Estate No. 31-2360759

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

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

FACTUM OF THE APPELLANT

January 10, 2019

MINDEN GROSS LLP
Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Catherine Francis (LSO# 26900N)
cfrancis@mindengross.com

Tel: 416-369-4137
Fax: 416-864-9223

Lawyers for the Moving Party/Appellant, Medallion Corporation as authorized agents for 280 Richmond Street West Limited

TO: **PALLETT VALO LLP**
Lawyers & Trade-mark Agents
77 City Centre Drive
West Tower, Suite 300
Mississauga, Ontario L5B 1M5

Alex Ilchenko
ailchenko@pallettvalo.com
Tel: 905-273-3022 Ext. 203
Fax: 905-273-6920

Lawyers for the Trustee, RSM Canada Limited

#3512972 | 4019296

Estate No. 31-2360759

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

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

FACTUM OF THE APPELLANT

PART I - OVERVIEW

1. The Appellant/Landlord appeals from the disallowance of its claims in the estate of the Bankrupt. The Landlord is a creditor in the bankruptcy. The Landlord successfully mitigated its damages arising from the termination of the Lease between the Landlord and the Bankrupt. The Landlord is claiming damages as calculated in accordance with the terms of the Lease. There is no legal principle under which the Landlord should be disentitled from filing a proof of claim for its contractual damages.

PART II - SUMMARY OF FACTS

The Lease

2. Medallion Corporation is the authorized agent for 280 Richmond Street West Limited (the "Landlord"), a creditor of the Bankrupt, Curriculum Services

Canada/Services Des Programmes D'Etudes Canada (hereinafter referred to as "Curriculum" or the "Tenant").[1]

3. The Landlord owns premises at 150 John Street West, Toronto, Ontario, Suite 600 (the "Premises").[2]

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

5. 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]

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

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

> If any of the following shall occur:

---

[1] Affidavit of Joseph Cacciola sworn October 16, 2018 ("Cacciola Affidavit"), para. 1
[2] Cacciola Affidavit, para. 2
[3] Cacciola Affidavit, para. 4, Exhibit "A"
[4] Cacciola Affidavit, para. 5
[5] Cacciola Affidavit, para. 6
[6] Cacciola Affidavit, para. 7

…

> (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 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

8. 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]

9. 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

[7] Cacciola Affidavit, para. 8, Exhibit "B"

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

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

11. 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]

12. On April 20, 2018, Medallion filed a Proof of Claim with the Trustee on behalf of the Landlord for an unsecured claim in the amount of $4,028,111.23 and a preferred claim in the amount of $100,558.59 in accordance with its rights under the Lease.[11]

13. 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

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

---

[8] Cacciola Affidavit, para. 9
[9] Cacciola Affidavit, para. 10
[10] Cacciola Affidavit, para. 11
[11] Cacciola Affidavit, para. 12, Exhibit "C"
[12] Cacciola Affidavit, para. 13
[13] Cacciola Affidavit, para. 14, Exhibit "D"

15. 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]

16. 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]

17. 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 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]

18. 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

19. 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.

---

[14] Cacciola Affidavit, para. 15
[15] Cacciola Affidavit, para. 16
[16] Cacciola Affidavit, para. 17
[17] Cacciola Affidavit, para. 18, Exhibit "E"

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

21. 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]

22. 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]

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

Relevant Provisions of the Bankruptcy and Insolvency Act (the "BIA")

23. 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:
>
> …

[18] Cacciola Affidavit, para. 20
[19] Cacciola Affidavit, paras. 21 and 22
[20] Cacciola Affidavit, paras. 21 and 23; Exhibit "G" (spreadsheet)
[21] Cacciola Affidavit, para. 24

(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”

24. Section 121 of the BIA provides 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.

25. 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.

26. 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.

27. 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 *Commercial Tenancies Act*, RSO 1990, c L.7 (the "CTA")

28. 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

29. 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.[22]

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

The Standard of Review on an Appeal from Disallowance

30. Where the trustee's decision involves a question of law or the interpretation of a statute, the standard of review is correctness. On the other hand, where the matter under consideration is factual in nature or involves a discretionary element, the standard of review is reasonableness.[23]

31. It is acknowledged by the Trustee that this appeal involves pure questions of law. Accordingly the standard of review is correctness.

