

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

FACTUM OF THE RESPONDENT

July 2, 2019

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FACTUM OF THE RESPONDENT

PART I - OVERVIEW

1. On this appeal, a commercial landlord that was able to mitigate its damages following the bankruptcy of its tenant seeks not only to recover on the preferred claim specifically afforded to landlords under section 136(1)(f) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 (“**BIA**”), but also a general unsecured claim for damages for unpaid rent and additional rent payable under the lease with the bankrupt and relating to free rent and leasehold improvements made at the Landlord’s expense.
2. The appellant, Medallion Corporation, in its capacity as authorized agent for 280 Richmond Street West Limited (the “**Landlord**”), is a commercial landlord that owned

property in which Curriculum Services Canada/Services des Programmes d'Etudes Canada (“**Curriculum**” or the “**Bankrupt**”) was a tenant prior to its bankruptcy.

3. After occupying the leased premises and paying occupation rent for a short time following the bankruptcy, RSM Canada Limited, the trustee in bankruptcy of the estate of Curriculum (the “**Trustee**”), disclaimed the Bankrupt’s lease with the Landlord under section 146 of the BIA and sections 38 and 39 of the Ontario *Commercial Tenancies Act*, R.S.O. 1990, c. L.7 (“**CTA**”). The Landlord filed a proof of claim comprised of a preferred claim for three months’ accelerated rent and an unsecured claim for damages for the unexpired portion of the term.
4. The Trustee allowed the Landlord’s preferred claim but reduced it to the total realization from the assets on the leased premises in accordance with section 136(1)(f) of the BIA. The Trustee disallowed the Landlord’s unsecured claim in full on the basis that a landlord of a bankrupt tenant in Ontario is not entitled to make such a claim.
5. The Landlord sought to appeal the disallowance. The Honourable Madam Justice Chiappetta dismissed the appeal on the basis of long-standing precedent in Ontario that bars claims made by a landlord when a lease is disclaimed by a trustee, other than the preferred claim in section 136(1)(f) of the BIA.
6. The Landlord now appeals to this Honourable Court, seeking both the balance of its preferred claim in the amount of \$50,289.28 and its unsecured claim for “contractual damages” in the amount of \$203,442.37.

7. There is no basis in law to overturn Madam Justice Chiappetta's decision. The decision is well-reasoned and properly applies the limited case law on the point. In the circumstances, the appeal should be dismissed.

PART II - FACTS

Trustee's Position on Facts as Set Out in Landlord's Factum

8. The Trustee does not take issue with the facts as set out in Part III of the Landlord's Factum, other than the suggestion in paragraph 29 that the Trustee was somehow required to ask the Landlord for supporting documentation, inquire about the Landlord's mitigation efforts or advise the Landlord that it was contemplating issuing a Notice of Disallowance before partially disallowing the Landlord's claim. The Trustee allows or disallows proofs of claim under the BIA based on the proof of claim filed by a creditor, including supplementary documents required to be provided with the proof of claim by the creditor.

Reference: Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3 ("BIA"), s. 135

9. As discussed in greater detail below, the Trustee's partial disallowance of the Landlord's claim was based on its understanding of the law in Ontario and not on some documentary defect in the Landlord's claim that could have been cured through additional communications with the Landlord.

Trustee's Summary of Additional Facts

10. The Trustee occupied the Leased Premises¹ from its appointment on March 29, 2018 until the Trustee disclaimed the Lease on April 23, 2018. The Trustee paid occupation rent of \$25,698.31 to Curriculum during this time.

Reference: Notice of Disclaimer dated April 23, 2018, Respondent's Compendium dated July 2, 2019 ("Respondent's Compendium", Tab 1, p. 1

11. On or about April 20, 2018, the Landlord filed a Proof of Claim with the Trustee claiming:
- (a) a preferred claim for three months' accelerated rent in the amount of \$100,558.59 under section 136(1) (f) of the BIA; and
 - (b) an unsecured claim in the amount of \$4,028,111.23 for the unexpired portion of the term of the Lease under section 136(3) of the BIA.

Reference: Proof of Claim dated April 20, 2018, Respondent's Compendium, Tab 2, pp. 3-4 and 6

12. Upon review by the Trustee and its counsel of the Proof of Claim filed by the Landlord, the Trustee issued a Notice of Partial Disallowance of Claim pursuant to s. 135(3) of the BIA. The Notice of Partial Disallowance disallowed in part the claim made for priority in the amount of \$100,558.59 on the basis that the realization by the Trustee from the assets (office equipment) on the leased premises totaled \$24,571.00. Accordingly, the Trustee admitted a preferred claim for \$24,571.00 with the priority in payment provided under section 136(1)(f) of the BIA. This claim was admitted in addition to the occupation rent of \$25,698.31 that the Trustee paid to the Landlord.

¹ Capitalized terms used but not otherwise defined herein have the meanings given to them in the Factum of the Appellant dated May 3, 2019.

Reference: Notice of Partial Disallowance dated September 19, 2018, Respondent's Compendium, Tab 3, pp. 7-8

13. With respect to the initial claim by the Landlord for the unexpired portion of the term of the Lease in the amount of \$4,028,111.23, the Trustee disallowed the claim in its entirety. The reason for the disallowance was that, due to the operation of the provisions of section 146 of the BIA, sections 38 and 39 of the CTA and applicable jurisprudence, the disclaimer of a lease in Ontario by a trustee in bankruptcy is deemed to be a consensual surrender of the lease by the tenant to the landlord. Consequently, no claim for damages can be founded on such a deemed surrender of obligations under the lease.

