. of R.); *Beaudoin* v. *Dominion Clothing Co.*, (1908), 34 C.S. 157 (Ct. of R.); *O'Connor* v. *Flint*, (1908), 33 C.S. 491 (Ct. of R.); *Schimanski* v. *Higgins*, (1898), 13 C.S. 348 (Ct. of R.).

There can, of course, be a combination of age and defect, as seen, for example, in *Eusanio* v. *Thuot*, [1947] C.S. 46 (Archambault, J.). This list of cases does not include those in which a delictual recourse was granted, since Article 1055 C.C. covers both a want of repairs and defects.

[47] See heading II, 1. *The cases of uninhabitability or diminution of enjoyment, infra*, at p. 373 *et seq.*

[48] See heading II, 3, *The claim for damages, infra*, at p. 378 *et seq.*

[49] Italics added.

[50] Italics added.

Thus the *Code* gives separate treatment, in the title of *Lease and Hire,* to defects and the obligation to repair. Many defects are clearly distinguishable from a state of disrepair, but in numerous instances the division line is blurred. The courts, for their part, have tonded to be liberal in their use of the word defect, extending it to include disrepair.

2. *Defects giving rise to the warranty.*

Once it has been established what is a defect, the next question to be considered is what defects does the landlord's warranty under Article 1614 C.C. cover. It will be recalled that in the title of sale, the vendor's warranty is against *latent* defects only;[51] *apparent* defects are excluded.[52] The courts have, with a few exceptions, interpreted these articles in such a way as to impose quite a heavy burden on the buyer: he must examine and inspect the object before buying; if he is not knowledgeable about the sort of thing he is acquiring, he must engage the services of an expert; any defect that would have been discovered on a careful examination by a competent expert will be considered apparent, and consequently one which the vendor's warranty would not cover. The requirement for an expert is not spelled out in the *Code;* it goes a long way back, however, at least to Pothier, and appears to be based on the proposition that a prudent man will secure the services of an expert in fields where he is ignorant, and that the failure to do so will constitute negligence. This reasoning renders unnecessary the specific mention of an expert in Article 1522 C.C.[53]

What about the contract of *Lease?* Article 1614 C.C. renders the lessor liable for "*all* defects and faults" ("*tous* les vices et défauts").[54] It is to be noted that not only is the word "all" added (it is absent from Article 1522 C.C. concerning the vendor's warranty), but in addition no distinction is made between "apparent" and "latent" defects. It might then be concluded that the article means what it says on the face of it, namely that the landlord is responsible for every defect affecting the premises.

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[51] Article 1522 C.C.

[52] Article 1523 C.C.

[53] See, *inter alia,* J. W. Durnford, *What is an Apparent Defect in the Contract of Sale?,* (1964), 10 McGill L.J. 60; J. J. Gow, *A Comment on the Warranty in Sale against Latent Defects,* (1964), 10 McGill L.J. 243; J. W. Durnford, *Apparent Defects in Sale Revisited,* (1964), 10 McGill L.J. 341; J. J. Gow, *A Further Comment on Warranty in Sale,* (1965), 11 McGill L.J. 35.

[54] Article 1614 C.C.

Things are seldom that simple, however. It has been argued that because the title of *Lease and Hire* contains only Article 1614 C.C. on the subject of the landlord's warranty against defects, we should turn to the considerably more extensive rules of the equivalent warranty in the title of *Sale*.[55] This proposition was formerly supported on a number of occasions (though not always in connection with this particular problem).[56]

Is the foregoing proposition a sound one? It is respectfully submitted that a comparison of the objectives of the two contracts discloses that in many respects it is not. Sale transfers ownership; the seller is liable only for defects existing at the time of the sale (saving the existence of an express guarantee providing otherwise); the buyer cannot turn to his seller with respect to defects that subsequently arise. There is therefore some logic in requiring a buyer to ensure that the object he buys is not too obviously defective, and to require him to take his redhibitory action with reasonable diligence.[57]

Lease, in contrast, does not transfer ownership; the premises continue to be the property of the landlord and the tenant is not acquiring them; instead, he is being granted the right to receive the temporary *enjoyment* of them,[58] and this during the whole term of the lease; part of the obligation to furnish enjoyment is to maintain the premises and to warrant against defects that may arise at any time. The tenant is therefore entitled to look to the landlord in the event of defects.

There is, therefore, no reason to require a rigorous examination of the premises by a prospective tenant before he leases. Indeed, no authority seems to have gone so far as to require him to engage an expert. On the other hand, there is a respectable body of authority excluding the warranty where the defects were or should have been

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[55] Articles 1522 *et seq.* C.C.

[56] P. B. Mignault, *Le droit civil canadien*, t. 7, (Montreal, 1906), pp. 257-258; *Mallette* v. *Sehwartz*, [1945] C.S. 212 (A. Décary, J.); *Brisebois* v. *Bertrand*, [1944] R.L. 547 (Décary, J.); *Rae* v. *Phelan*, (1898), 13 C.S. 491 (Ct. of R.); *Benson* v. *Vallière*, (1894), 6 C.S. 245 (Routhier, J.).

[57] Article 1530 C.C.

[58] Article 1601 C.C.

apparent to the tenant himself.[59] Defects have nonetheless been subjected to the warranty even where they were apparent.[60]

There are two added elements of confusion here. One is that the relevance of the apparency of the defects may vary depending on whether the tenant is seeking damages or not; the other is that the rules that apply when a delictual recourse is being invoked are different. These two elements will be dealt with when the tenant's recourses are being discussed.

What is to be the solution concerning the problem of when a defect is to be considered apparent? The judgments dismissing recourses of tenants on the ground of apparency all relate to defects that were blatantly obvious.[61] Perhaps this is the key to finding a

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[59] L. Faribault, *Traité de droit civil du Québec*, t. 12, (Montreal, 1951), p. 95; Mignault, *op. cit.*, t. 7, p. 258; *Snow's Landlord and tenant in the Province of Quebec*, 3rd ed., L. C. Carroll ed., (Montreal, 1934), pp. 123, 126, 165, 169, 173, 174; *Bertalan* v. *Huels*, [1968] B.R. 715; *Fortier* v. *Leclerc*, [1967] B.R. 930; *Riel Investment Corp.* v. *Kithala*, [1964] C.S. 223 (Brossard, J.); *Tondreau* v. *Canadian National Railway Co.*, [1964] C.S. 606 (Larouche, J.); *Bergeron* v. *Bastarache*, (1938), 44 R.L. n.s. 463 (Fortier, J.); *Boudreau* v. *Marcotte*, (1926), 32 R.J. 398 (Archambault, J.); *Verrier* v. *Daragon*, (1925), 63 C.S. 202 (Archambault, J.); *Lefebvre* v. *Dufresne*, (1925), 31 R.L. n.s. 394 (Bruneau, J.); *Villecourt* v. *Blais*, (1918), 53 C.S. 115 (Ct. of R.); *O'Connor* v. *Flint*, (1908), 33 C.S. 491 (Ct. of R.); *Rivard* v. *Pelchat*, (1905), 28 C.S. 8 (Tellier, J.); *Bertrand* v. *Noël*, (1904), 10 R.J. 367; *Cartier* v. *Durocher*, (1902), 22 C.S. 255 (Langelier, J.; conf. Ct. of R.); *Beauchamp* v. *Brewster*, (1889), 16 C.S. 268 (Doherty, J.) (here the tenant had knowledge of the defect at the time of entering into the lease); *Peatman* v. *Lapierre*, (1890), 18 R.L. 35 (Tellier, J.).

[60] *Eusanio* v. *Thuot*, [1947] C.S. 46 (Archambault, J.); *Greenberg* v. *Germain*, (1941), 71 B.R. 17. See also *Guaranteed Pure Milk Co. Ltd.* v. *Cane*, (1933), 54 B.R. 473; *Lair* v. *Siminovitch*, (1914), 20 R.L. n.s. 109, *Lair* v. *Simonoviteh*, (1914), 45 C.S. 341 (Bruneau, J.).

[61] In *Bertalan* v. *Huels*, basement premises, which were four feet below the level of a street at the base of the Northern slope of Mount Royal and were unprotected by a wall, were flooded; In *Dame Fortier* v. *Leclerc*, where a 19 month old child fell through the railing on an outside staircase, the fact that he was able to go through below the stairs and the horizontal middle railing was described by the Court of Appeal as hazardous for young children but a normal hazard rather than a defect, and the Court said that "plaintiffs knew what they were leasing"; in *Riel Investment Corp.* v. *Kithala*, the premises did not conform with the municipal by-laws in that they did not have two exits; in *Tondreau* v. *Canadian National Railway Co.*, the users of a railway freight car used for transporting minerals had not shut the door properly (it was held by a stick which got knocked out of place), and the Court said that "il s'agissait là d'un vice apparent, d'un vice qui sautait aux yeux"; in *Bergeron* v. *Bastarache*, the lessee of a country cottage got infected on a beach fronting on the St. Lawrence River by poison ivy which was notorious in the area; in *Boudreau* v. *Marcotte*, the tenant of a dwelling situated over a Chinese laundry could not

solution. Accordingly, a defect would only be apparent if the tenant did not discover it on an ordinary visit of inspection or if it arose from a factor notorious in the area, such as smells in the locality of oil refineries, dampness near swamps. Moreover it could be argued that even an apparent defect would be covered by the lessor's warranty if the tenant had good reason to believe that the same would be rectified.

