

CAIRP Webinar June 2020 / Presentation by the Superintendent of Bankruptcy / Questions and Answers

- 1. Question: Do you see the omnibus order being extended? How does the OSB see it operating in a world where the measures may not be the same from province to province in the event of a second “wave” of COVID-19.**

Superintendent: No. I do not believe there is a compelling enough case to support an extension in every single province and territory given the varying states of re-opening. I would be concerned that we may end up with a patchwork of orders across the country and, obviously, this is not ideal for a federal statute. Also, given that legislative proposals relating to legislative time limits and deadlines have been tabled, I think the courts would view Parliament as the right place to address these issues now. Given the uncertainty of the legislative process, I would suggest LITs focus on the June 30th end date in the orders, for now.

- 2. Question: Does the OSB have any concerns / perceive any new risk / foresee challenges in the current COVID-19 environment?**

Superintendent: The OSB is actively assessing risks and opportunities arising from this situation. Two risks that I would flag are: first, LIT businesses who may be suffering financially right now; and secondly, system capacity going forward. If any LITs are facing financial challenges, I hope that they will access the government support that is available and also reach out to the OSB for assistance.

- 3. Question: Although the Superintendent’s communication from June 8, 2020 is supportive of assessments other than in-person up to March 31, 2021, has anyone from the OSB been in contact with provincial authorities regarding the appetite of those authorities to permit other than in-person commissioning of Statements of Affairs?**

Superintendent: Interim measures, such as virtual oaths or witnessing of documents by video conference that allow for other than in-person commissioning of Statement of Affairs were put in place in all provinces and territories. A permanent solution for BIA matters would require a legislative change and, while it is something we could explore, these kinds of changes take time.

- 4. Question: Should assessments other than in-person be permitted on an ongoing basis, would the Superintendent contemplate approving cross provincial licenses for LITs in order to improve access to the insolvency system?**

Superintendent: This is a much larger question that deserves appropriate consideration. It will be something to think about but I do want to manage expectations in terms of OSB priorities for the year to come where we 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.

- 5. Question: Your June 8, 2020 message regarding conducting assessments other than in-person references the fact that “LITs must consider their ability to continue to provide adequate in-**

person services in the debtor's locality as required, at no additional cost to the estate or the debtor." Is the intent of this to prepare LITs for future service delivery, where LITs may conduct assessments remotely on an ongoing basis, however, for the assessment to be conducted remotely, the LIT would be required to have a resident or non-resident office in the locality of the debtor?

Superintendent: Yes, for now the rules are status quo. LITs will need to be ready to return to in-person service delivery in case we find it is not appropriate to make this change permanent.

- 6. Question: As a counter argument to the public embracing assessments other than in-person, there will be a small number of debtors who are technically challenged or do not have access to communicate electronically. Should there be a permanent movement to assessments other than in-person, is the OSB open to receiving submissions outlining possible solutions as to how these debtors can be serviced?**

Superintendent: The OSB is always open to hearing from LITs and, as I have said before, the profession is a great source of practical and innovative solutions. We will, of course, consider the system broadly and ensure that any risks to integrity can be properly addressed. I think a multi-channel approach will be necessary as I believe insolvency services should be delivered in a way that best meets both the debtors' needs and maintains the integrity of the insolvency system.

- 7. Question: We live in the midst of a long-term technology revolution. Technology changes will accelerate. However, the current counselling directive is clear that counselling is to be conducted in-person and that delivery of counselling via videoconference is only to be conducted by exception. As the use of technology continues to evolve in every day business and is becoming a preferred method of communication by the general public, do you foresee a change in the counselling directive that allows for videoconference delivery to be equally acceptable as in-person counselling?**

Superintendent: As mentioned, we are considering all challenges and opportunities and will be looking for efficiencies and improvements to service delivery that meet the needs of the system and do not pose undue risks.

- 8. Question: While we are on the topic of automation, is there any plan for Directive 5R5 s. 7(6) to be amended to better facilitate direct dividends to creditors? Several of the financial institutions that LITs use cannot integrate the directive's current requirements with a commonly used LIT database system, thus making the automation of these types of payments prohibitive.**

Superintendent: As mentioned, the OSB is currently looking at Directive No. 5R5 *Estate Funds and Banking* and the issue of electronic fund transfers to creditors or other third parties is proving to be complicated so we are working on solutions to find a way to enable it while ensuring an appropriate audit trail.

9. Question: Regarding e-filing – has any thought been given to allowing people to indicate a gender other than male or female?

Superintendent: This is a great question and it is something we have been examining at the OSB. This could be addressed via OSB's planned comprehensive regulatory review project, which would include form changes. This project is of course subject to a possible shift in priorities due to the impacts of COVID-19. We will need to evaluate possible form changes in terms of privacy considerations, and of their potential impact on data cleanliness for our database. This last point is very important in order for the OSB to make effective use of artificial intelligence; which is something we are currently exploring with our Debtor Compliance program. I cannot speak to specific timelines for form changes, but we will look at changes in the near term, so please stay tuned.