Reference: Notice of Partial Disallowance dated September 19, 2018, Respondent's Compendium, Tab 3, pp. 7-8

14. Given the small amounts at issue, and to avoid an appeal from the disallowance of these small amounts, the Trustee in this case did not credit the occupation rent paid by it (\$25,698.31) against the amount of the Landlord's allowed preferred claim (\$24,571.00), as provided for in section 136(1)(f). Had the Trustee done so, the Landlord's claim would have been disallowed in full.
15. Following the disclaimer, the Landlord was successful in mitigating its damages for the unexpired portion of the term in the amount of \$4,028,111.23 by securing another tenant to lease the premises. Accordingly, the Landlord amended its unsecured claim in its appeal materials to instead seek recovery of the six months of free rent totalling \$175,225.28 provided by the Landlord pursuant to the terms of the Lease (the "**Free Rent**") and to seek compensation for "contractual damages" for the leasehold improvements in the amount of \$45,280 provided at the Landlord's cost under the Lease (the "**Improvements**").

16. The appeal was heard on January 21, 2019 and Madam Justice Chiappetta released her decision dismissing the appeal on February 15, 2019. Her Honour characterized the issue to be decided as: "...whether it remains the law in Ontario that the disclaimer of a lease by a trustee in bankruptcy prevents a landlord from claiming unsecured damages." After reviewing the case law on the issue, including *Re Mussens Ltd.*, [1933] O.W.N. 459, 14 C.B.R. 479 (Ont. H.C.J.) and *Re Linens 'N Things Canada Corp.* (2009), 53 C.B.R. (5th) 232 (Ont. S.C.), Madam Justice Chiappetta found that, after a disclaimer of a lease in Ontario by a trustee in bankruptcy, there is no right for a landlord to claim damages for the unexpired portion of the lease or other contractual damages.

Reference: In the Matter of the Bankruptcy of Curriculum Services Canada, 2019 ONSC 1114, 2019 CarswellOnt 2545 at para. 13, Brief of Authorities of the Respondent/Trustee ("Responding BOA"), Tab 1

PART III - TRUSTEE'S POSITION ON ISSUES SET OUT IN LANDLORD'S FACTUM

17. The Landlord raises the following issues in its Factum:
- (a) Is leave to appeal required in this case?
 - (b) What is the standard of review applicable to this appeal?
 - (c) Did the Trustee have a duty to ask the Landlord for supporting documentation, inquire about the Landlord's mitigation efforts or advise the Landlord that it was contemplating issuing a Notice of Disallowance before partially disallowing the Landlord's claim?
 - (d) Is the Landlord entitled to rank as an unsecured creditor for either of:

- (i) the portion of its preferred claim that was disallowed; or
- (ii) its damages claim in respect of the Free Rent and the Leasehold Improvements?
- (e) Should the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") dealing with lease disclaimers have any bearing on the interpretation of the provisions of the BIA at issue in this appeal?

18. The Trustee's position on each of these issues is set out below.

Issues A and B: Is leave to appeal required in this case? What is the standard of review applicable to this appeal?

19. The Trustee concedes that the property involved in this appeal exceeds \$10,000 in value and that this appeal lies to the Court of Appeal. The Trustee also concedes that this appeal involves a question of law and that the standard of review is correctness.

Issue C: Did the Trustee have a duty to make further inquiries or give notice to the Landlord before partially disallowing the Landlord's claim?

20. At paragraphs 29, 48 and 51 of its Factum, the Landlord quotes section 135 of the BIA, which pertains to a trustee's review of a proof of claim, and appears to suggest that the Trustee had an obligation to ask the Landlord for additional support to establish the claim, to inquire as to the status of the Landlord's mitigation efforts and to advise the Landlord that it was contemplating issuing a Notice of Disallowance prior to doing so.

21. The Landlord's argument is contradicted by the plain wording of section 135(1), which states that a 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” (emphasis added). A trustee has a *duty* to examine every proof of claim and a corresponding *right* to require further evidence in support of the claim where necessary to adjudicate the claim. If further evidence is not necessary to adjudicate the claim, the trustee does not have an obligation to request it in any event.

Reference: BIA, supra, s. 135(1)

22. The Landlord also relies at paragraph 51 of its Factum on a passage from Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada* quoted by Registrar Schwann of the Saskatchewan Court of Queen's Bench in *Royal Bank v. Insley* to the effect that a trustee has a duty to demand sufficient evidence to establish the validity of the claim if the Trustee is “unsatisfied with the proof of claim or its supporting material”.

Reference: Royal Bank v. Insley, 2010 SKQB 17, 2010 CarswellSask 47 (“Insley”), Responding BOA, Tab 2

23. *Royal Bank v. Insley* was an application by the Royal Bank of Canada to expunge or reduce proofs of claim of certain other creditors pursuant to section 135(5) of the BIA. The Registrar made the comments relied on by the Landlord to “...plac[e] the whole of s. 135 in its proper context” and to make clear that the Trustee had a duty to examine the proofs of claim that were sought to be expunged. Importantly, the Registrar was not considering an argument by a creditor that the trustee in that case should have taken further steps to satisfy itself that the creditor’s claim should be disallowed. *Royal Bank v. Insley* can be distinguished on this basis alone.

Reference: Insley, supra at para. 23, Responding BOA, Tab 2

24. Moreover, in this case, The Trustee was not “unsatisfied” with the Landlord’s proof of claim in the sense that the Landlord neglected to include information or documentation which the Trustee required to assess the proof of claim. The Trustee simply disallowed a portion of the claim as legally invalid on the basis of the provisions of the BIA, the CTA and the applicable Ontario case law. It cannot be the case that a Trustee has a duty to request further information and documentation from a claimant each time it wishes to disallow a claim as being invalid for legal reasons. This would result in an absurdity and unnecessary increased costs to the bankruptcy estate.
25. In addition, as noted at paragraph 15 above, the claims being made on this appeal were not included in the original proof of claim, but made after mitigation of the unexpired portion of the term of the lease in the Landlord’s appeal materials.

