



Office of the Superintendent
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Consultation Paper



Review of the Trustee Licensing Regulatory Framework

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Canada 



Protecting the
Integrity of the
Insolvency System

Protéger l'intégrité
du système
d'insolvabilité

Review of the Trustee Licensing Regulatory Framework Consultation Paper

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Review of the Trustee Licensing Regulatory Framework Consultation Paper

This consultation document is being issued with the objective of updating the Office of the Superintendent of Bankruptcy's (OSB's) licensing regulatory framework to ensure that it is reflective of the current environment, that the licensing process is complete and transparent, and that the public interest is respected.

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*.

In addition to the *Bankruptcy and Insolvency Act* (sections 13 to 13.2 and 14.08 to 14.1) and the *Code of Ethics for Trustees in Bankruptcy* (Rules 34 to 53), the licensing regulatory framework is principally governed by the Directive on Trustee Licensing (Directive No. 13R2). This Directive, which dates back to March 31, 2000, sets out the required qualifications and criteria for obtaining and maintaining a trustee licence. Provisions relating to the names of corporate trustees were amended on August 15, 2005, and September 18, 2009; other technical amendments were made on April 4, 2006. Note that the Directive is based on the old Trustee Licensing Policy, which dates back to 1989.

In addition, the Policy on Multi-Jurisdictional Licences, in effect since July 1, 2006, sets out various elements that are considered in reviewing a trustee's application to extend his or her licence to a province in which he or she does not maintain a resident office. The policy is intended to ensure consistency in the application of the rules for extending licences to other districts.

Finally, the Directive on Advertising by Trustees (Directive No. 29), dated September 18, 2009, outlines the position of the Superintendent of Bankruptcy concerning advertising by trustees in general.

1. Office of the Superintendent of Bankruptcy

The mission of the Office of the Superintendent of Bankruptcy is to contribute to a fair and efficient marketplace by protecting the integrity of the bankruptcy and insolvency system on behalf of investors, lenders and the public. Its mandate is to supervise the administration of all estates and matters to which the *Bankruptcy and Insolvency Act* applies. In exercising its duties and powers, the OSB takes as its strategic objectives:

- to maintain an efficient and effective regulatory framework;
- to promote awareness of the rights and responsibilities of stakeholders in the insolvency system;

- to ensure trustee and debtor compliance with the legislative and regulatory framework; and
- to be an integral source of information on Canadian insolvency matters.

The objective of the licensing regulatory framework is to maintain an efficient and effective licensing framework that would inspire the confidence of stakeholders in the Canadian insolvency system. More specifically, the licensing regulatory framework has the following goals:

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

2. Stakeholders

The insolvency system is one of the pillars supporting Canadian credit markets. By providing a regulatory framework that is consistent, open, transparent, honest and capable of resolving creditor/debtor disputes effectively, the marketplace is able to price its credit risk accordingly. The better the system works, the lower the risks and the lower the cost of credit. Therefore, there are a number of stakeholders whose views are important for maintaining the credibility of the licensing regulatory framework, including insolvency practitioners, investors, creditors’ groups, consumer associations, court representatives, credit counsellors, turnaround management professionals, receivers and auctioneers.

Another important player in the regulatory framework is the Canadian Association of Insolvency and Restructuring Professionals (CAIRP). The association is a non-profit corporation established in 1979 to “advance the practice of insolvency administration and the public interest related to it.” While membership in CAIRP is not mandatory, the association includes approximately 880 general members acting as trustees in bankruptcy, receivers, agents, monitors and consultants in insolvency matters. The association has developed professional conduct rules and standards of professional practice that its members must respect.

3. Insolvency Field

Trustees administer the complete range of insolvency engagements from the largest corporate restructurings to bankruptcies for indigent consumers. They perform their duties, as insolvency specialists, by operating through various types of business entities, such as multidisciplinary international consulting firms, national and international public accounting firms, and regional public accounting firms, or as sole practitioners.

Many trustees specialize in various areas or “niches” of the insolvency field, with some firms restricting their practices to large corporate cases while other firms deal only with consumers. As well, some firms offer the full range of insolvency services while others offer a full range of expertise or services (not only insolvency services) dedicated to a specific industry; for example, a firm may have developed expertise in restructuring the forestry or health industry.

The following are highlights from the latest statistical data on trustees:

- In 2008, the number of trustee firms holding a corporate trustee licence increased to 253, with only 28 trustees practising without a corporate licence. In comparison, in 1992, 196 trustee firms administered insolvency files under a corporate licence, while 96 trustees practised without a corporate licence.
- In 2008, 69 percent of trustees had training in accounting, while in 1992, more than 84 percent of trustees were accountants.
- Between 2000 and 2008, the net increase in the number of trustees was 20 individual trustees, taking into consideration trustees who left the domain.
- In 2008, 238 trustees operated as sole practitioners and only 4.0 percent of trustee firms employed 10 or more trustees.
- Since 2000, the average number of open summary administration files, by trustee, increased by nearly 20 percent, and individual proposal files by 87 percent. Ordinary administration bankruptcy files of individuals and corporations decreased by 10 percent and 6 percent respectively.

The licensing regulatory framework has been developed over the years. We believe that the time has come to determine whether it still meets the needs of the insolvency field, and to make any changes that may be required. The market evolves very quickly and we can identify a number of factors that will influence the future of the trustee profession:

- the relative number of new estates due to the economic conditions;
- interest of various groups to be licensed to offer insolvency-related services;
- composition of and demographic changes in the population of trustees;

- constant need to improve training and continuing education programs for trustees in bankruptcy;
- need to compete with other professions for applicants to the program as evidenced by the decreasing number of new candidates entering the program;
- trend toward specialization and increased advertising;
- behaviour or level of engagement by debtors and creditors; and
- use of technology.

4. Consultation Process

This document is divided into three parts: the first part deals with the licensing process, i.e., criteria for licensing and qualifications for practising as a trustee; the second part relates to trustees' administrative practices; and the third part concerns issues related to trustees' fiduciary duties.

The Office of the Superintendent of Bankruptcy is committed to consulting with trustees, candidates for a trustee licence and other stakeholders in the credit community in the development of amendments to the Directive on Trustee Licensing. You are invited to forward your comments on any or all of the issues identified in each part of this document. Once views have been received, a proposed draft of changes accepted by the Superintendent of Bankruptcy will be circulated for final comments.

Part One: 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)

Current Context

Currently, there are differences between the Directive on Trustee Licensing and the Memorandum of Understanding between the Superintendent of Bankruptcy and the Canadian Association of Insolvency and Restructuring Professionals relating to prerequisite qualifications, number of attempts at the oral examination, amount of time a candidate has to complete the program at each stage and obtain a licence, and exemptions.

- **Prerequisite Qualifications**

The Office of the Superintendent of Bankruptcy (OSB) will harmonize the Directive on Trustee Licensing with the Memorandum of Understanding between the Superintendent of Bankruptcy and CAIRP. For details on specific changes contemplated, see “Harmonization Proposal” ([Annex A, Section C](#)).

