

CAIRP Webinar June 2022 – Summary of OSB and CAIRP Presentations

The Canadian Association of Insolvency and Restructuring Professionals (CAIRP or Association) hosted their first webinar of their 2022 - 2023 National Webinar Series, together with the Office of the Superintendent of Bankruptcy (OSB). This online event featured presentations by Jean-Daniel Breton, Chair of the CAIRP Board of Directors, and Elisabeth Lang, Superintendent of Bankruptcy.

In his presentation at the June 16 (English) and June 21 (French) online events, the Chair briefed members on CAIRP's continued efforts over the last 24 months to help members weather the COVID-19 pandemic; efforts to enhance the insolvency system through collaboration with the OSB, with Innovation, Science and Economic Development Canada (ISED), and with the Canada Revenue Agency (CRA); significant initiatives by CAIRP in the areas of education and communications; and, providing responses to government consultations. The Chair also provided an update on how the association has managed during the pandemic and key areas of focus over the past year and the year ahead.

In her presentation, the Superintendent provided an overview of the OSB's 2022-23 Business Plan Priorities; gave key updates on the OSB's work regarding the debt advisory marketplace and shared some operational highlights. The Superintendent also shared some important compliance reminders and provided some insight into key court cases of interest to participants of the webinar.

The event served to highlight all the hard work accomplished throughout the year by both CAIRP and the OSB towards advancing key initiatives and ensuring the proper functioning of the Canadian insolvency system. It was also an opportunity for the participating Licensed Insolvency Trustees (LITs) to direct questions to the Superintendent and the CAIRP Chair. Below is a summary of the presentations and a [record of the question and answer sessions](#) from the webinars.

Summary

Presentation by the CAIRP Chair

The CAIRP Chair began by welcoming participants to the June 16 and June 21 webinars and thanking Superintendent Lang for her participation. The Chair opened his presentation by acknowledging the challenging journey the COVID-19 pandemic had presented the insolvency and restructuring profession over the last 24 months and noted that while the industry appears to be past the hardest terrain, it does not yet seem to have an unbridled path. The Chair reported that as part of the association's annual planning process, the Board of Directors establishes high-level goals to guide the development of CAIRP's strategies, action plans and budget. When COVID-19 hit, the Board established an additional goal of implementing solutions to the challenges presented by COVID-19. The Executive Committee and Board have been meeting monthly to identify and mitigate financial and operating risks for CAIRP, and importantly, to discuss and get resolution for members on a broad range of issues, many of

which were due to the pandemic. The Chair further advised members that key performance indicators are also set to monitor and measure the association's success in achieving these goals and reminded members that they can review CAIRP's performance each year through the annual report which is published online in August.

The Chair noted that while a break-even result was initially anticipated for the 2021-22 fiscal year, education enrolment declined significantly in the last half of the fiscal year. The Association responded with administrative cost reductions to contain the impact and CAIRP finished the year with a small deficit. Given the current economic climate, the fiscal 2022-23 members' dues deadline was extended again to July 15, 2022. Fiscal 2022-23 is the seventh consecutive year with no members' dues increase.

The Chair reported that CAIRP launched the Insolvency Administrator Associate category. He reminded participants that the Association's members had ratified the by-law modifications that provide for this new Associate category at CAIRP's September 2021 Annual General Meeting, for individuals who have successfully completed CAIRP's Insolvency Administrator course and are employed by a CAIRP member. The Chair welcomed the inaugural Insolvency Administrator Associates to the OSB-CAIRP Webinar. He encouraged members who haven't had a chance to enroll their employees who meet the qualifications to do so, particularly given the pricing was kept low to encourage participation and there is a mutual benefit to the active participation from these associates.

On the education front, the Chair reported that 2022-23 work is in full swing as CAIRP continues the virtual delivery of all education programs including the tutorial, all exams and the Competency-based National Insolvency Exam (CNIE) assessment and appeal centres. He noted that while the 2021 Core Knowledge Exam (CKE) and Practical Course on Insolvency Counselling (PCIC) pass rates remain strong, the CNIE pass rate is not where CAIRP wants it to be. The Chair cautioned however against looking at a punctual pass rate, as the flow through rate is a better measure of candidate performance, and that rate is significantly higher than the yearly pass rate. That said, CAIRP is still striving to improve candidates' success at the CNIE while maintaining the required high-quality standards.

The Chair reported that a survey of 2020 and 2021 CNIE candidates was completed in February 2022. Based on the feedback and the analysis of candidate performance, CAIRP has made some modifications for 2022. The modifications include hosting five live exam preparation sessions from May to September which incorporate a new format developed to improve engagement and provide best value for candidates as they prepare for the CNIE in November. The candidates will also benefit from a CNIE tutorial supplemental course which includes the recordings of all tutorials and exam preparation sessions from the past two year. The Chair outlined other modifications to help candidates and enhance sponsor support throughout the program.

The Chair reported the CQP renewal is moving along, with the Intro Course to be launched in January 2023. Candidates need not wait for the renewed program however, as all of the enhancements introduced this year provide candidates with the support they need right now to be successful.

