THE LESSEE'S RIGHT TO REPAIR AT THE EXPENSE OF THE LESSOR

by John Durnford*

It is a cold day in mid-winter. You receive an urgent call from a client who is a manufacturer. He carries on his operations in leased premises. The lease is in its third year (it has a five year term). Your client tells you that the steam boiler by means of which the building is heated has rotted from old age, it has become impossible to heat the premises properly, and that the Provincial inspector of Pressure Vessels has just condemned the boiler and has ordered that the heating system be turned off immediately. You say to yourself that what is involved is a lessor's repair.

What is your client to do? You advise him that he should put the lessor in default to effect the required repairs within a certain delay, failing which he will be entitled to abandon the premises on account of their being uninhabitable.[1] You assure your client that he will have this right of abandonment regardless of whatever clause there may be in the lease relieving his lessor of the obligation to make repairs, as it is of the essence of the contract of lease that enjoyment of the thing be furnished to the lessee.[2] You continue by stating that shortly after vacating the premises, an action in cancellation of the lease should be taken against the lessor.[3]

Your client, however, interrupts you while you are reciting the rules relating to abandonment of leased premises, and states that he does not want to vacate, as his plant is busily engaged in manufacturing bathing suits which will have to be ready for delivery to the stores not later than April or May if they are to have any chance of being sold — he will not be able at this late date to locate another suitable plant to which to move his machinery and start operations again. What he wants to do is to have the boiler repaired immediately. He understands that this can be done by a heating contractor in the matter of a few days, but that the cost will be quite high.

On repeating to your client the suggestion that he ask his lessor to do the repairs (in the hope that he will), you are told that the relations between the two parties to the lease are strained. The lessor has for some time been most uncooperative. In fact, he has been trying to get the lessee to move out in order that he may re-let the building to somebody else at a higher rate (rentals for that type of accommodation having gone up). Consequently, the

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[1] *Broadway Properties Limited v. Les Editions Faust Limitée* [1958] S.C. 548 (A.I. Smith, J.); *Kaunat v. Dame Michaud* 1960 Q.B. 1056.

[2] *Lacroix v. St. Pierre* (1903) 9 R. de J. 463 (Lavergne, J.).

[3] *Broadway Properties Limited v. Les Editions Faust Limitée*, supra.

lessor will not be likely to effect the repairs. Furthermore, he is of doubtful solvency, with the result that any subsequent claim against him for damages resulting from the failure to repair following the putting in default will probably be illusory.

What your client wants to do is this: have the boiler put back into service by himself instructing the heating contractor to do the required repairs, even though the repairs in question would constitute lessor's repairs, and then claim reimbursement from the landlord. Your immediate reaction is that in any event the lessor must first be put in default to do the repairs within a certain period if there is to be any chance of collecting from him later.[4] As your client is in a great hurry and you yourself are hardpressed, your next move may well be to consult that handy and generally reliable authority, Snow's *Landlord and Tenant*, third edition, in which will be found the following passage on page 123:

> "A tenant who has made necessary repairs himself, which he could have forced his landlord to make, has a right to reimbursement even if not authorized to do so by the court . . .";

In support of this statement are cited the judgments in *McCaw v. Barrington*[5] and *Fauteux v. Beauvais*[6].

If the lessor is duly put in default to repair, and fails to do so within the specified period; if the lessee goes ahead and has the boiler fixed at a substantial cost; if subsequently you take an action on behalf of the lessee in reimbursement against the lessor; and if you do not do any further legal research until the eve of the trial, you may spend a sleepless night wondering whether the court will agree with your advice to the tenant that he could safely proceed with the repaits.

The question as to whether a lessee has the right to carry out urgent repairs to the premises leased by him without having first obtained judicial authorization is a knotty problem, but one that does not appear to have received much attention on the part of our writers. Thus Mignault, in Vol. VII of "*Le Droit Civil Canadien*", in discussing the various recourses of the tenant at page 324 *et seq.*, does not directly consider this problem. The same remark applies to Faribault.[7]

The rights and recourses of the lessee in relation to repairs are dealt with by Article 1641 C.C., which reads in part as follows:

> "The lessee has a right of action . . . :
> 1. To compel the lessor to make the repairs and ameliorations stipulated in the lease, or to which he is obliged by law; or to obtain authority to make the same at the expense of such lessor; or, if the lessee so declare his option, to obtain the rescission of the lease in default of such repairs or ameliorations being made . . ."

