



## OSB Operations and Policy Advisory Panel What We Heard

On October 29, 2019, the Office of the Superintendent of Bankruptcy (OSB) convened a panel of industry stakeholders and experts to meet with the Superintendent of Bankruptcy to discuss various topics related to insolvency in Canada. The panel included subject matter experts drawn from diverse areas of expertise such as: academia, credit counselling, information technology including digital services and data analytics, lending institutions and regulatory/financial compliance, as well as the Licensed Insolvency Trustee (LIT) community. Also on the panel were key federal government officials from the OSB and from Innovation, Science and Economic Development Canada (ISED), representing the Office of Consumer Affairs, the Competition Bureau and the Strategy and Innovation Policy Sector of ISED.

Through this event, the OSB was looking to leverage panelists' expertise, share perspectives and have a fruitful discussion on ideas and opportunities to improve the insolvency system. Much of the discussion served to open the door for future conversations. The present document is a summary of what we heard during these discussions.

### TOPIC 1: Trustee Compliance Modernization

The OSB is exploring Trustee Compliance (TC) modernization options that support appropriate innovation in the insolvency industry, while looking to more effectively and efficiently promote, monitor and enforce trustee compliance.

The TC modernization discussion focused mainly on the opportunities and challenges afforded by current technology. A common view amongst panel members was that the OSB and its stakeholders should endeavour to explore technological innovations in order to leverage them in a way that can strengthen the insolvency system. The key will be to find ways to work smarter, not harder, together. Key areas of consideration that were discussed included:

#### Software and IT

There is very little variety in the software available for use in the insolvency field, and new software is costly to develop. It was agreed that the OSB should become more familiar with the software used by Licensed Insolvency Trustees (LITs), and to incorporate that deeper knowledge into its TC oversight

activities. Another suggestion was greater/easier access to the OSB's database for LITs in order to facilitate data reconciliation between the OSB and LITs.

From an IT perspective, some panelists felt that the OSB and stakeholders need to examine and consider the opportunities presented by open banking (data portability of consumer information) and artificial intelligence (AI). For example, it was suggested by some panelists that open banking could facilitate processes such as the Annual Banking Report prepared by LITs, or it could provide information used in the assessment of a debtor. However, with cybersecurity and privacy being noted as a primary concern with most panelists, it was agreed that it will be important to weigh the possible benefits of open banking and AI vs the possible risks (e.g. security of data and privacy).

### **Enhanced Communication**

Panelists discussed the merits of having more frequent and easier communication between LITs and the OSB, and suggested that alternatives to communicating via email could be considered, including instant messaging software or applications.

### **Remote Service Delivery**

Both credit counsellors and debt consultants are at times using remote service delivery when dealing with clients, so it was felt by panelists that it could be worth exploring for insolvency matters, while keeping in mind the benefits of in-person assessment. In-person assessments are still favoured by many clients, as well as many LITs, since the immediacy and intimacy can help build a rapport between client and provider. Holding the first meeting face to face and then allowing remote delivery for subsequent meetings was viewed as one way to strike an appropriate balance.

### **Trustee Office Visits (TOVs) Improvements**

There was a concern that TOVs are not being conducted in the most efficient or effective way by the OSB. It was suggested that when TOVs are conducted, there can sometimes appear to be too much focus on checklists and some reticence to review files via LIT software. It was expressed that some elements of the TOV evaluation appear to be given undue weight. It was noted that retired LITs could be leveraged to provide insight from an LIT's perspective regarding the TOV process and offer possible improvements to TC oversight and TOV effectiveness.

## **TOPIC 2: Strengthening Debtor Compliance**

The OSB is working to strengthen its Compliance Framework, including the modernization of its Debtor Compliance (DC) Program. The overall objective is to enhance the program's risk based approach, reinforce national standards, and respond effectively to occurrences of debtor non-compliance.

The debtor compliance discussion focussed on working more closely with creditors and developing analytical tools to better identify risks of debtor fraud. Post-filing non-compliance is deemed less of a problem since LITs are better able to detect these issues. Therefore, it was suggested by some panelists that the OSB could work with creditors to explore ways to improve information sharing regarding potential pre-insolvency non-compliance, for example by approaching the fraud departments of significant creditors. It was noted that any initiatives would have to be sensitive to privacy obligations under Canadian law.

It was discussed that certain red flags could be gathered and shared among stakeholders, including: debtors referred from a third party, partial income or asset disclosure, repeat filers, self-employed debtors and those with a variable income. It might be beneficial to consider how predictive analytics might be able to help the OSB and LITs assess debtor risk.

Among other ideas, it was suggested that the OSB consider opposing more discharges, and that the OSB communicate more frequently with Canadians on cases of debtor non-compliance by publishing, on its website, stories where sanctions were imposed, for its deterrence effect. Panelists also recognized the importance of debtor rehabilitation and the increase in financial literacy efforts from the OSB, federal government partners and/or other jurisdictions. It was also suggested that the government should consider funding/leading more research into understanding the consumer habits and trends which lead people into serious debt.

