USE OF INSOLVENCY PROCEEDINGS IN TERMINATING COMMERCIAL RELATIONSHIPS

INTRODUCTION

One of the common features facing companies in financial crisis on the eve of insolvency relates to contracts or agreements they have entered into that have turned out to be far less profitable/advantageous to them than anticipated and in fact are causing them to lose money. These agreements cover the gamut from supplier contracts, commercial lease agreements or even employment agreements. Month after month, year after year, these agreements eat away at the business, eroding the ability of a business to carry on. What if the company in financial difficulty was given the opportunity to assign such agreements to a third party, possibly for a profit, or to cancel the agreements entirely without penalty? Would such a shift in the companies' contractual obligations turn the tide, make the company profitable again and keep it in business? This is exactly what is afforded to companies that qualify for protection under Canada's two main insolvency/reorganization statutes, the *Bankruptcy & Insolvency Act* (the "*BIA*") and the *Companies Creditors' Arrangement Act (*the "*CCAA*"), in conjunction with British Columbia's *Commercial Tenancy Act* (the "*CTA*").

The ability of a debtor company to restructure/reorganize its affairs balances the ability of the debtor company to assign/terminate certain contractual obligations with the rights of the companies and/or individuals whose rights/contractual agreements are being assigned/terminated. It is a delicate balance indeed, but the prevailing legislative wisdom is that if a company can be saved through a reorganization of its affairs rather than simply going bankrupt, this creates a benefit to the "greater good" of all parties, including the company, its employees, and those doing business with the company which outweighs the rights of the individual parties whose contractual rights are being displaced.

Having a basic understanding of the insolvency process and how it permits companies to restructure/reorganize will assist you in giving advice to a client, whether they are the debtor who would benefit from invoking the protection of the *BIA* or the *CCAA* or they are a party whose contractual rights or employment might be impacted by way of assignment or termination.

THE BANKRUPTCY & INSOLVENCY ACT (THE "BIA")

The *BIA* has specific provisions that allow debtors to terminate agreements that are impacting on the viability of their business.

TRUSTEE'S RIGHT TO DISCLAIM OR RESILIATE CONTRACTS

Part III of the *BIA* which deals with proposals, allows a debtor to make a proposal to its creditors that generally would include terms for repayment of amounts owed to its unsecured creditors over time and at a compromised amount (i.e. 30 to 50 cents of the dollar paid over 3 years). The terms can also provide for the cancellation of unfavorable supplier contracts and/or lease agreements.

Section 65.11 (1) of the BIA provides that a debtor may disclaim or resiliate an agreement. Notice of the disclaimer or resiliation must be provided to the other parties in the prescribed form and must be approved by the Trustee.

The other party (s) to the agreement, upon being given notice from the debtor, have 15 days to apply to Court for an order that the agreement is not to be disclaimed or resiliated. The Court would only grant this order if the other party successfully argued that the agreement was not rendering the company insolvent.

Given the competitive market place and constant technology advancements, debtors often find themselves in situation where they have entered into agreement for services that quickly become uncompetitive and result in the debtor not being able to successfully compete in the market place. Phone and internet service providers are good examples.

The provisions in section 65.11 (1) can only be used with respect to an agreement that is in relation to a business operated by an individual or a corporation.

DEBTOR'S RIGHT TO DISCLAIM OR RESILIATE COMMERCIAL LEASES

Another useful provision in Part III of the BIA is the right to disclaim or resiliate a commercial lease of real property or an immovable.

Under s. 65.2(1) of the *BIA*, at any time between the filing of a notice of intention and the filing of a proposal, or on the filing of a proposal, a tenant may disclaim a lease by giving thirty days' notice to the landlord in the prescribed manner.

Section 65.2(2) provides that within fifteen days after being given notice of the disclaimer, the landlord may apply to the court for a declaration that the disclaimer does not apply in respect of that lease. If the landlord does apply, then s. 65.2(3) provides that it is up to the tenant to show that the proposal will not be viable without the disclaimer of that lease and of any other leases that the debtor has disclaimed (*Re Superstar Group of Companies* (2001), 25 C.B.R. (4th) 119 (B.C.S.C.)).

