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FAQs about the BIA and CCAA!

It's 2009 and, regrettably, the "B" word is on the minds of many people. We thought it was a good time for a brief run down of some of the questions we are most frequently asked about bankruptcy and insolvency. So, here goes:

When a tenant delivers a Notice of Intention ("NOI") to make a proposal under the Bankruptcy and Insolvency Act ("BIA"), can the landlord terminate for non-payment of rent?

Instead of filing for bankruptcy, an insolvent tenant may try to save its business by making a proposal under the BIA to its creditors, including its landlord. The creditors vote on the proposal and if it is accepted and approved by the court, the proposal proceeds. If rejected, the tenant is deemed to have made an assignment in bankruptcy.

Tenants usually start the process by filing a NOI. This results in an automatic 30-day stay period – which may be extended to 45 days. During the stay period the landlord cannot distrain or terminate for arrears of rent; however, the tenant is required to pay current rent. Upon receiving a NOI the landlord should send a rent invoice for the month, or part month, following the date of the NOI. If the tenant fails to pay rent for the period after the stay commences the landlord may take steps to terminate the lease.

What is the difference between a Bankruptcy Proposal and a Plan of Compromise or Arrangement under the Companies' Creditors Arrangement Act ("CCAA")?

The CCAA is more flexible and is used by large companies. (A company must have debts exceeding \$5,000,000 to qualify for CCAA proceedings.) A CCAA proceeding starts with an Initial Order that sets the ground rules including: a stay similar to the automatic stay under a bankruptcy proposal; priority for the financiers of the company during the CCAA proceedings (this is known as Debtor in Possession or DIP financing); the appointment of a monitor who oversees the business but does not actually run the business during the CCAA proceeding; and, where there are leases, often a power to disclaim leases.

The CCAA allows debtors a great deal of flexibility in restructuring their business. Where commercial leases are concerned, the Initial Order will prevent the landlord from terminating the lease for past defaults and will require the tenant to comply with its lease obligations going forward, including the

payment of rent. Aside from the right to disclaim, the Initial Order should not amend an existing lease.

What is the difference between a court appointed receiver and a private receiver?

Security documents (such as mortgages or personal property security agreements) generally grant a secured creditor the right to appoint a receiver. A private receiver is appointed by a secured creditor pursuant to its security documents and has no greater rights, vis-à-vis the landlord, than the tenant. In other words, the private receiver steps into the shoes of the tenant. A private receiver has no right to disclaim the lease and there is no stay period. The appointment of a receiver is often an event of default under a lease for which a landlord may terminate the lease.

A court appointed receiver is given additional powers by the court, but is court supervised. A Receiving Order will generally include a Stay Order that prevents the landlord from terminating the lease during the receivership provided, of course, that the rent is paid and the receiver otherwise complies with the lease.

Can the stay be lifted and the lease terminated?

One common feature of all bankruptcy restructuring cases is the "stay". While a company is restructuring, whether it is under the BIA, the CCAA or a court appointed receivership, there will be a stay preventing landlords from terminating leases for past defaults and requiring the tenant to pay the rent and comply with the lease terms during the restructuring. Landlords should not feel they are being treated unfairly as the stay applies to all contracts.

Courts also have discretion to lift or terminate a stay to allow the claim of a particular creditor. This order may be granted where a landlord can prove to the court that the tenant will suffer little prejudice and that the landlord will suffer significant prejudice if the order is not granted.

Why do tenants who are restructuring under CCAA or during a receivership also make an assignment in bankruptcy?

In insolvency and restructuring cases both debtors and creditors can combine their rights and remedies. An assignment in bankruptcy allows the tenant's trustee in bankruptcy to disclaim or assign a commercial lease pursuant to the BIA and the related provisions under landlord and tenant legislation in each of the provinces except Quebec. A trustee in bankruptcy is able to

occupy the tenant's premises for up to 3 months following bankruptcy. During this time the landlord cannot terminate the lease or distrain for arrears, and the trustee may elect to: retain, disclaim or assign the lease. If the trustee makes no election, then after 3 months the stay expires and the landlord may terminate the lease if there is a default.

In Quebec a trustee in bankruptcy may remain in the premises, rent free, until the first meeting of creditors. If the lease contains an *ipso facto* termination on bankruptcy clause, the lease can be terminated after the creditors' meeting.

Can a landlord make a claim as a preferred creditor for 3 months' accelerated rent if the rent is being paid after the assignment in bankruptcy?

Under the BIA, upon a tenant's bankruptcy, the landlord is a preferred creditor and is entitled to make a claim for 3 months' rent arrears, if any, and up to 3 months of accelerated rent, provided the lease allows for acceleration of rent. The landlord's preferred claim is limited to the amount realized from property on the premises as of the date of the bankruptcy. As secured creditors are entitled to realize on the tenant's property first, there is generally little, if anything, left to satisfy the landlord's preferred claim.

Any rent paid during the 3 months following bankruptcy is deducted from the amount of accelerated rent to which the landlord is entitled. Therefore, if the trustee pays occupation rent for the full 3 months after the date of bankruptcy, the landlord would have no claim for accelerated rent.

Is a landlord entitled to compensation when its lease is disclaimed?

Except for the landlord's preferred rent claim already discussed, in any restructuring or insolvency situation the landlord is an unsecured creditor for arrears of rent and future loss of rent.

The BIA provides that under a Bankruptcy Proposal, a landlord may claim for its actual loss or the lesser of: (i) 1 year's rent plus 15% of the rent payable over the remainder of the term, or (ii) 3 years' rent. Whatever amount the proposal calls for, the landlord remains an unsecured creditor.

Under the CCAA, there are no fixed rules and the compensation, if any, depends on the terms of the plan of arrangement as approved by the creditors and the court.

Can a landlord object to an assignment of its lease by a trustee?

Under provincial landlord and tenant legislation (except in Quebec) a trustee in bankruptcy may elect to assign a lease following the tenant's bankruptcy. The lease must be in good standing, all rent must be paid and, if the landlord does not consent to the assignment, the trustee is permitted to make an application to the court to approve the assignment. The court will approve the assignment if it is satisfied that the proposed tenant is a fit and proper person who will observe and perform all terms of the lease. Generally this gives the trustee in bankruptcy wide latitude in obtaining approval for an assignee.

What happens to subtenants when the head tenant goes bankrupt?

Where the tenant is bankrupt and a subtenant is in possession of the premises prior to the bankruptcy, provincial landlord and tenant legislation in some provinces (ON, MB, NB, AB and PE) permits a subtenant to take over the head lease on the terms and conditions of the head lease, except as to rent. In Ontario, for example, if the subtenant makes this election, it will be required to pay to the landlord a rent that is the greater of the amount payable under the sublease and the amount payable under the head lease. The subtenant is not required to pay any arrears of rent accumulated by the head tenant.

Once Again, 5 DV Lawyers Recognized!

We are proud to announce that Francine Baker-Sigal, Jeanne Banka, J.E. Dennis Daoust, Natalie Vukovich and Deborah Watkins have been chosen for inclusion in the 2009 edition of The Canadian Legal Expert Directory. Daoust Vukovich LLP continues to be recognized in this directory as the firm with the largest number of leasing law experts in Canada and we thank you for continuing to put your confidence in us.



Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients' needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

Often a deal will change complexion in mid-stage. At this critical juncture, you will find us responsive, flexible and able to adjust to the changing situation very quickly and creatively. We turn a problem into an opportunity. That is because we are business minded lawyers who move deals forward. The energy our lawyers invest in the deal is palpable; it makes our clients' experience of the law invigorating.

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