

Comments on a National Licencing Model for LITs

Introduction:

The following comments are the writer's, from the perspective of an experienced LIT, in practice continuously from 1982 till the present except for one year on an insolvency related project.

My experience includes time with 3 national firms, 3 multi-jurisdictional major firms, and 5 single jurisdiction independent firms. The latter ranging from 3 to 50 owners and staff. 5 of these firms were the result of mergers, This experience includes periods as an owner for 20 years and therefore privy to private affairs of the practices.

I have held my license to practice in 3 provinces, all at different times, as well as both Territories and Nunavut. My comments are based on my observations from this experience.

Issue:

Qualification of Issue;

If the envisioned National Licence is for a firm in one province to open a resident office in different provinces or territories or Nunavut (hereinafter referred to as "Regions") no comments are required because this situation is governed by Directive currently in effect for all Regions. If a LIT firm is prepared to expend the resources to establish a bricks and mortar location and man it appropriately with a LIT license for the region, the office can operate at the discretion of the OSB.

I assume the comments requested are in regard to one Licence that allows a LIT to practice in all Regions, without the necessity of having a resident office in an area where there are existing resident offices of other LITs .Potentially any Licence in any Region would have the ability to administer files in any other Region, without the special permission for remote assessment or resident office.

Matters to Consider:

My comments will be made on 4 matters;

-Access to the Public

-Regulation by OSB

-Standard of professionalism and confidence in the administration of the BIA

-Marketing strategies and the effect on public perception

1) Access to the Public

Previous to the unprecedented situation brought about by the covid pandemic, all assessments were conducted in-person. Individual permission was required to conduct

Assessments otherwise by telephone or video conference. This system has worked historically and required the vast majority of debtors meeting with the LIT and/or qualified staff in person. The incidence of debtors not being able to access the BIA options were virtually non-existent. The rare use of the OSB Referral Program is proof of the ease of access to the BIA. The system therefore works with regard to access while most licences have been valid for only 1 or 2 regions.

2) Regulation by OSB

An LIT is an uncommon, specialized profession. Most professions with significant educational and experience requirements, similar to a LIT, are self-regulated by the profession, sanctioned by Regional or federal legislation. Regulation is by the professional's peers. Examples include lawyers, doctors, dentists, accountants, engineers, pharmacists, architects to name a few. Serious concerns or complaints are commonly judged by a panel of peers. Those with professional knowledge and experience assess the practice issues of fellow practitioners.

LITs are unique in this situation where the OSB is a stand alone federal agency that has the role of regulator for all LITs in Canada, over all Regions. The major reason for this situation is the scarcity of LITs in Canada. Many years ago, CAIRP removed the goal of self-regulation due to the enormity of the cost that would, by necessity be borne by so few Licencees.

The OSB regulates what it can with the resources at hand. Few, if any within the OSB, have the experience or practice knowledge of the average LIT. The primary activities within OSB regulation include;

- a) determination for new Licencees (with the assistance of LITs and lawyers in the respective Regions) via an oral exam, after the candidates have successfully completed the CAIRP education modules
- b) monitoring trust accountant reconciliations prepared and provided monthly by Licencees with direct access given to the OSB to Licencee trust accounts.
- c) Accepting as the formal depository, all filings under the BIA.
- d) Audits of practices. The majority of comments regarding audits tend to be basic. The monthly trust account reconciliations and annual banking report form part of the Licencee's accounting records for trust funds and should be straight forward for review. Otherwise, audits typically contain whether or not the appropriate BIA forms were prepared, signed and in evidence in the file. Where applicable, deadlines for notices or practice were met. These are clerical issues and do not consider the application of professional expertise needed in the daily operation of a practice to attain the goal of professionalism the public deserves in a LIT. The exercise of professional knowledge and judgement includes the thought process or procedure involved in the determination or realization of assets. The quality of Assessments conducted. The level and reasonableness of investigation of the statement of affairs to appropriately advise the debtor and creditors. These

are rarely, if ever, questioned in an audit. These are matters more accurately reviewed peer to peer.