The Chair then turned to the issue of representativeness within the industry which he noted was very important to CAIRP and its members. He reported that great care has been taken with

CAIRP's education programs to ensure that course materials and examinations accurately reflect this goal. The Chair shared examples of CAIRP's efforts in this regard, including involving a psychometrician in the development of the examination questions to ensure that no candidate would be at a disadvantage.

To provide professional development (PD) for members during the pandemic, CAIRP introduced the National Webinar Series. The Chair reported that, building on the previous year's success, CAIRP released 28 original live and on-demand webinars in both English and French in 2021-22. He advised that the total webinar views reached over 3,800 and 81% of the membership attended one or more CAIRP PD webinars. The Chair further advised that in addition to the National Webinar Series, CAIRP also successfully delivered the Annual Review of Insolvency Law (ARIL) virtual conference for the ARIL Society which attracted more than 850 attendees. CAIRP members will again be provided with virtual PD offerings, including consumer, corporate, plenary and regional technical updates through the re-launch of the National Webinar Series for 2022-23.

The Chair reported that a number of initiatives were undertaken to help raise the LIT industry's profile over the past year. CAIRP was very active in its ongoing media outreach with the issuance of six media releases generating stories in major and regional news outlets across the country. The CAIRP Media Communications Committee along with the Provincial Associations initiated and drove an initiative this past spring which involved the creation of eight new provincial association websites that are closely aligned in brand look, feel and messaging with CAIRP and stem from the CAIRP website platform. The Chair asserted that aligned messaging will greatly assist the industry in its efforts to raise its profile and better serve the public with consistent, clear messages. The Chair thanked the CAIRP Media Communications Committee and the Provincial Presidents for their efforts.

The Chair announced that another CAIRP website project would be getting underway this summer. The initiative involves building a member firm directory on the CAIRP website so that CAIRP will be in a better position to proactively direct the public to search for member firms, including their websites, in addition to searching for members on the Find a Chartered Insolvency and Restructuring Professional (CIRP) feature. This initiative will provide added visibility and value to CAIRP members and will highlight that member firms are trusted federally regulated firms. This initiative will be a foundational piece in CAIRP's efforts to raise the industry's profile in the midst of the noise of the debt advisory marketplace. Links will also be provided to the OSB's listing of LITs and firms. The Chair encouraged all member firms to participate by sending in their corporate logos, website link and services provided to CAIRP at info@cairp.ca.

To recognize the tremendous efforts of the recent CIRP graduates, the Chair advised that ads featuring the 2021 graduates will again be placed in CAIRP's *Rebuilding Success* magazine and on LinkedIn. In addition to recognizing new members, the ads encourage readers to find out more about exciting careers in insolvency and restructuring. The ads demonstrate how the face of the LIT industry is evolving. Last year, 52% of CIRP graduates were female and over 20% of the graduates were of diverse backgrounds. This bodes well for the future of the industry. The Chair thanked the members for their efforts over the last few years as the insolvency industry embraced diversity and inclusiveness as part of its business practices.

The Chair reported that CAIRP has been collaborating with the OSB in numerous ways to strengthen relations and improve Canada's insolvency profession. CAIRP and its Committees were fully engaged on the OSB consultations over the past year and in particular with two major consultations: the OSB's Comprehensive review of directives and regulations under the *Bankruptcy and Insolvency Act* (BIA) and *Companies' Creditors Arrangement Act* (CCAA), and more recently, the OSB's Consultation on the Modernization of Physical Office Requirements for LITs.

CAIRP has also been raising a number of member issues with the OSB and CAIRP is seeing results. As reported in CAIRP's recent newsletter, the issue of a company identifying a consumer proposal as a bankruptcy on credit reports has been resolved and efforts are underway to resolve a similar issue with another company. CAIRP raised a number of issues flagged by members with the OSB, and in a number of cases, "Cease and Desist" letters were sent by the OSB, or the OSB referred the matters to the Competition Bureau for enforcement. CAIRP also raised with the OSB the possibility of better informing the public about the debt advisory marketplace by re-issuing a consumer alert originally released by the Financial Consumer Agency of Canada in 2019. The OSB is currently reviewing this potential initiative. These initiatives demonstrate the benefit to the insolvency system and to Canadians when CAIRP members and the OSB find common ground to work together.

To further enhance the insolvency system, CAIRP has also been meeting on a quarterly basis with ISED to discuss a range of issues including COVID-19 and the economy; public interest functions of public post-secondary educational institutions in insolvency and restructuring situations; super-priority for unfunded pension liabilities; and bilingual/multilingual insolvency court proceedings. ISED and CAIRP have agreed to continue to meet regularly going forward and the next meeting will again focus on Micro-Small and Medium Sized Enterprises (MSMEs). CAIRP is working closely with the CRA on a CRA Portal Project which will allow CAIRP members to e-file documents with the CRA, allow for two-way communications and provide better integration with other systems and the OSB.

