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

APPELLANT'S FACTUM

May 3, 2019

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PART I - IDENTITY OF APPELLANT, PRIOR COURT & RESULT

1. The Appellant, Medallion Corporation, in its capacity as authorized agent for 280 Richmond Street West Limited (the "**Landlord**") is appealing the Order of Madam Justice Chiapetta (the "**Bankruptcy Judge**") dated February 15, 2019 dismissing the Appellant's appeal from the disallowance of its claims in the bankruptcy of Curriculum Services Canada/Services Des Programmes D'Etudes Canada (referred to herein as "**Curriculum**", the "**Bankrupt**" or the "**Tenant**").

PART II - OVERVIEW - NATURE OF CASE AND ISSUES

2. The Appellant/Landlord is a creditor in the bankruptcy of Curriculum. The Respondent, RSM Canada Inc. (the "**Trustee**"), is the trustee in bankruptcy of Curriculum.

3. The Landlord was reflected in Curriculum's sworn Statement of Affairs as Curriculum's largest creditor, in respect of Curriculum's rent obligations under a lease between the Landlord and Curriculum.

4. The Landlord filed a proof of claim in Curriculum's estate in accordance with the indebtedness reflected by Curriculum in the Statement of Affairs.

5. Following the liquidation of assets, the Trustee disclaimed the lease. Thereafter, , the Trustee disallowed the entirety of the Landlord's claim, with the exception of a small preferred claim, without making any inquiries into the Landlord's mitigation efforts or damages under the lease.

6. The Landlord appealed the disallowance. As reflected in the Appeal from Disallowance, the Landlord successfully mitigated its damages. The Landlord therefore restricted its claim to the balance of its claim for three months' rent in accordance with the *Bankruptcy and Insolvency Act* RSC 1985, c B-3 ("**BIA**") and the *Commercial Tenancies Act*, RSO 1990, c L.7 (the "**CTA**") and to an unsecured claim for damages calculated in accordance with the Landlord's contractual rights under the Lease.

7. The Bankruptcy Judge dismissed the Landlord's appeal. In doing so, the Bankruptcy Judge failed to address the Landlord's claim for the balance of its three

months' accelerated rent. On the plain wording of the BIA, the Landlord was entitled to claim the balance as an unsecured claim.

8. With regard to the remainder of the Landlord's unsecured claim, the Bankruptcy Judge held that, as a matter of law, landlords cannot claim as unsecured creditors in the estate of bankrupt.

9. The Appellant's position is that there is nothing in the BIA or the CTA prohibiting a landlord from filing an unsecured claim for damages in the estate of a bankrupt, nor is there any principled reason under the BIA or the CTA why landlords should be treated differently from all other creditors in a bankruptcy.

10. The Bankruptcy Judge relied on a line of authorities that was overruled by the Supreme Court of Canada in *Crystalline Investments Ltd. v. Domgroup Ltd*., [2004] 1 SCR 60, 2004 SCC 3 (CanLII) ("***Crystalline****")*, as well as a decision of the Registrar in Bankruptcy which failed to consider the Supreme Court of Canada's decision in *Crystalline* and which was not binding on her.

11. In any event, the Supreme Court of Canada has also expressly recognized that a lease of land creates both an interest in land and contractual rights. None of the authorities referred to by the Bankruptcy Judge address the situation where the lease expressly contemplates and provides for the situation of a bankruptcy or disclaimer and expressly sets out the contractual damages to which the landlord is entitled.

12. This appeal is of considerable importance to both the bankruptcy and leasing professions, as it deals with the legal rights of landlords as creditors in a bankruptcy and

is the first appellate case to address the decision of the Supreme Court of Canada in *Crystalline*.

PART III - SUMMARY OF FACTS

13. The facts are not in dispute.

The Lease

14. The Landlord is a creditor of Curriculum.[1]

15. The Landlord owns a property at 150 John Street West, Toronto, Ontario, Suite 600.[2]

16. Curriculum was a tenant at the sixth floor of the property pursuant to a Lease dated May 26, 2017 (the "**Lease**").[3]

17. The Lease was for 8,322 square feet of space at the Premises (the "**Leased Premises**") for a term of ten years, six months, commencing on July 1, 2017 and expiring on December 31, 2027, with basic rent payable as follows:

Months 1-42 $21.50 per square foot per annum

Months 43-78 $23.50 per square foot per annum

Months 79-126 $25.50 per square foot per annum[4]

