When Things Go Bad – Practical Remedies for Landlords and Tenants in Dealing with Bankruptcy, Insolvency, Trustees and Receivers: The Choices Available to an Insolvent Tenant

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I. Introduction

The insolvency of a commercial tenant can be differentiated from other insolvencies in three important ways. First, in any type of insolvency proceeding involving a commercial tenant, a landlord will be one of the principal stakeholders and creditors and, as such, will have considerable input in dictating how the insolvency proceedings will progress. Second, because a commercial tenant's business is contractually governed by its lease(s), the major issue facing an insolvent tenant will be the tenant's obligation and ability to abide by the terms and conditions of its lease(s). Third, the sale of an insolvent tenant's assets as a going concern will often times be complicated by the need to obtain the consent of the landlord to the assignment of the tenant's lease(s).[1]

When a commercial tenant is facing a financial crisis, the statutory vehicles that are available to the tenant in the form of formal insolvency proceedings are only one of a multitude of factors that the tenant must consider. While there is no comprehensive list, the following issues will, no doubt, be relevant to any commercial tenant:

- the amount of cash and other liquid assets that are available or will become available to fund a restructuring process;
- the cost of funding a restructuring process and, if the tenant wants to stay in business, the quantum of short-term liabilities that the tenant must incur to keep the lights on and continue operating in the ordinary course of business;
- the retention of the appropriate financial and legal professionals and other consultants;

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[1] David Bish, "Who's in the Driver's Seat? A Landlord Perspective on a Retail Tenant's Insolvency Proceeding" (2008) Carswell On-line Newsletter.

- the existence of personal covenants, if any, that may have been given by the tenant's principal(s);
- the nature of the tenant's relationship with the landlord and the landlord's level of sophistication and experience in dealing with defaults by tenants;
- the default rate that the landlord is currently experiencing with other tenants; and
- the overall economic climate and the extent to which the landlord is willing to cooperate with a restructuring process.

This paper will outline the principal options available to an insolvent commercial tenant and discuss the tenant's rights and obligations in each case. The discussion has been organized into three broad subject areas: (1) bankruptcy proceedings under the *Bankruptcy and Insolvency Act*[2] (the "*BIA*"); (2) restructuring proceedings under the *BIA*; and (3) restructuring proceedings under the *Companies' Creditors Arrangement Act*[3] (the "*CCAA*"). It should be noted that in certain circumstances, especially in cases involving smaller commercial tenants, it is not uncommon for informal negotiations to take place between a landlord and tenant for a restructuring outside the context of formal insolvency proceedings under the *BIA* or the *CCAA*.

II. Bankruptcy Proceedings under the *Bankruptcy and Insolvency Act*

Although the words "bankruptcy" and "insolvency" are synonymous to non-lawyers, they have different meanings in law. Insolvency is a financial condition, whereas bankruptcy is a legal status. Insolvency, as defined in the *BIA*, is the condition that is used to characterize a debtor that is unable to meet its obligations as they generally become due, that has ceased paying its current obligations in the ordinary course of business as they generally become due, or whose property, following an orderly liquidation process, would not be sufficient to enable payment of all its obligations, due and accruing due. Bankruptcy, on the other hand, is the legal status of an insolvent debtor that has become a "bankrupt" pursuant to a formal proceeding under the *BIA*. A bankrupt person is always insolvent, but an insolvent person does not necessarily have to be bankrupt.

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[2] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").
[3] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

The bankruptcy of a commercial tenant is rarely a matter of first resort. Rather, it is usually the option of last resort. It does, however, commonly occur after the assets of the tenant have been conveyed to a purchaser through a restructuring proceeding, either under the *BIA* or the *CCAA*, to formally "put the carcass to rest." Depending on the circumstances, bankruptcy proceedings can be a strategic and advantageous option to an insolvent tenant for at least two reasons. First, the *BIA* contains express provisions regarding the rights of tenants and landlords. There is a considerable body of statutory law, which has been further discussed and interpreted by the courts, that has the effect of making the outcome of bankruptcy proceedings relatively predictable to such participants. Second, some obligations that might have otherwise enjoyed a priority at law will enjoy a different, and oftentimes lower, priority in a bankruptcy situation.