The Chair also reported that CAIRP had another active year with interventions including the Sanaa Ismail Ali case in British Columbia and the Pierre Nolet case in Quebec. The Chair thanked the CAIRP Board of Directors, all of CAIRP's Committee members, the Provincial Presidents and Associations, and member firms for their excellent work and thoughtful feedback and volunteer efforts over the past year along with the superb work of CAIRP staff. He acknowledged CAIRP couldn't accomplish what it does without the hundreds and hundreds of volunteer hours and commitment to the insolvency and restructuring industry provided by CAIRP members.

The Chair concluded his remarks by thanking Superintendent Lang and her team for working so closely with CAIRP to work through the many challenges that COVID-19 presented. He advised that CAIRP looks forward to continuing working collaboratively with the OSB as the next round of OSB consultations get underway this fiscal year. The Chair then introduced Superintendent Lang to share her views and update.

Presentation by the Superintendent of Bankruptcy

The Superintendent expressed her appreciation for being able to connect with so many LITs at the same time with the online format of the webinar and also thanked the CAIRP Executive for another year of excellent collaboration. The Superintendent provided an overview of the OSB's 2022-2023 Business Plan Priorities, starting with the OSB's regulatory modernization project. She shared that this project will involve significant work in the year ahead and will continue beyond this year, following the 90-day consultation on the Comprehensive review of directives and regulations (CRDR) under the BIA and the CCAA that concluded in June 2021. Stemming from about 32 submissions received from stakeholders, the OSB counts a total of 373 itemized recommendations on various insolvency themes including: LIT licensing; virtual or remote proceedings and LIT offices; counselling and debt advisors; banking; taxation and fees; accessibility to the insolvency system; MSMEs; prescribed forms; and the Surplus Income Directive. The OSB is assessing the feedback and is planning the next steps in 2022-23. The Superintendent noted that one of the next steps will include consulting on drafts and then implementing amendments to directives and forms. In addition, the OSB will be undertaking a regulatory process to recommend amendments to regulations under the BIA and the CCAA. This will include consulting with key stakeholders and welcoming feedback from LITs on the proposed amendments and preparing a regulatory amendment package for Treasury Board approval.

The Superintendent also spoke about LIT licensing priorities for 2022-23 and shared some information on Oral Boards of Examination and the implementation of a licensing options pilot project. She mentioned that the OSB introduced the option to sit an oral board for a licence limited to either consumer or corporate practice. The goal of the pilot is to assess whether there is interest in a limited licence and if this option can reduce potential barriers for some candidates while maintaining high standards and, possibly, have a positive impact on the diversity of the LIT profession. The Superintendent highlighted the continued collaboration between the OSB and CAIRP on equity, diversity and inclusion and encouraged everyone to review the [OSB/CAIRP Guide to Promote Diversity and Inclusion](#) published in December of 2021. She noted that the OSB and CAIRP are now focusing on gathering information at the various stages of the licensing process in order to identify any potential barriers to entry, further highlighting the importance of ensuring there is an appropriate balance between rigorous training while avoiding unintended barriers to diverse talent given the proven benefits of increased diversity, equity and inclusion.

The Superintendent mentioned that the OSB is working to implement a Trustee Annual Report (TAR) to be submitted when licences are renewed, asserting that the TAR will help inform the OSB's oversight activities which can thereby help reduce the administrative burden on LITs. She shared an update on the recent consultation on Modernizing Physical Office Requirements for Licensed Insolvency Trustees, reporting that feedback received was overwhelmingly opposed to significant change at this time, and that a response along with guidance on licence extension requests will be published soon.

The Superintendent noted that in March the OSB published its Compliance Promotion Framework, which will focus on three key areas: emphasizing the rights and responsibilities of insolvency stakeholders; clarifying and communicating the OSB's position and interpretation of the regulatory framework; and, reinforcing the consequences of non-compliance. Compliance promotion is recognized as an efficient and effective regulatory tool, and the framework encourages stakeholders to comply voluntarily. The Superintendent then mentioned that the OSB is rolling out an internal Quality Assurance program to ensure that established standards, policies, and procedures are adhered to in order to ensure its activities support organizational excellence.

She then talked about the OSB's work over the last three years aimed at strengthening its Compliance Framework. The Superintendent noted that the OSB launched its new Debtor Compliance Management System which incorporates Artificial Intelligence (AI) for more effective and efficient detection of potential cases of debtor non-compliance. She mentioned that the OSB carried out a series of pilot Trustee Office Visits on LITs with significant affiliations to debt advisors, which will further inform the OSB's approach to addressing the compliance risks arising from LIT relationships with debt advisors. She highlighted that the OSB will continue to focus on risk-based approaches to compliance while pursuing appropriate consequences for non-compliance. The OSB will continue to pursue enforcement of the most serious insolvency offences in Canada by increasing engagement with law enforcement partners and leveraging technology.

Highlighting the efforts the OSB is making with regards to Information Technology (IT) modernization, the Superintendent again noted the launch of the Debtor Compliance Management System, as well as the OSB's work on developing a new, highly integrated Estate Administration system to more effectively manage insolvency estates.

