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CANADIAN ASSOCIATION
OF INSOLVENCY AND
RESTRUCTURING PROFESSIONALS

ASSOCIATION CANADIENNE
DES PROFESSIONNELS DE L'INSOLVABILITÉ
ET DE LA RÉORGANISATION

April 25, 2012

Ms. Sheila Westerink Robin
National Manager
Policy and Regulatory Affairs
Office of the Superintendent of Bankruptcy
155 Queen Street, 4th Floor
Ottawa, ON K1A 0H5

Dear Ms. Westerink Robin:

Re: Request for Comments on Directive 13R4 and related policies

The Canadian Association of Insolvency and Restructuring Professionals (CAIRP)[1] is pleased to provide comments on Phase I of the implementation of the changes resulting from the Licensing Framework Review. The Directive and policies posted for comment address some of the issues of concern that were part of CAIRP's submission in August 2010 on the Review of the Trustee Licensing Regulatory Framework. In particular, we are pleased that the new Directive does away with the limit on the number of times that a candidate may sit for the Oral Board and that it clarifies the conditions under which the two-year probationary period for newly licensed trustees can be lifted.

Our comments are as follows:

Directive 13R4

1. The definition of Directive should be modified to read: "Directive" means a directive validly issued by the Superintendent under the authority of subsection 5(4) of the Act.

   The reason for the change is that the Directive provides that a trustee's licence could be suspended or withdrawn unless the trustee complies with the Directives. If a licence is to be suspended or withdrawn for a failure to comply, then the Directive must *a priori* meet the requirement for being a valid directive, i.e., it must not be *ultra vires* of the power of the OSB to issue such a directive. An example would be Directive no. 10, before it was declared *ultra vires* by the Court in re: Climenhaga v. Alberta (Superintendent of Bankruptcy)[2], where conceptually a trustee could have seen his/her license suspended for failure to comply with a Directive that was *ultra vires*.

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[1] The Canadian Association of Insolvency and Restructuring Professionals (CAIRP) is a national professional organization representing some 920 general members acting as Trustees in Bankruptcy, receivers, agents, monitors, and consultants in insolvency matters, as well as 400 articling members, and 215 corporate, life, and inactive members. A non-profit corporation, CAIRP was created in 1979 to advocate a fair, transparent, and effective system of insolvency/restructuring administration throughout Canada.

[2] 2008 CarswellAlta 2156 (Alta Q.B.)

2. The definition of MOU should contemplate the possibility that the MOU may be amended or modified by agreement, from time to time.

   This would eliminate the requirement to reissue the Directive solely because an amendment was made to the MOU.

3. In paragraph 4(c): the following should be added to the end of the paragraph: "or was a member at the time that the disciplinary actions were taken against him." This addition would capture those individuals in CAIRP and other associations where there is no mandatory membership, who resign when a complaint has been filed against them and / or when disciplinary action is taken against them.

4. Paragraph 8: Same comment as above with respect to paragraph 4(c).

5. In paragraph 11, we suggest removing the word "credible" and suggest the following wording: "…provide reasons why such a request is reasonable."

6. In paragraph 14, there should not only be a reference to a "consumer bankruptcy", but an equivalent reference should be made to a "consumer proposal".

7. In paragraph 14, the inclusion of "indirectly" seems to be overly restrictive, e.g., as in the case where someone has personally guaranteed a business debt. The sentence should be re-worded to read, "(…) in which an individual has no direct business liability."

8. In paragraph 15, there should similarly not only be a reference to a "corporate bankruptcy", but also an equivalent reference should be made to a "corporate proposal".

   The reason is that without references to a consumer proposal in paragraph 14 and a corporate proposal in paragraph 15, the prohibition against taking on commercial or larger bankruptcies is ineffective, as one could start a file as a notice of intention or a proposal solely to have the notice of intention or proposal defeated, after which the trustee becomes automatically the trustee in the bankruptcy (subject to the right of the creditors to replace the trustee). The possibility to file a proceeding under Part III of the Act without restriction would effectively provide a "back door" around the prohibition to take on larger bankruptcy files.