Issue D: Is the Landlord entitled to rank as an unsecured creditor for the disallowed portion of its preferred claim or its damages claim?

26. At paragraphs 52-94 of its Factum, the Landlord argues that it is entitled to rank as an unsecured creditor for:
- (a) the disallowed portion of its preferred claim (\$50,289.28); and
 - (b) the Leasehold Improvements (\$45,280.00) and Free Rent (\$175,225.28).
27. It purports to rely on the following in support of this argument:
- (a) the language of section 136(3) of the BIA, which provides that a creditor whose rights are restricted by section 136 is entitled to rank as an unsecured creditor the balance of the creditor’s claim;

- (b) the existence of other provincial legislation that expressly restricts the rights of landlords to claim damages for rent due under the unexpired portion of a lease;
- (c) passages from *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*, [1971] SCR 562 to the effect that a lease is both a conveyance of land and a contract and that the repudiation, surrender or other termination of a lease gives rise to a claim in damages; and
- (d) the *obiter dictum* from the Supreme Court of Canada's decision in *Crystalline Investments* regarding the effect of a disclaimer on the contractual obligations of the parties.

A) Section 136(3) of the BIA

28. As outlined above, the Trustee admitted a claim for \$24,571.00 with priority under section 136(1)(f) of the BIA, being the total amount realized by the Trustee from assets on the leased premises. Based on the express limitation in section 136(1)(f) that a landlord's priority claim cannot exceed the realization from the property on the leased premises, the Trustee was unable to admit any higher amount than \$24,571.00 as a priority claim under section 136(1)(f) of the BIA.

Reference: BIA, supra, s. 136(1)(f)

29. The Landlord's position on this issue is summarized at paragraphs 55-56 of its Factum. According to the Landlord, pursuant to section 136(3) of the BIA, the Landlord is entitled to claim the disallowed portion of its preferred claim as an unsecured claim in the bankruptcy estate. The Trustee respectfully disagrees.

30. Section 136(3) provides that a creditor whose rights are restricted by section 136 is entitled to rank as an unsecured creditor for the balance of the creditor's claim. However, this does not mean that landlords in every bankruptcy across the country are entitled to make an unsecured claim for any remaining damages. This is because, pursuant to section 146 of the BIA (subject to priority of ranking for arrears of rent and accelerated rent), the rights of lessors are to be determined according to the law of the province in which the leased premises are situated.

Reference: BIA, supra, ss. 136(3) and 146

31. To the extent that sections 136(3) and 146 conflict, section 146, which speaks to the rights of landlords specifically, should prevail over section 136(3), as it pertains to the rights of creditors more generally.

Reference: Harding v. Fraser, 2006 CarswellOnt 3933 (S.C.J) at para. 31, Responding BOA, Tab 3

32. Accordingly, as articulated by the Supreme Court of Canada in its 1962 decision in *Re Gingras automobile Ltée*, subject to the priority ranking in the BIA, "...the nature and extent of the landlord's claim for rent or damages and any other rights he may have arising out of the contract of lease are determined by the law of the province in which the leased premises are situated."

Reference: Re Gingras automobile Ltée, 1962 CarswellQue 27, [1962] S.C.R. 676 at paras. 11-13, Responding BOA, Tab 4

33. In Ontario, the CTA governs the relationships between commercial landlords and tenants. However, sections 38 and 39 of the CTA, which govern a landlord's rights on the

bankruptcy of a tenant in Ontario, are silent as to whether a landlord can pursue an unsecured claim for its damages over and above its preferred claim.

Reference: Commercial Tenancies Act, R.S.O. 1990, c. L.7 (“CTA”), ss. 38-39

34. Where a statute is silent on any matter, the common law should prevail. As a result, it is necessary to turn to the common law to determine whether a landlord has a right to assert an unsecured claim for damages following the bankruptcy of a tenant.

Reference: Re Sidley, 1938 CarswellOnt 44 (H.C.J.) at para. 4, Responding BOA, Tab 5

35. Registrar Nettie’s decision in *Re Linens N Things* appears to be the only Ontario case that is directly on point. In that case, Registrar Nettie considered the issue of whether there is a damages remedy for landlords in Ontario beyond section 38 of the CTA and section 136 of the BIA and ultimately concluded that there is not. Registrar Nettie was persuaded by the fact that neither the CTA, nor the BIA, provide for this type of claim and, even more importantly, that nearly a century of Ontario case law has consistently held that:

“...the effect of a surrender or disclaimer by a trustee in this Province is as if there was a consensual surrender of the lease. In other words, it is at an end, and no claim for damages can possibly be founded from such a cessation of obligations under the lease.”

Reference: Re Linens N Things Canada Corp., 2009 CarswellOnt 2849 (S.C.J.) (“Linens N Things”) at para. 21, Responding BOA, Tab 6

36. Houlden & Morawetz confirm that, after a disclaimer or surrender of a lease by a trustee, “...there is no right in Ontario to claim damages for the unexpired portion of the lease”.

Reference: Houlden & Morawetz, Bankruptcy and Insolvency Analysis, G§§140-141, Responding BOA, Tab 7

37. As a result, the language of section 136(3) does not assist the Landlord with respect to any of the disallowed portion of its preferred claim as an ordinary unsecured claim, the Leasehold Improvements or the Free Rent.