Thus we see that while Article 1614 C.C. declares that the lessor's warranty covers *all* defects, as opposed to the vendor's warranty, which relates only to latent and excludes apparent defects,[62] the courts have nonetheless generally stated that the warranty will not lie where the defects are apparent (though with a much less rigorous test of apparency than the one requiring the buyer to engage an expert which is frequently applied with respect to sale).[63]

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complain of heat and smell rising from it as he saw it before leasing; in *Verrier* v. *Daragon,* plaintiff tenant's child was injured by a fall from a gallery on which the bars of the railing gave way since they were rotten — this decision is perhaps more harsh than the others, unless the rottenness was blatant; the court relied in part on the declaration in the lease (frequently written off by judges as a *clause de style*) that the premises were in good condition and that the tenant was satisfied therewith, coupled with a month's silent occupation which was interpreted as tacit acceptance; in *Dame Lefebvre* v. *Dufresne,* the tenant was aware of the balcony being defective; in *Villecourt* v. *Blais,* the tenant's action for damages due to flooding of the basement was dismissed since he had previously been a tenant of the premises and was fully aware of their defects; in *O'Connor* v. *Flint,* the tenant's claim for damages was dismissed since it was apparent that the building was in an advanced state of decay; in *Rivard* v. *Pelchat,* the defects were not described; in *Bertrand* v. *Noël,* the leased farm was on the bank of the Richelieu River and court felt that it was evident from its position that it would be subject to spring floods; moreover, the tenant made no complaints after the flood which occured during the first spring of his occupancy; in *Cartier* v. *Durocher,* the tenant's fall on the staircase was due to the absence of a handrail; in *Peatman* v. *Lapierre,* the tenant was held not to be entitled to complain of dampness which he knew was common in that part of the city due to floods. The references to these cases are given *supra,* n. 59.

[62] Articles 1522 and 1523 C.C.

[63] The same problem has arisen with respect to Article 1776 C.C. in the title of *Loan*:

Lorsque la chose prêtée a de tels défauts qu'elle cause du préjudice à celui qui s'en sert, le prêteur est responsable, s'il connaissait les défauts et n'en a pas averti l'emprunteur.	When the thing lent has defects which cause injury to the person using it, the lender is responsible if he knew the defects and did not make them known to the borrower.

It is stated by H. Roch and R. Paré, in *Traité de droit civil du Québec,* t. 13, (Montreal, 1952), pp. 188-189, that the lender is only liable for damages caused by the *latent* defects in the thing loaned.

What is the justification for this solution and is it a reasonable one? The reasoning seems to be that where a tenant leases premises affected by defects that are apparent, he takes them into consideration in the fixing of the rental and pays less accordingly;[64] or he disregards them on the basis that the premises will suit his purposes despite their existence.[65] These are neat theoretical solutions, doubtless supported by a measure of abstract logic, which may well be the answer where the parties are in a position to possess the necessary flexibility in bargaining. The situation may not allow for this where there is a shortage of housing, and the low income tenant will probably not have much of a choice as regards the calibre of the housing he is able to obtain.

The foregoing does not mean that a tenant should be permitted to accept premises suffering from obvious defects and then always be entitled to base a claim on them. While it may be hard to separate problems of adequate housing and the liability of the landlord for defects, it would seem that the rectification of the housing situation as regards the low income group is a problem distinct from what should be the extent of the landlord's liability for defects. In other words, while some landlords may be guilty of leasing substandard housing to those who are unable to exercise their rights, not all landlords should necessarily be liable for every defect.

II. The Recourses of the Tenant.

We are here concerned with how a tenant whose premises suffer from defects may act in the protection of his interests. There are two principal categories of recourses. The first concerns the lease itself and the rights and obligations of the parties under it; the other relates to the claim for damages by the tenant.

1. *The cases of uninhabitability or diminution of enjoyment.*

Enjoyment being of the essence of the contract of lease, uninhabitability gives rise to the right to resiliation.[66] This general rule

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[64] *Beauchamp* v. *Brewster*, (1899), 16 C.S. 268 (Doherty, J.) (the tenant, knowing of the defects at the time of entering into the lease, was not granted resiliation of the lease but only a diminution of the rent).

[65] Mignault, *op. cit.*, t. 7, p. 258; Faribault, *op. cit.*, t. 12, p. 95.

[66] J. W. Durnford, *The Landlord's Obligation to Repair and the Recourses of the Tenant*, (1966), 44 Can. Bar Rev. 477, at p. 499, and the authorities therein cited.

has been applied with respect to defects in particular.[67] The tenant need not await judgment; he may abandon the premises.[68] He must, however, first put the landlord in default to remedy the defect and

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[67] *Truax* v. *Murphy*, [1965] C.S. 436 (Jean, J.); *Athanasiou* v. *Palmina Puliafito Co. Ltd.*, [1964] S.C.R. 119; *Julien* v. *Maplewood Project Inc.*, [1963] C.S. 415 (Montpetit, J.); *Mayer* v. *Pelletier*, [1960] C.S. 455 (A. Demers, J.); *Lemcovitch* v. *Daigneault*, [1957] C.S. 178 (Collins, J.); *Coutu* v. *Carozzo*, [1948] C.S. 455 (Archambault, J.); *Greenberg* v. *Germain*, (1941), 71 B.R. 17; *Bélanger* v. *Lemieux*, (1940) 46 R.L. n.s. 314 (Verret, J.); *Bell* v. *L.-J. Beaudoin, Ltée*, (1930), 68 C.S. 493 (Archambault, J.); *Masson* v. *Gratton*, (1929), 35 R.L. n.s. 115 (de Lorimier, J.); *Nadeau* v. *Gratton*, (1929), 67 C.S. 63 (de Lorimier, J.); *Therrien* v. *Paquet*, (1926), 32 R.L. n.s. 389 (Pouliot, J.); *Miserany* v. *St-Aubin*, (1925), 63 C.S. 310 (de Lorimier, J.); *Baril* v. *Bonnet*, (1924), 36 B.R. 270; *Bissonnette* v. *Girard*, (1923), 35 B.R. 40; *Longpré* v. *Wallwork*, (1922), 28 R.L. n.s. 114 (Ct. of R.) (the acceptance by the lessor of the return of the key was held to constitute an acceptance of the tenant's abandonment); *Leroux* v. *Marcil*, (1920), 58 C.S. 511 (Bruneau, J.); *Pilon* v. *Saindou*, (1920), 58 C.S. 215 (Ct. of R.); *Lusher* v. *Foley*, (1920), 26 R.L. n.s. 58 (Ct. of R.); *Foley* v. *Baker*, (1918), 24 R.L. n.s. 185 (Ct. of R.); *Bigonesse* v. *Bouchard*, (1915), 48 C.S. 406 (Ct. of R.); *Lair* v. *Siminovitch*, (1914), 20 R.L. n.s. 109 (Bruneau, J.); *Lair* v. *Simonovitch*, (1914), 45 C.S. 341 (Bruneau, J.); *Middleton* v. *Allard*, (1907), 13 R.L. n.s. 195 (Ct. of R.); *Beardmore* v. *Bellevue Land Co.*, (1906), 15 B.R. 43; *Stanton* v. *Donnelly*, (1898), 13 C.S. 306 (Tellier, J.); *Rae* v. *Phelan*, (1898), 13 C.S. 491 (Ct. of R.); *Maillet* v. *Roy*, (1897), 12 C.S. 375 (Doherty, J.); *Laurier* v. *Turcotte*, (1896), 9 C.S. 86 (Ct. of R.); *Benson* v. *Vallière*, (1884), 6 C.S. 245 (Routhier, J.).

