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Canadian Association of Insolvency and Restructuring Professionals
Association canadienne des professionnels de l'insolvabilité et de la réorganisation

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Ms. Elisabeth Lang
Superintendent of Bankruptcy
Office of the Superintendent of Bankruptcy
Policy and Regulatory Affairs
155 Queen Street, 4th Floor
Ottawa, ON K1A 0H5

Re: Comprehensive review of directives and regulations under the *Bankruptcy and Insolvency Act*[1] (BIA) and the *Companies' Creditors Arrangement Act*[2] (CCAA)

Dear Superintendent Lang,

The Canadian Association of Insolvency and Restructuring Professionals (**CAIRP**) is pleased to submit the following comments in response to the OSB's *Comprehensive review of directives and regulations under the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. CAIRP has consulted extensively with LITs from across the country and is confident that the views expressed in this submission are representative of the LIT community. Of course, it is noted that individual LITs may have divergent opinions from the recommendations CAIRP is presenting.

CAIRP is the national association of insolvency and restructuring professionals that represents 955 Licensed Insolvency Trustees and as well, 350 articling candidates and 160 corporate, life, and inactive members. CAIRP was created as a not-for-profit corporation in 1979, and its mission includes (inter alia) advocating for a fair, transparent, and effective insolvency and restructuring system throughout Canada. Members of CAIRP complete a rigorous professional program to achieve the CIRP designation and adhere to a strict code of professional conduct, standards of professional practice, and mandatory professional development. CAIRP stringently enforces its regulatory standards, including investigations of complaints and where appropriate, public discipline hearings. By the authority of a Memorandum of Understanding with OSB, CAIRP develops and delivers the professional, CIRP Qualification Program (CQP) to develop the competencies of candidates preparing to achieve the CIRP and Licensed Insolvency Trustee designations.

Consistent with the consultation request, this submission focuses primarily on a review of the *Bankruptcy and Insolvency General Rules*[3] (**BIGR**) *the Companies' Creditors Arrangement Regulations*[4] (**CCAR**) and Directives[5] with the intent of supporting the OSB's stated objective of a more "agile, transparent, and responsive" insolvency system. Recognizing that the insolvency system is regulated by Acts, Rules, and

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1 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (**BIA**).

2 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (**CCAA**).

3 *Bankruptcy and Insolvency General Rules*, C.R.C, c. 368, as amended (**BIGR**).

4 *Companies' Creditors Arrangement Regulations*, SOR/2009-219 (**CCAR**).

5 Section 5(4)(b) BIA, Directives and circulars - Office of the Superintendent of Bankruptcy Canada.

Directives, CAIRP has taken the liberty to include references to legislative amendments of the Acts as it deemed appropriate to support the consultation objectives.

INTRODUCTION

The comments contained within this submission have been prepared with the intent of improving the insolvency regime to support and advance the interests of all Canadians. In its consultation document, the OSB succinctly states that the aim of the insolvency regime is to "minimize the impact of a debtor's insolvency on all stakeholders". For the purposes of this submission, "stakeholders" includes debtors, creditors, and the general public.[6] In a perfect world, debtors would be offered a fresh start; creditors would be fully repaid the monies owed to them; and the public would not be impacted by the loss of a supply source for products or services. While this idealistic scenario may be unattainable, CAIRP believes the impact of insolvencies on stakeholders can be minimized by ensuring debtors and creditors have ready access to highly competent and efficient insolvency professionals, the Licensed Insolvency Trustees (**LITs**), and by ensuring LITs operate and are regulated in a highly efficient and effective manner.

A fundamental challenge and reality of any insolvency filing is that there are insufficient resources to both relieve debtors of their financial burden and fully reimburse their creditors, without government intervention that would burden the public. Compounding the issue of scarce financial resources, funds are drawn from insolvent estates to cover the OSB's costs of regulation and LITs' remuneration.

In consideration, it is vital to the public interest that Canada's insolvency system continuously evolves and innovates to operate at peak efficiency, while maintaining a gold standard of service and integrity. When contemplating any amendments to the Acts, Rules and Directives, careful consideration should be given to how they might impact the costs and quality of Canada's insolvency services. Comments herein provide discussions and recommendations that CAIRP believes can help LITs and the OSB better optimize their respective administrations and procedures to realize higher levels of efficiency for the benefit of all stakeholders.

An underlying consideration in crafting the recommendations contained herein was the need to close any perceived or real gaps that exist in the current insolvency regime; with the intent of better ensuring all Canadians (consumers and businesses alike) regardless of their income, assets, and debt levels have ready access to, and are well served by, the insolvency system.

This submission is organized by the areas noted in the OSB consultation document. Respecting the OSB's statement that they represent only a "few areas" that the OSB is interested in receiving comment on, this submission includes an "Other Regulatory Issues and Recommendations" section to capture additional amendments CAIRP believes would support modernizing and improving the regulatory framework and administration of Canada's insolvency system. Some of these recommendations are more difficult to implement as they require legislative changes, but CAIRP believes it is necessary to mention them as they are important nonetheless.

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[6] In drafting the present text, efforts have been made to use a gender-neutral style, preferring the pronouns "they", "them" and "their" to describe all genders and both the singular and the plural. The text is lengthy, and if an error has slipped in regarding the use of a non-gender-neutral terminology, the reader will understand the error is inadvertent, and that the comments apply equally to all genders, and to one or more persons.

COMMENTS

A. MODERNIZATION/INNOVATION

What are the challenges and opportunities, including those brought to light by the COVID-19 pandemic, that you, your firm, your sector, or consumers face? Could the use of technology and more efficient processes address these?

Which technologies could be leveraged to modernize the insolvency system? How could technology further reduce administrative burden, transaction costs, and increase efficiency?

Are there risks or concerns associated with the use of certain technologies?

Discussion

Based on the experiences of the past year, CAIRP believes technological innovation has changed the way insolvency administration and services can be delivered and, as deemed relevant and appropriate, innovation should continue to drive their ongoing evolution. While the COVID pandemic has been a devastating global event, one positive consequence has been the opportunity for debtors, creditors, courts, and LITs to experiment with a broad range of virtually and electronically delivered insolvency services. For the most part, the experiences have clearly demonstrated that technological innovation can assist LITs and the Courts to deliver some services as, or more, efficiently and effectively than what traditional procedures have provided. Most LITs agree that videoconferencing, electronic signatures, and online notifications for some insolvency services have realized efficiencies that should be continued post-pandemic. With the hindsight of these experiences, there is an opportunity and need for each service innovation to be considered carefully to ensure that going forward, its use and delivery offers net positive value.

As an example, consider the videoconference service experience for assessments. Based on the anecdotal evidence CAIRP has received from numerous members, the experience has been largely successful, with several benefits identified, including:

- Greater access to LITs. This is especially true for those debtors who:
  - reside in remote geographic areas;
  - work full-time and would need to take non-remunerated time off work to attend in-person;
  - would incur childcare expenses to attend in-person; and/or
  - have mobility issues.

- Reduced travel time for LITs, allowing them to support a greater caseload of files.

- Flexibility and adaptability; for example, it is convenient and simple to include a 3rd party, e.g., family member, lawyer, business associate, etc.

However, it is important to note that videoconference assessments also present some challenges and risks:

- For some debtors, video conference meetings are not as effective as an in-the-same-room, face to face experience:
  - LITs cannot read a debtor's non-verbal communications as well, particularly if the debtor uses a smart-phone or has a poor internet connection.
  - It is more challenging for the debtor and LIT to build a professional rapport.

- Loss of a controlled environment, e.g. videoconferencing from a debtor's home may have unintended distractions.

- Some debtors cannot afford the required hardware/internet connection and/or are not adept or comfortable using online technologies.

- Videoconferencing requires access to hardware and internet technology that some debtors may not possess or have readily accessible.

- Virtual service delivery may cause some debtor confusion, making it more difficult for a debtor to differentiate between LITs and debt consultants/counsellors.

- The widespread use of remote services would likely create a market disruption that over time could displace some sole practitioners and/or small firms, potentially creating a barrier to the accessibility of in-person insolvency services.

While developing this submission, several technology related risks were identified, ranging from Fintech to cyber security to the insolvency software LITs use. One example is the potential risks related to the insolvency software LITs use to manage their insolvency files and transfer data. The OSB and LITs are reliant on this software, and with only two significant vendors/developers, the insolvency regime is exposed to the risk of one or more of these vendors taking actions, voluntarily or involuntarily, that could render the vendor conflicted or the software less effective, unavailable, or unaffordable.

Irrespective of the challenges that technologies may present, it seems obvious that innovation can continue to positively impact the insolvency system, provided that each innovation is launched only after ensuring it improves the quality-of-service and is appropriately safeguarded to minimize the risks of access, system integrity, and cybersecurity threats.

Recommendations:

1. **Technological accommodations:** Stakeholders have acknowledged the value of many of the technological accommodations implemented to support insolvency services during the COVID pandemic. Going forward, CAIRP encourages the OSB to embrace innovation with the intent of continuously improving the efficiency, effectiveness, and integrity of insolvency services. For some services, the OSB will find it is in the public interest for some technologies to only be used to accommodate circumstances, not as the norm. For example, it seems clear that assessments for most consumer debtors are more effective when conducted in-person and therefore should be the norm. The option of videoconferencing assessments should normally be allowed only at the debtor's choice.

   The following are specific changes that CAIRP suggests to the BIGR and Directives to address this recommendation:

   - BIGR - 53, 64(2)(a), 66(2)(a), 70(2), 70(3), 100(2)(a), 102(2)(a), 104(3): Upon the consent of both the sender and recipient of a document(s), the method of document delivery should be relaxed to allow documents to be sent in the most efficient manner. To accommodate this, the requirement that some documents be sent by registered mail should be removed. When sending documents by email, the sender should be required to use the "Read Confirmation" tool that is available in most e-mail applications. Where a delivery method does not allow for proof of delivery, the requirement should contemplate retaining some proof that the document was sent (mail affidavit, copy from a "sent"

folder, e-mail delivery receipt, etc.). Conspicuous delivery (registered mail, personal service, courier, or e-mail with read confirmation) should be required in the case of serving documents onto the LIT, such as in sections 64, 66, 100, 102 of the BIGR.

- BIGR 97: Clarify this section to define "in person" or "electronic transmission" as including videoconference participation.

- Directive 6R3: Amend Directive 6R3 to clarify that "in-person" means that a LIT and debtor have the choice of meeting together "physically" in the same room or "virtually" by videoconference to conduct the assessment. Further:

  - Debtors must always be provided the option of a physically-in-the-same-room in-person assessment.

  - The Assessment Certificate should be amended to include confirmation of the following:
    - The debtor was given the choice between an in-person meeting or a virtual meeting.
    - The type of meeting that was used for the assessment.
    - The debtor chose the meeting type.

