The Insolvency Institute of Canada

L'institut d'insolvabilité du Canada

August 26, 2010

SUBMISSION TO THE OFFICE OF THE SUPERINTENDENT OF BANKRUPTCY

Introduction

In June, 2010, the Office of the Superintendent in Bankruptcy ("OSB") issued a consultation document entitled, "Review of the Trustee Licensing Regulatory Framework". In response to the issuance of this consultation document, the Insolvency Institute of Canada ("IIC") established a task force to review and comment on same. This submission reflects the views of that task force[1]. As outlined in the document, the OSB licensing regulatory framework has the following goals:

- to protect the public interest so that users of insolvency services are competently served by duly licensed professionals responding to the needs of the "professional services market" such that regulation is neither too restrictive (thereby promoting the competitiveness of trustee firms), nor too permissive (thereby maintaining the integrity and quality of professional services);
- to ensure clear and transparent rules that enable trustees in bankruptcy and licensing candidates to make informed decisions; and
- to ensure that there are no unreasonable constraints in the licensing process that could impede the recruitment of new trustees.

The task force's comments on the nine specific issues raised in the consultation document are as follows.

[1] Members of the task force were: E. Jane Milton, Mark Rosen, William Courage and Peter Farkas.

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1. Summary of Task Force Recommendations

1.1 A summary of the task force's recommendations is listed in the table below. Specifics of the recommendations are in the body of our submission.

1.2 Recommendations

Issue	Summary of Recommendation
Licensing Process (Section 2)	• Candidates should have a maximum of three attempts to obtain their license, without a time limit • A panel of four should be retained
Dual Licensing (Section 3)	• The present licensing system should be retained • Specialization should be considered • Counsellors wishing to take mandates under the BIA should take the NIQP[2] and become licensed
Probationary Conditions for Newly Licensed Trustees (Section 4)	• Probationary conditions should be repealed
Reactivation of the License in the Event of the Trustee's Bankruptcy (Section 5)	• Upon the bankruptcy or filing of a proposal, a trustee's license should be suspended • In the case of an explainable, extraneous situation, reinstatement may be appropriate • A high standard should be set for reinstatement
Corporate Names (Section 6)	• The use of corporate names should be allowed • The OSB should establish guidelines and should have to approve all proposed names
Closed Company (or Private Company) and Share Ownership (Section 7)	• Trustee-in-bankruptcy activities should be conducted by private corporations or individuals
Licensing Fees (Section 8)	• Trustees with substantial compliance issues should pay greater inspection fees
Succession Agreements (Section 9)	• Succession agreements should be put in place where the practice is dependent on a key person
Annual Licensing Reports (Section 10)	• There should be some oversight by the OSB of a trustee's financial wellbeing including professional liability insurance coverage

[2] National Insolvency Qualification Program

2. Licensing Process

2.1 Discussion

Currently there is in place a three year course (NIQP) component administrated by CAIRP[3], with a comprehensive written exam (NIE[4]) and finally an oral exam administrated by a panel of four, being representatives of the OSB, a seasoned trustee, as well as a lawyer, who practices in the bankruptcy area. The OSB is considering how many times a candidate can attempt the oral exam, an overall time limit to complete the course of study, as well as the composition of the exam panel.

The course of study leading to the NIE is rigorous. A person who commits to obtaining a trustee-in-bankruptcy license is undertaking a serious commitment to the profession. At the same time the stakeholders currently in the profession want to maintain the highest standards for new entrants.

In reference to the number of exam attempts by a candidate, there are limits to a CA candidate writing the final exams. In terms of overall time to complete the course of study, this is likely self-governing, that is, candidates will likely drop out if they are not advancing through the program at a steady pace. In terms of the panel numbers, by serving on oral exam panels, the stakeholders currently are showing their commitment to the process. Serving on the oral exam panel is a large time commitment.

2.2 Recommendation

The IIC recommends that there be a maximum number of three attempts to appear before the oral board but with no time limit by which the candidate has to appear. This provides clarity to candidates and keeps professional standards high. Presumably when candidates finish the NIE they are the freshest in terms of knowledge and they would want to sit the oral exam as soon as possible in any event. Adoption of this recommendation will achieve the OSB's goal of transparency in trustee licensing.

