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## Strategies for Bankruptcy, Insolvency and Managing Tenants in Distress

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### Overview of Presentation



- Introduction
- Overview of relevant legislation
- Practical issues

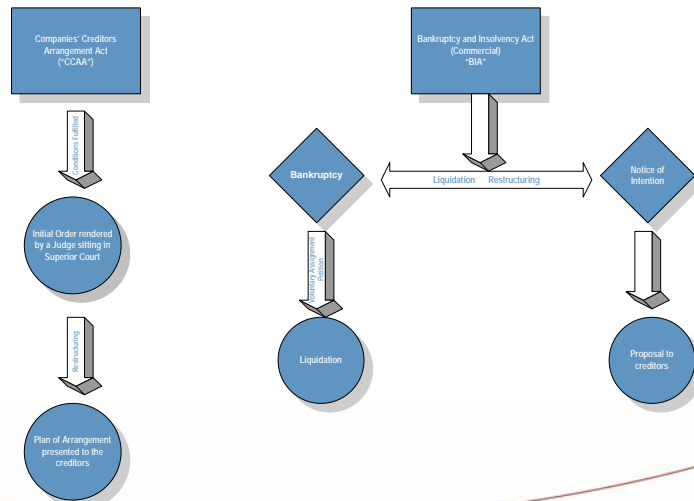
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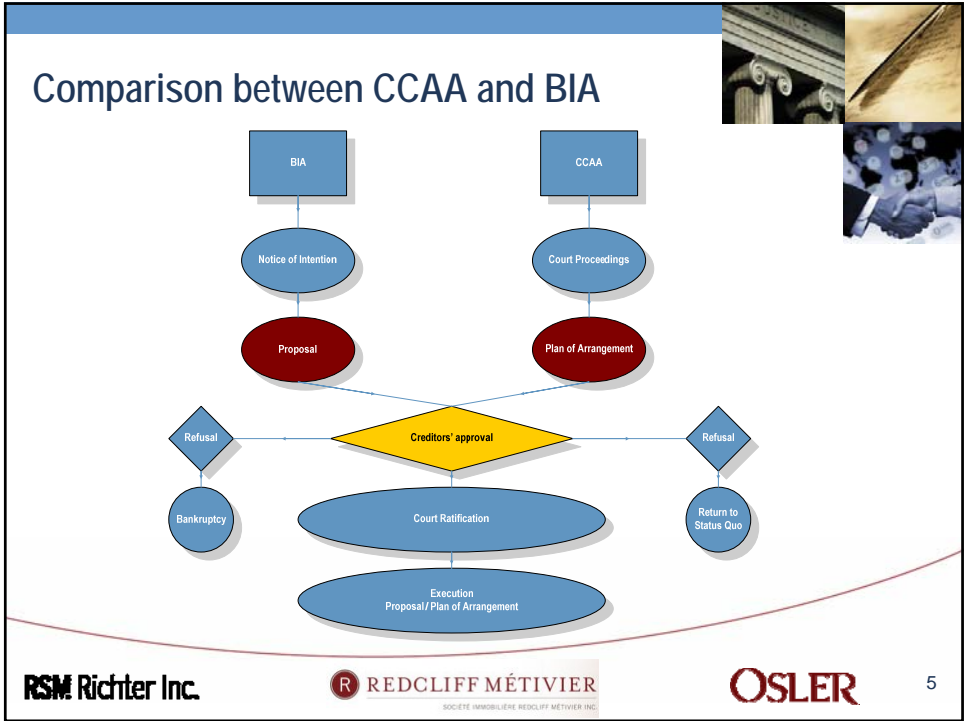
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## Relevant Legislation

- Bankruptcy and Insolvency Act (« BIA »)
- Companies' Creditors Arrangement Act (C-36) (« CCAA »)
- Quebec Civil Code (« CCQ »)

## Comparison between CCAA and BIA





### Landlord and Tenant Issues in Bankruptcy Proceedings under the Bankruptcy and Insolvency Act

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## Bankruptcy Situations

- Right of Occupancy
  - Trustee in place of debtor
  - Effective occupancy by Trustee
    - Operating Business
    - Changing locks
    - Liquidation/inspection of assets on premises
    - Employees/agents/signage
  - Trustee's right to occupy (Quebec jurisprudence)
    - Before first meeting of creditors – no personal liability
    - After first meeting of creditors – personally liable


## Bankruptcy Situations

- Right of Assignment
  - Provided for under BIA, but subject to provincial law
  - Landlord consent rights are respected in Quebec
- Assignment of lease by Trustee
  - Same terms and conditions
  - Obligation to cure bankrupt tenant's default
  - Pay rent for occupation of premises
  - Landlord consent

## Bankruptcy Situations

- Landlord rights as a creditor
  - Preferred claim
    - Priority to unsecured claims
      - Three months' arrears
    - PLUS**
    - Three months' acceleration (if in lease)
  - Offset by occupation rent paid
  - Limited to value of assets on premises
- Secured claim
  - Violation of BIA (Quebec jurisprudence)
  - Relevant CCQ provisions inapplicable

## Landlord and Tenant Issues in Notice of Intention/Proposal Proceedings under the Bankruptcy and Insolvency Act




## Notice of Intention/Proposal Situations

- BIA prevents:
  - Terminating lease
  - Modifying lease
  - Invoking default clauses
- Resolutive clauses (“ispo facto” clause)
  - Inoperative
  - Stay of proceedings
  - Exceptions
    - Post-filing rent
    - Termination for prohibited usage

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## Notice of Intention/Proposal Situations

- Assignment of Lease
  - Same terms and conditions
  - Obligation to cure bankrupt tenant's default
  - Pay rent for occupation of premises
  - Landlord consent
- Tenant's rights to terminate leases
  - Between NOI and filing of proposal
  - Only on commercial leases
  - Thirty-day notice/prescribed form

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## Notice of Intention/Proposal Situations

- Landlord's rights upon termination
  - Petition Court – declaration of inapplicability
    - Opposable if prevents tenant to make a VIABLE proposal
    - Burden of proof on tenant
- Indemnity for termination
  - Actual losses
  - OR*
  - Lesser of:
    - Aggregate rent for first year following effective date of termination PLUS 15% of remainder of lease
  - and**
  - Three years' rent
- Unsecured claim

## Landlord and Tenant Issues in Proceedings under the Companies' Creditors Arrangement Act

## CCAA Situations

- General Concepts
  - Legislation not specific on debtor's obligations
  - Preservation of *status quo*
  - Economic and legal position to be maintained
- Stay of proceedings
  - Against pre-filing defaults
  - Exercise of rights and remedies
- Obligation to pay post-filing rent
  - Entitlement to monthly rent in advance

## CCAA Situations

- Super Priorities – Initial Orders
  - Debtor in Possession financing («DIP»)
  - Administrative Charges
  - Directors' Charges

## CCAA Situations

### • Lease Repudiations

- Notice to landlord
- Rent payable during notice period
- Entitlement to take possession and re-let without prejudice to claim against debtor
- Indemnity Payment
  - Unsecured claim
  - Mutual consent
  - CCAA Plan of Arrangement

## CCAA Situations

### • Indemnity Payments – Precedents

- Unexpired term of lease
- Fixed amounts in Plan of Arrangement
- Need to mitigate damages
- No double recovery
- Separate classes under CCAA



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Thank you / Merci