SUBMISSION OF THE CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS[1] responding to the Review of the Trustee Licensing Regulatory Framework

August 31, 2010

INTRODUCTION

The Canadian Association of Insolvency and Restructuring Professionals (CAIRP) supports the efforts of the Office of the Superintendent of Bankruptcy's (OSB's) consultation regarding possible changes to the Canadian bankruptcy and insolvency system's licensing regulatory framework. CAIRP agrees with the OSB that "the licensing regulatory framework is an essential component in promoting the integrity of the insolvency system by ensuring that well-qualified, competent, ethical and financially capable individuals are licensed to act as Trustees in administering insolvent estates and applying the Bankruptcy and Insolvency Act".[2]

As the representative organization for more than 95% of Canada's practicing licensed Trustees, CAIRP offers an informed perspective on the issues, since its members are critical to the effective functioning of the bankruptcy and insolvency system.

CAIRP has a special interest in possible changes to the trustee licensing regime as under the terms of an October 2009 Memorandum of Understanding (MOU) between CAIRP and the Superintendent, as of September 1, 2010, the CIRP Qualification Program Committee will assume responsibility for delivering the education and training of Chartered Insolvency and Restructuring Professionals (CIRPs), trustees in bankruptcy (Trustees), and qualified insolvency counsellors. We appreciate the opportunity to present our analysis and recommendations

[1] The Canadian Association of Insolvency and Restructuring Professionals (CAIRP) is a national professional organization representing some 887 general members acting as Trustees in Bankruptcy, receivers, agents, monitors, and consultants in insolvency matters, as well as 405 articling members, and 208 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] June 2010 Consultation Paper, "Review of the Trustee Licensing Regulatory Framework" issued by the Office of the Superintendent of Bankruptcy Canada, [hereafter the Consultation Paper] page 1, para 2. The Consultation Paper can be found at: http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02424.html.

regarding the issues subject to review since changes to the Trustee licensing regulatory framework could impact on the structure and content of the qualification program.

Given the number of issues discussed in the Consultation Paper, we have structured our response to mirror the Consultation Paper's division into three parts, each with various issues. For ease of reference, we have included the OSB's wording of the issue(s) before giving our response.

EXECUTIVE SUMMARY

Part I: Licensing Process

Issue Number 1
Harmonization of the Directive on Trustee Licensing (Directive No. 13R2) with the Memorandum of Understanding between the Superintendent of Bankruptcy and the Canadian Association of Insolvency and Restructuring Professionals (CAIRP)

Issue Number 1 – CAIRP's Recommendations

- The OSB should proceed to harmonize the Directive with the MOU to make it clear that successful completion of the CQP (formerly the NIQP) is a prerequisite of licensing, (subject to limited exemptions), and to clarify the rules regarding undergraduate degrees, professional designation requirements, and/or relevant work experience requirements as prerequisites to admission into the CQP.

- The OSB should abolish the rule limiting the number of times a candidate may sit for the Oral Board, and should eliminate the time limits within which the Oral Board process must be completed, subject to enactment of support protocols for candidates and disincentives, as required, that would come into play after a candidate's third unsuccessful attempt.

- The OSB should exercise caution if it decides to modify the requirement that the Oral Board must be comprised of four members, as changes could compromise the objectives of the Oral Board process. Rather than seeing the OSB change the requirement to permit less than four examiners, CAIRP encourages the OSB to consider various alternatives, outlined within this submission, to encourage more practitioners to serve as Oral Board panellists.

- If the Directive is modified to explicitly allow the OSB discretion to allow a candidate to attempt the Oral Board without first having completed the CQP, the Directive should make it clear that the exercise of such discretion is reserved for extraordinary instances.

Issue Number 2
Dual Licensing, Specialized Licences and Administrators of Consumer Proposals

Issue Number 2 – CAIRP's Recommendations

Dual Licensing

- CAIRP submits that the current system of licensing for all trustees should be maintained, including imposition by the OSB of restrictions on licences when circumstances exist justifying restrictions.

- CAIRP recommends against the implementation of dual licensing for the numerous reasons detailed in this submission. Furthermore, CAIRP believes that the premise on which the OSB is considering the implementation of dual licensing is addressed through a myriad of risk mitigation variables (discussed in the submission) that currently exist.

Specialization

- While CAIRP recognizes that, practically speaking, some degree of specialization exists for the vast majority of practising Trustees, for the reasons set out in the submission, CAIRP is not in favour of regulated specialization. It is CAIRP's view that market focus and self-identification will allow the market to differentiate between specialists and generalists.

Administrators of Consumer Proposals

- CAIRP is opposed to the appointment or designation of others as administrators of consumer proposals unless such individuals meet the exacting standards expected of a professional service provider in fulfilling the obligations of the appointed role. The standards adopted by the OSB in this regard must be the highest standard, which are the standards currently embossed within Trustees:
    - A Trustee has completed an education program that requires the acquisition of significant and relevant knowledge and demonstrates the competence and experience expected of a professional to advise and guide a consumer debtor in financial distress.

- A Trustee's breadth of experience in administering a full spectrum of insolvency proceedings on behalf of consumer debtors that provides the Trustee with unique insight, which is of benefit to consumer debtors.

- The OSB, in its deliberation, must consider whether the inability of an alternative service provider to provide sound, strategic, and objective advice to a consumer debtor based on limited experience and education in alternative insolvency proceedings will adversely impact the ability of the consumer debtor's ability to make fundamental, informed decisions.

- CAIRP cautions the OSB that prior to deviating from a standard that has garnered the public's trust and confidence in the professionals that deliver the services, that it considers the standard to be applied and the rationale for deviation. CAIRP respectfully submits that the risk of altering the standard far exceeds any future benefit to be derived.

Issue Number 3
Probationary Conditions for Newly Licensed Trustees

Issue Number 3 – CAIRP's Recommendations

- CAIRP recommends maintaining the twenty four month probationary period with the following additional conditions:
  - The probationary period should involve insolvency and restructuring work under the guidance and direction of a Trustee in good standing;
  - A practice review of the new Trustee should be carried out; and
  - Individuals should be strongly encouraged to become (or remain) members of CAIRP for the duration of the probationary period.

- With respect to newly licensed Trustees who seek to become sole practitioners immediately upon receiving their Trustee's licence or within the probationary period, the following additional conditions should also have to be met:
  - Before starting their practice they should submit a business plan to the OSB that is acceptable to the OSB in form and substance; and
  - During their first two years of practice sole practitioners should be subject to peer practice reviews, the cost of which they should bear. These reviews should include written confirmation from the reviewer regarding the Trustee's compliance with established parameters.

- CAIRP does not believe there should be a requirement that new Trustees file a minimum number of estates prior to having any probationary conditions lifted because the number of files does not have any bearing on competency. Additionally, CAIRP does not believe a new Trustee need file an experience report during the probationary period. CAIRP would support requiring candidates to file with the OSB a more detailed experience report prior to the sitting of the Oral Board.

Issue Number 4
Reactivation of the Licence in the Event of the Trustee's Bankruptcy

Issue Number 4 – CAIRP's Recommendations

- We recommend that the minimum period following a Trustee's discharge or completion of an alternative insolvency proceeding until reinstatement be one year from the individual's discharge from bankruptcy or completion of the insolvency proceeding, and that the Superintendent's decision regarding reinstatement of a licence under Subsection 13.2(4) of the BIA be made on a case-by-case basis, subject to specific criteria to be set out in an amended licensing Directive.

- Regardless of whether a Trustee has met all the requirements, in evaluating whether to reinstate a licence the Superintendent should have latitude to refuse to reinstate the licence if the Superintendent is of the view that the public's confidence in the insolvency system would be impaired if the licence was reinstated.

- The licensing Directive should specify the following criteria for consideration by the Superintendent prior to reinstatement of a Trustee's licence:
  - The debtor-Trustee's discharge and any conditions of discharge;
  - The amount of time between the bankruptcy and the discharge of the debtor-Trustee;
  - The causes of the bankruptcy;
  - The number, nature, and quantum of the debtor-Trustee's creditors and their recovery;
  - The nature of the debtor-Trustee's practice (number and type of files);
  - The history of the Trustee's licence and of the firm at which the Trustee worked;
  - The debtor-Trustee's financial situation, including cash reserves to be able to operate the business over a period of time;
  - The practitioner's controls and reporting over trust accounts;

- Whether the Trustee will be working with other Trustees and will therefore be subject to internal control processes and procedures;
- Whether the Superintendent believes the former Trustee is:
    - Competent to carry on the practice of a Trustee,
    - Capable of performing the essential duties associated with his or her employment, or
    - Capable of carrying out any business or practice in which the member is engaged.
- Whether the Trustee wilfully neglected his or her creditors, was financially irresponsible, or whether his or her personal extravagance contributed to the bankruptcy;
- Whether the Trustee breached his or her fiduciary obligations, or committed any act that is, by its nature, fraudulent, or subject to criminal sanction by a court of competent jurisdiction; and
- Other factors, such as submission of references by the debtor-Trustee.

- In addition to the foregoing, we recommend that the Superintendent impose conditions of re-instatement, including:
    - A positive requirement to disclose any breaches, investigations or sanctions that may be related to the insolvency, whether criminal or non-criminal (for example, violations of securities laws);
    - Submission of an attestation regarding maintaining professional competency during the period the individual's licence was revoked; and
    - A requirement for enhanced reporting on the status of estate trust accounts from time-to-time.

Issue Number 5
Corporate Names

Issue Number 5 – CAIRP's Recommendations

- We support modernizing the naming standards, including the provisions set forth in the Consultation Paper that a firm name not be permitted if:
    - It is false or misleading;
    - It contravenes professional good taste;
    - It brings the profession into disrepute;
    - It includes a statement or claim that cannot be substantiated by the firm;

- It causes confusion as to the real identity of the individuals in the firm;
- It consists of a purely descriptive name; or
- The Superintendent believes it is not in the public interest.

- We specifically recommend:
  - Permitting the use of abbreviations in, or as, names;
  - Extending the naming standards beyond corporate names to all operating names and all operating structures; and
  - Not requiring a change in the name of the practice when ownership changes.

Issue Number 6
Closed Company (or Private Company) and Share Ownership

Issue Number 6 – CAIRP's Recommendations

- Since many jurisdictions no longer recognize the concept of a private or closed company, CAIRP recommends repeal of the requirement that a Corporate Trustee be a closed or private company. We believe investment in Corporate Trustees (either directly or indirectly) should be allowed, whether via private equity or through the public markets, subject to the following restrictions:
  - The entity whose securities are offered should be a parent company or other offering entity (such as a partnership) that owns 100% of the Corporate Trustee and the following rules should apply to the parent entity:
    - No shareholder, unit holder or other beneficial owner of the parent, other than a Trustee employed by, or active in, the business of the Corporate Trustee may own (directly or indirectly) more than a specified percentage of the issued and outstanding securities of the Corporate Trustee. (All securities convertible into common equity should be taken into account when determining whether an investment is within the ownership limit.)
    - At least one of the parent company's directors must be a Trustee employed by, and active in, the Corporate Trustee.
    - Appropriate processes and procedures must be put in place in the parent company to identify potential conflicts of interest between the parent company's significant shareholders and the Corporate Trustee's activities.
    - Significant shareholders of the parent company holding ownership of the controlling shares that would permit significant influence to be exercised in

respect of the Corporate Trustee should be required to execute an attestation acknowledging the obligations of the Corporate Trustee outlined above.

- The following rules should apply to the Corporate Trustee:
    - Its articles of incorporation should specifically restrict its activities to those of a Trustee or those functions normally carried out by a Trustee.
    - The majority of its officers and a majority of its directors must be Trustees.
    - Trustees who are officers and directors must be employed by, and active in, its affairs.
    - Appropriate processes and procedures must be in place in the Corporate Trustee to identify potential conflicts of interest between the holding company's significant shareholders and the Corporate Trustee's activities.

Issue Number 7
Licensing Fees

Issue Number 7 – CAIRP's Recommendations

- CAIRP recommends the OSB review the issue of annual fees paid by Trustees and institute a cost recovery system to reward compliant Trustees and penalize non-compliant Trustees. To achieve this, we believe a Trustee's annual licence fee should be paid based on the OSB's determination of which of four risk categories the Trustee falls into.

- The criteria the OSB uses to determine the risk rating levels should be disclosed on the OSB's web site, with the OSB retaining discretion to make findings that reflect the risk and to protect the functioning and reputation of the insolvency system. We recommend that, including the compliant category, there be four levels of compliance reflecting degrees of non-compliance and, therefore, risk to the system. The fees assessed at each of these levels should increase geometrically from the base fee paid by compliant Trustees and the amounts should be significant enough to encourage compliance and not be seen by Trustees as simply a cost of doing business.

- With regard to Corporate Trustees, we recommend the OSB assess risk for each Trustee within the corporation separately. If, however, the OSB determines that there is pervasive risk among the Trustees practicing within a Corporate Trustee and the Corporate Trustee is not proactively taking steps to reduce the risk, the OSB should retain the right to risk rate all

the trustees in the corporation at a higher rate than what they may have been rated individually.

- The category and rating assigned to each Trustee or Corporate Trustee should not be disclosed to the public, as doing so might create confusion and those paying the lowest annual fee might be seen as have earned a badge of approval, which is not the intent of such determinations.

- CAIRP recognizes that while the OSB currently maintains a Trustee Risk Assessment Model (TRAM), this model may not be suitable for purposes of risk categorization. CAIRP believes that for the OSB to be effective in implementing a risk model for purposes of assessing an appropriate annual fee the OSB will need to develop a substantive model that is based on identifiable and measurable metrics.

- CAIRP anticipates that the development of such a model would require a commitment of substantial resources and time. Therefore, and in the alternative, CAIRP would recommend the OSB adopt a direct cost recovery system whereby the OSB simply bills higher risk Trustees for the actual cost (based on a per diem rate and to a capped fee limit) of the additional supervision/audit the OSB incurs as a result of their behaviour. This alternative approach achieves the objectives of deterring unacceptable practice and of recovering costs of supervision of the higher risks Trustees.

Issue Number 8
Succession Agreements

Issue Number 8 – CAIRP's Recommendation

- CAIRP recommends that as a condition to practice all Trustees must have a valid succession agreement in place within two years of the coming into force of a provision requiring succession agreements.

- All Trustees should be required to provide the OSB with proof that they have a valid succession agreement, including a summary of its substantive terms.

- At the time of filing the Annual Banking Report or, alternatively, with the payment of the annual licensing fee, all Trustees should be required to file an attestation as to the validity of

the succession agreement with the OSB, including a requirement to detail any material changes that would affect the succession agreement.

- No Trustee, whether individual or corporate, should be exempt from the obligation to have a succession agreement.

- CAIRP has developed a template continuation agreement that could serve as the foundation for Trustee succession agreements. The template agreement contemplates a variety of circumstances, such as:
  - The death, disappearance, or long-term incapacitation of the Trustee, all of which would require the disposition or liquidation of the practice;
  - The short-term incapacitation of the Trustee, which would require the management and continuation of the practice for a period of up to six months; and
  - The voluntary absence of the Trustee from the practice on a temporary basis.

- CAIRP believes adoption of its continuation agreement as the foundation for a succession plan would serve the interests of the OSB and public stakeholders and would aid in implementation of the recommendations described here.

Issue Number 9
Annual Licensing Report

Issue Number 9 – CAIRP's Recommendations

- CAIRP generally supports requiring the filing of an Annual Report that includes a requirement for:
  - Self-identification of non-compliance, with restrictions, subject to the implementation of detailed protocols discussed in this submission; and
  - Inclusion of information pertaining to a Trustee's professional liability insurance, including employee fidelity bonding.

- For the reasons detailed within the report, including the very nature of work undertaken by Trustees, CAIRP does not agree with the self-reporting of complaints.

- We believe there are more effective and efficient means of protecting the interests of the stakeholders of individual estates and promoting the confidence of the public in the

bankruptcy and insolvency framework than by requiring Trustees to file annual financial statements and secure general and estate bonding. We believe there are alternatives involving legislative reform and third-party estate account audits that would promote confidence and mitigate risk of loss in the future. CAIRP would be pleased to assist the OSB in the development of either or both of these initiatives.

- Regarding the issue of whether Directive 21 should be amended to provide greater clarity on the amount of security for an estate bond, we believe the current drafting provides the OSB sufficient discretion to set the amount of an estate bond without need of amendment. Additionally, and as stated previously, CAIRP believes there are alternative ways of mitigating the risk within estate accounts without the need to post estate bonds.

DETAILED REPORT

Part I: Licensing Process

Issue Number 1

Harmonization of the Directive on Trustee Licensing (Directive No. 13R2) with the Memorandum of Understanding between the Superintendent of Bankruptcy and the Canadian Association of Insolvency and Restructuring Professionals (CAIRP)

ISSUE

1. The OSB is considering the following options (or combination of these) for amending restrictions on application to the oral examination:
   a. Eliminate the restriction on three attempts. According to this option, candidates could appear before the oral board as many times as they want until such time as they clearly indicate they no longer wish to be invited to appear before the board;
   b. Maintain a maximum number of attempts to appear before the oral board;
   c. Eliminate the time limit to obtain a Trustee licence. According to this option, candidates could try the oral examination for an unlimited time period (within the maximum number of attempts, if applicable) until such time as they clearly indicate they no longer wish to be invited to appear before the board; and/or
   d. Maintain a time limit to obtain a Trustee licence (for example, five years) commencing on the date the candidate successfully completes the National Insolvency Examination.
2 The OSB is considering specifying that the rule on four-member boards should be for guidance purposes only.

CAIRP supports harmonization of the Licensing Directive[3] (the Directive) with the MOU[4], including adopting the entrance requirements of the CQP[5], as outlined within the MOU, as a condition of a candidate being eligible for licensing as a Trustee. The changes to the Directive associated with such alignment would not substantively alter, or limit, access to those seeking licensing as a Trustee. The proposed changes would merely serve to recognize that successful completion of the CQP (formerly the National Insolvency Qualification Program (NIQP)) is a prerequisite to licensing (subject to limited exceptions) and would clarify the program entrance eligibility requirements regarding undergraduate degrees, professional designations, and/or relevant work experience.

CAIRP believes alignment of the prerequisites regarding licensing eligibility is necessary to achieve harmony between the education process leading to completion of the National Insolvency Examination (NIE)[6] and the ultimate licensing eligibility criteria, and would prevent deviations

[3] Directive 13R2.
[4] The MOU was signed on October 8, 2009 between the Superintendent of Bankruptcy and CAIRP.
[5] CIRP Qualification Program.
[6] National Insolvency Examination is a two day, six hour examination testing the knowledge and competency of candidates acquired and developed during the period of the NIQP.

that could result in candidates being over or under qualified for purposes of sitting the Board of Examination (the Oral Board) on completion of the CQP.

Below we address the different alternatives mentioned in the Consultation Paper related to this harmonization.

Abolishing Time and Testing Limits

The OSB has outlined four substantive options for consideration pertaining to the Oral Board licensing protocols: two related to the maximum number of attempts a candidate may make at the Oral Board and two related to the time within which a candidate must complete the Oral Board process.

Given that under the terms of the MOU, the CQP is recognized as the accredited qualification program for all candidates to the profession, we believe there is no need for a maximum number of attempts at the Oral Board because:

- The CQP (and formerly the NIQP) is an education program designed to ensure candidates have the requisite knowledge and skills to pass the Oral Board and to become professionals capable of ensuring the Canadian insolvency system functions properly and serves all stakeholders. Through the CQP, candidates obtain knowledge in the conceptual frameworks and structures related to bankruptcy and restructuring alternatives. This knowledge provides the necessary foundation in the governing legislation and related rules and Directives, jurisprudence, and other information portals practitioners may turn to for guidance or direction in particular circumstances. As well, CQP candidates learn how to apply this knowledge to create value for financially distressed enterprises and individuals through the various assignments and take up sessions with sponsors, as well as through application of the conceptual theories during their articling period with a practicing member. In addition to the foregoing, it should be noted that in the coming months CAIRP will be launching a revised CQP program featuring updated professional competency requirements. The revised program will include a clear delineation between knowledge acquisition and competency development based on recommendations that come out of a competency summit and member survey scheduled for the fall of 2010. The CQP revisions will be ready by September 2011.

- While CAIRP recognizes the purpose and objectives of the Oral Board, we have concerns for some candidates who, for example, by reason of their personal circumstances on a given date, stress tolerance, breadth of practical experience, and numerous other factors, may face challenges on any single or series of attempts at the Oral Board. Given that candidates who have successfully completed the NIE have demonstrated the aptitude, competence, and fortitude to practice in the complex bankruptcy and insolvency field, CAIRP believes that to impose an absolute limit on the number of attempts a candidate may take before the Oral Board is unnecessary and does not recognize the enhanced competence that can result from continued practice and experience.

- While Article 43 of the MOU expressly states that candidates are not subject to a time limit for completion of the CQP, the MOU does not address the number of times a candidate may take either the Intermediate Exam or NIE. The CQP Implementation Committee considered this matter and was of the opinion that there should not be limits on the number of attempts at the examinations. Further, the CQP Committee believes it is unfair to put an arbitrary time limit on candidates, given that some highly qualified candidates face challenges in terms of taking written examinations. In addition, given that the NIE is competency based, the passage of time and the gaining of experience and maturity that results from practicing in the complex field of insolvency and restructuring, may serve a candidate well, helping them succeed on the NIE and demonstrate professional competency.

