**English translation of the judgment of the Court**

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| 2177 23rd Avenue Holdings c. Pival International inc. | 2025 QCCA 19 |
| COURT OF APPEAL |
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| CANADA |
| PROVINCE OF QUEBEC |
| MONTREAL SEAT |
|  |
| No.: | 500-09-030702-237 |
| (500-17-120777-225) |
|  |
| DATE: |  January 9, 2025 |
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| CORAM: | THE HONOURABLE | FRANÇOIS DOYON, J.A.SUZANNE GAGNÉ, J.A.FRÉDÉRIC BACHAND, J.A. |
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| 2177 23RD AVENUE HOLDINGS ULCBP COGNAC CANADA OWNER LIMITED PARTNERSHIP |
| APPELLANTS / INCIDENTAL RESPONDENTS – Defendants |
| v. |
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| PIVAL INTERNATIONAL INC. |
| RESPONDENT / INCIDENTAL APPELLANT – Plaintiff |
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| JUDGMENT(rectified on February 3, 2025) |
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1. The appellants are appealing a judgment rendered on August 7, 2023 by the Superior Court, District of Montreal (the Honourable Andres C. Garin), that granted in part the respondent’s / incidental appellant’s Re-Modified Originating Application to Institute Proceedings.
2. For the reasons of Gagné, J.A., with which Doyon and Bachand, JJ.A. concur, **THE COURT:**
3. **ALLOWS** the appeal;
4. **QUASHES** the judgment in first instance;
5. **DISMISSES** the respondent’s / incidental appellant’s Re-Modified Originating Application to Institute Proceedings;
6. **TAKES NOTE** of the appellant’s / incidental respondent’s offer to allow the respondent / incidental appellant to continue occupying the leased premises until May 31, 2025, for a base rent of $10.50 per square foot;
7. **DISMISSES** the incidental appeal;
8. **THE WHOLE** with legal costs against the respondent / incidental appellant, both in first instance and on appeal.

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|  | FRANÇOIS DOYON, J.A. |
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|  | SUZANNE GAGNÉ, J.A. |
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|  | FRÉDÉRIC BACHAND, J.A. |
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| Mtre Alexandre ForestMtre Mathieu Papineau |
| GOWLING WLG (CANADA) |
| For the appellants / incidental respondents |
|  |
| Mtre Matthew Mc LaughlinMtre Alexandre Katerelos |
| KRB AVOCATS |
| For the respondent / incidental appellant |
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| Hearing date: | November 12, 2024 |

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| REASONS OF GAGNÉ, J.A. |
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1. The appeal concerns the interpretation of a so-called option to renew clause contained in a commercial lease and the duty to negotiate in good faith arising therefrom. The incidental appeal, for its part, primarily raises the issue of whether a renewal proposal conditional on the subsequent acceptance by the person(s) authorized by the proposal’s author constitutes an offer to contract within the meaning of article 1388 *C.C.Q.*
2. The trial judge answered the latter question in the negative and therefore concluded that no renewal agreement had been formed. He further held that the lease clause in question constituted a true option to renew, rather than a mere right of first refusal*.* In his view, the appellants’ predecessor in title, Fonds de Placement Immobilier Cominar (“Cominar”), breached its duty to negotiate the rental price in good faith after the respondent (“Lessee”) exercised the option. Holding that the evidence was insufficient to allow him to fix the rent, he ordered the parties to engage in good faith negotiations and reserved their right to seek further adjudication of the Superior Court should they fail to come to an agreement.[[1]](#footnote-1)
3. For the reasons that follow, I would allow the appeal and dismiss the incidental appeal. Indeed, I am of the view that the lease clause merely granted to the Lessee a right of first refusal, and that Cominar did not breach its duty to negotiate in good faith. At the same time, I would agree with the judge that the renewal proposal did not constitute an offer to contract.

# Background

1. The Lessee is in the business of transportation, warehousing, distribution and logistics. In July 2016, it entered into a five‑year commercial lease for industrial premises located in Lachine (the “Leased Premises”).
2. The lease, as amended in July 2017,[[2]](#footnote-2) included a so-called option to renew clause:

**27.6 Option de renouvellement**

À la condition que le Locataire remplisse, de bonne foi et ponctuellement, toutes les obligations qui lui incombent en vertu du bail et qu’il ne soit pas en défaut en vertu de l’une quelconque d’entre elles pendant le terme du bail, il pourra renouveler le présent bail pour une (1) période additionnelle de cinq (5) ans, soit pour la période débutant le 1er janvier 2023 et se terminant le 31 décembre 2028[[3]](#footnote-3). Un avis écrit, au moins neuf (9) mois avant l’expiration du présent bail, devra être donné au Bailleur. À défaut d’avis par le Locataire, le présent bail prendra automatiquement fin à l’arrivée du terme fixé.

Si le Locataire désire se prévaloir de l’option, le nouveau prix fixé pour son loyer devra être négocié dans un délai de soixante (60) jours de l’avis, et une nouvelle entente de location devra avoir été conclue entre les parties à l’intérieur du même délai, à défaut de quoi, l’option de renouvellement deviendra nulle et non avenue à l’expiration dudit délai de soixante (60) jours. Les taux applicables pour fixer le loyer seront les taux du marché et/ou de l’Immeuble alors en vigueur pour un terme équivalent et pour un espace comparable et d’usage similaire aux Lieux Loués et situés dans le même secteur de la ville de Montréal.