Section 65.2(3) states that no declaration shall be made under subsection (2) if the court is satisfied that the tenant would not be able to make a viable proposal without the repudiation of that lease and all other leases that the tenant has repudiated under subsection (1). The onus of proof is on the tenant to show that the proposal would not be viable without the repudiation of the lease. The Court must assess the likelihood of success of the proposal. If the Court decides that the proposal has only a slim chance of success, even if the lease is repudiated, the landlord's application will generally succeed. The making of the lease payment must be the factor that makes the proposal unworkable (*Re Carr-Harris & Co* (1993), 23 C.B.R. (3d) 74 (B.C.S.C.)).

Where the lease is disclaimed by the tenant, s. 65.2(4)(b) provides that the landlord has no claim for accelerated rent but the landlord may file a proof of claim for its actual losses arising from the disclaimer or for an amount equal to a prescribed percentage of lost rent.

THE TRUSTEE'S RIGHT TO ASSIGN THE LEASE

The combined effect of s. 29(2), s. 29(3), and s. 29(4) of the *Commercial Tenancy Act* also gives a Trustee the right to elect to disclaim the lease or to assign it to a fit and proper person (*Campbell Saunders Ltd.* v. *Pontiac Holdings Ltd.* unreported March 1, 1991 (B.C.S.C.)).

Trustees in bankruptcy are generally wary of electing to affirm the lease as it may become a personal liability of the Trustee. However, if the lease space can be assigned to a third party as part of an effort to maximize recovery for the bankrupt tenant's estate, a Trustee may elect to affirm the lease.

In order for a Trustee assign the lease to a third party, the Trustee must elect to retain the remainder of the lease within three months of the date of the bankruptcy order or assignment. If the Trustee fails to make the election within this period, it loses the ability to make the assignment (*Davis, Daignault, Schick & Co.* v. *K & H Hldg. Ltd.* (1986), 3 B.C.L.R. 275 (B.C.C.A.).

Section 29(3) of the C.T.A. provides that if the lease contains a condition that the lease shall not be assigned without the leave or consent of the landlord, and the landlord refuses such consent, the Trustee may apply to Court for an order that such a condition is of no effect and that the Trustee's assignment of the lease to a third party be approved.

On an application for approval, reliance is placed on the judgment of the Trustee (*Re Sunnybrook Meat Markets (Yonge) Ltd*. (1973), 1 O.R. (2d) 537, 41 D.L.R. (3d) 46 (H.C.J.)). The approval may be given on terms (*Re FigurMagic International Ltd.* (1974), 19 C.B.R (N.S.) 92 (Ont. H.C.J.)). There are numerous factors that the court will consider in approving the assignment:

1) Whether the tenant will be responsible and respectable, both personally and financially. It is not enough for the Trustee to merely establish that there is no fraud and that the transaction is at arm's length (*Peat Marwick Ltd. v. Kingswood Holdings Ltd. and Woodbrook Holdings Ltd*. (1983), 46 B.C.L.R 267 (S.C.));

2) Whether the tenant will be both motivated and able to honor the covenants in the lease and whether it will make a fit and proper use of the premises. As a corollary, the landlord cannot require the assignee to be a more upscale tenant than the bankrupt (*Re Griff &*

Sommerset (supra); *Elks Inc. (Trustee of) v. Simpson Ltd.* (1991), 5 C.B.R. (3d) 230 (Ont. Gen. Div.));

3) The reputation of the proposed tenant, the creditworthiness of the tenant, and the benefit to the estate of the bankrupt;

4) The intention of the proposed tenant to occupy the premises (*Re Niki''s Palace Restaurant Ltd.* (1983), 48 C.B.R (N.S.) 236 (Ont. H.C.J.));

