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## 2015 CAIRP Annual Conference

### Introduction

By David Wood, CIRP



CAIRP Chair David Wood

The CAIRP 2015 Annual Conference, our flagship event, was held this past August in beautiful Whistler B.C. over a fantastic three days with sunny weather, a stunning venue, great professional development, and an amazing time had by all.

Our lineup of panelists was (as usual) second to none and the topics and speakers were extraordinary.

Our opening keynote speaker, business and technology visionary Leonard Brody, provided us his thoughts on life in the digital age, introducing us to our "digital personas" and highlighting the differences between life before social media and the way it is now.

Personally, the most telling moment for me was comparing the difference when Paul Henderson scored the winning goal for Canada in the 1972 Canada-Russia series and the time Sidney Crosby scored the winning goal for Canada in the 2010 Olympics. After the former, you might have phoned a couple of friends. But after the latter, millions of Canadians were able to see each other's thoughts and share their emotions in real time.

Our keynote speaker, David Chilton, at the Chair's banquet, provided great insight to the *Dragons Den* and his other ventures. As well, all who attended received his latest book, *The Wealthy Barber Returns*.

Behind the scenes, the crack organizing committee – chaired by Craig Munro – and the highly competent CAIRP staff made the conference run like clockwork. Of course, they had a tough act to follow to match the success of the 2014 Annual Conference in Ottawa – and they pulled it off!

The conference smartphone app further enriched our experience. We could download documents and brochures with ease and it just took a tap or two to know where you wanted to be next. There was discussion and engagement by all who attended. And who could forget the new Chair's mini rant at the Consumer Proposal presentation?

Chief Darcy Bear, who spoke at our "First Nations and Insolvency" session, was a highlight for me. His presentation on the financial functioning of Native Reserves in the 21st Century was entertaining as well as inspiring.

Our awards dinner on top of Whistler Mountain at the Roundhouse provided breathtaking views and absolutely first-rate food. The 20-minute gondola ride to the summit was truly spectacular, and some of our guests got to see a young bear foraging for berries on the mountainside during the slow journey to the top!

A big thanks to our sponsors for helping make the conference such a huge success.

All in all, this year's conference was a big hit for all involved. I hope that you will be able to join us next year from August 18 to 20 for the 2016 CAIRP Annual Conference in Montreal. The annual conference, as previously stated, is our flagship event, and CAIRP always tries to make it fun, entertaining and educational. We look forward to seeing you there - start planning now.

# David Chilton, Keynote Address

Review by Paul Casey, CPA, CA, CIRP



David "The Wealthy Barber" Chilton speaks at the CAIRP Annual Conference  
Photo: Dave Buzzard, CP Images

“The funny thing is that people who live in homes they can truly afford consistently rank very highly in happiness surveys. Make sure it’s you that owns the home and not the other way around.”

Author, publisher, Dragon and financial humourist David Chilton brought his engaging and thoughtful style to the Chair’s Gala Dinner on Saturday night. CAIRP delegates and guests enjoyed David’s insider view of CBC’s *Dragons’ Den*, some most unusual entrepreneurial success stories, and, following the theme of his second personal finance book, *The Wealthy Barber Returns*, his comments on the current (and in David’s view, disappointing) state of Canadians’ financial affairs.

Wanting to make sure that CAIRP members received full value from his presentation, David carefully studied our mission and vision and offered up a new slogan for financial restructuring professionals, being: “We don’t make money unless you don’t make money.” While I am certain that David thinks his clever tagline will be helpful to CIRPs, I’m not sure we will see its widespread use by members any time soon.

For most, at least most my age, David will be best known as the author of the 1989 Canadian bestseller, *The Wealthy Barber*, which in addition to selling “an astonishing” two million copies, has fundamentally improved financial planning awareness and practices for countless individuals. You will recall Roy, the title character, advising Dave to “save 10 per cent of all that you earn and invest it for long-term growth”.

From his three seasons on CBC’s hit show *Dragons’ Den*, David shared some of his favourite entrepreneurial success stories, including: OMGs, the latest candy confection from the former Clodhoppers team; Steeped Tea, from Ancaster, Ontario which has grown to \$30 million in sales this year; the two engineers who turned ugly Christmas sweaters and then Zombie races into financial successes; and best of all, the high-flying exploits of Luigi the Lovebird. Luigi and her mistress are the co-creators of the Hand and Beak greeting card business, which has now achieved “flying colours” after partnering with Hallmark.

