Court File No. C66626

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE BANKRUPTCY OF
CURRICULUM SERVICES CANADA/
SERVICES DES PROGRAMMES D'ÉTUDES CANADA
OF THE CITY OF TORONTO, IN THE MUNICIPALITY OF TORONTO
IN THE PROVINCE OF ONTARIO

MEDALLION CORPORATION, in its capacity as authorized agent for 280 RICHMOND STREET WEST LIMITED

Appellant

- and -

RSM CANADA LIMITED in its capacity as trustee in bankruptcy of CURRICULUM SERVICES CANADA/SERVICES DES PROGRAMMES D'ETUDES CANADA

Respondent

ADDITIONAL WRITTEN SUBMISSIONS OF THE RESPONDENT

November 22, 2019

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PART I - OVERVIEW

1. This appeal was heard on October 9, 2019. Following the hearing of the appeal, the Ontario Superior Court of Justice released its decision in *7636156 Canada Inc. v. OMERS Realty Corporation*, 2019 ONSC 6106 ("***OMERS***") and, after being notified by the parties jointly, the panel invited the parties to make additional written submissions on the *OMERS* decision. The panel also directed the parties to address the decision of the Ontario Court of Appeal in *Re TNG Acquisition Inc.*, 2011 ONCA 535 ("***TNG Acquisition***"), from the decision of Campbell, J. 2010 ONSC 6119 ("***TNG Acquisition Motion Judgment***").

2. It is the position of the Respondent, RSM Canada Limited, in its capacity as trustee in bankruptcy of Curriculum Services Canada/Services des Programs d'Etudes Canada (the "**Trustee**") that, although neither *OMERS* nor *TNG Acquisition* is directly on point, both confirm that a lease disclaimer in a bankruptcy brings the lease to an end and terminates all

rights and obligations for the payment of rent. As such, it is the Trustee's position that, in Ontario, no claim can be made by a landlord in a bankruptcy with respect to anything beyond the preferred claim provided in section 136(1)(f) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("***BIA***").

PART II - LAW AND ARGUMENT

7636156 Canada Inc. v. OMERS Realty Corporation

3. The tenant in *OMERS* provided the landlord (the "**OMERS Landlord**") with an unconditional letter of credit in the principal amount of $2.5 million. The tenant was assigned into bankruptcy during the term of the lease and the trustee (the "**OMERS Trustee**") disclaimed the lease a short time later.

> ***Reference:*** *7636156 Canada Inc. v. OMERS Realty Corporation*, 2019 ONSC 6106 ("***OMERS***") at paras. 5 and 12, Brief of Authorities of the Respondent for Additional Submissions dated November 22, 2019 ("**Supplemental BOA**"), Tab 1

4. Following the disclaimer of the lease by the OMERS Trustee, the OMERS Landlord drew on the letter of credit in the full amount of $2.5 million on account of: (1) rental arrears; (2) restoration costs; (3) the unamortized cost for the landlord allowance provided for in the lease; and (4) a portion of the unexpired term of the lease (collectively, the "**Damages**"). The OMERS Landlord also delivered a proof of claim to the OMERS Trustee in the amount of $623,196.84 for three months' accelerated rent under the lease and in accordance with section 136(f) of the *BIA,* and then appears to have reserved the right to make a claim *under the letter of credit* for breach of the lease, including for damages for lost rent for the balance of the term, restoration costs and unamortized costs of a landlord allowance.

Reference: *OMERS*, *ibid.* at paras. 12-14, Supplemental BOA, Tab 1

5. The OMERS Trustee took the position that the OMERS Landlord was only entitled to draw $623,196.84 on the letter of credit for three months' accelerated rent pursuant to section 136(1)(f) of the *BIA*.

Reference: *OMERS*, *ibid.* at para. 16, Supplemental BOA, Tab 1

6. For its part, the OMERS Landlord argued that it was entitled to draw down on the entire amount of the letter of credit on account of the Damages. Unlike the Landlord in this case, the OMERS Landlord does not appear to have explicitly taken the position that it was entitled to make an unsecured claim in the bankruptcy estate on account of the Damages. Rather, the OMERS Landlord appears to have only reserved the right to make a claim for the Damages to be paid from the letter of credit.