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[1] Affidavit of Joseph Cacciola sworn October 16, 2018 ("**Cacciola Affidavit**"), para. 1 ("Appeal Book and Compendium ("Appeal Book"), Tab 5
[2] Cacciola Affidavit, para. 2; Appeal Book, Tab 5
[3] Cacciola Affidavit, para. 4, Exhibit "A"; Appeal Book, Tabs 5 and 6
[4] Cacciola Affidavit, para. 5; Appeal Book, Tab 5

18. In addition to basic rent, the Tenant was required to pay Additional Rent as defined in the Lease.[5]

19. Section 16 of the Lease deals with Defaults and Remedies. Sections 16.1 of the Lease provided in part as follows:[6]

> If any of the following shall occur:
>
> …
>
> (f) Tenant, any assignee or a subtenant of all or substantially all of the Premises makes an assignment for the benefit of creditors or becomes bankrupt or insolvent or takes the benefit of any statute for bankrupt or insolvent debtors or makes any proposal, assignment, arrangement or compromise with its creditors or Tenant sells all or substantially all of its personal property at the Premises other than in the ordinary course of business (and other than in connection with a Transfer requiring Landlord's consent and approved in writing by Landlord), or steps are taken or action or proceedings commenced by any person for the dissolution, winding up or other termination of Tenant's existence or liquidation of its assets (collectively called a "**Bankruptcy**");
>
> (g) a trustee, receiver, receiver-manager, manager, agent or other like person shall be appointed in respect of the assets or business of Tenant or any other occupant of the Premises;
>
> …
>
> then, without prejudice to and in addition to any other rights or remedies to which Landlord is entitled hereunder or at law, the then current and the next three (3) months' Rent shall be forthwith due and payable and Landlord shall have the following rights and remedies, all of which are cumulative and not alternative, namely:
>
> (i) to terminate this Lease in respect of the whole or any part of the Premises by written notice to Tenant (it being understood that

[5] Cacciola Affidavit, para. 6; Appeal Book, Tab 5
[6] Cacciola Affidavit, para. 7; Appeal Book, Tab 5

actual possession shall not be required to effect a termination of this Lease and that written notice, alone shall be sufficient); if this Lease is terminated in respect of part of the Premises, this Lease shall be deemed to be amended by the appropriate amendments, and proportionate adjustments in respect of Rent and any other appropriate adjustments shall be made;

…

(v) to obtain damages from Tenant including, without limitation, if this Lease is terminated by Landlord, all deficiencies between all amounts which would have been payable by Tenant for what would have been the balance of the Term, but for such termination, and all net amounts actually received by Landlord for such period of time;

(vi) to suspend or cease to supply any utilities, services, heating, ventilating, air conditioning and humidity control to the Premises, all without liability of Landlord for any damages, including indirect or consequential damages, caused thereby;

(vii) to obtain the Termination Payment from Tenant;

(viii) if this Lease is terminated due to the default of Tenant, or if it is disclaimed, repudiated or terminated in any insolvency proceedings related to Tenant (collectively “Termination”), to obtain payment from Tenant of the value of all tenant inducements which were received by Tenant pursuant to the terms of this Lease, the agreement to enter into this Lease or otherwise, including, without limitation, the amount equal to the value of any leasehold improvement allowance, tenant inducement payment, rent free periods, lease takeover, Leasehold Improvements or any other work for Tenant’s benefit completed at Landlord’s cost or any moving allowance, which value shall be multiplied by a fraction, the numerator of which shall be the number of months from the date of Termination to the date which would have been the natural expiry of this Lease but for such Termination, and the denominator of which shall be the total number of months of the Term as originally agreed upon.

The Bankruptcy

20. On March 28, 2018, Curriculum filed an Assignment for the General Benefit of Creditors (the "**Assignment**"). Amy Coupal, an officer and director of Curriculum, swore a Statement of Affairs dated March 28, 2018, in which she swore that Curriculum had assets totalling $1,903,563.87 and liabilities totalling $5,605,253.28, for a deficiency of $3,701,689.41.[7]

21. The single largest liability shown on the Statement of Affairs was Curriculum's liability to the Landlord, which was reflected as follows:

(a) Unsecured claim: $3,986,725.25

(b) Preferred claim: $100,558.59[8]

22. On March 29, 2018, pursuant to the Assignment, Curriculum became bankrupt. RSM Canada Inc. was appointed as Trustee.[9]

23. Curriculum's bankruptcy was an event of default under the Lease, triggering the Landlord's contractual rights and remedies under section 16 of the Lease. As set out in the Lease, these remedies are cumulative and include three months' accelerated rent and damages.[10]

24. On April 20, 2018, the Landlord filed a Proof of Claim with the Trustee for an unsecured claim in the amount of $4,028,111.23 and a preferred claim in the amount of