5) The provisions in the lease and the effect of a deviation from such provisions. For example, where the lease restricted the use of shopping centre premises to the sale of micro-wave ovens and strictly prohibited the sale of food, and the landlord had entered into restrictive covenants to this effect with other tenants, a proposed assignment to a food retailer was rejected by the court (*Micro Cooking Centres (Canada) Inc. (Trustee of) v. Cambridge Leaseholds Ltd*. (1988), 48 R.P.R. 32, 68 C.B.R. (N.S.) 60 (Ont. H.C.I.)). The courts' approach on this issue is varied (*Robinson, Little & Co. (Trustee of) v. Intra Land Corp.* (1987), 67 C.B.R (N.S.) 33, 56 Alta. L.R. (2d) 329 (C.A.) and *Re Robinson, Little & Co. (Trustees of) v. Marlowe Yeoman Ltd.* (1986), 5 B.C.L.R 67 (C.A.)).

TERMINATING, CANCELLING OR DEEMING VOID CERTAIN TRANSACTIONS/AGREEMENTS

The provisions of the *BIA* that deal with preferences and transfers at undervalue found in sections 95 and 96 give a Trustee the right to have a transaction deemed void or terminated if the transaction constitutes a preference or a transfer undervalue.

Section 95 of the *BIA* provides that any transaction that involves the transfer of property, provision for services or charge on property entered into by an insolvent person with a creditor dealing at arms-length within 3 months of a bankruptcy that has the effect of giving the creditor a preference over another creditor is void as against the Trustee. The period is extended to 12 months if the creditor is not dealing at arms-length.

Section 96 of the *BIA* gives the Trustee the right to apply to Court for a declaration that a transfer at undervalue is void as against the Trustee or an order that those persons benefitting from the transfer undervalue be required to pay the estate the difference between the value of the consideration received from the debtor an the value of the consideration given by the debtor.

The Court, before providing such an order, must be satisfied in the case of a party dealing at arms-length that:

1. The transfer occurred within 1 year of the initial bankruptcy event,
2. The debtor was insolvent at the time of the transfer or was rendered insolvent by it, and
3. The debtor intended to defraud, defeat or delay a creditor.

If the party was not dealing at arms-length the period is extended to 5 years and the Court only needs to be satisfied that the debtor was either insolvent at the time of the transfer or was rendered insolvent by it or that the debtor intended to defraud, defeat or delay a creditor.

In the *Abakhan vs. Braydon Investment Decision* of the Court of Appeal, the Trustee's ability to terminate a security agreement granted in favor of a transferee was confirmed. This case involved a company called Braydon Investments setting up a new business ("JW Auto Group") to acquire a portfolio of leased vehicles from a failed business ("Totem Ford"). The purpose of this acquisition was tax driven to allow Braydon Investments to obtain significant capital gain refunds by utilizing capital cost allowance claims of the failed Totem Ford.

The complicated structure used for this transaction was specifically designed to protect the assets of Braydon Investments against creditors of JW Auto/Totem Ford creditors. The result was that Braydon Investments received tax refunds/credits of approximately $19 million while the creditors of JW Auto/Totem Ford were left nothing.

The Judges in both the original hearing and in the appeal decided that there was no good consideration and that the transaction was not in good faith and therefore void as against the Trustee.

Although not automatic, all agreements that a bankrupt has entered into will be effectively cancelled on bankruptcy when the business ceases to operate and therefore the bankrupt or Trustee has no ability to fulfill its obligations under an agreement.

Upon a bankruptcy occurring the other party to the agreement would have the right to make a claim in the bankruptcy for any amounts owed pursuant to the agreement or damages that may be claimable under the terms of the agreement.

When considering a bankruptcy to effect a termination of an agreement, be sure to consider any exposure individuals or Directors may have due to personal guarantees that may have been given at the time the agreement was entered into.

IMPACT OF BANKRUPTCY ON EMPLOYMENT CONTRACTS

Upon a bankruptcy occurring any employment contracts that the debtor has entered into are effectively terminated. Employees are entitled to file a file a claim against the bankruptcy estate for any unpaid wages, vacation pay and severance pay.