[68] *Shorter* v. *Beaufort Realties (1964) Inc.*, S.C.M. 742,366, December 27, 1968, Mr. Justice Bélanger; *Julien* v. *Maplewood Project Inc.*, [1963] C.S. 415 (Montpetit, J.); *Lemcovitch* v. *Daigneault*, [1957] C.S. 178 (Collins, J.); *Coutu* v. *Carozzo*, [1948] C.S. 455 (Archambault, J.) (this case absolved the tenant from the obligation of taking possession of uninhabitable premises); *Greenberg* v. *Germain*, (1941), 71 B.R. 17 (by inference); *Masson* v. *Gratton*, (1929), 35 R.L. n.s. 115 (de Lorimier, J.); *Nadeau* v. *Gratton*, (1929), 67 C.S. 63 (de Lorimier, J.); *Therrien* v. *Paquet*, (1926), 32 R.L. n.s. 389 (Pouliot, J.); *Baril* v. *Bonnet*, (1924), 36 B.R. 270; *Pilon* v. *Saindou*, (1920), 58 C.S. 215 (Ct. of R.); *Lusher* v. *Foley*, (1920), 26 R.L. n.s. 58 (Ct. of R.); *Foley* v. *Baker*, (1918), 24 R.L. n.s. 185 (Ct. of R.) (the tenant was not obliged to take possession of the premises because of infestation by bedbugs); *Middleton* v. *Allard*, (1907), 13 R.L. n.s. 195 (Ct. of R.); *Laurier* v. *Turcotte*, (1896), 9 C.S. 86 (Ct. of R.) (the tenant was not obliged to take possession of premises previously occupied by a family with typhoid and which had not been disinfected); *Benson* v. *Vallière*, (1894), 6 C.S. 245 (Routhier, J.); *Thibault* v. *Paré*, (1894), 3 B.R. 48; *Wright* v. *Galt*, (1883), 6 L.N. 42 (Torrance, J.). The tenant must be justified in abandoning: *Vadboncoeur* v. *Scott*, (1940), 46 R.L. n.s. 35 (Forest, J.); *Chartrand* v. *Brunet*, (1932), 70 C.S. 142 (Martineau, J.).

give him a reasonable time to do so,[69] unless there is urgency, in which event he may simply walk out.[70]

Once a tenant has abandoned the premises, what should he do? The wisest course of action is for him to sue in resiliation of the lease as soon as practical after leaving. If he fails to do so, there is the danger that his landlord may subsequently, after rectifying the defect, summon him to retake possession, and if the tenant refused to do so, he might possibly then face an action in damages. His plea might well be that the premises were uninhabitable and that the lessor had failed to remedy the situation within the delay given by the putting in default, or that the lessor, by allowing a certain period of time to elapse after the tenant had quit the premises, had tacitly consented to its resiliation. In either event, the tenant is running a risk, for he may no longer be able to establish that uninhabitability existed at the time he quit the premises, or the court may hold that the landlord had not given up or lost his right to the lease.[71]

Where a tenant is faced with a state of *disrepair* not amounting to uninhabitability, his only recourse is to sue for repairs under Article 1641(1); he may only obtain the resiliation of the lease if the lessor fails to obey the judgment ordering the repairs.[72] It would appear, on the other hand, that where a *defect* exists, there need not be uninhabitability for the tenant to obtain the resiliation of the lease. It suffices if there is a serious diminution of enjoyment for the tenant to be entitled to sue for a cancellation of the lease (though

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[69] *Lussier* v. *Sklavounos*, [1963] C.S. 225 (Deslauriers, J.); *Mayer* v. *Pelletier*, [1960] C.S. 455 (A. Demers, J.); *Sauvé* v. *Moosbrugger*, [1953] R.L. 31 (Brossard, J.); *Moreau* v. *Gagné*, (1940), 46 R.L. n.s. 370 (Prévost, J.); *Vadboncoeur* v. *Scott*, (1940), 46 R.L. n.s. 35 (Forest, J.); *Speller* v. *Greenshields*, (1912), 18 R.L. n.s. 427 (Ct. of R.); *Beauchamp* v. *Brewster*, (1899), 16 C.S. 268 (Doherty, J.); *Benson* v. *Vallière*, (1894), 6 C.S. 245 (Routhier, J.); *Thibault* v. *Paré*, (1894), 3 B.R. 48. See also the interesting case of *Shorter* v. *Beaufort Realties (1964) Inc.*, S.C.M. 742,366, December 27, 1968, Mr. Justice Bélanger.

[70] *Moreau* v. *Gagné*, (1940), 46 R.L. n.s. 370, at p. 375 (Prévost, J.).

[71] The situation is the same as that arising where a tenant abandons because of uninhabitability due to disrepair; a fuller discussion of the problems is to be found in J. W. Durnford, *The Landlord's Obligation to Repair and the Recourses of the Tenant*, (1966), 44 Can. Bar Rev. 477, at pp. 513 *et seq.* See also *Lusher* v. *Foley*, (1920), 26 R.L. n.s. 58 (Ct. of R.).

[72] J. W. Durnford, *The Landlord's Obligation to Repair and the Recourses of the Tenant*, (1966), 44 Can. Bar Rev. 477, at pp. 505-506.

it may be risky for him to abandon the premises before judgment is rendered in case the court does not maintain the action).[73]

We must now consider the situation where the defect does not diminish the enjoyment to the extent of giving rise to a right to have the lease resiliated. The first question is one of gravity: it is to be noted that Article 1614 C.C. only renders the landlord liable for defects that prevent or diminish the use of the premises. Thus, defects that merely cause inconvenience do not qualify. This is in contrast to the situation surrounding repairs — Article 1613 C.C. requires that the premises be delivered in a good state of repairs *in all respects,* and the landlord must make all necessary repairs during the lease that are not tenant's repairs.[74]

Where the defect is of sufficient gravity for the tenant to have a recourse, the question that arises is what the nature of the recourse should be. In the event of *disrepair,* the tenant must sue for repairs and may only obtain the cancellation of the lease if the lessor fails to carry out the judgment.[75] There is little if any debate over this point because it is provided for specifically by Article 1641(1) C.C., which expressly spells out the remedies available in the event of repairs being required. No putting in default is required (unlike the situation where resiliation is being sought).[76] There is no provision that specifically applies to defects; there is merely the general recourse in cancellation of the lease set forth in Article 1641(2):

Le locataire a droit d'action, suivant le cour ordinaire de la loi ou par	The lessee has a right of action in the ordinary course of law, or by

[73] *Shorter* v. *Beaufort Realties (1964) Inc.*, S.C.M. 742,366, December 27, 1968, Mr. Justice Bélanger (abandonment by the tenant was held to be justified); *Price* v. *Sigma Construction Inc.*, [1966] C.S. 412 (Mitchell, J.) (abandonment during the proceedings was held to be justified); *Liquornik* v. *Turret Construction and Housing Co.*, [1962] C.S. 423 (A. I. Smith, J.); *Great-West Life Assurance Co.* v. *Raby,* [1960] C.S. 505 (Desmarais, J.) (there were several grounds for the resiliation of the lease, one of which, smells, constituted a defect); *Craig* v. *Brown,* [1955] C.S. 274 (Collins, J.) (in this case it was pointed out that the tenant is not obliged to sue for repairs where the trouble is impossible to cure); *Rabow* v. *Labrecque,* (1938), 76 C.S. 204 (McDougall, J.); *Bousquet* v. *Côté,* (1933), 54 B.R. 436; *Tarte* v. *Sarrazin,* (1933), 54 B.R. 99; *Leroux* v. *Marcil,* (1920), 58 C.S. 511 (Bruneau, J.); *Rémillard* v. *Cowan,* (1880), 6 Q.L.R. 305 Casault, J.).

The tenant must, of course, establish that there really is a defect: *Verret* v. *Bédard,* (1929), 35 R.L. n.s. 426 (Pouliot, J.) (the headnote is misleading).

[74] Mignault, *op. cit.*, t. 7, p. 256; *Brisebois* v. *Bertrand,* [1944] R.L. 547 (Décary, J.).

[75] Article 1641(1) C.C.; J. W. Durnford, *The Landlord's Obligation to Repair and the Recourses of the Tenant,* (1966), 44 Can. Bar Rev. 477, at pp. 504-506.

[76] *Rublee* v. *Fortin,* [1950] C.S. 425 (Salvas, J.).

procédure sommaire, tel que réglé au *Code de procédure civile:*

2. Pour résilier le bail, à défaut par le locateur de remplir toute autre obligation résultant du bail, ou à lui imposée par la loi;

summary proceeding as provided in the *Code of Civil Procedure:*

2. To rescind the lease for failure on the part of the lessor to perform any other of the obligations arising from the lease or devolving upon him by law;

The foregoing provision is certainly applicable where uninhabitability or serious diminution of enjoyment results from the defect. Rescision of the lease is clearly too drastic, however, for other situations, and yet the tenant is guaranteed against "*all* defects... in the thing leased... which diminish its use";[77] and so arises a state of confusion in the doctrine and jurisprudence. There are two basic schools of thought. One treats a defect as if it were a state of disrepair, and applies Article 1641(1) C.C.[78] The other takes a different view; it sees a parallel between the landlord's and vendor's warranties against defects, and would grant the tenant the redhibitory action to annul the lease where there is uninhabitability or a serious diminution of enjoyment (as seen *supra*), or a reduction in rent in the event of a partial diminution[79] even though Article 1641(2) C.C. does not provide for the latter, and Article 1660 C.C. while setting forth a precedent for a reduction in rent, does not apply.[80]

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[77] Article 1614 C.C. Italics added.

[78] *Fabian* v. *Therriault*, [1951] R.L. 558 (Jean, J.); *Dionne* v. *Roussel*, [1950] C.S. 82 (Michaud, J.); *Rublee* v. *Fortin*, [1950] C.S. 425 (Salvas, J.); *Dubreuil* v. *Dupras*, (1926), 32 R.L. n.s. 139 (Surveyer, J.); *Dagenais* v. *Gauvreau*, (1923), 61 C.S. 447 (Martineau, J.)) (this case was related to an uncompleted house, and is to be contrasted with *Greenberg* v. *Germain*, *infra*, n. 80); *Dufresne* v. *Tremblay*, (1919), 55 C.S. 235 (Ct. of R.); *Desautels* v. *Préfontaine*, (1912), 42 C.S. 401 (Saint-Pierre, J.); *Bélanger* v. *de Montigny*, (1894), 6 C.S. 523 (Ct. of R.). A case which illustrates the confusion in this area is *Tarte* v. *Sarrazin*, (1933), 54 B.R. 99.