Our first reaction may be to question whether the recourses set forth in this article are limitative. Is the lessee who occupies premises in which repairs

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[4] *Ginchereau v. Lachance* (1890) 13 L.N. 285, Routhier, J.

[5] M.L.R. (1888) 4 S.C. 210.

[6] (1916) 49 S.C. 141 (in Review).

[7] *Traité de Droit Civil*, Vol. XII, pp. 213 *et seq.*

need urgently to be done but who does not wish to abandon, obliged to await helplessly for several months until the rendering of a judgment, either ordering the lessor to effect repairs or authorizing the lessee to make them at the lessor's expense, by which time it may be much too late?

There are numerous authorities applying the provisions of article 1641 as to the right of the lessee to sue to compel the lessor to repair or to be authorized to repair,[8] and some cases have gone further and held that the lessee's rights are limited to the recourses provided for by the article[9], though it has also been held that the lessee's rights are not limited to the provisions of this article, such as Mr. Justice Stein having decided that a lessee may withhold the payment of the rent until the lessor has repaired the heating system,[10] and the Court of Appeals having stated that the lessor cannot force the lessee to furnish the premises if he has not fulfilled his own obligations.[11] None of the foregoing cases, however, deal directly with the problem of a claim by a lessee for reimbursement of the cost of repairs that he has actually carried out.

The judges that have been faced with the question that we are considering have been divided in their opinions. Let us now examine these judgments.

In the case of *Spelman v. Muldoon*,[12] the judgment was rendered by Mr. Justice Mackay of the Superior Court. The tenant was suing the landlord for *inter alia* the sum of $500 as the cost of necessary repairs which he alleged he had been obliged to make to the leased premises. The defendant landlord filed an inscription in law against this claim on the grounds that the tenant had not alleged having sued to compel the defendant to make the repairs or having put the defendant in default. Without any discussion of principles in the judgment, the court maintained the inscription in law and struck out the claim for the $500 on the basis that under article 1641, a tenant must put his landlord in default by action to make the repairs and obtain the authority of the court to do them in case of default by the landlord. Thus the matter appeared so straightforward to Mr. Justice Mackay and to fall so clearly within art. 1641, that he felt justified in denying the tenant a trial on the merits of the claim without being obliged to give further reasons.

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[8]Mignault, VII, pp. 324 to 327; Faribault, XII, p. 214; *Boulanget v. Doutre* (1851) 4 L.C.R. 170 (S.C. in Review); *Pagels v. Murphy* M.L.R. (1886) 3 S.C. 50 (S.C. in Review); *Charlebois v. Tate* (1901) 7 R. de J. 574 (Lavergne, J.); *Stagg v. Frigon* (1911) 17 R.L.n.s. 49 (S.C. in Review); and *Dagenais v. Gauvreau* (1923) 61 S.C. 447 (Martineau, J.).

[9]*Robinson v. St. Lawrence Investment and Trust Company* (1921) 27 R.L.n.s. 409 (Martineau, J.); *Benoit v. Racicot* (1921) 27 R.L.n.s. 193 (S.C. in Review); *Boucher v. Cadieux* (1929) 35 R.L.n.s. 325 (Archambault, J.).

[10]*Trépanier v. Thibodeau* (1931) 37 R.L.n.s. 325.

[11]*Gareau v. Martineau* (1927) 43 K.B. 569 — see especially the remarks of Chief Justice Lafontaine in relation to article 1641 at p. 577.

[12](1869) 14 L.C.J. 306.

Mr. Justice Gill of the Circuit Court rendered the judgment in *Heney v. Smith.*[13] The tenants were claiming from the landlord the sum of $58.05, being the cost of a safety valve which they had placed on a boiler in the leased premises, and for certain other repairs. Apparently some of the repairs would normally have been landlord's repairs and some of them tenant's repairs, but the court found that even in the case of the latter they had been necessitated by age. It was held that the installation was absolutely urgent and ordered by the boiler inspector on pain of all operations being halted, and that it had been established that the prices charged were the current prices and that the landlord had not proved that he could have better or more cheaply executed them.

The report discloses that Mr. Cross, the attorney for the landlord, argued that his client should have been put in default by a suit or at least by a notice. Notwithstanding this argument and the preceding judgment of *Spelman v. Muldoon*, the Court upheld the tenant's claim for the reimbursement of the cost of all the repairs, but made no reference either to art. 1641 or to previous authorities. The judge failed to enter into a discussion of judicial principles — he apparently felt that the urgency of the repairs coupled with the satisfactory manner in which they were done and the reasonableness of the prices were alone sufficient justification for the decision.