A bankruptcy also effects the obligation of the directors of a bankrupt corporation. Section 96 of the *Employment Standards Act* provides that Directors are not personally liable for any unpaid wages if the debtor company is subject any proceedings under the *BIA.* Absent such proceedings, directors can be held personally liable for up to 2 months of unpaid wages for each employee. This assumes that Employment Standards has not already issued a determination against the Directors.

RECEIVERSHIP ORDERS

In B.C. the most common appointments of a Receiver are made either by a secured lender that is commonly referred to as a privately appointed Receiver or by an Order of the Supreme Court of British Columbia which is commonly referred to as a Court appointed Receiver.

A privately appointed Receiver does not have a specific powers that would allow for the termination of an agreement however a Court appointed Receiver usually does have certain powers that would allow for the terminate of agreements. The usual rights that are provided for in the B.C. Model Receivership Order include the following:

Receiver's Powers 2 (c) …. cease to perform any contracts of the Debtor

Employees … the Receiver may terminate the employment of employees

(See Schedule "B" for Model Receivership Order)

The right to cease to perform contracts of a debtor is very broad and allows the Receiver to review all contracts that the debtor has entered into and terminate those contracts that are not economically beneficial to the business and could negatively impact the ability to restructure and/or sell the business.

For large contracts that will have a significant impact on the other parties to the contract, the Receiver will often include the right to terminate a specific contract in the initial Order being sought.

In both private and court receiverships there is also the specific provisions of the contracts that have been entered into by the debtor company. Often contracts will give both parties to an agreement the right to terminate the contract in the event of any insolvency proceeding such as bankruptcy or a receivership.

Similar to a bankruptcy, employment contracts can be terminated in a receivership and directors are no longer liable for the unpaid wages of the debtor. Again, this assumes that no determination has been issued against the director(s)

It should be note that if the business assets sold as turnkey operation including the rehiring of employees the purchaser *may* still have successor employer obligations with respect to those employees hired.

THE COMPANIES' CREDITORS ARRANGEMENT ACT (THE "CCAA")

The *Companies' Creditors Arrangement Act* is a Federal Act that allows financially troubled corporations the opportunity to restructure their affairs. By allowing the company to restructure its financial affairs, through a formal Plan of Arrangement, the *CCAA* presents an opportunity for the company to avoid bankruptcy and allows the creditors to receive some form of payment for amounts owing to them by the company.

The *CCAA* is restricted to corporations, that must have amounts owing to creditors in excess of $5 million to be eligible to use the Act. Corporations that do not reach this $5 million threshold can utilize the Division I Proposal under BIA.

The process begins in the Court system when the company applies to the Court for protection under the *CCAA*. The Court may issue an Order giving the company 30 days of protection (often referred to as the "Stay") from its creditors to allow for the preparation of the Plan of Arrangement. The Court can extend the Stay against the creditors upon further application to the Court by the company. Typically, the Court will continue the protection beyond the initial 30-day period if the company can demonstrate that it is likely that it will file a Plan of Arrangement and an extension of the Stay is not prejudicial to the creditors, as a whole. There is no time limit on how long the Stay can be extended. During the Stay period, the company will often continue operating, although it may commence restructuring activities at any time.

A Monitor is an independent third party who is appointed by the Court to monitor the company's ongoing operations and assist with the filing and voting on the Plan of Arrangement. The Monitor's duties include monitoring the business, reporting to the Court on any major events that might impact the viability of the company, assisting the company in the preparation of the Plan of Arrangement, notifying the creditors (and shareholders) of any meetings and tabulating the votes at these meetings. The Monitor prepares a report on the Plan of Arrangement that is usually included in the mailing of the Plan.

The Plan of Arrangement is the proposal that the company is presenting to its creditors on how it intends to deal with debt it owes at the time of the initial filing with the Court. There are no restrictions on what the Plan can entail. It is not uncommon to see offers to pay a percentage on the dollar of debt, either as a lump sum or over a period of time. Plans can include an offer of shares of the company in exchange for the debt outstanding or a combination of cash and shares. The debtor can identify a particular creditor or group of creditors as "unaffected." Unaffected creditors are included in the Plan and are not to be paid in the normal course. One of the benefits of the *CCAA* is that it allows for this flexibility when trying to put together a Plan.