Reference: *OMERS*, *ibid.* at paras. 12-14, 17 and 30-32, Supplemental BOA, Tab 1

7. Accordingly, the only issue before Justice Hainey in the *OMERS* case was the amount the OMERS Landlord was entitled to draw *under the letter of credit* as a result of the disclaimer of the lease by the trustee. This is different from the issue in this case, which considers the Landlord's entitlement to an unsecured claim to paid from the bankruptcy estate, over and above its preferred claim under section 136 of the *BIA*.

Reference: *OMERS*, *ibid.* at para. 15, Supplemental BOA, Tab 1

8. In the context of considering whether the OMERS Landlord was entitled to draw on the entire amount of the letter of credit to recover the Damages, Hainey J. reviewed, and ultimately affirmed, certain long-standing jurisprudence regarding the effect of a disclaimer of a lease by a trustee in bankruptcy in Ontario.

9. Specifically, Hainey J. relied on *Re Mussens Ltd.*, [1933] O.W.N. 459, 14 C.B.R. 479 (Ont. H.C.J.), *Cummer-Yonge Investments Ltd. v. Fagot*, 1965 CarswellOnt 4 (S.C.) and *Re Linens N Things Canada Corp.*, 2009 Carswellont 2849 (S.C.J.) – the very cases cited by the Trustee in this case and Chiappetta, J. in the case under appeal – for the long-standing proposition that a disclaimer of a lease by a trustee in bankruptcy operates as a voluntary surrender of the lease by the tenant with the consent of the landlord. As such, upon the disclaimer of a lease by a trustee in bankruptcy, the bankrupt no longer has any obligations owing to the landlord under the lease. According to Hainey J., the law in the Province of Ontario in this regard has been well settled for over 80 years.

> ***Reference:*** *OMERS*, *ibid.* at paras. 24-39, Supplemental BOA, Tab 1; *Re Mussens Ltd.*, [1933] O.W.N. 459, 14 C.B.R. 479 (Ont. H.C.J.), Supplemental BOA, Tab 3; *Cummer-Yonge Investments Ltd. v. Fagot*, 1965 CarswellOnt 4 (S.C.), Supplemental BOA, Tab 4; *Re Linens N Things Canada Corp.*, 2009 Carswellont 2849 (S.C.J.), Supplemental BOA, Tab 5; *In the Matter of the Bankruptcy of Curriculum Services Canada*, 2019 ONSC 1114 at paras. 15-38, Supplemental BOA, Tab 6

10. Applying that principle to the issue in the *OMERS* case, Hainey J. concluded that the OMERS Landlord was not entitled to draw on a letter of credit provided as security under the lease for any amounts in excess of the OMERS Landlord's three months' accelerated rent preferred claim under s. 136(1)(f) of the *BIA*.

> ***Reference:*** *OMERS*, *ibid.* at paras. 24-39, Supplemental BOA, Tab 1

11. Justice Hainey also confirmed that the Supreme Court of Canada's decision in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 ("***Crystalline***") did not impact his decision, as *Crystalline* dealt with direct claims by a landlord against an assignor of a lease rather than against a letter of credit.

> ***Reference:*** *OMERS*, *ibid.* at paras. 40-45, Supplemental BOA, Tab 1

12. This case currently before the Court is even more distinguishable from *Crystalline* than *OMERS*, as it does not involve the enforcement of a claim against a third party other than the tenant, outside of the bankruptcy proceedings, whether by means of a letter of credit, a guarantee, an assignment or otherwise.

13. Although Hainey J.'s comments were made in a different context, the Trustee also agrees with and adopts Hainey J.'s conclusion that a lease disclaimer in a bankruptcy operates as a voluntary surrender of the lease by the tenant with the consent of the landlord, meaning that the tenant no longer has any obligations owing to the landlord under the lease following the disclaimer and the landlord cannot make an unsecured claim for damages under the disclaimed lease.

14. The Trustee understands that the OMERS Landlord is in the process of appealing the *OMERS* decision to this Court. As of the date of these submissions, is not aware of any case law or scholarly articles considering the *OMERS* decision.

15. The Trustee has had the benefit of reviewing the further written submissions of the Appellant and respond as follows with respect to the *OMERS* decision.

16. It appears that Hainey J. in *OMERS* and Master Mills in her reasons below (the "***Mills OMERS Reasons***") (at TAB B of the Appellant's Written Submissions) were dealing with two differing fact situations arising out of the same dispute between the Trustee and the OMERS landlord. The *Mills OMERS Reasons* are clear that the only claim that was being dealt with on that appeal from the Trustee's disallowance by her was solely with respect to the proof of the claim filed by OMERS on May 17, 2018 with respect to its preferred claim for $623,196, but reserved the right to make further claims when they were quantified.