Chilton confesses that he never planned to write another financial

planning book, but *The Wealthy Barber Returns* evolved from his disappointment with Canadians’ savings rates, debt levels and investment returns. He good-naturedly shared his daughter’s less than complimentary response to the title when she asked, “What’s next, Dad? *The Wealthy Barber* goes to Hawaii? It’s like the old *Gidget* series.”

David discussed our current low interest rate environment (and they aren’t going anywhere soon), record-breaking personal debt levels, low growth prospects for the economy, and a past theme from his original book, the evils of credit card debt. The proliferation of home equity lines of credit have become a particular challenge to good financial planning as consumers are only considering the low minimum monthly interest payments, with less regard to how and when they are actually going to pay back the principal borrowed.

David jokingly blamed HGTV, and the home renovation sales phrase “while we’re at it”, as causes of unnecessary credit being obtained by otherwise sensible homeowners.

David concluded his remarks with a powerful personal observation: After 30 years of looking at financial plans, there is no correlation between owning more and happiness. Those who properly save for their retirement (as Roy the barber suggests) are not unhappy because they are delaying purchases today, but are much happier because they are saving for tomorrow.



Christopher Ramsay and George Abakhan enjoy a pre-dinner cocktail with Annual Conference Chair Craig Munro  
Photo: Dave Buzzard, CP Images

# Leonard Brody, Keynote Address “The Great Rewrite”

Review by Leanne Salyzyn, FCIRP



Keynote speaker Leonard Brody

Did you know that the world as we know it is being rewritten from the ground up? That history is no predictor of our future? And that today's society is so entrenched in technological innovations that we are unaware of how it is reinventing our lives on a daily basis? Welcome to the new world order according to Leonard Brody.

If you were fortunate enough to attend Mr. Brody's opening address at the CAIRP Annual Conference in Whistler, B.C., you would understand why he has been called a “media visionary”. In his thought-provoking presentation, those present learned that life as we know it will never be the same. Innovation is changing the face of how we think of the world around us and how we think as human beings.

Mr. Brody, a venture capitalist and successful entrepreneur, explained that today is unlike any other moment in time. The past has no relevance to our future as we can only predict two to three years ahead due to the pace of change.

Historically, a successful company would own or sell a product. However, consider today's most successful companies (such as Facebook, Skype, Uber, or Airbnb). None of these “own” a product. Now consider the four types of historical media: print, television, telegraph and radio. All are regulated by government, owned by someone, and expensive in nature. Then along comes the Internet – for the first time in history, anyone can “own” their communication at little or no cost and without government control. Never before has this happened.

Mr. Brody says the human form is also being rewritten – we are not the same people we once were. We are in fact

two: one physical person in the real world and one “virtual” identity.

We spend more time nowadays in our virtual identity (on Facebook, Twitter, or LinkedIn and the like) than in our real-world physical identity. We are more trusting of virtual life than reality. We connect with strangers in this virtual world to feel part of a community, but do we really know the people we are interacting with anymore?

He pointed out we are also experiencing an industrial change. Industries will soon be run by algorithms instead of workers. Automation will be more valued than the human experience as it will be a better predictor than human judgement. By 2020, most jobs will be automated and the cost of technology will come closer to zero. In 1975, it cost \$15 million to create the same technology that in 2010 we had in our phones for \$200!

Mr. Brody says that while one-third of the world's population is now online, he wonders, “How do we get the next one billion users online?” If and when this happens, it is destined to have an incredible economic impact on our future.

Mr. Brody says the currency market is also being rewritten. Cash is being phased out and a cashless society will be achieved someday in Canada. The job era is apparently ending and a new entrepreneurial class is emerging. The millennial generation considers the most desirable job title to be “entrepreneur” – it's almost given celebrity status. Personally, I found this a relatable comment since my 20-year-old son already has a registered business and his business cards sport the title “entrepreneur” – something unheard of by us baby boomers.



David Chilton at the CAIRP Chair's Reception and Dinner  
Photo: Dave Buzzard, CP Images



A fantastic performance by Lil'Wat Nation  
hoop dancer Alex Wells  
Photo: Dave Buzzard, CP Images



Spakwus Slolem (Eagle Song Dancers) of the Squamish  
Nation Photo: Dave Buzzard, CP Images



# Corporate Breakout: Ponzi Schemes

Review by Nicholas To, CPA, CMA, CIRP

Panelists:

John McEown, CA, CIRP (Boale, Wood & Company Ltd.)