Le fait que le Locataire continue d’occuper les Lieux Loués après l’expiration de son bail sans qu’un nouveau bail n’ait été signé ne constitue pas un renouvellement de bail, le Locataire étant considéré comme Locataire au mois, et il devra payer, en sus de toute somme payable à titre de loyer additionnel prévu au bail, cent vingt-cinq pourcent (125 %) du loyer de base payable lors de la dernière année du bail. Le Locataire s’engage à quitter les Lieux Loués dans un délai maximum de trente (30) jours suite à la réception d’un avis écrit du Bailleur à cet effet.[[4]](#footnote-4)

[Bold in the original; underlining added]

1. Discussions in view of renewal of the lease began in the spring of 2021. During a videoconference held on June 28, 2021, Mr. Mario La Barbera, President of the Lessee, verbally notified Mr. Michael Racine, a Cominar Executive Vice-President,[[5]](#footnote-5) that the Lessee wished to avail itself of the renewal option.[[6]](#footnote-6)
2. On September 27, 2021, Cominar sent a first renewal proposal to the Lessee. The base rents[[7]](#footnote-7) appearing were based on a market report prepared by CBRE (a real estate services firm) on industrial rentals for the third quarter of 2021. The Lessee refused that proposal.
3. On October 18, 2021, Cominar sent it a second renewal proposal. It is useful to reproduce it in its entirety:

Bonjour,

Suite à votre demande, il nous fait plaisir de vous soumettre les conditions de location concernant un espace dans l’immeuble situé à l’adresse mentionnée en objet. Veuillez noter toutefois que la validité de ces conditions, de même que les autres conditions de la location à intervenir, sont sujettes à l’acceptation ultérieure de la ou des personnes dûment autorisées du FPI Cominar. De plus, il est expressément entendu entre les parties que le présent document ne constitue pas un contrat et ne liera pas les parties tant et aussi longtemps que l’entente complète de location énonçant tous les termes et conditions ne sera signée par le Bailleur et le Locataire.

2177, 23e avenue, Montréal, QC 220 554 pieds carrés 200 000 pieds carrés 60 mois 1er janvier 2023

Adresse :

Superficie totale : Superficie locative : Terme :

Début du terme : Loyer de base :

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| **Loyer de base calculé sur 200 000 pieds carrés** |

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| --- | --- | --- | --- |
| **Période** | **Loyer de base par pied carré par année** | **Loyer de base mensuel** | **Loyer de base annuel** |
| 1er janvier 2023 au 31 décembre 2024 | 9,25 $ | 154 166,67 $ | 1 850 000,00 $ |
| 1er janvier 2025 au31 décembre 2025 | 9,50 $ | 158 333,33 $ | 1 900 000,00 $ |
| 1er janvier 2026 au 31 décembre 2027 | 9,75 $ | 162 500,00 $ | 1 950 000,00 $ |

 Loyer additionnel : Estimé comme suit pour l’année 2023

 Frais d’exploitation : 0,26 $ / p.c.

 Taxes foncières : 1,76 $ / p.c.

 Total : 2,02 $ / p.c.

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| **Travaux du Bailleur :** | Le Bailleur procédera au remplacement de la toiture au printemps 2023, le tout selon les modalités de l’article 27.4 du bail. |
|  | Le Bailleur procédera aux réparations de la dalle de béton dans la section des quais de chargement. |
|  | Tous les autres travaux et aménagements seront de la seule responsabilité du Locataire, à ses frais et à l’entière exonération du Bailleur mais ce dernier devra préalablement approuver par écrit tous ces autres travaux et aménagements. |
| **Allocation monétaire :** | Le Bailleur accorde au Locataire une allocation monétaire au montant de soixante-dix mille dollars (70 000,00 $) plus les taxes applicables, pour effectuer des améliorations locatives dans les Lieux Loués. |
| **Loyer gratuit :** | Le locataire n’aura pas à payer le Loyer de base pour le mois de janvier 2023. |
| **Option de renouvellement :** | 1 X 5 ans |
| **Autres conditions :** | Bail net standard du bailleur. |

Sous réserve du premier paragraphe de la présente, les présentes conditions de location sont valides jusqu’au 30 novembre 2021, après quoi, elles deviendront nulles et non avenues.

Sur réception ou confirmation de votre approbation des conditions de la présente à l’intérieur du délai ci-dessus mentionné, nous vous transmettrons l’entente de location à intervenir entre les parties. […].[[8]](#footnote-8)

 [Bold in the original; underlining added]

1. A few days later, Mr. Racine learned that Cominar was about to enter a “going-private” transaction. Indeed, on October 24, 2021, Cominar signed an Arrangement Agreement that required it to obtain the potential purchaser’s concurrence before entering into any lease agreement. From that point on, weekly meetings were held between Mr. Racine and Mr. David Owen, President of Pure Industrial (“Pure”), the manager appointed by the potential purchaser.
2. Over the course of those meetings, Mr. Racine observed that Pure had “*une opinion différente […] de l’évolution des loyers dans les marchés*” for the upcoming quarters. He therefore anticipated that Pure would probably not agree to the rents included in the second proposal. He informed the Lessee of this on November 24, 2021.
3. The next day, the Lessee accepted the second renewal proposal. On November 26, 2021, Cominar presented that proposal to Pure, who rejected it.
4. On November 30, 2021, Mr. Racine informed the Lessee of that refusal and reminded it that Cominar’s renewal proposal was conditional on the subsequent acceptance by the authorized person(s). Moreover, he assumed that the Lessee intended to avail itself of the renewal option and considered that the 60-day time limit in which to negotiate the rental price and enter into a new lease agreement began to run on November 25, 2021 (the acceptance date of the second proposal).
5. On December 6, 2021, the Lessee’s counsel wrote to Cominar informing it that his client considered “*déraisonnable et infondée la répudiation par Cominar des termes qu’elle a elle-même proposés*.”[[9]](#footnote-9)
6. On December 21, 2021, Cominar informed the Lessee that the potential purchaser “is still ready to do some work to improve the building and the site”, but that the asking base rate would now be $11.75 per square foot with a 4% percent increase each year.[[10]](#footnote-10)
7. Additional exchanges followed between the parties’ counsel, which I will discuss further when addressing the issue of Cominar’s bad faith.
8. On March 1, 2022, the appellants (the “Owners”) acquired the building in which the Leased Premises were located. About a month later, and although the 60-day period provided in clause 27.6 of the lease had expired, they sent the Lessee a list of 37 comparable rentals and asked it to provide its own data.
9. On April 26, 2022, the Lessee filed an originating application. It sought, *inter alia*, a declaration that the parties were bound by the second renewal proposal and by the lease purportedly resulting therefrom.