17. The Trustee disallowed the preferred claim and the reserved unspecified unsecured claim made in the Proof of Claim. Master Mills accepted a claim for a reduced preferred claim of $415,464.56 on the basis that OMERS had already elected to be paid one month of accelerated rent under the terms of the letter of credit. Master Mills also rejected the Trustee's disallowance of the unspecified reserved claim that OMERS intended to make when losses were determined and permitted OMERS to file a further proof of claim with the Trustee to claim either out of funds held by the Trustee or from the letter of credit. It appears, but is not clearly stated by Hainey J. in the *OMERS* decision, that OMERS proceeded to fully draw down on the letter of credit, for both the preferred claim and its other claims, and a motion was brought before Hainey J. to determine the proper amount that the landlord could claim under the letter of credit.

> ***Reference:*** *Mills OMERS Reasons*, *ibid.* at paras. 17, 20-21, 25; *OMERS* at paras. 1, 12-14, Supplemental BOA, Tab 1

18. Given that the *Mills OMERS Reasons* did not deal, at all, with the ability of the landlord to claim amounts other than the preferred claim amount that was claimed in the proof of claim at the time of the Mills OMERS Reasons, and the quantification of the accelerated rent claimed against the letter of credit, it is the position of the Respondent that the Mills OMERS reasons do not have any application to the issues in this appeal, as it is the OMERS Decision of Hainey J. that dealt with the ability of the Landlord to make those additional claims itemized in the OMERS Reasons of Hainey J.

19. With respect to the arguments made by the Appellant at paragraphs 9-17 of the Appellant's Written Submissions with respect to the issues raised in the appeal made by the OMERS Landlord in *OMERS*, the Respondent reiterates its submissions regarding the *Crystalline*,

Cummer-Yonge and *Mussens* cases in its Respondents Factum at paragraphs 46-54 and the arguments presented at the hearing of the appeal, and will not be reproducing them here.

Re TNG Acquisition Inc.

20. The tenant in *TNG Acquisition* (the "**TNG Tenant**") was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 ("***CCAA***"). The TNG Tenant sent a repudiation letter to the landlord (the "**TNG Landlord**") pursuant to the lease termination procedure in the CCAA Initial Order issued in that proceeding, but the TNG Landlord never responded by acknowledging, accepting or returning the repudiation letter. The TNG Tenant was subsequently declared bankrupt and the TNG Landlord filed a proof of claim in the bankruptcy for over $3 million. No Plan of Arrangement dealing with the consequences of repudiation under the CCAA was ever filed.

> ***Reference:*** *TNG Acquisition, supra* at paras. 3-13, Supplemental BOA, Tab 2; *TNG Acquisition Motion Judgment, supra* at paras. 9-10, Supplemental BOA, Tab 2

21. The trustee in bankruptcy (the "**TNG Trustee**") disallowed the bulk of the claim of the landlord's successor (henceforth also referred to as the "**TNG Landlord**"). The TNG Landlord unsuccessfully appealed, first to the Ontario Superior Court of Justice and then to the Ontario Court of Appeal. The TNG Landlord argued that repudiation of the lease was complete when it received the repudiation letter under the provisions of the CCAA Initial Order. Accordingly, it argued that there was nothing left for the TNG Trustee to disclaim in the bankruptcy and that the claims of the TNG Landlord should be calculated pursuant to the provisions of the CCAA rather than the BIA.

> ***Reference:*** *TNG Acquisition, ibid.* at para. 22, Supplemental BOA, Tab 2

22. By contrast, the TNG Trustee took the position that the lease had not been repudiated in the CCAA proceeding because the TNG Landlord did not respond to the notice of repudiation prior to the bankruptcy. Accordingly, the TNG Trustee was entitled to disallow the bulk of the claim on the basis of disclaimer pursuant to the BIA.