A. Making an Assignment in Bankruptcy

A commercial tenant may initiate bankruptcy proceedings by making a voluntary assignment for the general benefit of its creditors. The tenant's liabilities to its creditors must amount to $1,000 and the tenant must satisfy one of the following requirements: (1) it is unable to meet its obligations as they generally become due; (2) it has ceased paying its current obligations in the ordinary course of business as they generally become due; or (3) the aggregate of its property is not, at a fair valuation, sufficient or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due.[4]

B. Administration of a Bankrupt Estate

Upon bankruptcy, the tenant's property passes to and vests in the trustee named in the assignment, subject to the rights of its secured creditors. The trustee's role is to dispose of the tenant's unencumbered property and to distribute the proceeds among its creditors in accordance with the *BIA*. One of the first duties of a trustee is to prepare a list of the names and addresses of the creditors of the bankrupt and to send the prescribed form of notice to every creditor within five days after the date of the trustee's appointment.[5] In some cases, the notice will be the landlord's first notification of the tenant's bankruptcy. However, in most cases where the trustee

[4] *BIA*, s. 49.
[5] *BIA*, s. 102.

occupies the premises leased by the bankrupt, the trustee will notify the landlord almost immediately upon the occurrence of the bankruptcy.

Often times a bankruptcy will operate contemporaneously with a receivership proceeding and, therefore, a tenant and the trustee will have to deal with a receiver who has been appointed, either privately or by the court, to protect and safeguard the rights of a secured creditor. However, because the appointment of a receiver is not really an option from the tenant's perspective, receivership proceedings will not be examined in the context of this paper.

C. Stay of Proceedings

A stay of proceedings by creditors is automatically invoked upon bankruptcy.[6] A landlord may not commence an action against a tenant for rent and may not continue an existing one. A landlord's right to sue, or to continue an action, is "replaced" by the right to file a proof of claim. However, tenants should be aware that under section 69.4 of the BIA, a landlord may attempt to obtain relief from the stay of proceedings by satisfying the court that the continued operation of the stay is likely to materially prejudice the landlord, or that there are other equitable grounds on which to provide the landlord with relief from the stay. It is unlikely that a landlord would be successful in lifting the stay, in order to commence or continue an action for rent arrears.

D. The Right of Distress

The making of an assignment in bankruptcy by a tenant brings to an end the right of a landlord to distrain against the tenant's goods to recover arrears of rent (and, where the lease so provides, accelerated rent). If a landlord has not yet commenced the exercise of the remedy of distress when an assignment is made, it is too late to do so by reason of the stay of proceedings under section 69.3 of the *BIA*. Even if a landlord has commenced distress proceedings by seizing the tenant's goods (or by causing an agent, such as a bailiff, to seize them), but has not completed the process by actually selling the assets, upon the making of an assignment, the landlord or bailiff must turn the goods over to the trustee in bankruptcy.[7]

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[6] *BIA*, s. 69.3.
[7] *BIA*, s. 73(4).

However, where distress proceedings have been completed by the sale of the tenant's goods and the proceeds have been paid to the landlord or its agent, the landlord is entitled to keep the amount of the payment (to the extent of the amount of rent in arrears) and that amount does not form part of the bankrupt estate.[8] Tenants should be aware that subsection 73(4) of the *BIA* applies only to property of the bankrupt. Under section 31 of the *Commercial Tenancies Act*[9] (the "*CTA*"), there is a limited right to distrain against the goods of a third party on the leased premises (a subtenant, an assignee of the tenant and any person in actual possession of the premises under or with the consent of the tenant). This right is not taken away by subsection 73(4) of the *BIA*.

E. The Right of Forfeiture or Re-Entry

The landlord's right to re-enter and either terminate the lease or re-let the premises on the tenant's account for default or breach by the tenant ceases upon the bankruptcy of the tenant. This result follows from section 38 of the *CTA*, which applies in cases of a tenant bankruptcy in Ontario because of section 146 of the *BIA*. (The latter section states that, subject to two exceptions, the law of the province in which the leased premises are located applies to determine the rights of a landlord in bankruptcy.)