[79] Mignault, *op. cit*, t. 7, p. 257; Faribault, *op. cit.*, t. 12, p. 96 (but see also p. 97); *Price* v. *Sigma Construction Inc.*, [1966] C.S. 412 (Mitchell, J.); *Peters* v. *Baribeau*, [1953] C.S. 451 (Ferland, J.); *Mallette* v. *Schwartz*, [1945] C.S. 212 (A. Décary, J.); *Greenberg* v. *Germain*, (1941), 71 B.R. 17 (in this case the emphasis was on the tenant's right to have a lease resiliated on the ground of the building being incomplete, instead of his being obliged to sue for repairs); *Morrissette* v. *Fortier*, (1931), 50 B.R. 42; *Vezeau* v. *Siesdedos*, (1926), 32 R.L. n.s. 282 (Archambault, J.); *Clerk* v. *Poissant*, (1920), 57 C.S. 528 (Ct. of R.); *Masson* v. *Masson*, (1895), 7 C.S. 5 (Doherty, J.).

[80] Article 1660 C.C.:

Si, pendant la durée du bail, la chose est entièrement détruite par force majeure ou cas fortuit, ou expropriée pour cause d'utilité publique,

If, during the lease, the thing be wholly destroyed by irresistible force, or a fortuitous event, or taken for purposes of public utility, the lease

It is submitted that neither solution is a good one. To oblige the tenant to sue for repairs to rectify a defect, or to limit him to a reduction in the rent, is not realistic. The objective should be to provide a range of recourses that will best meet the facts of each individual situation.[81] We shall discuss this later.

One point is clear, however, and that is that the landlord is liable in warranty with respect to a defect whether he is aware of the same or not.[82] What about knowledge of the defect on the part of the tenant? It may be that the defect will be considered as an apparent one for him, thus leaving him without a recourse, unless he had reasonable cause to believe that the lessor was going to remedy it.[83] The tenant who is or becomes aware of a defect and does not complain, may find himself foreclosed from doing so on the ground that he has tacitly accepted its presence.[84] The courts are, however, generally loath to close the door on the tenant in this way.[85]

2. *The claim for damages.*

Unlike its counterpart in the *Code Civil*,[86] Article 1614 C.C. does not make any specific mention of the tenant's claim for damages caused by a defect in the premises. This means that Article 1641(3) applies:

Le locataire a droit d'action, suivant le cour ordinaire de la loi ou le bail est dissous de plein droit. Si la chose n'est détruite ou expropriée qu'en partie, la locataire peut, suivant les circonstances, obtenir une diminution du loyer ou la résiliation du bail; mais dans l'un ou l'autre cas, il ne peut réclamer des dommages-intérêts du locateur.	The lessee has a right of action in the ordinary course of law, or by is dissolved of course. If the thing be destroyed or taken in part only, the lessee may, according to circumstances, obtain a reduction of the rent or the dissolution of the lease; but in either case he has no claim for damages against the lessor.

[81] See heading III, *The need for reform, infra*, p. 388 *et seq.*

[82] Article 1614 C.C.

[83] See heading I, 2, *Defects giving rise to the warranty, supra*, p. 369 *et seq.*

[84] *Brisebois* v. *Bertrand*, [1944] R.L. 547 (Décary, J.); *Lemay* v. *McConomy*, (1932), 70 C.S. 531 (Chief Judge Roy); *Verrier* v. *Daragon*, (1925), 63 C.S. 202 (Archambault, J.); *Bertrand* v. *Noël*, (1904), 10 R.J. 367.

[85] See J. W. Durnford, *The Landlord's Obligation to Repair and the Recourses of the Tenant*, (1966), 44 Can. Bar Rev. 477, at pp. 481-482, and the authorities therein cited.

[86] Art. 1721 C.N.: «Il est dû garantie au preneur pour tous les vices ou défauts de la chose louée qui en empêchent l'usage, quand même le bailleur ne les aurait pas connus lors du bail.

S'il le résulte de ces vices ou défauts quelque perte pour le preneur, le bailleur est tenu de l'indemniser.»

par procédure sommaire, tel que réglé au *Code de procédure civile:*

3. Pour le recouvrement de dommages-intérêts à raison d'infraction aux obligations résultant du bail, ou des rapports entre locateur et locataire.

summary proceeding as provided in the *Code of Civil Procedure:*

3. To recover damages for violation of the obligations arising from the lease, or from the relation of lessor and lessee.

This article is of a general nature. Thus we are left with no guidance as to whether the landlord will always be liable for damages, whether he knew of the defect or not.[87] Some authorities, treating the situation as analogous to the vendor's liability for damages caused by the defect in the thing sold, use criteria similar to those contained in Articles 1527 and 1528 C.C. and hold that the landlord is liable only if the tenant proves that the defect caused the damage[88] and that the lessor knew or should have known of it,[89] or had been put in default

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[87] In France, it appears that the courts, interpreting Article 1721 C.N., hold the lessor to be liable whether he was aware of the defect or not, the sole effect of knowledge or lack of it being to vary the quantum of damages: Planiol et Ripert, *Traité pratique de droit civil français*, 2nd ed., t. 10, (Paris, 1956), no. 540, pp. 745-746.

[88] *Bertrand* v. *Cymbalista*, [1955] C.S. 434, at p. 436 (A. I. Smith, J.); *Pépin* v. *Joly*, [1944] C.S. 248 (A. Décary, J.); *Parrot* v. *Laberge*, (1939), 77, C.S. 181 (McDougall, J.). See also *Larouche* v. *Leahy*, [1958] B.R. 247; *Cooper* v. *Holden Co. Ltd.*, (1915), 48 C.S. 455 (Ct. of R.).

[89] *W. H. Thornhill Co.* v. *Avmor Ltd.*, [1959] C.S. 116 (Perrier, J.) (claim for damages to property due to overflow of furnace oil due to absence of two screw plugs in top of oil tank, which prevented the alarm whistle from operating, maintained — the Court said the lessor had failed to establish the removal of the plugs had not been done by one of its employees); *Bertrand* v. *Cymbalista*, [1955] C.S. 434 (A. I. Smith, J.) (claim for damages to property dismissed because tenant had failed to prove the cause of the fire was a defect or that the lessor knew of it); *Thibault* v. *Dumas*, [1947] B.R. 59 (claim for damages by tenant who had to move out while the premises were fumigated to remove fleas, dismissed; this is a confused majority decision with two dissents; Barclay, J., one of the majority, while holding that a lessor who was ignorant of a defect would not be liable for damages, would provide for an exception in the case of a defect inherent in the thing, for which he felt the lessor should always be liable); *Mallette* v. *Schwartz*, [1945] C.S. 212 (A. Décary, J.) (claim for damages due to bursting of four year old defective pipe in ceiling dismissed but cost of repairs granted); *Mongeau* v. *Sylvestre*, [1944] C.S. 276 (P. Demers, J.) (claim for damages arising from burst pipe hidden in wall dismissed); *Koscialyk* v. *Vineberg*, (1933), 71 C.S. 97 (Denis, J.) (claim for injuries caused by falling window concerning which lessor had been made aware of defect maintained, but lessor only liable for 50% of damages because of lessee's knowledge); *Lambert* v. *Bourassa*, (1927), 33 R.L. n.s. 437 (P. Cousineau, J.); *Leber* v. *Patenaude*, (1927), 33 R.L. n.s. 42 (Surveyer, J.); *Lemieux* v. *Viau Home Land Co.*, (1926), 64 C.S. 508 (Surveyer, J.) (a case relating to a state of disrepair); *Thaddée Brisson, Ltée* v. *Desbiens*, (1924), 37 B.R. 539; *Rémillard* v. *Desève*,

(1922), 28 R.J. 319 (Demers, J.); *Albeniti* v. *Baron*, (1921), 27 R.L. n.s. 424 (Ct. of R.); *Clerk* v. *Poissant*, (1920), 57 C.S. 528 (Ct. of R.); *Hingston* v. *Bénard*, (1916), 25 B.R. 512; (1918) 56 S.C.R. 17; *Mergeay* v. *Redon*, (1910), 16 R.J. 354 (Ct. of R.); *Granger* v. *Muir*, (1910), 38 C.S. 68 (Lafontaine, J.) (the lessor was ignorant of the defect but was held liable as he had supervised the construction himself; however, the action was based on quasi-delict as well as contract); *Central Agency, Ltd.* v. *Les Religieuses de L'Hôtel-Dieu de Montréal*, (1905), 27 C.S. 281 (Ct. of R.) (the same remarks apply to this case as to the immediately preceding one, except to add that the defendant-lessors had allowed the original building specifications to be departed from in certain important particulars); *Beaulieu* v. *Beaudry*, (1889), 16 C.S. 475 (Taschereau, J.) (claim for damages due to bursting of pipe by co-tenant dismissed); *Schimanski* v. *Higgins*, (1898), 13 C.S. 348 (Ct. of R.) (claim for damages due to fall on defective staircase dismissed — lessor not liable for defects arising after lessee takes possession unless the lessor knows of them); *Stanton* v. *Donnelly*, (1898), 13 C.S. 306 (Tellier, J.) (claim for damages due to partial collapse of building because of its not being strong enough to support tenant's machinery dismissed because lessor ignorant of defect); *Rae* v. *Phelan*, (1898), 13 C.S. 491 (Ct. of R.) (claim for damages due to flood from former municipal drains dismissed since owner unaware of defect); *Maillet* v. *Roy*, (1897), 12 C.S. 375 (Doherty, J.) (claim for damages due to dampness dismissed since lessor unaware of defect); *Masson* v. *Masson*, (1895), 7 C.S. 5 (Doherty, J.) (claim for damages arising from dampness dismissed because of lessor's ignorance); *Benson* v. *Vallière*, (1894), 6 C.S. 245 (Routhier, J.) (claim for damages due to unhealthiness of new house caused by defects dismissed because of lessor's ignorance); *Thibault* v. *Paré*, (1894), 3 B.R. 48 (lessor held liable in damages due to defects in drains since aware of same); *Juteau* v. *Magor*, (1892), 2 C.S. 428 (Pagnuelo, J.) (claim for damages due to bursting of frozen pipe dismissed because (a) not a defect and (b) lessor not aware); *Peatman* v. *Lapierre*, (1890), 18 R.L. 35 (Tellier, J.).

