



Disclaimer and Assignment of Agreements in Reorganizations under the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*

by E. Patrick Shea

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A certified specialist in bankruptcy and insolvency law, Patrick has acted for a variety of clients in large corporate restructuring and insolvency matters in the entertainment, retail, automotive, airline, food and beverage, pharmaceutical and other industrial sectors.

In 2009, the *Bankruptcy and Insolvency Act (BIA)* and the *Companies' Creditors Arrangement Act (CCAA)* were amended to add provisions to each Act that permit a reorganizing debtor to disclaim – that is, to unilaterally terminate – pre-filing agreements. The intention of these provisions is to allow the debtor to disclaim agreements that threaten the viability of the debtor's business going forward as part of its restructuring.

The disclaimer of an agreement by a reorganizing debtor is triggered by the delivery by the debtor of a Notice of Disclaimer to the other party to the agreement that is being disclaimed. If the other party to the agreement does not oppose the disclaimer of the agreement, no court attendance is required, and the agreement is disclaimed in accordance with the Notice of Disclaimer. If the other party to the agreement wishes to oppose the disclaimer of the agreement, within 15 days after receiving the Notice of Disclaimer, that other party must apply to the Court for an order prohibiting the debtor from disclaiming the agreement, and the Court will hold a hearing to determine whether the debtor can disclaim the agreement. In making its determination as to whether an agreement can be disclaimed by the debtor, the Court will consider whether

- the trustee or monitor approves of the disclaimer,
- the disclaimer will enhance the prospects of a successful plan or proposal, and
- the disclaimer will likely cause significant financial hardship to the other party to the agreement.

Where an agreement is disclaimed, the other party to the agreement will be able to file a proof of claim in the reorganization in respect of any damages resulting from the disclaimer. This claim will include, for example, any revenue that would have been generated as a result of the agreement that was disclaimed. The claim is unsecured.

Where the debtor disclaims an intellectual property licence, the rights of a licensee to continue to use the licensed intellectual property will not be affected by a disclaimer of the license, provided that the licensee continues to perform its obligations under the licence agreement, including paying any royalties or licence fees. The licensee's rights under the disclaimed licence, including the right to exclusive use of the licensed intellectual property during the term of the license, and during any permitted extensions, will not be affected by the disclaimer.

The *BIA* and the *CCAA* were also amended in 2009 to permit a reorganizing debtor to force the assignment of an agreement over the objection of the other party to that agreement. The intention of these provisions is to permit a reorganizing debtor to sell its business as a going concern.

The debtor must apply to the Court, on notice to the other party to the agreement that is being assigned, for an order permitting the debtor to assign its rights and obligations under the agreement. In deciding whether to permit the assignment of an agreement, the Court will consider whether

- The monitor or proposal trustee has approved the assignment.
- The proposed assignee will be able to perform the debtor's obligations under the agreement.
- It is otherwise appropriate to assign the agreement to the proposed assignee.

If the Court permits the debtor to assign the agreement, the *BIA* and the *CCAA* require that all monetary defaults be remedied or cured on or before a date that is to be fixed by the Court, other than those arising by reason only of

- the debtor's insolvency,
- the commencement of the insolvency proceedings, or
- the debtor's failure to perform a non-monetary obligation.

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