[7] Cacciola Affidavit, para. 8, Exhibit "B"; Appeal Book, Tabs 5 and 7
[8] Cacciola Affidavit, para. 9; Appeal Book, Tab 5
[9] Cacciola Affidavit, para. 10; Appeal Book, Tab 5
[10] Cacciola Affidavit, para. 11; Appeal Book, Tab 5

$100,558.59 in accordance with the Statement of Affairs and its contractual rights under the Lease.[11]

25. The Landlord's damages claim was subject to the Landlord being able to mitigate its damages, as set out in the Lease.[12]

The Disclaimer/The Disallowance

26. On April 23, 2018, the Trustee issued a Notice of Disclaimer of the Lease (the "Disclaimer").[13]

27. Under the Lease, the Disclaimer was a further event of default. In the event of a disclaimer, the Landlord is entitled under the Lease to claim, among other things, the value of all tenant inducements which were received by Tenant pursuant to the terms of this Lease, including free rent periods.[14]

28. Following the Disclaimer, the Landlord was successful in mitigating its damages arising from Curriculum's bankruptcy. Fortunately, another existing tenant in the building was prepared to take over Curriculum's space.[15]

29. Although the Landlord was the largest potential creditor in Curriculum's bankruptcy estate, the Trustee did not ask the Landlord for any information supporting the Proof of

[11] Cacciola Affidavit, para. 12, Exhibit "C"; Appeal Book, Tabs 5 and 8
[12] Cacciola Affidavit, para. 13; Appeal Book, Tab 5
[13] Cacciola Affidavit, para. 14, Exhibit "D"; Appeal Book, Tabs 5 and 9
[14] Cacciola Affidavit, para. 15; Appeal Book, Tab 5
[15] Cacciola Affidavit, para. 16; Appeal Book, Tab 5

Claim, did not inquire about the progress of the Landlord's mitigation efforts and did not advise that it was contemplating issuing a Notice of Disallowance.[16]

30. On September 19, 2018, the Trustee issued a Notice of Partial Disallowance of Claim (the "**Disallowance**"), allowing the Landlord's preferred claim in the amount of only $24,571.00 and disallowing the entirety of the Landlord's unsecured claim.[17]

The Appeal from Disallowance

31. On October 17, 2018, the Landlord filed an Appeal from Disallowance, supported by an affidavit of Joseph Cacciola, the General Manager, Commercial Properties – Office Portfolio at Medallion Corporation.

32. Although the Landlord incurred costs in re-leasing the Leased Premises and had a contingent claim in the event the replacement tenant defaults, the Landlord confined its claim to the accelerated rent payable under the Lease and recovery of tenant inducements provided to Curriculum, as it was entitled to do under the Lease.[18]

33. The tenant inducements which the Landlord provided to Curriculum are as follows:

(a) Leasehold Improvements provided at the Landlord's cost under the Lease, in the amount of $45,280.00;[19]

(b) Free rent for a six-month period, totalling $175,225.28.[20]

---

[16] Cacciola Affidavit, para. 17; Appeal Book, Tab 5
[17] Cacciola Affidavit, para. 18, Exhibit "E"; Appeal Book, Tabs 5 and 10
[18] Cacciola Affidavit, para. 20; Appeal Book, Tab 5
[19] Cacciola Affidavit, paras. 21 and 22; Appeal Book, Tab 5
[20] Cacciola Affidavit, paras. 21 and 23; Exhibit "G" (spreadsheet); Appeal Book, Tabs 5 and 12

34. The Disclaimer was issued 9¾ months after the commencement date of the Lease. The total Lease was for 126 months. Pursuant to the formula contained in the Lease, the Landlord is entitled to claim $203,442.37 in respect of the leasehold improvements and free rent, in addition to the balance of its claim for accelerated rent.[21]

35. The balance of the Landlord's claim for three months' accelerated rent is in the amount of $50,289.28 (Claim in the amount of $100,558.59, less the Landlord's preferred claim in the amount of $24,571.00, less the occupational rent paid by the Trustee in the amount of $25,698.31.[22]

36. The Appeal from Disallowance was heard on January 21, 2019 before the Bankruptcy Judge. The Bankruptcy Judge released her decision on February 15, 2019, dismissing the Landlord's appeal .[23]

PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES

Appeal Rights Under the BIA

37. Section 193 of the BIA provides as follows:

> **193.** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> …
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;

[21] Cacciola Affidavit, para. 24; Appeal Book, Tab 5
[22] The calculation is not disputed by the Trustee
[23] Order of Chiappetta, J. dated February 15, 2019; Appeal Book, Tab 2

(e) in any other case by leave of a judge of the Court of Appeal.