- **Three-Attempts Rule over a 10-year Period**

An oral examination is the Superintendent’s only assessment tool for deciding whether a candidate should be licensed. This oral examination is not being called into question. According to the old Memorandum of Understanding between the Superintendent of Bankruptcy and the Canadian Association of Insolvency and Restructuring Professionals, a candidate could only take the oral examination three times over a 10-year period commencing on the date of enrolment in the National Insolvency Qualification Program (NIQP). This restriction was reproduced in Appendix A (paragraph 7) of the Directive on Trustee Licensing. According to the rules of the mandatory training program, candidates who use up all three attempts at the oral examination within the 10-year period must re-enrol in the program, although exceptions have been made. Such candidates will normally be allowed to advance directly — but only once — to the National Insolvency Examination (written exam) without retaking the mandatory courses. If they pass the written examination, they have another three chances to pass the oral exam. If they fail the written exam, they must retake the mandatory courses.

The new Memorandum of Understanding, which took effect on October 8, 2009, does not include this restriction.

- **Rule on Four Members to Compose a Board of Examination**

According to Appendix A (paragraph 20) of the Directive, a board of examination shall consist of four persons: a trustee (selected by CAIRP), a lawyer (selected by the Superintendent of Bankruptcy), a person designated by the Regional Director to act as Assistant Superintendent and a representative of the Superintendent of Bankruptcy. There may be (rare) cases where it is not possible to have four members on the board of examination; for example, a member of a board of examination may unexpectedly find himself/herself in a conflict of interest situation, or facing illness or other serious impediment.

For additional background information, refer to:

- **Annex A**: 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)
- **Annex B**: Criteria to obtain a trustee licence – paragraphs 5 to 13 of the directive on trustee licensing
- **Annex C**: Process regarding issuance of an individual trustee licence – Paragraphs 1 to 14 of Appendix A of the Directive on Trustee Licensing

Issues

1. The OSB is considering the following options (or a 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 that 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 that they no longer wish to be invited to appear before the board.
 - 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.

Issue Number 2

Dual Licensing, Specialized Licences and Administrators of Consumer Proposals

Current Context

The expression “dual licensing” refers to two types of trustee practices — commercial and consumer. Currently, the Superintendent of Bankruptcy issues only one type of licence: a trustee licence; however, the licence may have limitations imposed on the trustee in terms of accepting or administering either commercial or consumer estates. Candidates for a trustee licence must successfully pass an oral board of examination that tests their ability to apply knowledge required for both types of practices before being granted a licence by the Superintendent. If a candidate receives weak scores related to one of the practices, the licence may be refused depending on other scores or can be limited to either corporate or consumer estates.

Another reality is that trustees, like many other professionals, tend to specialize in one or two areas; over time, there is a risk that they won’t remain current or competent to respond to issues and processes pertinent to the other type of practice. To counter this risk, many professions, including the Canadian Association of Insolvency and Restructuring Professionals (CAIRP) have included compulsory provisions for professional development.

Another form of specialization relates to the administration of consumer proposals. While trustees may act as administrators, the Superintendent also has the authority to appoint or designate persons as administrators of consumer proposals who are not trustees. To date, these appointments have been limited to provincial representatives but the *Bankruptcy and Insolvency Act* does not stipulate this limitation. Currently, Nova Scotia is the only province remaining active through its representatives as administrators of consumer proposals.

For additional background information, refer to:

- **Annex D**: Dual licensing, specialized licences and administrators of consumer proposals
- **Annex E**: Report of the subcommittee of CIPA on dual licensing – June 1994

Issue

The Office of the Superintendent of Bankruptcy (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 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 speciality. To do so, the OSB would have to consider:
 - Areas the specialist trustee could practise 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.
 - Other possible rule changes regarding advertising and ethics.
3. Continue with 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.

Issue Number 3

Probationary Conditions for Newly Licensed Trustees

Current Context

Currently, probationary conditions apply to newly licensed trustees for a minimum period of 24 months.

For additional background information, refer to:

- **Annex F**: Probationary conditions

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 practising as sole practitioners on the basis that the trustee does not have enough experience to justify an unconditional practice.

Issue Number 4

Reactivation of the Licence in the Event of the Trustee's Bankruptcy

Current Context

According to the *Bankruptcy and Insolvency Act*, a trustee licence is cancelled if the trustee becomes bankrupt. However, the Superintendent of Bankruptcy can reactivate an invalidated licence “on written representations made by the trustee... subject to such conditions and limitations as the Superintendent considers appropriate” [subsections 13.2(3) and 13.2(4)]. Moreover, the Directive on Trustee Licensing states that “the trustee must satisfy the Superintendent that reinstatement of the licence will not impair public confidence in the bankruptcy and insolvency system.”

For additional background information, refer to:

- **Annex G**: Insolvency of a trustee

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 of 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.

Part Two: Administrative Practices

Issue Number 5

Corporate Names

Current Context

According to the Directive on Trustee Licensing, the name of a corporate trustee can only be composed of the names of one or more trustees or accountants that are practising or have actively practised either as trustees or accountants. The name may also consist of the name of a monitor appointed in *Companies' Creditors Arrangement Act* proceedings commenced after September 30, 1997, and before September 18, 2009.

For additional background information, refer to:

Annex H: 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.

Issue Number 6

Closed Company (or Private Company) and Share Ownership

Current Context

According to the Directive on Trustee Licensing, a corporate trustee shall be a private or closed company as defined in the applicable legislation.

For additional background information, refer to:

- **Annex I**: Closed company (or private company) and share ownership

Issue

The Office of the Superintendent of Bankruptcy 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.

Part Three: Fiduciary Duties of Trustees

Issue Number 7

Licensing Fees

Current Context

Currently, all trustees are required to pay an annual licensing fee of \$850.

For additional background information, refer to:

- **Annex J**: 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.

Issue Number 8

Succession Agreements

Current Context

The Directive on Trustee Licensing does not require that trustees have a succession agreement in place to practice, while the current Policy on Multi-Jurisdictional Licences does make a succession agreement a condition to practice in more than one province at a time.

For additional background information, refer to:

- **Annex K**: Succession Agreements

Issue

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.

Issue Number 9
Annual Licensing Report

Current Context

Currently, there is no requirement for trustees to submit an annual report to the Office of the Superintendent of Bankruptcy (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.

Trustees are responsible for processing thousands of financial transactions involving hundreds of millions of dollars annually and are expected to carry out their fiduciary responsibilities to the highest standards to ensure that trust funds are not at risk and that they maintain public confidence in the insolvency system.

For additional background information, refer to:

- **Annex L**: Annual Licensing Report

Issues

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.



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.

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.

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)

Background

A. Licensing Program

At one time, there were two ways for candidates to obtain a trustee licence: members of the Canadian Insolvency Practitioners Association (as it was called) had to follow a mandatory training program before taking a comprehensive national examination (National Insolvency Examination (NIE)). Non-members, on the other hand, could access the NIE directly, without following the training program.