The Accelerated Rent Claim

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

33. There is nothing in the CTA restricting a landlord's preferred claim for three months' accelerated rent to the amount realized by the trustee from the assets on the premises. Such restriction is contained only in section 136(1)(f) of the BIA, and applies only to the landlord's entitlement to rank in priority to other creditors.

34. As noted above, section 136(3) of the BIA expressly addresses the balance of any claim that is restricted by section 163(1):

> **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.

[23] *Royal Bank of Canada v. Insley*, *supra*, para. 29

35. It is submitted that, under the plain wording of the BIA, the Landlord is entitled to rank as an unsecured creditor for the balance of its accelerated rent claim.

The Damages Claim

36. In addition to its preferred claim, the Landlord filed a 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.

37. 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.

38. It is respectfully submitted that there is no such law in Ontario.

39. As the Trustee acknowledges, there is an Alberta statute which expressly prohibits landlords from filing a claim in bankruptcy for rent for the unexpired term of a lease. Section 4 of the *Landlord's Rights on Bankruptcy Act*, RSA 2000, c L-5 provides as follows:

> 4. Subject to section 3, the landlord has no right to claim as a debt any money due to the landlord from the lessee for any portion of the unexpired term of the lessee's lease.

40. No such provisions are contained in the CTA. 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 a proof of claim for damages in the estate of the bankrupt.

41. Given the clear provisions of sections 121 and 136(3) of the BIA as to the rights of creditors to prove a claim in bankruptcy, there is no basis for reading in such a restriction. In particular, section 121 of the BIA expressly permits a creditor to prove a claim arising out an obligation, contractual or otherwise, incurred by the debtor prior to bankruptcy.

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

43. *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.
>
> …
>
> 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.

44. 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”.

45. Given the recognition by the Supreme Court of Canada in *Highway Properties* that a lease of land is a contract and that breach of the contract gives rise to a remedy in damages, there is no rational reason why a landlord, on the bankruptcy of a tenant and disclaimer of the lease, should (alone among all the bankrupt’s creditors) be deprived of the right to file an unsecured claim in the bankruptcy estate for damages.

Cummer-Yonge Investments Ltd. v. Fagot

46. In *Cummer-Yonge Investments Ltd. v. Fagot*, 1965 CanLII 295 (ON SC), [1965] 2 O.R. 152, aff’d [1965] 2 O.R. 157n, Gale C.J.H.C., relying on *Stacey v. Hill*, [1901] 1 K.B. 660 and *Re Mussens Ltd., Petrie Ltd.'s Claim*, [1933] O.W.N. 459, 14 C.B.R. 479, 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 rights came to an end.

47. 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 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.

48. It is submitted that this result should not have flowed from *Cummer-Yonge*, given the provisions of the BIA as previously discussed. Nevertheless, *Cummer-Yonge* (adopting and applying *Mussens*) was held for decades to be the law in Ontario as to the legal effect of a disclaimer, until it was finally laid to rest by the

Supreme Court of Canada in *Crystalline Investments Ltd. v. Domgroup Ltd*., [2004] 1 SCR 60, 2004 SCC 3 (CanLII).

49. 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.
>
> 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.

50. *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*"

51. 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*., 2014 ONSC 7221 (CanLII), 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)

52. As a result, 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*

53. In *R. v. Henry*, 2005 SCC 76 (CanLII), [2005] 3 S.C.R. 609, [2005] S.C.J. No. 76, 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.[24]

54. Although *Crystalline*, as was the case with *Cummer-Yonge*, dealt with the liability of third parties to damages, the *Cummer-Yonge* principle (i.e. the legal fiction that a disclaimer amounts to a consensual surrender of a lease) was the basis upon which subsequent cases held that a landlord whose lease had been disclaimed could not file a claim for damages for the unexpired term.[25]

55. Moreover, as in the case of *Highway Properties*, the Supreme Court of Canada in *Crystalline* explicitly recognized the obvious, that the disclaimer of a lease gives rise to a claim by a landlord for damages. With the overruling of the principle in *Cummer-Yonge*, there is no reason why a landlord cannot claim these damages as an unsecured creditor in bankruptcy.

Re Linens 'N Things Canada Corp.

56. The Trustee does not expressly rely on either *Cummer-Yonge* or the cases that followed and applied *Cummer-Yonge* in its factum.

---

[24] As quoted in *R. v. Prokofiew*, 2010 ONCA 423 (CanLII)

[25] See, for example, *Re Vrablik* (1993), 17 C.B.R. (3d) 152 (Ont. Bktcy.)