10. Question: In your remarks, you mentioned concerns about LITs soliciting insolvencies, could you provide any examples of the kinds of things that you've seen that cause concern in this regard?

Superintendent: I can't point to any solicitation activity in particular, but I am concerned about misrepresentations. Examples would include references to the consumer paying only 8 cents on the dollar or paying 20% of their debt. The concern is that debtors may not be getting a full and accurate picture, i.e. that the LIT will have to assess their affairs in bankruptcy or that the amounts payable in proposals will be voted on by creditors. Solicitation is very serious and, of course, there are criminal consequences in the BIA.

Mark Rosen, Chair, CAIRP: Echoes the Superintendent's concerns. LITs are the go-to person for debtors looking for information. We expect LITs to act with highest integrity in their work and to abide by CAIRP's rules of professional conduct and the rules and regulations on advertising. Most are working properly. Need to be careful to not mislead the public, particularly in these difficult times. Practice with integrity. Otherwise, the OSB will take action.

11. Question: Is there any guidance for creditors to vote on Division I proposals during the pandemic?

Mark Rosen, Chair, CAIRP: Suggests that meetings should be conducted as usual, where possible, with adjournments as needed.

Superintendent: Agrees with the Chair. Would also flag, in case it is pertinent to the question, that the OSB issued guidance on "holding proposals" as an option to deal with the 6-month time limit following the filing of a Notice of Intention.

12. Question: Is there any advice for LITs when they have "no choice" but to sell a bankrupt's home?

Mark Rosen, Chair, CAIRP: Dislocating families during the current pandemic and having people to view the property causes serious concerns. Any situation where you need to sell a property would need to be put on hold until it can be dealt with properly. Every circumstance is different and must be viewed accordingly. There would certainly be a difference between a voluntary sale and one arising from a foreclosure or forced sale process where the debtor may have few options.

Superintendent: LITs need to use their judgment, looking at all of the circumstances and considering all of the facts on a case-by-case basis. This is why we have LITs doing the job. If it were easy, we could just use computers. Directions can be sought where necessary and courts are likely to be sympathetic to COVID-19 related challenges.

13. Question: Is there a forum for people working to get their LIT licence to engage with others doing the same courses?

Mark Rosen, Chair, CAIRP: There is a web group for Chartered Insolvency and Restructuring Professional Qualification Program students.

14. Question: What is the status of the OSB's work on a process for Low-income/low asset (LILA) and No-income/no-asset (NINA) estates?

Superintendent: Last year the OSB prepared a detailed report about low-income/low asset (LILA) and no-income /no asset (NINA) debtor insolvency files in Canada. The OSB also conducted a comparative study of programs existing in other jurisdictions as well as conducting a statistical analysis of LILA/NINA debtors who made an insolvency filing. This priority is part of our 2020-2021 Business Plan. Right now, however, the OSB is concentrating on COVID-19 issues. It is difficult right now to predict at what point we will be able to proceed with our 2020-2021 Business Plan priorities, or at what point in time we will be able to publish this Business Plan as well as the report written in 2019-2020. When we'll be able to do so - this year if possible – the LILA/NINA debtor project will be included in our in-depth regulatory analysis project. Actors will accordingly have other opportunities to give their point of view in the consulting component of the in-depth regulatory analysis project.

15. Question: Is the OSB willing to implement a simplified procedure for the administration of simplified corporate bankruptcies and simple Division I proposals (e.g. presumed approval, creditors' meetings only on request, deemed ratification, deemed taxing of bills of costs, etc.?)

Superintendent: I personally believe that the insolvency system would be more efficient if everyone could have appropriate access to it. Likewise, I think that we should consider a program that better meets the needs of LILA/NINA debtors and that a simplified program for micro, small and medium-sized businesses would be beneficial. I think that this would increase the chances of successful restructuring that businesses have and would reduce the number of businesses, which merely close down without filing insolvency procedures. It is most often preferable for all of the parties involved that a formal insolvency procedure be filed. Such changes, however, require legislative amendments, and this type of project is directed by our colleagues at Innovation, Science and Economic Development Canada. I also wish to underline the fact that currently the government prioritizes emergency measures in connection with COVID-19. It would accordingly be a challenge to have such a legislative project tabled within the near future.

16. Question: Will there be more CAIRP webinars in French?

Jean-Daniel Breton, Vice-Chair, CAIRP: Yes and the ones we can confirm are:

- Technical Update for Consumer Practitioners;
- The Great Debate;
- Ethical Issues for Insolvency Practitioners;
- Intellectual Property and Insolvency; and
- Challenges for Insolvency Practitioners During the Pandemic.