Many comments received in the context of the CRDR consultation align with the OSB's long-term vision of a single IT system to serve the OSB, LITs and potentially other stakeholders. In 2022-23, the OSB will commence exploration of this long-term goal.

The Superintendent then spoke of the work the OSB is doing to address risks posed to the insolvency system by the debt advisory marketplace. She noted while the primary focus is on LIT compliance, the OSB can seek voluntary compliance to correct cases of false or misleading information in the public domain and, where appropriate, can consider enforcement options, including the investigation and associated prosecution for criminal offences found in section 202 of the BIA, when egregious cases are brought to its attention via complaints. The Superintendent reported that there has been some success already in addressing some concerning cases where websites have been amended or, in one case, taken down altogether, in response to OSB warnings. Furthermore, the OSB continues to engage with provincial governments to explore ways to protect consumers and address concerns in the debt advisory marketplace.

Superintendent Lang then provided an update on how the OSB continues its efforts in helping Canadians find the right debt solution for their needs and to empower consumers by arming them with trustworthy information to avoid paying for services or products they do not need.

She noted the launch of a [Debt Questionnaire tool](#) in March 2022 on the OSB's [Debt Solutions Portal](#), and mentioned an upcoming enhancement to the portal with the addition of a comparative table of debt solutions. She asserted that the OSB will explore ways to work with partners to warn Canadians about misleading information and deceptive practices in the debt advisory marketplace.

The Superintendent then shared some key operational highlights from 2021-22, noting that OSB teams conducted a total of 990 Debtor Compliance Activities and almost 1,900 Trustee Compliance activities. In terms of criminal investigations, she noted that OSB's Special Investigations Units saw charges laid in 15 cases and have 134 open cases being carried over into the new fiscal year while a further 42 cases are ongoing with the Public Prosecution Service of Canada. In terms of trends observed in these criminal cases, the OSB continues to see credit abuse cases, many of which may involve 3rd party coaching, and there is an increasing number of cryptocurrency related files. The Superintendent asserted that the OSB will continue to be active in all of these areas following the establishment of a new OSB Integrity and Enforcement Branch in 2021-22. The Integrity and Enforcement Branch is responsible for the Major Cases Unit as well as the Special Investigations Units. Superintendent Lang also shared positive statistics relating to the OSB's Debtor Compliance Referral Program, noting that since 2014, the OSB has received more than 1,400 Debtor Compliance Referrals and has conducted debtor compliance activities on 82% of these referrals.

The Superintendent then provided some interesting stats on the business outlook and insolvency impact, pulled from various sources, such as Statistics Canada and the Bank of Canada. She noted that reports show more than three-quarters of Canadian Small and Medium Enterprises applied for at least one type of government COVID support, such as the Canada Emergency Business Account (CEBA) and the Canada Emergency Wage Subsidy (CEWS), with an approval rate of 98 percent. She reported that while emergency programs have proven to be a critical lifeline for many businesses, there appear to be signs that financial uncertainties may be deepening for certain businesses as support winds down. She noted that with the impacts of inflation and rising interest rates, we may see the impact of pressures on businesses as we observed a bump in business insolvencies which were up 7.9% for the 12-month period ending April 30, 2022.

During the last part of her presentation, the Superintendent provided a few compliance reminders. First, she highlighted the importance and value of succession planning, particularly for sole practitioners noting that the OSB recently issued conservatory measures relating to the estates of an LIT who passed away suddenly, without a succession agreement in place. Second, she reminded LITs of their duty to close aged estates and highlighted two decisions, issued in February, 2022, by Associate Justice Kaufman of the Ontario Superior Court in [Re Terence Paul Thompson \(THOMPSON et al, 2022 ONSC 1236\)](#) in and [Re Douglas Cameron Carriere \(CARRIERE et al, 2022 ONSC 1237\)](#). These were cases of significant, unexplained inactivity on estates which resulted in the OSB issuing negative letters of comment. The LIT was unsuccessful in arguing that the Superintendent's comments at the 2021 CAIRP Webinar regarding an emphasis on estates over 10 years old and the fact that there was a closing plan in place to address ageing

precluded the OSB from taking issue with these estates. The court ultimately reduced their fees in both cases due to ageing. The Superintendent then reminded LITs that all corporate changes require pre-approval in the OSB Licence Administration Application (OLAA) request section, including new office spaces. She flagged that when requesting a licence extension, it is a baseline requirement to have adequate knowledge of the new jurisdiction's regulatory framework, and that LITs must all take the required attestation to this effect very seriously. Finally, she reminded LITs that all stakeholders should be given timely and proper service and that orders that have implications for statutory interpretation or directly order the OSB to take some action should be flagged.

Asserting that it had been an interesting year in jurisprudence, she highlighted a few court cases on topics such as what to do and what not to do with cases of fluctuating real estate valuations, the use of reverse vesting orders and estate charges and taxation. She concluded by indicating that the OSB will be issuing further guidance shortly on interpreter's costs and noted that while the courts have allowed that the charge could be claimed by LITs, a taxation would be required in order to do so. She encouraged LITs to ensure that no one is denied access to the insolvency system by reason of possible interpreter costs as this could lead to the need for a systemic solution that might not be as palatable to LITs.