### TOPIC 3: Low-income/low asset (LILA) and No-income/no-asset (NINA) estates

The discussion surrounding the topic of LILA/NINA estates revolved around observations from other jurisdictions, and the notion that some low-income debtors in Canada are incapable of paying the amount required to file for bankruptcy. It was suggested that the current Bankruptcy Assistance Program (BAP) is not a low-cost alternative or free, is very rarely used, and is insufficient to meet the needs of low or no-income debtors, and that a separate, lower-cost process should be developed.

Currently, the BAP does not have a lot of uptake and there are design concerns. It was opined that certain Canadians may not currently have equal access to a “fresh start” due to cost. Though section 156.1 of the *Bankruptcy and Insolvency Act* (BIA) allows LITs to engage with LILA debtors who cannot pay fees immediately, and there are some LITs who report being willing to help LILA/NINA debtors pro bono, there is no consistent way to ensure that these debtors have access to the system so that they can obtain a fresh start and participate fully in the economy once again.

Panelists discussed the findings and recommendations of the 2007 study “*Bankruptcy for the Poor?*” by Stephanie Ben-Ishai and Saul Schwartz, which also examined low-cost debt relief procedures/models in place in other countries (US, Australia, New Zealand, England and Wales, The Netherlands) as well as their 2020 follow-up study, “*Establishing the need for a Low-Cost Canadian Debt Relief Procedure*” (in draft at the time).

In discussing possible solutions, it was suggested that any new or revamped low-cost debt relief procedure would need to be regulated, would require accredited intermediaries and the maintenance of a public record; therefore, the OSB should continue to play a role.

Alternatively, the cost to access bankruptcy could be further lowered for these LILA/NINA debtors and the process somehow simplified for them, to encourage LITs to deal with these cases at a lower cost. However, the insolvency counselling currently required under the BIA should still be part of any simplified/low-cost solution due to the importance of rehabilitating the debtor.

#### TOPIC 4: Regulatory Roadmap for Canada's Insolvency System

The OSB is planning to undertake regulatory reform consultations regarding improvements and modernization of the insolvency regulations and Directives. The OSB is exploring ways to be more agile, transparent and responsive, while continuing to protect the integrity of the system, in support of a healthy and predictable economic environment for Canadians, investors, and businesses.

During this discussion, it was suggested by some panelists that Canadian consumers deserve a stronger voice in the insolvency system and that currently, they may not participate fully when the OSB consults on changes to the system. The insights, experiences and opinions of consumers could be invaluable when reviewing the regulatory framework. Also, when consulting, the OSB was urged to contact and involve stakeholders sooner rather than later and to provide them with regular updates during the process.

It was argued by some panelists that guidance on third-time and higher repeat bankrupts was much needed given the variance of court practices across the country.

There was also a conversation concerning the need for more clarity and education to be provided to Canadians, by the OSB, surrounding the use of "not-for-profit" as a designation by some credit counselling firms and organizations. It was argued that the term "not-for-profit" may be viewed by some to have an altruistic connotation, and that its use in the marketing of certain credit counselling firms can be misleading for vulnerable consumers who may be more likely to trust a company that identifies itself as "not-for-profit". This is in spite of the fact that the *Canada Not-for-profit Corporations Act* does not require that not-for-profit corporations operate for a philanthropic purpose.

#### TOPIC 5: Debt Advisory Marketplace

The OSB has been concerned that vulnerable Canadian debtors may be paying for advice and services that they don't need. This can have an adverse impact both on them and the return to their creditors.

It was generally accepted by panelists that unscrupulous debt consultants and advisors are causing serious damage to consumer confidence in the marketplace, as well as to consumers generally. It was recommended that the OSB play a more active role in the prevention of abuse by these actors, by potentially broadening its regulatory scope to include currently unregulated players, introducing new requirements in the Assessment process to build awareness of potentially predatory debt consultant activities, and by directing LITs not to purchase client leads from unregulated parties.

It was felt that the OSB could also be doing more to correct the misinformation about LITs being circulated by these actors. For example, the OSB could do more to highlight that LIT consultations are typically free.

Educating the Canadian public about their rights and responsibilities, and the possible risks involved with some debt advisors was viewed as important. Letting consumers know to look for accredited individuals who they can trust would help them avoid paying for advice and services they do not need to address their debt problems. The OSB's Debt Solutions Portal, launched on its website during spring 2019, was seen to be a good start.

It was thought that a lot of consumer confusion may come from the various nomenclature used for the different actors in the debt advisory marketplace. Another challenge noted was the differing regulatory-legislative frameworks in various provinces across the country surrounding the debt advisory marketplace.

One possible long-term suggested solution was to examine and amend the scope of the BIA, with a view to having the OSB regulate all players who touch the insolvency system, and/or make the OSB the door "in" to the system, to help lead debtors to the optimal solution.