# Judgment in first instance

1. First, the judge questioned whether clause 27.6 of the lease granted to the Lessee a true renewal option, rather than a mere right of first refusal. In his view it did, because the clause referred to market rates for a comparable lease which, in his opinion, rendered the rent determinable within the meaning of articles 1373 and 1374 *C.C.Q.*
2. Second, the judge considered the question of whether a lease agreement was formed on November 25, 2021, when the Lessee accepted the second renewal proposal. He found that that proposal did not constitute an offer to contract within the meaning of article 1388 *C.C.Q.*, and therefore that its acceptance by the Lessee did not result in an exchange of consents. He rejected all of the Lessee’s other submissions aimed at countering the subsequent acceptance stipulation contained in the proposal.
3. Third, the judge found that as of November 25, 2021, Cominar had breached its duty to negotiate the rental price in good faith. Cominar could not, in his view, wash its hands of the matter and simply be a mouthpiece for Pure.
4. Fourth, the judge considered the appropriate relief to be granted. He found that, but for Cominar’s bad faith, the Lessee would have entered into a new lease agreement based on market rates. He held however that the evidence did not allow him to set the rent. Referring to the mode of performance that is specific performance of the obligation, he ordered the parties to engage in good faith discussions in order to set the rent in accordance with market rates and reserved their right to seek further adjudication of the Superior Court should they fail to come to an agreement.

# Issues

1. Both parties are dissatisfied by the judgment. As mentioned, the Owners’ appeal concerns the interpretation of clause 27.6 and the judge’s conclusion that Cominar breached its duty to negotiate in good faith. In its incidental appeal, the Lessee argues that the judge erred in law by giving effect to the subsequent acceptance stipulation contained in the second renewal proposal. In the alternative, it argues that the judge should have set the rent.
2. I begin by addressing the issue of whether a lease agreement was formed on November 25, 2021, when the Lessee accepted Cominar’s second proposal. I will then turn to the interpretation of clause 27.6 of the lease and to the finding that Cominar acted in bad faith.

# Analysis

## Was a lease agreement formed on November 25, 2021?

1. The judge framed the issue in these terms:

**2. WAS THE LEASE RENEWED ON NOVEMBER 25?**

[21]  The second issue raised is whether the Lease was renewed by agreement between the parties on November 25, 2021, when Pival accepted a renewal proposal presented by Cominar. Irrespective of the terms of the renewal clause in section 27.6 of the Lease, to the extent that a binding offer was accepted by Pival on that date, a new contract will have been formed between the parties.

[Bold and underlining in the original]

1. After summarizing the discussions surrounding the renewal of the lease, the judge considered whether Cominar’s second proposal constituted an offer to contract. He cited article 1388 *C.C.Q*. in that regard:

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| **1388.** An offer to contract is a proposal which contains all the essential elements of the proposed contract and in which the offeror signifies his willingness to be bound if it is accepted. | **1388.** Est une offre de contracter, la proposition qui comporte tous les éléments essentiels du contrat envisagé et qui indique la volonté de son auteur d’être lié en cas d’acceptation. |

1. He determined that it did not, relying on the language of the proposal:

[44] The words used by Cominar stipulated that the proposed conditions were subject to further approval by duly authorised persons and that no contract would come into existence until a complete lease was signed. This language clearly indicates that Cominar did not intend to be bound by Pival’s acceptance of the Second Proposal.

[45] To be sure, the penultimate paragraph of the Second Proposal indicates that Cominar will transmit a lease agreement to Pival upon timely confirmation of its approval of the proposed terms. That said, given the clarity of the words used in the first paragraph, and the subsequent reference to that paragraph in the text stipulating the timeframe within which the proposal was open, I find that Cominar did not intend to be bound by mere acceptance of the Second Proposal.

[46] As explained by Lluelles and Moore, this sort of proposal does not constitute a true offer that, if accepted, creates a binding contact. Rather, it is the acceptance of such a proposal that itself constitutes an offer which, in turn, must be accepted to give rise to a contract:

*Même si elle renferme tous les éléments essentiels du contrat projeté, la proposition ne mérite pas pour autant le label d’offre, si elle ne révèle pas une volonté ferme de son auteur d’être lié par l’acceptation du destinataire. […] Il en ira de même si l’auteur d’une offre complète, présentée comme sérieuse, l’assortit d’une stipulation selon laquelle l’offre ne constitue aucun engagement en cas d’acceptation. L’« acceptation » de cette proposition ne saurait sceller le contrat; elle serait, en réalité, elle-même une offre, laquelle devrait être acceptée pour que le contrat puisse se former.*

[47] Reserves, whereby a party formulating a contractual proposal makes it subject to further approvals, are not unusual in contractual discussions. Nor are they prohibited by any principle.

[48] Given the fact that the Second Proposal was not firm, and did not manifest Cominar’s intent to be bound if accepted, I find that it did not constitute an offer under article 1388 CCQ. Accordingly, Pival’s acceptance of the Second Proposal did not result in a binding contract being formed.

[49] In reality, Pival’s acceptance of the Second Proposal, and its communication of such acceptance to Cominar, constituted an offer within the meaning of article 1388 CCQ. That offer was not accepted by Cominar and, as a result, no contract for a renewed lease in respect of the Lease Premises was concluded.

[References omitted; underlining and italics in the original]

1. There is nothing objectionable in this analysis.
2. According to the Lessee, the subsequent acceptance stipulation was inapplicable on account of its vague and imprecise nature and the fact that it did not indicate who the authorized persons were. This submission, which is not supported by any source, is without merit.
3. The Lessee also argues that the judge erred in setting the renewal option exercise date at November 25, 2021. In its view, the option was exercised, rather, on September 27, 2021, when Cominar sent it the first proposal. Cominar thus allegedly waived the requirement of a written notice. It argues that the judge erred in failing to address that argument.
4. It is true that the judge did not discuss this, but a judge need not “*discuter de tous les arguments des parties, certains ne méritant pas d’être traités en long et en large ni même d’être traités tout court*”.[[11]](#footnote-11) In any event, the option exercise date has no bearing on the issue of whether the second proposal – the only one that was accepted by the Lessee – constituted an offer to contract within the meaning of article 1388 *C.C.Q.*
5. In the alternative, the Lessee argues that Cominar used the subsequent acceptance stipulation as a ploy, thereby acting contrary to the requirements of good faith. The judge found otherwise and gave the following explanation:

[52]  As a matter of course, Cominar’s standard practice was to include reserves in its proposals. It did so to allow its negotiating teams to put together deals, which would then be brought to the persons within the organization with the requisite decision-making authority. This seemed to be the optimal way of managing the volume of deals that Cominar’s staff processed. Racine was highly placed within the organization. Nevertheless, given the square footage at issue, approval of the lease renewal was required from Racine’s direct superior, as well as Cominar’s president and its board.