38. This appeal involves the disallowance of claims in an amount significantly in excess of $10,000. There is no issue that the appeal involves property in excess of $10,000 and accordingly there is an automatic right of appeal.

39. If leave to appeal were required, the test for granting leave was set out in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*[24]:

> The court will look to whether the proposed appeal,
>
> a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
>
> b) is *prima facie* meritorious, and
>
> c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

40. This appeal raises issues of general importance to the practice in bankruptcy/insolvency and leasing matters and to the administration of justice as a whole, including:

(a) The interpretation of the relevant provisions of the BIA and the CTA;

(b) The rights of landlords in bankruptcy;

---

[24] *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 (CanLII), 115 O.R. (3d) 617, at para. 29; see also *Emery Silfurtun Inc. (Re),* 2018 ONCA 485 (CanLII)

(c) Whether *Cummer-Yonge Investments Ltd. v. Fagot*[25] ("***Cummer-Yonge***"), remains good law in Ontario, notwithstanding the decision of the Supreme Court of Canada in *Crystalline*.

41. The appeal is *prima facie* meritorious.

42. There is no issue or suggestion that the appeal has or will unduly impede the bankruptcy proceeding.

The Standard of Review

43. The appeal involves pure questions of law. There is no issue that the standard of review is correctness.

The Relevant Provisions of the BIA

44. Section 2 of the BIA defines "creditor" as follows:

> ***creditor*** means a person having a claim provable as a claim under this Act

45. Section 30(1)(k) of the BIA provides:

> "The trustee may, with the permission of the inspectors, do all or any of the following things:
>
> …
>
> (k) elect to retain for the whole part of its unexpired term, or to assign, surrender, disclaim or resiliate any lease of, or other temporary interest or right in, any property of the bankrupt"

[25] *Cummer-Yonge Investments Ltd. v. Fagot*, 1965 CanLII 295 (ON SC), [1965] 2 O.R. 152, aff'd [1965] 2 O.R. 157

46. Sections 121(1) and (2) of the BIA provide as follows:

> Claims provable
>
> **121 (1)** All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> **Contingent and unliquidated claims**
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

47. Section 146 of the BIA provides:

> **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.

48. Sections 135(1) to (4) of the BIA provide as follows:

> **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.

49. Section 136 of the BIA provides in part as follows:

> **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:
>
> …
>
> **(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;
>
> …

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.

The Relevant Provisions of the CTA

50. Sections 38 and 39 of the CTA provide as follows:

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.

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.
>
> **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.

The Duties of the Trustee

51. Under the BIA, the trustee has a statutory obligation to examine every proof of claim for the purpose of determining if the claim is valid. If unsatisfied with the proof of claim or its supporting material, the trustee has not only a right but a corresponding duty to demand sufficient evidence to establish the validity of the claim. The trustee is given many tools under the BIA to fulfil this function including, where necessary, examination of parties and requiring production of documents.[26]

[26] *Royal Bank of Canada v. Insley*, 2010 SKQB 17 (CanLII), para. 23

The Landlord's Preferred Claim

52. The Trustee partially disallowed the Landlord's claim for three months' accelerated rent, on the ground that the realization by the Trustee from the assets (office equipment) on the Leased Premises totaled only $24,571.00.

53. Pursuant to the CTA, a landlord is entitle to claim for three months' accelerated rent. There is nothing in the CTA restricting a landlord's right to claim three months' accelerated rent.

54. Section 136(1) of the BIA deals with priority claims. Pursuant to section 136(1)(f) of the BIA, a lessor is entitled to a preferred claim in the amount of three months' arrears of rent, together with three months' accelerated rent (if provided for under the lease), to the extent of the realization of assets on the premises under the lease and after credit for occupation rent.

55. Section 136(3) of the BIA expressly addresses the balance of any claim that is restricted by section 136(1) of the BIA:

> **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.

56. It is submitted that, as a matter of law and pursuant to the plain wording of the BIA, the Landlord is entitled to rank as an unsecured creditor for the balance of its three months' accelerated rent claim, which was expressly provided for in the Lease.

57. The Bankruptcy Judge failed to address this issue at all in her decision.

The Landlord's Unsecured Claim

58. In addition to its preferred claim, the Landlord initially filed an unsecured claim for damages for the unexpired term of the Lease. This was a perfectly valid claim. It was filed:

(a) In accordance with Curriculum's sworn Statement of Affairs (albeit with a slightly different calculation);

(b) Prior to the Trustee's issuance of the Disclaimer;

(c) Prior to the Landlord's re-letting of the Leased Premises in mitigation of its damages.