Chris Ramsay (Clark Wilson LLP)

Pat McParland, CMA, CFE, CFI (MNP Ltd.)

Katie Mak (Clark Wilson LLP)



Photo: Dave Buzzard, CP Images

This session explored Ponzi schemes, those carefully orchestrated financial frauds in which new debts are created to pay the obligations of existing debts – making them inherently insolvent from inception.

As the panel explained, insolvency professionals play a key role in the investigation and unwinding of Ponzi schemes. The process is similar to a typical insolvency engagement wherein the trustee/receiver aims to maximum realizations (clawing back fraudulent payments) for the benefit of creditors (net losers).

There are typically no real underlying investments in Ponzi schemes and once insufficient funds are raised from new investors to satisfy the obligations to existing investors, the entire scheme unravels giving rise to net winners and net losers.

Net winners are typically those that invested early and have received more in distributions than they invested and net losers are typically those that invested later whose

investments were used to pay earlier investors. Generally, insolvency professionals get involved once there has been a triggering event which might be a criminal and/or securities commission investigation.

Upon the discovery of a Ponzi scheme, the securities commission might appoint a receiver to freeze any remaining assets. The receiver's ability to claw back pay-outs from net winners is contingent upon its ability to prove the existence of a Ponzi scheme via an expert forensic accountant's report. Ponzi schemes have identifiable patterns. Once investor transactions are removed, the remaining transactions show a constant outflow of cash, including payments to the masterminds behind the scheme which is its primary purpose.

The bankruptcy of the Ponzi scheme should be considered early on as it fixes the date for the review for preference transactions, allows for examinations of the people behind the Ponzi scheme as well as investors, especially net winners.

Once disbursements from the scheme fall outside the clearly defined time periods in the Bankruptcy and Insolvency Act, the trustee must rely on provincial legislation, specifically the fraud and preferences provisions, and the unjust enrichment provisions in common law to claw back payments from net winners.

Sometimes there are assets to be realized upon but in most cases, availability of funds to pay professional fees depend on the success of recovering proceeds from net winners. With proper preparation, many net winners can be convinced to enter into settlement agreements to avoid litigation.

Many investors caught in Ponzi schemes are unsophisticated and do not have the required books and records to submit and prove their claim. Therefore it is common to use a court approved reverse claims process whereby the trustee/receiver calculates an investor's respective claim and allows each investor the opportunity to prove another amount.



Chief Darcy Bear of the Dakota First Nation, who spoke at the "First Nations and Insolvency" session  
Photo: Dave Buzzard, CP Images

# Municipalities in Financial Distress

Review by Daniel Weisz, CPA, CA, CIRP  
Moderator: Tevia Jeffries (Dentons Canada)

Panelists:

Chris Gannon (Conway MacKenzie, Inc.)  
Jeffrey Lee (MacPherson Leslie & Tyerman LLP)  
Jana Steele (Osler, Hoskin & Harcourt LLP)



Jeff Lee addresses the Municipalities in Financial Distress session.  
*Photo: Dave Buzzard, CP Images*

The last (but not least) session of the Annual Conference focused on financial issues facing municipalities and how certain municipalities have dealt with those issues.

Mr. Lee provided a history of municipal defaults that have occurred in Canada, which were relatively common in the 1930s. One recent example was the default on payment of a \$5-million pension contribution by the City of St. John, N.B., to its civic employee pension fund that occurred in 2010.

Mr. Lee noted that the financial outlook for municipalities appears generally favorable, subject to certain challenges – namely pension and other post-retirement liabilities and capital spending pressures resulting from monumental infrastructure deficits. The financial stability of Canadian municipalities is enhanced by (1) the stable Canadian housing market, which creates a reliable property tax base, (2) strong provincial government oversight and sound financial management

practices, and (3) the strong credit ratings of Canadian municipalities.

If municipalities face the need to restructure, Mr. Lee suggested that provincial municipal legislation currently provides the most viable restructuring option for Canadian municipalities, though he indicated that the potential use of the BIA or CCAA by insolvent Canadian municipalities remains an option.

Ms. Steele provided an in depth review of the City of St. John pension payment default and the events that led up to the city adopting a new form of pension plan for its municipal employees which was termed the “shared-risk” model.

