Court File No. C66626

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE BANKRUPTCY OF
Curriculum Services Canada/Services Des Programmes D'Etudes Canada
of the City of Toronto
in the Province of Ontario

B E T W E E N:

MEDALLION CORPORATION

Appellant

and

RSM CANADA LIMITED

Respondent

WRITTEN SUBMISSIONS OF THE APPELLANT

November 22, 2019

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WRITTEN SUBMISSIONS OF THE APPELLANT

1. At the panel's request, these submissions address both the Endorsement of Mr. Justice Hainey in *7636156 Canada Inc. v. OMERS Realty Corporation*, 2019 ONSC 6106 ("***763 v. OMERS***") and the Ontario Court of Appeal decision in *Re TNG Acquisition Inc. (Re)*, 2011 ONCA 535 ("***TNG***").

763 v. *OMERS*

1. Subsequent to Mr. Ilchenko's letter of October 30, 2019 enclosing a copy of Hainey J.'s Endorsement, we were advised that OMERS filed a Notice of Appeal on November 1, 2019. Attached at Tab A is a copy of the Notice of Appeal.

2. Although the main issue raised in OMERS' Notice of Appeal is the principle of the autonomy of letters of credit and the rights of a landlord in respect of the property of a third party (the issuer of the letter of credit in favour of the landlord), paragraphs 19 (d), (e) and (f) of the Notice of Appeal explicitly raise some of the same legal issues that are under consideration in the within appeal.

3. It is respectfully submitted that Hainey J.'s decision in *763 v. OMERS* illustrates the confusion that has arisen from a misapplication or conflating of legal principles relating to the contractual and statutory rights of landlords in bankruptcy.

4. In that case, OMERS bargained contractually for a $2.5 million third party letter of credit as security for the obligations of the tenant under the lease, to cover the very eventuality which occurred, that is, the bankruptcy of the tenant and disclaimer of

the lease. Notwithstanding this, Hainey J. found that the landlord was not entitled to draw on the letter of credit other than for the landlord's preferred claim.

5. In his recitation of the underlying facts, Hainey J. made the following statement at paragraph 14 of his Endorsement:

> [14] The Trustee did not dispute that the Landlord was entitled to $623,196.84 for three months' accelerated rent under the Lease and in accordance with section 136(1)(f) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended ("BIA"). However, the Trustee disallowed the Proof of Claim as the Landlord had reserved the right to make a claim for damages for breach of the Lease and had not taken into account its draw on the LC for rent for May 2018.

6. There is no reference, however, to the fact that OMERS had appealed the trustee's disallowance of its claim to the registrar in bankruptcy, Master Mills, or that Master Mills allowed OMERS' appeal in part, making the following findings at paragraph 12 of her Reasons for Decision (Tab B herein) on the autonomy of letters of credit:

> [12] It is well settled law that letters of credit are autonomous and independent contracts between the issuer and the beneficiary. A standby letter of credit creates a primary liability of the issuer to pay on presentment of documents in conformity with the terms of the letter of credit. Any funds paid under a letter of credit are those of the issuer, not the applicant. Reimbursement for payment of those funds is then sought from the applicant of the letter of credit, often by redeeming cash collateral.
>
> [13] As noted in *Richter & Partners Inc. (as Court Appointed Receiver & Manager of Lava Systems Inc.) v. Clarica Life Insurance Company*, the security provided by the issuance of a letter of credit at all times remains with the beneficiary of the letter of credit, even in the face of an insolvency. A trustee in bankruptcy or a receiver has no right to claim the return of any amount under a letter of credit that has not been drawn by the beneficiary. These funds are at all times the property of the issuing bank.

7. At paragraphs 20 – 23 of her Reasons for Decision, Master Mills also addressed OMERS' potential unsecured claim, which was referenced at Schedule "A" to the proof of claim. Master Mills stated at paragraph 22:

> OMERS appealed only the disallowance of the preferred claim. The trustee relies on s. 135(4) of the BIA to bar OMERS from filing any form of unsecured claim in the estate. This is unreasonable and improper. OMERS was simply putting the trustee on notice that it intended to file further claims in future. It had not filed an unsecured claim nor was it in a position to assert an unsecured claim until such time as the various heads of damages had been determined and the quantum ascertained after accounting for further draws against the Letter of Credit.

8. Master Mills explicitly held that OMERS had the right to file an unsecured proof of claim in bankruptcy, once the various heads of damages had been determined and the quantum ascertained after accounting for further draws against the letter of credit. This contradicts the suggestion that it is widely accepted and understood that landlords in Ontario cannot file unsecured proofs of claim for damages in a bankruptcy.

9. Hainey J.'s Endorsement does not refer at all either to the decision of Master Mills in the very case at hand or to the decision of the Ontario Court of Appeal in *Lava Systems Inc.*, referred to by Master Mills. He also does not refer to or analyze s. 2[1], ss. 121(1) and (2)[2] or s. 136(3)[3] of the BIA, or point to any provisions of the *Commercial Tenancies Act* ("CTA") which exclude landlords from the definition of

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[1] definition of a creditor
[2] definition of "claims provable"
[3] the right to file an unsecured claim for any claim that is restricted by s. 136(1)) of the BIA

creditors under the BIA, which confiscate landlords' security, or which prohibit landlords from filing an unsecured claim for damages in a bankruptcy.

10. Instead, Hainey J. relies on *Re Mussens Ltd.*[4] and *Cummer-Yonge Investments Ltd. v. Fagot*[5] for the following proposition (quoting directly from paragraph 17 of the decision of Chief Justice Gale in *Cummer-Yonge*):

> 17. I therefore find that, upon the bankruptcy of the tenant, all of its rights and obligations under the lease, including its liability to perform the covenant to pay rent, irrevocably passed to the trustee in bankruptcy. After that date, there were no covenants in the lease which the lessee was required to perform, and the defendants' guarantee of "the due performance by the Lessee of all its covenants in this lease" thereupon became inoperative.

11. Hainey J. then refers to and quotes from, but declines to apply the following *dicta* from the unanimous decision of the Supreme Court of Canada in *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, 2004 SCC 3:

> 42. The House of Lords went on to overrule *Stacey v. Hill*. In my opinion, *Cummer-Yonge* should meet the same fate. Post-disclaimer, assignors and guarantors ought to be treated the same with respect to liability. The disclaimer alone should not relieve either from their contractual obligations.

12. It is respectfully submitted that it impossible to reconcile the passage quoted from *Cummer-Yonge* above (that the bankruptcy/disclaimer relieves guarantors from liability) with the *dicta* from Supreme Court of Canada in *Crystalline* (that a disclaimer should not relieve guarantors from their contractual obligations).