59. After disclaiming the Lease, the Trustee disallowed the Landlord's unsecured claim in its entirety, without any inquiry as to the damages suffered by the Landlord and without requesting documentary support for the Landlord's claim, on the basis that, as a matter of law in Ontario, a landlord has no right to file an unsecured claim for damages in the estate of the bankrupt.

60. As indicated above, the Landlord had in fact mitigated its damages.

61. Rather than requiring the Landlord to file a fresh proof of claim, the Trustee agreed to have the Landlord's revised claim addressed on the Appeal from Disallowance, as a pure question of law. The Trustee has not disputed the Landlord's calculation of its damages in accordance with the provisions of the Lease.

62. Pursuant to the BIA, the rights of landlords are determined by provincial law. Some provinces have enacted legislation which restricts the rights of landlords to claim damages for rent due under the unexpired portion of a lease.[27]

63. Other provinces have not restricted the rights of landlords to claim damages for rent for the unexpired portion of the lease. Among other provinces, Ontario has no such restriction. The CTA addresses only the landlord's preferred claim for arrears of rent and accelerated rent and the rights of the trustee to elect to retain or disclaim the lease. The CTA does not prohibit a landlord from filing an unsecured proof of claim for damages in the estate of the bankrupt.

64. Pursuant to section 121 of the BIA, as set out above, provable claims include **all** debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt.

65. In *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd*., [1971] SCR 562, 1971 CanLII 123 (SCC), the Supreme Court of Canada expressly found that a lease is both a conveyance of an interest in land and a contract:

> It is no longer sensible to pretend that a commercial lease, such as the one before this Court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land.

[27] See, for example, section 4 of the *Landlord's Rights on Bankruptcy Act*, RSA 2000, c L-5

66. *Highway Properties* also expressly recognized that the repudiation, surrender or other termination of a lease gives rise to a claim in damages and addressed the appropriate measure of damages:

> One element of such damages would be, of course, the present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period. Another element would be the loss, so far as provable, resulting from the repudiation of clause 9.
>
> …
>
> Where repudiation occurs in respect of a business contract (not involving any estate in land), the innocent party has an election to terminate the contract which, if exercised, results in its discharge pro tanto when the election is made and communicated to the wrongdoer. … Termination in such circumstances does not preclude a right to damages for prospective loss as well as for accrued loss.
>
> …
>
> The rule of surrender by operation of law, and the consequences of the rule for a claim of prospective loss, are said to rise above any intention of the party whose act results in the surrender, so long as the act unequivocally makes it inconsistent for the lease to survive. **Even if this be a correct statement of the law, I do not think it would apply to a case where both parties evidenced their intention in the lease itself to recognize a right of action for prospective loss upon a repudiation of the lease, although it be followed by termination of the estate.** [emphasis added]
>
> …
>
> Since rent was regarded, at common law, as issuing out of the land, it would be logical to conclude that it ceased if the estate in the land ceased. But I do not think that it must follow that an election to terminate the estate as a result of the repudiation of a lease should inevitably mean an end to all covenants therein to the point of denying prospective remedial relief in damages.
>
> …

> As long ago as 1906, the High Court of Australia in Buchanan v. Byrnes[10] held that upon an abandonment by a tenant, in breach of covenant, of the hotel property which he had leased, the landlord was entitled to claim damages over the unexpired term of the lease notwithstanding a surrender.

67. More recently, in *Morguard Corporation v. Bramalea City Centre Equities*, 2013 ONSC 7213 (CanLII), Mr. Justice Perrell canvassed at length the principles applicable to the calculation of damages suffered by a landlord, being the "present recovery of damages for losing the benefit of the lease over its unexpired term".

68. In the present case, however, the Landlord's right to claim damages for loss of rent for the unexpired term of the Lease was moot. The Landlord successfully mitigated its damages for future lost rent over the unexpired term.

69. As a result, the ONLY issue for determination on the Appeal from Disallowance (other than the Landlord's claim for the balance of its three months' accelerated rent) was the Landlord's claim for the recovery of the cost of the Leasehold Improvements ($45,280.00) and free rent ($175,225.28) which Curriculum as Tenant was *contractually* obligated to repay in the event of a breach of the Lease, including a disclaimer.[28]

70. The Landlord and Tenant freely entered into the Lease, which contemplated the possibility of the Tenant filing an assignment in bankruptcy and the issuance by the Trustee of a disclaimer, and provided for the contractual consequences of such events.

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[28] Cacciola Affidavit, paras. 21 and 23; Exhibit "G" (spreadsheet); Appeal Book, Tabs 5 and 12

71. The Landlord, having mitigated its damages by re-letting the Leased Premises, calculated its damages exactly in accordance with its contractual rights under the Lease. This was not challenged by the Trustee.

