



# Insolvency Matters During COVID: New Challenges for the Courts

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Over the past four months, every industry has witnessed major shifts in their respective worlds. The insolvency and restructuring community is no different. COVID-19 has introduced a host of unique situations and restructuring professionals have had to do what they do best—come up with creative solutions for complex problems. [Stuart Mitchell](#) and [Allan Nackan](#) discuss an instance where B. Riley Farber acted as both Trustee and Receiver when dealing with a landlord to resolve a legal quandary.

We've seen a lot of 'firsts' in the last four months—especially in the restructuring community. From Zoom call court appearances to a flurry of activity that hasn't been matched since 2008; insolvency and restructuring professionals are still getting used to the new realities of the industry.

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When you think of adjusting to new realities in a COVID world, you probably wouldn't put the legal system in the category of first responders. However, a recent insolvency case had the Ontario Superior Court dealing directly with



several COVID-related challenges that couldn't have been contemplated just months before.

There was the peculiar fact situation of the case (access by a Trustee to a non-essential premises during COVID); the forum for hearing the motion itself (via video conference) and even the unique jurisdiction it exercised in deciding the matter (a suspension order enacted to deal with COVID.)

## The Facts

The case was *Cerberus Business Financial, LLC v. B & W Heat Treating Canada, ULC*, 2020, ONSC 3781 and the basic legal issue involved the distinct roles and actions of Receiver and Trustee in bankruptcy law in Ontario. B. Riley Farber was originally appointed as Receiver over all of the assets of the Debtor ("B&W") in September 2019, pursuant to section 243 (1) of the *Bankruptcy and Insolvency Act* ("BIA"). The receivership order enabled the Receiver to file an assignment in bankruptcy on behalf of B&W, which occurred on March 31, 2020 and resulted in B. Riley Farber also being appointed as the Trustee as well.

In its role as Receiver, B. Riley Farber then wrote to the landlord of B&W's premises on March 31, 2020, stating that the Receiver would no longer occupy the premises or pay rent, and later delivered the keys to the premises to the landlord. Also, on March 31, B. Riley Farber acting as Trustee, wrote directly to the landlord advising that the first meeting of creditors was scheduled to be held on April 21, 2020. At the meeting, the Trustee was instructed not to occupy the premises and, at the Trustee's discretion, to retain or disclaim the lease at any time within 90 days of the assignment in bankruptcy.

The Trustee then sought to assign the lease to a new tenant and attempted to access the premises for that purpose. However, the landlord responded by refusing access, taking the position that B. Riley Farber had surrendered possession of the premises and lease on March 31 by virtue of its actions as Receiver. The landlord argued that Farber, as Trustee, had knowledge of the Receiver's surrender, had at least tacitly acquiesced to the surrender of possession and the keys to the landlord, and therefore must be bound by its own actions taken in its role as Receiver. The landlord also asserted that, given the COVID-19 pandemic, the premises were not essential and must remain closed to the public pending further action by the Ontario government.

## The Motion

B. Riley Farber brought a motion in its capacity as Trustee both to gain access to the premises and to extend or suspend the 90-day limitation period provided for in s.38(2) of the *Commercial Tenancies Act* ("CTA"), which provides that a trustee must elect to disclaim, retain or assign a lease within that time period. The landlord submitted that the Trustee had no right to access the premises or assign the lease and that there was no basis in law to extend or suspend the three-month period provided for in the CTA.



## Issues and Decision

The motion was heard by video conference on June 11, 2020. In its Decision, released June 18, the Court confirmed the distinct roles of Receiver and Trustee, noting that B. Riley Farber had written two separate letters to the landlord on March 31, each taking different positions as to its rights and obligations. As Trustee, B. Riley Farber was relying on its right to assign the lease pursuant to s.38(2) of the *CTA*, a right that could not be prejudiced by its role as Receiver any more than in a case where two different firms had acted as Receiver and Trustee. The Court found “the fact that B. Riley Farber as Trustee had knowledge of B. Riley Farber as Receiver’s position is immaterial.”

With respect to the 90-day period under the *CTA*, which was to expire June 29, the Trustee argued that the Court had jurisdiction to extend the period for a further 90 days. In agreeing to an extension, the Court based its decision on s. 7.1(2) of the *Emergency Management and Civil Protection Act* (the “Suspension Order”), which was passed by the Ontario legislature specifically in response to the COVID-19 pandemic. The Court found that the Suspension Order gave it discretion to suspend “any period of time within which any step must be taken in any proceeding in Ontario,” where such suspension was to be retroactive to March 16, 2020. Further, the Court found that B&W’s bankruptcy constituted a “proceeding” pursuant to the *BIA* and that the three-month time period imposed under s.38(2) of the *CTA* was a period of time within which a step in the bankruptcy proceeding must be taken.

In the circumstances, the Court was not prepared to suspend the three-month period during which the Trustee was to elect to retain or assign the lease under the *CTA* for the duration of the emergency, as that would be unfair to the landlord. Instead, it extended the election period for a further three months from June 29, giving the Trustee access to the leased premises for the purpose of marketing the premises to potential assignees of the lease. In its discretion, the Court declared that the Trustee was not obliged to pay occupation rent for the first 30 days of the extension but that it was required to pay *per diem* rent to the landlord for the remaining 60 days if it wished to continue its attempts to assign the lease.

## Adjudicating in a COVID world

Ultimately, the Court decided that the landlord could not refuse the Trustee access to the premises for the purpose of showing it to potential assignees of the lease. In so doing, it confirmed the distinct roles of Trustee and Receiver, even in circumstances where the same firm acted in both capacities and took seemingly divergent actions. However, the Court covered new ground in confronting issues and challenges brought on by the COVID-19 pandemic. First, the hearing itself took place by video conference, a forum that would not have been contemplated for a motion of this sort a few months earlier. In addition, the fact situation involved the landlord refusing the Trustee access to the leased premises, ostensibly because of the security measures associated with COVID-19. Most importantly, in finding that the Court had jurisdiction to grant the extension sought by the Trustee, it invoked its discretion pursuant to regulations enacted specifically to address the disruption in legal proceedings caused by COVID-19.

As you can tell, this was a very unique situation. The world of restructuring calls on insolvency practitioners, lawyers and the courts, to come up with creative solutions to unique and difficult problems on a daily basis. Formulating creative and practical solutions is the cornerstone of what we do at Farber.



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## Our Contributors

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