  - LITs must have a registered resident or non-resident office in the locality of the debtor.

- Directive 23: With the reach of local newspapers significantly diminished in recent years and the high costs of newspaper notices, this Directive should be amended to allow online notices, possibly on a dedicated page that both the OSB and CAIRP maintain on their respective websites.

- Directive 28R: This Directive should be modified to confirm all of the following:

  - LITs may, as an option, allow the debtor to visit the LIT's non-resident office and use the non-resident office facilities to conduct videoconference interviews and meetings with the debtor.

  - Clarify paragraphs 7 and 8 to ensure non-resident offices that may be used for video conferencing are maintained with the appropriate videoconferencing hardware/software and internet connection and as well, support staff to assist the debtor. Ensuring that non-resident offices are outfitted with videoconferencing technology will provide a controlled environment for LIT/Debtor meetings, negating potential issues related to privacy and debtors not having their own access to, or ability to use, videoconferencing technology and internet service.

  - The Directive should also clarify that non-resident offices will only be approved where an LIT maintains a "meaningful presence" in the market area that the office is intended to serve. "Meaningful Presence" should be clearly defined, providing guidance to address the following conditions:
    - LIT or a LIT staff member must attend the office periodically.
    - LIT must be available to meet in-person, physically in the office, upon debtor request.
    - An exceptions policy must accommodate access for debtors who reside in remote regions.

  - To protect the integrity of the insolvency system, the Directive should add a requirement that LITs may not rent, lease or occupy the shared premises of a debt consultant or financial intermediary. Sharing, leasing or renting office space from a debt consultant or financial intermediary could cause debtor confusion between the different roles (LITs vs debt consultants

and financial intermediaries) and organizations (LIT firms vs debt consultant companies). These types of relationships also project perceived conflicts of interest and may lead to real conflicts. Preventing LITs from renting, leasing or occupying shared premises as debt consultants and financial intermediaries is a simple and effective way to prevent conflicts and acts of impropriety.

Are there risks or concerns associated with the use of certain technologies?

Discussion

In Canada, LITs currently have access to only two for-profit vendors of insolvency software solutions. This presents significant risks to the insolvency regime. With an insolvency community of just over 1,000 LITs, the critical mass of buyers makes it a challenge for either vendor to invest the resources that are necessary to build and maintain a highly innovative product, inclusive of all the tools LITs and the OSB want. The risk of one or both vendors winding up, entering conflicting relationships or leaving the market also exists. Further, as previously noted, the technologies used to support the insolvency system need to incorporate robust cybersecurity controls and as well, a more sophisticated means to e-file and access data, forms and documents.

Cyber threats are another technology related risk that requires consideration. It is well documented that the incidences of entities having their database information compromised by a cyber attack have skyrocketed in recent years. For the insolvency profession, cyber crime could be devastating. A cyber attack on the OSB or an LIT firm that compromises debtors' personal information or access to trust accounts would seriously undermine the confidence of all stakeholders. While some firms have best in class cyber security systems in place, this is not true across all firms. Existing BIGR and Directives provide little guidance on how LITs should be managing this risk.

Recommendations:

2. **Move towards a more secure supply chain for insolvency software solutions:** The OSB should encourage and support insolvency software vendors to advance the pace of innovation for their respective software, with the objective of improving the profession's data transfer and security needs. Ideally, the software should be designed to offer a highly secure, common data management and e-filing system, that seamlessly and virtually communicates with the OSB systems. The advantages of such a system include:

    - Achieving process/cost efficiencies, while accelerating the rate of innovation and supporting the seamless access/transfer/storage of data and documents between firms/OSB.

    - Ensuring the security of sensitive information/data across the insolvency regime (i.e., all firms/LITs and the OSB) by integrating best in-practice cybersecurity measures.

    If the software vendors are unable to meet the expectations, consider the viability of the OSB and CAIRP jointly developing/maintaining an insolvency software that would be used by all LITs. To reduce start-up development and programming time and costs, consider leveraging (purchasing the rights to) an existing insolvency software product and contracting the ongoing programming. If developed and launched, Directive 9R3 *Electronic Filing and Other Methods* should be updated to support the use of the common data management system and contracting the programming.

Does technology present opportunities to more effectively verify whether a debtor has disclosed all of their assets and to verify and realize upon those assets?

Discussion

LITs take advantage of an ever-broadening range of technologies and online services to verify that debtors have disclosed all their assets and to maximize the realization of those assets. For many LITs, the list includes such services as Equifax, Purview Services, PPSA searches, Google, etc. AI and Open Banking are other tools that LITs are likely to take more advantage of in the near future. While these resources are not foolproof, together with an LIT's professional insight, interview and analysis skill, the result provides a reasonably high level of confidence in the accuracy of the outcomes. An ongoing challenge for LITs is the need to balance the investigation of asset disclosure and realization, against the costs and net value of the investigation.

Recommendations:

No action is recommended at this time.

Are there issues with regard to digital assets like cryptocurrency? What changes within the insolvency system could help address these issues?

Discussion

The use of cryptocurrency as a digital asset has quickly moved beyond the emergence stage. Cryptocurrency is now widely used in Canada and globally as a currency and investment by investors, consumers, and businesses alike. Further, it is important to note that there have been numerous insolvency filings in Canada involving cryptocurrency the past few years and that the frequency is expected to grow exponentially. In the context of this regulatory review, four aspects of digital assets should be considered:

1) Legal qualification of digital assets/cryptocurrency

Cryptocurrency is a fully virtual and decentralized type of currency, that is neither controlled nor managed by a government or one of its chartered financial institutions, such as banks. It can be traded on different platforms and outside any platform (between peers themselves). In Canada, all types of cryptocurrencies are not considered as official Canadian currency within the scope of the *Currency Act*,[7] although they may be used for payment purposes.[8] Cryptocurrency is therefore not considered to be money. Cryptocurrencies are, however, still subject to various laws and regulations such as the *Income Tax Act* (**ITA**)[9] in which Bitcoin is classified as a type of digital currency for instance.[10] Digital assets and cryptocurrency/tokens could be considered as an "investment contract".[11]

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7 *Currency Act*, R.S.C. 1985, c. C-52, s 8(1).

8 Gregory Azeff, Stephanie De Caria & Matthew McGuire, "Governing the Ungovernable: Cryptocurrencies in Insolvency Proceedings" in Janis P Sarra et al, eds, *Annual Review of Insolvency Law 2018* (Toronto: Carswell, 2018) 167 at 183–84.

9 *Income Tax Act*, R.S.C. 1985, c 1 (5th Supp), as amended.

10 Erwan Jonchères, *Encadrement juridique des monnaies numériques*: *Bitcoins et autres cryptomonnaies* (LLM Thesis, Université de Montréal, 2015) at 49 [unpublished].

11 (sec. 1 of the *Securities Act*) vs. Security and financial asset (sec. 10 to 12 of the *Act respecting the transfer of securities and the establishment of security entitlements*).

Cryptocurrency falls with the BIA definition of assets, which includes "any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property".

2) Some characteristics of digital assets

Myth	Reality (in practice, LITs must consider...)
System without an intermediary	• Exchange platforms • Custodians (there is no qualified custodian registered in Canada, though at least two firms are actually working on this)
No fees	• Transaction and transfer fees • Custodian fees • Conversion fees
Infallible security	• Computer hacking • Loss of private keys
Universally accessible	• Complex language • High volatility and fungibility • Extremely divisible
Anonymous	• Theoretical "anonymity", in fact "pseudonymity" • Related problems whilst looking at transactions on the pertaining blockchain • Time-stamped, unchangeable, undeletable data bank

3) Managing the "ungovernable": digital assets in insolvency proceedings

The circumstances that an LIT may face will range from digital assets/cryptocurrencies in the hand of a debtor, or held by a debtor who operates an exchange or acts as a custodian for investors, depositors, speculators or other such creditors, or finally held because the debtor has launched an initial coin offering (**ICO**) / initial token offering (**ITO**) / initial digital asset offering (**IDAO**). Depending on the circumstances of the file, the digital assets or cryptocurrencies may have the characteristics of an intangible asset or property held for the benefit or on behalf of a third party. In all cases the property is fungible or unidentifiable. Where the property is held for the benefit or on behalf of a third person, the situation may be similar to the insolvency of a securities' firm under Part XII of the BIA, however without any regulatory framework to regulate the activities of the custodian or exchange or broker, and with an asset designed to be untraceable, private and secretive.

In these cases, the LIT may face many practical problems, including:

- Difficulties in obtaining possession of digital assets or cryptocurrencies, if all access keys are not submitted.

- The LIT may be dealing with investors/creditors/... claiming digital assets and/or money.
- There might be no information on investors/creditors available at all.
- The claim process suggests that the LIT must validate the investments/claims on the blockchain.
- The number of investors and creditors can be extremely large.
- The investors/creditors can be from all over the world.
- The Debtor may have committed reviewable or voidable transactions involving digital assets/cryptocurrencies, and the nature of the transactions make a forensic review of such transactions particularly challenging (research on blockchain in particular)
- Lack of knowledge – the use of digital assets and cryptocurrencies requires a fairly high proficiency with technological issues that may require specialized assistance from experts.
- Lack of specific regulations – There are no specific regulations governing digital assets and ICOs as a whole. Although some ICOs may be regulated, most originate abroad and are not regulated.
- Inadequate documentation – The documentation provided may be biased, incomplete or misleading. Expert technical knowledge is generally required to properly understand the investment.
- Price volatility – The price of a digital assets, like that of most cryptocurrencies, can be extremely volatile.
- Limited usability – Some tokens can only be used on a specific platform or for certain products or services. If the project fails, you might not be able to convert or cash out the tokens, which will essentially become useless.
- Potential for fraud – Due to their very nature, digital assets are fertile ground for fraud. Anti-Money Laundering and "Know Your Customer" safeguards are of no use to prevent fraud, since the digital assets and cryptocurrencies are designed to be private and secretive.
- Vulnerable platforms – Despite the lines of defense offered by new technologies, transaction platforms are not immune to bugs and hackers.
- The various digital assets or cryptocurrencies use different blockchain algorithms that will create differences in accessibility and transparency from one currency to the other, resulting in levels of privacy. For example, Bitcoin transactions are not fully anonymous, as payments through Bitcoins can ultimately be traceable on the public blockchain, but a Monero transaction can be far more obscure and private, allowing complete privacy of both the sender and the recipient by generating stealth addresses (a random one-time address that cannot be linked to a shared Monero address).

4) Regulatory review – what to look for, includes:

BIGR	General Comments
Notice	Considering the number of creditors involved, all notices to creditors/investors and the way they are served must be reconsidered.
68(1)	To the extent that digital assets become part of the records of the estate, or that the LIT continues/completes transactions, some of the records would need to be preserved in virtue of BIGR 68. That may include information on the blockchain, that is in theory, public and available. Costs to download / keep such information could be huge.
113	Considering the number of creditors/investors/etc. involved, all notices and the "serving" must be reconsidered.
Proof of claim form	The proof of claim form is likely insufficient and a "custom" made proof of claim may be required to capture the necessary claim information.
Voting letter and claim process	The claim process (sending, reception, treatment) needs to be reviewed overall – electronic filing (such as class actions) must be considered.