72. The Landlord's claims at issue on the Appeal from Disallowance were thus contractual claims clearly falling within the plain wording of section 121 of the BIA, to which Curriculum became subject either prior to or after its bankruptcy, as a result of the breach and termination of the Lease.

73. The Bankruptcy Judge failed to squarely address these claims or to explain why the Landlord, alone among all of Curriculum's unsecured creditors (of which the Landlord was one of the largest, if not the largest) should be disentitled from proving a claim for such damages or receiving a dividend in the bankruptcy estate for its acknowledged loss.

Cummer-Yonge and Crystalline

74. In *Cummer-Yonge*, Gale C.J.H.C., relying on *Stacey v. Hill*[29] and *Re Mussens Ltd. ("**Mussens**")*[30], held that the trustee's disclaimer of a lease under s. 38 of the then *Landlord and Tenant Act* had the same effect as if the lease had been surrendered with the consent of the lessor, as a result of which all of the landlord's rights came to an end.

75. Although *Cummer-Yonge* dealt specifically with the liability of guarantors after the disclaimer of a lease, the decision in *Cummer-Yonge* was adopted and extended in other

[29] *Stacey v. Hill*, [1901] 1 K.B. 660
[30] *Re Mussens Ltd., Petrie Ltd.'s Claim*, [1933] O.W.N. 459, 14 C.B.R. 479

Ontario court decisions to deny a landlord the right to file a proof claim in bankruptcy for damages for lost rent under a disclaimed lease.[31]

76. It is submitted that this result should not have flowed from *Cummer-Yonge*, given the provisions of the BIA as previously discussed. In fact, neither *Cummer-Yonge* nor *Mussens* addressed the right of a landlord to prove a claim for damages under section 121 of the BIA.

77. In addressing *Cummer-Yonge*, the Supreme Court of Canada in *Crystalline* made the following findings:

> 38. Gale C.J.H.C. applied the reasoning of the English Court of Appeal in Stacey v. Hill, [1901] 1 Q.B. 660. He read the guarantee clause strictly as a pure surety provision and found that when the lease was disclaimed by a trustee in bankruptcy, the bankrupt's covenants to perform were dissolved. Since the guarantors' obligation is to assure performance of those covenants, their obligations disappeared with the covenants. The Ontario Court of Appeal affirmed the decision without reasons (1965 CanLII 295 (ON SC), [1965] 2 O.R. 157n).
>
> 39 Cummer-Yonge has created uncertainty in leasing and bankruptcy. Not only have drafters of leases attempted to circumvent the holding in Cummer-Yonge by playing upon the primary and secondary obligation distinction, but courts have also performed what has been called "tortuous distinctions" in order to reimpose liability on guarantors. See J. W. Lem and S. T. Proniuk, "Goodbye 'Cummer-Yonge': A Review of Modern Developments in the Law Relating to the Liability of Guarantors of Bankrupt Tenants" (1993), 1 D.R.P.L. 419, at p. 436.
>
> 40 Despite the division over Cummer-Yonge, the distinction between guarantors as having secondary obligations that disappear when a lease is disclaimed by a trustee in bankruptcy, and assignors as having primary obligations that survive a disclaimer, thrives in Canadian case law.

[31] *Re Vrablik* (1993), 17 C.B.R. (3d) 152 (Ont. Bktcy.)

> 41 Not surprisingly, Stacey v. Hill, supra, led to a similar situation in England. …
>
> 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.

78. It is submitted that *Crystalline* put an end to *Cummer-Yonge*. Indeed, the official version of the case states: "**Overruled:** *Cummer-Yonge Investments Ltd. v. Fagot*, [1965] 2 O.R. 152, aff'd [1965] 2 O.R. 157*n*"

79. Prior to the decision of the Bankruptcy Judge in the instant case, the only Ontario case which has referred to *Cummer-Yonge* since it was overruled in 2004 is *Sirdi Sai Sweets Inc. v. Indian Spice & Curry Ltd*.[32], in which Mr. Justice Myers referred to the case in passing:

> [9] Mr. Mehta argued that he is not liable under the guarantee because the lease called for an indemnity agreement to be appended as schedule "E" and no such document was ever agreed upon or signed. However, the lack of an independent indemnity does not undermine the applicability of the guarantee. It was common practice to include both guarantees and indemnities in leases in order to avoid the risk that a guarantee might become unenforceable on the bankruptcy of the tenant based on pre-2005 common law.[1] While that law no longer applies,[2] it is not surprising to see a form of lease from 2005 that was drafted in that manner.
>
> [1] Cummer-Yonge Investments Ltd. v. Fagot et al., 1965 CanLII 295 (ON SC)
>
> [2] Crystalline Investments Ltd. v. Domgroup Ltd., 2004 SCC 3 (CanLII)

[32] *Sirdi Sai Sweets Inc. v. Indian Spice & Curry Ltd*., 2014 ONSC 7221 (CanLII),

80. It is submitted that, as a result of the Supreme Court of Canada's decision in *Crystalline*, the legal fiction that a trustee's disclaimer of a lease is equivalent to the consensual surrender of the lease, as originally proposed in *Mussens* and adopted in *Cummer-Yonge*, is gone. The rights of landlords do not disappear on the issuance of a disclaimer.