We now come to the two decisions relied on in support of the statement in Snow (cited above) to the effect that a tenant may obtain reimbursement from his landlord for the cost of necessary repairs even where the tenant has effected them without the prior authorization of the court, namely: *McCaw v. Barrington*, and *Fauteux v. Beauvais*.

In *McCaw v. Barrington*, the leased house was established as having been in a poor and dangerous condition, (e.g. the roof leaked in January and the stairways were seriously in need of repair), and in the lease the lessor had actually contracted to put the premises in proper condition. The tenant had a notarial protest served on the landlord specifying what repairs were needed and requiring them to be started within forty-eight hours, failing which the tenant would perform them at the lessor's expense. The lessor having not acted, the lessee then went to work, resulting in a claim for reimbursement in the amount of $111.93 for necessary repairs. Faced with this claim, the Defendant argued that a tenant has no right to make or to be reimbursed for repairs without a judgment of the court.

Faced with this defence, Mr. Justice Davidson met head on the problem in question posed by art. 1641. He began by laying down the general principle that the article embodies "more than a method of procedure. It involves a limitation of right, and in ordinary cases, the lessee cannot be reimbursed for repairs made without an authorizing judgment".[14] Having set down the

[13](1887) 10 L.N., 333.

[14]*Op. cit.*, p. 211.

foregoing principle, how did Mr. Justice Davidson justify his granting of the tenant's claim for reimbursement? He did so by virtue of the "maxime générale que personne ne doit s'enrichir des dépouilles d'un autre" which he applied to the problem of the tenant who has gone ahead and repaired without prior judicial authorization, but subject to the strict limitations of "cases of urgent necessity, or where the premises are in a condition dangerous to life or health..." The authority of even this statement in favour of the tenant, is however, detracted from by the statement that the lessor visited the premises during the course of the repairs and made no objection to them, so that "he must be held to have acquiesced in them . . ."[15] That the lessee's claim, where granted, must be for only essential repairs, is borne out by a statement to that effect in the judgment, and a reduction by the court of the amount in question.

In *Fauteux v. Beauvais*, at the start of the term of the lease the premises were uninhabitable and the tenant could not move in right away. Following a notarial putting in default, the landlord made some repairs, but when the lessee began occupation, largely owing to the repairs the landlord had carried out the walls were in a poor state of repair and needed to be papered or white-washed, which work the tenant proceeded to have done at a cost of $59.40. The Superior Court (Martineau, J.) merely stated that the tenant was justified in performing the work himself and granted the claim for reimbursement. Art. 1641 was not discussed. *McCaw v. Barrington* was the sole authority cited in support of the decision, which presumably means that the criteria set down by Davidson, J. in that case were observed with the consequence that this judgment cannot be considered as in any way broadening the grounds on which a tenant may claim. The Court of Review simply confirmed Mr. Justice Martineau's judgment.

So much for the "pre-Snow" cases. The problem does not appear to have again been the subject of a reported judgment until the case of *Lambert* et al *v. Dame Lacroix*[16]. In this instance, the leased premises, being a restaurant, were damaged by fire, and the lessor, under the impression that the fire had cancelled the lease, did not proceed with the making of repairs. The fire occurred on March 13, the tenants put the lessor in default to repair by letter dated April 16, the lessor replied by letter dated April 30 that the repairs would shortly be executed, the tenants again wrote on May 1 advising the defendant that if the repairs were not begun by the 4th they would do them themselves which they proceeded to do, and on May 12 the landlady resorted to an injunction to have the work halted because the tenants did not have the right to do it without her consent. It is to be noted that seven weeks had passed between the date of the fire and the commencement of repairs by the tenants.

With the foregoing facts before it, the Court had to decide whether the tenants should have obtained prior judicial authorization before starting to

[15] *Op. cit.*, p. 214.

[16] (1954) S.C. 81 (Batshaw, J.).

repair. The writer can do no better than to quote the words used by Mr. Justice Batshaw (pp. 83-84):

> "The right of a tenant to compel the lessor to make repairs to which he is obliged by law, or to obtain authorization to make them at the lessor's expense is undisputed. Art. 1641 C.C. specifically grants this right, and it has been frequently upheld in practise.
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> However, the right of a tenant to make the repairs himself *without prior authorization from the Court* and merely after putting the lessor in default, is not nearly so clear. Some French authors support its existence, but their views seem to be based largely on decisions which stress that such repairs must be of absolute necessity, of uncontroverted urgency and of little importance as to amount. It is conceivable that exceptional circumstances might arise where a tenant should be excused for having made urgent, necessary and limited repairs in order to prevent serious or irreparable loss. However, the facts of the present case do not disclose a situation that would warrant the Court in finding that there was just cause for departing from the general rule which requires prior authorization of the Court. To effect such departure lightly and except for very grave reasons would open the door to many abuses and complications, for, as stated by Laurent in discussing this question:
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> "Il ne faut pas apprendre aux hommes à se mettre au-dessus de la loi".[17]