On September 11, 1997, the Superintendent of Bankruptcy reached an agreement with CAIRP to the effect that all licensing candidates must follow the same process to obtain a trustee licence. The objective was to promote professionalism, increase the level of expertise and maintain public confidence in the training system. Before taking the oral examination, candidates had to successfully complete the training course, interim exams and the NIE; study under the guidance of a sponsor; and, finally, accumulate a certain number of hours of practical experience.

This first agreement was extended, with amendments, on September 24, 2004. A new agreement was concluded on October 8, 2009. The purpose of the new agreement is to ensure that the training program continues to meet its primary objectives.

B. Preliminary Considerations

Section 5(4)d) of the *Bankruptcy and Insolvency Act* authorizes the Superintendent to issue directives governing criteria to be applied by the Superintendent in determining whether a trustee licence is to be issued to a person, and governing qualifications and activities of trustees. The Superintendent issued the Directive on Trustee Licensing, which sets out required qualifications and criteria for obtaining and maintaining a trustee licence.

Relevant provisions of the current Directive on Trustee Licensing and the Memorandum of Understanding follow.

Directive on Trustee Licensing

To obtain a trustee licence, the applicant must satisfy the conditions set out in paragraphs 5 to 13 of the Directive on Trustee Licensing and paragraphs 1 to 14 of Appendix A of

the Directive. These relevant excerpts are reproduced in Annexes B and C of this document.

1. Prerequisite qualifications: The applicant must satisfy the prerequisites in paragraph 6 of the Directive:
 - a. he or she must not be an insolvent person and not have been in a state of insolvency within five (5) years preceding the date of the application;
 - b. he or she must possess a Canadian university degree or its equivalent, or hold a relevant professional designation recognized in Canada or have a minimum of five (5) years relevant work experience;
 - c. he or she must:
 - i. have successfully completed the National Insolvency Qualification Program (NIQP)¹; and
 - ii. have passed the National Insolvency Examination;
 - d. he or she must have successfully completed the Insolvency Counsellor's Qualification Course, as established by the Superintendent of Bankruptcy; and
 - e. he or she must be in good standing with, and not subject to any current disciplinary action by, any professional organization of which he or she is a member.
2. Specific qualifications: The applicant must satisfy the specific qualifications set out in paragraphs 8 to 12 of the Directive with regard to reputation and suitability. These specific qualifications are not mentioned in the Memorandum of Understanding between the Superintendent of Bankruptcy and CAIRP, and will not be discussed in this document.
3. Time limit and number of attempts: The applicant is limited to three (3) appearances before the Board of Examination, over a period of ten (10) years from the date of enrolment in the NIQP.

Memorandum of Understanding

To become a candidate for the NIQP, the applicant must satisfy the conditions set out in sections 36 to 38 and 41 of the Memorandum of Understanding (entrance requirements and membership in CAIRP). There are also examinations that must be passed.

¹ In a near future, the program will be renamed Chartered Insolvency and Restructuring Professional Qualification Program or Professional Qualification Program (PQP).

1. Entrance requirements: The applicant must meet one or more of the following entrance requirements:
 - hold a Canadian university degree or equivalent, or hold a relevant professional designation recognized in Canada, being a CA, CMA, CGA (or as such designation may be known from time to time), or LL.B (or similar law degree);
 - be in the final level of a program leading to such a designation;
 - have a minimum of five (5) years relevant experience and have successfully completed a minimum of one accredited course in each of accounting and business law at a post secondary education level.
2. Membership in CAIRP: All NIQP candidates (except employees of the Office of the Superintendent of Bankruptcy) must enrol as articling members of CAIRP.
3. Exemptions: The Memorandum of Understanding includes three types of exemptions:
 - NIQP Committee could exercise discretion in admitting applicants who do not meet the entrance requirements in accordance with pre-established guidelines.
 - An applicant who possesses relevant experience and knowledge may, on recommendation of the NIQP Committee, be exempted from the entire program and be allowed one attempt at the National Insolvency Examination.
 - All individuals wishing to become a CIRP must enrol in and complete the NIQP. The Superintendent will expect applicants for a licence for a trustee in bankruptcy to have successfully completed the NIQP, except in extraordinary circumstances as determined at the sole discretion of the Superintendent.

C. Harmonization Proposal

The Superintendent is contemplating adopting the entrance requirements of the Memorandum of Understanding for use in the Directive on Trustee Licensing. The table below illustrates the prerequisites that the candidate must meet.

Current Situation	Proposed Harmonization
6. An individual who wishes to apply for a licence must meet the following prerequisites:	
a. not be an insolvent person and not have been in a state of insolvency within five (5) years preceding the date of the application;	No change
b. possess a Canadian university degree or its equivalent, or hold a relevant professional designation recognized in Canada or have a minimum of five (5) years relevant work experience;	b. the candidate must meet one or more of the following entrance requirements: <ul style="list-style-type: none"> i) hold a Canadian university degree or equivalent, or hold a relevant professional designation recognized in Canada, being a CA, CMA, CGA (or as such designation may be known from time to time), or LL.B (or similar law degree); ii) be in the final level of a program leading to such a designation; iii) have a minimum of five (5) years relevant experience and have successfully completed a minimum of one accredited course in each of accounting and business law at a post-secondary education level;
c. have successfully completed: <ul style="list-style-type: none"> i) the National Insolvency Qualification Program; and ii) the National Insolvency Examination, as described in the licensing process set out in Appendix A [of the Directive];	<ul style="list-style-type: none"> i) no change except for the name of the program (Professional Qualification Program), subject to a possible exemption as mentioned below; ii) no change.

<p>d. have successfully completed the Insolvency Counsellor’s Qualification Course, as established by the Superintendent of Bankruptcy;</p>	<p>d. he or she must have successfully completed the Insolvency Counsellor’s Qualification Course offered or certified by CAIRP;</p>
<p>e. be in good standing with, and not subject to any current disciplinary action by, any professional organization of which the applicant is a member.</p>	<p>No change.</p>

The Superintendent is also contemplating:

- a) revoking the limits on the number of attempts before the Board of Examination and the time allotted to obtain a licence as they currently exist;
- b) including in the Directive the exemptions in the Memorandum of Understanding and adapting them as needed.

Criteria to Obtain a Trustee Licence (Paragraphs 5 to 13 of the Directive on Trustee Licensing)

Trustee Licence – Individual

Application

5. Application by an individual for a trustee licence shall be made using Form 2, Application for Trustee Licence (Individual).

Prerequisite Qualifications

6. An individual who wishes to apply for a licence must meet the following prerequisites:
 - (a) not be an insolvent person and not have been in a state of insolvency within five (5) years preceding the date of the application;
 - (b) possess a Canadian university degree or its equivalent, or hold a relevant professional designation recognized in Canada or have a minimum of five (5) years relevant work experience;
 - (c) have successfully completed:
 - i. the National Insolvency Qualification Program; and
 - ii. the National Insolvency Examination,

as described in the licensing process set out in Appendix A [of the Directive];
 - (d) have successfully completed the Insolvency Counsellor's Qualification Course, as established by the Superintendent of Bankruptcy; and
 - (e) be in good standing with, and not subject to any current disciplinary action by, any professional organization of which the applicant is a member.