The lessor is liable for damages suffered by a tenant caused by a contractor doing repairs: *Brabant* v. *Fogel*, [1960] C.S. 549 (Collins, J.); and for damages caused by faulty repairs: *Ducros* v. *Feinstein*, [1964] R.L. 424 (Chief Judge Leduc, now Leduc, J.).

The lessor has no claim against the lessee for damages due to the bursting of pipes where the freezing is due to defective construction: *Davidson* v. *King*, [1915], 48 C.S. 392 (Ct. of R.).

to remedy it and had failed to do so.[90] Others declare that the lessor will be liable even if ignorant of the defect.[91] A third category does not even discuss the question of knowledge or ignorance of the defect.[92] There is also a tendency on the part of some to deny the tenant's recourse where he was aware or should have been aware

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[90] *Bertalan* v. *Huels*, [1968] B.R. 715 (an added reason for the dismissal of the tenant's claim for damage to property was that the defect was apparent); *Mt. Royal Furniture and T.V. Inc.* v. *Industrial Glass Co.*, [1964] C.S. 269 (Perrier, J.) (claim for damages due to flood maintained; lessee had put lessor in default concerning defect); *Liquornik* v. *Turret Construction and Housing Co.*, [1962] C.S. 423 (A. I. Smith, J.) (claim for reduction in rent and moving expenses due to noisy heating system granted); *Bernard* v. *Cymbalista*, [1955] C.S. 434 (A. I. Smith, J.) (claim for damage to property dismissed; tenant had not put lessor in default to rectify pretented defect alleged to have caused fire); *Julien* v. *Julien*, [1945] B.R. 189 (claim for damages caused by water pipe freezing dismissed because tenant had failed te repair door which did not shut properly and allowed cold air to enter and freeze the pipe, which constituted a tenant's repair); *Koznets* v. *Labbé*, (1933), 71 C.S. 561 (McDougall, J.); *Thaddée Brisson, Ltée* v. *Desbiens*, (1924), 37 B.R. 539; *Batt* v. *Lamarre*, (1923), 29 R.L. n.s. 474 (Archer, J.); *Griffith* v. *Litner*, (1922), 28 R.L. n.s. 13 (Ct. of R.); *Pilon* v. *Saindou*, (1920), 58 C.S. 215 (Ct. of R.); *Desloover* v. *Mansfield*, (1919), 25 R.L. n.s. 155 (Ct. of R.); *Pilon* v. *Beaudoin*, (1914), 20 R.L. n.s. 472 (Fortin, J.); *Hingston* v. *Bénard* (1916), 25 B.R. 512; (1918), 56 S.C.R. 17; *Pelletier* v. *Boyce*, (1902), 21 C.S. 513 (Andrews, J.); *Snodgrass* v. *Newman*, (1896), 10 C.S. 433 (Archibald, J.; conf. by Ct. of R.); *Johnson* v. *Brunelle*, (1886), 14 R.L. 219 (Mathieu, J.); *Acheson* v. *Poet*, (1885), 29 L.C.J. 206 (Caron, J.); *Charbonneau* v. *Duval*, (1885), 13 R.L. 309 (Mathieu, J.); *Fitzpatrick* v. *Darling*, (1896), 9 C.S. 247 (Curran, J.). In *Daigneau* v. *Levesque*, (1886), 30 L.C.J. 188, the Court of Appeal said the lessee should have put the lessor in default, but granted the recourse in damages anyway because the lessee contested the action and denied that damages had been suffered.

Contra: Mindlin v. *Cohen*, [1960] C.S. 114 (Judge Trudel) (claim for loss of property due te rats maintained). See also *Shorter* v. *Beaufort Realties (1964) Inc.*, S.C.M. 742,366, December 27, 1968, Mr. Justice Bélanger.

[91] *Lechien* v. *Quentier*, (1923), 61 C.S. 367 (Sévigny, J.); *Vyse Sons & Co.* v. *Stephens*, (1918), 24 R.L. n.s. 222 (Ct. of R.); *St-Lawrence Realty Co.* v. *Maryland Casualty Co.*, (1913), 22 B.R. 451; *Scanlan* v. *Holmes*, (1879), 2 L.N. 185 (Johnson, J.).

[92] *Chabot* v. *Paquin*, [1965] B.R. 425 (claim for property damage due to flood caused by defective drain in premises of upstairs co-tenant maintained under Articles 1612 and 1053 C.C.); *Houle* v. *Desrosiers*, [1960] C.S. 709 (M. Cousineau, J.) (claim for damages by tenant due to expulsion by municipal authorities because building not in conformity with by-laws maintained); *Dussault* v. *H. & W. Importing Co.*, (1925), 63 C.S. 4 (de Lorimier, J.); *Crowley* v. *Silverstone*, (1912), 18 R.L. n.s. 87 (Bruneau, J.); *Middleton* v. *Allard*, (1907), 13 R.L. n.s. 195 (Ct. of R.); *Beardmore* v. *Bellevue Land Co.*, (1906), 15 B.R. 43; *Wright* v. *Galt*, (1883), 6 L.N. 42 (Torrance, J.).

of the defect that caused the damage,[93] or where the damage was caused by the tenant's failure to effect a tenant's repair.[94]

The situation is further complicated by the fact that claims are frequently based and maintained on a quasi-delictual basis, and more particularly on the third paragraph of Article 1055 C.C.:

Le propriétaire d'un bâtiment est responsable du dommage causé par sa ruine, lorsqu'elle est arrivée par suite du défaut d'entretien ou par vice de construction.	The owner of a building is responsible for the damage caused by its ruin, where it has happened from want of repairs or from an original defect in its construction.

The quasi-delictual action clearly lies in favour of third persons,[95] such as visitors to the premises, and may also be invoked by the tenant's wife[96] or on behalf of his children,[97] for none of these are

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[93] *Verrier* v. *Daragon*, (1925), 63 C.S. 202 (Archambault, J.); *Lefebvre* v. *Dufresne*, (1925), 31 R.L. n.s. 394 (Bruneau, J.); *Villecourt* v. *Blais*, (1918), 53 C.S. 115 (Ct. of R.); *Hingston* v. *Bénard*, (1916), 25 B.R. 512; (1918), 56 S.C.R. 17; *Barry* v. *Quinlan*, (1918), 24 R.L. n.s. 126 (Ct. of R.); *O'Connor* v. *Flint*, (1908), 33 C.S. 491 (Ct. of R.); *Rivard* v. *Pelchat*, (1905), 28 C.S. 8 (Tellier, J.); *Cartier* v. *Durocher*, (1902), 22 C.S. 255 (Langelier, J.; conf. by Ct. of R.); *Mireau* v. *Allan*, (1894), 5 C.S. 433 (de Lorimier, J.).

[94] *Julien* v. *Julien*, [1945] B.R. 189.

[95] *Lemieux* v. *Sénécal*, [1959] B.R. 372; *Marin* v. *Alter*, (1936), 61 B.R. 385; *Martin* v. *Labelle*, (1932), 70 C.S. 503 (Mercier, J.); *Deguire* v. *Asch*, (1927), 65 C.S. 400 (P. Demers, J.); *Lamontagne* v. *La Société de Placement de Montréal*, (1924), 30 R.L. n.s. 18 (Surveyer, J.); *Limoges* v. *Labelle*, (1920), 26 R.L. n.s. 121 (Ct. of R.); however, Article 1055 C.C. applies only to an owner and not to a tenant who allows a third party to use a garage: *Barraclough* v. *Guay*, [1947] C.S. 234 (Fortier, J.). A lessor is not liable for damages caused to a third party by a tenant's use of a building in the absence of fault on his part: *Dupont* v. *Leaside Engineering Co.*, (1931), 50 B.R. 91. On the other hand, where a neighbour suffers damage due to defective drains, it is the lessor and not the tenant who is liable: *Pagano* v. *Lipson*, (1926), 32 R.L. n.s. 213 (de Lorimier, J.). As between himself and the landlord, it is the tenant who is liable rather than the lessor for damages caused to third parties by the leased premises unless the tenant can establish the damage resulted from the presence of a defect and the absence of negligence on his part: *Northeastern Lunch Co.* v. *Hutchins*, (1923), 35 B.R. 481. Where the tenant maintains a defective trap-door in the sidewalk in front of the leased premises, he is liable in damages towards third parties who are injured by it: *Feiczewicz* v. *Valiquette*, (1916), 49 C.S. 481 (McCorkill, J.). Where the tenant calls on the lessor to install extra heating facilities as provided for in the lease, he must allow the lessor access to the premises, and the lessor will not be liable to a sub-tenant for damages due to a default in the heating apparatus: *Gordon* v. *Demitre*, (1914), 46 C.S. 312 (Guérin, J.).

