

To: Office of the Superintendent of Bankruptcy, econsultation

Attention: Nik Nanos

From: J. Douglas Hoyes, BA, CA, CIRP, CBV, Trustee

Submitted by e-mail to nnanos@nanosresearch.com

June 14, 2010

Re: Administrators of Consumer Proposals

I do not agree that non-trustees should be licensed as consumer proposal administrators.

The OSB *Consultation Paper* makes reference to the February, 2008 appearance by the Ontario Association of Credit Counselling Services (OACCS) before the Standing Senate Committee on Banking, Trade and Commerce. I am intimately familiar with that appearance, since I gave testimony before the Committee immediately prior to the OACCS testimony, and Ted Michalos and me, Douglas Hoyes, were the only trustees in the room watching their presentation.

I have great respect for the work of the OACCS, and their member agencies. Often they are the only voice encouraging prudent money management skills, and it is hard for them to make their voices heard against the back-drop of the massive advertising campaigns of credit card companies, banks, and other businesses that encourage consumers to spend, often beyond their means.

I fully acknowledge that these are difficult times to be a not for profit credit counsellor. As Ms. Ross correctly points out, many years ago the government provided funding directly to not for profit credit counselling agencies. When that funding stopped, as Ms. Ross eloquently stated:

“Some agencies were forced to close, others narrowed their service operation and the larger agencies continued to operate by finding alternative revenue streams. Revenue came from voluntary fair-share contributions from creditors, educational seminars for employee groups, the sale of educational material and the bankruptcy counselling that we do.”

Over the years not for profit credit counsellors began to offer Debt Management Plans, or DMPs, where creditors would agree to make a "fair share" contribution to the work of the counselling agency to fund their efforts.

While a DMP with full payment is good for the creditors, it is generally not an ideal solution for most people as compared to a consumer proposal. Again, to quote Ms. Ross:

“The debt management plans, DMPs, available through credit counselling provide consumers with a workable option to repay debt. Most people who undertake DMPs are technically insolvent, or close to it, but are determined to honour their credit obligations and repay their debt. DMPs are

negotiated with creditors to provide full debt repayment over an extended time frame. Upon acceptance by the creditors, member agencies manage and administer these DMPs and are authorized to operate trust accounts to facilitate payments to creditors.

Voluntary DMPs do not provide court protection for consumers, nor mandate creditors to stop charging interest on the debt, nor mandate a specified time frame for creditors to respond to debt repayment proposals. They do not mandate that creditors accept a pro-rated share of the debtor's ability to repay, nor do they address complex entitlement issues that may require a more formal plan.

On the other hand, consumer proposals are a court-supervised option to repay debt. A consumer proposal is an offer made by a debtor to their creditors to modify their payments in an effort to settle the debt. Under a proposal, a debtor may offer to pay a lower amount each month over a longer period of time or to pay a percentage of what they owe. A significant benefit to consumers of a consumer proposal is protection by the courts from unsecured creditors. This is important because it prevents creditors from taking legal steps, such as seizing property or garnishing wages, to recover debts.”

I agree with Ms. Ross. A DMP is not binding on the creditors, and therefore it is difficult to get all creditors in all cases to agree to the plan.

It is easy to see the problem faced by not for profit credit counsellors. The government withdrew their financial support many years ago, forcing the closure of many agencies. Debtors who need the services of not for profit credit counsellors generally don't have the money to pay for those services, so it is difficult for agencies to cover their operating costs. DMPs were a great way for not for profit credit counselling agencies to generate revenue to cover their costs (through the "fair share" contributions made by creditors), but as debtors realize that a consumer proposal is often a superior alternative, the percentage of debtors filing a DMP has fallen, resulting in reduced revenue for credit counselling agencies.

Realizing that consumer proposals are the superior alternative, many not for profit credit counselling agencies began working with trustees to offer consumer proposals to their clients. They would meet the debtor, assess their situation, gather the necessary financial information, determine their debt load, and then prepare the files for the trustee. The trustee then only had to "show up" at the credit counsellors office to witness the debtor signing the paperwork. The trustee would pay the credit counsellor for their work, and it was a "win-win" for everyone. The credit counselling agency earned some revenue, and the trustee had access to a steady stream of clients without having to do very much work.

Unfortunately, the OSB has rules against this approach. Federal law requires a licensed trustee to personally assess the debtor before they file a bankruptcy or proposal. [Directive No. 6R3 Assessment of an Individual Debtor](#), requires the trustee to personally meet with the debtor and review their assets, liabilities and income, and to review all of the options available for dealing with their debt problems.

[Directive No. 15, Trustee Consultation Fees in Bankruptcies and Proposals](#), specifically prohibits a trustee from charging a fee in most circumstances prior to the bankruptcy or proposal filing, unless that fee is deposited into the Estate.

Section 49 of the *Bankruptcy and Insolvency Rules* states that:

49. Trustees shall not, directly or indirectly, pay to a third party a commission, compensation or other benefit in order to obtain a professional engagement or accept, directly or indirectly from a third party, a commission, compensation or other benefit for referring work relating to a professional engagement.

Trustees therefore cannot pay a referral fee to a credit counsellor for assessing a debtor, or helping to prepare the file, as described in more detail in the OSB position paper on [Referral Agreements between Trustees and a Third Party](#).