Under the new plan, which was adopted by the city in or around December 2012, some city workers gave up certain of their benefits, resulting in the need to work longer before retiring and having higher payroll deductions. In exchange, the city was required to make payments on an annual basis to pay down the

pension fund deficit.

The conversion from defined benefit plans to shared-risk plans may be an economic reality. However, many issues have to be addressed, including intergenerational questions such as: How much do future generations want to pay for prior liabilities? The panel suggested that this may be why some municipalities prefer to “kick the can down the road” rather than face the problem now.

The session provided interesting insight into an area that is not frequently encountered by most CIRPs in their day-to-day practice.



A venue with a view: the skyline as seen from the Roundhouse Restaurant on Whistler Mountain  
*Photo: Hilary Casey*



Whistler Village, dusk.  
*Photo: Hilary Casey*

# Corporate Breakout: What's New in Sales Processes – BIA & CCAA

Review by Dan Woo, Dan Woo, CPA, CMA, CIRP

Moderator: Hon. Madam Justice Shelley C. Fitzpatrick (Supreme Court of British Columbia)

Panelists:

Steven Dvorak (Cassels Brock & Blackwell LLP)

Sean Collins (McCarthy Tétrault LLP)

Mark Wentzell, MBA, LL.B, CA, CIRP (Grant Thornton Ltd.)



Photo: Hilary Casey

The panel explored the typical methods for selling assets (tender, auction, retail sales, private placement, stalking horse bid) in a receivership proceeding.

There was general agreement among the panel that key factors in the successful selection of a sales process were professional judgement, a current appraisal, and an analysis of the asset mix.

The Blockbuster Canada engagement was cited as an example in which several of the above-mentioned sales processes were utilized successfully in the liquidation of assets.

The panel also touched on general issues encountered with sales processes such as:

- » The competing objective of maintaining the integrity of the sales process vs. achieving maximum recoveries for creditors;
- » Complaints by a debtor that the marketing effort was too short or the market was not broadly

canvassed;

- » Complaints by a debtor regarding the sales prices achieved; and
- » The often lurking “bitter bidder.”

Overall, the panel agreed that it is paramount for an Officer of the Court to protect the fairness and integrity of the sales process and to complete it in a transparent manner. Reference was made to the four factors listed in *Royal Bank of Canada vs. Soundair Corp.* [1991] O.J. No. 1137 (CA).

Madam Justice Fitzpatrick expressed the Court's view that it is critical to analyze why things are being done and to determine the most efficient manner in which to handle the process. The panel noted that courts in British Columbia tend to favour the acceptance of the highest bid price, even though the bid may be non-compliant with the rules set out in the sales process.

The panel also briefly discussed the following best practices:

- » Sealing bids;

- » Consideration of the use of break fees to assist the first bidder with the costs of due diligence; and
- » That pre-approval be sought for a specific sales process where matters are complicated or contentious.

With respect to the sales process and CCAA proceedings, the panel asserted that (if appropriate given the specific facts in a case) liquidating assets in a CCAA is considered acceptable even if a Plan of Arrangement will not be filed.

Panelists also questioned whether a ‘super monitor’ is the best party suited to oversee a Sale and Investor Solicitation Process (SISP) Order in a CCAA Proceeding. Further, the use of stalking horse bids and credit bids were discussed.

The use of U.S.-style auctions per section 363 of the U.S. Bankruptcy Code was reviewed as follows:

- » It is a relatively quick process where a sale is made free and clear of any liens;
- » Prospective bidders are vetted to ensure their ability to close;
- » This sales method works in a robust market where competing bids exist and is typically used in conjunction with a stalking horse bid as a starting point; and
- » Bidding typically proceeds by way of minimum increments.

The panel noted that there has been an increase in the use of Division I BIA Proposals for large commercial files where a liquidation is proposed but no proposal will be made to the unsecured creditors.



# Consumer Breakout: Registrars /Masters Panel

Review by Guylaine Houle, BCL, FCIRP

Panelists:

Master Lorne A. Smart

Master May Jean

Registrar Master Errick Harrison

Master May Jean began this session by discussing two important issues with respect to Canada Revenue Agency (CRA) and its claims in consumer proposal files:

- » The allocation of pre- and post-proposal income tax debt; and
- » The opt-out proposal by CRA.