Specific Qualifications

7. An applicant who meets the prerequisite qualifications must satisfy the reputation and suitability requirements described below.

(i) Reputation

8. The applicant shall
 - (a) be of good character and reputation; and
 - (b) satisfy the Superintendent that the issuance of a licence will not impair public confidence in the insolvency process.
9. Without limiting paragraph 8, an applicant who has been convicted of an indictable offence must satisfy the Superintendent that a pardon has been granted and that the conviction was not related to an offence of a commercial or an economic nature.
10. Without limiting paragraph 8, an applicant who has been found guilty of professional misconduct must satisfy the Superintendent that such misconduct was not of a commercial or an economic nature. Where the misconduct is not of a commercial or an economic nature, the applicant must show that the misconduct is not likely to impair public confidence in the applicant or in the bankruptcy and insolvency system in general.

(ii) Suitability

11. The suitability of a candidate to become a trustee is evaluated by a Board of Examination that will consider the skills of the applicant.
12. The applicant shall demonstrate before the Board:
 - (a) the ability to administer professional engagements;
 - (b) the ability to apply related legislation and jurisprudence;
 - (c) appropriate experience and a good understanding of business and consumer matters;
 - (d) good judgment in the administration of professional engagements; and
 - (e) a high standard of business ethics and professionalism.

Limit

13. An applicant is limited to three (3) appearances before the Board of Examination, over a period of ten (10) years from the date of enrolment in the National Insolvency Qualification Program, as described in the licensing process set out in Appendix A.

Annex C

Process Regarding Issuance of an Individual Trustee Licence (Paragraphs 1 to 14 of Appendix A of the Directive on Trustee Licensing)

1. In order to obtain an individual trustee licence, a person must meet the prerequisite qualifications set out in paragraph 6 of the Directive.

Professional Designation

2. Examples of relevant professional designations are those relating to accounting, law, business administration, management and finance.

Insolvency Counsellor's Qualification Course

3. Successful completion of the Insolvency Counsellor's Qualification Course is required in order for an individual to qualify to conduct counselling under the *Bankruptcy and Insolvency Act*. It is also a prerequisite qualification that must be met by an individual who wishes to apply for a trustee licence, as set out in paragraph 6(d) of the Directive.
4. This course provides individuals with the basic skills and knowledge required for delivering counselling to insolvent consumers. The course is intended to ensure that individual debtors will receive professional counselling from qualified people who can assist them in adopting more responsible practices in their financial matters.

National Insolvency Qualification Program

5. By Memorandum of Understanding (MOU), the Superintendent of Bankruptcy and the Canadian Insolvency Practitioners Association (CIPA) have established the National Insolvency Qualification Program (NIQP) as a common qualification system for providers of insolvency and business-recovery services in Canada.
6. The NIQP is a three (3) year joint education process that consists of a body of knowledge, a prescribed course of study, a tutorial, written examinations, the National Insolvency Examination (NIE) and an oral examination before a Board of Examination.
7. Individuals will be allowed ten (10) years from the date of enrolment to complete the NIQP, with no more than three (3) attempts at any examination, including the NIE and the oral board examination.
8. Subject to the transitional provisions and exemptions set out in the MOU, enrolment

in and successful completion of the NIQP is compulsory for any individual wishing to become a trustee.

National Insolvency Examination

9. The NIE, held jointly by the Office of the Superintendent of Bankruptcy (OSB) and the CIPA, is the written final examination that individuals must pass.
10. The purpose of the NIE is to assess the technical knowledge of a person wishing to apply for an individual licence.
11. The NIE is held once per year at locations and times determined by the OSB and the CIPA.
12. The NIE consists of two (2) parts, each three (3) hours long. The exam contains questions on bankruptcy and proposals, as well as on receiverships.
13. The examinations are marked by a committee made up of representatives of the OSB and the CIPA.
14. An individual may appeal the examination result, in writing, within thirty (30) days after the date on which the results are sent.

Dual Licensing, Specialized Licences and Administrators of Consumer Proposals

A. Background

1. Training Program for Obtaining a Licence

Currently, the candidate for licence follows a mandatory program of study that includes five courses aimed at providing complete academic training in bankruptcy and insolvency. Candidates study under the guidance of a mentor who directs their studies, marks their assignments and attests to their readiness to be examined. In addition, candidates must complete 2400 hours of practical experience prior to writing the National Insolvency Examination. This practical experience shall consist of, but not be limited to, areas such as fact-finding, administration and supervision of a file, application of legal concepts and information technology, and office management. In short, the training covers all academic and practical material.

Once candidates have passed the National Insolvency Examination, they appear before a board of oral examination to demonstrate that they have the ability to administer professional engagements; the ability to apply relevant insolvency legislation and jurisprudence; appropriate experience and good judgment in terms of business and consumer matters, and a high standard of professionalism, including the rules of ethics.

Upon recommendation of the members of the oral board, the Superintendent of Bankruptcy issues a licence, without making any distinction in terms of the type of licence. The licence may, however, be subject to limitations when the candidate has the necessary abilities in one specific area, but requires more time to acquire the experience and knowledge to attain the level expected of a trustee in bankruptcy with a full licence. When this happens, the licence is limited to the area in which the candidate has proven the required abilities. The restrictions are imposed as follows:

- a) A candidate who is stronger in commercial matters could receive a licence limited to corporate bankruptcies and proposals.
- b) A candidate who is stronger in consumer matters could receive a licence limited to consumer bankruptcies and proposals. For purposes of this annex, “consumer bankruptcy” means a bankruptcy in which an individual has, directly or indirectly, no business liabilities. A consumer proposal is as defined in the Act.

Where a bankruptcy does not constitute a “consumer bankruptcy” as defined above, and is not a corporate bankruptcy, it may only be administered by a trustee holding a licence

without limitations. This would be the case, for example, in the bankruptcy of a professional such as a doctor or lawyer.

It should be noted that having excellent abilities in one area is not sufficient to obtain a limited licence; the candidate must also demonstrate basic abilities in the other area. This is, therefore, not a “consumer licence” nor a “corporate licence” but, in fact, a trustee licence with limitations attached. These limitations may be lifted after a period of at least one year following the candidate’s appearance before an *ad hoc* board of examination.

2. Specialization

The Directive on Advertising by Trustees (Directive No. 29) states that trustees may not refer to themselves as specialists in a particular industry or area of insolvency. Furthermore, the Canadian Association of Insolvency and Restructuring Professionals (CAIRP) confers the Chartered Insolvency and Restructuring Professional (CIRP) certification on its members, thereby reflecting their various forms of practice.

However, some legal and accounting professional bodies do recognize specialization. The rules for recognizing and maintaining specialization vary depending on the professional body. In some cases, the professional must follow a mandatory training course; other professionals must acquire a certain number of years of experience; while others must demonstrate that they have acquired both specialized training and experience.