Questions and Answers

Preliminary comments: CAIRP and the OSB caution readers that the comments herein should not be interpreted as legal opinions or advice, but rather information intended to foster discussion amongst professional colleagues. Readers are advised to do their own research and seek out independent legal advice, if unsure how to proceed with any of the issues outlined below.

- 1. Question: The OSB has indicated they are committed to ensuring all Canadians have access to Canada's gold standard insolvency system. It has been identified that Micro-Small and Medium Sized Enterprises currently do not have proper access to the system. Given the current environment, can the OSB comment on their work to address the MSME issue going forward? Would the OSB consider recommending legislative changes for the MSME issue as part of their work identified in their Business Plan this year to address the gap in access to the insolvency system?**

Superintendent: I see fair and appropriate access to insolvency for those who need it as a very important element of maintaining the integrity and excellent reputation of the Canadian system. Many of our international counterparts have considered ways to enhance access to both low income/low asset consumers and micro, small and medium enterprises and I believe Canada should do the same. The OSB works closely with its ISED colleagues, who have the lead on legislative changes, to ensure that operational realities are considered as they juggle with competing priorities relating to amendments to the numerous pieces of marketplace framework legislation under their responsibility. I think it is incumbent upon all of us to be as ready as possible for the time when the window of opportunity for such legislative amendments may open.

CAIRP: Legislative changes depend on the government's agenda and priorities. These are set by the government in advance, and while they can be changed, the agendas are pretty busy, such that opportunities for changes to the insolvency legislation are few and far between. The current government has identified a willingness to review insolvency legislation in the mandate letters given to the Minister of Innovation, Science and Economic Development, but only in respect of post-secondary educational institutions (PSEIs), in response to the Laurentian University proceedings. The questions in this respect pertain to whether PSEIs should be excluded from the definition of "company" in the BIA and CCAA, in view of the impact that the insolvency of a PSEI can have on the community and other PSEIs.

That said, we noted that there is an increased focus on insolvency legislation from members of Parliament, as 3 separate private member's bills were presented regarding the issue of superpriority for deficits in defined benefit pension plans, one of which is at the second reading stage, one private member's bill was presented regarding the proposed creation of a deemed trust for unpaid products of agriculture, and one public bill was presented in the Senate regarding PSEIs.

The increased focus on insolvency legislation gives us hope as we continue to raise the need for reform with ISED in order to help MSMEs, the changes might gain prominence in the government's agenda.

- 2. Question: Can the OSB comment on their work on the low-income / low-asset or no-income/no-asset (LILA/NINA) debtor issue? The submission made by CAIRP last June addressed LILA/NINA issues and suggested working with the OSB to define the parameters of a LILA/NINA file and develop a process to ensure there is no hurdle to accessibility. Can the OSB comment on whether this work has been undertaken yet, and the desirable completion date?**

Superintendent: The OSB continues to actively explore options to ensure fair and appropriate access to LILA/NINA debtors – both via legislative and non-legislative options. An example of a non-legislative option is to consider a directive that supports access. The use of the Bankruptcy Assistance Program (BAP) has been on a steady decline and, in fact, has been used by fewer than 40 debtors per year since 2020. We don't have a completion date for this project but look forward to working with CAIRP on finding solutions to ensure more Canadian debtors can get the financial and emotional relief they need without paying more than is appropriate or staying in the system longer than they should to help address the significant adverse impacts financial stress can have on people's mental health and well-being and on the economy.

CAIRP: We are ready, willing and able and look forward to discussing the issue of access to the relief contemplated by the BIA for vulnerable debtors, with the OSB.

- 3. Question: My question concerns attestations LIT's had to make by April 30 of this year to the bank concerning Canada Deposit Insurance Corporation (CDIC) coverage of trust account balances. I identified my firm as a Professional Trustee for each trust account so there was no immediate requirement to identify/quantify the beneficiaries of each account but I understand that such identification and quantification could be requested**

from time to time by CDIC. As you will no doubt appreciate, the identity and amount of any creditor's interest in a trust account balance at any point in time may be uncertain; creditors' claims may be unfiled or in dispute, costs of administration may be unpaid or not even quantifiable. Do CAIRP and the OSB intend to advise/direct LIT's on how to respond to such requests from CDIC and to liaise with CDIC so as to apprise CDIC of the difficulties LIT's may encounter in responding to such a request. On a practical note, it could be useful to inquire into the capabilities of estate management software to provide a global schedule for each consolidated account administered by an LIT firm showing the name and address of each creditor and the amount or percentage that would be allocable to that creditor under settable assumptions as to trustee remuneration and expenses. This could save LIT's an enormous burden of consolidation of individual estate information into a report for the whole account. Your views will be greatly appreciated on this matter.

Superintendent: The OSB is following up with CDIC on these questions and will provide further guidance as soon as it is available. However, what I can tell you is that the beneficiary information would only be requested by CDIC in the event of a financial institution failure as that is when CDIC's insurance coverage obligations would potentially arise. As such, I think – or certainly hope – that this need is unlikely to arise. If LITs feel a software solution is needed, in any event, I would encourage you to work with your software vendors. But rest assured we will follow up with CDIC and seek to provide further guidance.