57. However, the Trustee relies on excerpts from *Houlden and Morawetz* which cite *Cummer-Yonge* and the decision of Registrar Nettie in *Linens 'N Things Canada Corp*. (Re), 2009 CanLII 25311 (ON SC) to resurrect the *Cummer-Yonge* principle, notwithstanding that *Cummer-Yonge* has been overruled by the Supreme Court of Canada.

58. It is submitted that 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,* which followed *Cummer-Yonge*.

59. The decision of Registrar Nettie in *Linens 'N Things* is problematic. In finding against the landlord in that case, Registrar Nettie relied heavily on *Mussens,* finding that the legal effect of a disclaimer or surrender of a lease is that it is considered to be surrendered on consent. This is the exact case which Gale C.J.H.C. relied upon in *Cummer-Yonge* to make exactly the same finding, which has now been overruled.

60. It is most peculiar and unfortunate that Registrar Nettie did not refer in *Linens 'N Things* either to *Cummer-Yonge* or *Crystalline* or, most significantly, to the fate of *Cummer-Yonge* in *Crystalline*. The only conclusion to be drawn is that for some reason, these authorities were not brought to Registrar Nettie's attention.

61. Decisions of a registrar in bankruptcy are not binding on a judge. Registrar Nettie's decision in *Linens 'N Things* is not binding on this court and does not

represent the law in Ontario post-*Crystalline*. Rather, landlords, like any other creditors, have the right to claim for damages suffered on breach of a lease.

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

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

63. The CCAA was originally skeletal legislation. However, significant amendments came into force in 2008 and 2009 to codify practices which had arisen in CCAA proceedings and to harmonize the CCAA with the BIA. These amendments included the explicit right to disclaim contracts (including leases).

64. 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.

65. This is a specific statutory acknowledgement that disclaimer of a lease gives rise to damages.

66. It is entirely anomalous to resurrect the discredited notion that the disclaimer of a lease by a trustee in bankruptcy amounts to a consensual surrender, thus depriving a landlord of any right to claim damages, while a disclaimer by a debtor company under a CCAA restructuring provides full damage rights.

67. Reading in such a restriction, where none exists in either the CTA or the BIA (and indeed where any 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*.

The Provisions of the Lease

68. In the present case, and in any event, the Landlord is not seeking to claim rent for the unexpired term, as the Landlord has mitigated its damages for lost rent. The Landlord is simply seeking contractual damages that are expressly recoverable under the Lease in the event of a bankruptcy and disclaimer of the Lease.

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

of a landlord and tenant to address such matters in a lease was recognized by the Supreme Court of Canada in the following passage in *Highway Properties*, as previously quoted:

> Even if this [the consequences of a surrender] 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.

70. It is a modern-day reality that landlords will be required to provide inducements to tenants, including by way of free rent and funding tenant improvements, on the expectation of recovering the inducements through future rental income. It is entirely appropriate that such amounts should be repayable if the lease is terminated prematurely, whether by bankruptcy or otherwise.

71. In the present case, the Lease specifically sets out the damages which the Landlord is entitled to recover in the event of Curriculum's bankruptcy and the disclaimer of the Lease. The Landlord, having mitigated its damages by re-letting the Leased Premises, has calculated its damages exactly in accordance with its contractual rights under the Lease. This is not challenged.

72. There is no principle under which landlords, as contracting parties, should be treated differently than other creditors. Indeed, in this case, the Landlord was the largest creditor in the estate. Depriving the Landlord of the right to file a proof of claim for damages would result in a windfall to the other creditors, and potentially even to the Tenant's shareholders, if there are surplus funds.

73. There is no legal basis for denying the Landlord's right to claim the damages that it expressly bargained for in the Lease.

PART IV - ORDER REQUESTED

74. It is requested 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.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of January, 2019

Catherine Francis

Catherine Francis

MINDEN GROSS LLP
Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Catherine Francis (LSUC# 26900N)
cfrancis@mindengross.com
Tel: 416-369-4137
Fax: 416-864-9223

Lawyers for the Landlord

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

Estate No. 31-2360759

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

Proceeding commenced at Toronto

FACTUM OF THE MOVING PARTY (APPELLANT)

MINDEN GROSS LLP
Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Catherine Francis (LSO# 26900N)
cfrancis@mindengross.com

Tel: 416-369-4137
Fax: 416-864-9223

Lawyers for Medallion Corporation as authorized agents for 280 Richmond Street West Limited