[53]  In the circumstances, I do not find that Cominar’s inclusion of language in its proposals that rendered them non-binding constituted bad faith.

[References omitted]

1. Recalling the principle of freedom of contract, he added that nothing prevented Cominar from requiring the concurrence of the potential purchaser before entering into a new lease agreement:

[56]  In short, the freedom to decide whether to enter into a contract is “the ultimate discretionary right”. In exercising that right, nothing precluded Cominar from having regard to its other contractual obligations, including its obligation under the Acquisition Agreement to obtain the purchaser’s approval prior to concluding material contracts.

[References omitted]

1. That finding, which was one of mixed law and fact, was supported by the pre-trial examination of Mr. Racine, and the Lessee has not shown any palpable and overriding error.
2. I agree with the judge that the second renewal proposal did not constitute an offer to contract within the meaning of article 1388 *C.C.Q.* and that no lease agreement was thus formed on November 25, 2021.

## Did clause 27.6 of the lease grant the Lessee a true renewal option or merely a right of first refusal?

1. The Owners argue that the judge made a reviewable error in finding that clause 27.6 of the lease granted the Lessee a true renewal option rather than a right of first refusal.[[12]](#footnote-12)
2. I agree.
3. It is true that clause 27.6 did not leave the negotiation of the new lease, nor even the rent, completely open, unlike the clauses at issue in some of the decisions relied upon by the Owners. For example, in *Place Lebourgneuf inc. c. Autodrome de Val Bélair inc.*, the clause stipulated that “*chacun des termes et conditions du bail à intervenir [doit] faire l’objet d’une entente entre les parties*.”[[13]](#footnote-13) The clause in this case is more specific in that it provides parameters for setting the rent. It is closer to the renewal option clauses found in academic commentary and in some judicial decisions.[[14]](#footnote-14)
4. But that is not to say that the rent was “determinable” within the meaning of articles 1373 and 1374 *C.C.Q*.[[15]](#footnote-15) Indeed, clause 27.6 does not refer to any known price index, nor does it provide for any lease determination mechanism “*objectif et extérieur aux parties*.”[[16]](#footnote-16) Even the words “*espace comparable et d’usage similaire*” are open to debate. Determination of the rent depended on the outcome of negotiations between the parties.
5. And there is more. The judge failed to consider that part of the clause that provided what would happen if no agreement on the rent was reached: “*à défaut de quoi, l’option de renouvellement deviendra nulle et non avenue à l’expiration dudit délai de soixante (60) jours*.”
6. In support of his interpretation of clause 27.6, the judge gave a few examples of decisions in which the Superior Court set the rent by relying on expert evidence on market rates:

[16]  Indeed, the case law offers a number of examples in which the Superior Court, relying on expert evidence, has set the rent payable pursuant to a clause providing for its determination in accordance with market rates.11 These cases demonstrate that language of the sort used in section 27.6 creates a determinable obligation.

11*Ibid*.[*9047‑7993 Québec Inc. v. Bairaktaris*, 2002 CanLII 45476 (QC CS), para. 3]; *National Trust Company v. 2000 McGill College Avenue Building inc.*, 1998 CanLII 11451 (QC CS) [*National Trust Company*]; *Immeubles Polaris (Canada) Ltée v. Société d’investissements Kesmat Inc.*, 2004 CanLII 20640 (QC CS) [*Immeubles Polaris*]; *United States of America v. Bleury-Dorchester Realties Inc.*, 2009 QCCS 3835, appeal dismissed: *Bleury-Dorchester Realties Inc. v. United States of America,* 2011 QCCA 362[*Bleury-Dorchester Realties*].

1. However, in each of those cases, the renewal option clause did not provide what would happen failing agreement. The judge should have considered that fundamental distinction in deciding whether clause 27.6 granted a true renewal option or not.
2. In the case at bar, the parties could have provided a mandatory arbitration clause[[17]](#footnote-17) or a provision calling for the rent to be set by an expert. Instead, they agreed that failing agreement on the rent within 60 days, the renewal option would become null and void. As with the clause at issue in *Cité Nordelec inc. c. 9087-0593 Québec inc.*,[[18]](#footnote-18) in this case, that part of clause 27.6 deprived the renewal option of any binding character whatsoever.[[19]](#footnote-19)
3. In *Nordelec*, the renewal clause provided that the base rent would be established “*au taux du marché pour des espaces similaires dans l’Édifice*” and that, failing agreement, “*le bail prendra fin à la fin du terme sans autres representations*.” According to the Court “*[c]ette disposition obligeait les parties à négocier et prévoyait clairement le résultat de l’échec des pourparlers : la fin du bail*.”[[20]](#footnote-20) After setting aside the judge’s finding on the lessor’s bad faith, the Court noted:

[7]  Cela dit, le juge aurait dû constater l’impasse des négociations et appliquer la sanction convenue par les parties et inscrite au dernier alinéa de la clause 9.1, la terminaison du bail.[[21]](#footnote-21)

1. Thus, where there is a clause providing that, failing agreement, the lease will terminate (or the renewal option will become null and void), the court has no other choice but to apply the consequence contemplated by the parties. To be sure, such a clause requires the parties to negotiate in good faith,[[22]](#footnote-22) but it does not allow the court to set the rent. Should a party breach its duty to negotiate in good faith, the court can only order it to pay damages for the injury caused to the other party by its failure to meet the requirements of good faith.[[23]](#footnote-23)
2. Here, the judge did not consider that part of the clause beginning with the words “*à défaut de quoi*” when he answered the first question: “Does the Renewal Clause Grant an Option to Renew?” On that question, he concluded as follows:

[19]  […] While the parties contemplated that the rent for the term of the renewal would be set by them pursuant to discussions, they also agreed in advance on how that rent would be set, rendering the amount of the rent determinable14.