B) Other Provincial Legislation

38. At paragraphs 62-63 of its Factum, the Landlord points out that some provinces have enacted legislation which restricts the rights of landlords to claim damages for rent due under the unexpired portion of a lease, while others have not. The Landlord notes that Ontario is one province that has no express restriction written into its statute (the CTA).
39. Included at **Schedule “B”** to this Factum is a chart summarizing the various provincial statutes enacted on the issue. Significantly, it appears that no province has enacted legislation which expressly permits the type of claim being advanced by the Landlord in this case. Rather, seven provinces and three territories appear to have enacted legislation that deals with a landlord’s claim in the bankruptcy of a tenant, of which four (Prince Edward Island, Saskatchewan, Alberta and British Columbia) expressly prohibit the type of claim being advanced by the Landlord, and six (Ontario, New Brunswick, Manitoba, Yukon, Northwest Territories and Nunavut) are statutorily silent on the issue. If anything, this indicates a national trend prohibiting a landlord from claiming damages for the unexpired portion of the term.

Reference: Landlord and Tenant Act, R.S.P.E.I. 1988, c. L-4, s. 73; Landlord and Tenant Act, R.S.N.B. 1973, c. L-1, s. 43; CTA, supra, ss. 38-39; The Landlord and Tenant Act, C.C.S.M. c. L70, s. 46; The Landlord and Tenant Act, R.S.S. 1978, c. L-6, ss. 43-44; Landlord's Rights on Bankruptcy Act, R.S.A. 2000, c. L-5, ss. 3-4; Commercial Tenancy Act, R.S.B.C. 1996, c. 57, ss. 29(5)-(7); Commercial Tenancies Act, R.S.N.W.T. 1998, c. C-10, s. 24; Commercial Landlord and Tenant Act, R.S.Y. 2002, c. 131, s. 36

40. As the Alberta Court of Appeal stated in *Dancole Investments Ltd. v. House of Tools Co. (Trustee of)*, the BIA and the *Landlord's Rights on Bankruptcy Act*, R.S.A. 2000, c. L-5 (the Alberta statute at issue in that case), represent a balancing of the rights of the landlord against the rights of other creditors.

Reference: Dancole Investments Ltd. v. House of Tools Co. (Trustee of), 2011 ABCA 145, 2011 CarswellAlta 774 at para. 30, Responding BOA, Tab 8

41. In the Trustee's submission, this comment applies equally to the CTA and the policy choice made by the various legislatures makes sense, as landlords are generally one of the largest unsecured creditors in commercial insolvency proceedings and have a better ability to mitigate their damages and absorb their losses than other, smaller unsecured trade creditors and employees.

C) *Highway Properties*

42. Throughout its Factum, the Landlord relies on *Highway Properties* for the propositions that:
- (a) a lease of real property is both a lease and a contract; and
 - (b) as a result, a landlord may have recourse not only to its rights as a landlord, but for contractual damages for breach of the contract which is the lease. With respect, this reliance is entirely misplaced.
43. *Highway Properties* dealt with a situation where a solvent tenant repudiated a lease. The tenant was not bankrupt and the provisions of the BIA and CTA relating to trustee disclaimers were not at issue. The Supreme Court was describing a landlord's remedies

against a tenant outside of insolvency, not within the confines of a bankruptcy proceeding where creditors' remedies are limited.

Reference: Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd., 1971 CarswellBC 239, 1971 CarswellBC 274, [1971] S.C.R. 562, Responding BOA, Tab 9

44. In any event, characterizing the Free Rent and Improvements as “damages” rather than rent is a distinction without a difference. Pursuant to the express terms of the Landlord’s Lease in this case, on the bankruptcy of Curriculum, the unamortized portion of the money given by the Landlord to make the Improvements, and the Free Rent granted by the Landlord, are deemed to constitute “additional rent”. The Lease itself belies the argument being advanced by the Landlord.

Reference: Lease dated May 26, 2017, sections 5.3(a) and 16.1(k)(viii) (re: Free Rent) and section 4 of Schedule “C” (re: Improvements), Respondent’s Compendium, Tab 4, pp. 10-11, 13-15 and 19

45. Characterizing the Free Rent and Improvements as “damages” also allows the Landlord to achieve indirectly what it cannot achieve directly. The rental payments under the Lease would have factored in any inducements that the landlord may have offered at the outset of the lease, such as the Free Rent and the Improvements. Therefore, as the Landlord has successfully mitigated its damages with respect to the outstanding rental payments owing under the Lease for the unexpired portion of the term, by extension, the Landlord has also mitigated its damages with respect to the Free Rent and Improvements.
46. The landlord in *Re Linens N Things* advanced the very argument now being advanced by the Landlord in this case and was rejected on the following basis:

“The Appellant has gone to great lengths at the hearing to characterize its disallowed claim as one for damages for breach of the contract contained in the lease. It has taken great pains not to claim that any part of the disputed amount is rent, as it accepts that it can only claim rent in accordance with s. 136 BIA and s. 38 CTA.

The Appellant relies upon the decision of the Supreme Court of Canada in *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 (S.C.C.) for the proposition that a lease of real property is both a lease and a contract. Flowing from this is the finding in that decision that a landlord may have recourse not only to its rights as a landlord, but for contractual damages for breach of the contract which is the lease.

While I take no issue with the decision in *Highway Properties*, and it is clearly binding, it is also entirely distinguishable on the facts. The circumstances of the breach of the lease in *Highway Properties* were that the tenant therein repudiated the lease. There was no insolvency, and no applicability of s. 146 BIA or anything like sections 38 and 39 CTA.”