[3] Canadian Association of Insolvency and Restructuring Professionals
[4] National Insolvency Examination

In terms of the panel, the IIC recommends retaining the panel of four; only in extreme circumstances should this be reduced and, in those circumstances, the trustee and the lawyer panellists should be mandatory, as these persons bring in-depth, broad-based experience to the process.

Adoption of the above recommendation will ensure there are no unreasonable constraints in the licensing process.

3. Dual Licensing

3.1 Discussion Regarding Dual Licensing

The discussion regarding dual licensing has been ongoing for many years. In 1994 the Canadian Insolvency Practitioners Association (as it then was known) struck a subcommittee to review and comment on the topic. Many of the issues raised in the resulting document are still relevant today.

Now, as then, commercial practitioners who have no interest in consumer bankruptcy matters consider their practice as significantly different from consumer practices and do not wish to burden otherwise promising trustee candidates with consumer practice processes that will never be used in their practices.

On the other hand, most smaller practitioners find themselves in a situation where the knowledge and understanding of commercial matters is important to their practices either because they are dealing with self-employed individuals, who in effect are businesses, as defined under the *Bankruptcy and Insolvency Act* ("BIA"), or because they carry on a blended practice and actively seek out commercial estates.

In terms of considering whether or not a dual licensing format should be considered, the structure of the current insolvency marketplace should be reviewed.

The BIA applies to all proposals and all bankruptcies, whether they are corporate or personal. Special rules have been introduced to streamline processes for consumer debtors due to the high volumes of consumer filings. Notwithstanding, the fundamental principles of the BIA have not changed in the last

twenty years. The role of the trustee in bankruptcy, as an officer of the Court who balances the needs of debtors and creditors, is paramount. Practitioners, regardless of area of practice, must be familiar with current law and the application thereof, including the following:

- problem identification and solution analysis;
- effective communication with dissatisfied stakeholders;
- understanding the range of laws affecting debtor-creditor relationships;
- secured creditors' rights and remedies;
- possessory liens or common-law liens;
- balancing interests between debtors and creditors; and
- conducting themselves in a professional fashion.

The skills are the same; however, the circumstances, the size and the nature of problems to which they are applied are different.

Large corporate files, including *Companies' Creditors Arrangement Act* ("CCAA") filings, related advisory appointments and international filings differ from core insolvency appointments. In the final analysis however, any insolvency and restructuring proceeding will have an effect at some point on individuals. It is useful for practitioners, who practice in the commercial area, to understand the basics of what options are available for affected individuals, and how those individuals are affected by the operation of law.

Currently, a trustee with a license restricted to administering consumer estates can only administer files where there are no business debts. This means that a debtor cannot have been in business. If a debtor has business assets, outstanding liabilities for trade debts, or dealings with government agencies, trustees with a restricted consumer license are unable to assist them. Accordingly, the number of trustees who would be content to practice with a license restricted to administrating only consumer estates is very small. Most trustees would make an effort to have the consumer restriction removed from their license so that they can accept appointments in all types of estates. Further, many consumer practices actively pursue some commercial work.

In contrast, individuals who are successful in obtaining a trustee's license restricted to administering commercial estates may be willing to continue as such as they do not anticipate having dealings with consumer debtors. It is useful to note that the restriction actually reflects a deficiency in the trustee's knowledge.

The current training program is focused on providing base level knowledge directed at obtaining a trustee-in-bankruptcy license. Each candidate, in addition to the training program, is required to obtain practical experience and for the most part candidates are employed full-time in an insolvency and restructuring practice. The practical application of academic knowledge is an important part of the training process and the continuation of this is essential. The breadth of knowledge is substantial.

In summary, the current system of licensing and restricted licenses has served the profession well for many years. Restrictions are appropriate on licenses as they indicate a deficiency in knowledge or experience and, therefore, limit an individual's practice in an area. The ability to return before an oral board and obtain an unrestricted license is a useful option. Considering that practitioners will or may make decisions regarding changing their practices long after their initial education process is completed, it appears reasonable that a reattendance for this type of application not be restricted to the original time frames for obtaining a license.