9. In paragraph 15, the last word should be "limitation" instead of limitations.

10. Paragraph 62 should be relocated immediately after paragraph 18, as otherwise paragraph 18 appears to be definitively preventing "branding" by certain firms.

11. In paragraph 19, it should be made clear that the descriptive list is not limitative, as otherwise the Directive would prohibit other work that is customarily performed by accountants or trustees, such as Monitor in proceedings under the CCAA, escrow agent, information agent, judicial sequestrator, etc. The section could be rephrased as, "(…) other related functions including but not limited to (…)".

12. In paragraph 23, the word, in this context, should be "practice" (a noun), rather than "practise" (a verb).

13. In paragraph 27, the text should be changed as follows: "In extraordinary circumstances, where the corporate trustee is left with no individual trustee in a given district due to an unforeseen event, such as death, sickness or resignation of an individual trustee, the Superintendent may grant, on written request from the corporate trustee, an authorization to maintain the corporate trustee's operation in a given district for a specified period of time."

    The suggested change is intended to reflect the fact that the OSB's decision is discretionary. The current text only mentions that the corporate trustee is required to request authorization.

14. In paragraph 29, the requirement that the individual trustee acknowledge acceptance in writing is not very realistic in the context of e-filing. A suggested alternative wording of the section would be, **"**An individual trustee designated pursuant to paragraph 28 of this Directive shall acknowledge acceptance of the designation to the Designated Senior Bankruptcy Analyst."

    We assume that the Estate Information Summary form that an individual trustee submits to the Superintendent complies with this paragraph.

15. In paragraph 28, it should be specified that the designated trustee must hold a licence that is valid for the district from which the engagement originates. Without that addition, there is an inherent loophole, in that there is no requirement that the designated trustee hold a licence that is valid for the district from which the file originates. In essence, it would be possible for a corporate trustee to designate a trustee that holds a licence issued in another district.

16. Paragraph 31 appears to be overly restrictive for no apparent reason and should be removed. Perhaps the OSB could clarify the intent of this paragraph.

17. In paragraph 34, the two words "or" that separate OSB, lawyer and notary should be removed, for consistency (the "or" does not appear elsewhere in the list and is not necessary).

18. In paragraph 43(b), the requirement that the OSB approve a change of employer may be considered as an infringement on an individual's ability to earn a living. Effectively, the provision means that the OSB can decide that the trustee is indentured to his or her employer. We believe that beyond the probationary period for a new licence or a change in condition or limitation associated with a licence, the choice of an employer should not depend on the wishes of the OSB.

19. Paragraph 43(c): There should be a semi colon at the end.

20. Section 44 should be reworded as follows: "Any other change in the information supplied (…) shall be communicated to the Superintendent, in writing *within* five (5) days of such a change.

21. Paragraph 50 would appear to be redundant and should be removed. The authorization to accept new files should be strictly a factor of whether a licence is active. The pre-approval by the

Superintendent should be irrelevant or implicit, once probationary conditions or limitations have been set and accepted.

Appendix A – Licensing Process

22. In paragraph 2, "will file with the Superintendent" should be changed to "must complete and file with the Superintendent."

23. In paragraph 5, "For example" should be removed at the beginning of the paragraph.

24. In paragraph 11, the word "mailed" should be changed to "communicated", as we believe the decision has, on occasion, been sent by means other than by mail. The mode of delivery should be at the Superintendent's discretion, provided it is issued contemporaneously to all applicants.

25. In paragraphs 12 and 13, there seems to be an inconsistency, as conceivably an applicant may be required to ask for a review of the Superintendent's decision on the same day he or she receives the feedback from the Board members. The request for a review of the decision should be made within 15 days after receiving the feedback or within 30 days of the decision, whichever is the later date.