Reference: Linens N Things, supra at paras. 12-14, Responding BOA, Tab 6

D) Crystalline Investments

47. At paragraphs 74-89 of its Factum, the Landlord argues that Madam Justice Chiappetta was required to follow the statements made in *obiter dictum* at paragraphs 38-42 of *Crystalline Investments Ltd. v. Domgroup Ltd.* and submits that *Crystalline Investments* “...put an end to *Cummer-Yonge*”.

Reference: Crystalline Investments Ltd. v. Domgroup Ltd., 2004 SCC 3, 2004 CarswellOnt 219, Responding BOA, Tab 10

48. In *R. v. Puddicombe*, the Ontario Court of Appeal held that *obiter* that is integral to the *ratio decidendi* of a judgment is binding, while *obiter* that is “incidental or collateral” to the analysis is not binding.

Reference: R. v. Puddicombe, 2013 ONCA 506, 2013 CarswellOnt 10743 at para. 68, Responding BOA, Tab 11

49. The paragraphs of *Crystalline Investments* cited by the Landlord pertain to third parties attempting to be relieved of their guarantee obligations under leases. They are not integral to the *ratio decidendi* of *Crystalline Investments* or the issues before the Supreme Court of Canada on the appeal.
50. *Crystalline Investments* involved a proposal proceeding under the BIA. The issue before the court was whether notices of termination of lease given by the debtor under section 65.2 of the BIA distinguished the rights of landlords vis-à-vis original tenants prior to any assignment.

Reference: Crystalline Investments Ltd. v. Domgroup Ltd., 2001 CarswellOnt 601, 2001 CarswellOnt 601 (S.C.J) (“Crystalline Lower Court Decision”) at para. 5, Responding BOA, Tab 10

51. Relying on *Cummer-Yonge Investments*, the motions Judge in *Crystalline Investments* found that since the leases no longer existed, the liabilities that would have been owed by the original tenant to the landlord also disappeared. The court granted summary judgment and dismissed the claims of the landlords.

Reference: Crystalline Lower Court Decision, Responding BOA, Tab 10

52. The Ontario Court of appeal disagreed, and found that the insolvency of the assignee and the termination of the lease pursuant to section 65.2 of the BIA did not affect the landlords, who could continue to look to the original tenant who assigned the leases to the insolvent party. This finding was upheld by the Supreme Court.

Reference: Crystalline Investments Ltd. v. Domgroup Ltd., 2002 CarswellOnt 705 (C.A.), aff'd 2004 SCC 3, 2004 CarswellOnt 21 ("Crystalline SCC Decision"), Responding BOA, Tab 10

53. Indeed, the issue of whether the leases were terminated by surrender (which Domgroup argued before the Supreme Court for the first time) was not an issue that the Court intended to consider in its decision-making:

“This appeal is limited to confirming that Food Group's repudiation of the leases assigned to it by Domgroup did not, by virtue of s. 65.2 alone, terminate Domgroup's rights and obligations under the leases. Section 65.2 relates to the repudiation of leases by insolvent commercial tenants. It is not concerned with the effects of that repudiation on third parties, such as assignors and guarantors. Whether the leases were terminated by surrender, as Domgroup argues for the first time in the Court, or by the application of some other principle of common law, is a question best left for trial.”

Reference: Crystalline SCC Decision, supra at para. 10, Responding BOA, Tab 10

54. The issue of whether the surrender of a lease completely terminates the lease for all purposes and for all parties including guarantors was not a matter that was in issue before the Supreme Court of Canada. As a result, any discussion of the issue of surrender of lease, and the jurisprudence underpinning it, were incidental to the Supreme Court's analysis and are not binding on this Court.

Issue F: Should the lease disclaimer provisions of the CCAA have any bearing on the interpretation of the provisions of the BIA at issue in this appeal?

55. At paragraphs 90-94 of its Factum, the Landlord argues that the BIA should be interpreted in a way that harmonizes it with the CCAA, which contains an express provision deeming creditors whose contracts have been disclaimed by the debtor to have a provable claim in the CCAA proceedings.

Reference: Companies' Creditors Arrangement Act, RSC 1985, c C-36 ("CCAA"), s. 32(7)

56. In support of this argument, the Landlord relies on the following passage from *Century Services Inc. v. Canada (Attorney General)*:

“With parallel CCAA and BIA restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes **to the extent possible** and encouraging reorganization over liquidation.”

Reference: Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, 2010 CarswellBC 3419 at para. 24 (“Century Services”), Responding BOA, Tab 12

57. *Century Services* does not stand for the proposition that the BIA and the CCAA are to be interpreted in the exact same manner where their provisions differ. Rather, they are to be interpreted harmoniously to the extent possible given that the bankruptcy provisions of the BIA deal with liquidations and the CCAA generally concerns itself with restructurings. In this case, it is impossible to harmonize the statutes when they contain two separate and distinct schemes for dealing with landlord claims.

Reference: Century Services, supra at para. 23, Responding BOA, Tab 12

58. The BIA contains very specific provisions about how to calculate a landlord’s claim in a liquidating bankruptcy and the relative priority status of that claim. These provisions entitle a landlord to a priority claim for, at a maximum, three months’ rental arrears and accelerated rent. They also provide that the rights of a landlord are to be determined according to the law of the province in which the leased premises are situated.