If the landlord has terminated the lease before bankruptcy, then the trustee has no right to occupy the leased premises or to retain or assign the lease. In the case of bankruptcy by assignment, a landlord may validly terminate a lease at any time before the assignment is filed with the official receiver. However, once bankruptcy occurs, it is too late for the landlord to terminate the lease, and the landlord is subject to the exercise of the trustee's rights as outlined below. It should be noted that judicial relief from forfeiture is generally available to a tenant upon application to court and the tenant bringing the lease into good standing, which, if successful, would put the trustee back in control of the premises.[10]

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[8] *BIA*, s. 70(1).
[9] *Commercial Tenancies Act*, R.S.O. 1990, c. L.7 (the "*CTA*").
[10] *CTA*, s. 20.

F. Trustee's Right of Occupation

If the lease is still in existence and has not previously been terminated, and has more than three months to run, upon bankruptcy, the trustee has the right to occupy the premises for up to three months after the date of the assignment. The trustee's right of occupation exists "despite any provision, stipulation or agreement in any lease or agreement or the legal effect thereof …"[11] A landlord cannot have a tenant "contract out" of this right. The trustee must pay occupation rent for the period of the trustee's occupation of the premises. The occupation rent is based on the rent payable under the lease, calculated on a per diem basis for the period of occupation.

G. Trustee's Right to Disclaim, Retain or Assign Lease

Under subsection 38(2) of the *CTA*, the trustee has the option, which must be exercised in the three-month period after bankruptcy, to: (1) disclaim the lease; (2) retain the premises for the whole or any portion of the unexpired term; or (3) assign the lease.

First, the trustee may disclaim the lease by delivering a written notice to the landlord, setting out the effective date and time of the disclaimer. The trustee does not require the landlord's consent to, or acceptance of the disclaimer. Second, the trustee may retain the lease by delivering a written notice to the landlord, setting out whether the retention is for the whole or a portion of the unexpired term. The trustee does not have to pay arrears of rent, but becomes personally liable for the payment of rent and the observance or performance of the lease covenants for the period of the retained term. For this reason, retention of a lease by a trustee is rare. Third, the trustee may assign the lease, subject to the terms and conditions of subsection 38(2) of the *CTA*. The right of a trustee to assign a lease, provided that the trustee follows the provisions of the *CTA*, takes precedence over any clause in the lease prohibiting assignment without the landlord's consent.

One important condition of the exercise of the right of assignment is the payment of all arrears of rent. As well, the proposed assignee must be a "person fit and proper to be put in possession of the leased premises" and must covenant to observe and perform all the lease terms and to conduct upon the leased premises "a trade or business which is not reasonably of a more

[11] *CTA*, s. 38(2).

objectionable or hazardous nature" than that which the bankrupt conducted on the premises. Subsection 38(2) of the *CTA* also contemplates that court approval will be obtained. In practice, however, the trustee, assignee and landlord will normally execute an assignment agreement on consent without incurring the cost of a court proceeding. A court motion would only be brought where the landlord is unreasonably withholding its consent and there will be sufficient recovery for the estate to warrant the cost of a court proceeding.

H. The Terms of the Lease

If a trustee elects to retain the leased premises without making an assignment of the lease, the trustee is bound by all the terms of the lease and the trustee has no ability to selectively exclude those provisions that the trustee finds inconvenient or objectionable.[12] On the other hand, if the trustee disclaims or assigns the lease, its obligations thereunder come to an end.

III. Restructuring Proceedings under the *Bankruptcy and Insolvency Act*

There are two principal statutory regimes in Canada by which an insolvent commercial tenant may attempt to reach a settlement with its creditors, in order to avoid bankruptcy and remain in business. They are: (1) a proposal under Division I of Part III of the *BIA*; and (2) a compromise or arrangement under the *CCAA*.

Part III of the *BIA* sets out a statutory procedure whereby insolvent individuals, corporations, partnerships and other entities may make a form of contract with their creditors, called a "proposal." A proposal is a written document that sets out the terms of the new agreement between the debtor and its creditors. A proposal will typically provide that the creditors will agree to: (1) accept a lesser sum than is owing to them in full satisfaction of their claims; and/or (2) extend the time for payment.

