

CAIRP AGM September 2022 – Summary of OSB Presentation

The Canadian Association of Insolvency and Restructuring Professionals (CAIRP) held its Annual General Meeting (AGM) on September 15, 2022. The event was held virtually again this year. Prior to the start of the CAIRP AGM, Elisabeth Lang, Superintendent of Bankruptcy, provided an update on the Office of the Superintendent of Bankruptcy's (OSB) [2021-2022 Business Plan](#) priorities, as well as some insolvency statistics and a few notable legal issues.

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

Summary

In her opening remarks, Superintendent Lang spoke about the consultations with stakeholders that took place in 2021 with regards to the review of directives and regulations under the *Bankruptcy and Insolvency Act* (BIA) and *Companies' Creditors Arrangement Act* (CCAA). She took the opportunity to thank LITs who provided input for this review, noting that the OSB had analyzed the submissions received and was in the process of developing a phased implementation plan. She mentioned that LITs could expect a consultation on key forms soon. She also mentioned that the OSB is seeking changes to the BIA and CCAA regulations through a longer, formal process that involves seeking Treasury Board approval.

Superintendent Lang noted the launch of the [OSB's new Debt Questionnaire](#) on its [Debt Solutions Portal](#) earlier in the year, adding that the questionnaire will help people identify what steps other Canadians, in similar serious financial situations, took to deal with their debt.

The Superintendent highlighted the fact that strengthening the integrity of the OSB's compliance framework has been a core priority for the OSB in the last few years and that several projects were completed or advanced in 2021-22 to this effect. This includes (inter alia) the creation of a new Integrity and Enforcement branch which centralizes OSB's expertise for major cases. This new branch is tasked with supervising CCAA and more complex BIA insolvency files, professional conduct investigations and conservatory measures. This group also brings together the OSB's Special Investigations Units to increase the OSB's capacity and focus on enforcement of criminal offences within the insolvency system.

Superintendent Lang was also proud to report that the OSB implemented a new Debtor Compliance Program with an overhauled Case Management System, which leverages artificial intelligence to more efficiently detect cases of debtor non-compliance that warrant further enforcement activities. The OSB is also leveraging artificial intelligence in the development of an LIT Risk Assessment model. The Superintendent went on to highlight the OSB's publication of a Compliance Promotion Framework with the goal of strengthening the compliance program by encouraging voluntary compliance. The framework envisions a greater focus on the rights and responsibilities of stakeholders in the insolvency system; providing clarity regarding OSB's

position and interpretation of the regulatory framework and reinforcing the consequences of non-compliance.

The Superintendent mentioned that the OSB is continuing to address issues relating to the debt advisory marketplace including engagement with partners to close the legislative gaps that currently exist in this field and to encourage them to address cases of false and misleading information.

The Superintendent shared that the OSB is continuing with its IT modernization work, which includes significant updates to the estate administration and e-filing systems and continues to invest in Operational Training.

Superintendent Lang highlighted the fact that the OSB engaged with stakeholders on the review of its Licensing Program to assess the impact of recent technological and operational innovations, taking into account evolving LIT business models as well as debtor and creditor preferences for insolvency services. While the COVID-19 pandemic enabled a trial of remote service delivery which proved to be quite effective, the majority of LITs did not favour significant shifts in the Licensing program or in requirements for physical offices, so the OSB will maintain the status quo for now. Following the Licensing Program review, the OSB established a pilot project to allow candidates appearing before Oral Boards to select the option of a licence limited to either consumer or corporate filings, or both. The pilot project is aimed at supporting diversity and inclusion in the LIT profession while maintaining high standards of training and knowledge for consumer and corporate insolvency matters.

The Superintendent also shared that in 2021-22, a committee composed of federal economic regulators was created to share information on trends and challenges with the first several meetings focusing on criminal enforcement. She noted that the OSB continues to convene a conference for registrars on a regular basis, providing registrars with an opportunity to discuss insolvency topics of national interest and share best practices.