13. *Stacey v. Hill*, the UK case referred to in *Crystalline*, dated back to 1901 and involved substantially the same fact situation and legal principles as *Cummer-Yonge*. Both cases were based on the notion that the involuntary disclaimer of a lease by a trustee in bankruptcy amounts to a **consensual** surrender of the lease and therefore terminates the obligations of a guarantor of the lease.

14. As submitted previously, none of the cases extending the *Cummer-Yonge* principle to a landlord's right to file a proof of claim in bankruptcy analyzed the statutory provisions of the BIA or clearly articulated why landlords, alone among all of the bankrupt's creditors, should not be entitled to prove a claim for damages for lost rent or other losses.

15. *Crystalline* was hailed 15 years ago as having overruled *Cummer-Yonge*. Indeed, as submitted previously, the official version of *Crystalline* on the Supreme Court of Canada website states: "**Overruled:** *Cummer-Yonge Investments Ltd. v. Fagot*, [1965] 2 O.R. 152, aff'd [1965] 2 O.R. 157*n*". *Cummer-Yonge* is no longer good law.

16. It is respectfully submitted that the overruling of *Cummer-Yonge* in 2004 was long overdue. As submitted previously:

(a) Leases are both interests in land and contracts;

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[4] *Re Mussens Ltd.*, 1933 CarswellOnt. 52 (S.C.)
[5] *Cummer-Yonge Investments Ltd. v. Fagot*, 1965 CarswellOnt. 4 (S.C.)

(b) The principle that the disclaimer of a lease amounts to a deemed consensual surrender of the lease is a legal fiction and is inconsistent with *Highway Properties;*[6]

(c) The bankruptcy regime is statutory. There is nothing in the BIA excluding landlords from ss. 121(1) and (2) of the BIA or stripping landlords of their security and no policy reason to read in such an exclusion;

(d) Prohibiting a class of creditors (landlords) from proving a claim for damages violates the *pari passu* scheme of the BIA;

(e) Where the provisions of the BIA and the CTA conflict (as in the case of the preferred claim) the provisions of the BIA prevail under the doctrine of paramountcy;

(f) There is, however, no conflict between the BIA and the CTA. Nothing in the CTA purports to take away the statutory right of a landlord to prove an unsecured claim for damages under the BIA;

(g) Disclaimers under the *CCAA* are not treated as a consensual surrender of the lease;

(h) Disclaimers of other executory contracts under the BIA are not treated as a consensual surrender of rights and do not strip creditors of their right to file a proof of claim for damages arising from the disclaimer.

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[6] *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*, [1971] SCR 562, 1971 CanLII 123 (SCC)

17. Furthermore, if claims against guarantors were to survive the disclaimer of a lease, but landlords were required to forfeit their security, letters of credit and the right file a proof of claim in bankruptcy, this would deprive landlords of their ability to mitigate their damages and share *pro rata* in recovery from the estate and would deprive guarantors of their statutory right to an assignment of the landlord's security pursuant to section 2 of the *Mercantile Law Amendment Act,* R.S.O. 1990, c. M.10 (Tab C).

18. The Endorsement of Hainey J. in *763 v. OMERS* has been widely circulated in the insolvency community.[7] It is respectfully submitted that this decision creates enormous uncertainty as to the rights of landlords, tenants and trustees in bankruptcy. Apart from resurrecting *Cummer-Yonge* for the very proposition that was considered to have been overruled by the Supreme Court of Canada in 2004, Hainey J.:

(a) Failed to address this Court's decision in *Lava Systems Inc.* on the autonomous nature of a letter of credit;

(b) Declined to follow the decision of Blair J. (as he then was) in *885676 Ontario Ltd. (Trustee of) v. Frasmet Holdings Ltd.*[8], which was cited with approval by this Court in *Lava Systems Inc.*;

(c) Instead, followed and applied the decision of Feldman J. (as she then was) in *Peat Marwick Thorne Inc. and Natco Trading Corporation et al.*[9], even though:

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[7] See the October 30, 2019 issue of Insolvency Insider, which prompted Mr. Ilchenko's letter to the panel, at Tab D to these submissions

[8] *885676 Ontario Ltd. (Trustee of) v. Frasmet Holdings Ltd.*, 1993 CarswellOnt. 186 (Gen. Div.),

[9] *Peat Marwick Thorne Inc. and Natco Trading Corporation et al.* 22 O.R. (3d) 727

(i) *Natco* was explicitly based on *Cummer-Yonge*, which at the time was binding authority;

(ii) Feldman J. nevertheless recognized in *Natco* that a letter of credit or security could be drafted to secure a landlord's claim for damages arising from the disclaimer of a lease:

> I agree that a letter of credit or other security to secure the obligations of the tenant under the lease may also be drafted to survive termination of the lease by the landlord for wrongful repudiation by the tenant and to therefore secure the landlord's claim for damages against the tenant and for which it remains responsible as per Highway Properties.

19. Hainey J. did not refer to the above-noted passage from *Natco*, which recognizes the primacy of landlords' contractual rights.

20. Even without *Cummer Yonge* having been overruled, it would require very clear language to deprive landlords of their statutory rights under sections 2, 121(1) and (2) and 136(3) of the BIA. Nothing in either the BIA or the CTA purports to do so.

TNG

21. As articulated by Mr. Justice Campbell in the court below, *TNG* involved a very narrow legal issue:

> [18] The single issue before the Court is what is the effect to be given to the letter of the CRO of February 22, 2008 in the context of a CCAA proceeding.

22. The appellant landlord's position was that the lease was forfeited prior to the bankruptcy. Campbell J. held that the lease had not been forfeited prior to the bankruptcy, principally because the landlord continued to accept rent without objection both before and after the letter of repudiation. The Court of Appeal agreed.

23. Neither party to the within appeal considered or addressed *TNG*, as the case dealt solely with the legal effect of a pre-bankruptcy repudiation. For reasons known only to the parties in *TNG*, the issues raised in the within appeal do not appear to have been raised or argued either before Campbell J. or the Court of Appeal.

24. The specific issue raised in *TNG* is now moot, as the events preceded the 2009 amendments to the CCAA, which harmonized the CCAA with the BIA. Among other amendments, section 32(7) of the CCAA now permits the disclaimer of agreements (including leases, where the debtor is the tenant).

25. It is significant to note that, in *TNG*, the trustee in bankruptcy accepted a portion of the landlord's unsecured claim.[10] The case does not support the proposition that a landlord has no entitlement to file an unsecured claim for damages in bankruptcy.