[96] *Camirand-Pineault* v. *Auger*, [1963] C.S. 102 (Mayrand, J.); *Beauregard* v. *St.-Amand*, [1962] C.S. 436 (Côté, J.) (it was also held in this case that the fact that repairs had been done by the tenant did not prejudice the wife's

parties to the lease and accordingly, they are not bound by a contract with the landlord.

The quasi-delictual action is also accepted by our court as to the tenant himself in claims against his landlord,[98] and this despite

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rights); *Emond* v. *Héritiers de Dame Lavigne*, [1947] C.S. 52 (Archambault, J.); *Kennedy* v. *Charest*, [1946] B.R. 289; *Dubuc* v. *Beaulieu*, [1942] B.R. 544; *Laterreur* v. *Lalonde*, [1942] C.S. 253 (Décary, J.); *Richer* v. *Normandin*, (1940), 78 C.S. 85 (McDougall, J.); *Brazeau* v. *Mourier*, (1934), 72 C.S. 503 (Guibault, J.); *Guaranteed Pure Milk Co.* v. *Cane*, (1933), 54 B.R. 473; *Guay* v. *Montpetit*, (1925), 31 R.L. n.s. 105 (Lane, J.); *Vineberg* v. *Foster*, (1903), 24 C.S. 258 (Archibald, J.); *Tremblay* v. *Gratton*, (1895), 8 C.S. 22 (Ct. of R.); *Elliott* v. *Simmons*, M.L.R., (1890), 6 B.R. 368.

[97] *Girard* v. *Demers*, [1948] R.P. 312 (Boulanger, J.) (by inference from the facts, though the specific reason given by the court was that the wording of the claim caused the action to be based on Articles 1053 and 1055 C.C. because a lack of maintenance and a state of age of a gallery railing were invoked); *Ouellette* v. *Martel*, (1942), 48 R.L. n.s. 289 (Loranger, J.); *Fisher* v. *Ouimet*, (1937), 75 C.S. 340 (Chase-Casgrain, J.); *Laberge* v. *Skelly*, (1931), 37 R.L. n.s. 189 (Surveyer, J.); *Collin* v. *Vadenais*, (1928), 44 B.R. 89.

[98] *Kuntz* v. *Les Immeubles Avignon Inc.*, [1968] C.S. 448 (Beaudoin, J.) (claim for bodily injuries from fall on uneven floor maintained); *Bertalan* v. *Huels*, [1968] B.R. 715 (claim for damage to property by tenant dismissed on ground, *inter alia*, that delictual liability not established); *Penny* v. *Kaplanski*, [1968] C.S. 270 (Challies, A.C.J.) (claim for bodily injuries from fall from balcony the railing of which collapsed maintained); *Ouimet* v. *L'Abbé*, [1965] B.R. 62 (claim for poisoning by gas escaping from central refrigeration unit maintained under Article 1054 C.C.); *Beauregard* v. *St.-Amand*, [1962] C.S. 436 (Côté, J.) (claim for bodily injuries from collapse of step maintained); *Belbin* v. *Tarte*, [1961] C.S. 234 (A. I. Smith, J.) (claim for bodily injuries resulting from fall on defective staircase maintained); *Northwestern National Insurance Co.* v. *Marier*, [1958] C.S. 565 (Batshaw, J.) (claim for damages to property due to backing up of city drains during storm because lessor had not installed safety valves maintained under Articles 1053 and 1054 C.C.); *Bourgoin* v. *Sullivan*, [1942] B.R. 593 (claim for damages by injured tenant caused by explosion of cooking gas due to absence of washer in pipe maintained under Articles 1053 and 1054 C.C.); *Dubuc* v. *Beaulieu*, [1942] B.R. 544 (claim by tenant for injuries suffered by his wife due to collapse of gallery maintained, with the court specifically holding that the liability under Article 1614 C.C. does not exclude that under Article 1055 C.C.); *Guaranteed Pure Milk Co.* v. *Cane*, (1933), 54 B.R. 473 (*obiter*, since claim was by tenant's wife); *Aero Insurance Co.* v. *Curtiss-Reid Aircraft Co.*, (1932), 70 C.S. 211 (P. Demers, J.), (1933), 55 B.R. 421; *Collin* v. *Vadenais*, (1928), 44 B.R. 89 (*obiter*, since child involved); *Granger* v. *Muir*, (1910), 38 C.S. 68 (Lafontaine, J.); *Central Ageney, Ltd.* v. *Les Religieuses de l'Hôtel-Dieu de Montréal*, (1905), 27 C.S. 281 (Ct. of R.). The tenant has a recourse in damages against a neighbouring proprietor whose defective walls collapse on the leased premises after a fire: *Evans* v. *Lemieux*, M.L.R., (1889), 5 B.R. 112.

the existence of a contract between them. There are several reasons for this. One is the tradition long observed by our courts to the effect that the existence of a contract will not take away the quasi-delictual recourses of a party.

There are also a number of concrete advantages insofar as the tenant is concerned. All he needs to do is prove that he has suffered damages caused by the "ruin" of a "building" belonging to the defendant owner (his lessor) and that the "ruin" was due to a want of maintenance or a defect in construction, and the owner will then be liable for the damages[99] unless he is able to establish that the damage was due to a fortuitous event or *force majeure*,[100] the act of a third party[101] or of plaintiff himself,[102] which grounds will rarely lie.[103] Moreover, the words "ruin" and "building" have been liberally interpreted so as to cover relatively minor mishaps, such as the collapse of a balcony railing or similar event.[104] Furthermore, the owner will be liable despite his ignorance of the defect causing the damage;[105] no putting in default to remedy the defect

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[99] *Sévigny* v. *Boismenu*, [1963] B.R. 323; *Brunet* v. *Borduas*, [1957] C.S. 432 (Montpetit, J.) (the action was dismissed because plaintiff failed to prove the existence of a defect); *Wright* v. *Blanchard*, [1951] C.S. 398 (Smith, J.); *Pepin* v. *Joly*, [1944] C.S. 248 (A. Décary, J.) (claim for damages suffered by child of tenant dismissed as no defect established); *Parrot* v. *Laberge*, (1939), 77 C.S. 181 (McDougall, J.) (claim dismissed since defect not proved); *Blais* v. *Lemieux*, (1921), 30 B.R. 410; *Cooper* v. *Holden Company, Ltd.*, (1915), 48 C.S. 455 (Ct. of R.) (claim dismissed since defect not proved); See also *Larouche* v. *Leahy*, [1958] B.R. 247 (action for damages caused by flood due to toilet in co-tenant's premises dismissed as defect not proved).

[100] See, for example, *Bénard* v. *Hingston*, (1918), 56 S.C.R. 17.

[101] See, for example, *Dodick* v. *Learmonth*, (1933), 54 B.R. 321 (where damages were caused by some stranger having drilled a hole in the upstairs drainpipe).

[102] See, for example, *Gariépy* v. *Jekell*, (1932), 70 C.S. 508 (de Lorimier, J.) (in which the tenant's wife threw herself against a balustrade in order to deliver a dog to a neighbour, and the railing broke).

[103] *Penny* v. *Kaplanski*, [1968] C.S. 270 (Challies, A.C.J.); *Blais* v. *Lemieux*, (1921), 30 B.R. 410; *Camirand-Pineault* v. *Auger*, [1968] C.S. 102 (Mayrand, J.).

[104] *Dame Camirand-Pineault* v. *Auger*, [1968] C.S. 102 (Mayrand, J.); *Penny* v. *Kaplanski*, [1968] C.S. 270 (Challies, A.C.J.); *Laterreur* v. *Lalonde*, [1942] C.S. 253 (Décary, J.); *Guaranteed Pure Milk Co.* v. *Cane*, (1933), 54 B.R. 473.