Reference: *TNG Acquisition, ibid.* at para. 23, Supplemental BOA, Tab 2

23. This issue was a critical one, as disclaimer and repudiation are distinct legal concepts with different legal effects. As the Ontario Court of Appeal stated in the *TNG Acquisition* case, in the context of a CCAA lease repudiation process:

> "To terminate a lease is to bring it to an end. Repudiation of a lease, on the other hand, does not itself bring the lease to an end. Repudiation occurs when one party indicates, by words or conduct that they no longer intend to honour their obligations when they fall due in the future. It confers on the innocent party a right of election to, among other things, treat the lease as at an end, thereby relieving the parties of further performance, though not relieving the repudiating party from its liabilities for breach.
>
> One party to a lease cannot unilaterally end its obligations under the lease. In the absence of proof of both acceptance of the repudiation and notification of the acceptance, the lease will be treated as subsisting."

Reference: *TNG Acquisition, ibid.* at paras. 34-35, Supplemental BOA, Tab 2

24. The TNG Landlord never made an election after receiving the repudiation letter. As a result, the relationship between the TNG Landlord and the TNG Tenant was subsisting at the date of the bankruptcy and was susceptible to statutory disclaimer under the BIA by the trustee following the commencement of the bankruptcy proceeding. The TNG Trustee's disallowance of the majority of the claim under the BIA was upheld by the Court of Appeal. It appears that, implicitly, the differing outcomes of lease disclaimers under the

CCAA and the BIA as to what claims can be made by landlords under repudiated and disclaimed leases respectively, were accepted by both Campbell, J. and affirmed by the Court of Appeal in this case.

Reference: *TNG Acquisition, ibid.* at paras. 37-38, Supplemental BOA, Tab 2

25. According to the first footnote of the Court of Appeal decision, the TNG Trustee appears to have allowed, prior to the appeal from disallowance, a preferred claim for rent pursuant to the provisions of the BIA up to the value of the assets on the premises. From the reasons of Campbell, J. this value was $7,775. In addition, the TNG Trustee also appears to have allowed an unsecured claim for a portion of the pre-bankruptcy rent arrears and operating costs as well as the cost of repairs to the HVAC system on the premises, but not claims for damages under the lease or claims for the unexpired portion of the term of the lease. It does not appear from either the TNG Acquisition Motion Judgement or TNG Acquisition that either level of court considered any issue other than the effect of the CCAA repudiation on the lease, and it does not appear that the validity of the unsecured claim in bankruptcy was an issue that was directly considered by either Campbell, J. in the TNG Acquisition Motion Judgement or by the Ontario Court of Appeal, unlike in *OMERS*, where it was.

Reference: *TNG Acquisition, ibid.* at para. 17 and footnote 1, Supplemental BOA, Tab 2; *TNG Acquisition Motion Judgment, ibid.* at paras. 15-17, 18, Supplemental BOA, Tab 2

26. In the Trustee's respectful submission, to the extent that any unsecured claim for damages was allowed by the TNG Trustee over and above any preferred claim for rent, this was an error due to: (1) the operation of section 146 of the BIA, which provides that the rights of lessors are to be determined according to the law of the province in which the leased

premises are situated; and (2) 80 years of case law holding that a landlord in Ontario has no claim for unsecured damages over and above its preferred claim under the BIA.

27. The cases considering *TNG Acquisition* generally cite *TNG Acquisition* for its statements on the repudiation of a lease. The cases do not involve the determination or valuation of landlord claims under the BIA or CCAA.

> ***Reference:*** *Stearman v. Powers,* 2017 BCCA 165, Supplemental BOA, Tab 7; *OPB Realty Inc. v. Transport North American Express Inc.*, 2012 ONSC 7248, 2012 CarswellOnt 16466, Supplemental BOA, Tab 8; *Pickering Square Inc. v. Trillium College Inc.*, 2016 ONCA 179, 2016 CarswellOnt 2929, Supplemental BOA, Tab 9

28. The Trustee is not aware of any scholarly articles considering TNG Acquisition, other than the two referenced in the Trustee's List of Authorities included at Schedule A hereto and provided to the Court at the time of these Additional Written Submissions, which deal with the issue of the effect of the issuance of a lease repudiation under the CCAA.

> ***Reference:*** N§187 — Application to Leases, HMANALY N§187, Supplemental BOA, Tab 10; Houlden & Morawetz On-Line Newsletter, Insolv. L. Nws. 2011-32, Supplemental BOA, Tab 11

29. With respect to the written submissions of the Appellant at paragraphs 21-39, the Respondent disagrees with the characterization in paragraph 24 regarding the harmonization of how claims under the CCAA and BIA are dealt with. The Trustee relies on its submissions at paragraphs 55-59 of its Factum in this regard.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of November, 2019.

per

Alex Ilchenko, C.S.