When specialization is recognized, it is after the general permission to practise has been issued.

3. Appointment of Administrators of Consumer Proposals

Since the introduction of consumer proposals in 1992, the Superintendent has had the authority, under section 66.11 of the *Bankruptcy and Insolvency Act*, to appoint persons who are not trustees as administrators of consumer proposals. To date, the Superintendent has only appointed representatives of certain provinces as administrators. Provinces that have had their representatives appointed include British Columbia, Alberta, Saskatchewan, Nova Scotia and Prince Edward Island. At this time, the only province that has remained active in this field is Nova Scotia.

Currently, persons to be appointed follow a similar process prior to their appointment as exists for candidates for a trustee licence in that they must be successful in both a written and an oral exam.

B. Demographic Data and Statistics

As of March 31, 2009, 94 trustees that had renewed their licensing fees had a limitation allowing them to administer either consumer files or corporate files. On that date, 66 trustees (70 percent) held a licence restricted to the corporate field.

According to a 2007 study, between 1998 and 2006, one in two trustees with a limitation for consumer files converted to a full licence. However, three out of four trustees with a licence limited to corporate files tended to maintain that licence limitation.

As of January 19, 2010, 90 individual trustees (or 8.85 percent) had limitations on their licences, while 927 individual trustees (or 91.15 percent) did not have limitations on their licences.

C. Discussion

1. Dual Licensing

The issue of dual licensing has been debated since the mid-1980s. About 15 years ago, CAIRP, then known as the Canadian Insolvency Practitioners Association (CIPA), established a subcommittee on dual licensing. The subcommittee's report was published in CIPA's June 1994 newsletter and is provided here in [Annex E](#).

Concurrently with this industry study, the Superintendent decided not to issue specialized licences and to continue the practice of subjecting some licences to limitations, as set out above.

2. Administrators of Consumer Proposals

The following is an example of representations that are made from time to time by persons wishing to be appointed administrators of consumer proposals.

In February 2008, the Ontario Association of Credit Counselling Services (OACCS) appeared before the Standing Senate Committee on Banking Trade and Commerce and asked the Committee to recommend that the OACCS and its member agencies be designated as administrators.

Three of the main reasons advanced by the OACCS to be appointed as administrators were:

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

The transcript of the appearance of representatives of the OACCS before the Committee is available at

http://www.parl.gc.ca/39/2/parlbus/commbus/senate/com-e/bank-e/07evb-e.htm?Language=E&Parl=39&Ses=2&comm_id=3.

**Report of the Subcommittee of
Canadian Insolvency Practitioners Association (CIPA)
on Dual Licensing – June 1994**



Dual Licencing

June 1994

Report of the Subcommittee

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The Dual Licence Debate

The basic issue revolves around the question as to whether the current "one licence" regime should be continued, or whether the CIPA should encourage the Superintendent of Bankruptcy to introduce a "dual licencing" format to give recognition to the differences between consumer and commercial insolvencies.

The Backdrop

The debate over "dual licencing" has been continuing since the inception of the CIPA over a decade ago. In essence, it focuses on the differences between consumer and commercial insolvencies. More recently, this debate has become heightened with the marked changes in the nature of professional insolvency services being demanded by the marketplace. These changes have been expansive, calling for skill sets in otherwise non-traditional areas of insolvency practice or those outside of the receivership and bankruptcy arena. A great number of insolvency practitioners, particularly in the major cities across Canada, find themselves almost exclusively engaged in areas such as debt restructuring, Companies Creditors' Arrangement Act proceedings, monitoring assignments, and in an environment where the engagements are larger and more complex, with much more involvement from the legal profession. These are also complex, often multi-jurisdictional, receivership proceedings and, in any event, are

clearly commercial matters. This shift naturally affects the experience and training of candidates working for firms (and sponsors) where the mainstay of the practice is commercial rather than consumer debtor work.

There are also several other dimensions. One of these is the *Bankruptcy and Insolvency Act* which codified the concept of counselling consumer debtors, emphasizing society's expectations that the bankruptcy/proposal process should in part rehabilitate the debtor which, in large measure, is designed to minimize repeat insolvencies. These expectations demand of practitioners new responsibilities and augmented skill sets. The argument follows that the training requirements for the practitioner differ depending on whether the practice is consumer debtor or commercial driven.

CIPA President, William J. Drake, notes that a definition of the prototypical insolvency practitioner of the next decade and the expectations of the users of its members' services will be a major consideration in addressing the need for dual licencing. Concurrently, it is timely to focus on this debate to allow the Association's articling members to understand clearly the curriculum they are expected to meet, and to afford the sponsoring general member an opportunity to ensure the candidate for a licence is adequately trained and prepared.

“It has been suggested that the need for dual licencing is a Toronto Bay Street problem.”

The Issues

Certain members of the profession have raised the notion that the need for differentiation in licencing is, in effect, a Toronto "Bay Street" problem, although there are practitioners in Montreal and to a lesser degree, in Vancouver, who have also expressed a desire for dual licencing.

Several of the major issues raised by proponents of dual licencing follow:

Education and Testing Program

Candidates for trustee licences must take a prescribed education and testing program involving commercial and consumer areas of bankruptcy practice, even if there is an intention to practice and keep up-to-date in only one area of practice.

It is argued that a licenced candidate, after having passed the examinations jointly administered by the CIPA and the Superintendent, should have the option of declaring that s/he only wishes to practice in either the commercial or consumer area and, after displaying adequate knowledge and experience in the area, to be awarded a restricted licence. In effect, the candidate would pass the written examination and sit before the oral board as currently exists but, if a desire for a restricted licence is stated, a special commercial or consumer oral board would undertake the testing process.

It is further argued that if this new process were adopted, the candidates would not be subject to going through a difficult process involving heavy concentration of study in an area of which they have little or no experience or interest,

and no intention of practicing in the area in the future. They also argue that it makes little commercial or practical sense to subject practitioners to onerous requirements in areas which they will never practice.

Finally, if a restricted licence were granted and the restricted licence holder subsequently wished to practice in the other area as well, s/he would always be able to appear again before another oral board to qualify for a removal of the restriction. The office of the Superintendent of Bankruptcy would retain its right to impose additional conditions on any licence granted.

Current Licensees

Current licensees may undertake both consumer and commercial bankruptcy work but, a grandfathering of current rights and privileges, subject to annual renewals, appropriate conditions, and adherence to appropriate standards of practice, should take place.

It is recognized that holders of current licences have obtained their designations by pursuing a prescribed program which existed at a particular point in time. In this context, it is suggested that practitioners should be urged by the office of the Superintendent not to take on engagements in the commercial or consumer area, unless they practice with reasonable frequency in a specific area and have sufficient resources to carry out the engagement in a professional, effective manner. This urging extends also to licensees to consider a restriction of their licence on a voluntary basis, all of which seems to underpin the notion for grandfathering.

Unconditional Licence Renewal

Certain current licence holders may not be performing within acceptable standards, and a more vigilant approach to unconditional licence renewal would be desirable.

