

## **CAIRP AGM September 2021 – Summary of OSB Presentation**

The Canadian Association of Insolvency and Restructuring Professionals (CAIRP) held its Annual General Meeting (AGM) on September 14, 2021. The event was held in virtual format in light of the ongoing COVID-19 pandemic.

Invited guest speaker Elisabeth Lang, Superintendent of Bankruptcy, provided an update on the results of the Office of the Superintendent of Bankruptcy's (OSB) 2020-2021 Business Plan priorities, and also highlighted some recent important initiatives.

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

### **Summary**

In her opening remarks, the Superintendent spoke about the OSB's consultation on a comprehensive review of directives and regulations under the *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA) in support of OSB's multi-year priority to modernize and improve the regulatory framework. She noted that the OSB is carefully examining all of the feedback received and is developing an implementation plan. She thanked CAIRP and stakeholders for their extensive input, and mentioned a few early changes that could be expected soon such as making remote services, based on fully informed debtor choice, available permanently.

With respect to the ongoing priority to strengthen the OSB's Compliance Framework, the Superintendent reported that great progress and significant compliance results were achieved on both LIT and debtor fronts, all while the OSB shifted to remote compliance operations in response to COVID-19. The debtor compliance (DC) pilot project using Artificial Intelligence (AI) and enhanced technology was rolled out nationwide, making OSB's DC work more efficient and effective. The Superintendent also noted that LIT compliance activities were being adapted to address the most serious insolvency offences, with an increased focus on compliance promotion and risk-based approaches.

Another core priority for the Superintendent has been engagement with stakeholders. The Superintendent affirmed the success of the 2020 Registrar's Conference, convened by the OSB and led by the Registrars. There was a great deal of interest and engagement with more than 60 participants including OSB, CAIRP and Innovation, Science and Economic Development (ISED) policy observers. The OSB received positive feedback and interest in having more regular meetings for Registrars going forward.

The Superintendent also spoke to the progress made on OSB's 2020-2021 priority to help Canadians find the right debt solution by helping them make informed choices on how best to manage their financial challenges. She noted the comprehensive research that was conducted to understand various debtor pathways to inform ongoing enhancements to the OSB's debt solutions portal in 2021-2022, including a comparative table of debt solutions and the launch of an AI-capable Digital Debt Advisor tool.

Protecting consumers and debtors in the debt advisory marketplace continued to be a priority for the Superintendent, who explained that since 2020-2021, the OSB has engaged with stakeholders and provided advice to clarify published information for debtors, and that continued discussions with federal and provincial stakeholders will help identify and address inappropriate practices in the debt advisory marketplace.

The Superintendent provided an update on OSB's Operational training revitalization that continued through 2021, resulting in a new Operational Learning portal offering learner-centred training to ensure all employees are well-equipped to deliver OSB's mandate.

The Superintendent presented some 2021 highlights. She noted a decrease in complaints, the lowest rate for insolvency filings seen since 1995, the highest ever rate for CCAA filings, and heavy OSB website traffic on the Insolvency Counselling Program pages. She also highlighted that the OSB responded to 18,062 enquiries and completed 114 external requests for insolvency data.

The Superintendent noted the amendments to the Estate Funds and Banking directive to allow electronic signatures for bank reconciliations and to facilitate electronic fund transfers. She also flagged the release of a new integrated Insolvency Counsellor registration tool in the OSB License Administration Application (OLAA) to reduce the administrative burden on LITs.

A strong advocate for diversity and inclusiveness, the Superintendent spoke of the continued collaboration between OSB and CAIRP in support of representativeness in the LIT profession. This included implementing a self-identification data collection process for LITs, as well as candidates enrolled in the Chartered Insolvency and Restructuring Professional Qualification Program and the Practical Course on Insolvency Counselling. She also mentioned plans to publish an OSB/CAIRP Guide on increasing representativeness in the LIT profession.

She noted that the 2021 Oral Boards went smoothly and saw one of the highest success rates in granting new trustee licences, all the while maintaining excellent service delivery in spite of the pandemic.

The Superintendent also provided highlights from debtor feedback regarding the insolvency counselling program, obtained between 2020-2021. The analysis of the feedback received indicated that the majority of debtor counselling sessions were conducted in compliance with the directive and viewed by debtors as useful for avoiding future insolvencies; LIT employees provided the majority of the counselling sessions, the vast majority of which conformed with standard timelines as outlined in the directive; and almost half of debtors utilized the optional online modules.

After sharing recent highlights and results from 2020-2021, the Superintendent brought to light the increasing global incidence of cyberthreats, urging LITs to consider upgrading network systems to safeguard against the recent exponential growth in security breaches and ransomware, and underlining the legal obligation of companies to inform customers and the Privacy Commissioner of breaches. The Superintendent shared information on a few resources to help LITs, adding that certification through a program such as CyberSecure Canada, a collaboration between a number of federal departments, can provide benefits including increased cybersecurity, increased stakeholder confidence, and competitive advantage.

Prior to proceeding with the Question and Answer segment, the Superintendent clarified some ambiguity resulting from the Eyton decision in Ontario (re: John Trevor Eyton, 2021 ONSC 1719 (CanLII: <https://canlii.ca/t/jdms5>) regarding statute-barred claims, confirming that statute-barred claims do not constitute a valid claim in insolvency. She noted that the OSB, in collaboration with CAIRP and the Consumer Practice committee, will consider amendments to the Proof of Claim and whether further guidance is required to encourage LITs to ask debtors specific questions at the initial assessment to

ascertain whether claims are statute barred and to use their professional judgment in dealing with such claims.