Ultimately, the company files its Plan of Arrangement and forwards it to the creditors / shareholders. A meeting of the creditors (and shareholders, if applicable) is called to vote on the Plan. For the Plan to be binding on each class of creditors, a majority of the proven creditors in that class, by number, together with 2/3 of the proven creditors in that class, by dollar value, must approve of the Plan presented to them. If a class of creditors approves the Plan, it is binding on all creditors within the class, subject to the Court's approval of the Plan. If all of the classes of creditors (and shareholders, if applicable) approve the Plan, the Court must then approve the

Plan as a final step. Upon Court approval, the company continues forward as outlined under the Plan until it has satisfied the requirements under the Plan.

In order to be able to vote on the Plan and receive any distribution under it, a creditor must file a Proof of Claim with the Monitor. The Proof of Claim sets out what is owed to the creditor and is reviewed by the Monitor and the company. Any discrepancies between the creditor's Proof of Claim and the company's records are investigated by the company. The Plan will outline the procedures for dealing with disputed claims.

If a class of creditors or the Court does not approve the Plan, the company does not automatically go into bankruptcy, but the Stay is lifted. However, once the Stay has been lifted, the pressures that caused the company to initially file for *CCAA* protection from its creditors will likely return and, accordingly, it is quite likely that the company will be placed into receivership or bankruptcy.

FLEXIBILITY IN RESTRUCTURING UNDER THE *CCAA* - ABILITY TO ASSIGN OR TERMINATE AGREEMENTS

The *CCAA* has evolved through case law and through amendments to the statute itself, into a fairly fluid/flexible process in which the debtor company can attempt to restructure its affairs. The *CCAA* provides a debtor company with wide ranging powers to restructure by permitting the right to assign and/or terminate contracts if certain criteria are met. The following is a basic overview of this power and the options facing third parties who's rights are being interfered with under the process.

A) ASSIGNMENT OF AGREEMENTS UNDER THE *CCAA*

Under section 11.3(1) of the *CCAA*, the debtor can make an application to Court for 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. The rationale behind this section is that it may be beneficial to the debtor's restructuring process if it can assign its interests in any agreement, presumably to either save money or to make money on the assignment. The Court has the authority to authorize such an assignment and to permanently stay termination of the agreement by the other party to the agreement by reason of either the assignment or any default of the debtor because of its insolvency.

As set out under section 11.3(2) of the *Act*, certain rights/obligations cannot be assigned which include an agreement entered into on or after the day on which proceedings are commenced, an "eligible financial contract" or a collective agreement. "Eligible financial contracts", as defined under section 2(1) of the *CCAA*, include derivative contracts and forward commodity sale contracts. They are covered later in this paper.

The Court retains the discretion to permit assignments, and considers the factors set out in section 11.3(1) to determine the issue. Naturally, the prospect of having someone you did not make agreement with become the party to whom you are bound to contractually can be disconcerting. In such a situation, it is expected that the other party to the contract would try to resist the assignment.

The factors under sections 11.3(2)(a) and (b) are fairly straight forward. The debtor company is required to lead some evidence as to the suitability of the "assignee" to perform the obligations under the agreement.

The more difficult factor is under section 11.3(2)(c). This requires a determination of whether the assignment is "appropriate". The Courts have consistently held that this requires a demonstration that the exercise of the Court's discretion be "*important to the reorganization process*" (per Tysoe, J. in *Re Woodwards Ltd. [1993] BCJ No.42 (S.C.)* Such discretion is rarely exercised. The Court has to be satisfied that the purpose and spirit of the *CCAA* will be furthered by the assignment and that the requested relief does not adversely affect the third party's contractual rights *"beyond what is absolutely required"* to further the reorganization (*Re Lexient Learning Inc.(2009), 62 C.B.R. (5th) (Ont. S.C.J.)*

In the *Re Lexient* decision, supra, the Court declined to exercise its discretion to permit the debtor company to assign its rights under a licensing agreement to a third party so as to prevent the other party to the agreement from attempting to terminate the same as a result of the insolvency of the debtor company (a triggering event under the underlying agreement giving rise to a right of termination). The assignment was of value to the debtor companies ongoing business arrangements with the assignee. Despite that, the Court would not permit the transfer, with the basic reason being that the requested assignment would not advance the restructuring process of the debtor and was plainly an unreasonable interference with the third party licensor's contractual rights.