CAIRP: We look forward to receiving the guidance from CDIC that the OSB has requested. At present, we understand that the requirement that was sent out for attestations is aimed at lightening the administrative burden for LITs, as persons identifying as “professional trustees” do not have to immediately list the beneficiaries of the trust accounts, but rather must be prepared to do so if and when requested to do so by the CDIC.

We intend to ask the software providers if it is possible to adjust the commercial software to generate lists of beneficiaries, but we caution that the list thus produced might be inexact and might require an adjustment before being submitted to CDIC, as the records might not contain fulsome information about the beneficiaries of the trust funds. For example, in an ordinary administration, the creditors with proven claims would certainly be beneficiaries, and each of these might have different rights to the funds (depending on the priority ranking), but creditors with a provable claim that has not yet been proven might also be beneficiaries, as would be the trustee for its allowable fees and disbursements, and the OSB for the levy.

Considering that the request for attestations is generated from a process that seeks to indemnify depositors in the event of the failure of a financial institution, we believe that precise information regarding beneficiaries is likely not needed unless there is a problem with a financial institution, and in that context, it should be easier to generate a more specific list of beneficiaries at that time.

4. **Question: Can the OSB and CAIRP provide us with an update and implementation date for the processing of dividends to creditors electronically? The ability to perform electronic distributions is a benefit to:**
- **The creditors (time and cost)**
 - **The LIT's (time and cost)**
 - **The Environment**

Superintendent: Directive No. 5 has authorized the use of electronic payment of dividends since 2004 and the amendments to Directive No. 5, issued May 3, 2021, further simplified the use of electronic payment of dividends by removing the requirement for prior written approval from the OSB. The only exception to the use of electronic payments is for payments to the OSB – for which there remain broader, government-wide challenges, which will need to be overcome before that can be enabled. I understand that one of the software vendors is still working on cleaning up creditor lists in order to enable the electronic payment of dividends. I would encourage LITs to work with their software vendors on this.

CAIRP: We understand that the comment does not pertain to the ability to process and issue dividends to creditors electronically, as this seems to be already addressed by s. 25(2) BIA and Directive No. 5R, but rather to whether the software allows it. To the extent that this is a software issue, we will be discussing the issue with the software providers to see if this functionality can be added, and we will report back to the members on the feedback we get from the software providers.

5. **Question: How will provincial legislation in Quebec, specifically Bill 96 (language law) and Bill 64 (privacy law), impact insolvency in Quebec and the rest of the provinces?**

Superintendent: Bill 96, *An Act Respecting French, the Official and Common Language of Quebec*, and Bill 64, *An Act to Modernize Legislative Provisions as Regards the Protection of Personal Information*, both recently received assent from the National Assembly of Quebec. The OSB is currently reviewing the material in both Bills to assess the impact that these Bills may have on the insolvency system and LITs in Quebec, and potentially other provinces and territories in Canada. We will seek to provide guidance to stakeholders as soon possible.

CAIRP: We are looking at the issue of the new legislation in Quebec regarding the changes to the Charte de la Langue Française. This issue is very new, and the new legislative provisions are not all clear, such that it is impossible at this point to assess what will be the impact on insolvency administrations. We believe it is important that the relief provided by insolvency legislation be available for debtors in both official languages and we are concerned that the additional administrative burden and restrictions could affect debtors' access to the judicial system. We believe our members are generally quite adept at providing services to individuals in a manner that promotes access to the relief, but we are unsure at this time if the requirement for all proceedings and orders to be in French at the Court level might hamper the individuals' access to the system.

We point out as well that the issue of access to the judicial system in both official languages is not an issue that is limited to Quebec. We are aware that complaints have been made in other provinces regarding the accessibility of judicial services in French, and we know that

the government has presented a bill that seeks to modify the *Official Languages Act*, to enhance the use of the French language in federally regulated private businesses, in regions where there is a strong French presence.

- 6. Question: We are starting to see some turnaround in insolvency filings in Canada albeit slow. What are you hearing from your colleagues in other countries? Are they tracking in a similar manner to Canada?**

Superintendent: To answer this question, I have canvassed my fellow Executive members of the International Association of Insolvency Regulators. For England and Wales, in the 12 months to 30 April 2022 compared to the previous 12-month period, the number of company insolvencies was 66.8% higher and the number of individual insolvencies was 2.8% higher. In the US, the only category of insolvency filings that is up, year over year, is smaller businesses filings under Chapter 5 — which is up by 15%. As many of you know, a simplified procedure for small businesses was introduced in February 2020, as subchapter 5, and these filings would be encompassed in the 15% increase. In Scotland, filings are up sharply on the corporate side and up a little on the personal side – but neither are back to pre-pandemic levels. In New Zealand, Australia and Hong Kong, the filing numbers are still trending down.

