

CAIRP AGM September 2020 – Summary of OSB Presentation

The Canadian Association of Insolvency and Restructuring Professionals (CAIRP) held its 2020 Insolvency and Restructuring Exchange and Annual General Meeting (AGM) in a virtual format on September 16, 2020. The Superintendent of Bankruptcy, Elisabeth Lang, was invited to provide an update on the Office of the Superintendent of Bankruptcy's (OSB) 2020-2021 Business Plan priorities, prior to the start of the formal AGM proceedings.

As well as outlining the OSB's priorities for the coming year, the Superintendent took the opportunity to discuss the OSB's on-going COVID-19 measures, and shared the perspectives of her international counterparts on the pandemic's effects on insolvency systems around the world.

Below is a summary of the Superintendent's presentation as well as a record of the question and answer session with Licensed Insolvency Trustees (LIT)s.

Summary

Presentation by the Superintendent of Bankruptcy

During her presentation, the Superintendent shared some examples of how the OSB continues to fulfill its mandate, by working toward modernizing Canada's insolvency system and contributing to the efficiency of the Canadian economy, while responding to the challenges presented by the COVID-19 pandemic.

The Superintendent presented the OSB's [2020-21 Business Plan](#) priorities, many of which build on work accomplished in 2019-20. Strengthening the OSB's Compliance Framework is one of the multi-year projects. The implementation of improvements has already begun after careful review of both the Debtor Compliance and the Trustee Compliance programs.

Another ongoing priority outlined by the Superintendent is the OSB's continued efforts to help Canadians with debt challenges find the right debt solution for their needs. As part of this effort, the OSB's debt solutions portal, launched in 2019, will be updated with new information and interactive tools this year. The Superintendent also noted that the OSB will engage with federal and provincial regulatory partners, as well as stakeholders, in regards to the debt advisory marketplace, to ensure that indebted Canadians get clear and accurate information to make appropriate debt-related decisions.

The Superintendent also noted that the OSB continues to invest to revitalize its Operational Training Program to ensure employees have the necessary skills and information to effectively support the OSB's mandate.

New priorities for the coming year include a comprehensive review of the insolvency regulatory framework. The OSB will be consulting with stakeholders about the best way to approach the modernization of regulations and directives.

The Superintendent also spoke of the OSB's plans to convene a virtual Registrars' Conference in the 2020-21 fiscal year. The OSB hopes that this conference will give the Registrar community a forum to discuss the interpretation and application of insolvency laws and share views and best practices for the benefit of all stakeholders.

The Superintendent highlighted measures that the OSB has taken to support the Canadian insolvency system since the beginning of the pandemic. This includes obtaining an omnibus court order in all provinces and territories to provide short-term relief to debtors, providing regular guidance and flexibility to LITs to help them address challenges arising from COVID-19, ensuring that Canadian consumers and businesses have relevant insolvency information via OSB's website and through social media, and making operational adjustments to address the restrictions and challenges arising from COVID-19. (For more information on these measures, please see the [Messages to LITs concerning COVID-19](#)). The Superintendent emphasized that, during this period of flexibility and adaptation, it will be crucial for LITs and other stakeholders to continue to strive to protect the integrity of the insolvency system.

Since the beginning of the pandemic, the Superintendent reported that she has been in regular contact with her international counterparts. She noted some developments from the US, UK, Australia, and Scotland and reported that the insolvency systems of those countries, although via different approaches have, like Canada, adapted quite well to the challenges presented by COVID-19.

Lastly, the Superintendent spoke to her appearance at the House of Commons Standing Committee on Finance in July ([view video](#) – Superintendent's appearance begins at 17:10 mark / [read transcript](#)), where she highlighted the steps that the OSB has taken in light of the pandemic, as well as how the OSB, LITs and other stakeholders in the insolvency system are preparing for the future. She also mentioned that the OSB was pleased that Google has added Canada to its list of countries with a certification process in relation to its advertising policy, and that LITs should now be able to apply and return to advertising their services through Google Ads – bearing in mind the requirements stated in the *Bankruptcy and Insolvency Act* and Directives.

The Superintendent concluded by thanking CAIRP and LITs for their efforts during the pandemic, noting that their support and collaboration are key to maintaining an effective and well-functioning insolvency system in Canada.