- e) Interventions, which include examinations of debtors or others are infrequent, and even less frequently, interventions with respect to Licence's actions. It is the writer's observation that the profession would be better served by more frequent review of what I refer to as "professional activity" of Licences rather than clerical activity. Such an increase in scrutiny would require a higher level of knowledge and experience within the OSB of the activities and decision processes within Licence offices. The result for some Licenses would be the OSB "raising the bar" of professional expectation which is a positive result for the Industry and the public.

3) Standard of professionalism and confidence in the administration of the BIA

Competition for market share and professionalism can be and are in my experience, contradictory in nature for many practices. When "getting the file" is more important than providing an honest and comprehensive analysis (Assessment) of a debtor's situation, all of us involved in this profession as well as the public lose. The debtor has not received the degree of professionalism that should be expected, the creditors suffer by a delay in a proposal with weak possibility of success, the Licence has done an ill service to the trust that has been conferred by the granting of a licence, the confidence that the public should have in a Licence and the administration of the BIA suffers as a result. I for one, believe that the increase in consumer proposal files vis-a-vis bankruptcies is a result of many practices "pushing" their staff to recommend consumer proposals, not because it is the best option for debtors and creditors, but because the remuneration to the practice versus costs favours consumer proposals over bankruptcies. Typically, in a proposal, assets do not require realization, there are no monthly income and expenses to monitor, reports are minimalized, there are no tax returns to prepare. Once the consumer proposal has been accepted by creditors, monitoring the file is merely a clerical operation. The professional responsibility of a Licence in such cases has been significantly lowered.

It is the responsibility of a Licence, when currently requesting a Licence for a new Region or an extension of their licence to a new Region, to certify to the OSB that the Licence is familiar with the legislation of the new Region that will affect the Licence's ability to properly administrate the BIA in the applied for Region. I have applied 3 times for my licence to be transferred to a new or changing Region. My review of the legislation for the new Region has necessitated review of all Regional legislation that affects property or creditors' rights. This typically is 3 or 4 dozen Regional Acts. Though many are similar from Region to Region, there are subtle differences that impact the administration of estates. Once in practice with the "new Licence" it still requires regular reference to the legislation of the new Region until the differences between Regions that

affect property and rights becomes familiar. Beyond the obvious exemption differences, some examples;

- “seize or sue” with respect to consumer goods is not consistent across Canada

- in some Regions, a debt subject to the relevant Limitation Act is stayed or unenforceable, in others extinguished, which is relevant whether a creditor can file a claim for the purpose of dividends or not.

- PPSA legislation has slight differences between regions that affect perfection of security interests

- matrimonial law and the determination of rights to property and effective date vary amongst Regions

Add to this, there are differences in Court procedures and the “flavour” of Court decisions between Regions, let alone Courts in the same Region. It can be a significant disadvantage for a Licence to fail to know or abide by the “general procedure” in the local Region Bankruptcy Court or even the procedures preferred by the Court clerks offices. Bankruptcy Registrars, Masters, and Judges soon know which Licences’ applications or suggestions can be trusted when considering an Order, or otherwise at the peril of the Licence. Faith in the local Licences by the Regional Judiciary can be an important factor in the public perception of the professionalism of LITs.

4)Marketing strategies and the effect on public perception and the health of the profession

It is one matter to be a resident member of the business and local community to establish confidence in the public of the professionalism of a Licence in general. It is very different to be marketing from afar and administering remotely.

As an example, consider the perception of the public regarding credit counsellors in general. Marketing strategies will tend to favour mass media opportunities, email alerts, mass cold-calls or robo-calling ? None of these methods elevates public perception of our profession, I would suggest they have the reverse effect.

If a file is to administered remotely based on a national licence, will the “National Licence” from afar forego complicated or controversial files that are difficult to administer remotely, or where Court action may be required ? Will the “National Licence” from afar cherry-pick files where assets or surplus income is abundant and skip low tariff return files as unprofitable ? Will such activity weaken the financial viability of resident Licences and in turn make accessibility for low return files more difficult ?

Summary;

All of the described matters and likely more, need careful consideration in assessing the benefit versus negatives of a “National Licence”.

The writer considers this a sufficiently important issue to co-operate in discussions by conference remotely or in person at the request of the OSB and/or CAIRP.

Licence 1954

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