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[12] *Micro Cooking Centres (Canada) Inc. (Trustee of) v. Cambridge Leaseholds Ltd*. (1988), 68 C.B.R. (N.S.) 60 (Ont. H.C.); *Re T. Eaton Co*. (1999), 12 C.B.R. (4th) 130 (Ont. S.C.J.); *Sunys Petroleum Inc./Les Petroles Sunys Inc. (Trustee of) v. 653129 Ontario Ltd*. (1999), 12 C.B.R. (4th) 27 (Ont. S.C.J.); Richter *& Partners Inc. v. Westwood Mall (Mississauga) Ltd*. (2001), 33 C.B.R. (4th) 292 (Ont. S.C.J.).

A. Making a Proposal

Under the *BIA*, a debtor may initiate the restructuring process by filing with the official receiver either: (1) a proposal; or (2) a notice of intention to make a proposal. Upon the filing of a notice of intention, a debtor has thirty days to file a proposal, or it may apply to the court for an extension of this thirty day period.[13] A insolvent commercial tenant obtains three significant benefits upon the filing of a proposal or a notice of intention to make a proposal: (1) a stay of proceedings by creditors, including secured creditors (with certain exceptions) and the federal and provincial governments;[14] (2) a prohibition of enforcement of "insolvency" clauses in agreements under which the other party might terminate or amend the agreement or accelerate payment of indebtedness on the basis of insolvency or the filing itself;[15] and (3) subject to certain conditions, a right to disclaim its commercial leases.[16]

A proposal must be made to all unsecured creditors, either as a mass or separated into classes as provided in the proposal, and may also be made to secured creditors.[17] A proposal must be accepted by the unsecured creditors at a meeting called for that purpose and it must be approved by the court. Refusal at either stage results in automatic bankruptcy. For creditor acceptance, all classes of unsecured creditors must accept the proposal by a majority in number and two-thirds in value of the unsecured creditors of each class present at the meeting and voting on the proposal or voting by proxy.[18] If so accepted, the debtor then applies to the court for approval of the proposal. To approve the proposal, the court must be satisfied that the terms of the proposal are reasonable and calculated to benefit the general body of creditors. Once accepted by the creditors and approved by the court, the proposal is binding on all unsecured creditors (and on any secured creditors that have accepted the proposal).

B. Stay of Proceedings

Upon the filing of a notice of intention by an insolvent tenant, the landlord is stayed under subsection 69(1) of the *BIA* from commencing or continuing a court action or distress

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[13] *BIA*, s. 50.4.
[14] *BIA*, ss. 69(1) and 69.1(1).
[15] *BIA*, ss. 65.1(1) and (2).
[16] *BIA*, s. 65.2(1).
[17] *BIA*, s. 50(1.2).
[18] *BIA*, s. 54.

proceedings until the filing of a proposal. If a proposal is subsequently filed, the stay will continue to be in effect until the proposal has been fully performed or the tenant has been deemed to make an assignment in bankruptcy by virtue of the rejection of the proposal by the creditors or the court. If an insolvent tenant does not file a notice of intention, but simply goes straight to filing a proposal, a stay will be in effect until the proposal has been fully performed or the tenant becomes bankrupt. As noted above, tenants should be aware that under section 69.4 of the *BIA*, a landlord may attempt to obtain relief from the stay of proceedings by satisfying the court that the continued operation of the stay is likely to materially prejudice the landlord, or that there are other equitable grounds on which to provide the landlord with relief from the stay.

Additionally, under subsection 50.4(11) of the *BIA*, where a tenant has filed a notice of intention, a landlord may seek a declaration terminating, before its actual expiration, the thirty day period for filing a proposal (or any extension of it previously granted by the court). To make the declaration, the court must be satisfied that: (1) the tenant has not acted, or is not acting, in good faith and with due diligence; (2) the tenant will not likely be able to make a viable proposal before the expiration of the period in question; (3) the tenant will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors; or (4) the creditors as a whole would be materially prejudiced by the court's refusal to make the declaration.

C. Prohibition Against Termination of Leases

Pursuant to subsections 65.1(1) and (2) of the *BIA*, where an insolvent tenant has filed a notice of intention or a proposal, the landlord may not terminate the lease or claim an accelerated payment under the lease by reason only that: (1) the tenant is insolvent; (2) the tenant has filed the notice of intention or proposal; or (3) the tenant owes rent for a period preceding the filing of the notice of intention or proposal.

