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Annual Review of Insolvency Law Virtual Conference: 2022

On February 4, 2022, CAIRP held its 19th Annual Review of Insolvency Law. The conference brought together insolvency law practitioners from across Canada for a showcase of papers authored for the latest edition of the *Annual Review of Insolvency Law* publication. The journal itself is now available in full on CanLII. Each panel was anchored by an ARIL paper whose author(s) led spirited discussions on contested topics important to the future of the insolvency practice.

Open access to the peer-reviewed *Annual Review* is one of the many innovations at ARIL since the annual conference has gone virtual. The conference organizers also posted ten podcasts for participants to access through the conference's online platform, with its first ever bilingual podcast presentation, 'Use of French in CCAA Proceedings' ('*L'utilisation du français dans les procédures de la LACC'*), featuring experts from both Toronto and Montréal.

Robert Thornton, President of the Insolvency Institute of Canada (IIC), opened the conference by telling participants that the role ARIL plays to the insolvency and restructuring community is immense. CAIRP Board Chair, Jean-Daniel Breton, said that ARIL contributes to thought leadership in insolvency and restructuring by providing an academic forum for debate on issues facing the industry and offering practitioners a place to collectively improve the field.

Edward Sellers, Board Chair of ARIL Society Inc., took a moment to honour Dr. Janis Sarra and Chief Justice Geoffrey B. Morawetz for their contribution to ARIL, both of whom assisted with the *Annual Review* in its nascent stage and offered their expertise to give credibility to the fledgling publication. Though COVID-19 still looms large, Mr. Sellers explained, the conference organizers hoped that the day's presentations would be forward-looking, focused on future aspects of insolvency practice and procedure, and would encourage participants to think about how to be positioned for the future of the field.

RVOs: Have We Gone Too Far?

The opening plenary session focused on whether RVOs are to be embraced as value maximizing instruments or whether they subvert creditor democracy and introduce "cramdown" into the

Canadian insolvency regime. Panelists, led by PwC's Michelle Pickett, debated recent decisions on the issue from across Canada, including *Harte Gold Corp (Re)* and *Quest University Canada (Re)*. Panelists sought to answer pressing questions put forward by Michelle Pickett and Linc Rogers in their paper *The Business Side of Reverse Vesting Orders*.

The Fees that Bind: Family Law and Personal Insolvency Proceedings

This session was centred around Dr. Anna Lund's (University of Calgary) paper of the same name, looked into effect of BIA proceedings on family law costs orders, examining how these orders should be handled when they are awarded after a trial dealing with support, property division and custody. Dr. Lund's innovative paper looked at the complicated intersection of family law and bankruptcy. Problems in these proceedings, Dr. Lund found, are exacerbated because few lawyers have sufficient expertise to advise clients navigating both simultaneously. Dr. Lund also posed the question: what role do estate trustees play in family litigation and bankruptcy? Chantal Gingras (Ginsberg, Gingras & Associés Inc.) offered guidance on how these cost awards are handled differently in Quebec and Ontario. Wesley Cowan (MNP Ltd) discussed how these findings can be transposed into an analysis of injury claims.

To Supply or Not to Supply: What are the Questions?

Our expert litigators, Brian Kolenda and Christopher Yung, authored the paper '*Shutting Off the Tap: When Can (and Should) Suppliers Seek to Cut Off Post-Filing Supply?'* which anchored a panel featuring Sara Scott (Stewart McKelvey LLP, Halifax), Olivier Benchaya, (Richter, Montréal) and Brian Kolenda in a lively debate about supplier leverage in insolvency proceedings from the perspective of debtors, suppliers, and court officers. The paper's abstract is as follows:

> *Insolvency 101 teaches us that suppliers in a CCAA cannot withhold supply but are not obligated to extend further credit during a debtor's restructuring. If only business realities were that simple. In truth, the complexities of the debtor/supplier relationship in a CCAA world are extensive – in addition to legal entitlements which may be found in the CCAA or an Initial Order, there are also often issues arising from jurisdiction, set off and shipping to name a few. Additionally the feasibility of a debtor's cash flow is also often predicated on it continuing to receive a certain level of trade credit post-filing. Monitors are key in these situations to control cash flow, appease worried suppliers and ensure DIP budgets are*

adhered to. Not all of this is immediately transparent to third party suppliers who are also often significantly impacted by their customer's restructuring and, in some cases, to a disproportionate degree. This group of experts will each lend their unique perspectives to engage in a debate on these issues.

The panelists debated the decisions in *Arrangement relatif à Gestion Éric Savard inc* and *Soccer Express Trading Corp. (Re)*, and commented on whether current global supply chain problems would give suppliers more leverage in restructuring proceedings in the near term.

The Honourable Donald Brenner Memorial Keynote – Leap Ahead: The Future of Work

Other sessions looked at the state of practice and trends in the industry. Several presentations focused on trends and innovation, including the Honourable Donald Brenner Memorial Keynote, which examined COVID-19's impact on gains made in diversity and inclusion in the workplace.

The Future of Insolvency Practice: A Conversation with Superintendent Elisabeth Lang

Panelists in this session opined on how to recruit the younger generation into insolvency and restructuring, including how to broaden the range of applicants and how to improve retention in the post-pandemic era. Superintendent Elisabeth Lang (Office of the Superintendent of Bankruptcy Canada) provided an insider perspective on 'a day in the life' in her position, discussing the scope of her role and the boundaries of the Superintendent's authority.

Judicial Panel

The conference culminated in the Judicial Panel, where four judge panelists shared their observations from a practical perspective on numerous topics related to insolvency practice. They offered advice to counsel for appearing in court in-person and virtually, emphasizing the loss of opportunities for mentorship and professional development during the pandemic. Justice Shelley Fitzpatrick, (British Columbia Supreme Court, Vancouver) told audience members that judges themselves were feeling disconnected in the virtual environment. Justice Marie-Anne Paquette, (Quebec Superior Court, Montréal) shared her perspective on the duty of transparency and timely information sharing that counsel have to each other, to the court, and to stakeholders interested in the matters being litigated.

Chief Justice Morawetz shared his perspective on the future state of the court. Though Caselines has been successfully adopted, he said, there should be a renewed focus on training for staff, judges, lawyers, and litigants. He reminded participants that court registrars are working diligently to implement changes. The Chief Justice also cautioned counsel that the Commercial List court will not rubber stamp appearances on consent, and that counsel should give fair presentation of the issues in these cases and provide the court with sufficient information to make their determinations. Chief Justice Suzanne Duncan, (Supreme Court of Yukon, Whitehorse) shared her perspective from the Yukon, and reminded participants that the courts in the Yukon have already been working virtually for many years – with half of the province's law society members being nonresident. Justice Marie-Anne Paquette, (Quebec Superior Court, Montréal) encouraged counsel to think about the local context when appearing in courts in Northern Canada.

Final Remarks

The 2022 Annual Review of Insolvency Law Virtual Conference was a success, first for the quality of substantive presentations from a cross-section of insolvency and restructuring experts; and second, for the organizers' mastery of the online platform and provision of open source, multimedia, and bilingual material that will enrich every participant's understanding of insolvency and restructuring law in 2022.