It would appear, as a point ancillary to dual licensing, that the Superintendent is being encouraged to restrict the licensee's right to practice in a certain area where an adequate level of performance cannot be demonstrated.

The Oral Board Process

This process is not consistent throughout the country.

Proponents of the dual licensing format raise the concern that the oral board process has been influenced by the need for licensed practitioners where there is a perceived shortage in certain geographical areas. Furthermore, it is argued, that there has been a tendency for oral boards to examine candidates closely in the commercial area if their involvement has been almost exclusively in the consumer area, and vice versa. Dual licensing, they note, will overcome this inconsistency.

Rebuttal and Comments

Strong opposition has been raised by many practitioners across Canada to the arguments in favour of dual licensing, and it is recognized by the subcommittee that a "personal" element creeps into both sides of the opposing points of view. Several seasoned practitioners note that "too much is being made of the new responsibilities concerning counselling

and that counselling by trustees does not justify the continuation of the dual licensing controversy." Additionally, by analogy, there is the argument that Chartered Accountants practice in different areas after qualification but the basic, minimum qualification remains uniform and consistent. Likewise, lawyers have preferred areas of practice but are all required to have the same qualifications; and so it should be for a licensed Chartered Insolvency Practitioner.

Still there are others who oppose dual licensing, but on somewhat different grounds. For example, a regional firm in Québec that has numerous offices located throughout the province, and a substantial portion of its practice in both Montréal and Québec City, notes that the survival of its practice depends on a broad mix of bankruptcy and other insolvency engagements. Dual licensing would lead to the possible need to withdraw from certain markets. Furthermore, it could result in a marked increase in the number of licensees, the emergence of new professional firms and an unwarranted degree of competitiveness which may result in the deterioration of the quality of services provided. Ancillary to this would be the increased involvement of the Superintendent monitoring the services provided in order to protect the public.

There are those who point to the difficulty the public already has in understanding the role of the trustee in bankruptcy. Dual licensing will exacerbate that confusion.

Numerous other points have been raised in opposition to dual licensing at this time:

- a perception that a consumer licence would be substandard to a commercial licence;

“A definition of the prototypical insolvency practitioner of the next decade and the expectations of the users of its members' services will be a major consideration in addressing the need for dual licensing.”³⁹

- the added costs of education and oral board examinations;
- the added burden of administering two streams of licences;
- defining the limits of practice may be difficult (e.g., consider the degree to which a small retail store is different as a corporation than as a proprietorship);
- it could be divisive to the CIPA;
- the dual licensing format could eventually lead to further division, as for example, administrators being licensed to handle summary administrations;
- the problem is localized to large firms in major metropolitan areas;
- the degree of evolution of the "insolvency industry" does not yet warrant dual licensing; and
- implementation costs do not justify the end.

Subcommittee Recommendations

The subcommittee, in its efforts to assess the need for dual licensing, has considered all points of view. It has also examined the demographics of receivership appointments as reported to the Official Receiver in Toronto noting that approximately one-third of such appointments were reported by major firms who are the thrust behind the introduction of dual licensing. Other analyses such as the number of licensees who are with large national firms, "mid-sized" firms and others have not been completed, nor does the subcommittee have details of the number of licensees who, today, would describe themselves as either "corporate" or "consumer" practitioners.

Finally, the subcommittee believes it would be valuable to trace the success of those candidates who in the past two years gained experience and training with the larger firms that endorse dual licensing compared to those who are opposed. This understanding, the subcommittee believes, will also provide additional insight into concerns raised that the oral process is not consistent throughout the country.

In its deliberations the subcommittee has also taken into account the degree to which the profession is in its process of maturity considering factors such as number of CIPA general and articling members, non-members (and non-licensees) carrying out assignments other than bankruptcy, and the demand for services in the industry generally.

Recommendation

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.

L. Hulcigh

Chairman
Subcommittee

Probationary Condition

Newly licensed trustees are subject to conditions that are generally referred to as “probationary conditions,” set out in paragraphs 27–30 of Appendix A of the Directive on Trustee Licensing. Basically, a new trustee must practise in the same location as an established trustee or only act in smaller files. On an exceptional basis, the new trustee may act in larger files, but only with prior approval of a Designated Assistant Superintendent of the Office of the Superintendent of Bankruptcy (OSB). At the end of two years, the trustee may apply to the Superintendent of Bankruptcy to have the conditions lifted. The Superintendent may lift the conditions based on the recommendation of a Designated Assistant Superintendent of the OSB as to the trustee’s performance.

Concerns have been expressed that newly licensed trustees do not file a sufficient number of estates to provide the OSB with enough information to allow for a proper recommendation that the probationary conditions be lifted. As well, some new trustees may work exclusively on cases filed by another trustee or other trustees with whom they are associated. Also, there is no specific onus on the established trustee to supervise the work being done by the new trustee.

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.

Insolvency of a Trustee

In the event of a trustee's insolvency, the Superintendent of Bankruptcy can take conservatory measures to protect an estate (paragraph 14.03(2)e of the *Bankruptcy and Insolvency Act*). In addition, to perform professional engagements, the trustee must be solvent at all times (paragraph 27 of the Directive on Trustee Licensing) and the Superintendent may, from time to time, conduct an inquiry to verify that the trustee is still solvent and to require that the trustee provide additional information and documentation, such as the trustee's financial statements (paragraphs 34–35 of Appendix A of the Directive).

Over the last 15 years, there have been a few cases of bankruptcy among practising trustees, with a small number of applications for reinstatement. These applications have been handled on a case-by-case basis. Where reinstatement was granted, the following factors were considered:

- debtor-trustee's discharge and any conditions of discharge;
- amount of time between the bankruptcy and the discharge of the debtor-trustee;
- causes of the bankruptcy;
- debtor's conduct before and during the bankruptcy;
- nature of the debtor-trustee's practice (number and type of files);
- history of the trustee's licence and the firm in which the trustee worked;
- debtor-trustee's financial situation, including cash reserves to be able to operate the business over a period of time;
- access to trust accounts; and
- other factors (for example, references submitted by the debtor-trustee).

The Directive should be transparent and identify the essential criteria to be met for reinstatement.

Corporate Names

1. Historic Background

a) Policy applicable to corporations on July 1, 1989

The Trustee Licensing Policy that came into effect in 1993 included, first of all, a definition of “proprietary identity”: TRANSLATION

““Proprietary identity” refers to a situation in which the individuals, who as owners, partners, directors, officers or shareholders, exclusively own and administer the affairs or services of the trustee in bankruptcy, are the same individuals who exclusively own and administer a public accounting practice.”

In addition, the rule applicable to the corporate name varied depending on whether or not there was “proprietary identity”:

“When there is proprietary identity, the name of the corporate trustee may be the same as the name used for the related public accounting practice...”

“When there is proprietary identity and the name of the corporate trustee is not the same as the name of the public accounting firm, the corporate name may only include the names of the individual trustee or trustees working for the corporation.”

“When there is no proprietary identity, the name of the corporate trustee may only include the names of the individual trustee or trustees working for the corporation.”