14Where an obligation is determinable, in case of disagreement, the courts may intervene and make the requisite determination: J.‑L. Baudouin and P.‑G. Jobin, *Les obligations*, 7th Ed. by P.‑G. Jobin and N. Vézina (Cowansville (QC): Yvon Blais, 2013), No. 26 (p. 34) [**Jobin & Vézina**].

1. In sum, the judge found that the parties had agreed in advance on the way to set the rent, but overlooked the fact that they had also agreed in advance on what would happen failing agreement.
2. The judge considered that particularity only at the remedy stage,[[24]](#footnote-24) after having found that Cominar had breached its duty to negotiate in good faith. He was of the view that the Court’s reasoning in *Nordelec* does not apply when one of the parties, in bad faith, prevents the renewal clause from producing its intended effect.[[25]](#footnote-25)
3. In making that finding, he relied on the decision of Courville J. of the Superior Court in *Desjardins Sécurité financière c. Bergeron*.[[26]](#footnote-26) Holding that the lessor had breached its duty to negotiate in good faith, Courville J. found that the lessor could not be released from the renewal option, even if the clause provided that, failing agreement, “*l’option de renouvellement sera réputée nulle et non exécutée*.”[[27]](#footnote-27) She therefore set the rent at the price of the first lease (the lessor having failed to establish the prevailing market rate for the renewal period).
4. Courville J. distinguished *Nordelec* on the ground that “*les parties, bien que sans succès, avaient néanmoins négocié*.”[[28]](#footnote-28) As seen, the *ratio decidendi* of *Nordelec* is “*la sanction convenue par les parties et inscrite au dernier alinéa de la clause 9.1, la terminaison du bail*.”[[29]](#footnote-29) The fact that a party breached its duty to negotiate in good faith does not allow the court to rewrite the clause.[[30]](#footnote-30)
5. The judge therefore made a palpable and overriding error in not applying that part of clause 27.6 of the lease, pursuant to which, failing agreement on the rent, the renewal option would become null and void. Drafted as such, that clause granted to the Lessee not a true right to the renewal of the lease, but at the very most a right of first refusal.[[31]](#footnote-31)

## Did Cominar breach its duty to negotiate the rental price in good faith?

1. Because the Lessee is not claiming damages for breach of the duty to negotiate in good faith, it would not be necessary, technically, to answer that question. I will address it, however, given the importance given to it by the parties.
2. As the Supreme Court has just held in *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, “good faith is an enacted standard of public order that applies at every stage of the contractual relationship.”[[32]](#footnote-32) The parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished.[[33]](#footnote-33)
3. In the case at bar, the duty to negotiate in good faith flows from clause 27.6 of the lease and therefore has a contractual basis.[[34]](#footnote-34) It consists in performing the contract consistently with what was undertaken,[[35]](#footnote-35) i.e., to negotiate a new rental price within the parameters provided in the clause, in accordance with the requirements of good faith.
4. I pause to underscore two important points.
5. First, the fact that the duty to negotiate in good faith has a contractual basis does not undermine the principle of freedom to contract, “*si essentielle à l’autonomie de la volonté et à la liberté de commerce*.”[[36]](#footnote-36) The good faith performance of a clause that requires the parties to negotiate the renewal of an agreement cannot serve “to require or impose specific outcomes from the negotiations.”[[37]](#footnote-37) The parties remain free not to enter a new agreement and to end their existing contractual relationship — again, subject to the requirements of good faith.[[38]](#footnote-38) That situation must be distinguished from that where a party legally undertakes to enter into a contract (e.g., a borrower who undertakes, in a loan agreement, to carry life insurance for the benefit of the lender). In such a case, “*celui qui a cette obligation se l’est en quelque sorte imposée à lui-même, usant précisément de sa liberté contractuelle*.”[[39]](#footnote-39). That is not the case here.[[40]](#footnote-40)
6. Second, the principle of freedom to contract and the duty to negotiate in good faith in the performance of a contract are not mutually exclusive. The fact that the parties remain free not to contract does not diminish their duty to fulfill the requirements of good faith, which may vary according to circumstances and the parameters provided under the contract. If one of the parties breaches that duty, they incur contractual liability and may be ordered to pay damages for the injury caused to the other party. In that sense, the principle of freedom to contract only affects the remedy that the court may grant. I will now return to the matter at hand.
7. The judge found that Cominar did not act in good faith after November 25, 2021. He relied primarily on Mr. Racine’s testimony and on the fact that the base rents demanded by Pure ($11.75 per square foot with an increase of 4% per year) were not supported by any study and did not reflect Cominar’s opinion as to the prevailing market rates in the same sector. He noted the following on that subject:

[71]  Owen himself did not rely on any market study or analysis in arriving at the $11.75 rate. In view of Racine’s testimony, I find that this rate was based solely on Pure’s experience in the Toronto market. It was not grounded on any endeavour by Cominar, or Pure for that matter, to ascertain market rates for 5-year leases of industrial properties of about 200,000 square feet in the same sector as the Leased Premises. To be sure, Pure’s experience in Toronto is of no assistance in identifying market rates for properties located in a particular sector of the City of Montreal.

[72]  In truth, the new asking base rent did not represent Cominar’s view of market rates. Cominar had formed an opinion as to what constituted market rates based on Racine’s research performed in preparing the First Proposal and subsequent discussions with Pival. As Racine indicated in his testimony, that opinion was reflected in the Second Proposal.

[73]  However, once the renewal clause was triggered, Cominar’s position was effectively dictated by Pure and its vision as to where rents were headed in Montreal. By presenting Pure’s position as its own, while knowing that this position was not based on any market studies or analysis, but rather on the latter’s experience in another market, Cominar did not act in good faith. In short, Cominar could not simply wash its hands of the matter and transform itself into a mere mouthpiece for Pure.