- 7. Question: Can you update us on your efforts against the unregulated debt consultants?**

Superintendent: As noted in my presentation, we are taking a multi-pronged approach to this issue with our primary focus on LIT compliance given that this is most directly within OSB's mandate. We are also addressing cases where we are advised of deceptive and misleading information – particularly where the impression is given that LIT services can be provided by debt advisors. But we are not stopping there. In keeping with our strategic objective of engagement, I believe that more can be achieved when we pull the right people together so we have been reaching out to our counterparts and will collaborate to try to address the problems posed by unregulated debt consultants. I will say that it is not always easy to get traction on these kinds of issues. As you all know, it is always difficult to get legislative amendments addressed in the face of competing priorities. And I would note that the provinces with which we have engaged have told us that they are not seeing a lot of complaints in this area so we encourage you and debtors to let the provinces know about the issues you're seeing - because if they don't know it's a problem, then they aren't likely to prioritize solutions.

- 8. Question: How would you define success for the OSB and the insolvency system in the upcoming year?**

Superintendent: Since my appointment as Superintendent, we have published our Business Plans and Annual Reports in an effort to be transparent about what we're working on for the benefit of the Canadian insolvency system and what success looks like for us as an organization. As you may have noted, many of the most important priorities take more than a year to accomplish but I am very proud of everything the OSB has achieved in the past few years including a complete overhaul of the debtor compliance program which is now supported by a modern IT system and AI to ensure a robust, risk-based approach and the ability to link outcomes to the intake source so we can measure performance and

continue to improve as we go. The creation of a new Integrity and Enforcement Branch and the role of Associate Deputy Superintendent, National Programs are also significant successes which are already starting to yield positive results in the form of enforcement and greater cohesion and consistency in OSB's compliance programs. The publication of our Compliance Promotion Framework is another positive development and voluntary compliance by stakeholders would be one definition of success for the system. I would encourage all LITs to adopt a proactive and voluntary compliance mindset. A diverse and inclusive insolvency system that provides excellent services at appropriate fee levels to all those who need it – particularly following the stress we have all experience throughout the past 2+ years – would also be a measure of success for the Canadian insolvency system. We are making good strides in that direction but will require time and collective, concerted effort to make a real difference.

9. Question: Is it possible to specify how adding a report for trustees to complete will reduce administrative burdens?

Superintendent: LITs currently renew their licence (individual and corporate) in the OSB Licence Administration Application (OLAA). As part of that process, LITs must validate basic information, such as their resident and non-resident offices, districts, employer, licence administrative status (active, semi-active, inactive), and the information for the BIA Insolvency Counsellors registered against their licence. At the corporate level, LITs can input information pertaining to the corporation's insurance as well as corporate structure; however, the fields are not mandatory. A new Trustee Annual Report (TAR) will be added as part of the licence renewal process and will provide the OSB with information (in a central location) to support trustee compliance activities and will reduce duplicative requests during Trustee Office Visits thereby reducing administrative burden. As well, the OSB would seek to have the TAR auto-populated with the prior year's information such that LITs would only have to validate existing information and update any new data before attesting to the accuracy. The OSB has collaborated with CAIRP to strike a small working group to help develop a TAR that strikes the right balance between collecting necessary information and administrative burden.

CAIRP: We believe any initiative that seeks to reduce administrative burdens merits due consideration and needs to be approached with an open mind. Regarding the addition of a report for trustees, we can imagine a situation where a standard, simple periodic reporting provides a better focus for the OSB's monitoring of LITs, which in turn may reduce the incidence of periodic reviews of LITs' practices. In essence, the additional periodic report would reduce the incidence of more invasive, more in-depth punctual reviews of practices. To make an analogy with the auditors' practices, we all remember from our study programs that auditors need to accumulate sufficient appropriate audit evidence to support their opinions, and that there are many ways in which this audit evidence may be accumulated. We also all remember the sea change in auditors' approach in the 1980s, where auditors decreased significantly substantive audit procedures, by undertaking a review of key internal controls on which they could rely, testing these internal controls, and moving towards more sophisticated sampling techniques as a result. In this situation, the additional work done in reviewing internal controls resulted in more efficiency and a decreased workload overall. It is possible that the additional periodic reporting has a similar effect.

10. Question: Given the difficulty in uncovering cryptocurrency, what tools can the OSB provide to Trustees to investigate possible cryptocurrency assets hidden by debtors?

Superintendent: The BIA provides LITs with a wide range of tools which can be used to ascertain if debtors are attempting to hide any assets or transactions, including those involving cryptocurrency. For instance, section 163(1) of the BIA allows for LITs to examine bankrupts under oath before the court. As LITs are aware, they should advise debtors of their duties to disclose all assets, including cryptocurrency, and they should equally probe to uncover whether any assets or transactions have been omitted (e.g. if the debtor used any cryptocurrency exchanges to buy or sell cryptocurrency; if they have a private or public key stored on their computer, a USB drive or an online cloud-based system). In the context of a criminal investigation, the OSB's Special Investigations Units have further tools they can use to compel information, such as production orders and witness statements.