SCHEDULE "A"

LIST OF AUTHORITIES

Cases

1. *7636156 Canada Inc. v. OMERS Realty Corporation*, 2019 ONSC 6106
2. *Re TNG Acquisition Inc.*, 2010 ONSC 6119, affirmed 2011 ONCA 535
3. *Re Mussens Ltd.*, [1933] O.W.N. 459, 14 C.B.R. 479 (Ont. H.C.J.)
4. *Cummer-Yonge Investments Ltd. v. Fagot*, 1965 CarswellOnt 4 (S.C.)
5. *Re Linens N Things Canada Corp.*, 2009 Carswellont 2849 (S.C.J.)
6. *In the Matter of the Bankruptcy of Curriculum Services Canada*, 2019 ONSC 1114
7. *Stearman v. Powers,* 2017 BCCA 165
8. *OPB Realty Inc. v. Transport North American Express Inc.*, 2012 ONSC 7248, 2012 CarswellOnt 16466
9. *Pickering Square Inc. v. Trillium College Inc.*, 2016 ONCA 179, 2016 CarswellOnt 2929

Articles

10. N§187 — Application to Leases, HMANALY N§187
11. Houlden & Morawetz On-Line Newsletter, Insolv. L. Nws. 2011-32

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

Commercial Tenancies Act, R.S.O. 1990, c. L.7

Lien of landlord in bankruptcy, etc.

38. (1) In case of an assignment for the general benefit of creditors, or an order being made for the winding up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant, the preferential lien of the landlord for rent is restricted to the arrears of rent due during the period of three months next preceding, and for three months following the execution of the assignment, and from thence so long as the assignee retains possession of the premises, but any payment to be made to the landlord in respect of accelerated rent shall be credited against the amount payable by the person who is assignee, liquidator or trustee for the period of the person's occupation. R.S.O. 1990, c. L.7, s. 38 (1).

Rights of assignee

(2) Despite any provision, stipulation or agreement in any lease or agreement or the legal effect thereof, in case of an assignment for the general benefit of creditors, or an order being made for the winding up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant, the person who is assignee, liquidator or trustee may at any time within three months thereafter for the purposes of the trust estate and before the person has given notice of intention to surrender possession or disclaim, by notice in writing elect to retain the leased premises for the whole or any portion of the unexpired term and any renewal thereof, upon the terms of the lease and subject to the payment of the rent as provided by the lease or agreement, and the person may, upon payment to the landlord of all arrears of rent, assign the lease with rights of renewal, if any, to any person who will covenant to observe and perform its terms and agree to conduct upon the demised premises a trade or business which is not reasonably of a more objectionable or hazardous nature than that which was thereon conducted by the debtor, and who on application of the assignee, liquidator or trustee, is approved by a judge of the Superior Court of Justice as a person fit and proper to be put in possession of the leased premises. R.S.O. 1990, c. L.7, s. 38 (2); 2006, c. 19, Sched. C, s. 1 (1).

Lien of landlord in bankruptcy, etc., further provisions
Election to surrender

39. (1) The person who is assignee, liquidator or trustee has the further right, at any time before so electing, by notice in writing to the landlord, to surrender possession or disclaim any such lease, and the person's entry into possession of the leased premises and their occupation by the person, while required for the purposes of the trust estate, shall not be deemed to be evidence of an intention on the person's part to elect to retain possession under section 38. R.S.O. 1990, c. L.7, s. 39 (1).

Rights of sub-tenants

(2) Where the assignor, or person or firm against whom a receiving order has been made in bankruptcy, or a winding up order has been made, being a lessee, has, before the making of the assignment or such order demised any premises by way of under-lease, approved or consented to in writing by the landlord, and the assignee, liquidator or trustee surrenders, disclaims or elects to assign the lease, the under-lessee, if the under-lessee so elects in writing within three months of such assignment or order, stands in the same position with the landlord as though the under-lessee were a direct lessee from the landlord but subject, except as to rental payable, to the same liabilities and obligations as the assignor, bankrupt or insolvent company was subject to under the lease at the date of the assignment or order, but the under-lessee shall in such event be required to covenant to pay to the landlord a rental not less than that payable by the under-lessee to the debtor, and if such last mentioned rental was greater than that payable by the debtor to the said landlord, the under-lessee shall be required to covenant to pay to the landlord the like greater rental. R.S.O. 1990, c. L.7, s. 39 (2).