It is doubtful that the court has any jurisdiction to extend the prohibition against termination to any grounds beyond those specifically outlined in section 65.1 of the *BIA* and, therefore, if there are any other grounds for termination or acceleration of payment included in the lease, the landlord may successfully exercise its right to do so pursuant to the terms of the lease. Furthermore, tenants should be aware that if the landlord can demonstrate that the

continued operation of the prohibition would likely cause the landlord "significant financial hardship" the court may lift the prohibition pursuant to subsection 65.1(6).

D. Disclaimer of Leases

Under section 65.2 of the *BIA*, after the filing of a notice of intention or a proposal, a tenant may disclaim a commercial lease on giving thirty days notice to the landlord. The landlord may, within fifteen days after being given the notice, seek a declaration from the court that the tenant may not disclaim the lease. Upon such an application by the landlord, the onus shifts to the tenant to demonstrate that the proposal would not be viable without the disclaimer of the lease. Where a lease is disclaimed, the landlord's claims with respect to losses resulting from the disclaimer are set out in the tenant's proposal and governed by the provisions of the *BIA*.

E. The Terms of the Lease

There is no statutory or common law authority for the proposition that a tenant in proposal proceedings is relieved of the obligation to comply with the terms and conditions of its lease, unless the lease is disclaimed as described above. Although a landlord is stayed from exercising its rights under a lease, the tenant must continue to abide by the terms of the lease going forward. However, the tenant is not required to cure existing defaults or pay arrears outstanding at the time of the commencement of proposal proceedings.

Given that a tenant in proposal proceedings has a clear obligation to abide by the terms and conditions of its lease, the obligation to pay post-filing rent is clear. Case law has made it clear that the obligation to pay rent once a proposal proceeding is commenced is a per diem obligation for the period after the date of the commencement of proceedings to the next payment date under the lease. Afterwards, payments will be made as they fall due under the lease.[19]

F. Result of Proposal

If a proposal is successful, and the tenant has not disclaimed the lease, the tenant will continue as tenant in occupation at the leased premises. If, on the other hand, a proposal is not successful because it has not been approved by all classes of unsecured creditors or by the court,

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[19] *Re Cosgrove-Moore Bindery Services Ltd*. (2000), 17 C.B.R. (4th) 205 (Ont. S.C.J.).

there is a deemed assignment of bankruptcy by the tenant. Likewise, if the proposal initially succeeds, but the tenant subsequently defaults in performing the terms of the proposal or it appears to the court that the proposal cannot continue without injustice or without delay, the court may annul the proposal in which case the tenant will be deemed to have thereupon made an assignment in bankruptcy.

IV. Restructuring Proceedings under the *Companies' Creditors Arrangement Act*

Where the total amount of claims against an insolvent corporation and its affiliated corporations exceeds five million dollars, the corporation may seek the court's assistance in making an arrangement with its creditors under the *CCAA*. Unlike the *BIA*, the *CCAA* does not provide any specific statutory guidance on landlord and tenant issues. Therefore, all landlord and tenant issues in *CCAA* proceedings are determined principally by reference to court orders issued pursuant to the *CCAA*, the common law on point and the practice developed under the *BIA* and the relevant provincial legislation, such as the *CTA*. While the absence of statutory guidance leads to uncertainty, proceedings under the *CCAA* can be advantageous to an insolvent commercial tenant because of their inherent flexible nature.

Under the *CCAA*, the debtor applies to the court under subsection 11(3) of the *CCAA*, generally on notice to the significant creditors and interested parties, for an initial order. It is not uncommon for the debtor and its significant creditors to cooperate in drafting the terms of the initial order. There are two types of initial orders: a short form and a long form. The principal difference between the two orders is that the long form grants the debtor certain restructuring powers not found in the short form. Model orders of both forms have been developed for and are commonly used in the Commercial List of the Ontario Superior Court of Justice. Applicants for an initial order are free to alter the model order, but must provide blacklined versions of the order sought and justify to the court any alterations to the model order.