26. *TNG* is a good illustration of the confusion and conflating of different issues and concepts which was caused by *Cummer-Yonge* and the cases following *Cummer-Yonge*.

27. Paragraph 14 of the Court of Appeal decision states that a trustee's disclaimer brings the lease to an end and terminates all rights and obligations to pay

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[10] See footnote 1 to the Court of Appeal decision

rent. This is correct. However, the purpose of the disclaimer is to terminate the obligation of the **trustee** to pay rent for the use of leased premises. This is distinct from the right of the landlord, as a creditor of the bankrupt, to file a proof of claim under section 121(1) or (2) of the BIA for damages for breach of contract.

28. It is unclear why the landlord in *TNG* would have been entitled to claim rent for the balance of the term if the lease had been terminated prior to the bankruptcy, but not if the lease was terminated after bankruptcy. In either case, the lease would have been terminated and the obligation to pay rent would have come to an end. In either case, the landlord would have to prove a claim for damages.

29. Pursuant to section 135 of the BIA, the trustee has an obligation to determine whether any contingent or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it. Where the landlord has proven a claim for damages for breach of the lease, there is no principled basis for the trustee to disallow the claim.

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

Catherine Francis

Catherine Francis

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TAB "A"

C671634

Court File No. 31-2372959
Court of Appeal No.

COURT OF APPEAL FOR ONTARIO

**IN THE MATTER OF THE BANKRUPTCY OF
7636156 CANADA INC., OF THE CITY OF VAUGHAN,
IN THE PROVINCE OF ONTARIO**

NOTICE OF APPEAL

THE APPELLANT, OMERS Realty Corporation (the "**Appellant**"), **APPEALS** to this Court from the Order of the Honourable Justice Glenn J. Hainey of the Superior Court of Justice (the "**Motion Judge**") made on October 22, 2019 at Toronto, Ontario (the "**Order**").

THE APPELLANT ASKS that the Order be set aside and that an Order be granted in its place as follows:

1. Dismissing the motion brought by Fuller Landau Group (the "**Trustee**") in its capacity as the trustee in bankruptcy of 7636156 Canada Inc. (the "**Bankrupt**");

2. Declaring that the Appellant, as beneficiary, was entitled to draw on the entire amount of the Letter of Credit (as that term is defined below) in the amount of $2,500,000;

3. Costs of the motion below and of this appeal in favour of the Appellant, as may be requested; and

4. Such further and other relief as to this Court may seem just.

THE GROUNDS OF APPEAL are as follows:

The Parties Were in a Commercial Tenancy

1. The Appellant landlord is the owner of an industrial building located at 71 Royal Group Crescent, Vaughan, Ontario (the "**Premises**").

2. The Bankrupt and the Appellant entered into a lease for the Premises dated February 18, 2014 (the "**Lease**").

3. The term of the Lease was for ten years commencing on May 1, 2014 and expiring on the last day of April 2024, unless terminated earlier as provided in the Lease.

The Letter of Credit

4. Schedule C of the Lease contained "Supplemental Terms and Conditions", including several sections requiring the Bankrupt to deliver a letter of credit to the Appellant. Section 2(a) of Schedule C required that the Bankrupt arrange a letter of credit in the amount of $2,500,000 with the Appellant as beneficiary for an initial term of one year, renewed annually on an automatic basis until sixty days after the expiry of the Lease's term.

5. Section 2(a) of Schedule C to the Lease described the purpose of the letter of credit and provided that it continued in full force and effect in the event of the bankruptcy or insolvency of the Bankrupt, and any disclaimer of the Lease:

> The Letter of Credit shall be held by Landlord as security for indemnification of Landlord in respect of any losses, costs or damages incurred by Landlord arising out of the failure by Tenant to pay Annual Rent or any other amounts payable under this Lease or resulting from any failure by Tenant to observe or perform any obligations contained in this Lease or resulting from any default under this Lease or resulting from any

termination, surrender, disclaimer or repudiation of this Lease whether by Landlord as a result of the default of Tenant or in connection with any insolvency or bankruptcy of Tenant or otherwise.

If at any time during the term of the Letter of Credit, Tenant defaults in the payments of any Annual Rent or other amounts payable under this Lease or in the performance of any of its other obligations under this Lease or if this Lease is surrendered, terminated, disclaimed or repudiated whether by Landlord as a result of default of Tenant or in connection with any insolvency or bankruptcy of Tenant or otherwise, then Landlord at its option may, in addition to any and all other rights and remedies provided for in this Lease or at law, draw a portion of or all of the Principal Amount of the Letter of Credit, whereupon the proceeds thereof shall be applied firstly towards repayment of the cost of Landlord's Work and other costs referred to above, secondly to compensate Landlord for damages suffered by it as the result of Tenant's default, and the balance, if any, will be returned to Tenant.

The rights of Landlord hereunder, in respect of the Letter of Credit, shall continue in full force and effect and shall not be waived, released, discharged, impaired or affected by reason of the release or discharge of Tenant in any receivership, bankruptcy, insolvency, winding-up or other creditors' proceedings including, without limitation, any proceedings under the *Bankruptcy and Insolvency Act* (Canada) or the *Companies Creditors' Arrangement Act* (Canada), or the surrender, disclaimer, repudiation or termination of the Lease in any such proceedings and shall continue with respect to the periods prior thereto and thereafter as if the Lease had not been surrendered, disclaimed, repudiated or terminated.

6. In accordance with the terms of the Lease, the Bankrupt caused an irrevocable letter of credit to be issued by the Bank of Nova Scotia ("**BNS**") on May 2, 2014 in the amount of $2,500,000 (the "**Letter of Credit**") in favour of the Appellant as beneficiary.

7. The Letter of Credit explicitly provided that it:

> ...will not be released, discharged or affected by the bankruptcy, receivership or insolvency of [the Bankrupt] or by [the Bankrupt] ceasing to exist (whether by winding-up, forfeiture, cancellation or surrender of its charger, merger or any other circumstances), nor by any disclaimer or repudiation of the [Bankrupt's] lease with you.

The Bankrupt's Trustee Disclaims the Lease

8. On May 1, 2018, the Bankrupt was assigned into Bankruptcy. The Trustee was appointed as the licensed insolvency trustee of the Bankrupt.

9. On July 23, 2018, the Trustee disclaimed the Lease.

10. In accordance with its rights under the Letter of Credit, the Appellant drew on the Letter of Credit to its full amount of $2,500,000 on account of the following:

    (a) $207,732.28 for rent for May 2018;

    (b) $1,621,160.72 for rent for the months of August 2018 through to and including April 2019;

    (c) $368,479 for the unamortized cost for the Landlord Allowance as per the terms of the Lease, inclusive of interest; and

    (d) $302,628 for restoration costs, as per the terms of the Lease.

