



**Submission to the
Office of the Superintendent of Bankruptcy
Policy and Regulatory Affairs**

Comprehensive review of directives and regulations under the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*

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1. Introduction – The Insolvency Regime and this Consultation

As stated in the Office of the Superintendent of Bankruptcy (OSB) consultation description, the aim of the insolvency regime is to minimize the impact of a debtor’s insolvency on all stakeholders. It does this by pursuing various key objectives that include providing a fresh start for the Debtor while striking an appropriate balance among competing interests.

The OSB is responsible for the administration of all estates and matters under the BIA, including investigating complaints regarding the conduct of monitors. It licenses and regulates the insolvency profession, supervises compliance with the insolvency process, and maintains public records and statistics to ensure that the insolvency regime functions effectively, contributes to an efficient marketplace, and promotes confidence in the Canadian economy. The OSB provides detailed requirements through directives and forms and by developing regulations, all of which share the objective of improving financial outcomes for Canadian consumers and businesses.

This regulatory review seeks to identify areas of Canada’s insolvency system that can be made more agile, transparent, and responsive without jeopardizing the integrity of the system. The OSB states that it strives for an outcome-and principle-based approach, where appropriate, while also maintaining a predictable, fair, and level playing field for all stakeholders.

The OSB is interested in receiving submissions on topics that concern stakeholders and invites broad stakeholder input through comments and suggestions on how to modernize and improve the regulatory framework, enhance the effectiveness of its administration, and increase accessibility to insolvency proceedings.

The OSB also states that although needed legislative changes fall outside of the scope of this consultation, submissions that reference or suggest the need for legislative change will be shared for consideration with Innovation, Science and Economic Development Canada officials responsible for legislative policy with respect to the insolvency framework.

In this submission, the Canadian Debtors Association (CDA) provides commentary, suggestions and recommendations that are:

- Within the scope of this consultation,
- For sharing with Innovation, Science and Economic Development Canada officials responsible for legislative policy with respect to the insolvency framework,
- Primarily focused on Consumer Protection and Modernizing Data and Metrics,
- Descriptive of consumer exposure to potential harms, mitigation, compliance, and enforcement activities that would strengthen consumer protection and protect the integrity of the insolvency system.

2. About Canadian Debtors Association (CDA)

Canada is a nation of Debtors; most Canadians are, have been or will be, a Debtor. For many, debt is ever present and a life without debt is but a dream.

Debtors in financial crisis are at the mercy of systemic flaws within the credit, debt, and insolvency industry. When flawed situations arise, people usually suffer in silence, and no one hears about them.

This changed in 2018 when the non-profit Canadian Debtors Association was formed to be the industry advocate that supports and acts solely for Debtors.

Building a better Debtor experience, particularly for those who are financially vulnerable, is CDA's transformational vision for Debtors in Canada. This means introducing better structures, supports and the care that is needed for Debtors to successfully recover from financial issues and insolvency.

Please refer to the Appendix for more information about CDA.

3. OSB Consumer Protection Assertions Do Not Reflect Reality

In the consultation paper communication, the OSB asserts statements and information about consumer protection that is very concerning to CDA. This is because the OSB's assertions do not appear to be based on facts, do not evince reality, nor are they supported by objective evidence. Furthermore, these untoward assertions reflect a misguided, serious bias:

- The OSB states that the Canadian insolvency system seeks to offer honest but unfortunate consumer debtors a fresh start while maximizing returns to creditors and that LITs must carry out their functions honestly and impartially.
- The OSB expresses the opinion that other service providers within the debt advisory marketplace (who are not trustees) may be driven by profit motives to engage in practices that pose risks to the integrity of the insolvency system by impeding debtors from finding the right solutions for their financial situations.
- Furthermore, the OSB opines that because such other service providers are not subject to the same advertising restrictions that govern trustees, they engage in marketing activities that may create confusion for debtors or cause debtors to pay unnecessary and costly fees.

4. The Reality Is

If the OSB must concern itself with all stakeholders, providing a fresh start for the Debtor, striking an appropriate balance among competing interests, ensuring LIT compliance with the insolvency process, and maintaining public records and statistics, the OSB fails to meet these objectives.

In addition, the OSB fails to exhibit the outcome and principle-based approach that it promotes and fails to demonstrably champion the predictable, fair, and level playing field for all stakeholders that OSB espouses.