The continued importance of CAIRP and the OSB working together was highlighted by their collaboration towards increasing diversity in the LIT profession. The Superintendent pointed to the [OSB and CAIRP Joint Statement on Representativeness in the LIT Profession](#) and the [OSB/CAIRP Guide to Promote Diversity and Inclusion](#) which were recently published.

The Superintendent presented some 2021-2022 results including, for example, the fact that there were 92,330 BIA insolvency filings and 18 filings under the CCAA; the OSB issued 35 new licences and renewed 1,197 licences; 146 remote LIT Office visits were conducted; the OSB completed 558 examinations of debtors and undertook 220 court interventions to remedy non-compliant behaviour by debtors.

The Superintendent then presented statistics on insolvency filing volumes; the median dividend paid to creditors and the median recovery rate for consumer and business insolvencies from both bankruptcies and proposals; the number of business entries and exits as compared to

business insolvency rates; the top three sectors for CCAA filings between 2010 and 2021; and a comparison of insolvency filing volumes in Canada, the United Kingdom, the United States and Australia.

The Superintendent then covered a few notable developments. She noted that Bill 96 in Quebec, *An Act respecting French, the official and common language of Québec*, which was assented to June 1, 2022, had given rise to some concerns about access to justice given the requirement to translate English pleadings into French and she pointed to the case of [Mitchell v. Attorney General of Quebec, 2022 QCCS 2983](#) which temporarily suspended the application of sections 9 and 208.6 of the Act until a hearing on the merits.

Superintendent Lang noted that the question of what is to be done with a bankruptcy where a CCAA filing is subsequently made was an issue before Madam Justice Fitzpatrick in the matter of *EncoreFX Inc. (Re), 2021 BCSC 750 (CanLII)* and she shared her position that the transitioning of a bankrupt debtor company into a CCAA proceeding should have the same impact as transitioning into to a BIA Division I proposal pursuant to BIA ss.61(1): such that the bankruptcy should be annulled *ab initio* concurrent with the CCAA Plan being sanctioned by the court but that the court cannot waive the taxation process. Superintendent Lang noted that LIT fees should not be fixed by the court at the time of the annulment, but rather, that the LIT must still forward a copy of their final statement of receipts and disbursements, and dividend sheet, to the OSB to allow for review, comment and taxation per section 152 of the BIA. She stated that taxation is a crucial part of the Superintendent's broad statutory authorities to supervise and guard the integrity of the bankruptcy system and that these statutory authorities cannot be ousted by courts.

The Superintendent thanked CAIRP and LITs for their participation and for their continued collaboration.

Questions and Answers

Question 1: Can the OSB provide an update regarding the attestations LITs had to make by April 30 of this year to the bank concerning Canada Deposit Insurance Corporation (CDIC) coverage of trust account balances?

Superintendent: The OSB has been working with CDIC to publish a notice to inform LITs that the government made important changes to the rules governing deposit insurance protection for deposits held "in trust" at CDIC member institutions. These changes, which took effect [April 30, 2022](#), introduced new disclosure requirements for trustees. Under the new rules, certain trustees who hold deposits in trust for clients, in a professional capacity, are now able to designate some, or all their accounts as Professional Trustee Accounts (PTA). Trustees who designate their trust accounts as PTAs will benefit from streamlined beneficiary reporting requirements. (Note: the notice regarding the [Important changes made to the CDIC Act that may impact LITs](#) was published on September 22, 2022).

Question 2: Is there an update regarding the expected OSB Position Paper on who pays for interpreter's fees in a summary administration?

Superintendent: There are ongoing discussions between CAIRP and the OSB with regard to a draft Position Paper on this issue. It will be discussed at the Consumer Practice Liaison Committee meeting on September 20th and the Position Paper will be published on the OSB's website in due course.

Question 3: Can you provide an update regarding the development of a Trustee Annual Report?

Superintendent: The OSB formed a working group with a number of LITs to develop a Trustee Annual Report (TAR) to be completed when licences are renewed. The report will collect information on LIT business models and practices to help inform the OSB's oversight activities and help reduce the administrative burden on LITs, for example, by avoiding certain requests for information during Office Visits and helping OSB plan those visits more effectively. The OSB is working with its Chief Information Officer on implementation which may follow the upcoming renewal period due to competing priorities.