[Referencs omitted; underlining in the original]

1. With all due respect, I hold that that finding was tainted by reviewable errors whose cumulative effect justifies undertaking a fresh analysis.
2. First, Mr. Owen’s testimony shows that at the time of negotiations, Pure managed approximately 6,000,000 square feet of rental space in Montreal. His view of the evolution of market rates was not based solely on his experience in the Toronto market. An while it is true that that view differed from that of Mr. Racine (essentially because of a different approach), the evidence does not support a finding that the base rents demanded by Pure were excessive or unreasonable in comparison with applicable rates.[[41]](#footnote-41)
3. Second, and importantly, the judge assessed Cominar’s conduct through the lens of the Lessee’s right to the renewal of the lease. Indeed, he considered that Cominar had a contractual obligation to enter into a new lease agreement. This is quite evident from his reasons where he addressed the issue of remedy:

[93]  However, that reasoning does not apply here since Pival holds a true option which, upon exercise, gives a right to a renewed contract with a rent based on market rates.57 In cases like the present one, failure of one of the parties to act in good faith and to renew the contract is itself a breach of a contractual obligation.

57This is notably what distinguishes the present case from *Singh v. Kohli* and the principles governing a breach of the duty to negotiate in good faith when there is no obligation to enter into a contract. As recognized by Bich J.A., there are circumstances where a party is bound to enter into a contract—usually on account of an existing contractual obligation and thus a prior exercise of freedom of contract (see para. 97; see also and Lluelles & Moore, *supra*, paras. 250 and 251 (p 129)). That is precisely the effect of a renewal option such as section 27.6 of the Lease.

1. And yet, in his analysis of the legal nature of the second proposal, the judge recognized that Cominar was not bound thereby and that it could first require Pure’s concurrence before entering into a new lease agreement.[[42]](#footnote-42)
2. In fact, the duty to perform clause 27.6 of the lease in good faith did not require the parties to contract, nor did it dictate the outcome of negotiations. The parameters provided in that clause gave the parties some leeway. Cominar was therefore justified in coming back with a new proposal and, as I mentioned earlier, the evidence does not establish that that new proposal was excessive or unreasonable to the point of being tantamount to a disregard for the Lessee’s interests or a refusal to negotiate.
3. Finally, the judge ignored the conduct of the Lessee, who, after November 25, 2021, became fixated on the idea that Cominar was bound by the base rents indicated in the second proposal. As the saying goes, however, “it takes two to tango.” Neither did the judge consider the openness displayed by Cominar who, visibly, was prepared to discuss the applicable rates and negotiate the price of the rents.
4. Thus, in an email sent to Mr. Racine on January 20, 2022 (in reply to the new rental proposal dated December 21, 2021), counsel for the Lessee wrote:

We reiterate again that our client’s preference is to conclude the renewal promptly, amicably, and to the exclusions of the Courts. However, if Cominar is unwilling to move forward with the accepted terms that it had proposed itself in October 2021, our client will have no alternative than to seize the Courts to adjudicate the present conflict. Therefore, we would appreciate that you respond to this email within a delay of 3 days to indicate whether Cominar is willing to renew the Lease based on the terms previously agreed upon by the parties.[[43]](#footnote-43)

1. Counsel for Cominar answered him the very next day. He indicated that his client would agree to extend the 60-day time limit provided under clause 27.6, on the condition, however, that the Lessee agree to negotiate a new agreement and a new price at market rates. It is useful to reproduce the last paragraphs of that letter:

Although Cominar could agree to a potential extension of the Renewal Period upon confirmation from Pival that it is willing to negotiate a lease agreement and rent at market price, no further extension will be granted should Pival maintain its position in its integrality. In this latter case and, should Cominar’s position prevail before the Court as to the non-binding character of the Renewal Proposal, Pival would be faced with no valid renewal of its Lease which term is expiring on December 31, 2022. At the same time, Cominar would be under no obligation to negotiate any renewal, which would compel Pival to vacate the premises. Considering the inherent delays of the Courts, we respectfully submit that it is a particularly bold judicial risk, all the while Cominar has repeatedly acted in good faith and showed its openness to negotiate and avoid litigation.

Even though our client would like to reiterate that it is convinced it will prevail in Court, it also would like to stress the fact that its preference would be to find an amicable solution. Cominar highly values its ongoing business with Pival and would very much like to continue this mutually beneficial relationship for years to come. However, our client cannot accept to be forced to strictly abide by the terms of a Renewal Proposal conditional on further approvals, which were never obtained.

Considering the above, could you please contact the undersigned at your earliest convenience in order to at least determine if additional negotiations would be worth a try so that we can discuss what potential extension to the Renewal Period could be allowed by our client? This first step is crucial considering that it will determine whether the Court will need to be seized of the matter without delay or if there is still hope for an amicable solution.[[44]](#footnote-44)

1. Counsel for the Lessee replied to that letter on February 4, 2022. Essentially, he maintained his client’s position expressed in the January 20 email, while indicating that his client would agree to a meeting. He added this: “Note however that we consider our client’s position to be legally secure and we cannot recommend entering into discussions that would be incongruous with the criteria of market rate.*”*[[45]](#footnote-45)
2. On February 11, 2022, counsel for Cominar asked him to clarify his position: “If this means that your client won’t accept any other rates, but the ones included under the October Renewal Proposal, we want it clearly stated in writing.*”*[[46]](#footnote-46)
3. The reply, if any was given, does not appear among the emails filed. All we know is that on March 31, 2022, counsel for the Owners (the same one who represented Cominar) came back with a list of 37 comparable rents. He offered the following path forward:

Although our client maintains the position as stated in the attached letter dated January 21, 2022, in good faith and on a without prejudice basis, it is willing to meet with your client, at its convenience, so to discuss comparables with regards to the market rate applicable as per the lease. You will find attached, provided to you and your client on a without prejudice and confidential basis and strictly for the purpose of trying to find a mutually acceptable solution so to avoid protracted litigation, a list of 37 comparables amply justifying a rate over the one which was included in the initial Renewal Proposal.

Could you please confirm:

1. When your client will be providing its own comparables;

2. When your client and yourself would be available to meet.[[47]](#footnote-47)

1. Less than a month later, the Lessee filed an originating application.
2. I am not saying that the Lessee, who was convinced of its position, acted itself in bad faith. As Kasirer J. noted in *Takuhikan*, negotiating tenaciously in one’s self‑interest can be entirely compatible with good faith.[[48]](#footnote-48) Nevertheless, the judge could not examine Cominar’s conduct in isolation, without regard to that of the Lessee. Both parties had an obligation to carry out in good faith the negotiations provided under clause 27.6 of the lease, and the judge had to assess their conduct in a contextual manner.
3. Based on the exchanges as a whole, it can be seen that by November 24,  2021, Cominar was transparent in apprising the Lessee of Pure’s opinion on the course that rents were taking. Later, it sent it a new proposal that could appear aggressive (it certainly was in the Lessee’s eyes), but, at all times, it displayed an openness to negotiate. All that it required in return was a confirmation that the Lessee was willing to agree to higher rents than those of the second proposal.
4. I therefore conclude that Cominar did not fail to conduct itself loyally or undermine the Lessee’s legitimate expectations. Nor can it be said, based on the evidence relating to the applicable market rates under clause 27.6 of the lease, that its conduct was excessive or unreasonable.