- Following the successful completion of the NIE, even before candidates sit the Oral Board, candidates become a general member[7] of CAIRP and are subject to CAIRP's continuing education requirements, which require 20 hours per year of professional development time, seven hours of which must be acquired by attendance at accredited events. This requirement promotes the candidate's continued learning and should help ensure future success before the Oral Board.

As part of the development phase of the MOU, and in considering our response to this consultative process, CAIRP carefully considered the issue of time limitations and we believe

[7] It is not a requirement that candidates who have successfully completed the NIE remain members of CAIRP. However, CAIRP represents the vast majority of practicing Trustees and it is highly unusual for a candidate seeking licensing as a Trustee not to remain a member of CAIRP.

there should not be any time limits within which candidates must fulfill the education requirements because:

- Given that candidates absorb knowledge at varying speeds, CAIRP believes the amount of time it takes a candidate to acquire knowledge and competency is irrelevant, so long as the candidate remains actively engaged in the field of bankruptcy and insolvency and under the direction of a CIRP/Trustee in good standing with CAIRP and the OSB. CAIRP believes what is crucial is that the candidate has demonstrated the necessary knowledge and competency on emergence from the CQP, and thereafter the Oral Board.

- Personal circumstances, such as health or illness-related challenges, family responsibilities, work, and other professional and non-professional commitments, may slow a candidate's progression through the education process, including the Oral Board process. CAIRP's view is that a protracted period of study does not adversely impact the candidate's chances of a successful career; indeed, it may actually lead to greater success because of the candidate's maturity and increased mentorship period.

Though CAIRP does not believe there should be a time limit or limit on the number of times a candidate can take the Oral Board, we believe candidates who have been unsuccessful on the Oral Board three times should be provided with further support to help them pass the Oral Board in the future. The support could include a more thorough debriefing process following the Oral Board examination aimed at providing the candidate with insights into areas he or she may need to improve. Alternatively, or additionally, after the third failure the candidate could be required to gain additional practical experience in areas in which the candidate was assessed to be weak.

If the OSB abolishes the time limitations, however, CAIRP believes that additional restrictions should be imposed to address situations where candidates take an extended absence from practice in the bankruptcy and insolvency area. We recommend adoption of the provisions regarding extended absences set out in Article 43 of the MOU[8], amended as necessary.

[8] Article 43 of the October 2009 MOU states:
Limitation period: No time limitation will exist for candidates to complete the Program, however:

a) Candidates that remain inactive for three (3) or more successive education program years (commencing on the Program Commencement Date) will be required to reapply in accordance with the program rules as if they were new applicants;

Finally, CAIRP believes there are some candidates who, for a variety of reasons, are unlikely to ever pass the Oral Board. To be fair to those candidates and to discourage them from continued repeated attempts, CAIRP believes a disincentive should be built into the system. The disincentive could, for example, be an increase in the cost of sitting the Oral Board after the third attempt, a requirement that the candidate's sponsor attest to the candidate's readiness for another attempt, or a requirement that the candidate repeat a portion of the education program or seek supplemental education.

Four Member Boards

CAIRP is concerned that modification of the requirement that examination panels for the Oral Board have four members could adversely impact the value of the Oral Board process, which is largely derived from the interaction of the panel members in a setting that more-or-less mimics actual situations Trustees face in their day-to-day practices. In addition, CAIRP is concerned that altering the composition of the panels may compromise the objective of the Oral Board, which is dependent on a panel with examiners who have diverse areas of experience and focus. Specifically, CAIRP feels strongly that to ensure appropriate peer assessment, all examination boards must continue to include a licensed Trustee, as well as legal counsel (for purpose of legislative interpretation), and a representative of the OSB (as the regulatory body).

CAIRP recognizes the difficulties that exist in enticing people to serve on examination boards, which, we believe, is one of the reasons the OSB is considering modifying the requirement for four member boards. But, we believe there are measures that can be implemented that would make finding qualified panellist easier, for example:

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b) A candidate may request, for a valid reason, an annual deferral (on payment of the deferral fee) from the CQP Committee and the CQP Committee, in its sole discretion, may grant such request; and

c) Candidates that are inactive and fail to request a deferral or fail to pay the annual deferral fee shall be struck from the candidate list of the Program six months following the Program Commencement Date. In such instance, the individual will be required to reapply in accordance with the program rules as if they were new applicants. The CQP Committee may, in its sole discretion, grant relief from such application requirement if the candidate can demonstrate reasonable circumstances that prevented compliance with the program requirements. In such circumstances the deferral fee is immediately due and payable.

- Expand the existing program where candidates travel to a populated area within the candidate's regional area of practice – this would be beneficial because, generally speaking, the pool of volunteers in larger cities is bigger.

- Altering the examination boards' time commitments, for example, limiting the number of examinations per day to two candidates – this would require board panellists to only be away from their practice for a half day at a time. While it may lengthen the overall period of the process, it would be less imposing on panellists sitting on the Oral Board;

- Allow for the concurrent running of Oral Boards, provided that the same documents are given to each Oral Board to ensure that the nature of the questions and topics covered by each Oral Board are essentially the same[9].

- Creating an incentive for eligible panellists to participate on examination boards – this could include financial or non-financial reward, example, a donation to a charity of the panellist's choice.

As noted above, it is CAIRP's view that options exist to address the OSB's concerns related to the composition of the Oral Board without compromising the objectives of the process. CAIRP would support amendments to the panel composition that establish a minimum number of panellists on the Oral Board at three, so long as every panel is required to include a licensed Trustee, legal counsel, and a representative of the OSB. (To this end, CAIRP is prepared to assist the OSB in soliciting member volunteers to sit on examination boards.)

Regardless of the OSB's decisions regarding structural modifications to the Oral Board process, CAIRP urges the OSB to consider our suggestions regarding ways of limiting the adverse impact on panellists' practices associated with time commitments required to serve on such panels.

[9] The very premise of the Oral Board is that the discussion that ensues may be led by a candidate's comment, with the result that the exploration of an issue and testing of content and competency may flow from that.

Exemptions of the MOU

The OSB is considering including in the Directive provisions outlined in the MOU that constitute limited exemptions from normal licensing provisions. The limited exemptions outlined in the MOU are:

- In accordance with pre-established guidelines, the CQP Committee could exercise discretion in admitting applicants who do not meet the normal entrance requirements.

- On the recommendation of the CQP Committee, an applicant who possesses relevant experience and knowledge may be exempted from the entire program and be allowed one attempt at the NIE. And,

- In extraordinary circumstances (determined at the sole discretion of the Superintendent) an individual who has not completed the CQP may be granted an opportunity to attempt the Oral Board.

CAIRP understood at the time of entering into the MOU that future amendment to the Directive by the OSB would include reference to the OSB's ability to exercise its discretion in extraordinary circumstances to permit a candidate to attempt the Oral Board without first having completed the CQP. It is our understanding, however, that such discretion will be exercised infrequently and only in extraordinary circumstances, given that the CQP is considered fundamental to preserving the integrity of, and the public confidence in, Canada's bankruptcy and insolvency system.

Based on the foregoing, CAIRP does not take issue with the Directive being modified to allow the OSB to exercise discretion to permit a candidate who has not completed the CQP to attempt the Oral Board, but that the OSB should only do so in extraordinary circumstances. CAIRP does not believe it is necessary to consider inclusion of the additional exemptions, outlined above, within the context of the Directive.

Summary of Recommendations

CAIRP recommends that:

- The OSB proceed with the harmonization of the Directive with the MOU so that the Directive clearly provides that successful completion of the CQP (formerly the NIQP) is a prerequisite of licensing, subject to limited exemptions, and to clarify the rules regarding undergraduate degrees, professional designations, and/or relevant work experience requirements with completion of specific courses as prerequisites to admission into the CQP.

- The OSB should do away with the rule limiting the number of times a candidate may sit for the Oral Board, and should eliminate the time limits within which the Oral Board process must be completed, subject to enactment of support protocols for candidates and disincentives, as required, that would come into play after a candidate's third unsuccessful attempt.

- The OSB should exercise caution if it decides to modify the requirement that the Oral Board must be comprised of four members, as changes could compromise the objectives of the Oral Board process. Rather than seeing the OSB change the requirement that there be four examiners, CAIRP encourages the OSB to consider the various alternatives and incentives, outlined above, to encourage more practitioners to serve as Oral Board panellists.

- If the Directive is modified to explicitly allow the OSB discretion to allow a candidate to attempt the Oral Board without first having completed the CQP, the Directive should make it clear that the exercise of such discretion is reserved for extraordinary instances.

Issue Number 2
Dual Licensing, Specialized Licences and Administrators of Consumer Proposals

ISSUE

The OSB is considering the following options:

1. Implement a dual licence system whereby an applicant could choose to apply for a commercial licence, a consumer licence or both. To do so, the OSB would have to consider:
   - Parameters and limitations (services to be provided) of each licence.
   - Main features for the ideal Trustee training program for holders of these licences (entrance requirements, program of study, and, if possible, length of time to complete the training program.
   - Assessment tools (written exam, oral exam, work experience).
   - Requirements for disclosure to members of the general public as to areas of practice.
2. Recognize specialization once the Trustee is already licensed. Under this option, the Superintendent would still issue a "Trustee licence". However, by amending the Directive on Advertising by Trustees (Directive No. 29), the Superintendent would recognize areas of practice that would be considered as a specialty. To do so, the OSB would have to consider:
   - Areas the specialist Trustee could practice under.
   - Parameters and limitations (services to be provided) of each specialization.
   - Basic training and assessment tools to obtain a Trustee licence along with the training and assessment tools that the Trustee should receive to be recognized as a "specialist";
   - Rules (for example, in terms of continuing education) for specialist Trustees to maintain their "specialist" status; and
   - Other possible rule changes regarding advertising and ethics.
3. Continue the current system of granting licences with limitations.
4. Appoint or designate persons as administrators of consumer proposals subject to having a training program in place that would ensure that only the highest quality candidates are appointed.

DUAL LICENSING

The OSB is considering implementing a dual licensing system under which a candidate seeking a Trustee's licence could choose to apply for a "commercial licence", a "consumer licence", or both.

Background

Canada's insolvency system was largely modelled on the United Kingdom system, with two important differences. The U.K. has two laws governing insolvency: the Bankruptcy Act, which applies to individuals and partnership, and the Winding Up Act, which applies to corporations. In Canada all insolvency matters are governed by the BIA, although ancillary insolvency legislation related to corporate reorganizations and winding up are also part of the insolvency legislative

regime. The second key difference between the Canadian and British approaches involves who administers insolvency matters. Professor Jacob Ziegel explains the difference:[10]

> "Under the Canadian legislation, the trustee serves as IP[11] for all bankrupts, companies as well as individuals and whether or not the individuals are engaged in trade. The British legislation on the other hand, continues to distinguish between the administration of unincorporated estates and the administration of incorporated estates and uses trustees for the first type and liquidators for the second."

Amendments to Canadian bankruptcy legislation, since the enactment of the first Bankruptcy Act of 1919, have continued to respect the same basic principle regarding the critical role of Trustees in the administration of all insolvency estates.

The debate over dual licensing has a long history dating back to the mid-eighties, coming to a head with the 1992 amendments to the BIA that introduced consumer proposals and mandatory counselling for individuals. The focus of the discussion at the time was whether the training requirements for a Trustee candidate should differ depending on the nature of insolvency services they intend to provide: consumer versus corporate.

In 1994, the CIPA (as CAIRP was then known) formed a committee to study the dual licensing issue. The committee ultimately recommended against dual licensing, pending further study. According to the CIPA committee:

> " … dual licensing should not be introduced by the Superintendent at this time and should be deferred by the CIPA for further assessment for at least 18 months to two years hence. In the interim, the CIPA, in cooperation with the Superintendent of Bankruptcy, should develop the statistical and demographic analyses which will form a key component in future assessments."[12]

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[10] "The Personal Liabilities of Insolvency Practitioners under Insolvency Legislation: A Comparative Analysis of the Canadian, English and American Positions." This study can be found under the "For Academics" section at www.osb-bsf.ic.gc.ca.
[11] Insolvency Practitioners.
[12] Report of the Subcommittee of Canadian Insolvency Practitioners Association (CIPA) on Dual Licensing – June 199, Annex E of the Consultation Paper.

Though CAIRP has no data to suggest that a further assessment of this issue was advanced, we believe that circumstances make this issue moot because Trustees tend to develop professional practices consistent with their experience, skill and interest. In addition, the OSB already has power to restrict a Trustee's licence to a particular practice area if it thinks the person's experience and knowledge necessity imposition of a restriction. The statistics provided by the OSB[13] indicate that of the 1,017 individual Trustees as at January 19, 2010, 90 (8.85%) had restrictions placed on their licenses, whereas 927 (91.15%) had unrestricted licenses; CAIRP has no data to evaluate the nature of the restrictions with respect to the 90 restricted licenses, but suspect the majority are practice restrictions to either consumer or corporate matters.

Current situation

The current Canadian insolvency system contemplates the issuance of one trustee licence to those individuals that qualify, with limited exceptions, following the completion of a two step process:

1. Successful completion of the rigorous education program, the CQP; and
2. Successful completion if the Oral Board.

Only following the successful completion of these two steps and recommendation of the Oral Board to issue the license to the candidate, either with or without restrictions, does the Superintendent of Bankruptcy consider the appropriateness of issuing a licence to a particular candidate.

1. *Education Program*

A person that meets the entrance requirements, as detailed within the MOU, and who wants to pursue licensing as a Trustee must enrol in a post-graduate program administered by CAIRP that consists of self-study courses with exams, the writing of a competency-based NIE, mentoring by a sponsor, and an articling period:

- Courses with exams – The exams are designed to assess the knowledge of a candidate as he or she progresses through the program. The course materials are progressive, such that candidates continue to build on the base of knowledge accumulated with the passage of time and experience. In addition, the course exams are designed to assess, at a point in time, the candidate's knowledge as against the expectation set out in the syllabus.

[13]Page 2, Annex D of the Consultation Paper.

- NIE – the NIE represents the culmination of the education program, with the successful completion of the NIE entitling a candidate to apply for general membership with CAIRP and to use the CIRP certification mark. In addition, successful completion entitles the candidate to be invited to sit before the Oral Board (assuming other prerequisites have been achieved). The NIE is conducted over a two day period. It is designed to assess a candidate's competence to practice as a professional insolvency practitioner, including assessment of whether the candidate has sufficient skills, knowledge, experience, intuition, judgment, and ethical practices to assume their role.

- Sponsor – candidates enrolled in the program require an individual (a Sponsor) to direct their studies, mark their assignments, act as mentors, and, ultimately, attest to their readiness to be examined. A sponsor must be a CIRP and must be in good standing with CAIRP and the OSB. And,

- Articling – a candidate must have a minimum of 2,400 hours of relevant insolvency experience prior to being entitled to sit the NIE. During their articling a candidate must work in an estate administration role within a trustee in bankruptcy office or as an official receiver while progressing through the program and writing the NIE.

2. *Oral Board Examination*

The Oral Board process is organized and administered by the Superintendent of Bankruptcy. The Oral Board examination is designed to evaluate a candidate's skills, capacity to analyze specified fact situations, and confidence in providing sound financial advice. More specifically, the Oral Board assesses whether the candidate has:

- A high standard of business ethics and professionalism;
- The ability to administer professional engagements;
- The ability to apply relevant insolvency legislation and jurisprudence; and
- Appropriate experience and good judgment in business and/or consumer matters.

Following the candidate's appearance, the Oral Board panel makes a recommendation to the Superintendent regarding whether the candidate should be granted a licence, and the nature of the licence to be granted. Based on the Oral Board's recommendation, the experience report provided

by the candidate, and other information, the Superintendant decides whether to grant a licence and whether to apply any restrictions to the licence.

If a candidate is considered to have practice abilities in a particular practice area (corporate or consumer) but is considered deficient (in terms of ability or experience) in the other area, the Superintendent may impose restrictions on the candidates licence, as follows:

- A licence limited to corporate bankruptcies and proposals; or
- A licence limited to consumer bankruptcies and proposals."[14]

As noted above, according to the statistics provided by the OSB, fewer than 9% of all Trustees have restricted licences.

International Treatment

United Kingdom

Considering the impact of introducing a dual licensing system, CAIRP examined other jurisdictions to understand and compare their insolvency legislation with respect to the dual licensing.

Currently there is no dual licensing in the United Kingdom[15]. In the United Kingdom, depending on the region in which they practice, insolvency practitioners must be licensed by a recognized professional body or by a government body.[16] Candidates wishing to obtain a licence to practice insolvency must meet the practical experience requirements of his or her sponsoring body and successfully complete the Joint Insolvency Examination Board (JIEB) examination. The JIEB covers the following areas:

- Liquidations;
- Administrations, company voluntary arrangements and receiverships; and

[14] Annex D of the Consultation Paper.
[15] Commencing in November 2010, insolvency practitioner candidates in the United Kingdom will be permitted to sit the personal insolvency examination without requirement to sit the other insolvency examinations, thereafter successful candidates will be able to apply for the Individual Voluntary Arrangement only licenses. We understand the issue as to whether a licence will be granted remains subject to active debate.
[16] In the United Kingdom, Insolvency Practitioners are subject to the authority of authorising bodies based on the jurisdiction in which they practice. There exist eight authorising bodies in the UK, for a descriptive of each visit: www.insolvency-service.co.uk/bodies.htm

- Personal insolvency.

Candidates who satisfy the practical experience required by their sponsoring body and who successfully completed the JIEB are granted a licence to practice as an Insolvency Practitioner (IP). There is only one type of IP within each jurisdiction of the United Kingdom. IPs in the United Kingdom are subject to a Code of Professional Conduct that varies according to the professional body to whom the IP reports. Like Trustees in Canada, IPs are designated as Officers of the Court.

Within the United Kingdom, IPs whose practice is more focused on personal insolvency are expected to maintain their knowledge regarding non-statutory debt solutions at the level they originally needed to pass the JIEB examination.

In the United Kingdom only IPs can provide insolvency-related services to debtors, whether corporate or consumer, though there are a variety of individuals providing debt relief and debt management services to debtors. These individuals are subject to oversight by the Office of Fair Trading and are subject to the Consumer Credit Act.

United States

In the United States, the United States Trustee's Office has general oversight of the bankruptcy system in all jurisdictions, except Alabama and North Carolina.

In the U.S. there are four groups of professionals who administer the different types of proceedings (referred to as "Chapters" because they are chapters of the U.S. Bankruptcy Code (Title 11 of the U.S. Code)). It should be noted that only licensed attorneys can represent debtors (whether a corporate or consumer) in the U.S. Bankruptcy Court (a federal court) and assist a debtor in making legal decisions related to their bankruptcy, including under which Chapter of the US Bankruptcy Code to file and completion of their bankruptcy schedule.

The Chapter under which a matter is filed determines who administers the insolvency estate. The insolvency estates and their respective professionals are:

- Chapter 7 proceedings – these are liquidations in which the trustee is selected by the debtor from a panel of approved trustees for the administration of Chapter 7 cases. Though the approved trustees need not be attorneys, the vast majority of them are.

- Chapter 13 proceedings – these are individual reorganizations (three to five year plans) under which the debtor makes payments to the Chapter 13 trustee who distributes the amounts to creditors in accordance with the terms of the plan. Again, while the Chapter 13 administrator need not be an attorney, the vast majority of them are.

- Chapter 11 proceedings – these are debtor-in-possession corporate reorganizations and certain individual reorganizations (where an individual's debts exceed the amount permitted in a Chapter 13 filing). The insolvency practitioners for an individual filing under Chapter 11 attorneys representing the interests of the debtor, creditors committee, and other stakeholders. In addition, for corporate reorganizations (which are the vast majority of proceedings brought under Chapter 11 of the US Bankruptcy Code) insolvency practitioners, who are certified as Certified Turnaround Professional (CTP) and who may also be licensed under another profession, for example, Certified Professional Accountants (CPAs), are typically engaged to assist in all financial aspects of the restructuring.

The US bankruptcy system also has a fourth insolvency practitioner: bankruptcy petition preparers. These practitioners assist debtors in filling out their bankruptcy schedules. They are not permitted to give legal advice or represent the debtor in the Bankruptcy Court, as only attorneys are recognized as Officers of the Court. Bankruptcy petition preparers must disclose their involvement and are regulated by the United States Trustee's Office.

The key distinction between the U.S. bankruptcy system and Canadian bankruptcy system is that the lead professionals in the U.S. are lawyers, whereas they tend to be accountants in Canada. As a result, the U.S. system features a more adversarial path to resolution than the Canadian system, which is based more on the principle of negotiated resolution. As well, with oversight limited to the United States Trustee's Office, the U.S. process is largely unregulated as compared to the Canadian.

While Canada and the US have common bonds with regard to trade and other international practices, the foundation of the bankruptcy system is fundamentally different so comparing licensing regimes is difficult.