The Principle of *Stare Decisis*

81. In *R. v. Henry*,[33] Mr. Justice Binnie, writing for a unanimous court, recognized that *stare decisis* commands compliance not only with the *ratio decidendi*, but some of the *obiter* from the Supreme Court of Canada. He put it in these terms, at para. 57:

> All obiter do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive ratio decidendi to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" . . . . The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity.[34]

82. More recently, in *Black v. Owen*[35], the Ontario Court of Appeal emphasized the importance of *stare decisis*:

> [42] As the Supreme Court emphasized in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 (CanLII), [2013] 3 S.C.R. 1101, at para. 38: "Certainty in the law requires that courts follow and apply authoritative precedents. Indeed, this is the foundational principle upon which the common law relies." Failure to adhere to this core principle is inconsistent with the principle of *stare decisis*, the need

[33] *R. v. Henry*, 2005 SCC 76 (CanLII), [2005] 3 S.C.R. 609, [2005] S.C.J. No. 76
[34] As quoted in *R. v. Prokofiew*, 2010 ONCA 423 (CanLII)
[35] *Black v. Owen*, 2017 ONCA 397 (CanLII)

> for certainty and stability in the administration of justice, and the orderly development of the law.

83. In the present case, the Bankruptcy Judge distinguished *Crystalline*, on the basis that *Crystalline* (as well as *Cummer-Yonge* itself) dealt only with the liability of third parties under a lease, as opposed to the right of a landlord to file a proof of claim for damages in an estate. The Bankruptcy Judge therefore declined to follow *Crystalline* and instead held that *Mussens* remains good law in Ontario.

84. It is respectfully submitted that *Mussens* was adopted in *Cummer-Yonge* for the principle that a disclaimer of a lease amounts to a consensual surrender of a lease. This is the very principle which was rejected the Supreme Court of Canada in *Crystalline*.

85. In reaching her conclusion that *Mussens* and *Cummer-Yonge* remain good law notwithstanding *Crystalline*, the Bankruptcy Judge has effectively resurrected the legal fiction that a disclaimer of a lease is equivalent to a consensual surrender of the lease, thus putting an end to all rights of the landlord. As indicated above, this is no longer good law. The Bankruptcy Judge erred in resurrecting a principle that has been disapproved by the Supreme Court of Canada.

86. In reaching her conclusion that *Mussens* remains good law notwithstanding that *Cummer-Yonge* has been overruled, the Bankruptcy Judge also relied on the decision of Registrar Nettie in *Linens 'N Things Canada Corp*. as well as excerpts from *Houlden and Morawetz*.[36]

[36] *Linens 'N Things Canada Corp*. (Re), 2009 CanLII 25311 (ON SC)

87. It is submitted that the Bankruptcy Judge erred at law in following *Linens 'N Things* for the following reasons, among others:

(a) A judge is not bound by decisions of the Registrar. Rather, Registrars in Bankruptcy are bound by decisions of a Judge (and higher courts);

(b) *Linens 'N Things* does not refer to or discuss either *Cummer-Yonge* or *Crystalline*. There is no indication that either decision was brought to the Registrar's attention;

(c) *Linens 'N Things* did not in any event deal with a contractual claim for damages under a lease.

88. The excerpts from *Houlden and Morawetz* are holdovers from the days of *Cummer-Yonge*. Indeed, in s. G 140(8), *Houlden and Morawetz* cites *Cummer-Yonge* as an authority for the effect of a surrender, without referencing the fact that *Cummer-Yonge* has been overruled. In s. G141, Houlden and Morawetz does not cite *Cummer-Yonge* itself, but it cites both *Mussens* (which formed the basis for *Cummer-Yonge*) and *Re Vrablik*[37], which followed *Cummer-Yonge*.

89. If there were actually a statutory basis for depriving landlords (or other creditors whose contracts had been disclaimed by a trustee in bankruptcy) from filing a proof of claim in bankruptcy for their losses, then there would never have been a need to rely on *Cummer-Yonge* in the first place. But as indicated above, the BIA clearly permits a

[37] *Re Vrablik, supra*

creditor to file a proof of claim for damages and there is no contrary statutory prohibition to the contrary in Ontario.