The Superintendent thanked CAIRP and LITs for their continued efforts in supporting debtors while dealing with the ongoing pandemic and for continued collaboration in maintaining the integrity of Canada's insolvency system. She also thanked Mark Rosen, outgoing Chair of CAIRP, for his significant contribution to the Canadian insolvency system over the course of his time as Chair.

## Questions and Answers

- 1. Superintendent Lang, you provided some details on the rollout of the next steps with the regulatory review and any resulting changes. Do you envision that you will have completed the rollout in the next 12, 18 or 24 months?**

Superintendent: We are still in the process of triaging the projects and determining what will be able to be implemented sooner versus later, and we have a fairly significant list of changes to consider. Some important changes will inevitably take more time, where regulatory changes are needed for example as that requires a Treasury Board submission. There are many steps to get there, as well as finding availability on the Treasury Board agenda – when they are sitting, which they typically don't do during elections. Another element that can take additional time is anything with IT implications. So, form changes, which will definitely be on the table, are an example of this where IT changes have to be developed on our end and business requirements shared with the software vendors and LITs with proprietary software – and then they need sufficient time to make the changes on their end. While we are not in a position to provide specifics, much beyond what I mentioned in my presentation, we will share more information with LITs when we know the plan. I think it is safe to say that the changes will not all be able to be implemented within the next 12 months.

- 2. CAIRP has identified that Micro, Small and Medium Sized Enterprises (MSMEs) insolvency is an issue in Canada and provided the OSB and Innovation, Science and Economic Development (ISED) a proposed solution to the MSME challenge. In your view, what is required to move this file forward and ensure all MSMEs have access to the insolvency system?**

Superintendent: As this would be a legislative change and falls under the responsibility of our ISED policy colleagues – and, particularly, because we are in the middle of an election, I can't say much about it. Generally speaking, I would note that all legislative changes have to be prioritized within the context of competing policy agenda items. They also require consultation and a Treasury Board submission, so needless to say, it can be a very lengthy process. I think following up with ISED leads on this matter, post election, would be the best approach.

- 3. You raised the issue of cybersecurity. What are your concerns as they relate to Canada's insolvency system? Is this something that the OSB is actively looking into? For example, are there perceived risks around e-filing, the electronic transmission of documents in general and the insolvency software we are currently using?**

Superintendent: In the course of our annual business planning exercise, we look at trends and issues that may be relevant to the insolvency system. I don't have any particular concerns or specific examples of unique risks for LITs, but this is something that every single Canadian business should be prioritizing given the 600% increase in ransomware attacks alone. This is a very real and present threat and no business is immune. The government is certainly taking it seriously and, as an example, the change in the login process to OLAA this past summer was the result of security upgrades.

**4. Should we expect video assessments to be allowed to continue beyond the end of this year and what is the OSB's view on "phantom" non-resident offices when LITs have no real significant presence?**

Superintendent: Note that currently, it is necessary to have a resident or non-resident office in the jurisdiction in order to accept a filing. There are different ways to meet this requirement, including having viable flex space approved by the OSB when seeking approval for a non-resident office. However, as mentioned in my remarks, it is hard to see a future where bricks and mortar requirements for non-resident offices remain a factor in enabling debtor choice in a digital world. Imagine a debtor in Kenora, Ontario who is fully informed about their options, who would like remote services and is considering two LITs who are licensed in Ontario. The debtor may decide that one LIT is a better fit for them, but then would be barred from choosing that LIT, simply because the LIT does not have a non-resident office in Kenora – if the current office requirements are maintained. In terms of empowering debtors and in terms of open competition, I just don't see how we could justify such an outcome from a policy perspective.

**5. More and more, we are hearing about comparisons between the United Kingdom and Canadian insolvency regimes. In your presentation, you mentioned "breathing room" legislation that they have in the UK. Can you explain what that is?**

Superintendent: In many countries, similar legislation has been introduced and, from what I understand from hearing some experts from those jurisdictions, this is in part to address the debt advisory marketplace. When a debtor consults a recognized professional – in the UK this would essentially be the equivalent of credit counsellors – they can obtain a 60 day stay of proceedings. The idea is that they will be given the time and advice necessary to choose the best option for their particular debt issues. This is one approach, but I would hope that we could get debtors the information they need to help them make the right choice without having to pass similar legislation.

**6. You indicated that the OSB has conducted debtor pathway research, you are looking at an AI supported digital advisor, comparative tables and you are hoping to launch these new tools in 2021-22. This is something that some LITs are already doing in some ways. One could argue that the OSB will now be competing with LITs for views on the internet. On the other hand this could be an opportunity to steer debtors away from bad actors. I would hope that the OSB would be steering debtors to get a free consultation from an LIT in most cases. How does the OSB balance all these things?**

Superintendent: Again, this is about helping debtors to find the right solution for their particular financial issues as directly as possible and helping them to avoid paying for services they may not need. As you know, some debt advisors charge as much as \$2,400 and it would appear that their only “service” is to pass the debtor along to an LIT to file a consumer proposal. In my view, it would be better for all stakeholders if an insolvent debtor who needs a BIA solution could get to the LIT directly - without spending that money and facing delays along the way. The key here is that the OSB is not a private sector business, so we hope the information we provide can be seen as unbiased and reliable and we hope that all stakeholders will help to promote these tools for the good of indebted Canadians and the insolvency system.