- **Debtors Are Stakeholders Too**

A most basic issue is that the Debtor is not recognized as a legitimate “stakeholder” by the insolvency system. Because of this, Debtors are disrespected, discounted, and not allowed to have their own, independent representation before and throughout the insolvency process. This inherent unfairness is described in more detail below.

- **The Fresh Start**

The *Bankruptcy and Insolvency Act* was enacted to bestow Debtors the opportunity of a “fresh start”. While its intent and main purpose remain clear, its application fails many Debtors because no one is legally prescribed in the BIA or the insolvency system to solely represent the interests of the Debtor.

Lacking this provision, the *BIA* exploits the Debtor by disrespecting and disempowering them through completely ignoring the Debtor’s deep needs at a time of tremendous vulnerability. In economic hardship and insurmountable debt, Debtors require, yet are denied, choice and opportunity to have their own representation of a independent and qualified Debtor Advocate, to work solely on their behalf in proceedings under the *BIA*.

With statutory duties, the Licensed Insolvency Trustee (LIT) is often described as a referee with a duty to investigate a Debtor’s affairs, protect the interest of the creditors and ensure that Debtor treatment is within the bounds of the *BIA*. The LIT’s duty to both creditors and the administration of the personal bankruptcy and consumer proposal process prohibit a Trustee from acting as an advocate for the Debtor.

Thus, Debtors face the enormous challenge of navigating an unfair playing field that is tilted to advantage the creditors, while at the same time, are systemically restrained from the potential of a best possible result for themselves under the *BIA*. Often, this drives Debtors to bankruptcy rather than a consumer proposal option which is devoid of the trauma and stigma of bankruptcy.

Denying the representation choice for Debtors to select who could best serve only their needs, is also unfairly discriminatory. This imposed restriction is like the medical system disallowing a patient to select the medical supports the patient believes would aid and speed their healing. There is no published evidence or basis in fact that supports the OSB to deny Debtors from having their own independent representative that would serve to support and assure their best interests.

- **Debtor Advocates – A Crucial Resource, Not a Threat**

Although the insolvency system has no role in regulating Debtor Advocates, the insolvency system itself unfairly discredits these helping professionals as being unwarranted and unneeded by Debtors. The insolvency system now denies certain fully OSB-qualified ICQC independent counsellors from performing the *BIA*-mandated insolvency counselling sessions with Debtors. This has significantly disadvantaged Debtors by removing from them the availability of a pool of qualified individuals and valuable supports that were proven to help Debtors in their effort to rehabilitate their financial wellness, before, during and post-insolvency.

Without merit or justifiable cause, the current positioning within the insolvency system is that only the LIT should act for the Debtor, even though the *BIA* explicitly prohibits the LIT from doing so.

Debtor Advocates pose absolutely no threat to the insolvency system, but rather are a crucial resource to be encouraged as an important and positive contributor for Debtors and the system alike.

CDA is committed to improving the Debtor experience and raising the bar of expertise for the Debtor Advocate profession. True to this mission, CDA has implemented a gold-standard certification program that bestows qualifying professionals with the Certified Debtor Advocate designation.

Every aspect of CDA's certification training is uniquely designed to be Debtor-centric, with foundational principles of Trust, Integrity, Respect, Truth and Expertise. Developed competency through successful completion of specific training modules in the areas of Ethics and Values, Behavioural Financial Coaching, Fundamentals of Advocacy, Servant Leadership and Anatomy of the Debt System in Canada is required in order to be certified.



Adherence to CDA's Code of Ethical Standards and Principles of Conduct is also required along with continuing education to maintain the Certified Debtor Advocate designation.

CDA is actively working towards regulation of the Debtor Advocate profession.

More information about CDA's Certification program is available at CDA's website:
www.debtorsvoice.org.

- **The Falsehood of a Fresh Start**

As mentioned above, the *Bankruptcy and Insolvency Act (BIA)* was enacted to bestow Debtors the opportunity of a “fresh start”. The unfortunate reality of this fresh start, however, reveals serious flaws that subject Debtors to unconscionable misery.

This is because the insolvency system is deficient in any reference, responsibility, rules, or accountability concerning the reporting of accurate information within the credit reports of Debtors who undergo consumer bankruptcy and/or consumer proposal. This includes public record, trade lines and narrative information with respect to bankruptcy and/or consumer proposal. In addition, there is a total lack of explicit responsibility for the integrity and accuracy of bankruptcy and/or consumer proposal information that generates from or through the various parties involved in the system, such as creditors, Licensed Insolvency Trustees (LITs), credit reporting agencies (credit bureaus), etc.