Master Jean briefly reviewed the basic principle that, unlike in a bankruptcy scenario where the Income Tax Act provides that the date of the bankruptcy constitutes a tax year end, no such provision exists for consumer proposals. To address this issue, CAIRP in consultation with CRA had developed a standard whereby the following steps were to be taken in order for the pre-income-tax debt of the current year be included in the proposal. The steps to be taken according to the Standard are as follows:

1. All previous-year income tax returns must be filed;
2. A provisional income tax return must be filed as of the date of the proposal for the pre-proposal calendar year return; and
3. If the amount of the actual current year pre-proposal income tax debt exceeds the estimated current year pre-proposal income tax debt, the excess will become a post-proposal debt. Generally speaking, a practice has developed in the preparation of proposal to include such a clause.

Master Jean, after reviewing the case law<sup>1</sup>, concluded that a proposal

1 Re Barrow Court file no.32-1847560  
Re Cynthia-Joy Ouellette Court file no, 31-185902  
Re Kenneth Mark Dun Brook Court file no. 31-1857900  
Re Antonio Marra Court file no. 31-1856720  
Re Willcox (2014) NSSC 291 – decision by Registrar Cregan.



Networking with CAIRP sponsors in the Château Whistler lobby

*provision that confers a special benefit upon a particular creditor within a class of creditors has no place in a proposal made to creditors generally.*

In her decisions, (first four cases mentioned at footnote 1), Master Jean concluded that the court should refuse to approve any proposal with such a clause and that the administrator of the proposal should always ask themselves if the terms requested by individual creditors benefit the main body of creditors. In her mind, this issue only becomes a problem when the pre-proposal income tax debt is poorly calculated.

Registrar Harrison chose to discuss with the audience the value of Section 34 of the Bankruptcy and Insolvency Act (BIA)<sup>2</sup>. He commented on the use of this section to assist trustees to come to a resolution in more difficult files.

Registrar Harrison agreed that the work by trustees is becoming more and more complicated and sometimes a motion for direction as indicated

2 Section 34 authorizes a trustee to “apply to the court for directions in relation to any matter affecting the administration of the estate of the bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances.”

in Section 34 is the only alternative for resolving an issue. He cautioned trustees, however, that to succeed with such a motion, they must have all the facts and also have defined all the issues. Master Harrison noted that this section is rarely used, but in his opinion, it could greatly help the trustee community in resolving some of the more difficult issues they encounter in particular insolvency files.

On this topic, Master Smart cautioned that in order for a Section 34 motion to succeed, the trustee must come with potential solutions. In some recent decisions<sup>3</sup>, Master Jean indicated that Section 34 motions were mostly used for protective purposes and thus the motions were denied in all cases. Trustees should be mindful of the authority of the registrars.

Master Smart, concluded the discussion by addressing the issue of taxation of fees of insolvency professionals, particularly trustees. Clearly, trustees must address all issues within each and every file otherwise they will not be entitled to the full fee.

For example, trustee must have done their investigation into the income of a debtor in a consumer file and reviewed various accounting documentation and have appropriate discussion when preparing a cash flow statement for a debtor filing a proposal and or a notice of intention.

3 Re Vittoria Yousuf Mantenuto Court file NO. 32-999910, Re Mohammed Yousuf Merchant Court file No. 31-1636224 and Re Waheeda Banu Ebrahim Merchant Court file No. 31-1637101

# Trends in Consumer Proposals

Moderator: Rebecca Frederick, CIRP (Frederick & Company Ltd.)

Panelists:

Lawrence Crandall, LLB, CIRP (Grant Thornton Ltd)

Jordan Rumanek, CIRP (Rumanek & Company Ltd.)

Chantal Gingras, CIRP (Ginsberg, Gingras & Associates, Inc.)

Leah Drewcock, CIRP (BDO Canada Ltd.)



Jordan Rumanek and Chantal Gingras  
Photo: Hilary Casey

The Trends in Consumer Proposals panel provided an informative and interactive session beginning with a review of the consumer proposal items in the CAIRP submission to Industry Canada on 15/Jul/14. The four recommendations are available on the website at <http://cairp.blob.core.windows.net/media/90679/Report-on-the-Statutory-Review-of-the-BIA-and-CCAA.pdf>

- » Restrictions on CP for consumer debts only
- » Secured creditors rights to request a meeting and vote in CP
- » Deemed Annulment of CP after bankruptcy
- » Increase in Prescribed Threshold

The next topic, Reduction of Administrator's Fees in Consumer Proposals, led to active participation. Trustees spoke on instances where they have reduced the tariff to lower the monthly payment to a more affordable amount for the debtor, to obtain approval of certain creditors or

in proposals with lump sum payments where fees may be high for work involved. Those against a reduction in tariff expressed concern that the practice may raise the expectation that fees are negotiable which may lead to trustee shopping or impact the tariff itself in future reviews.