3.2 Discussion Regarding Specialization

The discussion about providing specialist qualification after licensing a trustee is intuitively appealing. If appropriate, we suggest that CAIRP or other appropriate professional bodies administer specialization, as these organizations are in the best position to determine criteria for specialization. Prior to discussing this; however, it is useful to review current practices and identify what benefits, if any, may be obtained from specialization.

Based on the statistics provided, most trustees operate in smaller firm environments. Some of these smaller firms are boutique commercial practices. Most firms are blended practices that conduct an active

consumer practice and periodically accept commercial engagements. Accordingly, it is our view that the majority of trustees engaged in smaller practices would be reluctant to categorize themselves only as "consumer" specialists.

In considering whether specialization for commercial activities is necessary, it is useful to review the way that significant commercial appointments evolve. Generally, significant commercial files involve larger enterprises that have significant internal resources and established networks of advisors and consultants to assist them. When a problem is identified, a referral to a restructuring specialist is usually the result and that specialist will bring in other specialists, as they consider necessary, be they lawyers, accountants, advisors, or management officers. All of these appointments are generally made through personal contact or referral and the criteria are past experience, past performance and ongoing business relationships.

Further, significant formal appointments require stakeholders and Court supervision. In all of these proceedings, there are usually commercially sophisticated parties with professional advisors involved. Any party who is appointed to a formal role is going to be subject to the review of stakeholders and the Court and, if there are significant concerns regarding their ability to undertake the work, the issue would come to light. While the Court may consider a specialist qualification certification in considering a professional, it is more likely that the views of stakeholders would be given greater consideration.

However, there may be some practice areas which are so specialized that a "specialist" label may be appropriate in order to keep the public informed and to also promote excellence. For example, given the growth of the use of the CCAA, it may be helpful to have some specialization identification for those practitioners who regularly act as monitor. There may be other areas of specialization that can be identified. This is not dissimilar to lawyers or chartered accountants who can be designated by their respective professional bodies as specialists in "litigation" or "valuation" or "insolvency and restructuring". Potential areas for specialization would have to be identified and criteria be developed as to qualifications. Once again, the relevant professional bodies should be called on to administer.

Any specialist certification would be voluntary and available to all trustees who wish to avail themselves of obtaining same.

3.3 Discussions Regarding Granting Licenses with Limitations

The current system of granting licenses with limitations ensures that all parties that hold themselves out as professionals have a base level of understanding of statutory and legal requirements that are necessary for them to conduct their practices. The system of restrictions ensures that parties that are not qualified to do certain work are restricted from it; however, by reattending before the oral board, they would be able to remove the restriction from their license and then proceed with either type of estate.

3.4 Discussions Regarding Designating Administrators of Consumer Proposals

A consumer proposal is but one of the options available to an individual debtor who is considering options for resolution of financial problems. Pursuant to the provisions of the "Assessment Directive", the trustee must present an insolvent debtor with all options available to resolve their financial difficulties. These options include:

- modifying current behavior to pay creditors;
- allowing existing legal collection proceedings to continue;
- seeking assistance from an accredited credit counsellor to obtain assistance in filing a debt-management plan;
- filing a consumer proposal; or
- filing an assignment in bankruptcy under the BIA.

It would seem, therefore, that in order to provide a full range of options, the individual doing the assessment must be qualified in all areas.

The material provided by the OSB includes material submitted by OACCS (Ontario Association of Credit Counselling Services, an association of not-for-profit credit counsellors who have arrangements with the Canadian Banker's Association for administering and receiving payment for Debt Management Plans;

similar agencies exist in other provinces) in support of its position (Appendix "D" to the consultation document) that credit counsellors should be licensed as administrators, as follows:

- "it would allow for the availability of a credible alternative to Canadians for unbiased advice and consumer choice related to consumer proposals;
- it would help to offset the fact that the OACCS's revenue has been adversely impacted by the issuance by the Superintendent of the position paper "Referral Agreements between Trustees and a Third Party" (this position paper forces the largest of the credit counselling services to stop preparing files for consumer proposals as agents for certain trustees); and
- it would change what is, in essence, a monopolistic approach that limits access to the consumer proposal option for those in need."