## TOPIC 6: Advances in Information Technology

It was noted that information technology (IT) systems support a well-functioning insolvency system. The two main IT systems are estate administration software used by LITs, and regulatory oversight systems used by the OSB. The specialized software relied upon by LITs to administer estates, and the custom-built IT applications used by the OSB to manage its compliance programs were seen to represent a first generation of IT in the insolvency system.

While these systems have enabled the insolvency system to efficiently handle a growing volume of insolvencies and provide the OSB with a wealth of data, it was observed that there are numerous developments in the IT world that could lead to significant impacts, for better or for worse, on the insolvency system.

The OSB asked panelists to consider what existing, or future, technologies and trends could have the biggest impacts on the insolvency system, and asked what the OSB should do to prepare for and/or

leverage these technologies. The discussion focused on a number of topics, including cryptocurrency, open and e-banking, AI and data-sharing, and automation to improve business processes.

Some panelists maintained that the advent of cryptocurrencies, while interesting on many levels, could “turn everything on its ear,” further adding that the potential impact of cryptocurrencies on the insolvency system is not clear. It was suggested that the characterization of cryptocurrencies as a commodity (since they are not currently considered legal tender in Canada) presents another way for dishonest people to hide assets, and could make it challenging for the OSB, creditors and LITs to track these assets.

With the regulatory landscape regarding cryptocurrency still evolving across international jurisdictions, it was felt that it will be very important for the federal and provincial governments to understand the full impacts of cryptocurrency, and to put the right measures in place to handle cryptocurrency as part of the monetary system.

Advances in e-banking are beginning to allow Canadians more freedom to review and manage their finances from the digital device of their choosing, anywhere, at any time. It was suggested by some panelists that the OSB consider ways to incorporate open and e-banking into the insolvency processes in order to encourage a paperless approach and allow for more flexibility for LITs. However, as noted during the TC discussion, increased use of open and e-banking may also present risks in terms of consumer data privacy. Furthermore, it may be premature as open banking is not currently in place in Canada.

Some panelists reiterated that the OSB could explore the use of AI for compliance purposes, and further suggested that the OSB could use AI together with the data it collects from the insolvency system, for predictive analysis which could help identify non-compliance. In conjunction with this, some panelists maintained that increased data sharing amongst the OSB, LITs, creditors and credit reporting agencies would be a great benefit to the insolvency system. It was noted that any initiatives would have to be sensitive to creditors’ substantial privacy obligations under Canadian law.

Finally, it was suggested that the OSB and stakeholders explore opportunities to streamline certain business processes in the insolvency system through the use of automation technology.

## TOPIC 7: Future Risks and Opportunities

As the insolvency system continues to evolve, the OSB would want to identify and fully assess the potential impacts of external and internal environmental factors or trends, both near and long-term, to ensure the organization remains relevant and effective, and to ensure the integrity of the system.

The Superintendent led this discussion by first outlining potential risks and opportunities identified by the OSB, and then invited all panel members to provide their perspectives. The discussion ranged

broadly from topics such as the importance of increased financial literacy, the changing financial reality for Canadians to the potential risks associated with technology.

### **Financial Literacy**

The debt to income ratio in Canada was viewed by some panelists as an indicator of a lack of financial literacy in this country. The Federal Government was urged to find creative ways to increase their outreach. It was suggested that departmental partners (such as the OSB and the Financial Consumer Agency of Canada) should coordinate and better align messaging in order to prevent message fatigue, since Canadians are constantly being bombarded by information on the internet and social media.

It was felt that financial education should focus on school-age children and those who may be unfamiliar with the Canadian financial system. Existing financial literacy programs were discussed, such as those in the financial sector. Some panel members argued that finding ways to get information into the schools and subsequently back home with parents through their kids could help. It was suggested that the OSB could play a preventative role by increasing financial literacy amongst Canadians, and thus helping them to weather economic shifts and to avoid becoming insolvent.

### **Changing Financial Reality for Canadians**

It was opined by some panelists that financial security in retirement may be becoming less likely for millennials and younger generations given the changing nature of the job market, and that this may impact insolvency rates. It was suggested that, currently, the default rate among seniors is higher since they may be supporting younger generations. Panelists also discussed how trends might have significant effects on the insolvency system including the continued rising costs of tuition and home ownership, uneven labour markets and precarious employment due to technology, pension instability, and the economic impacts of severe climate change events.

### **Technology risks**

Though there is an expressed willingness to explore new technologies and ways of improving the insolvency system through their implementation, this was tempered with an awareness of the potential for security risks. Cyber-security was seen as an ever-growing area of focus, and both the OSB and LITs are holders of significant amounts of data belonging to often vulnerable members of society and that efforts should be undertaken to protect this data moving forward.

## **In Conclusion**

The Superintendent of Bankruptcy would like to sincerely thank all those who participated in the OSB's Operations and Policy Advisory Panel and shared their valuable insights. It is important that all stakeholders in the insolvency field work together to strengthen the system and provide relief for the honest but unfortunate debtor.

The insights shared will inform the OSB's future work on reviewing the regulatory framework, its business planning process and will figure prominently in its work on information technology development as well as operational improvements.