It should be noted, however, that the lessees had not contented themselves with merely repairing so as to restore the premises to their former condition. Instead, they made "extensive repairs involving even the alteration of the façade of the premises . . ."[18] Thus they seem to have stepped outside of the strict realm of making repairs and made alterations, which of course a tenant has no right to do as the premises are not his property.

Despite the statement in the judgment that, as a general rule, a lessee may only repair on having received the prior authorization of the court and that there was no just cause in this instance to depart from this rule, we find towards the end of the judgment the following words (p. 85):

> ". . . it (the Court) reserves plaintiffs' rights for reimbursement of useful repairs, if any, effected to the premises, to the extent that defendant may have benefited therefrom . . ."[19]

Has not the word "useful" a broader meaning than the expressions "repairs . . . of absolute necessity, of uncontroverted urgency and of little importance as to amount", and "urgent, necessary and limited repairs in order to prevent serious or irreparable loss"? Was not the landlady being left open to a claim for repairs accomplished before the injunction that might not have been strictly necessary? Presumably the answer is that the word "useful" was being used in relation to the necessary repairs that the landlady would have to perform.

What conclusions are to be drawn from an examination of art. 1641 and the jurisprudence in connection therewith? The first is that the Courts may not always follow the statement in Snow to the effect that a tenant may claim reimbursement from the lessor of necessary repairs which he could have forced him to do, logical and sensible though that statement may be.

Secondly, there seems to be a tendency on the part of the courts to consider the recourses of the tenant provided by art. 1641 to be limitative, thus forcing the tenant to obtain the prior authorization of the court before effecting repairs

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[17]Laurent, Droit civil (1878), 3e éd., t. 25, n. 112, p. 121.

[18]*Op. cit.*, p. 84.

[19]*Op. cit.*, p. 85.

and thereby excluding the possibility of the tenant's repairing after a mere putting in default and then claiming reimbursement.

Thirdly, the Courts seem willing to make an exception to the foregoing rule and to maintain the tenant's claim for reimbursement despite the absence of prior judicial authorization when the following circumstances are present: that the repairs are not only absolutely necessary (as opposed to merely useful), but of great urgency and of small amount, and that the lessor has been put in default to effect them. Presumably these criteria would result in your client losing the hypothetical case posed at the beginning of this article, as the cost of repairing the boiler would be high.

The judges are, of course, the prisoners of the law, and no doubt feel that the tenant is limited in his recourses as to repairs by the provisions of art. 1641. However, that the judges are not always happy with the limitations of the article is borne out by those cases where they have maintained the claims for reimbursement, but the amounts involved in these cases have proven to be small. On the other hand, it also appears that when more expensive repairs are in issue, the courts tend to consider the provisions of art. 1641 to be sound, and that it would be undesirable for the tenant to be given a free hand in to making these repairs normally at the charge of the lessor.

What is the philosophy underlying the restrictive nature of art. 1641? Some hints are given in various judgments: Thus, for example, to allow the tenant to effect lessor's repairs of his own volition would constitute taking the law into his own hands[20] and a tenant, unlike a usufructuary, a purchaser subject to a right of redemption or a possessor as proprietor in good faith, is merely temporarily controlling the property as simple occupier.[21] The idea seems to be that a lease merely entitles a lessee to temporary occupation and enjoyment of another person's property and that accordingly the tenant should not have a free hand with respect to such property; hence the lessor-owner is the only one entitled to carry out the major repairs, subject to the sanction of a negligent lessor being ordered to repair by the court, with the lessee only being permitted to repair after the necessity for the repairs has been established by the court and the lessor has failed to perform them.

How fair, however, is this theory to your client in the hypothetical case we have given, where he is faced with an uncooperative landlord? Here we are faced with a conflict between the owner's right to look after his property as he sees fit, subject only to receiving a court order, and the tenant's right to enjoyment of the property with his only sanction in law a possible claim for damages which may either be illusory or unable to compensate him fully for his losses. Which interest should override, that of the lessor or that of the lessee? It is our submission that in the circumstances we have envisaged, the lessee should be favoured.