In considering these comments, there appears to be a disconnect between the Assessment Directive which requires a trustee to provide all options to a debtor, including information regarding credit counselling through an accredited counselling outlet and a discussion of the bankruptcy process, versus the so-called unbiased advice of a credit counsellor who can only provide debt management plans or consumer proposals. The OACCS's comments imply that trustees are biased and not acting in the best interest of the public, which we strongly disagree with; Trustees refer files to counselling agencies on a regular basis when bankruptcy or consumer proposals are not appropriate.

Anecdotally, in the Province of Nova Scotia, the only province where credit counsellors are accredited as administrators, the experience appears to be that consumer debtors are urged to file consumer proposals that are sometimes unrealistic. Trustees who subsequently deal with these individuals pursuant to the annulment of the consumer proposals report that the consumer debtors were, frankly, not provided with unbiased clear information regarding bankruptcy. The answer to the OACCS's first submission is effective training of trustees.

We find the second assertion by the OACCS, that their revenues were adversely impacted by the referral agreements position paper, not relevant to the issue. Firstly, the practice of certain trustees contracting with credit counselling agencies appears to be in contravention of the Code of Ethics for Trustees. While OACCS agencies may not have done anything wrong, the trustees who were involved in such a scheme appear to have contravened Rule 49 of the BIA, being a section of the Code of Ethics for Trustees that

prohibits payment for referrals. Further, such agreements were restrictive and limited the choice of trustee for unsuspecting consumer debtors. This is a concept not supported in the BIA which insists on the clear and transparent administration of an insolvency process.

In terms of trustees being a monopoly, a simple review of Yellow Pages under the "Credit Counselling" or "Bankruptcy Trustees" headings, typing in the term "bankruptcy" or "consumer proposal" in an internet search engine, listening to radio or watching TV will indicate that there is active competition among businesses providing advice to debtors experiencing financial difficulties; not all of these solutions are provided by trustees in bankruptcy. Other services providers include traditional not-for-profit credit counselling agencies, such as OACCS, private credit counsellors, lawyers, and paralegals. Bankruptcies and consumer proposals can only be administered by licensed individuals who have the training, experience and supervision to do so.

If the OSB were to consider licensing other parties as administrators of consumer proposals, it is important that the administrators be able to provide information to debtors regarding all options. Since the 1997 Memorandum of Understanding between the Office of the Superintendent of Bankruptcy and CAIRP, the qualification program for becoming a trustee in bankruptcy has been, in effect, an open process. The transfer of the administration of the training program to CAIRP was completed on the basis that accessibility is not limited. A person who had worked for a consumer credit counsellor for a period of five years would be qualified to enter the program and would, assuming he or she met all of the scholastic qualifications, be able to obtain a license as a trustee-in-bankruptcy. It is important that anyone considering obtaining the administrator's certification be fully versed in bankruptcy law.

3.5 Recommendation

The IIC recommends that:

(a) the present restricted licensing system be retained as it protects the public interest in ensuring all trustees in bankruptcy have a base level of knowledge in all areas;

(b) specialization be considered in certain areas so that users of insolvency services can make informed decisions. Specialization designations will also promote excellence. The identification of specialization areas, criteria and candidate selection should be delegated to CAIRP and other appropriate professional bodies to administer; and

(c) in order for counsellors to act under the BIA, they enrol in the CIRP Qualification Program ("CQP") and become licensed. This will protect the public in maintaining high standards.

4. Probationary Conditions for Newly Licensed Trustees

4.1 Discussion

While the NIQP is a three year education process, in practice, by the time a candidate passes the oral boards, the candidate will have been in practice at least 4 to 5 years. They are required to have completed 2,400 hours of work undertaken across a range of activities under the supervision of a trustee. In comparison to other professions (e.g., CA or law), once a candidate receives their designation, they can practice as they wish, although most often they stay where they are employed for at least a few years to gain additional experience. As noted above in Sections 2 and 3, there is a rigorous course of study and exam process in place; presumably the oral exam particularly "weeds out" unqualified candidates. We suspect the probationary period is a legacy issue adopted prior to the current training and licensing regime put in place in the 1980s.

4.2 Recommendation

The IIC recommends the OSB repeal the probationary conditions for newly licensed trustees. Adoption of this recommendation will achieve the OSB's goal of transparency in trustee licensing.