In *Re Hayes Forest Services Ltd.* (2009), [2009] B.C.J. No. 1725, 2009 BCSC 1169, 57 C.B.R. (5th) 52 (BCSC), the applicant corporations applied for an order approving the sale of a stump to dump logging contract, between the applicant Hayes Forest Services Limited and Teal Cedar Products Ltd. (Teal), to North View Lumber Ltd. ("North View"). The applicants sought to sell the contract as part of a restructuring under the *CCAA*. North View had made a $50,000 deposit to purchase the contract, $277,000 was due at closing and the $1,614,266 balance would be paid at the rate of $3.00 per cubic metre of timber harvested. Teal opposed the application, applying to lift the stay of proceedings to commence arbitration proceedings pursuant to the terms of the contract. In the alternative Teal sought an order approving the sale of the contract to 0858434 B.C. Ltd. ("858") for $1,400,000, consisting of a $400,000 down payment with the balance to be paid at the rate of $2.00 per cubic metre of timber harvested. Teal provided the offer through 858 and there was no information regarding the financial capability of 858 before the Court.

The Court approved the assignment. In approving the assignment, the Court held that advantage to the creditors of the debtor company far outweighed any disadvantage to the creditor, despite the consent of the creditor being reasonably withheld. In particular, the court considered the equipment, crew and expertise to undertake the work required would be available to North View and North View was financially capable. North View's offer was better, was paid off more quickly than 858's and there was no information regarding the financial capability of 858 before the Court.

B) DISCLAIMER OR RESILIATION OF AGREEMENTS UNDER THE *CCAA*

The Model CCAA Initial Order attached at Appendix B sets out at paragraph 12 the types of powers granted to the debtor company regarding the ability to terminate/resiliate agreements/contracts.

Under section 32 of the *CCAA*, a debtor company may, on notice to the other parties to an agreement and the monitor, disclaim or resiliate any agreement to which the company is a party at the commencement of the *CCAA* proceeding. The Monitor must approve the proposed disclaimer or resiliation otherwise the debtor is required to make an application to the court for an order that the agreement be disclaimed or resiliated: s. 32(1) and (3).

The other party to the agreement will have 15 days to make an application to the Court opposing the disclaimer or resiliation: s. 32(2). In deciding whether to make the order, the Court is to consider, among other things, whether the Monitor approved the proposed disclaimer or resiliation; whether it would enhance the prospects of a viable compromise or arrangement; and whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement: s. 32(4).

This power to "walk-away" from a contractual agreement or obligation under the *CCAA* gives the debtor a broad and sweeping ability to get out of agreements which are no longer favorable to the debtor company. Downsizing and reduction in operating costs are virtually automatic strategies an insolvent company will adopt in order to survive. Usually this means a surrender of an existing lease of premises in order to lease smaller premises at a reduced rent. Other examples of contracts or agreements which a debtor company has traditionally sought to resilitate include:

a) supplier or service arrangements or agreements in the context of a logging company: *Re Skeena Cellulose Inc.* (2002), 43 C.B.R. (4th) 178, 2002 CarswellBC 2032 (B.C.S.C.);

b) supply contracts in the context of a pulp and paper company: *Re Abitibibowater inc.* (2009), 2009 CarswellQue 12167, 58 C.B.R. (5th) 1 (Que. S.C.);

c) a contract of insurance (*Re Village Green Lifestyle Community Corp.*(2007), 27 C.B.R. (5th) 199 (Ont. S.C.J.); and

d) an employment agreement in respect of retirement benefits of a former employee: *Timminco Ltd. (Re)*, [2012] O.J. No. 4008, 2012 ONSC 4471.