Reference: BIA, supra, ss. 136(1)(f) and 146

59. In contrast to this relatively comprehensive and specific code for dealing with landlord claims, in a restructuring proceeding under the CCAA generally provides that a party to an agreement that was disclaimed by the debtor has a provable claim in the CCAA proceedings. The CCAA does not provide any guidance as to the ranking or amount of that provable claim, and instead permits the parties to deal with those claims as part of the plan of compromise or arrangement ultimately approved by the court. Significantly, the CCAA does not explicitly contain the same priority claim for landlords found in the BIA. In these circumstances, *Century Services* does not assist the Landlord.

Reference: CCAA, supra, s. 32(7)

PART IV - ADDITIONAL ISSUES

60. The Trustee does not wish to raise any additional issues on this appeal.

PART V - ORDER REQUESTED

61. The Trustee respectfully requests an order dismissing this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of July, 2019.

per 

Alex Ilchenko

PALLET VALO LLP

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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

CERTIFICATE

I, Dina Milivojevic, confirm that:

1. An order under subrule 61.09(2) (original record and exhibits) is not required; and
2. I estimate that 50 minutes will be required for the Respondent's oral argument.

July 2, 2019

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In its capacity as trustee in bankruptcy of
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Programmes d'Etudes Canada

SCHEDULE “A”

LIST OF AUTHORITIES

1. *In the Matter of the Bankruptcy of Curriculum Services Canada*, 2019 ONSC 1114, 2019 CarswellOnt 2545
2. *Royal Bank v. Insley*, 2010 SKQB 17, 2010 CarswellSask 47
3. *Harding v. Fraser*, 2006 CarswellOnt 3933 (S.C.J.)
4. *Re Gingras automobile Ltée*, 1962 CarswellQue 27, [1962] S.C.R. 676
5. *Re Sidley*, 1938 CarswellOnt 44 (H.C.J.)
6. *Re Linens N Things Canada Corp.*, 2009 CarswellOnt 2849 (S.C.J.)
7. Houlden & Morawetz, *Bankruptcy and Insolvency Analysis*, G§§140-141
8. *Dancole Investments Ltd. v. House of Tools Co. (Trustee of)*, 2011 ABCA 145, 2011 CarswellAlta 774
9. *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*, 1971 CarswellBC 239, 1971 CarswellBC 274, [1971] S.C.R. 562
10. *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, 2004 CarswellOnt 219
11. *R. v. Puddicombe*, 2013 ONCA 506, 2013 CarswellOnt 10743
12. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, 2010 CarswellBC 3419

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY – LAWS

| SURVEY OF PROVINCIAL STATUTES | | |
|---|--|--|
| Province / Territory | Statute | Provision |
| Newfoundland | No relevant statute located. | N/A |
| Prince Edward Island (landlord has preferred claim for rent due for a period “equal to three terms or times of payment”; landlord has general unsecured claim for balance of accrued rent beyond amount mentioned above and 3 months’ accelerated rent if provided for in lease; statute expressly provides that landlord does not have claim for balance of unexpired portion of term) | <i>Landlord and Tenant Act</i> , R.S.P.E.I. 1988, c. L-4 | <p>73. Rights of landlord on tenant’s bankruptcy</p> <p>(1) In case of a tenant making an assignment for the general benefit of his creditors, or of a tenant company being wound up under the <i>Winding-up Act</i> R.S.P.E.I. 1988, Cap. W-5, the right of the landlord to distrain or to complete a distress upon any goods which pass to or vest in the assignee or liquidator, cease from and after the date of the assignment or of the resolution or order for winding up, and the assignee or liquidator is entitled to immediate possession of the property of the tenant; but in the distribution of the property of the tenant <u>the assignee or liquidator shall pay, in priority to all other debts, the landlord’s claim for rent to an amount not exceeding the value of the distrainable assets of the tenant and not exceeding the rent due and accruing due at the date of the assignment or of the resolution or order for winding up, for a period equal to three terms or times of payment</u>, according as the term of times of payment may be weekly, monthly or quarterly, or for a period of one year if the term of times of payment be more than three months and the costs of distress, if any distress has been commenced.</p> <p>General creditor, proof as</p> <p>(2) In the case of an assignment or winding up referred to in subsection (1), <u>the landlord may prove as a general creditor for (a) any surplus of rent accrued due</u> at the date of the assignment or of the resolution or order for winding up over and</p> |

| SURVEY OF PROVINCIAL STATUTES | | |
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| Province / Territory | Statute | Provision |
| | | <p>above the amount mentioned in subsection (1) for which the landlord may have a preference or priority in payment; <u>and (b) any accelerated rent to which he may be entitled under his lease, not exceeding an amount equal to three months rent.</u></p> <p>Unexpired portion of rent, no claim for (3) Except as otherwise provided in this section, <u>the landlord is not entitled to prove as a creditor for rent for any portion of the unexpired term of his lease,</u> but the assignee or liquidator, shall pay to the landlord for the period during which he actually occupies the leased premises from and after the date of the assignment or of the resolution or order for winding up a rental calculated on the basis of the lease and payable in accordance with the terms thereof, but any payment already made to the landlord as rent in advance in respect of accelerated rent, shall be credited against the amount payable by the assignee or liquidator for the period of his occupation.</p> |
| Nova Scotia | <i>Tenancies and Distress for Rent Act</i> , R.S.N.S. 1989, c. 464 | No relevant provision located – statute only appears to address landlord’s right to distrain on bankruptcy of tenant. |
| New Brunswick (landlord has preferred claim for 3 months’ accrued rent and 3 months’ accelerated rent; statute is silent regarding whether landlord has general unsecured claim for balance of unexpired term) | <i>Landlord and Tenant Act</i> , R.S.N.B. 1973, c. L-1 | <p>Rights of landlord on tenant bankruptcy</p> <p>43(1) Where an order is made for the winding-up of an incorporated company, or a receiving order in bankruptcy or authorized assignment is made against or by a tenant, then the right of the landlord to distrain or realize his rent by distress ceases from and after the date of the assignment or order, and the assignee, trustee or liquidator is entitled to immediate possession of the property of the tenant; but in the distribution of the property of the tenant <u>the assignee, trustee or liquidator shall pay to the landlord, in priority to all other debts, an</u></p> |