CAIRP's Position

CAIRP submits that the current system of one licence for all trustees should be maintained for the following reasons:

- All Trustees, whether practicing in the area of consumer or corporate estates, must maintain a necessary level of understanding regarding both practice areas, even if they are not actively engaged in one area on a daily basis. Situations often arise within any given engagement, whether ostensibly a commercial or consumer engagement, that require the full spectrum of knowledge. Examples of such situations include:

    - Fielding inquiries from employees, suppliers, or other individuals in commercial estates, who are concerned with their own personal position as a result of the insolvency of the employer or customer;
    - Where an insolvent individuals is self-employed the Trustee could have to apply knowledge related to the commercial aspects of the BIA; and
    - Responding to an individual who may have sought the protection of the BIA as a result of a loss of employment stemming from a corporate reorganization and who inquires about their rights under the Wage Earner Protection Program Act (WPPA) or the Companies' Creditor Arrangement Act (CCAA).

    Such examples demonstrate that while a Trustee may limit his or her area of practice, they must never-the-less maintain proficiency in both corporate and consumer matters, at least to the point of being able to identify issues and, where necessary, refer the party to a professional that can meet their needs. CAIRP's continuing education program is specifically designed to ensure that practitioners that have targeted a practice area are able to maintain their knowledge with respect to the area in which they do not engage on a daily basis.

- The division between consumer and commercial insolvencies would be arbitrary. The BIA is based on the principle that all provisions of the legislation apply to all insolvency

estates in the same or similar manner.[17] There are limited exceptions to this principle, for example, summary bankruptcy administrations[18] and administrators of consumer proposals[19] include specific provisions that apply solely to these proceedings. Other than these limited exceptions, the principles and application of the legislation is consistent without regard to the nature of the proceeding, so a division between consumer and corporate administrations is not readily apparent.

- Establishing a definitive separation between consumer and corporate proceedings is impracticable. For example, consumers may file proceedings traditionally reserved for corporate estates (such as Division I Proposals). And, there are many individuals who, as a result of the nature or amount of their debt, are ineligible to file summary bankruptcy administrations or consumer proposals and so must file proceedings under those administrations normally reserved for commercial proceedings.

- The cost of administrations could significantly escalate should a division of licensing come into effect. There are many small business owners that are required to seek recourse under the BIA through the commencement of a commercial insolvency proceeding. In many of these instances, the same business owner, having invested all his or her personal finances in an attempt to save the business and/or personally guaranteed the indebtedness of the business, must also seek recourse under the BIA through the commencement of a consumer insolvency proceeding. In such circumstances, economic efficiencies and administrative cost savings can result from having the same Trustee administer both proceedings. These efficiencies and cost savings result in increased returns to the creditors, which is one of the founding principles of the BIA.

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[17] Section 157 of the BIA states: *"Except as provided in section 155, all the provisions of this Act, in so far as they are applicable, apply with such modifications as the circumstances require to summary administration".*

[18] It is important to remember that the provisions for summary administration (section 155 of the BIA) were introduced in 1966 following stakeholder submissions and were meant to provide a less complicated insolvency process for consumers with a smaller amount of debt and basically no assets.

[19] Sections 66.11 to 66, Division II of Part III, were enacted in 1992 to afford insolvent consumer debtors an alternative to bankruptcy by introducing a separate regime for consumer proposals. Separate provisions were thought necessary because the proposal regime under Division I of Part III were drafted with the needs of commercial debtors in mind and they do not provide an acceptable process for a consumer debtor with relatively few debts.

- Limiting the scope of professional services that may be provided could adversely impact access by a debtor seeking professional help to address a financial stress. Limiting Trustee's to practice as either corporate or consumer Trustees could result in deficient capacity to service the market, particularly in periods of economic downturn. Appointing Trustees to a single area would essentially define capacity in the marketplace. This fixed capacity will rarely be at equilibrium with the requirements of the market so there could be too many or too few practitioners to service a particular segment of the market. As well, though there may be some Trustees that will secured the right to practice in both consumer and corporate matters under a dual licensing regime, as a practical matter, it can be expected that the pool of Trustees who practice in both areas will diminish over time as practitioners opt to specialize exclusively in one area or the other.

- Currently there is a common frame of reference and skills that are portable and that allow a trustee proficient in one practice area to quickly become proficient in the other practice area. A qualification program that provides candidates with knowledge and experience sufficient for them to work on both types of files ensures practitioners have portable skills, which means they have greater flexibility to direct their career based on their personal choices.

- The public recognizes Trustees as the professionals that have expertise in the area of bankruptcy and insolvency. The public does not distinguish between a consumer Trustee and a corporate Trustee. Implementing a dual licensing system would mean an individual seeking insolvency advice would have to figure out who to turn to for help. This could create confusion among the general public.

- The implementation of dual licensing could create a perceived value division between corporate and consumer licences by candidates seeking a licence. Such perceptions could result in future candidates seeking a license they perceive as being more valuable. This could lead to unacceptable capacity imbalances, which could have an adverse impact on the public and the insolvency regime.

Addressing the Concerns of the OSB

CAIRP understands that one of the principle rationales for the consideration of dual licensing is a concern related to Trustees shifting from a corporate practice to a consumer practice (or vice

versa) depending on the demands of the market and economic circumstances without the Trustees having an adequate base knowledge and experience to assume the alternative role. CAIRP believes that adequate safeguards exist to mitigate risk and to ensure Trustees exercise professionalism and good judgement in such circumstances. These safeguards include:

- CAIRP's continuing education program provides current and topical education for both consumer and corporate practitioners, including a requirement for mandatory professional development (minimum 20 hours annually, with at least 7 hours by personal attendance at an accredited program).

- CAIRP rules of professional conduct and standards of professional practice that define and articulate the requirements of a professional in practice.

- The Professional Conduct Committee of CAIRP, which investigates and sanctions members for wrong doing, including sanctions that would have an adverse impact on the professional (including, in the most egregious circumstances, expulsion from the Association). While not all Trustees are members of CAIRP, the vast majority of practicing Trustees are members. (Indeed, of the 5% of Trustees who are not CAIRP members, a high percentage of those are no longer members because they failed to satisfy CAIRP's membership criteria.).

- All practitioners recognize the ability of the OSB to exercise its practice review rights. Trustees, as professionals, understand that adverse relations with the OSB will adversely impact their ability to practice as they choose. They also know that engaging in practices that do not meet the OSB's expectations will give rise to heightened scrutiny and could impede their ability to run their day-to-day practice.

- Trustees understand that the privilege of holding a licence and being recognized as a professional requires a high degree of trust and expertise in the delivery of a service to a consumer or corporate entity. Trustees recognize that their actions are continuously scrutinized, whether by the OSB, Human Resource and Social Development Canada, Canada Revenue Agency, debtors, creditors, Boards of Directors, employees and numerous other stakeholders in a proceeding, and they recognize that should their actions not meet the standard expected of a professional servicing a particular market, a cause of action may result, potentially leading to litigation. Trustees, like all individuals, seek to avoid actions that could give rise to such adverse circumstances.

- Trustees recognize the value and importance of maintaining a good reputation. They understand that inferior services or services that conflict in any manner with regulatory requirements will have an adverse effect on their reputation, which could ultimately affect their standard of living.

SPECIALIZATION

The OSB is considering the recognition of a specialization once a trustee is already licensed. If this option is adopted, the Directive on Advertising by Trustees (Directive No. 29) would have to be amended to reflect areas of practice the OSB would recognize as a specialty.

International Treatment

United Kingdom

Earlier we noted the similarities between the U.K.'s licensing of Insolvency Practitioners (IPs) and Canada's licensing of Trustees, including the fact that IPs are recognized as Officers of the Court, just as are Trustees in Canada. Another similarity between the U.K. and Canada is that the United Kingdome has not instituted specialization designations associated with IPs. Instead, both countries currently allow practitioners to practice without restriction.

United States

As well, in the U.S. no regulated specialization exists with respect to trustees. In the U.S., the type of work the professional undertakes (including under which Chapter of the U.S. Bankruptcy Code he or she works in) determines the expertise the practitioner develops.

CAIRP's Position

While CAIRP recognizes that the majority of Trustees tend to develop some expertise in one area, CAIRP is not in favour of regulated specialization for many of the same reasons we are not in favour of dual licensing. It is our view that market focus and self identification serve to designate a professional in certain areas. In addition to our arguments for maintaining the current system of

granting licensing (with restrictions where necessary), in respect of specialization CAIRP offers the following additional rationale:

- Though some associations and professional orders allow for specialization, others prohibit members from using a "specialist" designation or describing themselves as a specialist. In Quebec, the code of ethics of the Ordre des Comptables Agréés du Québec (OCAQ) generally prohibits professionals from describing themselves as a specialist. (The OCAQ does allow specializations, but only after consultation with the Office des Professions du Québec.) Therefore, if the OSB were to a allow Trustees to specialize, since such specialties would not be allowed in Quebec, inequality could be created.

- CAIRP has a vested interest in educating its members. CAIRP's current role in (i) the education of candidates for CIRP certification and licensing as a Trustee through the CQP and (ii) the education of CIRPs and Trustees through our continuing education program. We are contemplating developing a post-NIE and post-Oral Board education specialized practice program. In addition, CAIRP is consulting with member firms as to their interest in the development of a specialist course that would allow those that have achieved their CIRP and/or licence as a Trustee to further pursue continuing education in their chosen area of practice. The intent behind such education is not to prescribe an area of specialization for the individual; instead it is to permit a practitioner an opportunity to explore in greater depth the theory and practice in a specific area they feel may not have been adequately addressed in the CQP.

- While the Canadian Institute of Chartered Accountants and provincial CA institutes (other than Quebec) have formally recognized specializations in certain subject areas, including recognition of the CIRP for CAs who wish to be recognized as specializing in insolvency and restructuring (along with recognition of the Chartered Business Valuator and Investigative and Forensic Accounting designations), doing so makes sense as a means of carving out a specific expertise from the wide realm of work a CA might otherwise carry out. Given the nature of work Trustees do, it is not appropriate to further narrow their expertise to either corporate or consumer work. Furthermore, as articulated above, the framework, principles and skills are the same for both types of work, so there is no need to designate specialties.

ISSUE
The OSB is considering the following options:

4. Appoint or designate persons as administrators of consumer proposals subject to having a training program in place that would ensure that only the highest quality candidates are appointed.

ADMINISTRATORS OF CONSUMER PROPOSALS

CAIRP is opposed to the appointment or designation of others as administrators of consumer proposals unless such individuals meet the exacting standards expected of a professional service provider in fulfilling the obligations of the appointed role. The standards adopted by the OSB in regard to administrators must be the highest standard – in other words, the standards already required of Trustees. A Trustee has completed an education program that requires the absorption of significant knowledge and has demonstrated the competence and experience needed to expertly advise and guide a consumer debtor in financial distress.

In its deliberation of this issue, the OSB must consider the ability of an alternative service provider to provide sound, strategic, and objective advice to a consumer debtor, including consideration of the alternatives to a consumer proposal available to a consumer debtor. This is necessary to ensure the consumer debtor can make an informed decision – a decision that will affect the individual for many years to come.

CAIRP believes that as Officers of the Court, Trustees have unique standing within the bankruptcy and insolvency framework. This standing reinforces their impartially in advising debtors and creditors. Furthermore, whether in the role of a Trustee of a bankrupt estate or as an administrator of a consumer proposal, Trustees recognize that neither the debtor nor the creditors are their clients and their duty is to balance the interests of the parties.

CAIRP hopes that before deviating from a standard that has garnered the public's trust and confidence in the professionals who have always delivered the highest quality services, the OSB will thoroughly consider the standard to be applied and consider whether there is a valid rationale for deviation from the current standard. CAIRP respectfully submits in our view the risk of inherent in altering the standard far exceeds any future benefit to be derived. Our view is based on a widely held consensus that insolvency practitioners should be well educated, licensed, subject to

a code of conduct (ethics), and standards of practice that are enforced by a governing body and a professional association.[20]

History

Consumer proposals and/or debt arrangements are a concept that did not exist in the Canadian Insolvency system until 1966. Generally speaking, early bankruptcy acts[21] in Canada contained provisions only for consumer bankruptcies.

In 1966 Parliament adopted amendments to the Bankruptcy Act then in existence and specifically incorporated into it Part X: *Orderly Payment of Debts*. All provinces, with the exception of New Brunswick, Newfoundland, Quebec, and Ontario, opted to administer consolidation orders, which required payment in full of a debtor's total debt obligations under Part X of the Bankruptcy Act.[22]

Even with the adoption of Part X of the Bankruptcy Act, a consumer debtor unable to repay his or her debt obligations in full, who wanted to avoid bankruptcy, was required to resort to the generally cumbersome proposal provisions of the Act. These provisions were drafted with the needs of a commercial debtor in mind, and they lack an acceptable process for a settlement of debts at less than face value by a consumer debtor with relatively few creditors.

The need for an alternative to bankruptcy for consumer debtors was recognized as early as 1970 in the Tassé Report.[23] The report concluded that consumer debtors, like their corporate counterpart, needed to be offered an alternative to reorganize their financial affairs without filing an assignment in bankruptcy.[24] However, none of the recommendations of the Tassé Report were

[20] Allen, Jay and Cooper, Neil, "EBRD (European Bank of Reconstruction and Development) Insolvency Office holder Principles", (June 2007) at page 13. The authors described the qualification of an office holder (Trustee) necessary to achieve a system that is fair and acceptable for all stakeholders.
[21] The first Bankruptcy Act was enacted in 1869 and was repealed in 1880 by the enactment of the insolvency Repeal Act S.C. 1880, c.1. From 1880 to 1919, there was no federal bankruptcy or insolvency legislation. In 1919 a national Bankruptcy Act was enacted and in 1932 the Bankruptcy Act that served as the basis of our current Bankruptcy Act was enacted.
[22] At the time of preparing this submission the provinces of Alberta, Nova Scotia, and Saskatchewan continue to offer this service. The province of Québec continues to offer La Loi Lacombe, which is now known as Les Dépôts Volontaires (Voluntary Deposit), which basically contains the same concepts as Part X of the BIA.
[23] Report of the study committee on Bankruptcy and Insolvency legislation Canada 1970.
[24]Section 3.1.05 and following of the Tassé Report.

acted upon due to Parliament's failure to enact amendments to the Bankruptcy and Insolvency Act.[25]

In 1984 a special Advisory Committee was convened to examine the bankruptcy system and recommend amendments to modernize it. The report, which became known as the Colter Report, was presented to the OSB on January 3, 1986. The Colter Report recommended that special provisions apply to proposals by consumer debtors[26], and recommended processes that should apply to proposals filed by consumer debtors.[27] The Colter Report recommendations became the basis for the 1992 amendments to the BIA.[28]

The number of consumer proposals filed has consistently increased since inception in 1992. The introduction of a consumer proposal regime to the BIA and its continued success has been driven by one factor: the Canadian government's policy to offer consumer debtors a viable alternative to bankruptcy when their financial situation is such that they no longer can afford the payment of their debts as they generally become due. Commitment to this policy has continued with recent amendments to the BIA and, more particularly, with the amendments to the Surplus Income Directive related to the definition of assets and the definition of income, as well as to changes to the automatic discharge provisions.

Given a general requirement that a consumer proposal yields a recovery to creditors that is greater than that available in a bankruptcy, while debtors are able to retain some of their key assets (such as their principal residence and automobile), consumer proposals have become a more economically sound process than bankruptcy for both consumer debtors and other stakeholders.

The Current Situation

A consumer proposal is a formal plan filed by a consumer debtor who owes $250,000 or less (excluding the mortgage on his or her principal residence) put forth to the individual's creditors in

[25] On March 21, 1978 the redrafted Bankruptcy and Insolvency legislation was introduced in the Senate as Bill S-11; it was referred to the Committee on Banking, Trade, and Commerce but it died on the Order Paper. In March 1979 Bill S-14 was introduced in the Senate but it too died on the Order Paper. The same bill was reintroduced as Bill S-9, which later died when a federal election was called. On April 16, 1980 the redrafted Bankruptcy and Insolvency legislation was introduced as Bill C-12. It went for second reading but died on the Order Paper.
[26] Colter Report, page 9, paragraph 58.
[27] Colter Report, page 9, paragraph 59.
[28] Bill C-22 came into force on August 1, 1992 and November 30, 1992.

an effort to settle his or her debts. An individual wishing to make a consumer proposal must obtain the help of an "administrator", who helps the debtor prepare the proposal.[29] The creditors review the terms of the proposal and vote on its acceptability, with the majority (determined based on value) of voting creditors determining the outcome.

In most cases, a consumer proposal allows a debtor to settle his or her debts at a percentage of the actual amount owed. Once a consumer proposal is filed, and during the proposal process, the consumer debtor's creditors cannot take, or continue, legal proceedings[30] to recover debt that existed as at the date of the filing of the proposal.

Section 66.11 of the BIA defines an administrator of a consumer proposal as:

(a) a Trustee, or
(b) a person appointed or designated by the Superintendent to administer consumer proposals.

Currently, the only administrators of consumer proposals, other than Trustees, that have been named by the Superintendent are employees of the Provinces of Alberta, Nova Scotia and Saskatchewan, all provinces that continue to administrate Part X of the BIA: Orderly Payment of Debts Plans.

In February 2008 the Ontario Association of Credit Counselling Services (OACCS) made representations to the Standing Senate Committee on Banking, Trade, and Commerce to recommend that OACCS and its member agencies be designated as administrators of consumer proposals. According to its June 2010 Licensing Review, the OSB is considering this and has requested comments and recommendations from all stakeholders on this issue.

As mentioned above, CAIRP is opposed to the appointment or designation of persons other than Trustees as administrators of consumer proposals, unless the standard applied to persons so appointed are consistent with, or exceed, the standards applied to Trustees.

[29] BIA para. 66.13(1)(a).
[30] BIA para 69.2.

It is CAIRP's position that the requirement that high quality standards apply is essential to ensure the provision of sound professional financial advice, which is necessary to promote the betterment of the financial stricken consumer debtor. CAIRP, and all Trustees, recognize that the exercise of professional skill and judgement is required in balancing the competing interests of the consumer debtor with his or her creditors. Development of standards that promote the delivery of sound professional financial advice and judgement requires consideration of many factors, including:

- A quality education program that promotes an understanding of the options available to a consumer debtor, including the rights of the creditors with their competing economic interests – in this regard, we respectfully submit that the CQP is recognized as the education program that prepares people to get CIRP certification, which can lead to licensing as a Trustee.

- A belief in the need to have standards of professional practice and controls in place to ensure compliance with the BIA, the Code of Ethics, Directives and Circulars, and all applicable Provincial legislations.

- Recognition of the strict standards applied to Trustees in safeguarding trust funds, including stringent banking controls.

- Recognition of advisors before the Court – Trustees are recognized as Officers of the Court and therefore they have standing before the Court. This standing demonstrates recognition of a high degree of integrity and trust.

- A belief in mandatory professional continuing development – CAIRP members are subject to significant mandatory professional development requirements that promote continued professionalism.

- A belief in having the best qualified professional deliver quality serviced to consumer debtors - the inclusion of other market place participants who have a narrower breadth of experience, narrower ability to deliver a full suite of solutions and who are not held to the highest account in the administration would adversely impact of the public's trust in the bankruptcy and insolvency system.

- The need to ensure transparency in the insolvency system, including safeguards entrenched through the regulatory oversight of the OSB.

Trustee Education Program

One of the key roles and missions of CAIRP is educating its members and prospective members.

CAIRP's mission is to:

- Educate and support its members in providing insolvency, restructuring, and related advisory services in a manner that instils the highest degree of public trust; and
- Advocate for a fair, transparent, and effective system of insolvency and restructuring administration throughout Canada.

Since September 1997 the education of Chartered Insolvency and Restructuring Professional (CIRP's), Trustees, and registered insolvency counsellors has been delivered by the NIQP, which has been jointly sponsored by CAIRP and the OSB.

Effective September 1, 2010, the education of CIRP's, Trustees and registered insolvency counsellors will be delivered by a committee of CAIRP (the CAIRP Qualification Program Committee (CQP Committee)) in accordance with the MOU. Under the terms of the MOU, the CQP Committee will have full responsibility for the post graduate program and the Insolvency Counsellor's course (together referred to as the CQP), although the OSB will maintain an important advisory and consultative role in the development and maintenance of the CQP.

The MOU details the roles, responsibilities, and interests of the parties with respect to the delivery of a competent professional qualification program for insolvency professionals, including applicants seeking qualifications as Trustees.

In accordance with the MOU:

- The parties will work together to ensure the existence of competent and cost-effective professional qualification program. The CQP will support the required professional development of individuals wishing to be certified as a CIRP. Such individuals would be able to counsel individuals suffering financial distress and may apply for a licence as a Trustee. The CQP is designed to compete with other professions to attract talented

individuals and to develop those individuals into qualified professionals in sufficient number to meet market demands;

- The parties recognize that the CQP will strengthen the insolvency and restructuring system in Canada by increasing the level of expertise and competency of insolvency professionals; and

- The parties agree that it is desirable to maintain an education program and process whereby all providers of insolvency and business recovery services in Canada receive consistent, standardized, high quality, and appropriate training.

The CQP Committee will provide reasonable access to the CQP through the establishment of entrance eligibility criteria. Applicants to the CQP must satisfy one of these criteria:

- They must hold a Canadian university degree or the equivalent;
- They must hold a relevant professional designation recognized in Canada, for example, a CA, CMA, CGA (or as such designation as these professions may award) or LL.B (or a similar law degree);
- They must be in the final level of a program leading to such a designation; or
- They must have a minimum of five years relevant experience and have successfully completed a minimum of one accredited course in both accounting and business law at a post secondary level.