Questions Asked and Answers Provided During the AGM

1. Question: With respect to recent software updates, our members using Ascend in particular, have noticed that the Canada Child Benefit (CCB) was removed from form 65 and is

also impacting the surplus income calculation and this raises a number of questions as to whether there is going to be an amended directive indicating how we are to calculate surplus income in light of this apparent change and whether this exclusion is solely a result of COVID-19, can we expect it to be reversed once COVID-19 is resolved? Also, how should the debtor be encouraged to account for their income and expense and how do we communicate this information to debtors. Can you please address this issue to members?

Superintendent: We just recently became aware that the Universal Child Care Benefit (UCCB), the predecessor to the CCB, and the CCB had been included on form 65 by one of the software providers and that in its most recent release that has been changed. It has always been our position that the legislative intent has been to exclude these amounts from income. As this is just a very recent development, we are working on communications and considering the implications of the situation. We plan to communicate with LITs shortly.

2. Question: As a follow-up, are there any other COVID-19 measures expected to impact income and/or property on a permanent basis? Any other legislative changes, not necessarily as a result of COVID-19 that might have happened?

Superintendent: Just to clarify, this was not a COVID-19 development as the predecessor legislation excluded the UCCB and the subsequent legislation excluded the CCB. It may be, however, that the OSB's guidance regarding the CCB COVID-19 top up brought this to the software provider's attention. As to what possible measures the Government is planning, it is hard to predict. But, as we know, the Speech from the Throne is planned for September 23rd and there may be new mandate letters issued, so the direction of the government is something that we will have to watch and see. Generally, I think we have seen that COVID-19 support measures have typically been excluded from income pursuant to the legislation that provides them, which is what OSB looks to when we provide guidance.

3. Question: The developments with Google is encouraging. That brings us to other social media platforms including Facebook. There is a recent Facebook notice saying that effective December 2020 it will be changing some of the advertisement requirements, specifically anyone advertising in the market, employment or credit opportunities. I believe that credit opportunities might be where LITs are advertising and those restrictions have to do with not being able to target certain segments of the population. Is this something that the OSB is able to assist LITs with in terms of education with the social media platforms to say that we are regulated and we should be exempted from certain requirements where other players may be taking advantage or conveying improper information?

Superintendent: This is very recent news for us. The OSB will look into the matter and will make efforts to clarify for Facebook that LIT ads, in our opinion, should not be considered as falling into that definition. We also encourage LITs of course to clarify this through their Facebook contacts.

4. Question: The next question has to do with third party service providers in the context of what is the OSB's position on the use of third parties to provide back office support, meaning file administration to Trustees and also file intake function and marketing assistance. Is this something that the OSB is looking at or has concerns?

Superintendent: I will start by saying that is a difficult question to answer without a full understanding of the details because the details really are crucial here. Some of these arrangements have proven to be referral arrangements disguised as something else. So really, the first place this question should be explored is with your Senior Bankruptcy Analyst and you will need to provide them with sufficient detail to allow them to provide you with guidance. There are a lot of things that we will be bearing in mind as we respond to those kind of arrangements along with some directives that could apply here. We have paragraph 35 of Directive 13R7, Trustee Licensing, which restricts the business practices of LITs, and paragraph 36 of that directive which precludes a Corporate Trustee from any interest or relationship that impairs its professional judgement; Directive 4R, Delegation of Tasks; Directive 1R6, Counselling in Insolvency Matters, that talks about intermediaries and referral arrangers; and Directive 6R3, Assessment of an Individual Debtor. There is a general duty to collaborate with the OSB and the emphasis here is that the duty falls on the LIT regardless of any decision to outsource true back office functions, if that were deemed appropriate. We have a Position Paper on Referral Arrangements. LITs will have to always bear in mind issues of document retention and privacy laws pertaining to the treatment of personal information and then, of course, the broad Code of Ethics comes to bear. All of that being said, we are aware of changes in the insolvency-operating context including the use of third parties for pure back office functions and we are analyzing the current state of the system in an effort to predict the future state. Ultimately, the one thing I want to leave you with is that, no matter how you arrange your work and what we might approve, LITs remain accountable for all work done on all estates under their licence.

5. Question: The next question has to do with draws. When can members expect revisions to allow more draws or for modifications to the Tariff? The context of the question is to allow more draws to better match LIT expenses with their cash flow. COVID-19 has caused a decrease in insolvency, we are still working on a number of active files and certainly, if we could organize draws better with our work it would be helpful for our members.