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1. I find it useful to add a final comment on the relief granted by the judge.
2. Referring to the mode of performance that is specific performance of the obligation (articles 1590 and 1601 *C.C.Q.*), the judge was of the view that he could order the parties to negotiate the rental price:

[109]  As a matter of specific performance, Pival and the Defendants, who are Cominar’s successors by particular title and who are themselves bound by the Lease, may be ordered to engage in good faith discussions aimed at setting the rent for the renewal period in accordance with the strict parameters of section 27.6. As required by the text of the renewal clause, the rent so set—and by extension the parties’ good faith discussions—must be based on market rates for a five‑year term in force (“*alors en vigueur*”) on November 25, 2021, when the renewal clause was exercised.

[Italics in the original]

1. One may ask whether forced specific performance of the duty to negotiate in good faith is possible. According to Professor Brigitte Lefebvre, that solution, although theoretically conceivable, is not realistic in practice:

La question de donner ouverture à l’exécution en nature pour une obligation de moyens peut s’accepter en principe. En théorie, il est concevable que la sanction de ne pas négocier soit d’imposer aux parties de continuer les négociations. Le droit donne techniquement ouverture à une injonction mandatoire. En pratique cependant, cette solution est irréaliste. On ne peut pas faire abstraction du fait que les parties n’ont pu s’entendre et ont rompu les négociations. Il serait illusoire de croire que les forcer à continuer à négocier ait une quelconque pertinence. La négociation revêt, sous certains aspects, un caractère *intuitu personae* et l’exécution forcée devient impossible. M. Cedras est formel: « La seule sanction juridique admissible est l’exécution par équivalent ».[[49]](#footnote-49)

[References omitted]

1. Authors Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore share that view, noting that “*la liberté contractuelle ne permet pas qu'une partie ayant rompu les négociations soit, par la suite, obligée de les reprendre contre son gré*.”[[50]](#footnote-50)
2. Without answering the question as definitively, I doubt that the forced specific performance of the duty to negotiate in good faith can be effective. More often than not, under the freedom to contract principle, that mode of performance risks bringing the parties back to square one. Generally, when a party breaches its duty to act in good faith, the appropriate remedy will be an award of damages, rather than specific performance of the duty.

# Conclusion

1. For these reasons, I would allow the Owner’s appeal, quash the judgment in first instance and dismiss the Lessee’s originating application. The Court should take note of the Owner’s offer to allow the Lessee to occupy the Leased Premises until May 31, 2025, for a base rent of $10.50 per square foot. Finally, I would dismiss the Lessee’s incidental appeal. The whole, with legal costs against the Lessee, both in first instance and on appeal.