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[20] *Lambert* et al *v. Dame Lacroix* (1954) S.C. 81 at p. 84.

[21] *McCaw v. Barrington*, M.L.R. (1888) 4 S.C. 210 at pp. 211-212.

In support of this submission, we have the judgments condemning lessors to reimburse their lessees for repairs that were absolutely necessary, of great urgency and of small amount. Why should there be imposed this condition of a small amount? Why should a tenant who is leasing big and complex premises, where large and expensive repairs might be required, be in any worse position than a tenant of modest premises involving modest repair costs? Provided that the first two criteria of absolute necessity and great urgency were met, why require the third, namely, of small amount? Should not the third criterion be replaced by the obligation of the lessee to establish that the cost of the repairs was in accordance with current prices and that the lessor could not have more cheaply executed the repairs[22], with the sanction that the Court could refuse to grant either a part or the whole of the claim for reimbursement?[23] The lessor would also be protected, under the criterion of "absolute necessity", from having to pay for changes or improvements to the premises. In other words, the lessee would have to prove that he had merely restored the premises to their proper condition. The lessor's protection would lie in his being able to take injunction proceedings if the lessee began making changes rather than mere repairs, notwithstanding his right to claim damages. What about the possibility that the tenant might, in repairing, make substantial changes to the premises which were not to the liking of the lessor or reduced their value, and leave the lessor with only an illusory claim for damages such as we suggested the tenant might have if the lessor did not act quickly enough? We feel that on balance and in general the lessee would stand to lose more if he were not allowed to repair without court authorization than an alert lessor would stand to lose if his lessee did have the right to go ahead after merely putting the lessor in default.

Is the foregoing submission that the lessees be permitted to effect lessor's repairs under certain circumstances really abhorrent to the principles of our law relating to leases (even though art. 1641 as presently drafted may prevent its application)? We submit that it is not. While art. 1641 is a reproduction of a previous statutory enactment, its sources go back *inter alia* to Pothier and Domat. Walton[24] tells us that our civil code is a very brief summary of the whole of the civil law, and as a result of its being so condensed we may have to refer to the sources of an article (e.g. Pothier) to clarify ambiguities, as the code may put into three lines what Pothier took a page to explain.

On examining Pothier's "Traité du Contrat de Louage" we find that section 130 and the first part of 131 read as follows:

> 130. Pareillement, à l'égard des maisons, quoiqu'un locataire ne soit pas facilement écoute à demander le remboursement des réparations qu'il a faites sans en avertir le locateur lorsqu'il le pouvait; néanmoins s'il est bien constant que ces réparations étaient indispensables, le

[22] *Heney v. Smith*, supra.

[23] *McCaw v. Barrington*, supra.

[24] "The Scope and Interpretation of the Civil Code of Lower Canada" at pp. 92-93 and 127-128

locateur doit être condamné à rembourser au locataire ce qu'il en a coûté, n'étant pas juste qu'il profite aux dépens du locataire: *Neminem Aequum est cum alterius damno locupletari.*

131. A l'égard des impenses seulement utiles qu'un locataire aurait faites, il ne peut pas s'en faire rembourser par le locateur qui n'a point donné ordre de les faire;

In Domat, Vol. II, Title IV, Section III, paragraph 7, appears the following passage:

Si le preneur se trouve obligé à quelque dépense pour la conservation de la chose louée, comme si le locataire d'une maison a appuyé ce qui était en péril de ruine, ou s'il a fait quelque autre dépense nécessaire dont il ne fût point tenu par son bail, ni par l'usage des lieux, le bailleur est obligé de l'en rembourser.

The reader may now object that while we are entitled to refer to the sources of an article to clarify ambiguities, not only is art. 1641 not ambiguous, but it is evident that the codifiers did not follow Pothier and Dumat as regards the quoted passages, so that they do not form valid authorities. This may be so, but the passages do go to show that in principle the idea that a tenant may collect the cost of necessary repairs is not in itself abhorrent to our law of lease.

If, therefore, with art. 1641 being as it is now drafted, the courts do not feel free to order reimbursement to lessees by lessors for repairs that have been effected by the former, then in the revision of the code it should be provided that the tenant has the right, after putting the lessor in default to do them, to effect himself the lessor's repairs that are of absolute necessity and of great urgency and to collect the cost regardless of the amount thereof from the lessor, subject to the courts having the discretion to refuse or reduce the claim for reimbursement on the grounds that the price of the repairs was not in accordance with the market prices then current or that the lessor could have better or more cheaply carried out the repairs himself.