11. BNS accepted the Appellant's demand under the Letter of Credit and paid the amount of $2,500,000 to the Appellant.

The Trustee's Position on the Motion Below

12. The Trustee brought a motion to the Motion Judge in the Bankrupt's bankruptcy proceeding seeking the following relief:

    (a) a determination as to the amount that the Appellant was entitled to draw on the Letter of Credit; and

(b) in the event that the Appellant drew on the Letter of Credit for more than it was entitled to:

(i) an order directing the Appellant to forthwith pay to the Trustee such excess amount; and

(ii) an order directing BNS to release to the Trustee the remaining cash collateral for the Letter of Credit.

13. The Trustee took the position that, because the Lease had been disclaimed, the Appellant was limited by section 136(1)(f) of the *Bankruptcy and Insolvency Act* (BIA) and sections 38 and 39 of the *Commercial Tenancies Act* (Ontario) to three months' of accelerated rent, the value of which was agreed to be $623,196.84, and that this was the maximum amount that could be drawn by the Appellant under the Letter of Credit.

14. In the alternative, the Trustee argued that the maximum which could be drawn on the Letter of Credit pursuant to Schedule C of the Lease was $1,357,135.53.

The Motion Judge's Decision

15. In Reasons released on October 22, 2019, the Motion Judge held that the Appellant's right to draw under the Letter of Credit was limited to three months' rent under the Lease and the Appellant was obliged to pay the Trustee $1,876,803.14 ($2,500,000 - $623,196.84) from the proceeds of the Letter of Credit.

16. In reaching this conclusion, the Motion Judge found that 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. Therefore, according to the Motion Judge, a landlord is not entitled to draw on a letter of credit provided as security under the lease for any amounts in excess of the landlord's three months' preferred claim under s. 136(1)(f) of the BIA.

17. The Motion Judge also accepted the Trustee's alternative submission that the value of the Letter of Credit should have been reduced from $2,500,000 to $1,357,135.53 in accordance with the terms of the Lease. In doing so, the Motion Judge relied upon language in Schedule C to the Lease that:

> ...If Tenant is not then and has not been in default of its obligations under this Lease and has at all times promptly paid all Rent throughout the Term, the Letter of Credit shall decline in value as set out in subparagraph (b) below (the value of the Letter of Credit from time to time being hereinafter referred to as the "Principal Amount").
>
> ...
>
> (b) if Tenant is not then and has not been in default of its obligations under this Lease and has at all times promptly paid all Rent throughout the Term, this Lease has not been disclaimed, and at no time has Landlord been required to draw upon the Letter of Credit (failing any such pre-conditions, this subparagraph (b) shall cease to have application), the Letter of Credit may be reduced as follows:
>
> (i) on the thirty-seventh (37th) month of the initial Term, the Letter of Credit may be reduced by an amount equal to fifty percent (50% of the Permitted Decline Amount (as herein defined).
>
> ...
>
> For the purposes of this Paragraph 2(b) of Schedule C, "Permitted Decline Amount" means a sum equal to (I) Two Million, Five Hundred Thousand Dollars ($2,500,000); less (II) an amount equal to the Annual Rent, the estimated Operating Costs and Taxes, and HST thereon, payable by Tenant for the last month of the initial Term.

18. The Motion Judge held that since there had not been any "events of default" under the Lease, the amount of the Letter of Credit had to be reduced. The Motion Judge failed to

appreciate the distinction between "defaults" and "events of default" under the Lease. An "event of default" was a defined term under the Lease and could only occur when the Bankrupt failed to cure a "default" within 5 days after receiving notice of the default. The evidence in the record established that the Bankrupt had been late in paying rent on the due date on several occasions and was therefore in default of its obligation to pay rent when due on these occasions. The Motion Judge found that any delays in paying rent were relatively minor, and that the Appellant had never advised the Bankrupt that it had failed to pay the rent promptly under the terms of the Lease. This finding was contrary to the unchallenged evidence of the notices provided by the Appellant to the Bankrupt on the occasions when it failed to pay rent when due.

Errors in the Motion Judge's Decision

19. Respectfully, the Motion Judge made several errors of law in coming to his conclusions, including:

(a) Finding that the Letter of Credit did not create independent contractual obligations between the Appellant and BNS. It is well-established that letters of credit are autonomous in nature and create contractual obligations between the beneficiary and the issuer. Subject only to fraud, the Letter of Credit was payable by BNS in accordance with the terms of the Letter of Credit. The raison d'être of a letter of credit is to provide certainty of payment by a creditworthy entity regardless of the circumstances that may exist between the parties to the underlying contract. This decision deprives the Appellant of the very benefit it bargained for in securing the

Letter of Credit: indemnity for economic losses in the event the Lease was disclaimed in a bankruptcy.

(b) Finding that the Trustee had standing to recover proceeds of the Letter of Credit from the Appellant. In particular, the Motion Judge erred in finding that the proceeds received by the Appellant from BNS comprised the property of the Bankrupt over which the Trustee had any interest. The amount paid by BNS to the Appellant was the property of BNS, not the Bankrupt. BNS took security over the Bankrupt's assets to protect itself in the event the Letter of Credit was called and BNS was listed as a secured creditor for the full amount of the Letter of Credit in the Trustee Preliminary Report prepared by the Trustee in the bankruptcy estate. The Trustee has no higher rights than the Bankrupt itself.

(c) Failing to follow binding precedent upon him, including this Court's decision in *Lava Systems Inc. (Receiver & Manager of) v. Clarica Life Insurance Co.*, 2002 CarswellOnt 2053 (CA) on the autonomy of letters of credit and ownership of the funds paid under a letter of credit and the Supreme Court of Canada's decision in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 establishing that the disclaimer of a lease in bankruptcy does not protect third parties from the consequences of a bankrupt's repudiation of a commercial lease.

(d) Following and applying case law that has been explicitly and/or implicitly overruled by the Supreme Court of Canada, including *Cummer-Yonge Investments Ltd v Fagot*, 1965 CarswellOnt 4 (S.C.) and cases that follow it.

(e) Following case law that was not binding on him, including *Linens N Things Canada Corp*, 2009 CanLII 25311 (Ont SCJ (Registrar)).