Directives	General Comments
5R6 – banking	The Directive may be reviewed to specify that an investment in cryptocurrencies' is not an appropriate investment for excess funds, and that digital assets and cryptocurrencies held should not be considered as "estate trust funds" as defined in the Directive, but rather as asset of the estate to be realized upon and/or distributed or remitted to the claimants thereof.
7 - inventory of assets	The Directive is relevant when the assets are digital assets or cryptocurrencies, but the specific procedures listed therein may be inapplicable or insufficient.
16R – statement of affairs	Digital assets may require a distinct category; validation of ownership of digital assets is not a simple task (and seizure involve great risks).
17- retention of documents	The same comments as those made in respect of BIGR 68, above, apply to this Directive.

Directives	General Comments
22R2 – proofs of claim...	Automation of procedures/use of digital procedures is essential for efficiency, given the likely large number of claimants. Electronic filing (such as what is done in class actions' procedure) should be considered, which may require some changes to the requirements regarding signature verification of claims.
23 - publication local newspaper	Dealing with an Exchange or an ICO makes publication of local newspaper irrelevant and obsolete.
25R – realization of assets	The Directive is relevant when the assets are digital assets or cryptocurrencies, but the specific procedures listed therein may be inapplicable or insufficient.

Recommendations:

3. **Form an advisory board:** Considering the complexities and impact of insolvency issues related to cryptocurrency, CAIRP recommends that the OSB convene an advisory group of LITs, technology experts and other professionals (e.g. lawyers) who have direct experiences dealing with digital assets in insolvency filings and who have become the *de facto* thought leaders of this new asset category. This group can more fully discuss and identify for the OSB the regulatory changes that are necessary to effectively deal with cryptocurrency assets in insolvency files.

4. **Revisit the approach to Directives:** As noted in the discussion above, some of the Directives are relevant to digital assets and cryptocurrencies, but the specific procedures listed therein may be inapplicable or insufficient. Consideration should be given to modifying the Directives to provide:

   - that professional judgment should be exercised in complying with a Directive, such that a departure from strict compliance with the Directive may be warranted and acceptable provided that the basis and rationale for departing from the prescriptive provisions are documented.

   - for general principles to be followed, that would apply in all circumstances, without providing a list of overly specific procedures that may be overly prescriptive and inapplicable.

   - for examples of specific procedures that would be expected to be followed in common situations (for example, the explanation of how to deal with motor vehicles or life insurance in Directive 25R).

   This revised approach to Directives would allow for the application of Directives to less often encountered problems or fast changing environments, such as is the case for cryptocurrencies.

B. LICENSING MODERNIZATION (DIRECTIVE 13R7)

B.1 - National License (BIA 13.1(b))

Should licences be issued on a national basis? What opportunities and/or challenges would this create?

Discussion

In recent years, an increase in the number of LITs applying for licenses to practice in multiple provinces has been noted. The main reason for this occurrence is that some LITs are broadening their scope to reach and serve clients that reside beyond the provincial border in which they were originally licensed, and others see it as a requirement to serve debtors and creditors who operate in several provinces[12] or nationally. With technological innovation and the pandemic experience, LITs have become increasingly adept at delivering virtual services. A debtor's geographic residence, by itself, is no longer a significant service barrier. Considering this, it might seem reasonable to contemplate the idea of issuing LIT licenses on a national basis. At first glance, the potential benefits may seem obvious. Debtors would have a greater choice of LITs and regional time zone differences may accommodate service outside normal office hours. Further, LITs could operate more efficiently, potentially handling a greater caseload of debtor files. However, CAIRP believes a more in-depth analysis of this matter reveals that the potential risks and costs of a national license option significantly outweigh the potential benefits.

A national licensing process would need to ensure that the respective LIT is knowledgeable of, and can competently apply, the provincial rules applicable to each of the districts they are licensed to operate. To do otherwise would put the public interest at risk. While variances in provincial legislation and jurisprudence have narrowed somewhat over the years, they remain significant. The existing *CIRP Qualification Program* (**CQP**) only ensures that all candidates are cognizant of the major differences and risk areas of provincial legislation, so they can seek help from their network or do additional research in instances where a multijurisdictional problem may surface. It seems impractical to require a demonstration of the rules in every provincial jurisdiction at the CIRP/LIT qualification point. Setting the Competency-based National Insolvency Examination (**CNIE**) to test all the rules of all jurisdictions and requiring candidates to demonstrate competency on that criterion would create an unreasonable barrier to licencing. Further, it seems unrealistic to expect such an assessment to be conducted during the OSB's Oral Examination. Aside from legislative variants, it is also necessary to address the need for regional specific competencies that support differences in provinces' social and business cultures e.g. Alberta oil industry, Atlantic Canada fishery businesses, Quebec/New Brunswick French language, civil vs. common law principles, etc. A knowledge of the local court system and access to the regional network of lawyers and other professionals that LITs may rely on for assistance in an insolvency filing is also critical for LITs to effectively serve the interests of all stakeholders.

Without appropriate provisions in place, a national licence could also result in a decreased opportunity for consumer debtors to meet in-person with their LIT. Consider that a debtor may initially be comfortable dealing with a LIT who resides in another province, however a change in circumstances during the administration could potentially lead the debtor and/or LIT to want or need in-person interaction, a service that may now be impractical for the LIT to offer.

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[12] The reader will understand we use the term province to lighten the text, but the comments herein apply to all provinces or territories.

A national license that does not require an LIT's physical presence in the marketplace they serve might encourage some LITs to maintain offices and services in larger, more profitable centers only. With an opportunity to penetrate new markets that require little or no infrastructure cost, LIT firms (some with larger advertising budgets) could potentially displace smaller, locally operated firms. Such displacements could ultimately reduce the number of LITs who serve consumer debtors in some localities. This would be a significant issue for a profession that already faces challenges to secure the funding needed to develop and deliver quality professional development and qualification education and as well, is expected to accommodate significant fluctuations in demand for consumer and commercial services within a constantly evolving economy. A reduction in the number of LITs would create accessibility issues, particularly for debtors who prefer or need to meet in-person.

Should there be conditions to be met to qualify for a national licence? For instance, should there be a probationary period to allow for sufficient experience to be gained? If so, how long a period would be appropriate and why?

Discussion

A national license could only serve the public interest with the implementation of stringent conditions that could and would be effectively enforced. For example, as discussed above, to ensure an appropriate standard and quality of service, professionals seeking a national licence would need to demonstrate sufficient proficiency and knowledge of the legislation and practices of all provincial regimes and as well, the ready ability to meet in-person with debtors who express the desire to do so.

Providing candidates/LITs with a qualification program that would develop competencies for all provincial variants (legislative and cultural) and assess competency proficiency to an acceptable standard would be cost prohibitive. Further, to regulate these new requirements, the OSB would need to monitor LIT practices more closely. To do so, CAIRP believes an enhanced practice review process would be more effective than trying to establish a one-size fits all probationary period. Considering that the circumstances and supports individual LITs have access to vary considerably (e.g. national practice vs. sole proprietor vs. regional practice), enhanced practice reviews would more effectively monitor the compliance and competency of nationally licensed LITs. The frequency of practice reviews could be reduced for LITs who over time continue to demonstrate an acceptable standard of compliance. With this pointed out, the incremental costs of qualification and compliance required to establish a national license would be prohibitive, outweighing any value that national licensing might offer.

What office requirements should be considered with respect to a national licence? What benefits and/or challenges would this create?

Discussion

As briefly mentioned earlier, if a national licence were to be offered by the OSB, then nationally licensed LITs should be required to demonstrate that they have ready access to office space and resources that are sufficient to carry out engagements in each, and all, the marketplaces they intend to serve. This is of particular importance for serving consumer debtors and may require onsite office staff and space for debtor and creditor meetings.

Recommendations:

5. **Maintain the present system of licenses by bankruptcy district:** CAIRP does not believe that a national license process would serve the public interest or add any net value to the insolvency system. The OSB's current system of allowing LITs to apply for multiple provincial licenses and to demonstrate competency for each province they wish to operate in appears to be working reasonably well and should be retained.

6. **Review the impact of a national license on the practice:** The OSB is strongly encouraged to carefully assess the net costs and benefits of implementing all the conditions that would be necessary to ensure the public would realize net value from a national license.

7. **Review Directive 13R7** – While BIA 13.1(b) provides the OSB with the authority to determine in which district(s) an LIT can practice, Directive 13R7 provides no further direction as to how this is done. In consideration, CAIRP recommends that Directive 13R7 be amended to explain that a license is normally conferred for the province in which the LIT resides and is currently practising. Further, the Directive should be amended to clearly explain the process for an LIT to obtain a license to practice in another province.

B.2 - Bifurcated Licenses

Should LIT candidates have the options to apply for a consumer, commercial, or full licence? What opportunities and/or challenge would this create?

Discussion

CAIRP acknowledges the arguments that a bifurcated licensing process could recognize the reality that some LITs spend most of their careers serving only consumer or corporate clients. Further, if candidates were only required to demonstrate consumer or commercial insolvency competencies, the licensing requirements might hypothetically be more easily met, potentially improving accessibility to the profession. While these arguments might hypothetically offer some validity, CAIRP believes that modifying the insolvency licensing system to offer three licensing options would not only harm the public interest but as well, potentially do irreparable damage to Canada's insolvency profession.

Consider that regardless of the practice type, a competent LIT should have a certain level of familiarity with issues that arise in both commercial and consumer files. As an example, invariably, a LIT acting in a commercial file will be asked to respond to questions from employees, suppliers or other individuals concerned with their personal positions that have resulted from the insolvency of their employer or supplier. The LIT should be able to identify the issues, respond to them and when necessary, refer the employee or supplier to a professional who can help with their problems. Similarly, LITs providing consumer insolvency services regularly deal with debtors who are business owners. Their scope of business insolvency competency cannot be based on the size of a business, as some small businesses can be extraordinarily complex, while some large business insolvency files can be relatively straightforward. Further, it would be more costly, inefficient and confusing to a small business owner if they needed to employ the services of two different LITs, one to handle personal insolvency issues and the other to handle their commercial insolvency issues. This is particularly relevant in the case of the micro, small and medium enterprises (**MSME**), discussed at greater length later in this document. It should be noted that according to CAIRP

surveys, greater than 40% of LITs report that they practice in both the consumer and commercial insolvency areas.[13]

Bifurcated licenses would be unnecessarily confusing to a public that already does not fully understand the differences between LITs, debt consultants and credit counselors. Differentiating the license types publicly by license category (Corporate Only, Consumer Only, Corporate & Consumer) eg. "LIT.Consumer", would only confuse the public further and as well, possibly create hierarchies among practitioners where none should exist.