Other organizations have also stressed the need to ensure those entrusted with helping administer insolvencies are highly trained. The United Nations Commission on International Trade and Law (UNCITRAL)[31] has stated: " . . . the insolvency representative plays a central role in the effective and efficient implementation of an insolvency law with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially. Accordingly, it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings . . . but also that there is confidence in the insolvency regime".

[31] 2004 UNCITRAL's Legislative Guide on Insolvency Law, Section B, paragraph 35.

Licensed Trustees have always been the only profession recognized under the BIA. The role of the Trustee was confirmed in the 1992 amendments to the BIA with the requirement that a Trustee performs the assessment of a consumer debtor for purpose of the BIA and that is to be completed in accordance with the directive.[32] The status of Trustees was further entrenched with the 2009 amendments requiring that monitors and receivers must also be licensed Trustees.[33] CAIRP submits that it would be a step backward to permit any individual who has not met the rigorous education standards of a Trustee and who has not been recognized as an expert in matters pertaining to financial restructuring of consumer debtors and who can only offer limited advice.

CAIRP recommends that future amendment to the BIA include amendment to the definition of administrators of consumer proposals, contained in Section 66.11 of the BIA, to ensure Canadian provisions are aligned with internationally accepted principles required of a sound insolvency regime.

The Unique Perspective of a Trustee

We believe the education Trustees receive under the CQP and the competence and experience derived from advising financially stressed consumer debtors in diverse consumer insolvency proceedings differentiate Trustees from others who might seek recognition as administrators of consumer proposals for the following reasons:

- Students under the CQP gain an understanding of issues related to both bankruptcy and proposals.

  CAIRP's education program ensures that individuals who have successfully completed the CQP are well versed in all matters of insolvency and are competent professionals. We believe that to advise a debtor, administrators of consumer proposals must be able to discuss with the debtor, and be able to evaluate, all alternatives available to the consumer debtor, including both consumer proposals and personal bankruptcies. In addition, because a Trustee recognizes that the debtor is not the client of the Trustee, the Trustee serves as a fiduciary to facilitate an arrangement between the consumer debtor and the

[32] Directive 6R3 – Assessment of an Individual.
[33] Subsection 243(4) of the BIA.

creditors, ensuring that the arrangement is equitable to both parties, while promoting the rehabilitation of the consumer debtor and providing the debtor with a fresh start.

- The ability to recognize preferential payments and transactions at undervalue is crucial when evaluating proposals.

  One of the most important duties a Trustee must perform in an insolvency situation, especially with regard to a proposal, is to advise the creditors as to the proposal's worthiness. The administrator of a consumer proposal must be able to identify not only all the assets that would be liquidated in a bankruptcy, he or she must be able to determine the amount of surplus income and the monthly payment associated with it and must investigate and determine whether there were any preferential payments and/or transactions at undervalue (TUV).[34]

  In a consumer proposal the identification of TUVs is a fundamental aspect of assessing the equity of outcome to the stakeholders under the proposal. TUV and other transactions must be considered before the trustee formulates a recommendation as to whether a creditor should accept the terms of the consumer proposal.[35]

- The ability to identify all the options available to the debtor (Directive 6R3) is also crucial in consumer insolvencies. Section 7 of Directive 6R3 – Assessment of an Individual Debtor, states:

  For the purpose of the assessment, the individual conducting the assessment, or the relevant portion of it, shall inquire about the debtor's property and financial affairs and shall:

  3) Identify and discuss, in general, the options available to debtors for resolving financial difficulties, including a discussion of the rights and responsibilities of debtors and creditors under each of the following options:

  a) non-legislative debt settlement arrangements;

[34] Sections 95 and 96 of the BIA.
[35] Paragraph 66.13(2)(a) of the BIA and 66.14 (a) (i) of the BIA states that the Trustee must investigate the consumer's property and report the result of the investigation to the Official Receiver and the creditors.

b) an Orderly Payments of debts under Part X of the Act, or similar option under provincial legislation if applicable;
c) a consumer proposal under Division II of Part III of the Act;
d) a proposal under Division I of Part III of the Act; and
e) an assignment in bankruptcy under section 49 of the Act;

This directive highlights the importance of the choice available to a consumer debtor in insolvency proceedings. Insolvency practitioners must be able to understand, differentiate, and explain in layman's terms all options that exist under insolvency legislation so that the consumer can make a fully-informed decision.

CAIRP respectfully submits that for an administrator of consumer proposals to complete the assessment required by Directive 6R3, an administrator of consumer proposal must have knowledge of all the processes contained within the BIA, as well as all the provincial legislation pertaining to insolvency. In addition, CAIRP respectfully submits that the breadth of practical experience and knowledge derived by a Trustee from managing all options available to a consumer debtor, except for Orderly Payment of Debt provisions under Part X of the Act, enable the Trustee to provide a consumer debtor a rational basis for consideration of the options, including assisting in the formulation of a plan that is likely to achieve success, should the consumer debtor pursue the making a consumer proposal.

We are concerned that persons who are not licensed Trustees would not be in a position to assess the options or leverage a breadth of experience to understand the viewpoint of the stakeholders, which makes it more unlikely that such persons would receive the benefit of a frank and open discussion of all their insolvency options with their chosen advisor.

- The complexity of the insolvency system requires education and skills that can only be obtained by persons who complete the steps necessary to obtain the status of a licensed Trustee.

Creditors often rely on the administrator's opinion as to the viability of the consumer proposal and whether it is advantageous for them to vote in favour of the proposal. Paragraph 66.14(a)(ii) of the BIA requires that:

The administrator shall, within ten days after filing a consumer proposal prepare and file with the Official Receiver, a report in the prescribed form setting out:
. . . (ii) the administrator's opinion as to whether the consumer proposal is reasonable and fair to the consumer debtor and the creditors and whether the consumer debtor will be able to perform it.

The administrator's report must also be sent to every known creditor.[36] Licensed Trustees, as experts, possess a unique ability to comment on the equities of the consumer proposal among competing stakeholder groups.

Furthermore, CAIRP submits that the implementation of the new debt limits ($250,000 and $500,000 for joint files) for consumer proposals, and the general increase in the filing of proposals as a viable alternative to bankruptcy, have opened the door to:

- More complex files – more and more consumer proposals relate to commercial activity, which means administrators need expertise of a commercial nature. Such knowledge is obtained through CAIRP's education program and mandatory professional development requirements. Indeed, a common fallacy is that because consumer proposals deal with individuals, the issues and problems associated with the proposals are not complex and therefore require a lesser degree of training – there is no line of delineation between a simple and complex consumer proposal; often what appears as simple at first blush can become very complex as creditor claims and other matters related to the consumer debtor arise.
- Larger amounts of debt, as well as different types of debt (employees, deemed trusts, secured claims, lien claims) that often substantially affect the terms of a consumer proposal (including whether such claims may be compromised at all) – these factors can affect the amount offered to the unsecured creditors.
- Larger amounts that remain in trust accounts for a longer period.

[36] Paragraph 66.14(b)(ii) of the BIA.

- Knowledge of not only the BIA but other legislation is required when administering consumer proposals.

  To determine the rights of the debtor and the creditors, administrators of consumer proposals must not only deal with the issues surrounding the BIA, they must also deal with various provincial statutes. For example, when dealing with individuals who are separated or divorced, an administrator must determine the amount of the monthly payments the consumer debtor would have if he or she had filed an assignment in bankruptcy.[37] To make this determination, the administrator must have knowledge of the applicable family law statutes of the debtor's province of residence.

- In addition, administrators must be familiar with and/or distinguish between the nature of claims that may be assessed against the assets of the consumer debtor, including:
  - The statutory exemptions provided in each province to accurately compare the proposal with alternative proceedings for purpose of a recommendation on the consumer proposal;
  - The nature of all claims to which a consumer debtor may face including, for instance, an unsecured creditor, a secured creditor, lien claimant, deemed trust claimant, garnishee, and numerous other forms of claims. In respect of the secured claim, the administrator must have the ability to determine whether the security will be valid and enforceable against third parties, including a Trustee in bankruptcy proceeding to fairly assess whether such outcome could affect the equity return to the creditors. Making such determinations requires knowledge of various aspects of provincial legislation.[38] In addition, the administrator would need to understand the priority among the claimants so as to properly advise as to the layering of recoveries to the creditors within the consumer proposal; and
  - Deemed trust claims are a complex area of law that require a proper assessment such to recognize the impact of the claim on the assets available for the benefit of the

[37] The administrator of a consumer proposal has to determine the following:
- whether the surplus income directive applies;
- if the surplus income directive applies, how much the payments would be; and
- how long the debtor would be in bankruptcy, considering the amendments to Section 168.1 and the introduction of section 172.1 of the BIA.

[38] For example, for a consumer debtor residing in Québec, the administrator of the consumer proposal must have knowledge of the Civil Code of Quebec. An administrator of a consumer proposal in Ontario must have knowledge of Ontario's Personal Property Security Act.

creditors generally. A deemed trust claim is an example of where specialized knowledge and expertise is required for a Trustee to fairly perform an assessment of the consumer debtor and, where a consumer proposal remains a viable option, to consider formulating a recommendation with respect to the consumer proposal. These issues require specific knowledge of the federal Income Tax Act, Excise Tax Act, the Employment Insurance Act, Canada Pension Plan Act and provincial legislation that gives rise to similar deeming provisions.

- An ability to understand the nature of the claims against the assets of the consumer debtor is only but a component of the administration process. Persons administering proceedings, either a bankruptcy or a consumer proposal, must be familiar with the process for the calling and adjudication of claims, particularly where discrepancies exist. When discrepancies exist, the administrator must understand the concept of disallowing claims (and the associated time lines) and/or negotiating an acceptable resolution of the matter.

- A specific understanding of terminology used in the BIA and ancillary legislation is required. Section 7, paragraph 4, of Directive 6R3 requires that for purpose of an assessment, the administrator of a consumer proposal must:

  " . . .explain the general meaning of the following credit and insolvency matters if pertinent to the circumstances:

  a) garnishment;
  b) co-signers;
  c) credit rating;
  d) assets;
  e) legal action;
  f) windfalls;
  g) tax returns;
  h) tax credits;
  i) mediation; and
  j) the discharge process and types of discharge orders.

  To understand the complexities of these provisions, including the interplay between them, and be able to explain the impact of each on a consumer debtor prior to the same debtor

selecting, or not, to proceed with a course of action, the administrator must have an understanding of the entire scheme of the BIA and all related and applicable Federal and Provincial legislation that could give rise to an adverse event.

For example, an administrator of a consumer proposal must be able to determine whether the tax refunds would be subject to seizure in the event of a bankruptcy, whether a garnishment will remain once the debtor has filed a consumer proposal, whether mediation would apply with respect to the filing of an assignment, and a vast array of other considerations that require knowledge and experience that is unique to a Trustee.

CAIRP believes Trustees hold a unique position within the insolvency framework in advising consumer debtors with regards to their options (including the anticipated outcome associated with each) and have earned the trust and acknowledgement of key stakeholders.

Issue of Trust Funds and the Quality of Banking Controls

Because Trustees are subject to strict rules and fiduciary obligations regarding dealing with trust funds, they are in the best position to act as administrators of consumer proposals.

As a designated administrator of consumer proposals, the Trustee is bound by the rules in Directive 5R3 – Estate Funds and Banking. This Directive sets out rules regarding how Trustees (whether acting as a Trustee in Bankruptcy or as an administrator of a consumer proposal) are to keep and safeguard funds in bankruptcies, Division I proposals, Division II proposals (Consumer proposals) and interim receiverships.

Directive 5R3 sets out various rules that are fundamental. For example:

- The Trustee has a fiduciary obligation to the parties to any estate;
- The Trustee must keep estate funds in a deposit account in a bank or other financial institution that has insurance on deposits;
- The Trustee must maintain proper records of the Receipts and Disbursements related to the account;
- The Trustee must perform monthly reconciliations of accounts and report unexplained discrepancies to the OSB; and

- Trustees are required to provide an annual report to the OSB regarding all of the accounts that it maintains for the various estates under its control.

As well, Trustees are subject to rules on banking, such as:

- Dealing with, and control of, electronic banking transactions;
- Maintaining transfer accounts, if necessary;
- Allocating interest to each of the estates in a consolidated account (consolidated accounts are referred to below);
- Rules against overdrawn accounts (or individual estates in the case of consolidated accounts);
- Maintaining and reviewing regular banking internal control features; and
- Investing estate funds.

Trustees are allowed to maintain consolidated bank accounts for summary bankruptcy estates (personal bankruptcies with little or no assets) and consumer proposals. Bankruptcy accounts are maintained in one consolidated account and all consumer proposals are maintained in a second separate consolidated account. The rationale for consolidated accounts is to facilitate the efficient handling of banking matters related to the many small estates that comprise the Trustee's portfolio of summary bankruptcies and consumer proposals.

Only a Trustee may sign cheques drawn on estate bank accounts, whether the estates are in an individual Trustee's name or in the name of the Corporate Trustee. The fact that this ability cannot be delegated helps protect the integrity of the insolvency system and helps promote public confidence in the system. The fact that administrators who are not Trustees would not be subject to these rules could undermine the integrity of the system as well as the public confidence in it.

Integrity of the System with Respect to the Role of the Trustee as an Officer of the Court

Subsection 16(4) of the BIA states:

> *"The Trustee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the bankrupt, be in the same position as if he were a receiver of the property appointed by the court, and the court may on his application enforce the acquisition or retention accordingly."*

Trustees, as Officers of the Court[39], are charged with the responsibility of discharging their duties to the highest standard.

As an officer of the court, a Trustee has several specific duties, including:

- To impartially represent the interests of creditors[40];
- To realize as much as possible from the estate for the benefit of the creditors[41]; and
- To take steps to have a security declared invalid, if appropriate.[42]

By virtue of Section 66.11 of the BIA, Trustees designated as administrators of a consumer proposal are deemed to hold office as Officers of the Court. Consequently, all the powers and duties of a Trustee derived by virtue of being an Officer of the Court are attributable to the Trustee when acting in a capacity as an administrator of a consumer proposal.[43]

The Courts, including judges and Registrars, are familiar with Trustees and they respect the integrity and impartiality Trustees bring in the most contentious and adversarial of circumstances. As an Officer of the Court, a Trustee's recommendation to the Court is accepted as being based on sound principles and on full disclosure of information. A Trustee appearing before a court on behalf of a consumer debtor benefits from the trust and integrity he or she has earned and judges and Registrars feel confident and rely on the good judgement of these Officers of the Court. As a result, the consumer benefits from a process that is efficient, predictable, and effective.

The Trustees status as an Officer of the Court is a key differentiator between a Trustee and any other person designated to hold office of a specified role, including that as an administrator of consumer proposals.

[39]Canadian courts have recognized the concept of a Trustee as an Officer of the Court. See, for example, Re Beetown Honey Products Inc. (2003), 46 CBR (4th) 195.
[40] Re Roy (1963), 4 CBR (N.S.) 275 (Que.S.).
[41] Re Coffey (2004) (2004) 160, 2 CBR (5th) 121(N.L.T.D.).
[42] Re Margaritis (1977), 23 CBR (N.S.) 150.
[43] For example, power to set aside fraudulent preference (Section 95 of the BIA); power to set aside conveyances made by the debtor before filing where the conveyance was for less than full value (Section 96 of the BIA); the power to disallow claims (Section 135 of the BIA), etc.

Mandatory Professional Development Hours, Professionalism, and Standards

CAIRP's Rules of Professional Conduct (the Rules) set high standards for members. First and foremost is the duty to protect the general public and all stakeholders to the Insolvency regime.

Rule 2 of the Rules states:

> "A member shall sustain his or her professional competence by keeping informed of developments in professional standards and legislation."

Various professions require mandatory professional development (MPD). MPD requirements prescribe minimum levels of continuing professional development to assist professionals in maintaining their professional competency throughout their careers. Professions with MPD requirements generally provide their members with continuing professional development that focuses on learning, with a view toward the development of new or existing competencies that are relevant to the individual member's overall professional responsibilities and growth.

MPD is one of the ways CAIRP enhances the reputation of the Trustee profession and increases confidence in CAIRP and its members who have earned the right to use the CIRP certification mark. CAIRP's vision is for its members to be recognized leaders in providing solutions to financially challenged individuals and businesses. CAIRP's value statement is that:

> "CAIRP and its members are committed to professionalism, trustworthiness and objectivity."

To ensure we achieve our vision and fulfill our value proposition, our members have a professional responsibility to refresh and to add to the skills they apply to their daily work. The minimum required MPD for general members is 20 hours of annual professional development. Members must certify annually that they have met the MPD requirements. In fact, the majority of our members significantly exceed the minimum requirement.

With respect to professionalism, CAIRP members who are Trustees are bound by CAIRP's Professional Rules of Conduct, as well as the Code of Ethics for Trustees[44] (Code of Ethics).

[44] Sections 34 to 53 of the Bankruptcy and Insolvency General Rules.

Both the Rules and the Code of Ethics indicate the importance of professionalism, honesty, integrity, and due care.[45] In addition, CAIRP's Rules are based on the key principle that a member shall perform his or her professional services with integrity and care.

In the last eight years CAIRP and its members have dedicated substantial effort to enhancing the requirements of the profession through the development of greater than 22 standards of professional. It is our pleasure to advise the OSB that in February 2011, CAIRP anticipates enacting four additional standards of professional practice to further promote the confidence of the OSB and public in our members administration of estates. The four new standards of professional practice will cover:

- Counselling of consumer debtors;
- Surplus income;
- Preparation and verification of the statement of affairs; and
- Reports of administrators for consumer proposals.

Alternative Service Providers

CAIRP is concerned that persons designated solely as administrators of consumer proposal would not be able to provide creditors with a credible assessment of alternatives, since those persons would not have experience or knowledge of administrating alternative insolvency proceedings. Given that such administrators would only be able to administrate within the framework of the BIA consumer proposals, we are concerned there could be an inherent bias toward recommending a consumer proposal to the consumer debtor even when a consumer may not meet the individual needs of the consumer debtor or provide an equitable result to the creditors. The rationale for this statement is not to levy a criticism against those that would provide services of a limited scope, it is simply a practical reality that arises from a lack of knowledge of the viable alternatives.

In addition, CAIRP is concerned with the issue of conflict in relation to two matters:

- A conflict exists, real or perceived, in respect to parties that are able to administrate both regulated and non-regulated consumer proposals. The nature of the potential conflict can be associated with the creditors previously the subject of the non-regulated proposals,

[45] See sections 36, 38, 39, and 41 of the Bankruptcy and Insolvency General Rules.

non-compromised debt settlements (100 cent dollar proposals). While measures may be implemented to alleviate the potential for conflict, the perception that a conflict may remain cannot be absolved.

- Trustees, many of whom are professional accountants and lawyers, are familiar with the concept of conflicts when accepting engagements. Further, the professional standards of CAIRP require that a member hold himself or herself free of influence that could impair their objectivity. In addition, the Code of Conduct for Trustees would suggest that Trustees conduct themselves at all times to the highest ethical standard. It is our position that all those who practice in the insolvency framework must follow, and be held to, the same high standard regarding objectivity and ethics, so that public trust in the bankruptcy and insolvency system is preserved. Whereas Trustees and CAIRP members are subject to strict regulatory requirements and professional standards, others that may seek to fulfill a role under the BIA as an administrator of consumer proposals may not be held to the same account.

As noted above, the vast majority of Trustees are professional accountants and lawyers that maintain a specialized knowledge related to the principles of financial restructuring, including the financial analysis necessary to properly assess and opine on a consumer proposal for the benefit of creditors. Whereas a consumer debtor may not possess the financial skills necessary to assess the various options prior to selecting of a path within the context of insolvency proceedings, a Trustee has the ability to perform the financial analysis to help the consumer debtor to make an informed decision. The ability of a Trustee to render sound financial advice and present financial analysis in a format that can be readily understood by the consumer debtor is the result of their specialized education and experience. Before the OSB considers designating others to fulfill the role of administrators of consumer proposals, CAIRP would expect the OSB to define or assess the financial abilities of the parties to ensure they meet the needs of consumer debtors.

Finally, CAIRP welcomes those seeking appointment as administrators of consumer proposals to enrol in the CQP and complete the training to become a CIRP and thereafter become eligible for licensing as a Trustee. CAIRP believes the CQP is a preeminent program that adds substantial credibility to the public's trust in the bankruptcy and insolvency framework.

Summary of Recommendations

Dual Licensing

CAIRP submits that the current system of licensing for all Trustees should be maintained, including the imposition of restrictions on the licence by the OSB when circumstances exist for such justification. CAIRP recommends against the implementation of dual licensing for the numerous reasons detailed above. Further, CAIRP believes that the premise on which the OSB is considering the implementation of dual licensing, including the risk inherent in Trustees changing their focus of practice based on market demands and economic circumstances is addressed through a myriad of risk mitigation variables that currently exist and as detailed above.

Specialization

While CAIRP recognizes that, practically speaking, some degree of specialization exists among practicing Trustees, but for the reasons articulated, CAIRP is not in favour of regulated specialization. It is our view that market focus and self-identification serve to designate individual Trustees as experts in one field or another.

