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CCAA KEEPS LANDLORDS AT BAY

The insolvency of the Hudson's Bay Company ("HBC"), Canada's oldest corporation and iconic department store, is the most recent in a long list of fallen anchor tenants. In the last ten years, Target, Sears, and Nordstrom have all disappeared from the Canadian market. Just like those tenants, HBC is utilizing the *Companies' Creditors Arrangement Act* ("CCAA") to address its dire financial circumstances. The CCAA is a flexible tool that has brought on a barrage of questions from HBC's landlords about what the process means for their shopping centres.

The CCAA Process

The CCAA is designed as a "reorganization" tool. Enacted during the depression of the 1930's, it was intended to provide a means by which insolvent entities (that is, entities that cannot pay their debts as they fall due) could shed certain liabilities and emerge as a (hopefully) viable entity. The CCAA provides a pathway to a Court-approved plan, aimed at avoiding the harsh social and economic effects of pure bankruptcy.

The CCAA process begins with the insolvent entity, in this case HBC, seeking an initial Court order. Because the initial order can be made without notice to creditors (that is, on an "ex parte" basis), landlords are not positioned to oppose it. The initial order will include a temporary "stay of proceedings", which means that all creditors (including landlords) are prohibited from commencing (or continuing with) Court proceedings against the insolvent tenant. The stay provided to HBC goes further by suspending all "rights and remedies" of creditors, including those available to a landlord, such as distraint or termination.

The stay is intended to give the insolvent tenant "breathing room", to allow it (through a court officer, known as the "monitor") to craft a plan of compromise for presentation to its creditors and approval by the Court. The stay is only granted for a limited period of time, but is periodically extended where the Court is satisfied that an extension is appropriate to promote the success of the restructuring.

These Court orders generally require that rent be kept current while the stay is in effect. Typically, the rent is payable biweekly, on the 1st and the 15th of each month. Pre-filing arrears of rent do not usually need to be paid at this time, and by virtue of the stay, landlords are prohibited from enforcing their rights in respect of these arrears. The tenant's other lease obligations typically must also be observed throughout the stay.

The tenant may, with Court approval, divide its creditors into separate "classes". Landlords are often (but not always) grouped into their own class. To be successful, a tenant's plan of compromise requires the support of a sufficient body of creditors and approval of the Court. The Court may only approve the plan if it is satisfied that the plan is for the benefit of all creditors generally, and it is approved by the required number of creditors (being a majority of the members of each class and the holders of at least two-thirds of the value of that class's total claims).

The alternative to a successful plan of compromise is often bankruptcy. Bankruptcy is a legal process whereby the insolvent entity's assets are fully liquidated and claims are paid in accordance with the fixed priority rankings in the *Bankruptcy and Insolvency Act* (the "BIA"). In a bankruptcy, neither the tenant nor the creditors have control over the pay-out regime. Landlords have a "priority claim" (behind secured creditors, and much of what may be owed to employees and in municipal taxes)

for three months' worth of arrears and three months' worth of accelerated rent (so long as the lease provides for accelerated rent). Since landlords are not in a position to recover more than this priority claim in a tenant bankruptcy, and since a bankruptcy could result in the lease being disclaimed or assigned to a third party without the landlord's consent, landlords are often motivated to work towards a plan of compromise during CCAA proceedings, in the hope that it will result in a better financial outcome for the landlord - or at least give the landlord some control over the fate of the premises. Landlords frequently coordinate as a group to negotiate with the tenant and the monitor for treatment of the leases under the plan of compromise. For its part, the tenant is motivated to work with the landlord group, as the tenant needs to satisfy the requisite number of creditors as a precondition for Court approval of its plan.

The HBC Stay

On March 7, 2025, HBC was granted an initial order with a stay of 10 days. The stay has since been extended until May 15, 2025. Interestingly, the initial Court order applied the 10-day stay to co-tenancy rights as well. That is, third party tenants that are entitled to certain remedies provided for in their leases if HBC fails to operate (such as the right to pay a reduced rent, operate limited hours, and/or terminate their leases) were also prohibited from enforcing such rights.

There is precedent for this approach. The Court imposed similar restrictions when Target underwent CCAA proceedings in the mid-2010's. However, the legal basis for staying the rights of co-tenants is not robust. Traditionally, the stay only applies to those with a direct relationship with the insolvent tenant. Curtailing the rights of parties that do not have a direct relationship with the insolvent tenant is not squarely within the insolvency paradigm. Nevertheless, the Court has broad discretion under the CCAA. The flexibility afforded by this discretion is one of the reasons that many insolvent parties prefer the CCAA over alternative insolvency processes, such as the "proposal" regime in the BIA. The initial 10-day co-tenancy stay has not been extended.

HBC Lease Monetization Process

Court materials indicate that HBC intends to extract maximum value from its large portfolio of leases by undertaking a "lease monetization process", whereby it will engage real estate consultants to solicit bids for the purchase of 74 of HBC's 80 retail leases. These bids may be submitted by third parties that wish to take over the lease or by landlords that would like to buy back their space. The deadline for the first round of bids is April 15, 2025.

For now, the fate of all HBC's leased premises remains uncertain. Landlords and major tenants are posturing for what may come next.

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.



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