Bill James, the Superintendent of Bankruptcy, joined in the discussion. He stated that although the Tariff hasn't changed in a long time, the decision making process of the government has. He advised CAIRP that if they do their homework and make a good business case considering all stakeholders, he is willing to review the tariff in his role as advisor to cabinet.

Our incoming chair, David Wood, provided a succinct objection to the reduction of the tariff both as Chair and a practitioner. He recommended trustees consider a Division I proposal in situations where they wish to reduce their fees below the tariff.

The final topic was Compliance Clauses in Consumer Proposals. Trustees spoke out about requests they have received and/or have included in Consumer Proposals, primarily at the request of CRA.

- » Future tax compliance clauses and whether they result in default
- » Disclosure undertaking clauses where the debtor confirms all relevant information or CRA can opt out for misrepresentation
- » Value of property clauses where debtor is required to sell an asset
- » Escalation of monthly payment clause for increases in income

Art Weston, CRA, provided some insight on his understanding of CRA's position. He stated that CRA recognizes that they have to make some changes and are working on it. He indicated that CRA's main concern with compliance clauses relate to GST and source deductions and CRA will garnishee if they do not receive payment.



Nathalie Brault and past CAIRP Chair Paul Casey  
announce Montréal as the host city for  
CAIRP's 2016 Annual Conference  
Photo: Hilary Casey



# Consumer Breakout: Personal Income Tax Debtors

Review by Naida Kornuta, CIRP

Moderator: Colleen Craig, CA, CIRP (C. E. Craig & Associates Inc.)

Panelists:

Jason W. Levine (Department of Justice Canada)

Registrar Stuart Cameron (Supreme Court of British Columbia)

Katherine Wellburn (Murray, Jamieson, Barristers & Solicitors)

Graeme Whitehead (Farber and Partners Inc.)

In this session, the panel tackled the challenges associated with personal income tax debtor provisions in insolvencies and considerations at the application for the bankrupt's discharge.

Bankruptcy courts give special consideration for large tax liabilities and there has been a shift towards emphasizing the integrity of the bankruptcy process.

The panel noted that Canada Revenue Agency (CRA) applications for discharge under Section 172.1(4) of the Bankruptcy and Insolvency Act (BIA) are based on factors that came out of prior case law and include the debtor's circumstances, efforts made to pay, evidence of preference to other creditors, and future prospects.

CRA would suggest that ability to pay is only one factor and not necessarily the most important one. The tax debtor who has ignored his tax obligations will not meet the definition of Honest and Unfortunate Debtor, which is considered by the Court along with the debtor's lifestyle and post-bankruptcy obligations.

CRA will generally expect to receive orders for payment in the range of 40 to 60 per cent of the tax portion of the debt. They are also not expected to bring forward cases that have been decided more favourably toward the bankrupt.

Ms. Wellburn noted that the BIA does not provide for an expected percentage of recovery and, since a change in the legislation, the Court is to consider the debtor's ability to pay.

Unrepresented bankrupts, she said, are at a disadvantage when faced with the Department of Justice book of authorities. High orders are generally seen where the debtor has the income to support repayment or there is the potential for hidden assets. The panel



Photo: Dave Buzzard, CP Images

was of the view that the order should be uniform across Canada to allow for some consistency and expectation by the debtor as to the potential outcome of these hearings.

Suspensions are often seen where the circumstances are offensive, such as in the case of tax avoidance schemes.

According to the panel, Trustees face some challenge in managing these types of files. For example, the Trustee may be unable to give the bankrupt some expectation of debt discharge - the role of the Trustee is a neutral one which poses the concern of balancing the rights of an unrepresented bankrupt in the face of the book of authorities.

Registrar Cameron advised that the Court has discretion and consideration of the following facts would be important:

- » Conduct of the bankrupt as a whole;
- » Cause of tax debt;
- » Rehabilitation of the bankrupt.

All of this must be balanced against the integrity of the BIA.

Although the Trustee is in a neutral position, the Court would expect the Trustee to provide information and evidence without advocacy for either side. As the Court will put significant weight on the Trustee's information, it is important that a Section 170 report

be fulsome with information that was discovered during the course of the bankruptcy, and any additional extenuating circumstances that have been disclosed by the bankrupt.