A significant advantage of a licensing process that requires both corporate and consumer competencies is that it provides the profession more elasticity to seamlessly adjust to changes in the demand for insolvency services. That is, corporate/consumer competent LITs provide their respective firms with an ability to quickly address fluctuating demands between consumer and corporate files as economic circumstances change.

A move to offer licensing options would require substantial modifications to the qualification program. Three separate learning and assessment pathways would need to be developed and delivered, requiring a sizeable investment in resources and an ongoing increase to operational expenses. Exacerbating the complexity and cost concerns, the qualification program needs to accommodate both French and English languages and address both the Common Law and Civil Law systems. With only 300-400 candidates nationally to amortize CQP course/exam development and delivery costs over, a 3-pathway program would require substantial subsidies to achieve affordability.

Considering the costs, complexity and time required to complete a learning pathway, it also seems unreasonable to believe many candidates or LITs would subsequently upgrade to a full LIT licence after earning their initial consumer or commercial only license. This would limit candidates/LITs' career choices and over time, downgrade the value of the licence. Conversely, the existing qualification program that is common to all candidates and provides both consumer and commercial insolvency knowledge and competencies, offers LITs career flexibility and stability, resulting in very few LITs leaving the insolvency profession early or mid-career.

In CAIRP's view, the argument that a full license is outside the reach of some candidates because it is more difficult to achieve the competency standard for one type of administration than the other is a misconception, particularly considering the standard applies to an "entry level CIRP/LIT". For candidates principally involved in commercial or consumer files, there is obviously a need to demystify the competencies that they do not have an opportunity to practice. However, this is an education process, not a real barrier to entry. In consideration, CAIRP and the OSB have a responsibility to deliver an effective education and mentorship process that provides all candidates (who meet the minimum entrance criteria, and are motivated to succeed), with a high level of confidence that they will eventually meet the competency standards for the CIRP designation and LIT license. CAIRP is confident that its current strategy and investment to redevelop the CQP program will achieve this goal.

Recommendations:

8. **Maintain the present system of licenses:** Based on the considerations above, CAIRP does not believe that bifurcated licensing process would be in the public interest.

[13] CAIRP Member Survey October 2020.

C. CONSUMER PROTECTION

What business practices affecting the insolvency system, if any, expose consumers and creditors to potential harm?

How could regulatory changes within the insolvency system better protect consumers and creditors against these harms?

Are there compliance and enforcement activities that the OSB should consider to strengthen consumer protection and protect the integrity of the insolvency system?

Discussion

The OSB regulates LITs to ensure that, as insolvency professionals and officers of the court, they impartially and proficiently support the dual roles of providing consumers a "fresh start" and maximizing returns to creditors. CAIRP shares the concerns noted by the OSB in their consultation document of the risks associated with unregulated insolvency service providers, including debt consultants, introducers, lead generators, and credit counselors.

CAIRP has previously expressed the public interest risks it attributes to the business practices of non-regulated insolvency service entities, in particular credit counselor and debt consultant agencies.[14] To reiterate:

- Credit counseling and debt consultant agencies are not regulated to consistent standards of education, experience, practices, and codes of professional conduct. Consequently, the public has no means to accurately assess the competency of counselors/consultants.

- While many credit counseling agencies are promoted as "not-for-profit" organizations, this status is often misleading. Unknown to debtors, these agencies deliver services funded by the debtor's payments to creditors. Credit counseling agencies are biased to encourage debtors to accept a debt management plan, regardless of other insolvency solutions that may be available and what may be in the debtors' best interests.

- Some debt consultant agencies promote costly and unnecessary supplemental services that provide debtors little or no value and exacerbate their financial difficulties.[15]

- Some debt consultant and credit counselling agencies attempt to sell, or accept donations, for leads and services to LITs. A LIT who pays or donates for such leads and services risks compromising the insolvency system's independence standards and contravenes BIGR 49.

- Additionally, CAIRP has observed risks associated with Fintech companies and the evolution of lead generators. Increasingly, with little regulatory oversight, lead generator firms are moving into the market of subprime lending and using their data and technology to provide debt consultants and LITs with debtor leads, sometimes from clients to whom they have provided credit to. Further, it appears that lead

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[14] *Do You Really Know Canada's Credit Counselling Associations & Agencies,* CAIRP *Rebuilding Success* Spring/Summer 2020 Edition.

[15] Review of Licensed Insolvency Trustee business practices in relation to administration of consumer insolvencies - Office of the Superintendent of Bankruptcy Canada – Costs of insolvency of consumer debtors; April 28, 2017.

generator entities may be entering into shareholder relationships with LIT Firms, potentially creating independence or conflict of interest issues.

Recommendations:

9. **One-Stop Debt Support LIT Firms** - The OSB should be more proactive towards educating debtors on the value of meeting with an LIT as their first step to a "fresh start" and to encourage LIT firms to offer a full menu of insolvency services that may include initial assessments, credit counselling, a full range of debt repayment/rehabilitation tools (including consumer proposals, bankruptcy, debt management plans, credit repair/rebuilding), financial literacy training, budgeting techniques and post-filing rehabilitation services. With these services delivered under the oversight of an LIT, the OSB would be positioned to regulate them to appropriate standards. In support, the OSB should ensure provisions are in place to appropriately compensate LIT firms for the breadth of services they deliver and, as well, to provide LITs the authority to delegate, under their oversight, lower-complexity services to appropriately trained Insolvency Administrator employees.

10. **Regulate Non-LIT Debt Advisors** – In an ideal world, non-LIT debt advisor services should be strictly regulated. As such, the OSB could consider, in partnership with provincial governments, establishing a regulatory regime that applies to all entities operating in the debt advisory marketplace. However, considering the complexity of the legislative challenges and the costs related to establishing and maintaining an effective regulatory regime, CAIRP believes this option is both difficult and impractical to implement.

11. **Directive 13R7** – The OSB should consider modifying Directive 13R7 to further tighten the provisions designed to prevent the involvement of individuals associated with incompatible occupations in the activities of LITs. To this end, CAIRP suggests that in addition to the requirement that a majority of the directors and officers of a corporate LIT firm be licensed insolvency trustees, other requirements be added to ensure that minority non-LIT directors and officers must not carry out an incompatible activity. Further, the OSB should ensure that persons carrying out an incompatible activity are prohibited from owning shares of a corporate LIT firm. As part of its oversight responsibilities, the OSB should add a requirement that shareholders of an LIT firm be disclosed during the annual licensing renewal process to ensure compliance. Should the OSB find that an LIT firm has existing noncompliant relationships, the LIT firm be allowed up to 2 years to bring themselves into compliance. Finally, CAIRP believes that the list of incompatible activities should be expanded to include insolvency lead generators. Clear direction and action by the OSB in tightening the provisions of Directive 13R7 is requested to stem an unlevel playing field that is starting to emerge across the country.

12. **Educate Public** - The OSB and CAIRP should jointly commit to investing in educating the public on the importance of seeking insolvency assistance from LITs and the risks of using unregulated debt services. Media releases, website/social media communications, and limited advertising could effectively support such an initiative.

13. **Enforcement of the OSB's regulatory powers (BIGR 49 and Directive 6R3) -** In the interests of ensuring LIT independence and protecting the interests of all stakeholders, the OSB is encouraged to enforce LIT compliance more strictly with BIGR 49. To further support independence and transparency, the OSB is encouraged to amend the Assessment Form (Appendix A to Directive 6R3) to require additional disclosure of any fees/agreements, along with their source, paid/agreed to by the debtor to third parties for insolvency related services. Further, consideration should be given to creating a prescribed form that can be provided to creditors and that contains this information. With regards to

enforcement, the OSB is encouraged to investigate and prosecute debt advisors who purport to offer services regulated under the BIA more assertively.

D. ACCESSIBILITY TO THE INSOLVENCY SYSTEM

General Comments

Ensuring ready access to the insolvency system for all Canadians requires a multifaceted approach. Effective accessibility requires a system that appropriately supports the broad interests of all stakeholders, including the general public, all consumer debtors, all insolvent businesses (large, medium, and small sized corporations and proprietorships), creditors, and LITs. For this discussion, CAIRP considers whether Canada's poorest consumer debtors are being well-served; provides recommendations to close the service gap that currently exists for a micro, small or medium enterprise (**MSME**) (see Section E below for a more detailed discussion of this topic); presents ideas for improving administrative efficiencies and affordability; and makes recommendations to help ensure debtors continue to have ready access to effective services and a sufficient supply of highly qualified insolvency professionals.

"Affordability" has been identified as a potential access issue for some low-income consumer and MSME debtors. These debtors typically earn insufficient income and possess insufficient unsecured assets to either reimburse their creditors or cover the insolvency service costs attributed to LITs and the OSB. Low-income low-asset (**LILA**) consumer debtors are often caught in a debt spiral, acquiring new debt at increasingly higher rates of interest to pay older debt. Further, many do not possess the financial literacy or motivation to take advantage of a "fresh start" opportunity. MSME debtors are faced with the challenges of a highly procedural, judiciary, and administratively costly insolvency process. Some business debtors are unable to pursue an insolvency filing due to CRA's deemed trust provisions. CAIRP recognizes that some LILA and MSME debtors may deem the solutions provided by the insolvency system as unaffordable (or for any other reason inaccessible). As a consequence, some choose to forego formal insolvency proceedings. Some consumer debtors simply walk away from their debts, effectively ignoring their creditors. Similarly, MSME owners, faced with overwhelming issues, will make the decision to walk away from both the business' debts and assets. "Walk-away" debtors create a significant public interest concern. Walk-away consumer debtors are unable to rebuild their credit rating in a timely manner and their creditors are forced to write off the debts in their entirety or take costly legal collection actions to recover the monies owing. For MSME owner debtors, walking away from a business eliminates any opportunity to restructure the business into a going concern; abandons assets that could have been sold or kept in productive use to partially compensate creditors; and leaves any staff they may have employed without any recourse for compensation, such as is available under the *Wage Earner Protection Program Act* (**WEPPA**).[16] The sections that follow explore the issues facing LILA and MSME debtors in more detail and make recommendations to better ensure they have affordable access to effective insolvency services.

CAIRP believes that "affordability" can also be supported by implementing administrative efficiencies that reduce the costs of services provided by the OSB and LITs. As well, for the most financially disadvantaged debtors who can least afford the costs of insolvency services, this submission considers how these debtors can be supported to end their debt spiral and make a fresh start that offers an opportunity of future financial stability.

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16 *Wage Earner Protection Program Act*, SC 2005, c. 47, as amended (**WEPPA**).