[105] *Belbin* v. *Tarte*, [1961] C.S. 234 (A. I. Smith, J.); *Bourgoin* v. *Sullivan*, [1942] B.R. 593; *Richer* v. *Normandin*, (1940), 78 C.S. 85 (McDougall, J.); *Guaranteed Pure Milk Co.* v. *Cane*, (1933), 54 B.R. 473 (the notes of Létourneau, J., are interesting in the distinction he draws between the knowledge of a defect being required by a *lessor* for him to be liable for damages, whereas an *owner* will be even if he is ignorant of the defect. Rivard, J., suggests that the lessor was deemed to know of the bad condition of the railing, so that he would be liable even on a contractual basis); *Curtis-Reid Aircraft Co.* v. *Aero Insurance*

is required;[106] and the only effect of knowledge of the defect or carelessness on the part of the tenant or its apparency will be to reduce the damage award.[107] Indeed, in relation to claims based on delict, it has been held that it is not up to the tenant to inspect the building and search for defects, but the *landlord* must do so from time to time and not await complaints,[108] and the fact that a defect is apparent actually seems to confirm the landlord's liability.[109] Besides, an exclusion of liability for damages in the lease will not always prejudice a tenant's action under Article 1055 C.C.[110]

It is not altogether surprising, in view of the foregoing, that the plea of Professor Paul-André Crépeau, in his article entitled *Des régimes contractuel et délictuel de responsabilité civile en droit civil canadien,*[111] to the effect that where the relations between the

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Co., (1932), 70 C.S. 211 (P. Demers, J.), (1933), 55 B.R. 421; *Collin* v. *Vadenais*, (1928), 44 B.R. 89; *Larocque* v. *Freeman's Ltd.*, (1916), 50 C.S. 231 (Bruneau, J.); *Troude* v. *Meldrum*, (1902), 21 C.S. 75 (Archibald, J.); *Allan* v. *Fortier*, (1901), 20 C.S. 50 (Larue, J.); *Tremblay* v. *Gratton*, (1895), 8 C.S. 22 (Ct. of R.).

[106] *Bertalan* v. *Huels*, [1968] B.R. 715; *Beauregard* v. *St.-Amand*, [1962] C.S. 436 (Côté, J.); *Belbin* v. *Tarte*, [1961] C.S. 234 (A. I. Smith, J.); *Fisher* v. *Ouimet*, (1937), 75 C.S. 340 (Chase-Casgrain, J.); *Brazeau* v. *Mourier*, (1934), 72 C.S. 503 (Guibault, J.); *Collin* v. *Vadenais*, (1928), 44 B.R. 89; *Dame Lamontagne* v. *La Société de Placement de Montréal*, (1924), 30 R.L. n.s. 18 (Surveyer, J.); *Beaudoin* v. *Dominion Clothing Co.*, (1908), 34 C.S. 157 (Ct. of R.); *Vineberg* v. *Foster*, (1903), 24 C.S. 258 (Archibald, J.).

[107] *Penny* v. *Kaplanski*, [1968] C.S. 270 (Challies, A.C.J.); *Kennedy* v. *Charest*, [1946] B.R. 289; *Koseialyk* v. *Vineberg*, (1933), 71 C.S. 97 (Denis, J.); *Guay* v. *Montpetit*, (1925), 31 R.L. n.s. 105 (Lane, J.); *Persichino* v. *Gratton*, (1922), 60 C.S. 35 (Ct. of R.) (in this case the lessor was held liable for damages even though he had advised the tenant of the defects and had them fixed as soon as possible).

[108] *Camirand-Pineault* v. *Auger*, [1968] C.S. 102 (Mayrand, J.); *Emond* v. *Héritiers de Dame Lavigne*, [1947] C.S. 52 (Archambault, J.); *Bois* v. *Décarie*, (1941), 47 R.L. n.s. 114 (Forest, J.); *Collin* v. *Vadenais*, (1928), 44 B.R. 89; *Larocque* v. *Freeman's Ltd.*, (1916), 50 C.S. 231 (Bruneau, J.); *Troude* v. *Meldrum*, (1902), 21 C.S. 75 (Archibald, J.).

[109] *Belbin* v. *Tarte*, [1961] C.S. 234 (A. I. Smith, J.); *Laterreur* v. *Lalonde*, [1942] C.S. 253 (A. Décary, J.).

[110] *Penny* v. *Kaplanski*, [1968] C.S. 270 (Challies, A.C.J.); *Collin* v. *Vadenais*, (1928), 44 B.R. 89 (*obiter*, since a child was involved, but it is interesting to note that the Court expressed the view that public order was at stake).

A flooding claim under Article 1055 C.C. was barred by an exclusionary clause in the absence of negligence on the part of the owner in *Lion Fastener Co.* v. *Gross*, [1964] B.R. 475.

[111] (1962), 22 R. du B. 501.

parties are governed by a contract, they should not be allowed to invoke a quasi-delictual recourse, should not have been the object of more general acceptance.[112] He is undoubtedly right in his submission that the contractual and delictual recourses are incompatible. However, so long as claims, especially in the realm of bodily injuries, will lie in the field of quasi-delicts and sometimes not in the field of contract, the courts will naturally continue to maintain actions under Articles 1053 and 1055 C.C. despite the presence of a lease contract.

The answer would probably lie in a fresh interpretation of Article 1614 C.C. on its merits. As we have seen, it is in broad general terms. There is no requirement that the defects be latent; nor is knowledge on the part of the landlord of the existence of a defect stated to be necessary in order for him to be liable for damages resulting therefrom. It is the courts which, embarrassed by the breadth and scope of the provisions, have tended to cut them down by reference to the more detailed and limiting rules of the contract of sale; then, wishing to maintain claims that would not have been admitted under the more restrictive rules drawn from the contract of sale, they relied on the delictual action.

It would appear that Article 1614 C.C. could be given the broad and liberal interpretation that would cause it to furnish as effective a recourse as does the delictual one. The justification for the limitations on the vendor's warranty against defects lies in the fact that the change of ownership puts the object entirely at the charge of the purchaser except insofar as it is affected by defects existing at the time of sale (in the absence of an express guarantee); a person acquiring a thing should be somewhat on his guard since it will be *his*.

In the contract of lease, on the other hand, the thing is not and never will be the property of the tenant. He will only be in temporary possession, and the landlord will have the obligation of furnishing him enjoyment. There is therefore, a continuing obligation on the landlord and a right on the part of the tenant to expect its fulfilment. It would therefore appear logical to give Article 1614 its full effect, unaffected by the more restrictive rules of sale, a contract of a different nature.

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[112] His views have been applied in: *J. Duncan Girard* v. *National Parking Ltd.*, S.C.M. 752,313, December 20, 1968, Mr. Justice Albert Mayrand. An appeal is presently pending: C.B.R. (Montreal) 11,844. See also, *Hôtel-Dieu St-Valier* v. *Martel*, [1968] B.R. 389.

3. *The effect of lease clauses excluding liability.*

It is not necessary to read many leases to receive the impression that the aim of many of their draftsmen is to reduce to a minimum the rights of the tenant and consequently the obligations of the landlord as well. One may sometimes be forgiven for wondering whether the lessee is left with any of the recourses that the law would give him.

However, while freedom of contract is still a general principle of our law, the courts have not idly sat by and allowed tenants to be stripped of all their rights. Indeed, they have gone much further than the rule set forth in Article 1019 C.C. to the effect that a contract is interpreted against the stipulator.

As to the clause that the tenant declares that he has examined the premises, has found them to be in good condition, and is satisfied therewith, the courts have written the same off as a *clause de style.* What is meant by this is not quite clear,[113] and the judgments that apply this appellation to a provision do not define it. However, it seems that a *clause de style* (a) is one that appears regularly in a certain type of contract, and (b) is disliked by the courts. In any event it is usually considered as relating only to the *apparent* condition of the premises[114] and as not relieving the landlord of his warranty against defects.[115]

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[113] See Perreau-Charmantier, *Petit Dictionnaire de Droit,* 2e éd.. (Paris, 1957), p. 59. This definition is attributed to Planiol & Ripert. See Planiol & Ripert, *Traité pratique de droit civil français,* 2e éd., t. 6, (Paris, 1952), pp. 483-4, no. 373 *bis.* See also Barraine, *Dictionnaire de Droit,* 3e éd., (Paris, 1967), p. 72, which is attributed to Ripert & Bélanger. Ripert & Bélanger, *Traité de droit civil,* t. 2, (Paris, 1957), p. 148, no. 374.

[114] *Lemcovitch* v. *Daigneault,* [1957] C.S. 178 (Collins, J.); *Glifllian* v. *Laporte,* (1929), 35 R.J. 440 (Surveyer, J.); *Lemieux* v. *Viau Home Land Co.,* (1926), 64 C.S. 508 (Surveyer, J.).

Such a clause is ineffective where there is a state of uninhabitability; *Collin* v. *Vadenais,* (1928), 44 B.R. 89; *Lair* v. *Siminovitch,* (1914), 20 R.L. n.s. 109 (Bruneau, J.). Where the tenant really knows the premises (*e.g.,* from previous occupancy), he will be bound by his declaration: *Leber* v. *Patenaude,* (1927), 33 R.L. n.s. 42 (Surveyer, J.); *Marion* v. *Théoret,* (1925), 31 R.L. n.s. 313 (Surveyer, J.) (the exception of uninhabitability would presumably still apply). The same may also apply where the tenant remains in occupation for a month without complaining: *Verrier* v. *Daragon,* (1925), 63 C.S. 202 (Archambault, J.).