The Court is open to settled conditions in advance of the application but also needs to ensure the agreement is reasonable and strikes the right balance of interests.

CRA is seeking compliance, and will consider financial situation of the debtor, age of debtor, surplus income and assets when making their recommendation to the Department of Justice. They will deal with applications for discharge on a case by case basis and have a significant amount of information available to them. CRA will certainly take into consideration any underlying conditions that they may not be aware of.

In consumer proposals, CRA's position is to maximize recovery and typically wants to see the debtor's best proposal offer up front. CRA will consider high-tax-debt situations giving consideration to future prospects and previous history with CRA.

The panel noted that CRA policy and procedures are applied uniformly across the country "in theory". Each region has taken positions and requested clauses that are not necessarily the position of the policy and procedures branch. The clauses being requested are being reviewed.

# Consumer Breakout: Surplus Income and Mediation

Review by Douglas G. Collins, FCGA, FCIRP

Moderator: Dean Gurney, CIRP

Panelists:

Guylaine Houle, BCL, CIRP

Kimberley Burke, CIRP

Donna Carson, CGA, CIRP

Charmaine Martin, Office of the Superintendent of Bankruptcy (OSB)

**M**s. Martin provided an overview of OSB statistics that show that the use of mediation grew significantly in 2011/2012. Currently, the vast majority of mediations are undertaken at the time of discharge.

Ms. Martin provided information showing that 26 per cent of the estates in the western region have surplus income compared to approximately 15 per cent in the Ontario/eastern regions. In 2013/2014 approximately 20 per cent of estates with surplus income utilized the mediation process.

Additionally, Ms. Martin clarified the mediator's role to be one of facilitating discussion between the parties to assist them in finding common ground.

There was a lively discussion among the panelists and the audience concerning the limit of the Trustee's discretion while taking into account the personal financial situation of the bankrupt and the family unit when determining surplus income. Reference was made to Section 68 of the Bankruptcy and Insolvency Act (BIA) and to the Superintendent's Directive on Surplus Income. A summary of recent case law was provided.

It was generally agreed that mediation works well when used to provide the bankrupt with additional time to pay an outstanding balance on the required surplus income payment for the period of the bankruptcy. As well, the expedited mediation process implemented by the OSB is commonly used by

Trustees, resulting in time savings for all parties involved.

This suggests that there is little disagreement between the Trustees and the bankrupts with respect to the amount of surplus income to be paid. Ms. Martin advised that 60 to 70 per cent of mediated agreements were successfully completed. Unfortunately, separate statistics to indicate how often mediation is used or is successful when the quantity of the surplus income is in dispute are not available.

The Trustees' concerns regarding the confidentiality provision included in the Mediation Settlement Agreement

was also discussed. Concerns raised included the effect on the Trustee's ability to make the Court aware of relevant information learned during mediation, and/or the Trustee's potential inability to report on and deal with assets that may have been disclosed during mediation.

It became apparent that, as Officers of the Court, Trustees are uncomfortable with the possibility of being in a position where they have to be less than forthright.



The Chair's Reception and Dinner at the Whistler Conference Centre  
Photo: Dave Buzzard, CP Images

# Corporate Breakout: Corporate Income Tax

Review by Dawn Walby-Parchoma, CIRP

Moderator: Sandy Sheinin, CPA, CA (Farris, Vaughan, Wills & Murphy LLP)

Panelists: Neil Bunker, CA, CIRP (PricewaterhouseCoopers)

Mitchell Gropper, Q.C. (Farris Vaughan Wills & Murphy LLP)

Ronnie de Zen, CA (PricewaterhouseCoopers)



Photo: Dave Buzzard, CP Images

I have to admit that I find Corporate Tax fascinating, so this session was a highlight for me at the Annual Conference. From the panel's experience, insolvency practitioners are generally concerned with realizing on "hard" assets and often discount financial attributes too quickly. In some instances, the financial attributes can enhance the salability of less desirable assets and/or enhance recoveries which should prompt an insolvency practitioner to evaluate the pros and cons at the beginning of a file.

The session began with a focus on restructuring plans and the related tax issues such as debt forgiveness, acquisition of control (AOC) and loss restriction provisions of which most insolvency practitioners have a basic understanding.