Administrators of Consumer Proposals

CAIRP is opposed to the appointment or designation of others as administrators of consumer proposals unless such individuals meet the exacting standards expected of Trustees. The standards adopted by the OSB in this regard must be the highest standard, which standards are currently embossed within a Trustee:

- A Trustee has completed an education program that requires the absorption of significant and relevant knowledge and has demonstrated the competence and experience expected of a professional to expertly advise and guide a troubled consumer debtor in financial distress.

- It is a Trustee's breadth of experience in administrating a full spectrum of insolvency proceedings on behalf of consumer debtors that provides the Trustee a unique insight, which is the value proposition to the consumer debtor.

The OSB, in its deliberation, must consider whether the inability of an alternative service provider to provide sound, strategic, and objective advice to a consumer debtor based on limited experience in alternative insolvency proceedings, including a lack of education related thereto, will adversely impact the ability of the consumer debtor to make the fundamental and informed decision.

CAIRP cautions the OSB that prior to deviating from a standard that has garnered the public's trust and confidence in the professionals that deliver the services, that it considers the standard to be applied and the rationale for deviation – CAIRP respectfully submits its view that the risk of altering the standard far exceeds any future benefit to be derived.

Issue Number 3
Probationary Conditions for Newly Licensed Trustees

ISSUE
The Office of the Superintendent of Bankruptcy (OSB) is considering the following alternatives/options:

1. Require newly licensed Trustees to file a minimum number of estates prior to requesting that probationary conditions be lifted.
2. Require newly licensed Trustees to file a time allocation report with the OSB detailing the type of cases and type of work done on each case.
3. Apply other criteria to determine if the 24-month probationary period should be lifted, shortened or extended.
4. Repeal probationary conditions for new Trustees working for a multi-Trustee firm on the basis that the Corporate Trustee is ultimately responsible for the work of its individual Trustees.
5. Establish different probationary conditions for new Trustees practicing as sole practitioners on the basis that the Trustee does not have enough experience to justify an unconditional practice[46].

CAIRP is in favour of maintaining a probationary period, with exceptions, for all newly licensed Trustees. Though newly licensed Trustees have demonstrated a high level of proficiency in completing the education program of the NIQP[47], and beginning September 1, 2010 the CQP[48], as well as the OSB's Oral Board examination, the probationary period provides an important opportunity for new Trustees to further develop, mature, and gain experience, within a supervised environment.

[46] Note that this is the wording in the Consultation Paper. We believe that the OSB most likely meant: "… does not have enough experience to justify an unconditional *licence*."
[47] Per the Memorandum of Understanding (MOU) signed October 8, 2009 by the Superintendent of Bankruptcy and the Chair of CAIRP, the ownership of the insolvency education program will become the sole ownership of CAIRP and will be known as the CQP as of August 31, 2010.
[48] Id.

Furthermore, we believe the importance of the probationary period will increase in the future as the education program of the CQP is amended. The MOU recognizes that the CQP will be amended to allow a candidate to complete the learning and examination periods in two to three years, inclusive of the practical experience period, rather than the four or five years under the former NIQP. While the benefit of the amendments is to attract a better qualified candidate, the trade-off is that candidates emerging from the CQP will have had less practical experience time. Therefore on balance, we recommend maintaining the current 24-month probationary period.[49]

In general, a probationary period permits a professional a reasonable opportunity to experience a breadth of practice and an ability to adjust to the enhanced responsibilities derived from the completion of their studies. The probationary period affords new Trustees the practical experience related to practice administration, sound financial and operational protocols, non-financial controls necessary to mitigate exposure and practice errors, as well as solid grounding in best practices. During the probationary period new Trustees mature through experience and gain the confidence necessary to provide sound financial and non-financial advice and to better understand and respect the practice guidance and regulatory environment within which the profession operates. From a regulatory perspective we believe the probationary period provides practitioners an opportunity to develop sound compliance practices that serve the interests of the practitioner, the OSB and the profession.

The current Directive defines conditions in addition to the probationary period (24 months) of new Trustees that must be satisfied prior to the granting of an unrestricted license, albeit these conditions are typically general in nature. CAIRP recommends the introduction of additional conditions of probation. These supplemental conditions can be divided into two categories:

1. General conditions applicable to all newly licensed Trustees; and
2. Specific conditions that apply with respect to newly licensed Trustees seeking to establish an independent practice within the probationary period.

General Conditions Applicable to All Newly Licensed Trustees

We recommend the following conditions be applied to all newly licensed Trustees

[49] Sections 27 to 30 of Directive No. 13R2 – Trustee Licensing.

- Newly licensed Trustee should be required to work in the field of insolvency and restructuring during the twenty four month probationary period.[50] Absence from practice during the probationary period should result in an extension of the probation period by the equivalent amount of time. In the event the period of time is protracted (we would define that as greater than 12 months), prior to being granted an unrestricted licence, the Trustee should be required to re-take all or a portion of the Oral Board, or alternatively, demonstrate to the OSB that the Trustee has maintained knowledge through education or otherwise prior to being granted an unrestricted license.

- During the probationary period newly licensed Trustees should undergo a practice review.[51] If, as a result of a review, improvement is required, the Trustee would be required to produce a formalized plan and satisfaction of the improvement plan would be a prerequisite to the probationary period ending.[52]

- We also recommend that all newly licensed Trustees be encouraged to become a member of CAIRP (or, if they already are a member, to maintain their membership) for the duration of the probationary period. Our reason for this recommendation is two-fold: as members they would be subject to CAIRP's rules, regulations, and standards of professional practice, which would serve to enhance the public's trust, and they would personally benefit because they would have access to CAIRP's Practice Advisor Program, should practice issues arise in which they require guidance beyond that available from their sponsor (mentor).[53]

One of the main objectives of the probationary period is for new Trustees to gain practical experience in the field. In addition, the probationary period permits the new Trustee the opportunity to consult with a mentor (who need not be the sponsor the Trustee had during the course of his or her study[54]) on specific situations they may encounter from time-to-time. The combined impact of the probationary period and compliance with the conditions imposed, helps

[50] The probationary period should not be allowed to run while a Trustee is practicing in another field, or if he or she is not working because on a leave, such as a family leave of other leave of absence.
[51] A practice review is an examination of an individual Trustee's administration. It can cover all or some of the aspects of the administration of estates in general. Practice reviews do not apply to Corporate Trustees.
[52] Section 27 of the Directive 13R2 on Licensing.
[53] CAIRP's Practice Advisor Program is a program available to all members of CAIRP where Trustees may call on other, more experienced Trustees for advice.
[54] The mentor would have to meet the requirements within the MOU or similar requirements, such as holding a Trustee's licence and being in good standing with both the OSB and CAIRP.

ensure adherence to practice standards, including the legislation, rules, directives, and the standards of professional practice established by CAIRP, all of which enhances the integrity of the insolvency system and the public's confidence in it.

Specific Conditions that Apply with Respect to Newly Licensed Trustees Seeking to Establish an Independent Practice within the Probationary Period

We recommend the following conditions be applied with respect to newly licensed Trustees who wish to practice on their own during the 24 months immediately following the successful completion of the Oral Board.

- In addition to the general practice review standard outlined above, we believe that during their initial two years of practice newly licensed Trustees who practice on their own should be subject to a peer review of professional practice by a Trustee in good standing with both the OSB and CAIRP. The cost of the peer review should be borne by the newly licensed Trustee. The peer reviewer should be required to provide written confirmation that the newly licensed Trustee has demonstrated the necessary knowledge and skills to practice on his or her own and has established sound financial and non-financial controls to mitigate practice risk.

- In addition, the newly licensed Trustee should be required to provide a business plan to the OSB that includes a description of the internal controls, banking systems and controls, evidence of adequate insurance, evidence of sufficient working capital to fund the operating requirements of the practice, evidence of sufficient capital or access to capital to meet changing circumstances, a successor agreement (with a Trustee in good standing with both CAIRP and the OSB), a statutory declaration pertaining to the personal solvency of the individual, and any other requirements that may be specified by the OSB on a case-by-case basis. The business plan, including confirmation from the OSB as to its adequacy, should be in place before the newly licensed Trustee may begin practicing on his or her own.

CAIRP is of the view that all new Trustees can benefit from the probationary period associated with the privilege of being granted a licence to practice as a Trustee and that exceptions and

exemptions should not be permitted, whether the person practices as part of a multi-Trustee firm, Corporate Trustee, or otherwise.

As noted in Annex F of the Review of the Trustee Licensing Regulatory Framework, "Anecdotal evidence from professional bodies (lawyers, accountants) suggests that the first years of practice are critical for a practitioner to learn to apply the expected standards of performance set by the professional body." Given such evidence – and based on our experience – CAIRP believes that substantive guidance to a new Trustee under a mentor or through supportive processes that require adherence to "best practices" have long and sustained benefits for the individual, and more importantly, for public confidence in the insolvency framework and those who practice within it.

Regarding the issue of whether newly licensed Trustees should be required to file a minimum number of estates prior to satisfying the probationary conditions, CAIRP believes that this criteria does not have a bearing on a newly licensed Trustee's competency. This measure does not reflect on the Trustees adherence to standards or demonstrate sound business judgement in fulfilling the requirements of the legislation, rules, regulations, directives, or the standards of professional practice developed by CAIRP.[55]

Finally, while CAIRP recognizes the requirement of a new Trustee to gain a breadth of experience and develop a broad base of competencies within a supported framework, CAIRP does not believe that requiring new Trustees to file with the OSB a time allocation report detailing the type of cases and type of work done on each case, is particularly useful in demonstrating the quality of the Trustee's experience. Instead, we believe implementation of the recommendations set out above relating to existing and supplemental conditions during the probationary period will serve the interests of the OSB and the public in promoting confidence in the insolvency framework. However, CAIRP would be supportive of a requirement that the experience report of a candidate invited to sit the Oral Board require greater detail regarding the candidate's experience. This would help the OSB assess the candidate's experience and

[55] It is important to note that a newly licensed Trustee practicing in an environment where his or her mandate is strictly for large commercial estates could easily have only two or three estates (or less) over the two years, whereas someone practicing in an environment where his or her mandate is more for consumer estates could easily have one new estate per day. In addition, for large corporate estates, it is unlikely that the estate would be filed under the license of the new Trustee, but rather the senior practitioner; as such, a new Trustee may be exposed to numerous estates and a vast breadth of experience, yet the statistical data for the new Trustee could include reference to no estates filed.

competence before it grants a provisional license. A more detailed experience report would also serve the interests of the OSB and the candidate in the event of an appeal of the results of the Oral Board or an appeal of a denial of a licence to practice.

Summary of Recommendations

CAIRP recommends maintaining the twenty four month probationary period with the following additional conditions:

- The probationary period should involve insolvency and restructuring work under the guidance and direction of a Trustee in good standing;
- A practice review of the new Trustee should be carried out; and
- Individuals should be strongly encouraged to become (or remain) members of CAIRP for the duration of the probationary period.

With respect to newly licensed Trustees who seek to become sole practitioners immediately upon receiving their Trustee's licence or within the probationary period, the following additional conditions should also have to be met:

- Before starting their practice they should submit to the OSB a business plan that is acceptable to the OSB in form and substance; and
- Peer practice review should be required during their first two years as sole practitioners, the cost of which the practitioner should bear. The review should include written confirmation from the reviewer regarding the Trustee's compliance with established parameters.

For the reasons articulated above, CAIRP does not believe there should be a requirement that new Trustees file a minimum number of estates prior to having any probationary conditions lifted because the number of files does not have any bearing on competency. Additionally, CAIRP does not believe a new Trustee need file an experience report during the probationary period. However, as noted above, CAIRP would support the filing of a more detailed experience report by a candidate prior to sitting for the Oral Board.

Issue Number 4
Reactivation of the Licence in the Event of the Trustee's Bankruptcy

ISSUE
The Office of the Superintendent of Bankruptcy (OSB) is concerned that the notion of "will not impair public confidence" needs to have a level of clarity in terms of the conditions or reinstatement being more clearly established. The OSB, therefore, is considering the following options:

1. Repeal the notion of "not impair public confidence" because it is too broad.
2. Replace the case-by-case principle with a clear, more transparent policy that applies to all without distinction.
3. If the Superintendent is to continue handling reinstatement applications on a case-by-case basis, whether he should indicate in a public policy the criteria that may be taken into consideration.

Trustees are the public face of the insolvency process. Not only must they be competent and skilled, they must possess personal qualities of integrity, impartiality, independence, and good management skills. Having no record of financial wrongdoing is essential to a Trustee's integrity. The public has the expectation that Trustees have the financial and money management skills of the highest order. Just as the public expects doctors to be role models for healthy lifestyles, Trustees should take care not to become insolvent. If a Trustee becomes bankrupt or the subject of an insolvency proceeding, it is reasonable for the public to expect that the Trustee's licence will not be reinstated to practice as a licensed Trustee until the Trustee is once again able to meet the standards or criteria required to initially apply for their licence, other than the five year solvency period (for the reasons explained below).

The current rules for issuance of a new Trustee licence[56] are rigid and include the requirement that a licence cannot be granted to a person who is insolvent or within five years after their discharge from bankruptcy. If this standard is applied for re-instatement of licenses following the bankruptcy of a licensed Trustee, the practical result would be that a Trustee who becomes bankrupt would not be able to apply for reinstatement for at least six to seven years, the typical period for administration of the bankruptcy including the minimum five year period of solvency. While adoption of such a policy might help foster the public's confidence that the Trustee's financial stability has been restored, it creates the risk that a Trustee would not be able to stay up-to-date with the rules and regulations of the profession if he or she is unable to practice with another Trustee. In addition, adoption of such a standard would not respect the very essence of the objectives and policy considerations related to the bankruptcy and insolvency system, the fundamental objective of which is rehabilitation.

[56] Directive 13R2, section 6(a).

Further support for a truncated post-discharge reinstatement period can be found in the rules governing other professional bodies (many of which Trustees are subject to in addition to the Directive) that reinstate members upon their discharge from bankruptcy.[57]

Options the Superintendent of Bankruptcy might consider:

1. Maintain the status quo of re-instating an individual as eligible to administer estates following the individual's discharge from bankruptcy or emergence from an insolvency proceeding (upon request);
2. Implement a five year minimum "cure" period prior to eligibility for reinstatement (consistent with the standard applicable for issuance of a new licence);
3. Reduce the minimum cure period to one year following discharge from bankruptcy or emergence from an insolvency proceeding (or some other period determined in the sole discretion of the OSB); or
4. Determine eligibility of a Trustee to return to active estate administration status on a case-by-case basis.

Background

The Superintendent has the authority to issue, revoke, or apply conditions to the granting of a licence. Paragraphs 5(3)(a) and (b) of the BIA provides that the Superintendent shall:

> *(a) receive applications for licences to act as Trustees under this Act and issue licences to persons whose applications have been approved;*
>
> *(b) monitor the conditions that led to a Trustee being issued a licence to determine whether those conditions continue to exist after the licence has been issued and take the appropriate action if he or she determines that the conditions no longer exist;*

Under subsection 5(4) of the BIA the Superintendent has the authority to establish criteria regarding the eligibility of an individual or a corporation to apply for and obtain a licence, as well as to impose conditions in respect of holding a licence. Clearly, holding a licence is a privilege, not a right, and it is not granted in perpetuity – Trustees must continue to satisfy the requirements.

[57] Such reinstatement is usually permitted so long as there are no other impediments to their reinstatement, such as missing trust funds or a criminal record.

Under subsection 13(3) of the BIA the Superintendent may refuse to issue a licence to an applicant who is insolvent or who has been found guilty of an indictable offence that is of a character that would impair the Trustee's capacity to perform his or her fiduciary duties. Under the Directive an individual applying for a licence must not be insolvent at the time of application or in a "state of insolvency" within five years of making the application. Under the Directive, "state of insolvency" includes being bankrupt, having filed a notice of intention or a proposal under the Act, or subject to similar proceedings under any federal, provincial or foreign legislation. Furthermore, Section 27 of the Directive requires that Trustees must be solvent at all times (not merely at the time of application) and that they must have financial resources sufficient to properly finance their operations and activities as a Trustee. The rationale for these requirements is obvious: given that the property of a bankrupt is vested in a Trustee for the benefit of the creditors of the estate, public confidence that no further credit or administrative risk exists once the estate has been turned over to a Trustee is crucial and, if Trustees do not have sufficent working capital to properly finance and administer the estates under their control, the potential risk of Trustees misusing trust funds increases.

Subsection 13.2(3) of the BIA provides that a licence becomes invalid if a Trustee becomes a bankrupt. Subsection 13.2(4) of the BIA gives the Superintendent power to reinstate a Trustee's licence on the Trustee's written request and to place conditions and limitations on the reinstatement. The Directive provides that before a licence is reinstated, the Superintendent must be satisfied that reinstatement will not impair public confidence in the system.

The Directive does not list specific criteria to be considered in any application for reinstatement. Therefore, to gain insight into criteria that may be considered on application for reinstatement, it is instructive to look at how the Superintendent has dealt with past applications. Over the last 15 years there have been relatively few applications for reinstatement. It is our understanding that in those cases the Superintendent considered the following:

- The debtor-Trustee's discharge and any conditions of the discharge;
- The amount of time between the bankruptcy and the debtor-Trustee's discharge;
- The causes of the bankruptcy;
- The nature of the debtor-Trustee's practice (for example, the number and type of files);
- The history of the Trustee's licence (and of the firm, where the Trustee was employed by a firm);

- The debtor-Trustee's financial situation, including cash reserves to be able to operate the business for a period of time;
- Access to trust accounts; and
- Other factors (for example, references submitted by the debtor-Trustee).

CAIRP agrees that investigating the specific circumstances of each application for reinstatement is critical to the Superintendent's exercise of discretion in accepting or rejecting applications.

How Other Professions Deal with Reinstatement

Given that the majority of Trustees are accounting professionals (subject to the strict professional standards of the accounting bodies) and lawyers, examining how these professions deal with members who become insolvent is also instructive. CA Institutes and Law Societies address the ramifications of members becoming insolvent[58] in their respective By-laws and Rules or Codes of Professional Conduct. Because CAs and lawyers are provincially regulated, the rules vary somewhat from province-to-province; however, the following common themes emerge:

- Members must report their insolvency or bankruptcy to the governing professional body, including details related to the circumstances leading to the insolvency and information about their financial circumstances.
- Members are subject to immediate suspension if they inappropriately used trust funds.
- The professional body conducts a review of the circumstances leading to the insolvency or bankruptcy and determines whether:
    - The member's rights and privileges of membership should continue,
    - To negotiate a consent order that includes special terms, conditions, or restrictions on the person's membership; or
    - To hold a hearing to consider the member's circumstances and to determine his or her status.[59]
- The reputation of the profession is paramount and the professional body exercises its discretion in favour of maintenance of public trust.

[58] "Insolvent" is not necessarily consistently defined by these professional bodies but it usually includes being bankrupt, filing a proposal, or otherwise becoming the subject of a proceeding. On this issue, Directive 13R2 requires a member to seek clarification from the Superintendent if there is any doubt as to what constitutes a state of insolvency.

[59] Members of the Chartered Accountants of Nova Scotia are immediately suspended upon becoming bankrupt with an immediate right to apply for the suspension to be terminated unless there is a complaint outstanding.

- During a member's bankruptcy, the member is subject to increased monitoring and reporting requirements, with additional safeguards put in place to ensure the safety of trust accounts.

By way of example, the Institute of Chartered Accountants of Ontario (ICAO) lists the following criteria in addressing an application for reinstatement following insolvency:

- The circumstances that caused the bankruptcy, proposal, insolvency proceeding, or receivership, and the member's conduct related to the circumstances.
- The extent to which being bankrupt might put at risk the interests of any client, or of an employee of the member.
- The number and nature of the creditors affected.
- whether there was any associated criminal or civil liability on the part of the member, in respect of the bankruptcy;
- The member's financial circumstances as at the date of the hearing;
- The date the member expects to be discharged from bankruptcy or released from insolvency;
- Whether the member is competent to carry on the practice of public accounting, if the member is engaged in such practice or indicates an intention to engage in such practice in the foreseeable future; or whether the member is:
    - Capable of performing the essential duties associated with his or her employment; or
    - Capable of carrying out any business or practice in which the member is engaged.

In addition, where the member is engaged in public practice, the ICAO also considers:

- Whether the member is able to finance, organize, and manage a public accounting practice; and
- Whether a reasonable observer would conclude that the member's objectivity or independence has been impaired or appears to have been impaired.

Discussion of Options

1. *Maintain the status quo*

CAIRP is of the opinion that maintenance of the status quo does not serve the interests of the profession or public. The current practice of re-instating an individual's licence is premised on the condition that reinstatement "… not impair public confidence in the bankruptcy and insolvency system"[60]. This standard does not provide an objective basis on which the OSB and the applicant can fairly assess the decision of whether to reinstate the licence. Though an individual who has satisfied the requirements of an insolvency proceeding has a right to maintain a standard of living and seek to perform services as an active member of society[61], in the case of a Trustee who was insolvent, this right must be balanced against the need to maintain public confidence in the bankruptcy and insolvency system.