5. Reactivation of the License in the Event of the Trustee's Bankruptcy

5.1 Discussion

Stating the obvious, a trustee is meant to be a model for the community in terms of financial responsibility. It should be a rare event that a trustee becomes bankrupt[5]. There can be circumstances where a trustee is bankrupt perhaps for health, or family reasons, or some totally extraneous issue not related to his/her practice and with no reflection on the trustee's character. There is little sympathy for the trustee who becomes bankrupt as a result of malfeasance or fraud. This type of bankrupt trustee brings disrepute to all stakeholders.

5.2 Recommendation

Upon bankruptcy or filing of a proposal of any kind, a trustee's license should be suspended.

Any request for reinstatement should be on a case-by-case basis with a transparent policy as to the criteria that will be taken into consideration. The OSB should consult with CAIRP and the provincial trustee association and get input as part of its due diligence when considering a reinstatement. In the case of an explainable extraneous situation, reinstatement may be appropriate but there should be a very high bar set for same.

Adoption of the above recommendation will achieve the OSB's goal to protect the public interest such that insolvency services are provided by competent practitioners.

6. Corporate Names

6.1 Discussion

The issue of only allowing the personal names of trustees or accountants is, once again, a legacy issue. Prior to the 1990s only accountants carried on trustee practices; most were CAs. This has changed, is as

[5] "Bankrupt" in this section also includes the filing of a proposal.

evidenced by the fact that, in 1992, more than 85% of trustees were accountants while, by 2008, this had dropped to 69%[6]. Lately, many insolvency boutiques have emerged, large and small, that are not part of an accounting firm. This is especially true in commercial practice. Most users of commercial type services are sophisticated and have advisors, so the chance of the public in this sector being misled by a particular name is small.

The OSB has identified the issue of use of corporate names in context of consumer practice, where there can be misleading branding in order, for instance, to get to the top of a yellow pages directory (e.g., by using "AAAA") or using a name where the public does not know it is dealing with a bankruptcy trustee (e.g., Ottawa Insolvency Centre Inc.).

By way of a reference point, the *Business Corporation Act (Canada)* provides guidelines to companies as to what are unacceptable types of names[7]. Perhaps the OSB could do likewise.

There is also the issue of succession, where new trustees buy an established practice with an existing trustee's name; there may be goodwill attached to the existing trustee's name which the new owners wish to capture.

6.2 Recommendation

The IIC recommends modernizing the rules surrounding corporate names whereby practices which are largely commercial can use a corporate name that does not include the personal names of the partners.

In terms of practices focused on consumers, a corporate name can be used but the nomenclature "trustee in bankruptcy" should appear in all advertising such that the public will not be misled.

[6] OSB Consultation Paper, *Power of the Trustee Regulatory Framework*, page 3
[7] CBCA, Policy Statement 1.1(a)

As an overall check, all proposed names should be submitted to the OSB and the OSB should have the final say that a particular name is not misleading in the context of the framework noted in the consultation document.

Adoption of the above recommendation will achieve the OSB's goal to protect the public interest so users of insolvency services are duly served without regulations that are too restrictive so as to hinder competition.

7. Closed Company (or Private Company) and Share Ownership

7.1 Discussion

We are aware that, in the U.S., there are certain restructuring practices which trade publicly. However, the role of such firms is different than in Canada where the trustee is a fiduciary and assets vest in the trustee. There could be independence and conflict issues if a trustee's firm is allowed to be a public company. There could be restructuring advisory activities undertaken by professionals that are not trustee (or CCAA) assignments; these types of practices may be conducive to a public vehicle.

7.2 Recommendation

The IIC recommends that trustee in bankruptcy activities be conducted by private corporations or individuals.

8. Licensing Fees

8.1 Discussion

The OSB inspects trustee officers for the purpose of ensuring compliance with the BIA and OSB Directives. It is assumed that, over time, the OSB develops a performance rating for each particular office with the view that offices with poorer ratings are inspected more regularly. There may be other

criteria for the frequency and depth of inspection. Inspections are costly. They also promote good governance.

8.2 Recommendation

The IIC recommends that the OSB develop a methodology that results in trustees with sustained compliance concerns paying extra to defray the more frequently required inspections and monitoring. The recently completed development by the OSB of its "trustee scorecard" and risk management approach to monitoring trustees is an essential first step. Based on the risk assessment and ranking, there could be rebates for better ranked offices/trustees. An alternative would be for all offices to pay for inspections and monitoring; the more frequently an office is inspected, the more it will pay. This should promote good governance as trustees will want to ensure that their risk profile is lower in order to keep costs down.