In recent years, Canada Revenue Agency has become more active in reviewing and reassessing tax loss transactions. It is therefore important for insolvency practitioners to seek advice on how to structure a transaction so that CRA's reportable transaction requirements are

not triggered, the transaction is defensible, and that the transaction does not offend general anti-avoidance rules.

The panel provided an overview of four tax loss transactions, two of which had an interesting twist in that they were limited partnerships (LP) as the AOC provisions do not apply to LPs. Most practitioners are aware that in order to sell the tax attributes, the transaction must be structured as a share sale, so something must be given to the shareholders in return.

Each transaction discussed by the panel had different stakeholders, which meant a lot of negotiations on how the sale proceeds would be split between various creditor groups and shareholders. The amount allocated to shareholders and unsecured creditors, who would otherwise receive nothing in a straight asset liquidation, was of particular interest.

My key takeaway from this session is that these are complex transactions requiring specialized tax and legal advice. The process runs more smoothly when the secured lenders,

insolvency practitioner and purchaser all have past experience structuring these types of transactions. A smoother process can lead to lower costs and make relatively small value transactions economic. The end result can lead to found money for all stakeholders.



Whistler village from the gondola to the top.  
Photo: Hilary Casey



INSOL President Adam Harris



# Corporate Breakout: Valuation Considerations for Different Asset Classes

Review by Angela Lock, CIRP

Panelists:

Russel Law, CA, CIRP, CFE (Crowe MacKay & Company Ltd.)

Jason Boyer, CPA, CA, CBV (PricewaterhouseCoopers Inc.)

Aaron Stewardson, CPA, CA (Maynards)

Hart Buck, (Colliers International Canada)

This session examined the very practical subject of issues practitioners should consider when dealing with an array of diverse asset groups, from intangible property to shares of solvent subsidiaries, to obsolete or outdated equipment or inventory, to distressed real estate.

The panel focused on two distinctly different case studies, the first considering the assets of Jackpine Forest Products Ltd. and the second those of League Assets Corp.

Jackpine Forest Products was a forestry company located in Williams Lake, B.C. This case showed the large discrepancy between an appraisal used for asset-based lending versus an appraisal done for a receiver only a year later due to a flood of equipment in the market and changes in the economy.

The receiver tried to market and sell the equipment as a going concern as the best realization approach to receive the most funds. Two years later, the assets still hadn't sold and an auction was held. The realization of these assets only returned 25 per cent of the valued security to the secured creditor.

The lesson in this case was that equipment should be sold as quickly as possible as it is subject to obsolescence, repairs, and maintenance and/or replacement costs, as well as unpredictable matters such as market conditions and the economy.

League Assets was a real-estate focused business with assets spread over 11 locations from across Canada. A valuation of all the buildings it

owned was required in a short time frame for court approval of the debtor-in-possession loan.

This case represented the major differences between appraised value versus estimated transaction value versus sale price. An appraisal is a more technical analysis with a list of similar types of assets sold within a specific time frame. An estimated transaction value occurs when a broker teams up with an individual in that geographic area who knows the area. Sales price is what it will realistically sell for in the next 90 days.

This scenario demonstrates how imperfect information can have a major effect on asset values and that details are important when selling assets (they found that one of the buildings in this case had mould and was almost worthless very late in the game.)

The below summaries represent considerations for auction and business values.

Auction Appraisal Considerations:

- » Get an auction value early
- » The size of an asset is important (i.e., how easily can the assets be transported?)
- » Are there environmental concerns?
- » Are the assets overstated on financial statements?
- » Have the assets been maintained properly?

Auctioneers have a network of clients to market assets to, however the industry can be small and often the competition will know the company had been struggling, decreasing an asset's value.

If the asset is unique, you can look at selling internationally with the view of having to take foreign exchange and conversions costs into consideration.

Business valuation considerations:

- » What are the financial markets doing?
- » Does the price match the value?
- » Estimated return on profitability long term
- » How likely is it to be profitable and how long will it take to be profitable?
- » What are the issues (e.g., economic or environmental)?
- » Is there volatility in that particular industry?

Intangible assets such as intellectual property, patents, a loyal customer base, and goodwill, are becoming more of the norm. Often they lack capital and it can be very difficult to pinpoint value. Things to consider are the uniqueness of the asset (is it scarce?), the ability to replicate the asset, and how much would it cost to replicate.

In summary, there are many different ways to value assets, and many variables to take into consideration. In our current economy it is important to have current values and to sell assets as a going concern is the best-case scenario.