Unfortunately once the OSB realized what was happening, they had no choice but to enforce the rules and stop these practices, as noted by Ms. Ross:

“For some time, the larger of the credit counselling services had prepared files for consumer proposals on behalf of certain trustees. This included statutory counselling, interviewing and **assessing** the debtor, and confirming the debt load. The Superintendent of Bankruptcy has recently determined that it is incompatible with the trustee's responsibility to outsource this work. This decision has affected our agency's revenue to the detriment of its ability to provide broader services as well as BIA proposals.”

I both sympathize and empathize with the plight of accredited not for profit credit counselling agencies. They are trying to help people deal with their debts. But a credit counsellor is not licensed to provide assessments, and the OSB correctly has worked to prevent this practice.

The essence of their argument is this: credit counsellors need revenues to fund their worthwhile services, like budgeting education, so they want to generate revenue by administering consumer proposals.

Unfortunately consumer proposals are not “bankruptcy lite”. Consumer proposals are a legally binding, court enforced, federally legislated and regulated legal procedure. Issues that arise in complicated bankruptcy filings can also arise in “simple” consumer proposals, such as preference reviews, transfers at under value, applications to court, disputes at creditors’ meetings, and the ability to issue stays to stop court proceedings. These complicated areas require a great depth and breadth of professional expertise.

Yes, credit counsellors are financial experts, but that does not automatically qualify them to serve as consumer proposal administrators. (Of course they could find a sponsor, enroll in the NIQP and become trustees, which would then qualify them to administer proposals).

I am a chartered accountant, a chartered business valuator, and a licensed trustee in bankruptcy. I obviously have financial expertise. However, does that also imply that I am qualified to sell mortgages, mutual funds, and life insurance? No, because specific training is required to perform specific duties, and I don’t possess that specialized training. Similarly, a credit

counsellor can advise on debt options, but it does not logically follow that they possess the expertise to administer consumer proposal.

The key issue is this: not for profit credit counsellors require a source of revenue so that they can continue to provide their services to Canadians in debt that would otherwise not be able to afford their services. They want to administer consumer proposals to solve their revenue shortfall, but they are not qualified to provide that service. I believe there is a better alternative.

What credit counsellors do best is credit counselling. They are highly skilled in providing advice on budgeting and money management. They are excellent educators. They should concentrate on what they do best. But how do they generate the revenue to cover their costs to provide this unbiased money management education?

The most obvious answer is through the revenue they receive from the credit counselling that they provide to individuals that have filed a bankruptcy or consumer proposal in Canada. Many trustee firms, including my firm, Hoyes, Michalos & Associates Inc., out-sources a significant amount of our bankruptcy and proposal credit counselling to not for profit credit counselling agencies, so that they learn from the experts proper money management skills, so that they don't have any future money problems.

As we all know, Rule 131 prescribes that the rate that is to be paid for the two required counselling sessions is \$85 for each individual session, or \$25 per person if the counselling is provided in a group session. Unfortunately the \$85 tariff is not sufficient, in many cases, to allow the not for profit credit counsellor to cover their expenses, particularly in larger cities where operating costs are high.

Even worse, that \$85 amount has remained unchanged for many years. \$85 in 1994 is the equivalent of \$115 today. The tariff has not kept pace with inflation.

So the first, and most obvious, solution is to increase the amount that is paid for credit counselling sessions. Increasing the rate to \$115 per session would bring the tariff back to where it was in 1994. I would go one step further: I would increase the rate to \$125, or even \$150 per session. Those increased resources would provide greater revenue to not for profit credit counselling agencies, since trustees would have more resources to pay them.

In addition to increasing the rate, I would increase the number of credit counselling sessions required.

Currently the first session must be done in the first 60 days of the bankruptcy or proposal, with the second session completed before the 210th day. That timing makes sense for a bankruptcy that lasts for nine months, but it may not be sufficient for a bankruptcy that lasts for 21, 24, or 36 months, as they often now do under the new rules. It's also not sufficient for a consumer proposal that can last for up to five years.

Therefore my second suggestion is that for all bankruptcies that are automatically extended past nine months, a third counselling session should be added, to occur at some point in the second

year. In addition, for all consumer proposals that last for greater than twelve months, a third counselling session should be added.

This new third session could focus on a review of the techniques learned in the first two sessions, and could include a review of the budget the debtor should be keeping during their insolvency process. This extra counselling session could be used to review different methods of saving (like the new Tax Free Savings Account), and could cover more advanced budgeting techniques. Perhaps this new counselling session could include an interactive web based component, allowing debtors to track their budget information on line. There are many tools that already do this, so it would not be that difficult to develop the content for the new third credit counselling session. Credit Canada, a not for profit credit counselling agency, has created a [Financial Coaching Series](#) that costs \$120 per session for six sessions, so the expertise and content already exists for this extra counselling session. In fact, I would seek the input of the not for profit credit counsellors, including the OACCS and Credit Canada, to help design this third session.

By raising the counselling rate from \$85 to \$125, and by adding a third session, the revenue generated by each personal bankruptcy or consumer proposal would increase from \$170 to up to \$375. That increase in revenue would go a long way towards helping not for profit credit counsellors help the people they want to help.

While increasing the counselling tariff and adding a third counselling session may not be the perfect solution, it would begin to address the true underlying issue: declining revenues at not for profit credit counselling agencies.

Further more detailed commentary is provided at <http://www.bankruptcy-canada.ca/trustees-talk/bankruptcy-alternatives/20100614/should-credit-counsellors-administer-consumer-proposals.html>