It is the onus of the debtor company to establish that the resiliation of an agreement is appropriate. In *Re Doman Industries Ltd.* (2004), 2004 CarswellBC 1262, 1 C.B.R. (5th) 7 (B.C.S.C.), the debtor company sought to terminate replaceable logging contracts as conditions precedent to the implementation of a restructuring plan. The Court declined to terminate the logging contracts in the absence of sufficient evidence to support the conclusion that the proposed contract terminations were fair and reasonable. It commented that evidence simply that the company would be more profitable if the terminations were effected was not sufficient.

The jurisprudence on resiliation of indicates that a Court will exercise its direction by ultimately weighing the competing interests and prejudice of the parties in deciding is fair and reasonable as

to whether a resiliation is appropriate: *Re Dylex Ltd.*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106. A Court will also consider the economic conditions for the industry in which the debtor company does business: *Re Abitibibowater inc.* (2009), 2009 CarswellQue 12167, 58 C.B.R. (5th) 1 (Que. S.C.). The Court have consistently held that the resiliation of a contract must be fair, appropriate, reasonable, and must have been issued after good faith negotiations: *Re Allarco Entertainment Inc.* (2009), 2009 CarswellAlta 1458, 58 C.B.R. (5th) 140 (Alta. Q.B.).

In an effort to restructure their affairs debtor companies with a number of retail commercial companies throughout the country which are non-financial performers or are simply too expensive have used the *CCAA* to, in essence, rid themselves of such bases. This was effectively done by Air Canada in 2003, helping to substantially trim its operations. From a tactical perspective the *CCAA* permits, in certain circumstances, a debtor tenant to terminate unfavourable leases while staying the Landlord's right to exercise distraint (ie. seize goods on the premises to pay arrears and amounts due) and to sell/assign leases.

A landlord left holding the surrendered premises will file a significantly large claim in the *CCAA* proceedings for the aggregate amount of rent for the balance of the lease. However, the landlord has a duty to mitigate his loss by finding a new tenant. Until recently, it was thought that a landlord's claim in a *CCAA* was the same as a claim in a bankruptcy, governed in each province by provincial legislation. In Alberta, for example, the landlord in a bankruptcy situation cannot claim in excess of the actual amount of rental arrears (if any), plus three months accelerated rent, less any occupation rent actually paid.

However, the Court of Appeal in Alberta in the *Alternative Fuel Systems Inc.* [2003] A.J. No. 1103, 2003 ABQB 745 clarified the law and stated that a landlord in a *CCAA* case can file a claim for the full amount of its arrears of rent, plus the future rent for the balance of the term of its lease with the debtor.

EXCEPTIONS

There are some exceptions to the types of contracts or agreements which may be resiliated or disclaimed. Those include: (1) an eligible financial contract, (2) a collective agreement, (3) a financing agreement if the debtor is the borrower, (4) a lease of real property if the debtor is the lessor and (5) an agreement granting use of intellectual-property rights: s. 32 (9).

"Eligible Financial Contracts" are excepted out of a debtor company's power to assign an agreement under section 11.3 or to resiliate an agreement under section 32. The previous definition was removed from the *Act* and placed in the regulation to assist with greater ease in amending the definition in the future as new financial products are developed. The current regulation came into force in 2007 and was amended in 2009. The current definition of Eligible Financial Contract is wide enough to include various types of currency and interest rate swap agreements, foreign exchange agreements and commodity purchase contracts.

Additionally, a collective agreement may not be assigned, disclaimed or revised except in limited circumstances. If a voluntary agreement cannot be reached, a debtor may apply to the court for an order authorizing the debtor to serve a notice to bargain. If an agreement is reached, the union has a claim as an unsecured creditor for an amount equal to the value of concessions granted by

the union for the remaining term of the collective agreement. If no agreement is reached, the existing collective agreement remains in force: s. 33.