Adoption of the above recommendation will achieve the OSB's goal to protect the public interest so that insolvency services are provided by competent practitioners.

9. Succession Agreements

9.1 Discussion

Sole practitioners practices represent 85%[8] of all trustee offices. In sole practitioners or smaller practices, the incapacitation of a trustee can lead to a rudderless practice. In these instances, the OSB has to step in quickly to manage the practice and engage, in time, a third-party trustee to complete the estate administrations of that practice. Succession agreements would anticipate such an eventuality and presumably some preparatory work could be done by the selected successor firm ahead of time so that the successor firm has knowledge of the processes of the target firm prior to a crisis. This could involve briefings and documentation on scope of practice, software, and key personnel. Thus, in the event of a

[8] ibid, page 13

need, there can be a smooth and more economic transition and thus provide protection to the public. A standby fee may have to be paid by the target firm to encourage successor firms to participate in such a program. The OSB needs to develop criteria that identifies target firms.

The chosen successor firm should be of a sufficient scale that it can assume management of the practice of the target firm. Safeguards will have to be put in place such that the chosen successor firm does not take advantage of confidential information and use confidential information in any anti-competitive manner.

9.2 Recommendation

The IIC recommends that there be a program for succession agreements for all firms where the departure or incapacitation of a key person puts the practice in jeopardy. If a firm is identified as needing a succession agreement but the firm does not put one in place, perhaps a higher annual fee should be charged to compensate the OSB in case it needs to ultimately step in and also to encourage firms to structure succession agreements.

Adoption of the above recommendation will achieve the OSB's goal of serving the public interest in that efficient services will be provided to users.

10. Annual Licensing Reports

10.1 Discussion

There is no annual review of trustees, a trustees' financial well being, and professional liability insurance coverage, notwithstanding that trustees can have significant trust funds under administration in their accounts. It should be noted that other professions (e.g., CA or law) have such annual oversight usually conducted by their professional bodies.

It has been suggested that trustees submit financial information to the OSB annually to be assessed. There is some concern in the trustee community as to who will determine what is a good financial statement and what is not. There is also some concern about confidentiality of information.

The OSB has also raised the issue of self-reporting of complaints and noncompliance. As to complaints about trustees, there is opportunity for the public to contact the OSB offices (or professional bodies such as CAIRP or provincial CA institutes), if they feel a trustee has transgressed. To expect trustees to report on themselves raises the question of materiality and, frankly, goes against natural processes.

10.2 Recommendation

The IIC recommends that there should be some oversight by the OSB of a trustee's financial well being. To address concerns about assessing the quality and confidentiality of financial statements, perhaps the reintroduction of a general bond, scaled for the size of practice, might be appropriate. This has the added benefit of the OSB being able to call on the bond if there is an insurable event. If a trustee cannot obtain a suitable bond, it would be a signal to the OSB of a potential problem. Presumably the more financially secure a trustee is, the lower the bond premium, once again prompting good governance.

Trustees should also confirm their professional liability insurance coverage annually with the OSB and some minimums should be established by the OSB, once again scaled to the size of the practice.

Adoption of the above recommendation will achieve the OSB's goal to protect the public interest by promoting good governance and financial solvency of trustee affairs.

The self-reporting of complaints and noncompliance is not, in our view, a workable idea.

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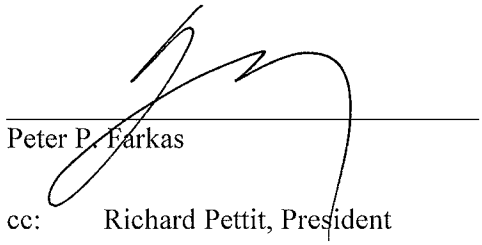
These are the submissions of the task force that was established by the IIC. The task force is available to the OSB to answer any questions raised in this document.

Thank you for the opportunity to provide comment.

Respectfully submitted on behalf of the IIC task force,



Peter P. Farkas

cc: Richard Pettit, President