(f) Finding that when a lease is disclaimed in bankruptcy, landlords are limited to a preferred claim equal to three months' rent under s. 38 of the *Commercial Tenancies Act* and s. 136(1)(f) of the BIA. This finding ignored s. 136(3) of the BIA, which explicitly provides that creditors continue to have claims in addition to the three months' rent preferred (priority) claim, but that any such claims rank as unsecured in respect of the property of the bankrupt in the bankruptcy estate. This issue is squarely before the Court of Appeal for Ontario in *Medallion Corporation v. RSM Canada Limited*, Court File No. C66626, which appeal has been heard with the decision currently under reserve.

(g) Finding that a landlord's rights against a tenant (as may be restrained or altered by the BIA) are similarly restrained or altered as against third parties, including the issuer of a letter of credit such as BNS.

(h) Failing to give effect to the terms of the Lease and the Letter of Credit that explicitly contemplated resort to the Letter of Credit in circumstances of a bankruptcy and/or disclaimer of the Lease for damages above and beyond the preferred claim equal to three months' rent.

20. With respect to the Motion Judge's alternative finding that the value of the Letter of Credit had been reduced, he made errors of law, including:

(a) Finding that the Trustee or the Bankrupt had the right to unilaterally reduce the value of the Letter of Credit, particularly in circumstances where no request for reduction had been made to BNS as the issuer of the Letter of Credit at any time, and in particular prior to it being drawn by the Appellant.

(b) Finding that the Letter of Credit could be found retroactively to have been reduced in value when it was renewed at its full value and in circumstances where its issuer, BNS, had never purported to reduce its value.

(c) Finding that the Letter of Credit could be found retroactively to have been reduced in value in circumstances where none of BNS, the Bankrupt or the Trustee purported to reduce its value or communicated the reduction of its value to the Appellant at any time prior to the Bankrupt's bankruptcy.

21. With respect to the Motion Judge's alternative finding that the value of the Letter of Credit had been reduced, he made errors of mixed fact and law, including:

(a) Finding that the Appellant had never at any time prior to May 1, 2017 informed the Bankrupt that it was not paying rent promptly.

(b) Finding that the requirement to pay rent promptly meant that delays in paying rent on the day they were due are somehow excused if they are not too many days late.

(c) Reading into the Lease a requirement that the Appellant had to give formal notice that rent was not paid promptly when due, when no such requirement exists and

when the uncontradicted evidence in the record was that the Appellant notified the Bankrupt when the rent payments were late.

22. Such further and other grounds as counsel may advise and this Court permits.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. This appeal is to the Court of Appeal and leave is not required as the appeal arises out of an order of a judge under the BIA and the property involved in the appeal exceeds in value ten thousand dollars.

2. In the alternative, if leave to appeal is required under s. 193(e) of the BIA, the Appellant seeks leave to appeal and requests that the motion for leave be heard at the same time as the appeal. The appeal involves matters of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole.

3. Pursuant to s. 195 of the BIA, the order of the Motion Judge is stayed until this appeal is disposed of.

4. The Appellant relies on Section 183(2), Sections 193(c) and (e) and Section 195 of the *Bankruptcy and Insolvency Act*, RSC 1995, c. B-3, as amended.

November 1, 2019

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IN THE MATTER OF THE BANKRUPTCY OF 7636156 CANADA INC.

OMERS Realty Corporation

Appellant

Court File No. 31-2372959
Court of Appeal No.

ONTARIO
COURT OF APPEAL

NOTICE OF APPEAL

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C67634

Court File No. 31-2372959
Court of Appeal No.

COURT OF APPEAL FOR ONTARIO

**IN THE MATTER OF THE BANKRUPTCY OF
7636156 CANADA INC., OF THE CITY OF VAUGHAN,
IN THE PROVINCE OF ONTARIO**

APPELLANT'S CERTIFICATE RESPECTING EVIDENCE

The Appellant, OMERS Realty Corporation, certifies that the following evidence is required for the appeal, in the Appellant's opinion:

1. Affidavit of Alistair Pickering sworn on April 16, 2019, and all exhibits referred to therein (Court File No. 31-2372959);

2. First Report of the Trustee, dated March 26, 2019, and all exhibits referred to therein (Court File No. 31-2372959);

3. Transcript from the Cross-Examination of Alistair Pickering held on May 9, 2019 (Court File No. 31-2372959); and

4. Answers to Undertakings of Alistair Pickering (Court File No. 31-2372959).

November 1, 2019

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IN THE MATTER OF THE BANKRUPTCY OF 7636156 CANADA INC.

OMERS Realty Corporation

Appellant

Court File No. 31-2372959
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ONTARIO
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APPELLANT'S CERTIFICATE RESPECTING EVIDENCE

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TAB "B"

CITATION: In re: 7636156 Canada Inc., 2018 ONSC 7737
COURT FILE NO.: BK-18-2372959-0031
MOTION HEARD: 20181211

SUPERIOR COURT OF JUSTICE – ONTARIO
(IN BANKRUPTCY AND INSOLVENCY)

RE: 7636156 Canada Inc., Bankrupt

BEFORE: Master J. E. Mills

COUNSEL: S. M. Citak, Counsel, for the Moving Party Creditor

R. Moses, Counsel, for the Trustee

HEARD: December 11, 2018

REASONS FOR DECISION

[1] OMERS Realty Corporation ("OMERS"), the landlord of the bankrupt, appeals the disallowance of its Proof of Claim pursuant to s. 135(4) of the *Bankruptcy and Insolvency Act*[1] (the "BIA").

[2] The parties agree that an appeal from a Notice of Disallowance is a true appeal and therefore to be considered on the basis of the record available to the trustee at the time the disallowance was issued.[2] Correctness is the appropriate standard of review for the disallowance of a proof of claim but the trustee's decision is entitled to a degree of deference having regard to the experience and expertise of trustees in restructuring and insolvency matters.[3]

[3] The bankrupt filed this voluntary assignment on May 1, 2018. On May 17, 2018, OMERS submitted a priority claim pursuant to s. 136(1)(f) of the BIA, seeking $623,196.84 on

---

[1] R.S.C. 1985, c. B-3
[2] *Charlestown Residential School, Re,* 2010 ONSC 4099 at para. 21
[3] *Ibid.*, at paras. 12 and 17.

account of its accelerated rent entitlement for the months of May, June and July 2018 in accordance with Article 15.03 of the lease agreement dated February 18, 2014 (the "Lease"). The Trustee does not dispute that OMERS is entitled to this claim; the issue is from where the payment ought to be made.

[4] Section 136(1)(f) of the BIA provides as follows:

> 136(1) Subject to the rights of secured creditors, the proceeds realized from the property of the bankrupt shall be applied in priority of payment as follows:
>
> ...
>
> (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 is 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 the lease, and any payments made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent.