The *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("CCAA")

90. It is submitted that, if the disclaimer of a lease (or any other contract, for that matter) by a trustee, liquidator or other court officer amounts to a consensual surrender of the lease (or other contract), then the same principle should apply under all insolvency legislation. This is not the case.

91. Sections 32(1) and 32(7) of the CCAA provide as follows:

> **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.
>
> ...
>
> **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.

92. The provisions of the CCAA are entirely consistent with the principles expressed by the Supreme Court of Canada, both in *Highway Properties* and in *Crystalline*. There is no reason why a party whose contract has been disclaimed by a trustee or other judicial officer should be disentitled from providing a claim for damages for such loss and sharing in the dividends (if any) available to unsecured creditors.

93. In *Century Services Inc. v. Canada (Attorney General)*[38], the Supreme Court of Canada discussed the importance of harmonizing the CCAA and the BIA:

> [24] 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 …

94. Reading in a restriction to the rights of landlords to file a proof of claim for their (admitted) damages, where no such restriction exists in either the BIA or the CTA (and indeed where any other creditor can file a claim for damages arising from a disclaimer of a contract or breach of an obligation) would be contrary to the principle of harmonization expressed by the Supreme Court of Canada in *Century Services*.

Conclusion

95. As submitted above, the Landlord is not claiming for damages for the unexpired term of the Lease. Even if such a claim were restricted, there is no reason why the Landlord cannot prove its claim for both the balance of its accelerated rent claim and its contractual damages for recovery of the Leasehold Improvements and free rent provided to Curriculum.

96. However, for the sake of the development of the law, it is respectfully submitted that the Bankruptcy Judge's legal determinations with respect to the effect of a disclaimer on landlord's rights should be overruled.

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[38] In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379

PART V - ORDER REQUESTED

97. It is respectfully requested that the appeal be allowed and that the Landlord's Appeal from Disallowance be allowed in the amounts set out in the Appeal from Disallowance with costs payable out of the Bankrupt's estate, including costs of this Appeal.

CERTIFICATE

98. The lawyers for the Appellants certify that:

(a) an order under subrule 61.09(2) is not required; and

(b) the estimate amount of time of 2 hours will be needed for oral argument of the appeal, not including reply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of May, 2019.

Catherine Francis

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SCHEDULE "A"

LIST OF AUTHORITIES

1 *Black v. Owen*, 2017 ONCA 397 (CanLII)

2 *Business Development Bank of Canada v. Pine Tree Resorts Inc.,* 2013 ONCA 282 (CanLII), 115 O.R. (3d) 617, at para. 29

3 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379

4 *Crystalline Investments Ltd. v. Domgroup Ltd*., 2004 SCC 3 (CanLII)

5 *Cummer-Yonge Investments Ltd. v. Fagot,* 1965 CanLII 295 (ON SC), [1965] 2 O.R. 152, aff'd [1965] 2 O.R. 157

6 *Emery Silfurtun Inc. (Re),* 2018 ONCA 485 (CanLII)

7 *Linens 'N Things Canada Corp. (Re),* 2009 CanLII 25311 (ON SC)

8 *Morguard Corporation v. Bramalea City Centre Equities*, 2013 ONSC 7213 (CanLII)

9 *R. v. Henry*, 2005 SCC 76 (CanLII), [2005] 3 S.C.R. 609, [2005] S.C.J. No. 76

10 *R. v. Prokofiew*, 2010 ONCA 423 (CanLII)

11 *Re Mussens Ltd., Petrie Ltd.'s Claim*, [1933] O.W.N. 459, 14 C.B.R. 479

12 *Re Vrablik (*1993), 17 C.B.R. (3d) 152 (Ont. Bktcy.)

13 *Royal Bank of Canada v. Insley,* 2010 SKQB 17 (CanLII), para. 23

14 *Sirdi Sai Sweets Inc. v. Indian Spice & Curry Ltd*., 2014 ONSC 7221 (CanLII),

15 *Stacey v. Hill*, [1901] 1 K.B. 660

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

1. *Bankruptcy and Insolvency Act, RSC 1985, c B-3*, sections 2, 30(1)(k), 193, 121(1) and (2), 135(1) to (4), 136 and 146

2. *Commercial Tenancies Act*, RSO 1990, c L.7, sections 38 and 39

3. *Companies' Creditors Arrangement Act,* RSC 1985, c C-36, Sections 32(1) and 32(7)

4. *Landlord's Rights on Bankruptcy Act*, RSA 2000, c L-5, section 4

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 File No. C66626

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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