Settlement of disputes

(3) In the event of any dispute arising under this section or section 38, the dispute shall be disposed of by a judge of the Superior Court of Justice upon an application. R.S.O. 1990, c. L.7, s. 39 (3); 2006, c. 19, Sched. C, s. 1 (1).

...

Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3

...

Admission and Disallowance of Proofs of Claim and Proofs of Security

Trustee shall examine proof

135 (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

Determination of provable claims

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Disallowance by trustee

(2) The trustee may disallow, in whole or in part,

(a) any claim;

(b) any right to a priority under the applicable order of priority set out in this Act; or

(c) any security.

Notice of determination or disallowance

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Expunge or reduce a proof

(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

Scheme of Distribution

Priority of claims

136 (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal representative or, in the Province of Quebec, the successors or heirs of the deceased bankrupt;

(b) the costs of administration, in the following order,

(i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(a),

(ii) the expenses and fees of the trustee, and

(iii) legal costs;

(c) the levy payable under section 147;

(d) the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid;

(d.01) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.3 and 81.4 and the amount actually received by the secured creditor;

(d.02) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.5 and 81.6 and the amount actually received by the secured creditor;

(d.1) claims in respect of debts or liabilities referred to in paragraph 178(1)(b) or (c), if provable by virtue of subsection 121(4), for periodic amounts accrued in the year before the date of the bankruptcy that are payable, plus any lump sum amount that is payable;

(e) municipal taxes assessed or levied against the bankrupt, within the two years immediately preceding the bankruptcy, that do not constitute a secured claim against the real property or immovables of the bankrupt, but not exceeding the value of the interest or, in the Province of Quebec, the value of the right of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee;

(f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any

payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

(g) the fees and costs referred to in subsection 70(2) but only to the extent of the realization from the property exigible thereunder;

(h) in the case of a bankrupt who became bankrupt before the prescribed date, all indebtedness of the bankrupt under any Act respecting workers' compensation, under any Act respecting unemployment insurance or under any provision of the *Income Tax Act* creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;

(i) claims resulting from injuries to employees of the bankrupt in respect of which the provisions of any Act respecting workers' compensation do not apply, but only to the extent of moneys received from persons guaranteeing the bankrupt against damages resulting from those injuries; and

(j) in the case of a bankrupt who became bankrupt before the prescribed date, claims of the Crown not mentioned in paragraphs (a) to (i), in right of Canada or any province, rateably notwithstanding any statutory preference to the contrary.

Payment as funds available

(2) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, payment in accordance with subsection (1) shall be made as soon as funds are available for the purpose.

Balance of claim

(3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him.

...

Application of provincial law to lessors' rights

146 Subject to priority of ranking as provided by section 136 and subject to subsection 73(4) and section 84.1, the rights of lessors are to be determined according to the law of the province in which the leased premises are situated.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

[Currently in force]

Agreements

Disclaimer or resiliation of agreements

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

(4) In deciding whether to make the order, the court is to consider, among other things,

a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor.

...

Certain rights limited

34 (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

Lease

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings.

...

Certain acts not prevented

(4) Nothing in this section is to be construed as

(a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of proceedings under this Act;

...

[In force between January 1, 2010 and December 13, 2012 (at the time of the release of *TNG Acquisitions*)]

Disclaimer or resiliation of agreements

32. (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;

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...

Certain rights limited

34. (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

Lease

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that proceedings commenced under this Act, that the company is insolvent

or that the company has not paid rent in respect of any period before the commencement of those proceedings.

...

Certain acts not prevented

(4) Nothing in this section is to be construed as

(a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of proceedings under this Act;

...

IN THE MATTER OF THE BANKRUPTCY OF
CURRICULUM SERVICES CANADA/
SERVICES DES PROGRAMMES D'ÉTUDES CANADA
OF THE CITY OF TORONTO, IN THE MUNICIPALITY OF TORONTO
IN THE PROVINCE OF ONTARIO

Court File No. C66626

ONTARIO
COURT OF APPEAL

PROCEEDING COMMENCED AT
TORONTO

ADDITIONAL WRITTEN SUBMISSIONS OF THE RESPONDENT

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