Accessibility requires ready access to LIT professionals. Debtors need to be able to access a LIT for help regardless of their geographic residence or any financial or societal factors. Some recommendations related to non-resident offices and videoconferencing that support accessibility have been discussed earlier in this submission. However, ready access to insolvency services also requires there to be a sufficient supply of LITs to serve debtor/creditor demand. Accordingly, this submission will also address ways to better ensure that high achieving individuals are motivated to pursue a LIT career and that those who achieve the qualification of LIT continue to practice insolvency services.

The following provides more detailed discussion and recommendations related to specific areas impacting insolvency service accessibility.

D.1 - Low-Income Low Asset Debtors (LILA)

Could the summary process be further simplified for eligible low-income/low-asset estates? What checks and balances would be needed?

Could estate administrators perform the bulk of the work where the estate is largely administrative with LITs remaining accountable?

What would be a fair rate for a simple consumer estate if a debtor fully complies with their duties?

Discussion

CAIRP is committed to helping ensure all Canadians are provided accessible, affordable and high-quality insolvency services. However, considering debtors who might fall into the LILA category specifically, CAIRP is highly skeptical that a customized LILA program would offer any net value. For certainty, and regardless of its design, a customized LILA program would not cure, nor significantly impact, the broad scope of societal issues that contribute to debtor poverty. In fact, CAIRP believes a LILA program could potentially create greater problems of inequality and access than what it would be designed to solve. Establishing an insolvency service targeted to serve a specific and vulnerable segment of the population is fraught with complexities.

As an example, consider an eligibility issue of whether to include debtors with self-employment income as qualifying for a LILA program. While many debtors are self-employed in some manner, including them in a LILA program would cause considerable complexity in determining their eligibility and administrating their file. Should the eligibility income threshold be based on the debtor's business income draw or total gross business revenue or net business income? Should fully amortized or written off unsecured assets be included in the asset threshold (recognizing they may have some realizable fair market value)? With these kinds of complexities (along with the costs related to addressing them), it seems obvious that debtors with self-employed income should be disqualified from LILA. However, it would not be fair to automatically disqualify a debtor who earns a nominal self-employed income amount from providing in-home child-care services.

Further, establishing criteria to determine the appropriate debt threshold for LILA eligibility would be complex. What kinds of debts should be included and excluded in the threshold? Is there a risk that some debtors (possibly with the help of paid debt service providers) might manipulate their debt level to fit within a LILA eligibility box? Also consider the potential risk of some LITs refusing to accept LILA engagements where it is uncertain that they will recover their costs of service, further exacerbating the perceived risk of

accessibility to insolvency services. Incremental costs related to the additional training that LIT staff would need to administer another insolvency program should also be factored.

CAIRP acknowledges that the technical administration of insolvency files for consumer debtors who earn little income, possess no assets, are compliant with ITA filings and are not self-employed, can be less complex than non-LILA files. However, the "emotional factors" associated with many of these debtors often make the insolvency proceeding considerably more demanding and time consuming. LILA debtors are often financially illiterate and emotionally vulnerable and distrustful, with a history of having been taken advantage of by some creditors. Based on CAIRP's research of member and practice leaders' views, the LIT community believes LILA debtors are well-served by the existing system. This view is strongly supported by recent research undertaken by Professor Benadiba.[17] Her research has determined that LITs normally demonstrate considerable flexibility when dealing with LILA debtors, often reducing monthly payments when affordability is an issue and offering alternative solutions when a bankruptcy or proposal is not the most appropriate outcome. In a recent member survey conducted by CAIRP, 83% of the 221 responses indicate LITs will reduce the cost of a summary bankruptcy proceeding for LILA debtors without surplus income. Professor Benadiba also found that none of the LITs she interviewed for her research study refuse insolvency files based on the debtor's level of debt or inability to pay the LIT's fees and disbursements. She concluded that "resorting to a new simplified bankruptcy procedure for the poorest therefore does not seem appropriate". Dr. Benadiba's research paper further recommends that consideration should be given to implementing stricter controls on lenders, that require them to better assess the creditworthiness of borrowers, and as well, to providing debtors with more opportunity for financial education. Together, she believes these are the kinds of supports that could effectively improve the economic fate of LILA debtors.

Recommendations:

14. **Self-Declaration -** The evidence seems to clearly confirm that LITs are effectively serving LILA debtor interests, regardless of their debt level or ability to pay the LIT's fee. Further, as discussed above, there are risks and complexities associated with introducing a new LILA program. To raise the confidence level that LILA debtors have ready access to quality insolvency services, the OSB should consider requiring all LITs who provide consumer insolvency services, to complete a self-declaration annually to verify they do not refuse service to low or no income/asset debtors because of their inability to pay the LIT's service fees.

15. **LILA Program & Directive 20 -** If the OSB continues to believe a customized program is required to better support the segment of debtors defined as "Low-Income, Low-Asset consumer debtors", CAIRP is prepared to work with the OSB to help gather, review and assess any evidence that may indicate a LILA debtor accessibility issue and, if deemed appropriate based on the research, to develop a targeted strategy that can effectively address the challenges and risks discussed in this submission, while delivering affordability and system integrity. If a decision were made to develop such a LILA program, it seems reasonable to believe Directive 20 could be amended to:

    - Clearly define a narrow set of criteria that restricts eligibility to those individuals who are experiencing the highest level of financial hardship,

    - Streamline the costs of administration,

    - Ensure system integrity is maintained and determine how the services would be funded.

[17] Access of LILA and NINA debtors to the legal insolvency system in Canada; Prof. Aurore Benadiba, January 2021.

D.2 - BIA 66.11 – consumer debtor

What other potential opportunities can you identify to improve accessibility, streamline proceedings or reduce costs and other barriers to access?

Recommendation:

16. **Legislative changes:** The definition of "consumer debtor" for Consumer Proposals should be amended to remove secured creditors from the monetary threshold as follows: **"consumer debtor** means an individual who is bankrupt or insolvent and whose aggregate debts, excluding any secured debts, are not more than (…)" (see also Recommendation 17., which recommends raising the debt limit for consumer proposals from $250,000 to $325,000).

D.3 - *Pro-Bono* Insolvency Services

In addition or alternately, could a pro bono program help to ensure the administration of services for low-income/low-asset estates?

Discussion

As mentioned earlier, it is in the public interest to ensure that all consumer and commercial debtors are provided ready access to regulated insolvency services delivered by LITs. Further, to help maintain a supply of LITs that is sufficient to meet public demand, LITs should be compensated commensurately with their education and experience. However, with these points in mind, CAIRP and its members recognize the importance of offering *pro-bono* services to Canada's most financially disadvantaged debtors. In fact, based on member surveys, most members already offer *pro-bono* or subsidized services to those who are most in need. In consideration, CAIRP embraces the idea of formalizing a *pro-bono* system that would serve the most disadvantaged. This would be consistent with other regulated professional bodies, such as Law Societies and CPAs, that also offer limited *pro bono* services to help high need segments of the population.

CAIRP believes LITs may be amenable to considering a *pro bono* model that helps support a segment of LILA estates. Such a model could encompass the following provisions:

- Consumer LITs offer *pro-bono* services equivalent to 3% of their annual consumer filings, which could represent thousands of LILA debtors annually across Canada.

- OSB waives filing fees.

- *Pro-bono* LILA consumer debtor services would be restricted to a one-time only service, for debtors with very modest debt levels.

As an alternative to a pro-bono service, consideration could be given to establishing a service that is cost subsidized by the LIT and OSB. To help offset the costs of such service, consideration could be given to using the interest received from the OSB's undistributed dividends account.

D.4 - LIT Remuneration

Could changes in the fee structure associated with the administration of estates, or the waiver of fees in certain instances, serve to enhance accessibility?

Discussion

LIT professionals are essential to supporting and balancing the best interests of the stakeholder group – debtors, creditors, and public alike. In fact, LITs enhance the efficiency of the system and ensure the accomplishment of the overarching objectives of the insolvency legislation. Accurately assessing debtors' financial positions and preparing effective solutions (within the legislated rules and regulations) to fairly support debtor and creditor interests is a complex undertaking, and often, extraordinarily so. CAIRP believes that only LITs possess the breadth and depth of professional competencies needed to deliver an effective standard of insolvency services.

To ensure debtors have ready access to a sufficient supply of competent insolvency service professionals, CAIRP strongly encourages the OSB to ensure LITs are fairly remunerated, commensurate with their education, experience and complexity of engagements. Consider that LITs typically complete 7-9 years of post-secondary and professional education and several years of professional experience just to earn their insolvency license. A fair compensation regime is essential to ensuring there is a sufficient supply of LITs entering and remaining in the profession.

Section 128 of the BIGR has not been modified since April 1998. Since that time inflation has risen over 55% in Canada.[18] Further, salary, technology and marketing costs (primarily due to the proliferation of non-regulated debt service providers) have all significantly outpaced the rate of inflation. As well, it has been observed that some insolvency requirements have become more complex and time-consuming and that the average value of realized assets had diminished. LITs have had to absorb these changes by implementing operational efficiencies. This is clearly not a sustainable model. Consider that:

- LITs are not always fairly compensated for the time commitment that some cases require. The files with higher receipts no longer compensate for those with lower receipts.
- LIT compensation has not kept pace with the increased skills and knowledge that the profession requires.
- Competitive compensation is necessary to continue attracting and retaining quality candidates and LITs to the profession.
- The average remuneration per file has not kept pace with the extra costs associated with the longer administrations.

Recommendations:

17. **Amend the BIGR to update the remuneration and tariff calculations:** To create a fair and sustainable LIT remuneration model that serves all stakeholder interests, CAIRP encourages the OSB to enact the following BIGR amendments:

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[18] Calculated based on the non-seasonally adjusted consumer price index (**CPI**) reported by Statistics Canada for April 1998 and March 2021, accessible at https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1810000401, data retrieved on May 10, 2021.

- BIGR 128(3), 64, and 65(1) – Amend these Rules as proposed in CAIRP's submission to the OSB entitled, *Review of Can. Reg. 368 – Bankruptcy and Insolvency General Rules 128, 64 and 65.*[19] In brief, they include:

  - Supplemental Draws: Amend BIGR 128(3) to increase the frequency of draws for administrating personal bankruptcies. Implementation would not negatively impact stakeholders. This adjustment would simply improve the cash flows for LITs, not increase the amount of LIT compensation.

  - 30-Day Rule: Amend BIGR 64 and 65(1) to repeal the requirement for LITs to wait 30 days after mailing the notice of Form 15 to draw their final fees.

- BIGR 131 and 128(2) – Amend to allow a reimbursement of non-discretionary costs and to raise the BIA Insolvency Counselor Fee and Administrative Fee, as were recommended by CAIRP in its submission to the OSB, entitled, *A Discussion To Enhance Canada's Consumer Insolvency System*:[20]

  - BIA Insolvency Counselor Fee: The BIA Counselling Fee in BIGR 131 has not been adjusted since its inception in 2002. In recognition of cost inflation and the increased emphasis on the counselling role, it would seem appropriate that the fee for mandatory counselling sessions as prescribed in the Bankruptcy and Insolvency Act and Counselling Directive be increased from $85 to $140 and then adjusted annually for inflation.

