

## WHEN TENANTS GO BROKE: A LANDLORD'S GUIDE TO SURVIVING THE INSOLVENCY APOCALYPSE

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### Introduction:

With high interest rates and extensive market shifts, insolvency and bankruptcy are concepts on the minds of many, including commercial landlords. The possibility of tenant insolvency can create uncertainty and unease for landlords leasing to commercial tenants on the brink of financial collapse.

In this article, we compare the four insolvency and restructuring proceedings which may apply to a commercial tenant under the *Bankruptcy and Insolvency Act* ("**BIA**") and the *Companies' Creditor Arrangement Act* ("**CCAA**"). We further outline best practices for commercial landlords and explain the nuances of each proceeding, including its purpose, the requirements for a tenant to proceed, whether there may be a stay of proceedings, whether rent is payable, potential outcomes relating to the lease, and the priority ranking of a landlord's claim.

By gaining an understanding of the nuances of each proceeding, commercial landlords can anticipate the issues, understand their rights, and plan for the future.

### A Comparative Chart of Bankruptcy and Insolvency Proceedings in Commercial Leasing:

Type of Proceeding:	Process Initiated by:	Purpose:	Requirements:	Stay of Proceedings?	Rent still payable?	Outcome of lease?	Priorities/ Landlord's Claim:
<b>CCAA</b>	Debtor (Tenant) or Creditors.	Allows Debtor to restructure financial affairs under supervision of the Monitor and possibly avoid bankruptcy.  Debtor, often a corporation, remains in possession and control of the premises and their property.	Only accessible to corporations with more than \$5 million in debt.  A licensed insolvency trustee must be appointed as "Monitor".	Not automatic, but often is included in initial order.  The scope of the stay is discretionary.	Tenant must pay post-filing rent where premises are occupied, unless or until it disclaims or assigns the lease.	Debtor is entitled to disclaim the lease by giving 30 days' prior notice to Landlord, or it may assign the lease (without Landlord's consent if all monetary defaults are cured).  Landlord may object to the disclaimer or assignment. Tenant has onus to prove that it would not be able to make a viable proposal without the disclaimer of the lease and all other leases that Tenant has disclaimed.	No statutory provision providing a Landlord with a preferred claim for arrears and/or accelerated rent.  Damages of Landlord from disclaimer of the lease are treated as unsecured claims.

Type of Proceeding:	Process Initiated by:	Purpose:	Requirements:	Stay of Proceedings?	Rent still payable?	Outcome of lease?	Priorities/ Landlord's Claim:
<p><b>Notice of Intention (NOI) to make a Proposal under the BIA</b></p>	<p>Debtor (Tenant) or Receiver/Liquidator/ Trustee.</p>	<p>Allows Debtor to attain financial relief and maintain possession of the premises, its assets, and business while restructuring their debt.</p> <p>Once filed, creditors with proven claims vote for/against the proposal (i.e., deemed accepted if 50% of creditors in number and 2/3 of creditors in value vote in favour of proposal), subject to court approval.</p> <p>If creditors reject the proposal, Tenant is automatically deemed bankrupt.</p>	<p>No threshold amount.</p> <p>A licensed insolvency trustee must be appointed as a "Proposal Trustee".</p>	<p>Automatic stay upon filing.</p> <p>Does not prohibit enforcement for post-filing rent obligations.</p> <p>Stay is for an initial period of 30 days, but cannot exceed 6 months.</p>	<p>A Trustee must only pay occupation rent if it "occupies" the premises (e.g., changing the locks to protect assets and removing the assets may not be sufficient for "occupation").</p> <p>Tenant may occupy the premises during the proposal period as long as it pays post-filing rent.</p>	<p>Debtor may apply to court for order to assign the lease.</p> <p>Debtor is entitled to disclaim the lease by giving 30 days' prior notice to Landlord.</p> <p>Landlord may object to the disclaimer or assignment. Tenant has onus to prove that it would not be able to make a viable proposal without the disclaimer of the lease and all other leases that Tenant has disclaimed.</p>	<p>Where a lease is disclaimed, the BIA stipulates the manner in which Landlord's claim is to be calculated.</p> <p>The proposal must indicate whether Landlord may file a proof of claim for the actual losses resulting from the disclaimer or in accordance with the BIA formula.</p>