[5] OMERS required the bankrupt to post an irrevocable and unconditional letter of credit in the amount of $2,500,000 as security for its financial obligations under the Lease. The letter of credit was to stand as security in respect of any losses, costs or damages incurred by OMERS arising from the failure to pay rent or any other amounts payable under the Lease as a result of any default, termination, surrender, disclaimer or repudiation of the Lease whether by OMERS as a result of default or in connection with any insolvency or bankruptcy of the tenant.

[6] Irrevocable Standby Letter of Credit No. OSB5825TOR (the "Letter of Credit") was issued by the Bank of Nova Scotia on May 2, 2014 with OMERS identified as the beneficiary and RM2 Canada Inc. (the former name of the bankrupt) as the applicant. The Letter of Credit is noted as having been issued and connection with lease payments and lease defaults for premises located at 71 Royal Group Crescent, Vaughan, Ontario and the Letter of Credit specifically provides it will not be released, discharged or affected by the bankruptcy, receivership or insolvency of RM2 Canada Inc., nor by any disclaimer or repudiation of the RM2 Canada Inc. lease. Demands under the Letter of Credit are payable on sight accompanied by a certification by OMERS that the amount drawn is due and payable, request has been made for payment and payment has not been received. The Letter of Credit is governed by the ICC Uniform Customs and Practices for Documentary Credits.

[7] The Letter of Credit was supported by cash collateral in the amount of $2,500,000, provided by the bankrupt and held at the Bank of Nova Scotia pursuant to an undated Authority to Hold Funds on Deposit agreement.

[8] As at the date of bankruptcy, the bankrupt was not in default of the Lease. The Trustee occupied the premises until a Notice of Disclaimer of Lease was delivered by the Trustee, effective July 23, 2018. The occupation rent owed by the Trustee is set off as against the three months accelerated rent entitlement, as required by s. 136(1)(f) of the BIA. The

Trustee submits therefore that OMERS has no claim against the Trustee for occupation rent.

[9] OMERS submits that its accelerated rent entitlement should be paid from the proceeds realized from the property of the bankrupt as opposed to being drawn from the Letter of Credit. A partial draw against the Letter of Credit was taken for the May 2018 rent but OMERS maintains it was done without prejudice to its rights to assert a claim for the full amount of the accelerated rent as against the proceeds realized from the liquidation of the bankrupt's property. The monies available under the Letter of Credit were to be applied against damages not yet ascertained at the time the Proof of Claim was filed. Counsel advised that OMERS has now drawn down on the Letter of Credit for post-occupancy rent, unamortized cost of the landlord allowance and restoration expenses in the total amount of $1,710,000.

[10] The Trustee authorized OMERS to take a further draw for the June and July accelerated rent entitlement on the basis that the cash collateral pledged to support the Letter of Credit is an asset of the estate, subject to the security interest of the Bank of Nova Scotia. Further, the Letter of Credit, on its terms, was intended to stand as security for any payments owed in the event of bankruptcy. Having asserted a claim against the Letter of Credit for one month of accelerated rent, the Trustee submits that OMERS is now estopped from asserting its claim against the estate proceeds held by the Trustee.

[11] It is the submission of OMERS that any payments made under the Letter of Credit are payments by the Bank of Nova Scotia as it has an independent legal obligation to honour proper demands made against its issued standby letters of credit. The payment cannot be said to be made from the assets of the bankrupt. The payment is made by the Bank of Nova Scotia who then turns to the bankrupt for reimbursement in accordance with the terms of the Application for Irrevocable Standby Letter of Credit dated April 24, 2104. As noted above, the Bank of Nova Scotia holds $2,500,000 in cash collateral posted by the bankrupt as its security for its obligations under the Letter of Credit.

[12] It is well settled law that letters of credit are autonomous and independent contracts between the issuer and the beneficiary.[4] A standby letter of credit creates a primary liability of the issuer to pay on presentment of documents in conformity with the terms of the letter of credit.[5] Any funds paid under a letter of credit are those of the issuer, not the applicant.[6] Reimbursement for payment of those funds is then sought from the applicant of the letter of credit, often by redeeming cash collateral.

[13] As noted in *Richter & Partners Inc. (as Court Appointed Receiver & Manager of Lava Systems Inc.) v. Clarica Life Insurance Company,*[7] the security provided by the issuance of

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[4] *Bank of Nova Scotia v. Angelica-Whitewear Ltd.*, [1987] 1 S.C.R. 59 at para. 10; *885676 Ontario Inc. (Trustee of) v. Frasmet Holdings Ltd.*, [1993] O.J. No. 113 at para. 29.
[5] *Westpac Banking Corp. v. Duke Group Ltd.*, [1994] O.J. No. 2203
[6] *Richter & Partners Inc. (as Court-Appointed Receiver and Manager of Lava Systems Inc.) v. Clarica Life Insurance Company,* 2002 CanLII 41968 (ONCA) at para. 5.
[7] *Ibid.*

a letter of credit at all times remains with the beneficiary of the letter of credit, even in the face of an insolvency. A trustee in bankruptcy or a receiver has no right to claim the return of any amount under a letter of credit that has not been drawn by the beneficiary. These funds are at all times the property of the issuing bank.

[14] The cash collateral which provides the issuing bank with security for payment by the applicant of any properly paid draws against a letter of credit is an asset of the bankrupt, subject to a validly proven security interest of the bank. At the date of this voluntary assignment, there had been no draws against the Letter of Credit and the full $2,500,000 cash collateral remained as security pledged by the bankrupt to the Bank of Nova Scotia pursuant to the Authority to Hold Funds on Deposit agreement. The cash collateral is an asset of the bankrupt's estate, subject to a secured claim of the Bank of Nova Scotia.

[15] OMERS made a partial draw on the Letter of Credit on or about May 8, 2018 for the May 2018 rent which was not paid as a result of the bankruptcy. The documents supporting the partial draw have not been produced on this appeal however, the terms of the Letter of Credit require a certification by OMERS that the amount drawn was due and owing, request for payment had been made and no payment had been received. In order to be properly paid for the draw on the Letter of Credit, OMERS must have provided this certification to the Bank of Nova Scotia, failing which the demand was non-compliant and the payment was improper. There was no suggestion by either OMERS or the trustee that this was the case and therefore it is presumed the payment made pursuant to the Letter of Credit was proper. In the circumstances, OMERS cannot now claim payment of the May rent from the trustee.

[16] The payment of OMERS entitlement to accelerated rent for the month of May is in compliance with s. 136(1)(f) of the BIA. The fact that the funds were paid pursuant to a demand on the Letter of Credit does not change the characterization of the payment.