We believe that a protocol for re-instatement, while permitting the OSB discretion, should include substantive measures, timeframes, and procedures that permit a licence holder, before commencing an insolvency proceeding, a basis upon which to assess the immediate impact on his or her licence, as well as upon emergence from the insolvency proceeding.

2. *Implement a five year minimum "cure" period prior to eligibility for reinstatement (consistent with the standard applicable for issuance of a new licence)*

While implementation of a five year minimum cure period for reinstatement of a licence following the completion of an insolvency proceeding is consistent with the standard applied to the granting of an initial licence and can be viewed as a strong deterrent to Trustees from taking undue risks with their personal or professional finances, it does not address situations where circumstances beyond the individual's control cause the insolvency.

A five year minimum cure period is excessive because:

i.) it unduly penalizes the Trustee whose insolvency may have been caused by external factors (for example, the failure of his or her professional service partnership or other

[60] Directive 13R2, section 57.
[61] The bankruptcy system and legislation is premised on a fresh start and rehabilitation.

losses that occur that are unrelated to excessive speculation, such as marriage breakdown, health related issues, etc.), and

ii.) it may result in the professional being unable to maintain his or her professional competency over this extended period, which could jeopardize his or her being allowed to resume practice.

For these reasons, we believe a minimum five year "cure" period, though arguably in line with the requirements necessary for the initial granting of a licence, is excessive and should not be a standard applicable to re-instatement of a licence.

3. *Reduce the minimum cure period to one year following discharge from bankruptcy or some other period determined in the sole discretion of the OSB*

The third option represents a middle ground between the status quo and a five year cure period. The rationale for having at least some period of post-discharge wait time before an application for reinstatement is considered is simply that a Trustee should be held to a higher standard of financial responsibility than the public, given the fiduciary obligations that result from the holding of a Trustee's licence. Such a policy would underline the stringent financial and other qualifications that a licensed Trustee must hold, and may also serve as a deterrent to aggressive financial behaviour.

Balancing the interests of the individual and the public at large, and based on the higher standard to which a Trustee must be held to account, CAIRP would support a limited cure period that serves the interests of the public However, we believe that the OSB should have discretion to apply conditions on restatement, such as requiring that the Trustee engage in meaningful work in the area of bankruptcy and insolvency and engage in active professional development to enable the individual to resume practice upon re-instatement of his or her licence.

4. *Determine eligibility of a Trustee to return to active estate administration status on a case by case basis*

The reinstatement of a Trustee's licence can be made on a case-by-case basis by the OSB and still maintain the public's confidence in the insolvency system. However, in the event of implementation of a nominal post-bankruptcy cure period (one year or less), we recommend that

the specific factors and circumstances of reinstatement be clearly articulated so Trustees and the public know what is expected. Further, we recommend that strict policies be implemented so that if the insolvency was the result of fraudulent activities or other wilful misconduct, re-instatement of the license would be forever precluded. It is CAIRP's recommendation that specific circumstances be identified in advance regarding the reinstatement criteria to be considered, regardless of the member's unconditional discharge from bankruptcy or emergence from the insolvency process.

In addition to the specific criteria, CAIRP recommends that the Superintendent impose certain conditions to reinstatement, including:

- That applicants be required to disclose breaches, investigations, or sanctions that may be related to the insolvency, whether criminal or non-criminal (for example, violations of securities laws), so that the OSB applies the reinstatement criteria based on full information.

- That a person applying to have his or her licence reinstated should be required to confirm their continued professional competence by way of an attestation. The attestation, which should be sworn by the applicant and by the Trustee who employed them during the period they were not licensed, should include information regarding their compliance with continuing educational requirements and the number of hours per year they worked on insolvency-related proceedings.

- That the person applying for reinstatement have an enhanced requirement for annual practice reviews or more frequent reporting pertaining to estate trust accounts (as required by Directive 5R) for a period of time.

We believe the requirements that must be met when making an initial application, including the test of financial responsibility and the requirement that the person must not have been insolvent for a given period (albeit, in our view, a period that is substantially less than five years), should also be applied on application for reinstatement.

Summary of Recommendations

We recommend that the minimum period following a Trustee's discharge or completion of an alternative insolvency proceeding until reinstatement be one year from the individual's discharge from bankruptcy or completion of the insolvency proceeding, and that the Superintendent's decision regarding reinstatement of a licence under Subsection 13.2(4) of the BIA be made on a case-by-case basis, subject to specific criteria to be set out in an amended licensing Directive.

In evaluating whether to reinstate a licence, regardless of whether the Trustee meets all the requirements, the Superintendent should have latitude to refuse to reinstate the licence if the Superintendent is of the view that the public's confidence in the insolvency system would be impaired if the licence was reinstated. (Specific examples of these extreme situations are discussed above.)

We recommend the licensing Directive specify the following criteria for consideration by the Superintendent prior to reinstate of a Trustee's licence:

- The debtor-Trustee's discharge and any conditions of discharge;
- The amount of time between the bankruptcy and the discharge of the debtor-Trustee;
- The causes of the bankruptcy;
- The number, nature, and quantum of the debtor-Trustee's creditors and their recovery;
- The nature of the debtor-Trustee's practice (number and type of files);
- The history of the Trustee's licence and of the firm at which the Trustee worked;
- The debtor-Trustee's financial situation, including cash reserves to be able to operate the business over a period of time;
- The practitioner's controls and reporting over trust accounts;
- Whether the Trustee will be working with other Trustees and will therefore be subject to internal control processes and procedures;
- Whether the Superintendent believes the former Trustee is:
    - Competent to carry on the practice of a Trustee,
    - Capable of performing the essential duties associated with his or her employment, or
    - Capable of carrying out any business or practice in which the member is engaged.

- Whether the Trustee wilfully neglected his or her creditors, was financially irresponsible, or whether his or her personal extravagance contributed to the bankruptcy;
- Whether the Trustee breached his or her fiduciary obligations, or committed any act that is, by its nature, fraudulent or subject to sanction as criminal by a court of competent jurisdiction; and
- Other factors, such as references submitted by the debtor-Trustee.

In addition to the foregoing, we recommend that the Superintendent impose conditions of re-instatement, including:

- A positive requirement to disclose any breaches, investigations or sanctions that may be related to the insolvency, whether criminal or non-criminal (for example, violations of securities laws),
- Submission of an attestation regarding maintaining professional competency during the period the individual's licence was revoked; and
- A requirement for enhanced reporting on the status of estate trust accounts from time-to-time.

While CAIRP recognizes a need for formal reinstatement criteria following bankruptcy or insolvency proceedings involving a Trustee, and we have made numerous recommendation in respect thereto, CAIRP wishes to highlight that the occurrence of a bankruptcy or insolvency proceeding involving a Trustee as the debtor is rare.

Part Two: Administrative Practices

Issue Number 5
Corporate Names

ISSUE
The Office of the Superintendent of Bankruptcy (OSB) is considering a modernized approach to corporate names, while still striving to respect the need for fairness and transparency in the marketplace that would allow for removal of the requirement that Corporate Trustee names be composed of the names of practising Trustees or accountants in the firm. The OSB envisions a policy whereby the firm name will not be accepted by the OSB if it:

a) is false or misleading;
b) contravenes professional good taste;
c) brings the profession into disrepute;
d) includes a statement or claim that cannot be substantiated by the firm;
e) causes confusion as to the real identity of the individuals in the firm;
f) consists of a purely descriptive name (for example, Ottawa Insolvency Centre Inc.) or an acronym that is not made up of the initials of individuals (for example, AAA Trustee Inc.); or
g) is not in the public interest in the opinion of the Superintendent of Bankruptcy.

CAIRP supports modernizing the approach to the use of corporate names by Trustee firms. The restriction to the name(s) of the Trustee(s) or an affiliated accounting firm is not reflective of the changing composition of those providing insolvency services and with existing practice. CAIRP agrees with the naming standards presented by the OSB in the Consultation Paper though, as explained below, we believe there should be some room for latitude with regard to the use of abbreviations[62] that have become commonly used by many accounting firms providing insolvency-related services, whether locally, nationally, or internationally.

We believe the overriding criteria or standard that must be applied should be premised on the principle that the name will not bring disrepute to the profession or to Canada's insolvency system. As well, the naming standards adopted should be considered in light of the rules of professional conduct governing other professionals, such as accountants and lawyers, and the laws governing the naming of corporations and the advertising standard applied to Trustees by way of Directive 29.

[62] Though many people refer to names such as BDO, KPMG, BGN, IBM, etc., as acronyms, they are not acronyms; they are abbreviated versions of names or words. (Acronyms are actual words formed using the first letter or first few letters of a compound term, for example: scuba, which stands for self-contained underwater breathing apparatus.)

Application of the Standards

Standards adopted for corporate names should also be applied to operating names, where they are different from the corporate name, and to the names of other organizational structures through which Trustees may provide their services, such as partnerships. Placing restrictions on corporate names but not applying the same criteria to the operating or business name in alternative operating structures affords an opportunity for abuse and detracts from the objective of the standards.

Regardless of the structure through which a Trustee delivers his or her services, we believe it is vital that high standards relating to business names be maintained to protect the reputation of Canada's insolvency system and the profession. There are potentially many corporate and/or operating names that if used by Trustees, by their nature, could be marketing-focused and could bring disrepute to the profession by commoditizing the services of the profession in a way that does a disservice to the public and to the stakeholders of the insolvency system.

The Value in a Name

It is important to remember that the name of an insolvency services firm can become extremely valuable if the public comes to recognize the firm as an organization that provides high quality advice and services. It is important, therefore, that ownership of the name be allowed so that the name itself can be transferred if the corporation, or its ownership, changes, without restricting the use of the name. Name recognition among the public is good for Trustees and for overall public confidence in the insolvency system.

Abbreviations

The standards should recognize and permit the current market reality, including the use of abbreviated versions of names and words, for example: RSM, BDO, KPMG, PWC, and E&Y. Historically, a Corporate Trustee's name had to include the name of one or more individual Trustees, the name of an accounting firm, or a combination of the two. As accounting firms merged and adopted names that were comprised of a series of letters, such as KPMG or BDO, the names of Corporate Trustees so evolved.

Global Expansion

More recently there has been an emergence within Canada and globally of speciality or boutique firms that are not associated with accounting firms and that focus on providing insolvency or insolvency-related services to, or in respect of, corporations, such as Alvarez & Marsal, Alix Partners, FTI Consulting, and Zolfo Cooper. While the origin of these names has not been researched for purpose of this submission, it is recognized that the brand value associated with these names is substantial, and while the names may lack specific reference to an individual licensed Trustee, the name is synonymous with the provision of specialized, quality services. Such names are consistent with the objective of promoting public confidence in the insolvency system within Canada.

Advertising Directive

While a standard may be developed to determine the adequacy of a corporate or operating name, it must also be recognized that Directive 29 on advertising by Trustees has an impact on the name of a Corporate Trustee. The Directive provides that:

> *A Trustee shall not advertise, directly or indirectly, in a manner that:*
>
> *a. is false or misleading;*
> *b. contravenes professional good taste or fails to uphold professional courtesy;*
> *c. reflects unfavourably on the competence or integrity of any Trustee;*
> *d. refers to the Trustee as a specialist in a particular industry or area of insolvency; or*
> *e. involves a statement, the content of which the Trustee cannot substantiate.*

Clearly, the naming standards adopted must ensure that the OSB retains the discretion to assess "taste" when it comes to the establishment of a corporate or operating name. CAIRP further acknowledges that the standard must support, and be consistent with, Directive 29 on Trustee advertising. Defining good taste and identifying factors that bring disrepute is not easy, but a set of standards that provide the appropriate guidance is vital.

Guidance Provided by Law

The names of Corporate Trustees are also subject to limitations under various corporate law provisions, both federal and provincial, depending on the jurisdiction under which the corporation is incorporated. For example, per paragraph 12(1)(a) of the *Canada Business Corporations Act* (CBCA), a corporation created under that statue is not allowed to carry on business under a name that is "deceptively misdescriptive".[63]

Under CBCA Regulation 30, a corporate name is prohibited if it is descriptive of the business of the corporation, of the services it provides, or the quality, function, or other characteristic of the services, or is primarily, or only, a geographic name. Further, Regulation 31 specifies that:

> *For the purpose of paragraph 12(1)(a) of the Act, a corporate name is deceptively misdescriptive if it is likely to mislead the public, in any language, with respect to any of the following:*
>
> *(a) the business, goods or services in association with which it is proposed to be used;*
>
> *(b) the conditions under which the goods or services will be produced or supplied or the persons to be employed in the production or supply of the goods or services; and*
>
> *(c) the place of origin of the goods or services.*

Other Professionals' Standards

Regulations governing the names under which other professionals may carry on business also are instructive. For example, the Rules of Professional Conduct of the provincial Institutes of Chartered Accountants impose restrictions on the names under which a member may carry on the practice of public accounting.[64] In provinces where lawyers are permitted to incorporate restrictions are imposed on the naming of the corporation. For example, in British Columbia the name must not be "contrary to the best interests of the public". In all, the naming standards of professional bodies are consistent with the practice of maintaining good taste and preserving, protecting, and maintaining the reputation of the profession and thereby the confidence of the public in the framework in which the professions practice.

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[63] *Canada Business Corporations Act*, R.S.C. c. C-44, para. 12(1)(a).

[64] See, for example, Sections 401 and 402 of the Institute of Chartered Accountant o f British Columbia's rules of Professional Conduct.

Summary of Recommendations

We support modernizing the naming standards where those standards serve to prevent bringing disrepute to the profession or the Canadian insolvency system, including the provisions set forth in the Consultation Paper that a firm name not be permitted if:

a. it is false or misleading;
b. it contravenes professional good taste;
c. it brings the profession into disrepute;
d. it includes a statement of claim that cannot be substantiated by the firm;
e. it causes confusion as to the real identity of the individuals in the firm;
f. if consists of a purely descriptive name; or
g. the Superintendent believes it is not in the public interest.

We specifically recommend:

- permitting the use of abbreviations in, or as, names;
- extending the naming standards beyond corporate names to all operating names and all operating structures; and
- changes in ownership of an insolvency practice not necessitate a change in the name of the practice.

Issue Number 6
Closed Company (or Private Company) and Share Ownership

ISSUES
The Office of the Superintendent of Bankruptcy (OSB) is considering adapting restrictions on Corporate Trustees to allow for a variety of corporate structures; however, it is thought to be necessary to restrict the corporate entity to one that does not offer shares to the public. Other restrictions on control of the corporate entity being in the hands of an active Trustee are also being considered.

The Directive requires that a Corporate Trustee must be a private or closed company[65] (depending on the term used in the jurisdiction of incorporation). We understand that the OSB's rationale for this requirement was to ensure that Trustee firms not be listed on a stock exchange. In many jurisdictions the concept of a private or closed company has been replaced with concepts of distributing companies or reporting issuers. As the Consultation Paper points out, the fact that

[65] A private or closed company typically has fewer than 50 shareholders, is prohibited from offering securities to the public, and the transfer of shares requires approval of the Board.

closed corporations no longer exist in many Canadian jurisdictions creates difficulties for enforcing the Directive on Trustee licensing. For that reason, and others that we discuss below, reconsideration of the rules related to the ownership of Corporate Trustees is timely.

Under the BIA and the Directive there are no restrictions with regard to who may hold shares of a Corporate Trustee. The Directive does, however, require that the majority of directors and officers of a Corporate Trustee be Trustees. The Directive further provides that the business of the Corporate Trustee must be limited to those activities normally undertaken by a Trustee.

In Canada, Corporate Trustees have traditionally been owned by a firm offering accounting, assurance, and management advisory services, and whose owners may include one or more Trustees. While not owned by public companies, Corporate Trustees affiliated with the larger Canadian and international accounting firms are effectively owned by many partners, often hundreds and quite possibly thousands, and can be larger than many public companies, both financially and in the number of owners.

Speciality or boutique firms owned, at least in part, by non-trustees, have emerged both within Canada and globally. While these organizations are not associated with accounting firms, they are focused on providing insolvency or insolvency-related services to corporations. In both the United States and United Kingdom there are insolvency and restructuring firms that are directly or indirectly listed on stock exchanges, which means their securities may be acquired by the public.[66] In many of these situations, insolvency and restructuring engagements are taken on by one or more of the public company's wholly-owned subsidiaries rather than by the public company directly. In many cases, the publicly traded holding company owns a number of entities, some of which are branches or subsidiaries that operate in specific countries, and some of which offer services other than insolvency and restructuring services.

Reasons for Carrying on Business Through a Corporation

By far the most common structure through which insolvency and restructuring services are provided in Canada is through corporations. Indeed, the vast majority of insolvency and restructuring engagements (greater than 99%) are undertaken by Corporate Trustees.

[66] Examples include FTI Consulting, Inc. (USA), Huron Consulting Group Inc. (USA) and Begbies Traynor Group plc (UK).

There are a number of reasons Trustees often prefer to provide insolvency and restructuring services through a corporation. For example:

- Debtors that are insolvent and/or undergoing a restructuring may operate nationally or internationally and may have operations and assets in multiple jurisdictions. Therefore, it may be easier to provide insolvency and restructuring services through a corporation that also operates nationally or internationally or that may be extra-provincially registered to permit the efficient operation of the entity in multiple jurisdictions;
- Even in the absence of a particular Trustee from his or her office, timely execution of documents and financial transactions can continue uninterrupted when multiple officers are available to make decisions or execute documents on behalf of the Corporate Trustee;
- A corporate form provides limited personal liability protection to the shareholders; and
- A corporation may be more readily sold or otherwise transferred, in whole or in part, to another shareholder, making succession and the introduction of additional owners easier.

In addition, there are potential tax benefits of operating an insolvency and restructuring practice through a corporate entity. Being able to efficiently capitalize a Corporate Trustee practice with after corporate tax retained earnings provides an advantage to new and growing firms, as well as to Trustees looking to establish a new practice or acquire an existing one. In addition, increasing amounts of capital are required to ensure timely, efficient, and effective execution of a Trustee's work. Trustees are also facing increased capital requirements because estates are remaining open for longer periods and because mismatches in the timing of collection of revenue and payment of expense reimbursements are resulting in an increasing need to fund accounts receivables and work-in-progress. Having a corporate structure provides Trustees a more efficient means to raise capital to meet these financial demands.

Possible Concerns Related to Ownership

CAIRP recognizes the potential risk of conflict, whether real or perceived, between the objectives of the owners of a Corporate Trustee and the provisions of the BIA should restrictions not apply. CAIRP is also cognizant of a potential conflict of interest that could arise for a Trustee who is a minority director of a corporation, since he or she may have conflicting duties related to administering an insolvency or restructuring engagement versus maximizing returns for the corporation's shareholders, especially where there are non-trustee shareholders who may have no

interest in the activities of the corporation other than as an investor. Finally, CAIRP recognizes that the interests of a Corporate Trustee's significant shareholder may conflict with the Trustee's obligations regarding a particular matter if the shareholder also has an interest in that matter, such as being a creditor of, or an investor in, a debtor.

While we believe that the possible existence of such conflicts does not require a limitation on the ownership of a Corporate Trustee, as any real threats posed by such potential conflicts can be effectively mitigated through restrictions, as are discussed below, we have recommend limitations to the ownership structure of the Corporate Trustee as a means of resolving even the perception that a conflict could exist.

Responsibilities of directors generally

Under Canadian corporate statutes, the duty of directors is to manage, or supervise the management of, the business and affairs of the corporation. Directors, as fiduciaries, are held to a high standard of loyalty and good faith in their conduct in relation to the corporation. This duty has been codified in corporate statutes that require directors to act honestly and in good faith with a view to the best interests of the corporation. This duty of loyalty and good faith requires, among other things, that each director must act in the best interests of the corporation, as opposed to in his or her own interest or those of a particular constituency (such as a controlling shareholder, a class of shareholders, creditors, or others). Corporate directors are required to act in the best interest of the corporation and to ensure that the interests of the shareholders are advanced.

BIA and professional requirements

Trustees must always monitor their actions and the actions of those reporting to them, ensuring that their relationships with others who may have an interest in an insolvency and restructuring engagement, or its outcome, do not impair their professional judgement or objectivity. Our experience shows that CAIRP's members are skilled at recognizing and managing such conflicts. For example, CAIRP members who are affiliated with accounting firms are accustomed to dealing with such conflicts because they must comply with the increasingly restrictive rules concerning auditor independence while offering Trustee services in situations where some of the firm's assurance clients may have a material interest in the debtor, for example, as a creditor or potential purchaser.

Ultimately, the Trustee(s) associated with the Corporate Trustee licence have obligations to carry on their practice in accordance with the provisions of the BIA, including the requirement under section 13.5 to comply with the prescribed code of ethics as outlined in rules 34 to 53, and, where Trustees are members of CAIRP, with CAIRP's Rules of Professional Conduct and Standards of Professional Practice. Given this, perceived conflicts of interest do not translate into real conflicts Trustees cannot handle.