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| SUZANNE GAGNÉ, J.A. |

1. *Pival International inc. c. 2177 23rd Avenue Holdings*, 2023 QCCS 3096 [Judgment under appeal]. [↑](#footnote-ref-1)
2. With this amendment, the parties agreed to extend the lease term to December 31, 2022. With the exception of this new term, the terms of the 2016 lease remained essentially unchanged. [↑](#footnote-ref-2)
3. As the trial judge noted, renewal of the lease for an additional five-year period would end on December 31, 2027, not December 31, 2028. [↑](#footnote-ref-3)
4. Exhibit P-3, Lease Modification executed in July 2017 regarding the commercial property situated at 2177 23rd Avenue, Montreal, Quebec, p. 3-4. [↑](#footnote-ref-4)
5. Mr. Racine’s exact title is Executive Vice President, Office and Industrial Leasing. [↑](#footnote-ref-5)
6. According to Mr. La Barbera’s testimony. For his part, Mr. Racine does not recall any specific discussion on this subject. He does, however, agree that if Mr. La Barbera sent him a proposal, “*c’est que, probablement, il voulait possiblement exercer son option, mais ce n’est pas une confirmation qu’il l’exerce*”. [↑](#footnote-ref-6)
7. $9.50 / square foot for 2023-2024, $9.75 for 2025-2026 and $10 for 2027. [↑](#footnote-ref-7)
8. Exhibit P-8, Email sent on October 18th, 2021 by Michael Racine to Plaintiff containing a revised proposal. [↑](#footnote-ref-8)
9. Exhibit P-11, Letter dated December 6th, 2021, sent by Plaintiff’s attorneys to Cominar. [↑](#footnote-ref-9)
10. Exhibit P-12, Email dated December 21st, 2021, sent by Cominar to Plaintiff, p. 1. [↑](#footnote-ref-10)
11. *Syndicat national de l’automobile, de l’aérospatiale, du transport et des autres travailleuses et travailleurs du Canada (TCA-Canada), sections locales 187, 728, 1163 c. Brideau*, 2007 QCCA 805, para. 42. [↑](#footnote-ref-11)
12. Judgment under appeal, paras. 10-19. [↑](#footnote-ref-12)
13. *Place Lebourgneuf inc. c. Autodrome de Val Bélair inc.*, [1985] C.A. 364, p. 1 (reasons of Nichols J.A.). See also: *Mutuelle des fonctionnaires du Québec c. Les immeubles G.C. Gagnon inc.*, 1997 CanLII 10674 (C.A.), where the option to renew the lease referred “*aux mêmes conditions sauf le loyer qui devra être négocié*”. [↑](#footnote-ref-13)
14. Stanislas Bricka, *Le louage immobilier – Les baux commerciaux* *(Art. 1851 à 1891 C.c.Q.)*, Montreal, Yvon Blais, 2015, no 1878 575, p. 394, citing *Desjardins Sécurité financière c. Bergeron*, 2011 QCCS 2204 [*Desjardins*] and *9047-7993 Québec inc. c. Bairaktaris*, 2002 CanLII 45476 (C.S.). See also: Johanne Gagnon, “L’option de renouvellement : sa nature, son mécanisme et les conséquences de son existence”, (2015) 23 *Le bail commercial – Deuxième colloque* 139, pp. 144‑145; Mylany David & Adèle Poirier, “Le bail commercial : sa rédaction en deux temps”, (2017) 1 *Cours de perfectionnement du notariat* 71, p. 86. [↑](#footnote-ref-14)
15. Judgment under appeal, para. 15. [↑](#footnote-ref-15)
16. Didier Lluelles & Benoît Moore, *Droit des obligations*, 3rd ed., Montreal, Thémis, 2018, no 1049.14. [↑](#footnote-ref-16)
17. M. David & A. Poirier, *supra*, note 14,p. 86; René Gauthier, “La rédaction de certaines clauses particulières du bail : les formulations à privilégier”, (2017) 27 *Le bail commercial* – *Troisième colloque*1, p. 192. [↑](#footnote-ref-17)
18. *Cité Nordelec inc. c. 9087-0593 Québec inc.*, 2003 CanLII 72173 (C.A.) [*Nordelec*]. [↑](#footnote-ref-18)
19. S. Bricka, *supra*, note 14, p. 393. [↑](#footnote-ref-19)
20. *Nordelec*, *supra*, note 18, para. 2. [↑](#footnote-ref-20)
21. *Id.*, par. 7. [↑](#footnote-ref-21)
22. S. Bricka, *supra*, note 14, p. 392. [↑](#footnote-ref-22)
23. *BMW Canada inc. c. Automobiles Jalbert inc*., 2006 QCCA 1068, para. 145, application for leave to appeal to the Supreme Court dismissed, February 22, 2007, no 31685; Brigitte Lefebvre, “Rupture des pourparlers : négociateurs, appel à la prudence!”, (1998) 112 *Développements récents en droit commercial*121, p. 129. See also: Jean-Louis Baudouin, Patrice Deslauriers & Benoît Moore, *La responsabilité civile*, *Volume 1 – Principes généraux*, 9th ed., Yvon Blais, Montreal, 2020, no 1-71; D. Lluelles & B. Moore, *supra*, note 16, no249.4. [↑](#footnote-ref-23)
24. Judgment under appeal, paras. 88 et seq. [↑](#footnote-ref-24)
25. *Id.*, para. 96. [↑](#footnote-ref-25)
26. *Desjardins*, *supra*, note 14. [↑](#footnote-ref-26)
27. *Id.*, paras. 5, 53-54. [↑](#footnote-ref-27)
28. *Id.*, para. 31. [↑](#footnote-ref-28)
29. *Nordelec*, *supra*, note 18, para. 7. [↑](#footnote-ref-29)
30. *BMW Canada inc. c. Automobiles Jalbert inc*., *supra*, note 23, para. 145. [↑](#footnote-ref-30)
31. D. Lluelles & B. Moore, *supra*, note 16, no 2192. [↑](#footnote-ref-31)
32. *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39, para. 104, citing *Ponce v. Société d’investissements Rhéaume ltée*, 2023 SCC 25, para. 70.See also: Didier Lluelles, “La bonne foi dans l’exécution des contrats et la problématique des sanctions”, (2004) 83 : 1 *Revue du Barreau canadien*181, p. 186 (respect for this principle in the implementation of obligations is an integral part of civil law). [↑](#footnote-ref-32)
33. Art. 1375 *C.C.Q.* [↑](#footnote-ref-33)
34. *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, *supra*, note 32, para. 109. [↑](#footnote-ref-34)
35. *Id*., para. 112, Justice Kasirer quotes author Laurent Aynès for whom good faith is “a duty of behavior which consists in rendering the performance of the contract in conformity with the undertaking” (preface to L. Aynès in Rita Jabbour, *La bonne foi dans l’exécution du contrat*, Issy-les-Moulineaux, Librairie générale de droit et de jurisprudence, 2016). [↑](#footnote-ref-35)
36. D. Lluelles & B. Moore, *supra*, note 16, para. 249.3, cited in *Singh c. Kohli*, 2015 QCCA 1135, para. 69. [↑](#footnote-ref-36)
37. *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, *supra*, note 32, para. 112. [↑](#footnote-ref-37)
38. *Ibid.* [↑](#footnote-ref-38)
39. D. Lluelles et B. Moore, *supra*, note 16, paras. 250-251. [↑](#footnote-ref-39)
40. Contrairy to what the judge wrote at the remedy stage: Judgment under appeal, footnote no 57, *infra*, para. ‎[68]. [↑](#footnote-ref-40)
41. Moreover, in para. 5 of the judgment under appeal, the judge points out: “the evidence adduced by the parties is insufficient to set the rent in accordance with the terms of the renewal option”. See also: Judgment under appeal, para. 107. [↑](#footnote-ref-41)
42. Judgment under appeal, paras. 55-56, *supra*, para. ‎[40]. [↑](#footnote-ref-42)
43. Exhibit P-13, Email reply dated January 20th, 2022 from Plaintiff’s attorneys to Cominar, p. 1. [↑](#footnote-ref-43)
44. Exhibit P-14, Letter dated January 21st, 2022 from Cominar’s attorneys to Plaintiff, pp. 2-3. [↑](#footnote-ref-44)
45. Exhibit P-15, Email dated February 4th, 2022 sent by Plaintiff’s attorneys to Cominar’s attorneys, p. 1. [↑](#footnote-ref-45)
46. Exhibit D-1, Emails exchanged between Plaintiff’s lawyer and Defendants’ lawyer from January 21, 2022, to March 31, 2022, p. 7. [↑](#footnote-ref-46)
47. *Id.*, p. 1. [↑](#footnote-ref-47)
48. *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, *supra*, note 32, para. 112. [↑](#footnote-ref-48)
49. Brigitte Lefebvre, *La bonne foi dans la formation du contrat*, Cowansville, Yvon Blais, 1998, p. 155. [↑](#footnote-ref-49)
50. J.-L. Baudouin, P. Deslauriers & B. Moore, *supra*, note 23, no 1-71. [↑](#footnote-ref-50)