“The name of the corporate trustee must be such that the Superintendent is satisfied that the public will not be prejudiced or misled.”

This policy did not have the binding nature of a directive.

b) March 31, 2000, Directive on Trustee Licensing

The first Directive on Trustee Licensing, dated March 31, 2000, discarded the notion of “proprietary identity”:

“The name of the corporate trustee must consist of one of the following:

- a) the name of one or more individual trustees;
- b) a name derived from the name of an accounting firm; or

- c) a combination of a) and b);

provided that the Superintendent is satisfied that the public will not be prejudiced or misled.”

- c) August 15, 2005, amendment to the Directive

The Directive on Trustee Licensing was amended on August 15, 2005, to allow a trustee firm to operate under a corporate name that included the name of a deceased or retired associate. While restricting the corporate name to the names of trustees or accountants, the amendment also removed the obligation to satisfy the Superintendent of Bankruptcy that the public would not be prejudiced or misled.

“The name of a corporate trustee shall only be composed of the names of one or more trustees or accountants that are practising or have actively practised either as trustees or accountants.”

- d) September 18, 2009, amendment to the Directive

The amendment of September 18, 2009, was intended to relax the rules governing the name of a firm so as to grandfather those firms that had acted as a monitor under the *Companies’ Creditors Arrangement Act (CCAA)* between September 30, 1997, and September 18, 2009. This allowed those firms to continue to use their established names as monitors under the amended CCAA:

1. Subject to paragraph 20(2) of this Directive, the name of a corporate trustee shall only be composed of the names of one or more trustees or accountants that are practising or have actively practised either as trustees or accountants.
2. The name of a corporate trustee may consist of the name of a monitor appointed in *Companies’ Creditors Arrangement Act (CCAA)* proceedings commenced after September 30, 1997, and before the day on which subsection 1(1) of Chapter 36 of the Statutes of Canada, 2007, comes into force.

2. Directive on Advertising by Trustees (Directive No. 29)

Paragraph 5 of the Directive on Advertising by Trustees has an impact on the name of the trustee firm:

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.

3. Philosophy of Change

There are two general principles underlying our interest in changing the current situation:

- A. maintain a fair balance between market demand and protection of the public; and
- B. promote free competition while enabling a firm to develop value added in its corporate name.

A. Maintain a fair balance between market demand and protection of the public

At the time of the 2005 amendments, the Superintendent of Bankruptcy wrote the following:

“Our review of the relevant regulations of various provincial accounting bodies revealed a trend towards liberalizing the rules governing the corporate names of accounting firms. For example, l’Ordre des comptables agréés du Québec (OCAQ) informed us that as per the new regulation allowing professional engagements to be exercised through a corporation through shares, from now on accounting firms will be allowed to have names that make no mention of individual OCAQ members. In the past, accounting firms could only have names composed of personal names, i.e., made up of the names of an individual or individuals in that firm. That is no longer the case because accounting firms are now allowed to adopt a corporate name made up of ordinary words, a combination of letters, or even a made-up word. This has necessarily had an impact on the naming of trustee firms with regard to the old section 23 of the Directive, which stipulated that the name of a corporate trustee must consist of the name of one or more individual trustees, a name derived from the name of an accounting firm or a combination of the two.

The OSB generally considers developments in other professional bodies and as much as possible attempts to harmonize its standards governing trustee firms with those applicable to other comparable professionals. However, again today, given the characteristics of the insolvency market, we believe it is still necessary to protect the public from the confusion that could result from the offer of parallel services by unregulated firms and to ensure the distinctive and exclusive nature of firms offering professional trustee services. That is why we do not feel it is appropriate to adopt as liberal an approach as other professional bodies with regard to corporate names.”

B. Promote free competition while enabling a firm to develop value added in its corporate name

Developing a corporate name in the area of professional services may require significant investments and constant effort. A firm's corporate name may be linked to the name of the principal officer or his/her profession; the particular reputation of one of its officers or former officers; even the reputation of the firm itself and the people involved in it; finally, it may be associated with the particular nature of the services offered. This is particularly true in the context of globalization of markets and professional practices in the 21st century.

Regulation that is too restrictive in the area of corporate names would protect the acquired rights of a limited group of firms but would limit competition because it would prevent new firms from benefiting from the same advantages. However, regulation that is too liberal would serve to dilute the economic value of some corporate names. For example, in referring to the Canadian Association of Insolvency and Restructuring Professionals' practice standards, the Directive on Advertising by Trustees specifies that placing an extra "A" in front of a firm's name constitutes false advertising.

Annex I

Closed Company (or Private Company) and Share Ownership

A closed, or private, company traditionally has the following characteristics:

- the number of shareholders is limited to fifty (50);
- the company is prohibited from making any public offering; and
- prior approval of the officers is required for transferring shares in the company.

This notion of a closed company is no longer used in numerous jurisdictions. Instead, the inverse concepts of “distributing company” and “reporting issuer” are used. This situation creates difficulties for enforcing the Directive on Trustee Licensing. The purpose of this provision in the Directive was to ensure that trustee firms were not listed on a stock exchange. Large American restructuring companies are not subject to such a requirement.

Moreover, the Directive does not contain any other restrictions with regard to shareholders and company control. The company may be controlled by any person, whether or not that person is a licensed trustee.

Licensing Fees

A. Background

Since 2002¹, every individual trustee, including those working for a corporate trustee, plus every corporate trustee has been required to pay an annual fee of \$850. Prior to 2002, the fee had been \$400. The only trustees not subject to paying the fee are honorary licence holders and Office of the Superintendent of Bankruptcy (OSB) employees. Accordingly, even inactive trustees who do not perform any of the functions of a trustee are required to pay the \$850 fee that is mandated in the rules. Currently, there are approximately 1025 individual trustees and 253 corporate trustees. The current annual invoicing process is highly automated and straight forward. In the weeks preceding invoicing (September–October), the OSB, with the assistance of the trustee firms involved, revises the lists of trustees and then in November all trustees are electronically invoiced. Payment is then made by cheque or credit card.

B. Considerations

One of the main services provided by the OSB relates to its supervisory role regarding the performance of trustees in complying with their duties under the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*. Specific supervisory tasks performed by the OSB include reviews of trustee practices and complaint investigations.

Some trustees require a disproportionately high level of attention and additional supervisory resources by the OSB due to issues of non-compliance. Trustees should be held accountable for their actions in terms of non-compliance.

One option may consist of increasing the licensing fee where the performance of the trustee is considered “unsatisfactory” for a period of at least two years after having been formally advised to that effect; still under that option, the increase in the licensing fee would be higher for “non-compliant” trustees. As the amount to be paid for “unsatisfactory” trustees and “non-compliant” trustees would be dependent on the compliance costs of the OSB, the increase may be substantial.

Another option would be to scale the fee in the opposite direction. Based on that option, the basic fee would be increased but the amount would be reduced where the performance of the trustee is considered satisfactory.