Superintendent: I want to start by recognizing challenges faced by many LITs over the past many months, with decreased filing volumes and increased challenges due to COVID-19. As I mentioned in my presentation, I think all issues related to LIT fees can be addressed in the context of the Comprehensive Regulatory Review and, as I said, we will launch this process later this year. In the meantime, I do want to point people to the option in ordinary administrations, particularly Directive 27R and paragraph 7(1)(e) that provides ways in which an advance on Trustees remuneration can be approved in Ordinary estates. So, while a short term fix for summary administration estates isn't possible as we need to go through our consultation process first to get there, perhaps taking an advance in appropriate circumstances in Ordinary estates can relieve some of the pressure.

6. Question: Can you speak to the OSB views on third party debt consultants?

Superintendent: This remains one of our priorities. We are going to continue to work with our partners, use all of the tools at our disposal and think about new tools to address this issue. Particularly of concern is when debtors are getting false or misleading information, paying for services they do not need and in cases where we see negative impact on creditors. For Licensed Insolvency Trustees, the best approach is to maintain the highest quality of service so that the profession maintains a reputation of service quality and trustworthiness. I think that is one of the great ways to combat players that are coming into the market. Secondly, LITs should not support this marketplace through relationships or referrals because I think, over the long term, that is negative for the marketplace, not just for debtors and creditors but for LITs at the end of the day.

7. Question: There have been many views that consumer insolvency filings will grow significantly after the Canada Emergency Response Benefit (CERB) ends, when we get to the fourth quarter of 2020 or early 2021. What is the OSB's view of what it might see in insolvency volumes for the rest of 2020, 2021 considering there has been a significant decrease in filings in the last 6 months? Before the pandemic hit, insolvencies were growing at a good clip. What do you expect filings to be in comparison to 2019?

Superintendent: It is something we are watching very closely. First of all, while 2019 statistics were high in terms of pure numbers, the rate of per capita insolvencies has not changed that significantly over the years. You have to remember that Canada's population has grown over time. That still means that we have a lot of filings while the LIT population hasn't changed that significantly. What has changed, based on the data we look at, is that LIT firms appear to be becoming more efficient. I am encouraged by that. I think the capacity is there on the LIT side to handle an increase in insolvency filings. I also think the capacity is there on the OSB side. We have tested our E-Filing system to confirm that the system could handle a number of filings that far exceeded what we saw in 2019 or 2009. We also have levers that we can use to help to make sure the system works. For example, the remote assessments and counselling should help provide efficiencies for LITs and provide additional capacity. Also, if volumes surge and LITs had to really turn their focus to opening new estates, we could signal that we would be less focused on the closing statistics for a temporary period. I am hopeful that this time of relative calm has allowed LITs to get estates closed, subject to some challenges with courts, of course. One area that I want to explore more is court capacity. In 2009 that was one challenge we observed, so we want to be proactive in talking with some of the courts where we might see the surges to see what solutions we can find there.

Questions Received But Not Answered During the AGM

8. Question: The *Commissioners for Taking Affidavits Act* has suggested a modified version of the jurat for remote commissioning. Software programs currently do not allow for a wording change. What is the expectation of the OSB as to how the statement of affairs should look

given hard copy, with the new wording of the jurat, may look different than the copy we can send via e-filing through the software?

Superintendent: LITs should comply with the applicable provincial regulations with regard to remote commissioning and retain original copies of these documents as part of their records.

9. Question: There has been some suggestion that there could be a national licence for LITs. Can you comment on this?

Superintendent: This is a much larger question that deserves appropriate consideration. It may be something to consider, but for the year to come, the OSB will focus on the most immediate, high impact changes with the lowest system risks in order to address COVID-19 challenges and to support economic recovery.

10. Question: What are the plans regarding remote assessments. Is it the intention to allow these to continue?

Superintendent: As you are aware, on June 8, 2020, the Superintendent issued a [message to LITs](#) wherein it was communicated that the option to conduct remote service delivery of assessments was extended to March 31, 2021, with no need for separate approval. The OSB is currently analyzing the impact of remote service delivery and, in that regard, will be consulting in late November with LITs, debtors and OSB staff, on their experiences with remote assessments. The OSB will make a determination on remote assessments and communicate with stakeholders as soon as possible.

11. Question: A court appointed receiver received a denial of the Canada Emergency Wage Subsidy (CEWS) and wondered if the OSB could look into the matter.

Superintendent: Following receipt of this question, the OSB contacted the Canada Revenue Agency to discuss the situation and understands that the CEWS was subsequently granted to the company, in spite of its receivership status.