[115] *Penny* v. *Kaplanski,* [1968] C.S. 270 (Challies, A.C.J.); *Désautels* v. *Préfontaine,* (1912), 42 C.S. 401 (Saint-Pierre, J.); *Allan* v. *Fortier,* (1901), 20 C.S. 50 (Larue, J.).

This is especially so when the court maintains the action on the basis of a quasi-delict: *Penny* v. *Kaplanski,* [1968] C.S. 270 (Challies, A.C.J.); *Lemieux*

While in principle it is valid for a lessor to exclude his obligation to repair,[116] this clause will be ineffective where there is uninhabitability.[117] A clause relieving the lessor of having to repair is sometimes enforced as a bar to an action in damages;[118] on other occasions, it is not,[119] especially where the claims is by a third party.[120]

III. The Need for Reform.

It is evident that reforms are needed in this field of the landlord's warranty against defects — both on account of the confused state of the law as it now stands, and in order to prevent injustices.

The *Code* distinguishes between the warranty against defects,[121] on the one hand, and the lessor's obligation to repair,[122] on the other. This is logical enough, since a state of disrepair and a defect are two distinguishable conditions. However, while the *Code* spells out in Article 1641(1) C.C. how the tenant is to enforce his rights to have repairs carried out, there is no equivalent pro-

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v. *Sénécal*, [1959] B.R. 372 (a third party was involved); *Guaranteed Pure Milk Co.* v. *Cane*, (1933), 54 B.R. 473.

A clause obliging a lessee to suffer large repairs without a reduction in the rent affects only those that become necessary during the lease and not defects existing at the start of the lease: *Masson* v. *Masson*, (1895), 7 C.S. 5 (Doherty, J.).

[116] *Grondin* v. *Parent*, [1948] C.S. 41 (Chief Judge Roy); *Verrier* v. *Daragon*, (1925), 63 C.S. 202 (Archambault, J.); *Marion* v. *Théorêt*, (1925), 31 R.L. n.s. 313 (Surveyer, J.); *Rivard* v. *Pelchat*, (1905), 28 C.S. 8 (Tellier, J.); *Deault* v. *Ledoux*, (1894), 5 C.S. 293 (Ct. of R.). This clause has been held not to apply to a state of disrepair existing at the time of the lease: *Glifllian* v. *Laporte*, (1929), 35 R.J. 440 (Surveyer, J.). A clause excluding repairs does not relieve lessor from warranting that the heating system of the premises is in operating condition: *Frappier* v. *Perreault*, (1924), 62 C.S. 103 (Rinfret, J.).

[117] *Grondin* v. *Parent*, [1948] C.S. 41 (Chief Judge Roy); *Eusanio* v. *Thuot*, [1947] C.S. 46 (Archambault, J.).

Perhaps the following case could be included in this category of uninhabitability: *Désautels* v. *Préfontaine*, (1912), 42 C.S. 401 (Saint-Pierre, J.) (defective refrigerator in butchershop).

[118] *Mongeau* v. *Sylvestre*, [1944] C.S. 276 (P. Demers, J.) (flooding damage due to burst pipe); *Marion* v. *Théoret*, (1925), 31 R.L. n.s. 313 (Surveyer, J.) (claim resulting from bodily injuries); *Brown* v. *Lamarre*, (1916), 25 B.R. 492 (claim for bodily injuries); *Maillet* v. *Roy*, (1897), 12 C.S. 375 (Doherty, J.).

[119] *Bois* v. *Décarie*, (1941), 47 R.L. n.s. 114 (Forest, J.); *St. Lawrence Realty Co.* v. *Maryland Casualty Co.*, (1913), 22 B.R. 451.

[120] *Marin* v. *Alter*, (1936), 61 B.R. 385.

[121] Article 1614 C.C.

[122] Article 1613 C.C., *inter alia*.

vision for defects. This lacuna has resulted, we have seen, in divergent views: one being that the tenant should sue for repairs to rectify the defect under Article 1641(1) C.C., the other being that the proper recourses are the redhibitory action to vacate the lease where the defect is a major one and the *quanti minoris* action to obtain a reduction in the rent where the defect is a less serious one. A reduction in the rent may not, however, be as satisfactory to a tenant as a recourse in rectification of the defect; on the other hand, in some instances, a tenant may prefer to have a lower rent instead of having the defect remedied.

Then there is the problem that in many instances there is no clear indication as to whether the difficulty complained of by the tenant constitutes a defect or a state of disrepair, with the resulting danger that he might find his action dismissed because of a finding that he had formulated his action on the basis of the wrong recourse.

It would seem then, that while it would be appropriate to retain the separate obligations of the landlord as to repairs and as to the warranty against defects, the tenant's recourses with respect to both should be combined into one provision that would be applicable to either defects or disrepair. Thus, where premises were affected by a defect or needed repairs, the tenant could sue to have the lease cancelled where his enjoyment was seriously affected (after putting the lessor in default to remedy the situation); or, where his enjoyment was merely reduced, sue either to have the necessary repairs or other rectification effected (either by the lessor himself or by the lessee at the lessor's expense), or to obtain a reduction in the rent, according to the circumstances and in the discretion of the court.

We next consider the claim for damages. We are here faced with confusion arising out of the custom of the courts of granting claims based on quasi-delict when the relations between the landlord and his tenant are governed by their contract. As we saw, the reason for this is no doubt in part at least due to the fact that the recourse under quasi-delict is more favourable, because once the tenant has established that the damage was caused either by a defect or a want of repairs, the landlord as owner will be liable, whether he was aware of the defect or not, whereas the majority view is that the recourse in damages under the contractual warranty against defects under Article 1614 C.C. lies only where the lessor knew of the defect or had it brought to his attention.

There is also a certain illogic in having the lessee himself furnished with a much lesser recourse under his contract of lease than members of his family or even third parties have under quasi-delict.

The appropriate reform would appear to be to broaden the tenant's recourses for damages under the lessor's warranty against defects. Perhaps the new principle could be that the lessor would be liable in damages under his warranty even though ignorant of the defect, subject to his being permitted to plead that the damage was due to a fortuitous event, *force majeure*, the act of a third party, or the fault of the tenant himself. The basis would be that where both the landlord and the tenant were unaware of the defect before it caused the damage, both would be innocent parties, hence the one to bear the burden of the damage should be the owner, whose thing it is and who is bound to the warranty that it is not defective.[123]

It would be for the courts to determine when the defence that the damages were due to the fault of the tenant himself would lie. Perhaps it would be applicable where the tenant knew or should have known of the defect or state of disrepair and had done nothing to have it remedied, such as putting the landlord in default to rectify it. Another instance might be where the damage was caused by the tenant's failure to carry out tenant's repairs.

It is to be hoped that an important result of a broadening of the grounds for a tenant's recourse for damages under the landlord's obligation to warranty against defects would be that the courts would no longer continue to apply a quasi-delictual recourse to what is a contractual situation.

Then there is the problem of those lease clauses which purport to remove all or an important part of the tenant's rights. While such clauses have to a great extent been ignored by the courts, they nonetheless may still have the effect of denying a tenant's recourse. While freedom of contract is a principle that still forms part of our law, it would seem appropriate to invalidate the effect of such clauses, at least insofar as bodily injuries are concerned.

IV. Conclusion.

The landlord owes a warranty against all defects in the leased premises, which prevent or diminish their use, whether known to him or not (Article 1614 C.C.). This provision is deceptive in its

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123 It seems that in France the courts have opted for holding the landlord liable whether he was aware or not of the defect, the only difference being that in the case of ignorance, the landlord is only liable for the damages that were or could have been foreseen at the time the lease is entered into, whereas where he knew of the defect he is liable for all the damages: Planiol et Ripert, *op. cit.*, t. 10, no. 540, pp. 745-746.

apparent clarity, for it is too brief and leaves unanswered too many questions.

Faced with the question as to whether the warranty covers apparent as well as latent defects, the courts have decided in the negative, without, however, requiring the tenant to make more than an ordinary examination of the premises.

As to the fact that the *Code* has separate provisions for the landlord's warranty against defects (Article 1614 C.C.) and his obligation to repair (*inter alia*, Article 1613 C.C.), the courts have tended to allow the distinction to become blurred. This is due to the difficulty in many instances of determining whether a situation involves a defect or a state of disrepair, and to the fact that while the *Code* spells out the recourses where repairs are needed (Article 1641(1)), it does not do so with the same clarity with respect to defects.

When it comes to the claim for damages caused by a defect, there is a double confusion. Firstly, the courts have been maintaining actions by tenants against their landlords based on quasi-delict despito the existence of their contract of lease. Secondly, where the claim is regarded as being of a contractual nature, the question arises as to whether there is liability for damages where the landlord was ignorant of the defects, with the answer being generally in the negative. Thus, not only have quasi-delictual recourses been allowed where the relations of the parties were subject to a contract, but these recourses have been broader because of knowledge of the defect on the part of the owner under article 1055 C.C. being unnecessary.

There is accordingly a need for reform. The tenant's recourses as to defects and states of disrepair should be unified, and the claim for damages based on the warranty against defects arising out of the contract of lease should be rendered more satisfactory, with, hopefully, a by-product being the eclipse of the quasi-delictual action insofar as the tenant's claim damages against his landlord is concerned.