  - Administrative Fee: Similar to the BIA Insolvency Counselor Fee, the administration fee under BIGR 128(2)(e) has not been adjusted since 2002. The costs of administration have increased due to both inflationary and societal changes. CAIRP recommends that the administrative fee be raised to at least $150, indexed annually for inflation.

  - Other Non-discretionary Cost Reimbursement: LITs incur a variety of non-discretionary administrative costs in their duties to complete a bankruptcy or consumer proposal filing, e.g. translation, appraisals, auction fees, insurance, etc. In consideration, CAIRP recommends that the OSB clarify that the "Other" expenses line found on the Receipts and Disbursements Form can be used by an LIT for the reimbursement of such non-discretionary costs. For certainty, BIGR 128(2) should be amended to permit "Other non-discretionary administrative costs" or a clarification rule could be added to the *Miscellaneous Fees* section of the BIGR, to clarify that the administrative fee is not intended to include non-discretionary expenditures.

- BIGR 128(1) - The tariff for summary administrations has not been updated for the past 23 years. In consideration, CAIRP recommends simplifying the formula, modestly adjusting the receipt threshold, and committing to an annual cost of living adjustment (**COLA**) of the threshold. CAIRP suggests that the tariff be initially based on 100% of the first $1,000 in receipts and 50% of the excess, with a COLA applied to the first $1,000 threshold. Changing the scale would result in a small

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[19] May 2019, *Review of Can. Reg. 368 – Bankruptcy and Insolvency General Rules Rules 128, 64 and 65.*

[20] December 2016, *A Discussion To Enhance Canada's Consumer Insolvency System.*

initial increase in remuneration,[21] but an important one for trustees. Further, the annual COLA would minimally impact stakeholders of the insolvency system going forward.[22]

This proposed amendment would cover only a small fraction of the inflationary cost increases LITs have absorbed since 1998.[23] However, CAIRP is reasonably confident that such a change, together with commitments to an annual COLA for receipt thresholds and implementation of the other fee and MSE amendments proposed in this submission, would be perceived as fair and reasonable by the public and LITs.

- New Rule – As permitted by BIA subsection 66.11, "*consumer debtor*", CAIRP encourages the OSB to create a new Rule that updates the aggregate debt level cap for consumer debtors to be "not more than $325,000" from the currently prescribed amount of $250,000.

- Rules 128-136.1 - Aside from the specific recommendations above, the OSB is encouraged to review these sections in their entirety to determine whether the dollar threshold amounts remain relevant or should be updated to year 2021 dollars, with a commitment to automatically adjust the amounts periodically.

- With regards to Rule 130, CAIRP recommends that the amount for the purposes of subsections 49(6) and (8) be updated to $22,500 from $15,000 and that this amount be automatically amended annually by the COLA.

E. OTHER REGULATORY ISSUES AND RECOMMENDATIONS

E.1 - Micro and Small Enterprises (MSE) & Micro, Small, and Medium Enterprises (MSME)

What would be a fair rate for a simple business estate if a debtor fully complies with its duties?

What characteristics of consumer or business estates would qualify them as simple?

Discussion

CAIRP believes a gap in the existing insolvency system should be rectified to significantly reduce the number of micro and small business owners who walk away from their businesses due to a debt burden. While this gap may become more prevalent during the next few years as a consequence of the past year's pandemic, the reality is that this gap is a systemic issue that has long needed attention and remedy. Establishing insolvency services specifically targeted to MSMEs would support the public interest by reducing the number of MSMEs that shut down permanently, improve debtor prospects for rehabilitation, and provide a better recovery for the creditors. The services could be made affordable by reducing the complexity of insolvency administration. To better appreciate the magnitude of this issue, consider that in Canada, MSMEs employ 88.5% of the total private sector labour force.[24]

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[21] The change in scale would represent an increased remuneration of $166.25 at a receipt level of $2,500, as compared to the present tariff scale, excluding taxes, or an increase of 10.5% at this level.

[22] For example, a 2% change in the threshold as a result of a COLA adjustment would represent a change of $10 or 0.6% at a receipts level of $2,500, excluding taxes.

[23] See note 18, *supra*. At a receipt level of $2,500, the remuneration of $1,583.75 in 1998 dollars would be equivalent to $2,429.58 in 2021 Dollars, while the proposed remuneration at this level would only be increased to $1,750.

[24] Industry Canada, *Key Small Business - 2020,* http://www.ic.gc.ca/eic/site/061.nsf/eng/h_03126.html.

MSMEs also play a significant role in supporting Canada's middle class. CAIRP recognizes that establishing a MSME service would likely require legislative amendments to the BIA and that such changes fall outside the parameters of the current consultation. However, considering the urgency of this matter and that the recommended amendments would support the objectives of the consultation, CAIRP is including the related discussion and recommendations within this consultation submission.

From an MSME debtor's perspective, the adoption of CAIRP's recommendations would present insolvency solutions that are more accessible, affordable and timely. As well, creditors would realize improved recoveries, either through the sale of the bankrupt's assets or by the debtor restructuring their business to become a going concern. The recommendations are consistent with CAIRP's recent discussions with Innovation, Science and Economic Development Canada (**ISED**) and Department of Finance Canada officials and are closely aligned with and supported by Dr. Janis Sarra's 2016 report for the Marketplace Policy Branch of Industry Canada.[25] In her report, Dr. Sarra makes a strong case for amending the BIA to establish a streamlined approach to support insolvency proceedings for MSEs and MSMEs. Further, CAIRP's recommendations support the draft commentary and recommendations provided by the UNCITRAL report, *Draft text on a simplified insolvency regime*.[26]

The current qualification system ensures LITs will have the consumer and commercial competencies necessary to support MSE and MSME insolvency services.

Recommendations:

18. **MSE Bankruptcy –** Legislative changes should be made to allow a more streamlined, simple and accessible bankruptcy option for MSEs, similar to or fashioned after the summary administration provisions in Section 155 BIA. The process should have the following significant characteristics:

    - A definition should be provided to identify which businesses will qualify for the MSE bankruptcy treatment. We suggest that the provisions for access be that the MSE has unsecured assets of less than $X in value (CAIRP suggests it should be aligned with the amount used for the summary administration threshold) and has 10 or fewer employees. The organization structure is an incorporated entity.

    - The administrative process should be similar to the one described at section 155 BIA, with the exceptions that there should be no joint estates, the Notice of Bankruptcy should not refer to an application for discharge, there should be no requirement for counseling for directors (except as an option at the request of a Director/Owner), and creditors' meetings should be held only upon request by at least 50% creditors.

    - The fee for such an administration should be a standard, flat fee for the LIT's services, plus disbursements, set by regulation, with all such fees being subject to an annual adjustment for inflation.

19. **MSE Proposal –** Legislative changes should be made to allow a more streamlined, simple and accessible proposal option for MSEs, similar to or fashioned after the consumer proposal provisions in Section 66.1 to 66.4 BIA. The process should include the following characteristics:

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[25] Reference Micro, Small and Medium Enterprise (MSME) Insolvency in Canada, Report for the Marketplace Policy Branch of Industry Canada, Dr. Janis Sarra, March 30, 2016.

[26] United Nations Commission on International Trade Law, *Draft text on a simplified insolvency regime*, December 2020.

- A definition should be provided to identify which business will qualify for the MSE proposal treatment. CAIRP suggests that the provisions include the MSE being in an insolvent or bankrupt state, with unsecured debts of less than $500,000. The organization structure may be sole proprietor or incorporated entity.

- The significant provisions should include:

  - A single consolidated bank account to be maintained by the LIT for all such files.

  - Similar to a consumer proposal, counseling sessions should be required for business owner/corporate directors. This would require an amendment to Counselling Directive 1R6.

  - No "notice of intention" delay period before the proposal is made (businesses requiring notice of intention should file under Division I Proposal).

  - Time frame to vote: 45 days.

  - Creditor meeting only upon request by an aggregate of 50% of the dollar amount of proven unsecured creditors at 45 days.

  - Deemed approval by simple majority of creditors, without the need to seek court approval.

  - Default that would occur automatically upon the equivalent of three months' payments missed, or in the case where payments are to be made less frequently than monthly, the day that is three months after the day on which the debtor is in default in respect of any payment.

  - Possibility of a revival unless opposed by creditors.

  - No automatic bankruptcy if the proposal is not accepted or if it is annulled or deemed annulled, unless the MSE was bankrupt at the time of filing.

  - Term of the proposal: Maximum 5 years.

  - Deemed taxation and discharge of LIT.

- The fee for such an administration should be based on a flat fee plus a scaled variable fee based on a percentage of distributions for the LIT's services, plus administrative disbursements, plus a counselling fee, with all fixed fees being subject to an annual adjustment for inflation.

20. MSME Proposal – Legislative changes should be made to allow for a more streamlined, simple and accessible proposal option for MSMEs, inasmuch as they cannot benefit from the process contemplated for the MSE proposals. The more streamlined provisions could be used as an alternative to the provisions set out in Division I of Part III of the BIA, and would represent a path that is part ways between the provisions of Division I of Part III of the BIA and the provisions of Division II of Part III of the BIA. The process should have the following significant characteristics:

- Definition: Applies to businesses that do not fit within the Micro/Small Business Summary Administration definitions as proposed above.

- Voting issues: All questions relating to the proposal should be decided by an ordinary resolution of the creditors to whom the proposal was made, including the vote on the proposal (requires changes to BIA sections 50 (1.8) and 54 (2).

- Cash flow statement: Delay for the filing of the cash flow statement should be 30 days from filing. Additionally, if there has been a NOI filed with the appropriate cash flow, there should not be another cash flow unless material adverse changes have occurred in the period between the filing of an NOI and the filing of the proposal.

- Stay: Automatic stay for the first 75 days without court intervention, followed by two court applications of 45 days each.

- Meeting of creditors: Section 66.15 BIA should be used as a model, correlated with court approval rule. In keeping with this principle, the proposal would be deemed to be accepted by the creditors if there is no requirement to hold a meeting of creditors, and no meeting of creditors would be held unless after 45 days a majority (50% + 1 in value of claims filed) of the creditors request a meeting of creditors. Meeting of creditors to be convened within 21 days. If a meeting of creditors is required, the vote to carry the proposal should be a simple majority (50% + 1 in value of the claims voted).

- Court Approval: Deemed approval unless at least 25% (in value) of the proven creditors have requested the court approval within 15 days.