Type of Proceeding:	Process Initiated by:	Purpose:	Requirements:	Stay of Proceedings?	Rent still payable?	Outcome of lease?	Priorities/ Landlord's Claim:
<b>Bankruptcy (BIA) – Voluntary Assignment or Involuntary Bankruptcy Order</b>	Debtor (Tenant) or Creditor	<p>A Debtor may file an assignment in bankruptcy to obtain a discharge of most debts, and wind down operations.</p> <p>A Debtor will be deemed bankrupt after a failed proposal.</p> <p>Creditor may apply for a bankruptcy order against a Debtor.</p>	A licensed insolvency trustee must be appointed as a "Trustee in Bankruptcy".	Automatic stay upon filing.	<p>Trustee obtains right to retain the premises for three (3) months following Tenant's bankruptcy.</p> <p>Landlord is entitled to occupation rent for period of actual occupation.</p>	<p>Within three (3) months after bankruptcy order, Trustee must elect to: (i) disclaim, (ii) assign (if all arrears are paid in full) with court approval; or (iii) retain the premises for whole or portion of balance of the term.</p>	<p>Landlord's preferred claim priority falls below the CRA and secured creditors, but above unsecured creditors.</p> <p>Preferred claim is limited to arrears of rent for three (3) months owing before bankruptcy and an additional three (3) months accelerated rent, if provided for in the lease and is limited to the value of the assets on the premises.</p> <p>For amounts still owing on top of preferred claim, Landlord ranks as an unsecured creditor.</p> <p>In Ontario and many other provinces, Landlord cannot claim damages for unexpired portion of the lease.</p>

Type of Proceeding:	Process Initiated by:	Purpose:	Requirements:	Stay of Proceedings?	Rent still payable?	Outcome of lease?	Priorities/ Landlord's Claim:
<b>Receivership (private or court appointed) (BIA)</b>	Creditor, either under a General Security Agreement (private) or by applying to Court.	Take control and sell Tenant's property to satisfy debts of Creditors.	Private receivership requires security agreement which provides for appointment of a receiver.	No automatic stay for private receivership.  Court appointed receivership may include a stay in the Court Order.	Privately appointed receivers are bound to pay rent in accordance with the lease.  Rent is typically due from the inception of the process until either the process ends, or the lease is disclaimed.	Privately appointed receivers are bound by the lease.  Court appointed receivership may allow for assigning or terminating the lease.	Unless lease is assigned, upon termination of the lease by receiver, Landlord will have unsecured claim for damages as result of termination, arrears of rent, damages for breach of terms of the lease, and damages for loss of future rent.

### **Best Practices for Commercial Landlords:**

#### *When Suspecting Your Tenant is in Financial Difficulty*

- **Promptly Draw on Letters of Credit and Apply Deposits:** Promptly draw on letters of credit and apply deposits if your tenant is in arrears and if you become aware that your tenant may be facing financial difficulty.
- **Take Action Against Lease Guarantors and Indemnifiers:** Take action against any guarantors or indemnifiers upon default of the tenant.
- **Consider a Surrender of the Lease:** Consider if the premises are marketable, the amount of rent being paid, and if a voluntary surrender would make sense for both landlord and tenant.

#### *When Your Tenant is involved in an Insolvency Proceeding*

- **Ensure Comprehensive Information Flow:** Take necessary steps to ensure you receive all information available to creditors (e.g.: ensuring the Trustee or Monitor has your contact information and your lawyer receives the relevant documents).
- **Address Key Questions:**
  - **Type of Proceeding:** What type of legal proceeding is it?
  - **Location of the Proceeding:** Where is the proceeding taking place (i.e.: in/outside of Canada)?
  - **Important Dates:** Identifying critical dates, such as court hearings or document submission deadlines, is vital. (i.e. when is the next court hearing, deadline to submit documents)

- **Effective Communication with Court Officers:** Promptly communicate any concerns or legal issues to court officers.
- **Timely Submission of Proof of Claim:** Ensure that any proof of claim is submitted within the deadline.
- **Leasing Plan for Tenant Disclaimer:** Prepare a leasing plan in case the tenant disclaims the lease.

If you have any questions about the above or how a tenant's insolvency proceedings may affect your lease, please contact [Alex Kolandjian](#) or [Aida Nabavi](#) for assistance. A special thanks to [Catherine Francis](#), a Partner in our Insolvency practice, and our former Articling Student, Kaylee Rich, for their assistance with this article.

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