Question 4: As you know, the last two years have been challenging for all businesses including the insolvency and restructuring profession. Our members are experiencing a slowdown to their businesses as a result of the pandemic and the bite of inflation. Given this, the time has never been more critical to address the tariff issue. Can you please advise when we can expect increases in the tariff to assist the LIT firms as they move forward?

Superintendent: Recognizing that the last two years have been very challenging for businesses, including the insolvency and restructuring profession, it is important to note that an increase to the tariff is not a foregone conclusion. As mentioned earlier, changes to BIA and CCAA regulations involve significant work and a very structured, formal process including thorough analysis before a recommendation is made to Treasury Board. It is therefore difficult, at this stage, to give a firm estimate as to when this issue will be brought to Treasury Board for consideration.

Question 5: You briefly mentioned the debt advisory marketplace. Can you provide more details on what you feel is necessary to address this issue and ensure the public is protected?

Superintendent: After a significant period dedicated to exploring and understanding the debt advisory marketplace, the OSB is committed to ongoing efforts to take meaningful action where LITs' relationships with the debt advisory marketplace lead to non-compliant or unethical behaviour. The OSB is taking a multi-pronged approach including LIT office visits (LITOVs) and appropriate follow-up actions; addressing cases where non-LITs appear to be offering insolvency solutions; engaging with the provinces and the Financial Consumer Association of Canada (FCAC); raising consumer awareness through promotion of OSB's Debt Solutions Portal and developing a joint consumer alert with CAIRP.

The OSB has also issued numerous cease and desist letters and taken compliance action against various debt advisory entities purporting to be LITs; engaging in false or misleading advertising and negatively impacting the integrity of the insolvency system.

All LITs should bear in mind the importance of avoiding questionable business practices that may jeopardize their integrity, independence or competence and should carefully consider both the individual consequences and risks of non-compliance as well as the impacts on the LIT profession as a whole. LIT choices can have the greatest impact on the debt advisory marketplace.

(Note: the OSB-CAIRP consumer alert, "[Need help with your debt? Ask questions and shop around to avoid paying unnecessary fees](#)" was published on November 9, 2022).

Question 6: A number of CAIRP members operate practices that are national in scope. We hear from CAIRP members that each OSB region appears to have its own policies and procedures, and this makes it difficult to have one “set” way to interact with the OSB. Can you let us know what steps the OSB is taking to operate as a single national entity?

Superintendent: The OSB has national policies and procedures and strives to achieve national consistency, though regional circumstances and jurisprudence may sometimes come into play. This fiscal year, the OSB undertook a review of its compliance framework and associated procedures, along with its training material. This will help clarify sources of potentially inconsistent program and policy application. Furthermore, efforts with regards to the OSB’s LIT risk assessment model, commencing with the Statement of Receipts and Disbursements risk model, have been initiated with the goal of national consistency in mind.

The OSB is also working on an adjusted approach to monitoring national and multijurisdictional firms. This initiative is still very much in its early stages, however, the goals include achieving greater national consistency, efficiency and reducing administrative burden for LITs.

Question 7: The Canadian Federation of Independent Business recently issued a press release indicating that business bankruptcies are on the rise, but account for only 10% of looming business closures according to their research. Ensuring Micro, Small and Medium Enterprises (MSME’s) have affordable access to the insolvency and restructuring system is critical during this time. Other countries have implemented new programs to address this matter. CAIRP is advocating for changes with ISED but we are interested what efforts the OSB is undertaking within government to advocate on behalf of MSMEs.

Superintendent: As mentioned previously, other colleagues within the department have the lead on legislative matters, but we regularly emphasize the issue of fair and reasonable access to the insolvency system for both MSMEs as well as Low-Income, Low-Assets (LILA) and No-Income, No-Assets (NINA) debtors. The OSB has regular meetings with its ISED policy colleagues to share data and analysis, and suggest recommendations in support of potential legislative changes.