| SURVEY OF PROVINCIAL STATUTES | | |
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| Province / Territory | Statute | Provision |
| | | <u>amount not exceeding the value of the distrainable assets and restricted to the arrears of rent due during the period of three months next preceding and the costs of distress, if any, and the rent for the three months following the date of the assignment or order</u> , and from thence so long as the assignee, trustee or liquidator 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 assignee, trustee or liquidator for the period of his occupation. |
| Quebec | <i>Civil Code of Québec</i> , C.Q.L.R. c. C.C.Q-1991 | No relevant provision located. |
| Ontario (landlord has preferred claim for 3 months' accrued rent and 3 months' accelerated rent; statute is silent regarding whether landlord has general unsecured claim for balance of unexpired term) | <i>Commercial Tenancies Act</i> , 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, <u>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</u> , 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. |
| Manitoba (landlord has preferred claim for 3 months' accrued rent and 3 months') | <i>The Landlord and Tenant Act</i> , C.C.S.M. c. L70 | Right of Landlord on Tenant's Bankruptcy Lien of landlord in bankruptcy 46(1) In case of an assignment for the general benefit of creditors, or an order |

| SURVEY OF PROVINCIAL STATUTES | | |
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| Province / Territory | Statute | Provision |
| accelerated rent; statute is silent regarding whether landlord has general unsecured claim for balance of unexpired term) | | 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, <u>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</u> , 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 assignee, liquidator or trustee for the period of his occupation. |
| Saskatchewan (landlord has preferred claim for 3 months' accrued rent and general unsecured claim for any other surplus rent accrued due; statute expressly provides that landlord does not have claim for rent for balance of unexpired portion of term) | <i>The Landlord and Tenant Act</i> , R.S.S. 1978, c. L-6 | <p>Priority given to landlord</p> <p>43 When a receiving order or an assignment is made against or by any lessee under the <i>Bankruptcy Act</i> (Canada) and the lessee has goods or chattels on which the landlord has distrained, or would be entitled to distrain, for rent, the right of the landlord to distrain or realize his rent by distress shall cease with respect to those goods and chattels from and after the date of the receiving order or authorized assignment and the custodian or the trustee shall be entitled to immediate possession of all property of the debtor, but in the distribution of the property of the bankrupt or assignor <u>the trustee shall pay to the landlord, in priority to all other debts, an amount not exceeding the value of the distrainable assets and not exceeding three months' rent accrued due prior to the date of the receiving order or assignment</u>, and the costs of distress, if any.</p> <p>Power to prove for surplus</p> <p>44 The landlord may prove as a general creditor for all surplus rent accrued due at the date of the receiving order or</p> |

| SURVEY OF PROVINCIAL STATUTES | | |
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| Province / Territory | Statute | Provision |
| | | <p>assignment.</p> <p>Rent for unexpired term 45 The landlord shall not be entitled to prove as a creditor for rent for any portion of the unexpired term of his lease, but the trustee shall pay to the landlord for the period during which he actually occupies the leased premises from and after the date of the receiving order or assignment, a rental calculated on the basis of the lease.</p> |
| <p>Alberta (landlord has general unsecured claim for any rent accrued beyond 3-month period preceding bankruptcy and 3 months' accelerated rent if provided for in lease; statute expressly provides that landlord does not have claim for balance of unexpired portion of term)</p> | <p><i>Landlord's Rights on Bankruptcy Act, R.S.A. 2000, c. L-5</i></p> | <p>Surplus rent</p> <p>3 The lessee is a debtor to the landlord</p> <p>(a) for all surplus rent in excess of the 3 months' rent accrued due at the date of the receiving order or assignment, and</p> <p>(b) for any accelerated rent to which the landlord may be entitled under the lease but not exceeding an amount equal to 3 months' rent.</p> <p>When landlord unable to claim from lessee</p> <p>4 <u>Subject to section 3, the landlord has no right to claim as a debt any money due to the landlord from the lessee for any portion of the unexpired term of the lessee's lease.</u></p> |
| <p>British Columbia (landlord has preferred claim for 3 months' accrued rent and general unsecured claim for any other surplus rent accrued due; statute expressly provides that landlord does not have claim for rent for balance of</p> | <p><i>Commercial Tenancy Act, R.S.B.C. 1996, c. 57</i></p> | <p>Application of Bankruptcy and Insolvency Act (Canada) and rights of trustee and landlord</p> <p>29 (5) The landlord has a <u>preferred claim</u> against the estate of the lessee for arrears of rent not exceeding <u>3 months' rent accrued</u> due prior to the date of the receiving order or assignment, together with all costs of distress properly made before the date in respect of the rent hereby made a preferred</p> |