¹ SOR/2001-155. April 26, 2001. Published in the *Canada Gazette* on May 9, 2001 (vol. 135, no. 10). While the fee increase came into force on the 30th day after publication, the new licensing fee of \$850 was applied for the 2002 renewal.

Succession Agreements

1. Policy on Multi-Jurisdictional Licences

According to the Policy on Multi-Jurisdictional Licences issued by the Office of the Superintendent of Bankruptcy (OSB) effective July 1, 2006, a succession agreement is a condition to practice for trustees seeking to practice in more than one province at a time. The actual wording of the relevant paragraph is as follows:

“The trustee must conclude a succession agreement in case of death, incapacity or other factors 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 a trustee.”

If the policy rationale is that a succession agreement is mandatory because of the risks inherent in leaving estate files without a trustee, it would appear that this same rationale would also apply to all trustees wherever they practice.

2. Consequences of the Lack of a Succession Agreement

Unfortunately, on some occasions over the last several years, trustees have died without having a succession agreement in place. Anecdotal evidence suggests that, in the vast majority of these cases, the trustees involved were sole practitioners. Invariably, this has resulted in higher costs being incurred by stakeholders and financial losses being suffered by the families and heirs of the trustees involved. As well, the OSB has been forced to intervene, and in some situations it has not been possible to find a trustee willing to take on the open estates of the trustees. To deal with these situations in the future, the OSB may increase its resources to develop internal guardian trustee capacity to administer these files.

3. Article by Naveed Z. Manzoor

In the fall 2009 issue of *Rebuilding Success*, a publication of the Canadian Association of Insolvency and Restructuring Professionals (CAIRP), Naveed Manzoor also supports the idea that succession agreements are essential for all insolvency practitioners. Furthermore, he suggests that CAIRP’s Rules of Professional Conduct imply that the “public interest” professional obligation would require that succession agreements be in place.

As well, Manzoor points out that CAIRP has produced a Practice Continuation Agreement template to be used by insolvency practitioners in drafting their succession agreements.²

4. Demographics

A recent demographic profile of trustees revealed the following data, which also supports the desirability of having succession agreements:

- 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 three years.
- Of 349 active trustee firms, 68 percent are sole practitioners, i.e., 238 trustees.

² Naveed Z. Manzoor, *Succession Planning: It's Not Optional, It's Essential*, CAIRP, Rebuilding Success, Fall 2009, page 68.

Annual Licensing Report

Many professional bodies, such as members of various provincial bar associations, are required to file annual returns with their governing bodies in which they must provide such information as financial statements, insurance coverage and declarations regarding trust accounts. Some professional bodies also include in their rules of ethics self-reporting of non-compliance and complaints.

Filing of these annual reports ensures a minimum level of oversight for the professionals and serves to demonstrate that the public can have confidence in these professions and that the individual members of the associations are responsible, trustworthy and able to perform their fiduciary duties properly .

To practice, trustees are required to be solvent and have adequate professional liability insurance. As well, they must comply with the *Code of Ethics for Trustees*, which states in section 34:

“Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in the administration of the Act.”

To comply with this section, it is generally understood that trustees should have entered into succession agreements to ensure that their practices continue in the event of their deaths or incapacity. Currently, there is no requirement for trustees to submit an annual report to the Office of the Superintendent of Bankruptcy (OSB) containing information such as financial statements, details of professional liability insurance coverage and confirmation that a succession agreement is in place.

1. Financial Statements

Paragraph 27 of the Directive on Trustee Licensing requires that trustees be solvent at all times and that they have financial resources sufficient to warrant confidence in their ability to properly administer professional engagements. When trustees obtain their licences, they must provide the OSB with a personal balance sheet unless they are working for a trustee firm or, in the case of a corporation, a personal balance sheet of the firm’s managing trustee. There is no subsequent requirement for trustees to submit financial statements to the OSB. However, paragraphs 34 and 35 of Appendix A of the Directive allow the OSB to conduct inquiries to ensure that trustees continue to meet the requirements of the Directive and specifically refer to the possibility of trustees having to provide financial statements.

Along with the Directive requiring trustees to remain solvent, section 13(2) of the *Bankruptcy and Insolvency Act* (BIA) also allows the Superintendent to refuse to grant a

licence to an applicant who is insolvent and, by virtue of section 13.2(3) of the BIA, a trustee licence ceases to be valid when a trustee becomes bankrupt.

2. Professional Liability Insurance and Bonding

Paragraph 27 of the Directive on Trustee Licensing requires that trustees “have adequate professional liability insurance and adequate employee dishonesty (also known as fidelity) insurance, a bond or other suitable financial arrangements.” As well, paragraphs 14 and 26 require that trustees must continue to meet the requirements of the Directive at all times. The OSB verifies that the trustee is in compliance with this paragraph when the licence is issued, but there is no mechanism for verifying that trustees maintain valid insurance on an annual basis.

Professional liability insurance is an insurance product that covers errors and omissions of the trustee in the context of various trustee services. For example, if the trustee failed to insure property of an estate that was destroyed after filing an assignment, the insurance would cover the trustee for damages that creditors suffered from the loss.

Employee dishonesty insurance, or fidelity insurance, is an insurance product that covers crimes committed against or by an employee during the course of the administration of an estate. For example, if an employee is robbed while en route to the bank to make a deposit, this insurance will cover the trustee for the cash amount stolen. Employee dishonesty insurance does not generally cover fraud committed by an employee.

A bond is a financial instrument that secures the due accounting of property received by trustees and for the due and faithful performance of their duties in the administration of estates. There used to be two kinds of bonds: a “general bond” applicable to the trustee licence as a whole and a “specific bond” applicable to a specific estate.

The general bond (or licensing bond) was abolished in 1992. Before that, providing the bond by the trustee was linked to the issuance of a licence by the Superintendent of Bankruptcy. Indeed, old Section 5(1) read as follows:

“A person desiring the obtain a licence to act as a trustee shall file with the Superintendent an application for a licence ... and, when requested by the Superintendent, shall provide such security for the due and faithful performance of his duties in such form and amount as the Superintendent requires.”

While the general bond was abolished in 1992, the current Directive on Trustee Licensing provides that the Superintendent can request a trustee to provide such a bond.

The specific bond (or estate bond) is provided for in Section 16(1) of the BIA. According to that section, trustees give security (“in cash or by bond”) for the due accounting of property received by them as trustee and for the due and faithful performance of their duties. The BIA is supplemented by the Directive on Estate Security (Directive No. 21)

whose purpose is to provide guidance as to when the official receiver will set a security and how to determine the amount.

3. Succession Agreements

As noted above, it is generally understood that trustees should enter into succession agreements to ensure that their practices continue in the event of their deaths or incapacity. For a more complete discussion of succession agreements and related issues, refer to Issue Number 8.

4. Self-Reporting of Non-Compliance and Complaints

As professionals, there should be an obligation to report to the oversight body issues of non-compliance that have been identified by the trustee or by the trustee's agent, such as an internal auditor. Furthermore, to ensure a proper level of service to the public, trustees should report to the OSB all complaints and Court actions taken against them.