26. In paragraph 15(b), the word "that" at the beginning of the paragraph is superfluous. As well, the word "restriction" should not be plural.

27. In paragraph 15(b)(iii), the following should be added after $15,000: "or such amount as is prescribed pursuant to subsection 49(6) of the BIA and section 130 of the BIA General Rules".

28. CAIRP's CIRP Qualification Program (CQP), is specifically designed to ensure that the successful candidates acquire adequate knowledge and experience sufficient for them to work in both consumer and corporate insolvencies. CAIRP recognizes that the majority of trustees tend to develop an expertise in one area. In as much as this remains a professional reality, there is some concern that all newly licensed trustees be authorized to act in summary administration estates even if their developed area of expertise is with corporate insolvencies.

    The September 2009 amendments to the *Bankruptcy and Insolvency Act* (BIA) and particularly the changes with respect to the debtor discharge provisions[3] and the Surplus Income Directive[4], are complex and require a certain expertise which a newly licensed trustee with an expertise solely in corporate insolvencies may not have.

    Considering these points, CAIRP suggests that the following paragraph be added after 15(b):

    (c) that where, at any time during those twenty-four (24) months, the newly licenced trustee does not satisfy the requirement set forth in paragraph 15(a) above, the newly licenced trustee must:

[3] Section 168.1 to 172.1 of the *Bankruptcy and Insolvency Act*

[4] Directive No. 13R2

(i) submit a business plan to the OSB, that is acceptable to the OSB in form and substance, before starting to accept new engagements; and

(ii) agree to be subject to peer practice reviews at the cost of the newly licenced trustee.

29. Paragraph 19 is difficult to understand in the context of paragraph 15(a). We assume that the request to lift conditions must pertain to conditions other than the expiry of a 24-month delay (which is a probationary condition under paragraph 15(a)), as otherwise paragraphs 19(a) and 19(b) would not make sense). To address this issue the probationary period in paragraph 15(a) should be non specific, and the text in paragraphs 19(a) and 19(b) should be modified to refer to "a probationary period of 24 months" instead of "the probationary period of 24 months".

30. In addition to paragraph 21, the OSB should consider prescribing the process which a trustee would follow in order to have limitations lifted or modified.

Policy on Multi-Jurisdictional Licenses

31. In paragraph C.2 d), we do not understand the rationale for making this a requirement for an extension of a licence to other jurisdictions, if it is not a requirement for a license in one jurisdiction.

32. In Appendix A to the policy, it should read, "… very familiar with the following areas of provincial legislation as applicable", as some areas do not apply to all provinces.

Policy on Reinstating a Licence that has Ceased to be Valid by Reason of the Trustee Becoming Bankrupt

33. In section D, subparagraph (c), a factor that should be added to the list is a demonstration that the person asking for the reinstatement has the necessary financial management skills and knowledge. A trustee is not only required to hold funds or property for others, he or she also has a role as an educator and/or advisor for individuals who are considering the filing of a bankruptcy or consumer proposal. It is important that the trustee be able to properly assess, demonstrate or advise individuals in budgeting, financial management, etc.

As one of the primary stakeholder in the Canadian insolvency system, CAIRP recognizes the importance of the review of the licensing directive and in this respect would like to congratulate the Office of the Superintendent of Bankruptcy Canada for all the efforts which have been dedicated and continue to be dedicated to this very important review.

CAIRP hopes that these comments will be considered in the preparation of the final version of Phase I of the Licensing Directive and its appendices.

In addition, we would like to add that a number of other important recommendations can be found in CAIRP's submission on the Review of the Trustee Licensing Regulatory Framework and we hope that these will be taken into consideration in Phase II of your review of the Licensing framework.

Should you have any questions or require any additional information with respect to the comments made, do not hesitate to communicate with me.

Yours sincerely,

Guylaine Houle
Chair