| SURVEY OF PROVINCIAL STATUTES | | |
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| Province / Territory | Statute | Provision |
| unexpired portion of term) | | <p>claim.</p> <p>(6) The landlord may prove as a <u>general creditor</u> for</p> <p>(a) <u>all surplus rent accrued due</u> at the date of the receiving order or assignment; and</p> <p>(b) <u>any accelerated rent</u> to which he or she may be entitled under his or her lease, not exceeding an amount <u>equal to 3 months' rent</u>.</p> <p>(7) <u>Except as aforesaid, the landlord is not entitled to prove as a creditor for rent for any portion of the unexpired term of the lease</u>, but the trustee shall pay to the landlord for the period during which the trustee or the custodian actually occupies the premises from and after the date of the receiving order or assignment a rental calculated on the basis of the lease and payable in accordance with its terms, except that any payment already made to the landlord as rent in advance in respect of that period, and any payment to be made to the landlord in respect of accelerated rent, shall be credited against the amount payable by the trustee for that period.</p> |
| Northwest Territories (landlord has preferred claim for 3 months' accrued rent and 3 months' accelerated rent; statute is silent regarding whether landlord has general unsecured claim for balance of unexpired term) | <i>Commercial Tenancies Act</i> , R.S.N.W.T. 1998, c. C-10 | Priority of claim for rent 24. (1) Where (a) an assignment for the general benefit of creditors, (b) an order for the winding-up of a corporation, or (c) a receiving order in bankruptcy or authorized assignment, is made against or by a tenant, the right of the landlord to distrain or realize his or her rent by distress ceases on the date of the assignment or order and the assignee, trustee or liquidator may take immediate possession of the property of the tenant. |

| SURVEY OF PROVINCIAL STATUTES | | |
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| Province / Territory | Statute | Provision |
| | | <p>Distribution of property of tenant</p> <p>(2) In the distribution of the property of the tenant referred to in subsection (1), <u>the assignee, trustee or liquidator shall pay to the landlord, in priority to all other debts,</u></p> <p><u>(a) an amount not exceeding the value of the distrainable assets and restricted to the arrears of rent due during the three months</u></p> <p><u>immediately preceding the date of the assignment or order,</u></p> <p><u>(b) the costs of distress, if any, and</u></p> <p><u>(c) the rent for the three months following the date of the assignment or order,</u> and from then so long as the assignee, trustee or liquidator 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 assignee, trustee or liquidator for the period of his or her occupation.</p> |
| <p>Nunavut</p> <p>(landlord has preferred claim for 3 months' accrued rent and 3 months' accelerated rent; statute is silent regarding whether landlord has general unsecured claim for balance of unexpired term)</p> | <p><i>Commercial Tenancies Act</i>, R.S.N.W.T. 1998, c. C-10</p> | <p>Priority of claim for rent</p> <p>24. (1) Where</p> <p>(a) an assignment for the general benefit of creditors,</p> <p>(b) an order for the winding-up of a corporation, or</p> <p>(c) a receiving order in bankruptcy or authorized assignment,</p> <p>is made against or by a tenant, the right of the landlord to distrain or realize his or her rent by distress ceases on the date of the assignment or order and the assignee, trustee or liquidator may take immediate possession of the property of the tenant.</p> <p>Distribution of property of tenant</p> <p>(2) In the distribution of the property of the tenant referred to in subsection (1), <u>the assignee, trustee or liquidator shall pay to the landlord, in priority to all</u></p> |

| SURVEY OF PROVINCIAL STATUTES | | |
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| Province / Territory | Statute | Provision |
| | | <p><u>other debts,</u> <u>(a) an amount not exceeding the value of the distrainable assets and restricted to the arrears of rent due during the three months</u> <u>immediately preceding the date of the assignment or order,</u> <u>(b) the costs of distress, if any, and</u> <u>(c) the rent for the three months following the date of the assignment or order,</u> and from then so long as the assignee, trustee or liquidator 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 assignee, trustee or liquidator for the period of his or her occupation.</p> |
| <p>Yukon (landlord has preferred claim for 3 months' accrued rent and 3 months' accelerated rent; statute is silent regarding whether landlord has general unsecured claim for balance of unexpired term)</p> | <p><i>Commercial Landlord and Tenant Act, R.S.Y. 2002, c. 131</i></p> | <p>Rights of landlord on tenant's bankruptcy</p> <p>36(1) If an assignment for the general benefit of creditors, an order for the winding-up of an incorporated company, or a receiving order in bankruptcy or authorized assignment is made against or by a tenant, the right of the landlord to distrain or realize rent by distress ceases from and after the date of the assignment or order and the assignee, trustee, or liquidator may take immediate possession of the property of the tenant, but in the distribution of the property of the tenant the assignee, trustee, or liquidator shall pay to the landlord, in priority to all other debts, an amount not exceeding the value of the distrainable assets and restricted to the arrears of rent due during the period of three months next preceding and the costs of distress, if any, and the rent for the three months following the date of the assignment or order, and from thence so long as the assignee, trustee, or liquidator retains possession of the premises, but any payment to be made to the</p> |

| SURVEY OF PROVINCIAL STATUTES | | |
|-------------------------------|---------|---|
| Province / Territory | Statute | Provision |
| | | <p>landlord in respect of accelerated rent shall be credited against the amount payable by the assignee, trustee, or liquidator for the period of their occupation.</p> <p>(2) Despite any provision, stipulation, or agreement in any lease or agreement or the legal effect thereof, if an assignment for the general benefit of creditors, an order for the winding-up of an incorporated company, or a receiving order in bankruptcy or authorized assignment has been made against or by a tenant, the assignee, trustee, or liquidator may at any time within three months after the date of the assignment or order for the purposes of the trust estate and before they have 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, on the terms of the lease and subject to the payment of the rent as provided by the lease or agreement, and may on 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 on the demised premises a trade or business that is not reasonably of a more objectionable or hazardous nature than that which was thereon conducted by the debtor, and who shall on application of the assignee, trustee, or liquidator be approved by a judge as a person fit and proper to be put in possession of the leased premises.</p> |

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

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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.

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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

FACTUM OF THE RESPONDENT

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