[17] S. 136(1) of the BIA addresses the scheme of distribution and the priority of payments in a bankruptcy. The section speaks of "the proceeds realized from the property of a bankrupt" and subsection (f) entitles a landlord to a preferred claim for three months of accelerated rent. The intent of the section is to ensure an orderly distribution of proceeds and to protect certain classes of creditors, including landlords. OMERS elected to seek payment of one month of its accelerated rent as against the Letter of Credit. As noted above, by doing so, OMERS is now estopped from asserting that portion of its preferred claim against the proceeds held by the trustee. It does not result in the payment having been made outside of the accelerated rent entitlement conferred on OMERS by s. 136(1)(f). To make such a finding would result in a windfall of the equivalent of one month's rent to OMERS, to the detriment of the remaining creditors of the bankrupt.

[18] By its demand on the letter of credit for the unpaid May rent, OMERS is estopped from asserting a claim in the full amount of $623,196.84 for three months accelerated rent. The outstanding claim against the trustee for accelerated rent is limited to the months of June and July 2018 as OMERS has already been paid its rent entitlement for the month of May 2018. In this regard, the trustee properly disallowed the claim of OMERS.

[19] The balance of the accelerated rent entitlement may be asserted as a claim against the proceeds of the estate or satisfied by a further draw against the Letter of Credit. OMERS has the right to make its election and is not estopped by its conduct from filing a claim with the trustee to have the outstanding amount paid from the estate proceeds nor is it compelled to seek recourse from the Letter of Credit. In this respect, the trustee was incorrect in the disallowance of the preferred claim filed by OMERS.

[20] The Proof of Claim filed by OMERS on May 17, 2018 was solely in respect of its preferred claim. The Schedule "A" attached to the claim form outlined the basis upon which the preferred claim was being asserted and set out the manner in which the total claim of $623,196.84 was calculated. It also made reference to further claims OMERS intended to make once it had an opportunity to ascertain the nature and quantum of its damages. OMERS reserved the right "to file additional claims for any reason whatsoever". To the date of this appeal, no further proof of claim had been filed by OMERS.

[21] The Notice of Disallowance addressed the preferred claim for accelerated rent aand the "unsecured claim" which purported to address the undocumented further or potential claims referenced by OMERS in its Proof of Claim. The trustee and its legal counsel had issued written requests for particulars and evidentiary support respecting these potential claims. None was forthcoming by OMERS and on this basis, the "unsecured claim" was disallowed.

[22] OMERS appealed only the disallowance of the preferred claim. The trustee relies on s. 135(4) of the BIA to bar OMERS from filing any form of unsecured claim in the estate. This is unreasonable and improper. OMERS was simply putting the trustee on notice that it intended to file further claims in future. It had not filed an unsecured claim nor was it in a position to assert an unsecured claim until such time as the various heads of damages had been determined and the quantum ascertained after accounting for further draws against the Letter of Credit.

[23] The trustee may only disallow that which has in fact been claimed. The Proof of Claim filed by OMERS was in respect of its preferred claim under s. 136(1)(f) of the BIA. That is the claim OMERS was required to prove and the trustee has conceded the entitlement to a claim for accelerated rent. The balance of the information contained in Schedule "A" to OMERS Proof of Claim was simply putting the trustee on notice of future claims. It was not the assertion of a claim by OMERS capable of being examined or disallowed by the trustee.

[24] If I am wrong in this determination, I would exercise my discretion to allow OMERS a further 30 days from the date of this decision to file an appeal of the trustee's disallowance of the "unsecured claim".

[25] Based on the foregoing, the appeal is allowed to permit OMERS to assert a preferred claim for the balance of the accelerated rent entitlement in the amount of $415,464.56. At its own option, OMERS may assert the claim against the proceeds realized from the property of the bankrupt held by the trustee or it may seek payment from the Letter of Credit.

OMERS is not estopped from filing further claims in the estate of the bankrupt once the nature and quantum of damages has been ascertained.

[26] Although the balance of success weighs in favour of OMERS, there was mixed success on this appeal and as such, I decline to order costs to either party.

Master J. E. Mills

Date: December 27, 2018

TAB "C"

Français

Mercantile Law Amendment Act

R.S.O. 1990, CHAPTER M.10

Consolidation Period: From December 31, 1990 to the e-Laws currency date.

No amendments.

Definitions

1. In this Act,

"bill of lading" includes all receipts for goods accompanied by an undertaking to transfer them from the place where they were received to some other place by any mode of carriage whatever, whether by land or water or partly by land and partly by water; ("connaissement")

"goods" includes wares and merchandise; ("objets")

"warehouse receipt" means a receipt given by any person for any goods in the person's actual, visible and continued possession as bailee thereof in good faith and not as of the person's own property, and includes,

(a) a receipt given by any person who is the owner or keeper of a harbour, cove, pond, wharf, yard, warehouse, shed, storehouse or other place for the storage of goods delivered to the person as bailee, and actually in the place or in one or more of the places owned or kept by the person whether such person is engaged in other business or not,

(b) a receipt given by any person in charge of logs or timber in transit from timber limits or other land to the place of destination of such logs or timber,

(c) a specification of timber,

(d) a warehouse receipt as defined by the *Warehouse Receipts Act*. ("récépissé d'entrepôt") R.S.O. 1990, c. M.10, s. 1.

Right of sureties paying the principal debt, etc., to assignment

2. (1) Every person who, being surety for the debt or duty of another or being liable with another for any debt or duty, pays the debt or performs the duty is entitled to have assigned to the person or to a trustee for the person every judgment, specialty or other security that is held by the creditor in respect of the debt or duty, whether the judgment, specialty or other security is or is not deemed at law to have been satisfied by the payment of the debt or the performance of the duty. R.S.O. 1990, c. M.10, s. 2 (1).

Remedies on such assignment

(2) Such person is entitled to stand in the place of the creditor, and to use all the remedies and, on proper indemnity, to use the name of the creditor in any action or other proceeding in order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor, indemnification for the advances made and loss sustained by such person, and the payment or performance made by the person is not a defence to such action or other proceeding by the person. R.S.O. 1990, c. M.10, s. 2 (2).