- Deemed default: For monetary terms, a deemed annulment would occur if the equivalent of three months of payments are missed or if there is a time delay of more than 3 months after a missed payment, if payments are less frequent than monthly. As well, for non-monetary terms, a deemed annulment would occur after the LIT is notified in writing and/or the LIT determines that there is a default of a non-monetary term, has notified the debtor thereof within 15 days, and the debtor has not remedied the non-monetary default within 60 days (i.e. a total of 60 to 75 days in aggregate).

- Taxation and discharge of LITs: Deemed unless the official receiver or any interested party request taxation.

- The fee for such a process should be as is negotiated with the debtor and disclosed to the creditors and the OSB for transparency.

E.2 - Deemed Trusts and Crown super priorities

What other potential opportunities can you identify to improve accessibility, streamline proceedings or reduce costs and other barriers to access?

Discussion

Deemed Trust and Crown super priority provisions[27] (collectively referred to herein as **Deemed Trust** provisions) are a significant barrier for financially struggling small businesses in need of restructuring. In

[27] Sections 60(1.1) and 67(3) BIA, sections 224(1.2) and 227(4.1) ITA, equivalent provisions of the *Canada Pension Plan* (R.S.C. 1985, c. C-8, as amended) and *Employment Insurance Act* (S.C. 1996, c. 23, as amended), and substantially similar

many cases, the Deemed Trust prevents LITs from proceeding with an insolvency filing due to the risks of not knowing whether they will recover their costs, with respect to taking possession of assets as required by Directive 7, and the uncertainty of whether the filing will be resolved within a reasonable time frame. A common theme CAIRP heard from numerous LITs is that the Canada Revenue Agency (**CRA**)[28] is often uncooperative and very slow to respond to LITs seeking to enter into administrative agreements. As a result, MSME debtors often choose to, or are provided no other reasonable option than to walk away from their business with no opportunity to restructure. The assets become abandoned with no opportunity to realize their value to reimburse, at least in part, CRA and other creditors. Additionally, the opportunity for employees to access the relief provided for under the WEPPA is lost. The existing situation is clearly not in the best interests of any stakeholders: general public, business owner debtors, creditors, OSB, or CRA.

Recommendations:

21. **Pursue legislative changes:** In consideration, as an alternative to, or in conjunction with MSME legislation, CAIRP recommends that the OSB approach the Canada Revenue Agency or the Department of Finance to amend the ITA with the objective of significantly modifying Deemed Trusts. Modification suggestions include:

    - Drop the rank of Deemed Trusts to preferred, becoming part of the list of creditors in section 136 BIA.

    - Clarify that the costs of realization, including reasonable costs of administration of the bankrupt estate, have priority over the Deemed Trusts.

    - Limit the amount to be claimed to a specific period (e.g. debt arising in the three months preceding the date of the filing), with the balance of the debt, if any, to be considered as an ordinary unsecured claim.

E.3 - Access/Diversity to the LIT Profession

Discussion

Some concern has been expressed that the LIT profession may not be sufficiently accessible. Barriers include the CIRP Qualification Program (**CQP**) entrance requirements (including degree standard), the challenging program itself, the CNIE and Oral Board assessments, declining compensation for consumer insolvency services, and a general lack of knowledge about LIT career opportunities.

Recommendations:

22. **CQP Development:** CAIRP is currently undertaking a CQP redevelopment intended to improve candidate performance and improve access to the profession without compromising competency standards. Consideration should also be given by the OSB to participating, jointly with CAIRP, in developing a bridging program to enhance the success of disadvantaged candidates and implementing a unified and streamlined OSB License/CAIRP CIRP assessment process that improves the flow-through

provisions of provincial legislation. These provisions will take a number of different forms, from deeming property to be held in trust and separate and apart to garnishment rights as regards amounts due to the tax debtor, notwithstanding the existence of a security interest and sometimes notwithstanding the co-existence of a proceeding under the BIA.

[28] The comments are made in respect of the CRA, but apply equally to the Quebec Revenue Agency (**QRA**).

to licensing for newly certified CIRPs and eliminates the risk of an individual earning the CIRP but not the LIT.

23. **Promotion of the profession:** CAIRP, the OSB, and LIT firms should develop a joint initiative to more actively promote LIT career opportunities to university and college students and graduates.

E.4 - Compliance Model

Recommendations:

24. **Restructure Compliance Model:** With the objectives of realizing operational efficiencies and strengthening regulatory compliance, CAIRP recommends that the OSB consider enhancing and focusing more reliance on the value of practice review and complaint investigation/discipline processes:

    - Employ/contract experienced LITs to conduct practice reviews. LITs possess the professional competency to assess both the compliance of regulatory standards and quality of service provided. With an objective of improving the quality of insolvency services that LITs deliver, practice reviews should emphasize educating LITs on best practices and regulations and when deemed appropriate (normally for professional misconduct), discipline.

    - Employ/contract experienced and qualified professionals to investigate complaints.

    - Amend Directive 13R7 to implement a mandatory PD requirement for all LITs. Mandatory PD is the norm for regulated professionals. This requirement would help improve the quality of insolvency services, improve regulatory compliance and further distinguish LITs from non-regulated insolvency service providers. If the OSB sees value, CAIRP would be prepared to support the OSB as the designated provider of LIT professional development and as well, assist the OSB with tracking LIT PD hours.

F. OSB CONSULTATION DOCUMENT ANNEX

Recommendations:

25. **BIGR, Directives and CCAR additional changes:** The OSB Consultation Document contains recommendations, as an annex sent therewith, addressing specific BIGR sections and specific directives. CAIRP has considered the recommendations contained therein and have commented the same hereinbelow. As well, we are providing additional suggested changes to the BIGR, Directives and the CCAR. These are all set out below and should be considered as our recommendation for changes to the BIGR, Directives and CCAR, in supplement to the comments made in the text of the submission above.

    Bankruptcy and insolvency general rules and directives:

    - BIGR 5(1)(b) and 5(2): These rules should be harmonized with practice, to recognize that some documents are sent to both the Division Office and the Courts, and that the Court uses a “next business day” method when the deadline falls on a non-juridical day. The existing Rule can create a conundrum where a delay to file a proposal or request an extension falls on a non-juridical day, because section the BIGR 5(1)(b) suggests the deadline has expired if the extension is granted on

the next juridical day, while the Court would consider the deadline as being met. As well, Rule 5(2) should be updated to recognize that most documents are sent by email.

- BIGR 18, 58.1(1), 123: These rules should be reviewed by the OSB to determine whether the dollar threshold amounts are relevant or whether they should be updated to year 2021 dollars.

- BIGR 44 and 47: To reduce duplicity, consolidate these two rules into a single rule that addresses independence and conflicts of interests.

- BIGR 49, 50 and 51: Considering all three of these Rules deal with reputational risk and integrity of the system, it is recommended that they be consolidated, and recast into a single Rule.

- BIGR 53: Clarify that complaints submitted to the OSB must specify the Rule that has been violated and the complainant's identity.

- BIGR 56: This rule should be updated to better reflect the situation and achieve efficiencies. For an application under subsection 36(1) of the BIA, there should not be a need to notify creditors or the court in situations where the former LIT's accounts have been approved by the inspectors and the new LIT. Further, if a notification is to be maintained, it should not require permission of the Court. A decision by the new LIT and inspectors should be sufficient. As a failsafe, a decision by the OSB could be required. Accordingly, it should not be necessary to notify the creditors unless the new LIT and inspectors or OSB request it. The new LIT, the inspectors and the OSB have sufficient information regarding the reasonableness of the accounts to assess whether notification to creditors is appropriate or not. As well, the taxation/passing of accounts should be made more user friendly, to correspond with current practice. It should not be necessary for the LIT to attend at the taxation or passing of accounts, unless the taxing officer requests it, or if there is a dispute regarding the accounts.

- BIGR 57, 58(4), 108(2): The determination of whether a bankrupt can or cannot speak fluently in one of the official languages is highly subjective. The test to request translation services should be more objective (for example, on request by a bankrupt whose first language learned, and still practiced as their primary language, is not an official language). If a translator needs to be retained, the rule should address the payment arrangements. If the LIT is responsible to pay the translator and the translator needs to be acceptable for the Official Receiver, the amount allowed on taxation should be the actual amount paid, not the "rate that the taxing officer deems reasonable".

- BIGR 60, 67, 82, 102-103: The taxation of accounts should be more user friendly, to correspond with current practice. It should not be necessary for the LIT to attend the taxation of accounts hearing, unless the taxing officer requests it, or if there is a dispute regarding the accounts.

- BIGR 60/62: Contemplate moving towards deemed taxation for Ordinary Administrations & Division I Proposals, as being the norm and requesting court oversight where appropriate.

- BIGR 68; Directive 17, Directive 32: CAIRP believes the existing document retention period of 4 years following discharge is reasonable and appropriate. Technology has made file storage efficient and inexpensive, and it is conceivable that from time to time, documents may be of value three to four years following a discharge. CAIRP encourages the OSB to ensure the required storage period is consistent with best practices under PIPEDA legislation.

- BIGR 79: The Rule should be updated to remove the necessity to give notice to creditors in situations where the interim receiver does not terminate the receivership order or bankruptcy order. If the bankruptcy order was not granted, the debtor could be damaged by sending notices to the creditors.

- BIGR 83: This requirement should be modernized. In the case of a bankruptcy order, the LIT must take possession of the assets as soon as possible. A requirement to serve the bankruptcy order to the LIT within two days, and for the LIT to serve the bankruptcy order onto the bankrupt within two days is an archaic practice. The applicant should have the obligation to serve the documents on both the LIT and the bankrupt, and this should be done immediately upon receipt of the order.

- BIGR 104: This Rule should be reviewed, considering that it is not readily apparent what the Rule adds to the general provisions of the BIA, in particular BIA S. 77.

- BIGR 105: The Rule does not specifically provide guidance when an opposition to a discharge, solely on the grounds referred to in paragraphs 173(1)(m) or 173(1)(n), is withdrawn. The practice has been that a bankrupt who was eligible for an automatic discharge before the opposition was filed is again eligible for an automatic discharge. While this has not been an issue for LITs, the Rule should be clarified.

- BIGR 123: The wording of BIA Rule Section 123 and section 147 BIA should be amended to make it clear that the levy applies to the payments destined for creditors in general, before proceeding to a distribution. This clarification would avoid a recalculation of previously issued dividends when the rate changes (i.e. a situation where a 5% levy was deducted from employees' payments, just because the employees were paid first). Essentially, the practice for all levy calculations should be that the levy is paid first, then the preferred creditors are paid up to the value of their claims, then the ordinary unsecured creditors are paid on a *pro rata* basis, etc.

- BIGR 125-127, 136: Often there is more than one entity listed as respondents in the receivership order. The OSB currently requires the filing of separate BIA sections 245/246 documents for each entity listed, plus the $70 fee each, unless we obtain a consolidation order from the court. Recommend that if there is commonality of interests of the respondents, such that a court grants one order, the Receiver should only be required to file one BIA sections 245/246 document, even if the banking for each estate be maintained through a separate trust account.