Forms of Ownership by Non-trustees

Public

While we believe a Corporate Trustee may be widely held without resulting in additional risk to the insolvency and restructuring system in Canada if appropriate safeguards are put in place, we have not made this form of ownership the foundation for our recommendation. Statutory limits on the percentage a single owner may hold are common in regulated entities, for example, Canadian banks, and limiting the ownership interest of individual shareholders in Corporate Trustees could provide a safeguard against a Trustee failing to satisfy his or her obligations in providing insolvency and restructuring services. In setting the limit any shareholder might be permitted to own, the Superintendent could balance the need for independence and the need to attract large, stable investors like mutual funds and pension funds. The Superintendent could also look to rules established under securities legislation regarding the definition of what shareholding constitutes a "significant interest".[67]

We also recommend that, regardless of whether there is a significant shareholder, such organizations could be required to have robust processes and procedures to ensure they appropriately manage conflicts of interest and activities that might bring disrepute to the organization or that might cause it to be seen as not operating to the highest standards. Given the damage that can be caused to their reputation, their share price, and their ability to attract potential directors, such companies have plenty of incentive to ensure they operate to a high degree of integrity.

[67] Typically Canadian securities legislation defines a significant interest as ownership of 20% of the shares.

Private

We also believe that private equity investment should be permitted in Corporate Trustees that do not offer their shares to the public. Because private equity investors usually take significant positions (in many cases 100%) in the entities in which they invest, limiting private equity investment, either directly or indirectly, in a Corporate Trustee will likely limit private equity investment.

We are of the view that investment safeguards could apply, such as an attestation from an equity investor that acknowledges (in writing):

- The Trustee's obligations to the estates the Trustee manages;
- The Trustee's obligations to stakeholders;
- The Trustee's obligations to maintain the reputation of the insolvency system; and
- The investor's recognition of the fact that the Trustee may be required to take actions that are not necessarily consistent with, or that may be adverse to, the corporation's shareholders.

Such an acknowledgement, coupled with the current requirement that the majority of officers and directors must be Trustees, as stipulated by restrictions in the articles of incorporation, should help ensure the public interest is served while increasing the likelihood that Corporate Trustees will have access to private equity to meet growing needs and promote access to entry and competition.

Summary of Recommendations

Since many jurisdictions no longer recognize the concept of a private or closed company, CAIRP recommends repeal of the requirement that a Corporate Trustee be a closed or private company. CAIRP further recommends that investment in Corporate Trustees (either directly or indirectly) should be allowed, whether via private equity or through the public markets, subject to the following restrictions:

1. The entity whose securities are offered should be a parent company or other offering entity (such as a partnership) that owns 100% of the Corporate Trustee and the following rules should apply to the parent entity:

a. No shareholder, unit holder, or other beneficial owner of the parent, other than a Trustee employed by, or active in, the business of the Corporate Trustee may own (directly or indirectly) more than a specified percentage of the issued and outstanding securities of the Corporate Trustee. (All securities convertible into common equity should be taken into account when determining whether an investment is within the ownership limit.)
b. At least one of the parent company's directors must be a Trustee employed by, and active in, the Corporate Trustee.
c. Appropriate processes and procedures must be put in place in the parent company to identify potential conflicts of interest between the parent company's significant shareholders and the Corporate Trustee's activities.
d. Significant shareholders of the parent company holding ownership of the controlling shares that would permit significant influence to be exercised in respect of the Corporate Trustee should be required to execute an attestation acknowledging the obligations of the Corporate Trustee outlined above.

2. The following rules should apply to the Corporate Trustee:
    a. Its articles of incorporation should specifically restrict its activities to those of a Trustee or those functions normally carried out by a Trustee.
    b. The majority of its officers and a majority of its directors must be Trustees.
    c. Trustees who are officers and directors must be employed by, and active in, its affairs.
    d. Appropriate processes and procedures must be in place in the Corporate Trustee to identify potential conflicts of interest between the holding company's significant shareholders and the Corporate Trustee's activities.

Part Three: Fiduciary Duties of Trustees

Issue Number 7
Licensing Fees

ISSUE
The Office of the Superintendent of Bankruptcy (OSB) is considering whether annual licensing fees for Trustees should be tiered or subject to a scale of fees where the Trustee's performance has resulted in higher supervision costs by the OSB. Some of the possible options being considered are:

1. Require that Trustees with sustained compliance concerns pay a higher licensing fee to better defray the added costs of the supervision they require.
2. Establish performance criteria that could be used by the OSB to determine if a Trustee should be subject to a higher licensing fee.
3. Establish a period of time over which a Trustee's performance would be judged unacceptable to warrant a higher licensing fee.
4. Establish a time frame (for example, six months) during which a Trustee has notice to put his/her practice into compliance to avoid imposition of increased premiums.
5. Set an amount for the licensing fee of a Trustee whose performance remains unacceptable.

All Trustees, whether corporate or individuals, currently pay an annual licensing fee of $850. The OSB is considering a licensing fee regime under which a Trustee's annual license fee would be dependent on the Trustee's compliance status. Conceptually, such a regime recognizes that when a Trustee's actions result in the OSB incurring higher supervision costs, the Trustee should pay a higher fee.

Role of the OSB

The OSB supervises the performance of Trustees to ensure they comply with their duties under the BIA and the CCAA, including the rules, directives and other governing legislation. The OSB's supervision includes review of Trustee practices and complaint investigations. The OSB uses a variety of tools and approaches so that it can focus on the areas it considers involve greatest risk of non-compliance.

As noted, all Trustees currently pay an annual licensing fee of $850, whether they are active or not and regardless of the level of supervision they required from the OSB. As a result, Trustees who are continually in compliance with the requirements of the BIA pay the same annual fee as those who are not, even though the latter require a higher level of supervision and, in a few cases

even require initiation of proceedings against them for sanctions or to suspend or terminate their licence. In effect, compliant Trustees subsidize[68], at least in part, non-compliant ones.

One of reasons the government regulates particular professionals is that consumers may have little or no ability to assess the quality or competence of the professional offering the service. Licensing and regulatory oversight, whether through governmental agencies or self-regulated institutions, helps insure the public has access to qualified professionals, such as doctors, lawyers, chartered accountants, and in the case of the OSB oversight, Trustees. The licensing and regulation of these groups also result in limiting those who become licensed professionals and this potentially results in a higher cost for such services than might otherwise occur in an unregulated market. Balancing the protection of the public, ease of access to those seeking assistance, and the cost to the public requires continual monitoring.

Costing Model

It is increasingly common for governments to adopt a cost recovery approach to cover the cost of licensing and the regulation of participants in a particular market sector. The intention of cost recovery approaches is to appropriately allocate the cost, not to generate a profit or contribute to other areas of the regulator's activities. Where regulators use the cost recovery approach, the cost of issuing and supervising the licensee is assessed against the licensee. In Australia, for example, the government operates on a cost recovery basis and seeks to recover its costs unless there is some overriding policy reason not to. So, given that the insolvency practitioner is a beneficiary, in Australia they are assessed a fee.[69]

There are a number of different models for allocating the cost of licensing and supervision, for example:

- A flat annual fee;
- Graduated annual fees based on a transparent and determinable basis of measurement (likely some form of risk assessment) that results in those requiring increased supervision paying more than those who do not;

[68] Trustees' annual licence fees are not retained by the OSB as revenue; they become part of the Consolidated Revenue Fund. However, some of the OSB's costs are covered out of the equivalent of appropriations.
[69] International Association of Insolvency Regulators; *Revenue and User Fee Study*

- An allocation of the cost of regulation and supervision based on identifiable financial data so that the costs are allocated based on either size or ability to pay;
- A low annual fee coupled with an additional amount that equates to the additional cost of supervision and monitoring due to increased risk of failure or loss; and
- A combination of the above.

Where the model adopted has licensees paying differing amounts, the total recovered by the regulator should cover the costs of supervision and monitoring. For example, if each Trustee pays an equal amount of $850 and there are 1,017 Trustees, then the total cost recovery pool is $864,450. If 95% of all Trustees are fully compliant and pay a lower annual fee (say $800) then the remaining 5% would have to pay approximately $1,800 each to generate approximately the same total cost recovery amount.

Risk Assessment Models

The use of risk assessment models as a basis for focusing the level of regulatory supervision and monitoring on a particular entity is well accepted. For example, the Office of the Superintendent of Financial Institutions (OSFI) has, as part of its supervisory framework, a Composite Risk Rating. This rating is an assessment of the institution's overall risk profile and reflects OSFI's assessment of the institution's safety and soundness. OSFI has four levels of risk rating that reflect increasing risk of failure. In assigning a level, OSFI considers the unique circumstances of the financial institution including: nature, scope, complexity, and risk profile.

Another approach to the setting of annual fees or premiums is to apply an insurance-type approach: the greater the risk of potential loss, the higher the premium. Again, using the financial sector as an example, the premiums that deposit taking institutions are required to pay to the Canadian Deposit Insurance Corporation (CDIC) are based on risk.

Each year the CDIC assesses each of its member institutions and classifies them into one of four premium categories based on confidential risk ratings from OSFI. The category determines the rate applied to the insured deposits, which in turn establishes their premium for the year.

In Australia, the Insolvency and Trustee Service Australia (ITSA) is an Executive Agency under the Attorney-General's portfolio. ITSA administers the personal insolvency system but is not

involved in corporate insolvency matters. In carrying out its mandate ITSA monitors insolvency professionals based on six core areas: registrations and renewals; inspections; education; complaints; Inspector-General reviews, and disciplinary actions. From these the ITSA assigns a risk rating from 1 to 4 for each practitioner.

Other Professions

The provincial Institutes of Chartered Accountants each require their members to pay the same annual fee.[70] In addition, in some provinces CAs in public practice also have to pay an annual licensing fee. For example, a member of the Institute of Chartered Accountants of British Columbia pays $1,086.75 annually.[71] In addition, if they are in public practice they must obtain a provincial licence to practice. There is a $250 evaluation fee to get a licence and for a sole practitioner with no students the fee for the licence is $630. As well, the member must carry professional liability insurance, the premium for which is based on a number of factors, including the number of CAs in the practice, the level of risk, and the level of insurance coverage. Unless there is a professional conduct matter that results in some form of disciplinary action there are no additional provincial fees.

Trustee Compliance

Proceedings related to administering BIA estates or CCAA are part of a legal process. The legislation, rules, directives, and standards of practice are integrated and designed to promote an efficient and effective insolvency system in which the stakeholders and public have confidence. Trustee non-compliance increases the risk that losses will be sustained by stakeholders and requires the OSB to incur additional costs to monitor and supervise the non-compliant Trustee. Because the licensing fees are the same for all, the fee structure does not provide any sort of penalty for those who do not comply, nor does it provide any incentive to comply.

Trustees who take steps to ensure compliance incur costs to institute processes, systems, and controls. As a result, they face costs over and above the licence fee. Trustees who are non-compliant who have not implemented the necessary processes, systems, or controls likely have

[70] Reductions are available it specified criteria such as inactivity or age.
[71] A prime member plus CICA dues.

lower operating costs than those who comply. In effect, at least over the short term, those not in compliance may be getting what amounts to a free ride.

In a perfect world, if someone meets the minimum compliance standards they should be entitled to a licence and would pay a flat fee for it and someone who does not meet the minimum standards would simply not be issued a licence. Unfortunately, we do not live a perfect world and someone may have met the standards at the outset, but with the passage of time, or for a variety of reasons, he or she might begin to fail to meet the minimum requirements. Keeping with the spirit of rehabilitation, which is a founding principle behind the Canadian insolvency system, the OSB's approach has been to deal with these situations on an individual basis. This approach requires additional monitoring and supervision and so additional resources are directed to rehabilitating non-compliant Trustees. Thus there is an argument for levying an additional fee or cost on non-compliant Trustees.

Annual Fee Options

Based on the different models outlined above, there are a number of alternatives the OSB can consider:

1. Use a risk rating approach to assess all Trustees and those with the same risk rating pay the same amount.

   This approach is relatively straightforward. It assumes that each Trustee having the same rating[72] has similar issues or issues that require a similar level of monitoring and supervision. As any risk rating system has some degree of subjectivity, this approach is not necessarily reflective of the actual cost of the resources deployed. It does, however, offer a level of predictability since the fees for each level can be set in advance based on the best estimate of the activity levels at each risk rating for the coming budget year. For

[72] It is imperative that the risk rating assigned to each Trustee be kept completely confidential and known only to the OSB and the Trustee. It should never be disclosed to the public and not seen as an approval rating. To do otherwise undermines the public's confidence in the insolvency system. The Trustee should be advised in writing that they are not compliant including a description of the nature and scope of their non-compliance and non-compliant Trustees should have a period of time to come into compliance, for example, say six months. If they have not rectified the non-compliance as required, then they are assigned the rating and assessed accordingly. In addition, if the Trustee believes the rating assigned is incorrect, the Trustee should have a simple straightforward right of appeal, which must be lodged within 21 days of receiving the notification of non-compliance.

this approach to function properly the difference between the levels should be meaningful and should represent a best estimate of the costs incurred as a result of monitoring those at each level.

2. Assess all Trustees the same annual amount with those Trustees who have elevated risk ratings assessed an additional supervision and monitoring fee based on their risk rating.

   This approach treats all Trustees the same for the licence fee but assesses those who are at higher risk levels an additional amount. This approach is a derivation of alternative 1 above.

3. Assess all Trustees the same annual amount and, for those Trustees who have elevated risk ratings, assess an additional supervision and monitoring fee based on the actual time spent by the OSB carrying out monitoring and supervision that is in excess of the costs associated with monitoring a compliant Trustee.

   This approach has the benefit of driving home to non-compliant Trustees the fact there are costs associated with them being offside. This approach requires the OSB to keep track of staff time on each case and the establishment of a per diem rate for that time. The cost to the Trustee would not be easily predicted but it would reflect the actual additional costs incurred by the OSB.

Approaches involving annual licence fees that are tiered or scaled to reflect the higher costs of supervision are advantageous for the following reasons:

- Compliant Trustees are not penalized by having to fund the extra costs of supervision of Trustees who are not;
- Compliant Trustees are rewarded for ensuring they have the appropriate processes, systems, and controls;
- Compliant Trustees will likely enjoy lower premiums for both general and estate bonds, if required. (This would require sharing of risk ratings with the insurance company issuing the bond, which would require the OSB to allow a permitted exception to the confidentiality of the OSB's rating);
- Non-compliant Trustees have an incentive to correct, on a timely basis, their non-complaint activities; and

- The resources of the OSB required for increased supervision are replenished, which means their other mandated activities are less likely to be squeezed out.

We believe the basis on which the OSB determines the degree of non-compliance should be set out in a clear, succinct manner, including the time frames within which such assessments are to be made. Also, because even the most rigorous processes and systems will not ensure 100% compliance, it is important to establish a materiality threshold before a Trustee is assigned to a particular level regarding his or her non-compliance. Factors that the OSB might consider in determining this threshold include:

- the nature and frequency of the non-compliance;
- whether the Trustee detected the non–compliance on their own;
- whether the Trustee took proactive corrective action;
- whether the Trustee's breach resulted in a loss to stakeholders;
- whether the Trustee's non-compliance is systemic; and
- the Trustee's history of past non-compliance.

Furthermore, CAIRP believes there should be four levels, or stages, to reflect different degrees of non-compliance, i.e., four risk categories.

Where a sole practitioner is non-complaint the application of an additional fee is straight forward. Where there are multiple Trustees and multiple locations, additional considerations may need to be taken into account in determining whether it is an individual or the Corporate Trustee that should be assessed. Factors that may be taken into account include:

- Whether the non-compliance is attributable to a single Trustee or is organization-wide;
- Whether the non-compliance is attributable to a single location or is organization-wide;
- Whether the Corporate Trustee has a single Trustee at each of its locations who takes responsibility for every filing or whether the specific Trustee who is handling the estate takes responsibility;
- Whether the corporation has oversight processes and procedures (for example, annual audits of trust accounts, internal control audits of each Trustee and/or location) that identify matters of non-compliance and whether the OSB is able to rely on such processes; and

- The rigour the Corporate Trustee demonstrates in correcting non-complaint activities of its Trustees.

Summary of Recommendations

CAIRP recommends the OSB review the issue of annual fees paid by Trustees and institute a cost recovery system to reward compliant Trustees and penalize non-compliant Trustees. To achieve this, we believe a Trustee's annual licence fee should be paid based on the OSB's determination of which of four risk categories the Trustee falls into.[73]

The criteria the OSB uses to determine the risk rating levels should be disclosed on the OSB's web site, with the OSB retaining discretion to make findings that reflect the risk and to protect the functioning and reputation of the insolvency system. We recommend that, including the compliant category, there be four levels of compliance reflecting degrees of non-compliance and, therefore, risk to the system. The fees assessed at each of these levels should increase geometrically from the base fee paid by compliant Trustees and the amounts should be significant enough to encourage compliance and not be seen by Trustees as simply a cost of doing business.

With regard to Corporate Trustees, we recommend the OSB assess risk for each Trustee within the corporation separately. If, however, the OSB determines that there is pervasive risk among the Trustees practicing within a Corporate Trustee and the Corporate Trustee is not proactively taking steps to reduce the risk, the OSB should retain the right to risk rate all the trustees in the corporation at a higher rate than what each individual might have been rated.

The category and rating assigned to each Trustee or Corporate Trustee should not be disclosed to the public, as doing so might create confusion and those paying the lowest annual fee might be seen as have earned a badge of approval, which is not the intent of such determinations.

CAIRP recognizes that while the OSB currently maintains a Trustee Risk Assessment Model (TRAM), this model may not be suitable for purpose of risk categorization. CAIRP recognizes that for the OSB to effectively implement a model to risk categorize Trustee for purpose of

[73] In determining if a Trustee is non-compliant there should be a margin or buffer between being fully or 100% compliant and non-compliant. While the goal of all Trustees should be to achieve 100% compliance, errors occur and unless they are systemic in nature, or unless a number of failures occur on a regular basis, the Trustee should remain rated as compliant.

assessing an appropriate annual fee will require the OSB to develop a substantive model principled on identifiable and measurable metrics. CAIRP anticipates that the development of such a model would require a commitment of substantial resources and time. Therefore, and in the alternative, CAIRP would recommend the OSB adopt a direct cost recovery system whereby the OSB simply bills higher risk Trustees for the actual cost (based on a per diem rate and to a capped limit) of the additional supervision/audit the OSB incurs as a result of their behaviour. This alternative approach achieves the objectives of deterring unacceptable practice and of recovering costs of supervision of the higher risks Trustees.

Issue Number 8
Succession Agreements

ISSUES
The Office of the Superintendent of Bankruptcy is considering the following options regarding succession agreements:

1. Make it a condition to practice that Trustees have "succession agreements" in place with successor Trustees in the event of their deaths, incapacity or other factors that may prevent them from performing engagements.
2. Monitor/ensure, on an annual basis, that succession agreements remain valid and meaningful.
3. Take appropriate steps where there is no succession agreement in place.
4. Establish exceptions to the requirement to have succession agreements for certain Corporate Trustees.

CAIRP is in favour of making it a condition to practice that Trustees have succession agreements in place with successor Trustees in the event of their death, incapacity or other factors that may prevent them from performing their duties in various engagements.

Risk to the Marketplace

The risk to the marketplace associated with the death, incapacity, or other cause that fundamentally prevents a licensed Trustee from fulfilling his or her duties is one that cannot be assumed by the creditors and other stakeholders. Continuity in the administration of estates must be achieved and the interests of creditors and other stakeholders safeguarded.

The incapacitation of a Trustee, particularly a sole practitioner, can have many negative consequences to the estates he or she is in charge of, such as:

- Higher costs incurred by stakeholders;

- Lack of continuity within the administration of the estates and/or various insolvency mandates;
- Incomplete or untimely decisions taken with regard to estates, which could mean lower yields to creditors, or other disadvantages to debtors or creditors;
- Complete halt of all operations within the firm, such as the distribution of dividends to creditors, release of certificates of compliance, or certificates of discharge to debtors, disallowance of proofs of claims, chairing of meetings of creditors;
- Potential loss of key employees; and
- Financial losses being suffered by the Trustee's family and heirs.

CAIRP's Commitment to Leadership

Given the average age of CAIRP's members[74], the fact that approximately 68 percent of the active Trustee firms are sole practitioners[75], and the fact that many of CAIRP's members do not have succession agreements, CAIRP has developed and distributed to members a model practice continuation agreement (succession agreement).[76]

While this model agreement was provided to CAIRP members on the assumption that it would serve the interest of members, it has not been mandated. Currently only a Trustee seeking a multi-jurisdictional licence through application to the OSB (a licence to practice in more than one province)[77] is required to establish a succession agreement with another Trustee in good standing with the OSB (such agreements are not in the form of the continuation agreement developed by CAIRP).

Trustees are not obligated to establish a succession agreement to ensure the continuation of a practice as a result of catastrophic events that lead to incapacitation or other adverse circumstances that prevent a Trustee from fulfilling his or her duties. (Indeed, even if it were

[74] According to statistics set forth in Annex K of the Consultation Paper, the average age of Trustees is 51, which is six years older than the average age of Trustees in 1992, while over the same period the average age of the general population increased by only three years.
[75] Id.
[76] Available in the Members only section of the CAIRP website at : HTTP://www.cairp.ca/membership/memdoc/CONTINUATION %20 AGREEMENT%20TEMPLATE.doc
[77] "The Trustee must conclude a succession agreement in case of death, incapacity or other factor that could prevent him/her from performing engagements. He or she must ensure at all times that there is a successor for the files being administered. This criterion is mandatory in view of the risks inherent in leaving estate files without Trustees." From the Policy on Multi-Jurisdictional Licenses issued by the Office of the Superintendent of Bankruptcy (OSB) effective July 1, 2006.

mandated for CAIRP members, Trustees who are not members of the association would not be covered by the requirement.)