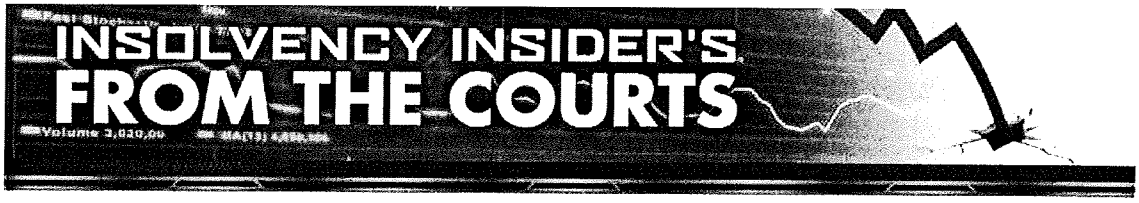
What one co-surety, etc., may recover from another

(3) No co-surety, co-contractor or co-debtor is entitled to recover from any other co-surety, co-contractor or co-debtor more than the just proportion to which, as between themselves, the last-mentioned person is justly liable. R.S.O. 1990, c. M.10, s. 2 (3).

TAB "D"

From: Insolvency Insider [mailto:editor@insolvencyinsider.ca]
Sent: Wednesday, October 30, 2019 7:00 AM
To: Ken Kallish <KKallish@mindengross.com>
Subject: Landlords drawing on letters of credit in a bankruptcy

Prepared for Ken Kallish



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RECENT COURT CASES

7636156 Canada Inc. v. OMERS Realty Corporation, 2019 ONSC 6106

Is a landlord entitled to draw on a letter of credit if a lease is disclaimed by a trustee?

The trustee brought a motion for a determination of the amount that the bankrupt's landlord was entitled to draw down on a letter of credit provided by the bankrupt to the landlord as security for its obligations under a lease.

The landlord owns an industrial building in Vaughan, Ontario. The bankrupt previously carried on business at the premises. The bankrupt and the landlord entered into a lease for the premises in February of 2014. The lease required the bankrupt to provide the landlord with an unconditional letter of credit ("**LC**") in favour of the landlord in the principal amount of $2.5 million for an initial term of one year, to be reviewed annually.

The bankrupt deposited $2.5 million with the Bank of Nova Scotia ("**BNS**") to secure BNS' obligations under the LC. On July 23, 2018, the trustee disclaimed the lease. The landlord subsequently fully drew the $2.5 million under the LC.

The landlord delivered a proof of claim to the trustee in the amount of $623,196.84 for three months' accelerated rent for the months of May, June and July 2018. The trustee did not dispute that the landlord was entitled to this amount of money both under the lease and in accordance with s. 136(1)(f) of the *Bankruptcy and Insolvency Act* (the "**BIA**"). However, the trustee disallowed the

proof of claim as the landlord had reserved the right to make a claim for damages for breach of the lease and had not taken into account its draw on the LC for rent for May 2018.

The sole issue for the Court to determine was the amount that the landlord was entitled to draw under the LC as a result of the disclaimer of the lease by the trustee. The trustee argued that the landlord was only entitled to draw $623,196.84 on the LC for three' months accelerated rent pursuant to s. 136(1)(f) of the BIA. The landlord argued that it was entitled to draw down the entire amount of the LC (i.e. $2.5 million) pursuant to both the LC and the terms of the lease. The landlord submitted that the LC was an independent third-party obligation of BNS, and the proceeds of the LC were not the bankrupt's property even if the LC is secured by the bankrupt's property.

Pursuant to s. 71 of the BIA, upon the bankrupt's assignment in bankruptcy, it ceased to have any capacity to dispose of or otherwise deal with its property, which immediately passed to and vested in the trustee. The bankrupt's property included its rights as a tenant under the lease.

Sections 146 and 136(1)(f) of the BIA address the rights of the landlord of a bankrupt tenant. Section 146 provides that the rights of landlords are to be determined according to the law of the province in which the leased premises are situated, subject to, *inter alia*, the priority claim provided in s. 136 of the BIA. Section 136(1)(f) sets out a landlord's preferred claim in a bankruptcy.

There was no dispute that the landlord had a preferred claim in the amount of $623,196.84 for three months' accelerated rent. In Ontario, however, disclaimer of a lease by a trustee operates as a voluntary surrender of the lease by the tenant with the consent of the landlord, which extinguishes all obligations of the tenant under the lease. If security taken by the landlord secures the obligations of the tenant under the lease, then when those obligations end, the security can

no longer be enforced in respect of obligations yet to be performed. Thus, a landlord is not entitled to draw on a letter of credit provided as security under the lease for any amounts in excess of the landlord's three months' accelerated rent preferred claim under the BIA.

The Court held that the landlord was only entitled to draw on the LC in the amount of $623,196.84.

***Counsel**: **Harvey Chaiton** of **Chaitons LLP** for the Trustee in Bankruptcy, Fuller Landau Group Inc. and **S. Michael Citak** of **Gardiner Roberts** for the Landlord, OMERS*

LATEST INSOLVENCY STATISTICS

YTD September 30, 2019 League Table By Number of CCAA Filings		
Ranking	Monitor	Filings
1	EY	5
1	PwC	5
2	Deloitte	3
2	FTI	3
3	GT / RC	2
	Industry Total	23

YTD September 30, 2019 League Table By Number of CCAA Filings		
Ranking	Applicant Counsel	Filings
1	Norton Rose	4
2	TGF	2
2	McCarthy	2
2	Fasken	2
2	BLG / Osler	2
	Industry Total	23

F2018 League Table By Number of CCAA Filings		
Ranking	Monitor	Filings
1	EY / KSV	3
2	Deloitte / FTI	2
2	MNP / PwC	2
2	GT RC	2
3	Various (5 firms)	1
	Industry Total	21

F2018 League Table By Number of CCAA Filings		
Ranking	Applicant Counsel	Filings
1	Blakes	3
1	Gowlings	3
1	GSNH	3
2	Various (12 firms)	1
	Industry Total	21

Total Corporate Filings - Monthly				
Monthly	Jul-19	Jul-18	Change	%
Bankruptcies	250	190	60	31.6%
Proposals	86	68	18	26.5%
CCAA	2	2	0	0.0%
Total	338	260	78	30.0%

Total Corporate Filings - Trailing Twelve Months				
	Jul-19	Jul-18	Change	%
Bankruptcies	2,860	2,618	242	9.2%
Proposals	936	922	14	1.5%
CCAA	30	24	6	25.0%
Total	3,826	3,564	262	7.4%

Source: OSB

- *From the Courts is proudly written by Matilda Lici. Henry Louis is the editor of the Insolvency Insider publications.*

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The Insolvency Insider Team

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IN THE MATTER OF THE BANKRUPTCY OF
Curriculum Services Canada/Services Des Programmes D'Etudes Canada
of the City of Toronto, in the Province of Ontario

BETWEEN:
MEDALLION CORPORATION
Appellant

- and -

RSM CANADA LIMITED
Respondent
Court of Appeal no. C66626

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

WRITTEN SUBMISSIONS OF THE APPELLANT

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