Both forms of initial order generally grant the following relief: (1) a declaration that the debtor is a company to which the *CCAA* applies; (2) a stay of proceedings by creditors (secured and unsecured), and also by the federal and provincial/territorial governments, for up to thirty days; (3) a prohibition against termination of contracts with the debtor by other parties to those contracts; (4) authorization to the debtor to file with the court a plan of compromise or

arrangement between the debtor and its unsecured creditors and, if desired, its secured creditors; (5) the appointment of a monitor to assist the debtor with its plan; (6) authorization to indemnify its directors and officers against statutory liabilities that they may incur by reason of their position as such and to grant them a charge on the debtor's property to secure the indemnity; and (7) authorization to borrow funds, up to a stated limit, from a specified lender (called a "debtor-in-possession" or "DIP" lender) for working capital requirements and other general corporate purposes and capital expenditures, and to secure those borrowing by granting a first-ranking (or other priority) charge to the DIP lender on the debtor's property.

A. Effect of Initial Orders on Landlords and Tenants

As indicated above, pursuant to an initial order granted under the *CCAA*, a landlord will normally be subject to a stay of proceedings and a prohibition against terminating a lease. For tenants, as with proceedings for proposals under the *BIA*, proceedings under the *CCAA* require the payment of post-filing rent. Specifically, pursuant to section 11.3 of the *CCAA*, no initial order or subsequent order extending the effect of the initial order can have the effect of prohibiting a person from requiring immediate payment for the use of leased property.

Recently, significant developments have occurred in regards to the manner in which landlord and tenant issues play out in insolvency proceedings. The *CCAA* proceedings in *Re Bombay Furniture Company of Canada Inc.* ("*Bombay*") developed the new standard from which subsequent large-scale commercial retail insolvencies have followed. *Bombay* is noteworthy because it marked the first time that the court considered the model *CCAA* orders in the context of a major retail insolvency filing.

The Initial Order in *Bombay* was obtained without notice to landlords and was modeled on the short-form model CCAA order. As such, the Order did not contain any restructuring provisions or provisions addressing the various landlord and tenant issues addressed in the long-form model order. This Order was initially granted on September 20, 2007, but was amended and restated on September 27, 2007 to include provisions with respect to the granting of DIP financing. However, of more significance was the Sale Procedures Approval Order, which was granted on October 5, 2007 and contained provisions dealing with landlord and tenant issues together with the approval of a sale process for the sale of the debtor's assets and the approval of

an agency agreement pursuant to which a liquidation of the debtor's inventory was to occur. This Order was significant for the following reasons: (1) it modified the restructuring provisions in the long-form model CCAA order relating to landlord and tenant issues, including the deletion of paragraph 14 which states that no proceeding or enforcement process shall be commenced against the debtor or affecting its business or property except with written consent of the debtor and the monitor or with leave of the court; (2) it set out a model for the approval of agency agreements and the conduct of liquidations in leased retail premises, as discussed above; (3) it reflected a fundamental respect for the terms of the debtor's leases; (4) it provided certainty, transparency and fairness with respect to the taking of steps that affect landlords (such as repudiation of a lease, the removal of fixtures, etc); (5) it refrained from granting or purporting to grant to the agent greater rights than the debtor itself has vis-à-vis landlords and leased real property; and (6) it refused to extend the Court-ordered charges to leases, limiting such charges to the proceeds of such leases only.[20]

The *Bombay* model of dealing with landlord and tenant issues in large-scale commercial retail insolvencies has been adopted in a number of subsequent cases. For instance, in the *CCAA* proceedings in *Athletes World Limited*, the debtor, upon an *ex parte* application for an Initial Order, was advised by the Court to revise the landlord and tenant related provisions in the draft Order so as to make them consistent with *Bombay*. Similarly, the *Bombay* model was adopted in the granting of Initial Orders in the recent insolvency proceedings involving *Music World Limited, SMK Speedy International Inc., Saan Stores Ltd.,* the *Cotton Ginny* group of companies, and *Hoop Canada Holdings, Inc.*

The following restructuring powers regarding realty leases were granted in the Initial Order in *Bombay*, and subsequently followed in the above mentioned cases:

- The applicant may vacate, abandon or quit the whole **but not part** of any leased premises and/or repudiate any real property lease and any ancillary agreements relating to any leased premise, on not less than seven days notice in writing to the relevant landlord, and pay any rent owing for the whole of the notice period to the relevant landlord or property

[20] *Supra* note 1 at pg. 21.

manager on such terms as may be agreed upon between the applicant and such landlord, or failing such agreement, to deal with the consequences thereof in any plan;