Consistent with our own efforts, CAIRP supports requiring all Trustees to maintain current and effective succession agreements. Further, CAIRP is in favour of yearly monitoring by the OSB of the validity of the succession agreements in place. To this end, CAIRP would support a requirement that individual Trustees be required to submit to the Designated Senior Bankruptcy Analyst a summary of the succession agreement as between the attesting party and another Trustee in good standing with the OSB. In addition, CAIRP would support a requirement that the Trustees annually attest to the validity of the succession agreement, including any material changes to the succession agreement. This attestation could be filed with the Annual Banking Report, as per Directive 5R4 – Estate Funds and Banking, Section 10(1) or, alternatively, with the payment of the annual licensing fee.

CAIRP recognizes that certain Trustees, because of the nature and number of estates within their practices, may have difficulties in finding a successor Trustee. As such, CAIRP is willing to assist the OSB in finding a successor Trustee by, among other things, providing a list to the OSB containing the names of Trustees, members of CAIRP in good standing, who are willing to act under those circumstances.

With respect to Trustees that refuse or neglect to establish a succession agreement, as opposed to those that actively seek a successor Trustee without success, CAIRP recommends that the OSB consider this in the risk assessment of individual practices, including in respect to the setting of fees, practice reviews and other actions that would serve to protect the interests of all stakeholders of the bankruptcy and insolvency system. CAIRP strongly believes that the interests of creditors and other stakeholders should not be prejudiced in any way by the failure of a Trustee to have a valid and enforceable succession agreement.

CAIRP is mindful of that fact that, while it recommends succession agreements should be mandated, individual Trustees will need time to implement such substantive agreements within their practices. Given this, CAIRP believes it would be reasonable to allow Trustees two years to comply with the requirement of entering into a succession agreement.

CAIRP believes all Trustees can benefit from entering into succession agreements. Though estates or mandates of a corporate nature are generally registered in the name of the Corporate Trustee, an individual Trustee must always be named as the administrator of the estate and, as such, each individual Trustee within the corporate firm should have a personal succession agreement naming one of the partners or another licensed Trustee within the firm as his or her successor Trustee.

Summary of Recommendations

CAIRP recommends that:

- As a condition to practice all Trustees must have a valid succession agreement in place within two years of the coming into force of a provision requiring succession agreements;
- All Trustees should be required to provide the OSB with proof that they have a valid succession agreement, including a summary of its substantive terms;
- At the time of filing the Annual Banking Report or, alternatively, with the payment of the annual licensing fee, all Trustees should be required to file an attestation as to the validity of the succession agreement, including a requirement to detail any material changes to the succession agreement;
- No Trustee, whether individual or corporate, should be exempt from this obligation.

As noted, CAIRP has developed a template continuation agreement that could serve as the foundation for Trustee succession agreements. The template agreement contemplates a variety of circumstances, such as:

- The death, disappearance, or long-term incapacitation of the Trustee, all of which would require the disposition or liquidation of the practice;
- The short-term incapacitation of the Trustee, which would require the management and continuation of the practice for a period of up to six months; and
- The voluntary absence of the Trustee from the practice on a temporary basis.

CAIRP believes adoption of the continuation agreement as the foundation for a succession agreement could serve the interests of the OSB and public stakeholders and would aid in implementation of the recommendations described here.

Issue Number 9
Annual Licensing Report

ISSUE
The OSB is considering whether it would be appropriate to require that Trustees file an annual licensing report with the OSB that would include information such as financial statements, self-identification of non-compliance matters, self-reporting of complaints received and resolutions, details of professional liability insurance coverage and confirmation that a succession agreement is in place. In particular, the OSB is considering the following options.

Annual Report

1. Require Trustees to submit an annual report to the OSB containing information such as financial statements, self-identification of non-compliance matters, self-reporting of complaints received and resolutions, details of professional liability insurance coverage and confirmation that a succession agreement is in place.
2. Whether there are any options aside from submitting an annual report that would allow the OSB to receive financial statements, details of professional liability insurance coverage and confirmation that a succession agreement is in place on an annual basis.
3. What action should be taken by the OSB if Trustees fail to comply with a requirement to submit an annual report.

CAIRP generally supports requiring Trustees to file an Annual Licensing Report (Annual Report) but we have concerns regarding some of the items the OSB is considering including in such a report, namely:

- Self-identification of non-compliance matters – We support self-identification of non-compliance matters by Trustees on condition that the OSB establish identifiable standards against which performance or non-performance can be assessed, materiality guidelines, and a clear protocol for reporting by Trustees and responding by the OSB. While self-identification of non-compliance matters is a laudable goal, such a goal could be problematic because of issues related to interpretation and subjectivity. CAIRP has the following specific concerns:

  - Trustees' actions are governed by many different acts, including, among others: the BIA, CCAA, and the *Wage Earner Protection Program Act* (Canada). As well, many of the roles they perform, including as receivers, monitors, and in other agency capacities, are subject to, and governed by, orders of the court. Non-compliance in relation to all the directional documents prescribing Trustees' activities can range from simple administrative breaches (such as failure to file a report within a specified time) to fraudulent activity (for example, theft of funds from a trust fund). Requiring Trustees to report every breach is not realistic, nor would it serve the interests of the stakeholders. To this end, CAIRP is concerned that a general requirement for self-reporting of non-

compliance matters, without a fair bit of specificity, could lead to voluminous reporting of non-material matters, all of which would be subject to review and a waste of economic resources;

- CAIRP is further concerned that a general requirement for self-identification of non-compliance matters, without a clear articulation of the key standards subject to reporting, could result in widely varying interpretations being applied by Trustees, with those facing the greatest degree of non-compliance perhaps applying the most liberal interpretation of the reporting standard;

- While we are aware that concerns have been expressed by some in the Trustee community that the OSB compliance model: (i) is premised on finding areas of non-compliance so it can impose punitive remedies (that sometimes seem to bear no relationship to the seriousness of the offence), as opposed to a model premised on promoting better practices and (ii) does not apply the same standards in a consistent manner across the country, CAIRP does not share this sceptical outlook about the OSB and we understand that the OSB is taking steps to ensure it applies compliance protocols consistently. CAIRP is concerned that until the Trustee community buys into the conceptual shift taking place within the OSB, self reporting will be viewed through "tainted lenses". To this end, we believe the reasons for self-reporting should be clearly articulated. CAIRP, as a key stakeholder, would be happy to assist the OSB in defining the protocols and will work, through consultation, to help mitigate areas of concern prior to implementation; and

- Finally, CAIRP is concerned that the OSB's response upon receipt of all this information would have to be coordinated nationally, to ensure responses to the reporting of non-compliance by Trustees is measured, predictable, and consistent; so that the end result of the reporting is credible and trustworthy.

Based on the foregoing, CAIRP supports a self-reporting standard that clearly:

- identifies the objectives of the program to promote enhanced practice standards;
- articulates identifiable standards subject to self-reporting in the event of a breach;
- establishes a threshold of materiality, such that there is a clear delineation between compliance and non-compliance;

- establishes a protocol for reporting by the Trustee to the appropriate authority at the OSB, including the form of reporting and time line within which reporting must occur. Such protocol must include not only identification of the breach but also ways of remedying non-compliance;
- requires that the OSB respond to the self-reporting within a set time and that it provide the Trustee with a clear statement of the its position regarding matters of concern; and
- ranks, or categorizes, the non-compliance metrics such that there is predictability in response to the reporting to the OSB.

- Self-reporting of complaints received and resolutions – We believe self-reporting of complaints should not be included in the Annual Report. Despite a Trustee's best efforts to balance the interests of various parties, the almost inevitable result of the Trustee's performance of his or her duties under the governing legislation is that there is an aggrieved party (for example, a debtor who has to pay additional amounts or a creditor that believes they are not recovering enough). As a result, Trustees are often subject to complaints. Because well developed, fair processes already exist for aggrieved parties to file complaints (for example, with the OSB or with CAIRP if the Trustee is a member) self-reporting of complaints and resolutions in an Annual Report would be duplicative and excessive. With respect to CAIRP, there is a well defined and active Professional Conduct Committee that pursues complaints levied against members; such investigation includes the appropriate consultations, hearings and findings that promote public confidence in the outcome. The Professional Conduct Committee is empowered to levy against a member penalties for breaches of standards of professional practice and for failure to comply with other governing protocols. The sanctions imposed can range from a written reprimand to expulsion from the association. As a result, CAIRP is confident that it addresses complaints in a fashion that is timely and thorough so additional self-reporting is unnecessary.

- Consequences for failure to file an Annual Report – we believe the consequences for failing to file an Annual Report should be clearly articulated in a standard. We believe the OSB should consider the following possible consequences:
  - an audit to be conducted by the OSB, including confirmation of all estate bank accounts reported on the most recent Annual Banking Report. The cost of such audit should be borne by the non-compliant Trustee;

- a protocol for assessing the basis of non-compliance, that if warranted triggers an increase in the risk rating of the Trustee and resultant increase in annual fees, levies, and the like; and
- such other remedies as the OSB sees fit having regard to the seriousness of the non-compliance and to promote compliance in the future.

The OSB and all stakeholders are entitled to assurance that Trustees adhere to the highest professional and ethical standards in the administration of their practice. Ensuring the public continue to regard Trustees as trustworthy professionals is a primary objective of both the OSB and CAIRP. We believe the filing of an Annual Report could serve as an efficient vehicle for assessing compliance and ensuring Trustees are carrying out their fiduciary responsibilities.

Issues (*continued*)

Financial Statements

1. Require both individual and Corporate Trustees to submit to the OSB, on an annual basis, financial statements that would attest to both their solvency and level of financial resources to run the Trustee's practice.
2. Whether a specific format for financial statements should be used by Trustees if they are required to submit them on an annual basis (statement of net worth, unaudited statements, audited statements).
3. What action should be taken by the OSB if Trustees fail to comply with a requirement to submit financial statements.
4. Whether any exceptions should be made to a requirement to submit financial statements for Corporate Trustees.

We do not believe Trustees should be required to submit financial statements to the OSB either as part of the Annual Report or on their own. While we recognize there have been some cases of abuse of trust funds, we do not believe that the filing of financial statements will promote the OSB's policy objective of discouraging abuses, nor will it help the OSB detect future abuses.

We have a number of specific reasons for our opinion on this issue:

- A Trustee's financial statements, whether individual or corporate, do not necessarily provide meaningful information with regard to either the solvency of the Trustee or the availability of financial resources to run the Trustee's practice. For example, to protect their family from financial catastrophe, many individual Trustees take legitimate steps to "creditor proof" their assets. As well, many Corporate Trustees leave minimal levels of equity in the corporation for "creditor proofing" or for tax planning reasons. In such cases, therefore, the actual net

worth/liquidity to support the Trustee's obligations and/or to finance the running of the Trustee's practice may be beneficially held by third parties, such as a spouse or a related accounting firm;

- Financial statements are historical in nature and subject to interpretation based on the accounting policies adopted in the particular circumstance. While consistency is a key principle of accounting, the initial selection of the standards and estimates applied vary a great degree among practitioners. Those seeking to interpret the financial statements will require a thorough understanding of accounting principles and an ability to analyze financial information. In addition, while financial statements provide a snap shot of the financial health of a business at a point in time, analysis of the solvency of the business requires substantive trend analysis. To draw conclusions from a Trustee's financial statements the OSB would have to do a holistic and historic review to the Trustee's financial statements. This cost and burden of such a review would likely outweigh any benefit derived from the review;

- The cost of an audit or other review of the financial statements by a third party would be an unacceptable burden on Trustees, particularly those with smaller practices, when compared to the benefit to be derived from the filing of such with the OSB;

  The financial statements of Trustees, similar to the tax returns of individuals, are personal. While we understand the OSB is required to ensure the solvency of Trustees, CAIRP believes that confidentiality protocols would need to be established to ensure a separation of the function of financial statement review and regulatory compliance at the OSB. CAIRP believes the only meaningful way for the OSB to ensure this separation is through creation of a new financial reporting branch within the OSB. We believe, however, that the cost of establishing such a branch would outweigh the benefit derived; and

- CAIRP is further concerned that the disclosure of financial statements to the OSB, containing confidential information pertaining to the practice of a Trustee, could become a public document within the context of a request *Freedom to Information Act*. CAIRP and the Trustee community would need to be satisfied the provision of such financial information could not be made available to the general public.

In short, CAIRP is of the view that the filing of financial statements with the OSB is not a cost-effective or efficient means of assessing a Trustee's risk of breaching his or her fiduciary obligations.

Issues (*continued*)

Professional Liability Insurance and Bonding

1. Require Trustees to provide confirmation to the OSB that they have adequate insurance.
2. Require that the specific amount of insurance be provided.
3. Ensure that the Trustee provides a confirmation letter from the insurance company (or from the broker) to the OSB certifying that insurance, including the amount, is in place.
4. What action should be taken by the OSB to deal with Trustees who do not maintain adequate insurance.
5. Whether the OSB should return to the general bonding practices that required a bond be in place at the time the Trustee licence is issued.
6. Whether the Directive on Estate Security (Directive No. 21) should be amended to provide more clarity on the amount to be issued as security for an estate bond instead of simply providing guidance to the official receiver.

We are in favour of requiring Trustees to confirm with the OSB that they have professional liability insurance and the amount of coverage. We believe it is only prudent for Trustees to carry professional liability insurance of an amount that is appropriate to the size of their practice and that it include fidelity bonding for the Trustee's employees. Indeed, many Trustees who are members of other professional bodies (for example, the Quebec Order of Chartered Accountants) must carry such insurance as a condition of membership in other professions. In addition, Trustees that obtain financing from banks and other lending institutions are required to maintain such insurance as a condition of the financing.

Furthermore, we believe the most efficient way of demonstrating compliance with this requirement is for Trustees to authorize their insurer/broker to directly confirm to the OSB the existence and amount of such insurance. Alternatively, we are not opposed to a requirement that the Trustee annually attests to the existence and amounts of such insurance.

We do not believe; however, that individual Trustees who are employed by Corporate Trustees need carry individual insurance. Professional liability insurance for individual Trustees who are employed by Corporate Trustees should be confirmed by the insurer of the Corporate Trustee. Where a Trustee is covered by a policy that covers other entities, for example, a Trustee working for an accounting firm, the Trustee may be covered by the firm's blanket professional liability policy. Of course, the onus of establishing the existence and adequacy of insurance should

remain with the Trustee and, in the case of a Corporate Trustee, the level of insurance must be commensurate with the overall risk profile of the entity.

Bonding Alternatives

We are opposed to requiring general bonding. While general bonding would provide additional comfort to the OSB and creditors, the availability of this insurance product at reasonable premiums cannot be guaranteed. Based on discussions with insurance providers, we understand that to obtain such bonds a Trustee would have to pledge substantial security, including, where necessary, the personal assets of the Trustee and, where those are insufficient, perhaps even assets of third parties (spouse or otherwise). As well, Trustees would have to provide detailed annual reporting to the provider of the bond. Many Trustees (or their related accounting firms or spouses) are reluctant to make such guarantees, especially where estate assets may be compromised in situations beyond the Trustee's control. A requirement for general bonds could result in fewer Trustees, which could be detrimental to the public, as they would have fewer to choose from. As well, a bonding requirement could be especially onerous for new Trustees who would likely face a higher risk rating to obtain bonding, which would, in turn, mean they would have to pledge more security and/or pay higher premiums at a time they are least able to absorb such requirements.

A viable alternative to estate bonding is regular trust account audits. Many of the provincial law societies self-insure and to do so they require trust account audits. Such audits are carried out in a manner that is consistent with all audits but with a methodology that is risk based as opposed to substantive. The audits are performed on an annual basis by an independent third party and they provide reasonable assurance that the procedures, practices, and protocols associated with the operation of the accounts are in accordance with pre-determined parameters. While we believe it is not practical or reasonable to audit all of a Trustee's trust accounts each year, CAIRP would support rotational audits across practices. CAIRP is willing to work with the OSB to develop an audit checklist that could be used by an independent third party auditor. CAIRP believes that such an initiative could provide greater comfort to the OSB and public stakeholders than the filing of financial statements and a requirement for a general bond.

Estate Security

The last issue considered in the Consultation Paper under the Professional Liability and Insurance Bonding heading relates to whether the Directive on Estate Security (Directive No. 21) should be amended to provide greater clarity on the amount of security for an estate bond. Though we note inconsistent application in relation to estate bonds, we believe the directive as drafted meets the needs of the OSB. We do not believe Directive No. 21 needs to be amended as it provides adequate guidance regarding the amount of security, while allowing reasonable discretion to the Official Receiver and Trustee in setting and adjusting the amount of security.

Directive No. 21 provides that estate security is not required where amounts available to preferred and unsecured creditors are less than $3,000. The Directive does not exempt funds held in a consolidated account. Given that the September 2009 amendments to Sections 68 and 168 will result in a substantial increase in the average balance per estate that is held in trust for summary administrations due to the increase in time before an automatic discharge (in cases where the bankrupt has surplus income), it is likely that Directive No. 21 will apply to more summary administrations as a result of the September 2009 amendments. CAIRP understands the OSB's concerns regarding these increasing cash balances and of the need to manage risks to instil confidence and to mitigate against future loss. Several alternatives exist to promote confidence and mitigate risk of loss, however, such as:

- Legislatively authorizing Trustees to pay interim dividends to creditors in both ordinary and summary bankruptcy administrations, as an example, when the availability of distributable funds exceeds $3,000, so as to reduce the balance in estate accounts to acceptable levels, thereby mitigating risk of loss.

- Incorporating the initiative regarding auditing of individual estate trust accounts, discussed above.

- Establishing estate bonding in accordance with Directive 29, though for the reasons detailed above, where the bonding requirements are substantial, the cost and burden of securing such bonding (particularly as regards the consolidated trust accounts) will be substantial and wrought with the same concerns expressed above regarding general bonding requirements.

Summary of Recommendations

CAIRP generally support requiring the filing of an Annual Report that includes a requirement for:

- self-identification of non-compliance, with restrictions, subject to the implementation of detailed protocols discussed above; and
- inclusion of information pertaining to a Trustee's professional liability insurance, including employee fidelity bonding.

CAIRP does not support the self-reporting of complaints. Despite a Trustee's best efforts to balance the interests of various parties, the almost inevitable result of the Trustee's performance of his or her duties under the governing legislation is that there is an aggrieved party. As such, Trustees are often subject to complaints. Because well developed, fair processes already exist for aggrieved parties to file complaints (for example, with the OSB or with CAIRP if the Trustee is a member) self-reporting of complaints and resolutions in an Annual Report would be duplicative and excessive.

We believe there are more effective and efficient means of protecting the interests of the stakeholders of individual estates and promoting the confidence of the public in the bankruptcy and insolvency framework than by requiring Trustees to file annual financial statements and secure general and estate bonding. We believe there are alternatives involving legislative reform and third-party estate account audits that would promote confidence and mitigate risk of loss in the future. CAIRP would be pleased to assist the OSB in the development of either or both of these initiatives.

Regarding the issue of whether Directive 21 should be amended to provide greater clarity on the amount of security for an estate bond, we believe the current drafting provides the OSB sufficient discretion to set the amount of an estate bond without need of amendment. Additionally, CAIRP believes there are alternative ways of mitigating the risk within estate accounts without the need to post estate bonds.

CONCLUSION

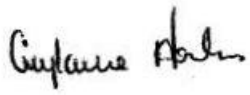
CAIRP appreciates the OSB's interest in hearing from stakeholders in its review of the Trustee licensing regulatory framework. As an organization committed to advancing the practice of insolvency administration and the public interest related to the insolvency system, and as a representative of more than 95% of all licensed Trustees, we offer our input and insights on the issues under review. As well, should the OSB implement amendments to the licensing regulatory framework that materially impact the administrative or operating practices of licensed Trustees in Bankruptcy, we recommend creation of a joint committee of the OSB and CAIRP to assess and address the consequences of any changes, and to develop transitional and implementation protocols.

Our comments and recommendations are respectfully submitted.

CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS

Respectfully submitted on behalf of Canadian Association of Insolvency and Restructuring Professionals and provincial associations of insolvency and restructuring professionals.

Kevin Brennan, CA•CIRP, CIRP
Chair



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APPENDIX A

SUBMISSION OF THE CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS responding to the Review of the Trustee Licensing Regulatory Framework

DEDICATED CAIRP MEMBERS

TRUSTEE LICENSING FRAMEWORK REVIEW TASK FORCE	
Name	**Firm**
Kevin Brennan, Chair	Ernst & Young Inc.
Guylaine Houle, Vice Chair	Pierre Roy & Associés Inc., Syndic
Norm Kondo, President	CAIRP
Andrew Dalgleish	Andrew Dalgleish & Associates Inc.
Sonya Mount	
Bob Sanderson	

In addition to the foregoing, CAIRP would like to recognize the exceptional efforts of more than 50 of its members, including the members of the CAIRP Executive Committee and Board of Directors, the Provincial Association Presidents and all the many other members who have volunteered countless hours in researching, consulting, drafting and reviewing the content of this response to the consultation initiated by the Office of the Superintendent of Bankruptcy.

APPENDIX B

CRITICAL PATH