- BIGR 132(1): Amend the filing fee deadline from the 15th of the month to the 30th of the following month. The additional time for payment avoids LITs having to lend money to the debtor's account in order to cover the filing fees for debtors who file near the end of the month.

- Directive 1R6: Add the option of a third counselling session to better support and rehabilitate debtors. Provide financial literacy and credit rebuilding education.

- Directive 2R – Joint Filings: Several modifications and clarifications with respect to updating this Directive are recommended, including:

    - Clarify what constitutes "substantially all" for the purpose of the Directive. Currently, the Directive provides no guidance as to what constitutes "substantially all". Without guidance, the variance in practice is significant amongst LITs. Some LITs apply a standard of "at least ninety percent" of joint debt, while other LITs may apply a standard as low as a simple majority.

- Further, the directive states that the "debts of the individuals" must be substantially the same but does not provide guidance on whether "debts of the individual" refers to *all* debts of the individuals, or only *unsecured* debts of the individual. As a result, the current wording may prevent a couple with entirely joint unsecured debts from proceeding with a joint filing, if the couple's house and mortgage are only in one person's name. As mortgage companies are not impacted by a joint filing when a couple has decided to retain the asset, this seems contrary to the intention of the directive.

- Considering this lack of guidance, LITs may provide, in good faith, inconsistent advice to debtors, which can result in "trustee shopping", and a negative impact on the integrity of the insolvency system.

- The Directive should be amended to clearly define "substantially all". Considering that "substantially all"[29] is most commonly defined as "greater than 90% but less than 100%", CAIRP recommends that the Directive be amended to define "substantially all" as: 90% or greater of unsecured debt.

- Limit of debts in a joint consumer proposal: A "consumer debtor" is defined in section 66.11 of the BIA as an individual who is bankrupt or insolvent and whose aggregate debts, excluding any debts secured by the individual's principal residence, are not more than $250,000 or any other prescribed amount. However, the Directive does not provide guidance on the limit for a situation of two consumer debtors in a joint consumer proposal. Accordingly, it is unclear whether the limit remains as $250,000 or should be increased to $500,000. The BIA is silent on this point, but caselaw tells us that the debt limit of $250,000 is not increased even when there are multiple consumer debtors.[30]

- CAIRP recommends that the Directive be amended to clarify the limit of debts for a joint consumer proposal.

- Directive 11R2 Surplus Income: Considering all that has transpired over the past year and further changes that are being contemplated, it is recommended that this Directive be reviewed in its entirety. Suggested amendments include the following:

  - In section 5(5), the Superintendent's Standards Appendix A amount allowed should be reduced by the amount of Canada Child Benefits received from the family unit. Since the amount of the Canada Child Benefit is not allowed to be added to income and it is presumably used to assist households with their household expenses it is equitable to reduce the standard to ensure fairness amongst all stakeholders and preserve the integrity of what this directive is meant to achieve.

  - A section should be added under section 5 to provide that non-discretionary expenses relating to other family members shall first be subtracted from those other family members to the extent of their income.

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[29] CRA Policy statement, Reference number CSP-S16, https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/summary-policy-s16-substantially.html.

[30] *Ter Mors Re*, (1998) 79 A.C.W.S. (3d) 889, at para 10.

- Consideration should be given to having regional rather than national guidelines under The Superintendent's Standards found under Appendix A. The cost of living in different areas of Canada can vary and it would be important to ensure that the standards reflect this disparity where applicable. Alternatively, consideration should be given to increasing the $200 amount found in sub-section 5(6) for regions that have higher costs of living.

- Example 5 needs to be clarified and it should be added as part of the main body of the Directive.

- Paragraph 5(4) should be amended by removing the requirement of income and expense statement and replacing that with simply a requirement to verify proof of income and proof of payments made pursuant to paragraphs 5(2) and 5(3).

- Directive 14: The Directive addresses (*inter alia*) the use of persons related to the LIT to perform certain administrative tasks on files, such as stocktaking and possession, accounting, etc. The policy, inasmuch as it relates to services provided by related persons, is necessary and useful, as it provides more specificity regarding the expectations of a LIT, in applying sections 34-52 BIGR (in particular sections 44 and 52).

- Directive 16: This Directive was originally issued in December 1988 and last amended in 1991. Considering the changes in legislation and practices over the past 30 years, this Directive requires a substantial rewrite. This Directive should be immediately repealed until it can be rewritten and then reissued. Update recommendations include:

  - Correct the form titles and trustee references to Licensed Insolvency Trustee.

  - Paragraphs 1 through 4 are outdated and require revisions to modernize.

  - Paragraphs 5-10: The content in these paragraphs is outdated and requires a complete rewrite. As examples, the content refers to incorrect Forms numbers and titles and define a consumer debtor incorrectly per BIA 66.11. Paragraph 8(b) is incoherent, and Paragraph 9 requires the LIT to have prior permission from OSB to use the alternate form.

  - Appendix A and B to the Directive: Paragraph 4 of the Directive states that LITs have multiple ways of disclosing the value of an asset. The appendices attempt to solve this issue. For the most part the appendices are reasonable however, there are divergent practices in listing values on the Statement of Affairs. The assets most at issue are property and vehicles. Providing guidance on how to properly account for selling costs for real property (i.e. real estate commission, legal fees, etc.) should be considered.

- Directive 21R: This Directive addresses estate security, i.e. the requirement that LITs provide a bond under s. 16(1) BIA. Given the cost of obtaining a bond and the administrative burden associated with maintaining the bond, we suggest that the OSB revisit the amounts referred to in the Directive and waive the requirement for a bond when the risk or amounts involved is small. The OSB should instead focus on obtaining a bond when the funds or assets at stake are substantial. Note however, that the requirement cannot be made overly onerous, and the Directive should contemplate a possibility of replacing the estate security by some other supervisory measure, as it is possible that a bond is not even available if the amounts at play are too high.

- Directive 33**:** CAIRP does not recommend substantial amendments to this Directive. However, consideration should be given to providing guidance for LITs that outsource their marketing to third parties.

Companies' Creditors Arrangement Regulations

- CCAR 6: The OSB should reconsider the requirement for a newspaper publication. Newspaper publications are a vestige of the past, expensive and not particularly effective to communicate information regarding the proceedings. Posting the publication on the OSB and CAIRP websites would be more effective.

- CCAR 7: Considering the list of creditors to be publicly published, the requirement is to publish the name, addresses and amount of claim is problematic when there are:

    - Employee claims. This is sensitive information. LITs normally group employee claims together, and enter one line item for this debt, so that no one person is singled out, and, information surrounding their claim (which is ultimately salary related), remains confidential, except in summary form. This practice is strictly consistent with the rule. In consideration, the rule/legislation should be updated to contemplate privacy issues.

    - Any other creditor who may have a reasonable expectation of privacy on their address. For example, the home address of a non-commercial creditor who was personally owed funds from a debtor should not be public. The legislation anticipates regular commercial suppliers/creditors when considering this public listing but does not contemplate discrete privacy issues. In consideration, while the names and amounts can be published, addresses should not.

- New CCAR recommendation: The CCAA needs a mechanism, like the BIA has, to give the Monitor direction on the course of action to take in respect of uncashed distribution payments to creditors. Presently, if a Plan is well crafted, it can spell out what the Monitor is required to do, but if it isn't or if a Plan is silent on this subject, the Monitor is faced with one of two actions:

    - Sending the funds back to the Debtor Company. This creates a dilemma as it is unclear whether the Petitioner is obligated to pay these funds to the creditor at a future date if/when the creditor asks for them. The release on the claim likely has already happened.

    - Send the funds to (for example) the BC Unclaimed Property Society, where a creditor can retrieve their funds.

- CCAR 9: The documents titled Form 1 and Form 2 in the Schedule to the CCAR contain information that is duplicative, and some information of questionable relevancy. The Forms should be redesigned to remove redundancy and information that is not relevant or of interest for the stakeholders. More specifically:

    - Form 2 – Allowing only 48 hours to file is not always reasonable when dealing with numerous legal entities under the filing. The OSB should provide guidance that offers flexibility based on the number of entities filing.

    - The obligation to file Form 3 within 5 business days after the day on which the court order was granted should be amended to be within 5 days on which the discharge court order becomes

effective. When getting the discharge order, LITs are often faced with completing additional steps which may take weeks or months. The court approves the discharge, but the discharge is not effective until such time that the LIT files a Certificate with the Court and the remaining steps are completed. In consideration, the filing of Form 3 with the OSB should be within 5 days of the Monitor's effective discharge date.

- Forms 1, 2 and 3 should all be amended to be adaptable for anticipating numerous legal entities in a single CCAA filing and to provide the flexibility of using software, such as Excel, to submit the information to the OSB. It is neither efficient nor effective to have the Monitor complete one form for each legal entity within the filing.

- Form 2:
  - Trust claims - the word 'trust' is subjective and needs defining. For example, is it meant to refer specifically to deemed trusts? What about other trust figures (for example, condo purchase deposits or construction advances)?
  - Contingent claims – these are rarely known at the onset of a CCAA filing. There is no value to stakeholders for reporting this.

- Form 2 and 3 – Amend to contemplate consolidated financial statements for the multiple entities that have been rolled up.

- Form 3 – Add a field to indicate if the filing resulted in a liquidating CCAA. If done so, sections 4 - 6 on this form can be eliminated. If an entity was sold during the CCAA (rather than liquidated/dissolved), then the financial statement reporting should be done.

- Form 3 – To provide quicker and more secure means submitting this form, create a secure web site or FTP server to facilitate e-filing these documents to the OSB.

G. CLOSING REMARKS

Thank you for inviting CAIRP to participate in this important consultation. CAIRP believes this regulatory review can lead to innovative and meaningful solutions that support the goals of Canada's insolvency regime. Based on the issues and recommendations identified in this submission, there seems to considerable opportunity for the BIGR and Directives to be updated and significantly improved. CAIRP looks forward to continuing to support and work with the OSB to further research and fine tune the recommendations presented in this paper. If you or any member of your team wish to discuss or clarify any of the issues, comments or recommendations made in this submission, please contact CAIRP President & CEO, Anne Wettlaufer.

Sincerely,

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Chair, CAIRP

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President & CEO, CAIRP

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CAIRP gives special thanks to the many members who contributed to the development of this submission. CAIRP consulted extensively with its membership across Canada and was rewarded with thoughtful and invaluable contributions from the members of its national committees, Provincial Boards, insolvency firm Practice Leaders, Past Presidents, Executive Committee, National Board, and other members at large. The views of members from small, medium and large firms are well represented, as are those of both consumer and corporate practitioners, providing confidence that the comments contained herein accurately reflect the majority view of Canada's Licensed Insolvency Trustee community.