- The applicant may repudiate such of its arrangements or agreements of any nature whatsoever, subject to certain limited exceptions, whether oral or written, as the applicant deems appropriate on such terms as may be agreed upon between the applicant and such counterparties, or failing such agreement to deal with the consequences thereof in the plan;

- The applicant may remove fixtures, but must give the landlord(s) at least seven days prior notice of its intention to do so, and the landlord may observe the removal and object thereto. If the landlord objects, the fixtures will remain on the premises and be dealt with as the relevant secured creditors, the landlord and the debtor may agree, or as may be ordered by the court. If the debtor repudiates the lease in question, the debtor will not be required to pay rent pending resolution of the dispute, and the repudiation of the lease shall be without prejudice to the debtor's claim to the fixtures in dispute;

- If the applicant repudiates its lease during the notice period prior to the effective time of the repudiation, the landlord may show the affected leased premises to prospective tenants during the normal business hours on giving the debtor and the monitor 24 hours prior written notice. At the effective time of the repudiation, the landlord may take possession of any such leased premises without prejudice to its claims or rights against the applicant, and the landlord shall be entitled to notify the debtor of the basis on which it is taking possession and is entitled to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith; and

- The applicant may dispose of any or all property located (or formerly located) on such leased premises without any interference by the landlord, and the debtor shall have the right to realize upon the property and other assets in such manner and at such locations, including the leased premises, as it deems suitable or desirable for the purpose of maximizing the sale proceeds.

The importance of *Bombay* and the string of decisions that have followed in its wake lies in the emergence of a predictable, consistent and widely accepted standard for initial CCAA orders relating to retail insolvencies. In approving this model approach, the Court has attempted to balance the interests of tenants and landlords in the restructuring process. Such a balancing act requires both the requisite degree of flexibility, as permitted under the *CCAA*, as well as recognizing the sanctity of contract when considering the rewriting of lease obligations. The question has, however, been asked: has the pendulum swung too far in favour of the landlord in this process?

V. Legislative Reforms

Pursuant to an Order in Council dated July 4, 2008, certain provisions of S.C. 2005, c. 47 (the "Insolvency Reform Act, 2005") and S.C. 2007, c. 36 (the "Insolvency Reform Act, 2007") came into force. As a result of these provisions, the *Wage Earner Protection Program Act*, as well as certain amendments to the *BIA* and the *CCAA*, are now in force, effective as of July 7, 2008. While the balance of the amendments to the *BIA* and the *CCAA* contained in the Insolvency Reform Act, 2005 and the Insolvency Reform Act, 2007 are not yet in force, it is expected that they will be proclaimed in force sometime this year. One of the most significant potential changes is found in what would be section 11.3 of the *CCAA* which, assuming the provision comes into force unamended, provides as follows:

> 11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.
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> (2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under
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> > (a) an agreement entered into on or after the day on which proceedings commence under this Act;
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> > (b) an eligible financial contract; or
> >
> > (c) a collective agreement.
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> (3) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

(5) The applicant is to send a copy of the order to every party to the agreement.

A similar change is found in what would be section 84.1 of the *BIA* which, assuming the provision comes into force unamended, provides as follows:

84.1 (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only rights and obligations in relation to the business may be assigned.

(3) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the date of the bankruptcy;

(b) an eligible financial contract; or

(c) a collective agreement.

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

(a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and

> (b) whether it is appropriate to assign the rights and obligations to that person.
>
> (5) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the person's bankruptcy, insolvency or failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.
>
> (6) The applicant is to send a copy of the order to every party to the agreement.

It remains to be seen whether an insolvent tenant can rely on these proposed provisions to compel the assignment of a lease over the objection of a landlord. If so, it seems that the forced assignment would be subject to the "fit and proper person" test, described above, for a trustee seeking to assign leases under the *CTA*.

VI. Conclusion

When a commercial tenant is facing a financial crisis, formal insolvency proceeding under the *BIA* or the *CCAA* can be a strategic, and sometimes necessary, means of dealing with a the tenant's obligations under its lease(s). However, a tenant's rights and obligations will vary greatly depending on the type of proceeding that is commenced and, not surprisingly, some proceedings are not suitable in certain situations. Therefore, a tenant must examine the situation carefully and, with the help of knowledgeable professionals, choose the path that best fits the financial and legal realities that it's facing.