11. Question: I would like to hear Superintendent Lang's comment regarding the Ali Case... what did she mean by non-palatable solutions if LIT's did not allow access because of cost.

Superintendent: It is essential that the insolvency system in Canada continues to function effectively and that access to it is fair and appropriate.

The OSB and CAIRP are in discussions regarding a position paper based on the Ali decision, which would include practical suggestions on how to proceed when interpreter costs are involved.

12. Question: Regarding statute-barred claims, some creditors have taken the position that they can file claims as they wish, and that it is not an offence to file known statute-barred claims (i.e., ones from 5-10 years ago). This creates an administrative burden (as these are required to be disallowed via registered mail). Have amendments or direction been considered to prohibit creditors knowingly filing such claims?

Superintendent: It is an offence per subsection 201(1) of the BIA for any person to make a false claim and this would include one that the creditor knows is statute barred. LITs should make efforts to proactively notify creditors of this fact. The OSB also informs creditors of this provision in presentations forming part of its compliance promotion efforts.

CAIRP: The judgment of the Honourable Sean Dunphy in the Eyton case (2021 CarswellOnt 7394, 2021 ONSC 3646) states that a claim that is prohibited from being enforced at the time of bankruptcy by reason of section 4 of the *Limitations Act, 2002*, of Ontario is not provable in bankruptcy within the meaning of section 121 BIA, because it is not a claim to which the bankrupt was subject (see par 25 of the judgment). To the extent that the claim is not a provable claim and that the creditor feels it is not an offence to file a claim based on a known statute barred claim, the creditor could be reminded of the provisions of section 201 BIA, which states it is an offence under the BIA to willfully make a false claim or proof that is materially false. The proof of claim form under the BIA requires the creditor to assert pursuant to section 124(2) of the BIA (*inter alia*), i.e. to prove a claim in order to share in a distribution that may be made. It is apparent that if the object of the claim is not a claim provable in bankruptcy, this would be a material misrepresentation, which may engage section 201 BIA.

13. Question: With the potential interest rate hikes by the Bank of Canada in the coming months, do you see a major increase in insolvency files?

Superintendent: Many experts are now predicting a mild recession in Canada in 2023. Based on current indicators including rate hikes, inflation and increasing debt loads, I expect Canada will see a return to pre-pandemic insolvency filing levels or perhaps even the higher filing levels we saw as a result of the last recession in 2008/09. However, I would not expect a sudden influx of filings and I'm confident that the insolvency system has sufficient capacity to effectively manage an increase.

CAIRP: We all know that the number of insolvency files decreased substantially during the pandemic, and while the numbers are increasing, the most recent quarterly statistics do not show them having reached the pre-pandemic levels yet. While we believe the assistance given by the government may have helped stave off some insolvency proceedings, we believe the decrease was due also, to a large extent, to other factors, such as increased tolerance on the part of creditors and decreased consumer spending. These factors are likely not going to have a permanent impact, such that it is likely there are latent files that will surface as a "catch up". It is possible that the high inflation and rise in interest rates may also put pressure on companies and individuals, which could affect the number of filings. In short, we expect there will be an increase in insolvency filings, although we would be unable to qualify such increase to say if it will be a "major increase". To qualify the increase would require a crystal ball and a definition of the frame of reference.

14. Question: Name and citation for cases noted please.

Superintendent: Here are the citations for the cases noted in this presentation:

- *Re Terence Paul Thompson* (THOMPSON et al, 2022 ONSC 1236)
- *Re Douglas Cameron Carriere* (CARRIERE et al, 2022 ONSC 1237)
- *Re Kim* (Kim (Re), 2022 ONSC 2731)
- *BDO Canada v. Carrigan-Warner* (BDO Canada v. Carrigan-Warner, 2022 NSSC 16)
- *Re Harte Gold Corp.* (Harte Gold Corp. (Re), 2022 ONSC 653)
- *Re Carde* (Carde (Re), 2022 ABQB 154)
- *Re Ali* (Ali (Re), 2022 BCSC 169)

15. Question: Thank you for the update as to the status of the current status of the Physical Office Requirements Consultation. We understand that there will be some written direction from the OSB in the near future. As this impacts our business operations and planning, is there anything that you can share with us today to give us some idea as to what to expect in the communication to come from the OSB?

Superintendent: The OSB held a public consultation regarding modernizing physical office requirements (POR) for LITs, and the majority of responses supported maintaining the current POR. Many stakeholders brought to the OSB's attention the risks that debtor choice and service quality could be adversely impacted with the anticipated closure of LIT offices in many smaller markets should the POR be modified. While the option for electronic videoconference services based upon the debtor's fully informed choice provides an

increased level of flexibility in the marketplace, the OSB is mindful of the fact that vulnerable debtors may not have the ability to effectively receive virtual services or insist upon in-person services, which could result in these debtors being underserved. Given the feedback received and the fact that the current approach strikes an appropriate balance, the OSB will be issuing an official response to the consultation on modernizing POR in the near future to indicate that the current requirements will remain in place. At that time, the OSB will also provide additional guidance regarding licence extension requests.