Inaccurate bankruptcy and consumer proposal reporting for consumer credit reports is an egregious defect in the insolvency system that impacts all Debtors who file a bankruptcy or undertake a consumer proposal. Over the last 7 years alone, there have been 846,637 Debtors affected.

Information and data that finds its way into consumer credit reports yields enormous power and influence over the livelihood and well-being of individuals. This is vitally important for all circumstances and, especially, when personal bankruptcy or a consumer proposal is part of any consumer's history. Only accurate data should be allowed, however, regrettably this is not what Debtors experience.

There are thousands of examples of BIA-related inaccuracies and misleading information issues on consumer credit reports; such as*:

- A lack of clarity and blurred distinction between bankruptcy and consumer proposal,
- Bankruptcy information erroneously applied to non-bankrupt Debtors,
- Consumer proposal information misstated or confused with bankruptcy information,
- Debt trade lines, including student loans, continuing to be reported delinquent by creditors despite such debt being included in a consumer proposal and fully paid,
- Attempts to correct credit report inaccuracies falling on deaf ears with desperate Debtors left to suffer in silence, having nowhere to turn and no one to help them.

- No accountability or responsibility in the system to correct errors or misleading information on credit reports; creditors place blame on the credit bureaus, credit bureaus place blame on the creditors, while LITs have no specified role or authority in credit reporting matters – all of which places the Debtor in a utterly hopeless situation.

** Copies of the consumer credit reports containing these examples are available from CDA, upon request.*

Debtors suffer undue hardship, reputational damage, and unjustified consequences when their credit report information is inaccurate. Based on real stories and experiences, Debtors with credit reports that are infected with inaccurate or misleading bankruptcy and/or consumer proposal information are being:

- Refused housing because a bankruptcy erroneously shows on their credit report,
- Declined employment because a bankruptcy erroneously shows on their credit report,
- Tarrred with individual creditor trade lines on their credit report that continue to show delinquency long after the consumer proposal is paid,
- Assumed to be a bankrupt because creditors do not understand or appreciate the difference between bankruptcy and a consumer proposal, and
- Advised by LITs that consumer proposals reflect better than a bankruptcy on their credit report, yet the actual treatment Debtors receive does not support this claim.

It cannot be over-emphasized how such inaccurate information affects the lives of Debtors. Incorrect information is also detrimental to businesses and organizations that make decisions on the basis of the information contained in a credit report. Factually incorrect information leads to flawed business decisions.

Rules that ensure the responsibility and accountability of all parties involved in the accurate reporting of bankruptcy and/or consumer proposals must be enacted without delay along with enforcement provisions that allow for inspection powers and penalties for lack of compliance. Some examples of enforcement provisions could include routine inspections, as follows:

- a. Of a random sample of credit reports for Debtors who have filed bankruptcy or undertaken a consumer proposal to determine the accuracy of such details,
- b. Of how third-party providers are stating bankruptcy and consumer proposal information on credit reports and whether this is consistent with the source information held by Equifax and Trans Union,
- c. To affirm the accuracy of the personal bankruptcy indicator and the consumer proposal indicator on consumer credit reports against creditor records, the records of the Licensed Insolvency Trustee and the records of the Superintendent of Bankruptcy.
- d. To affirm that trade lines are depicted accurately, and with the correct credit ratings, at the time of the official filing, during and post the bankruptcy or consumer proposal periods.

- e. The accuracy rate of bankruptcy and consumer proposal information on credit reports, with detailed explanations to describe remedial actions being taken to improve accuracy rates.

Lastly, non-compliance must result in fines and penalties imposed by the OSB as a strong deterrent for false statements concerning bankruptcy and consumer proposals on consumer credit reports.

- **The Impartiality Illusion – Conflict of Interest and Misleading Advertising**

Conflict of Interest

The OSB states that LITs must carry out their functions honestly and impartially. Yet, the BIA and insolvency system takes a position that promotes an inherent conflict of interest for LITs. This is because the more money that a Debtor repays to their creditors through a consumer proposal under the BIA, the greater the financial compensation is earned by the LIT. The LIT stands to earn 20% of every dollar of creditor distribution.

This conflict of interest can be resolved by not tying LIT compensation to the dollar amount of debt being repaid, but rather having a method of compensation that is based on the complexity of the consumer proposal filing. This approach is also logical in that, surely, handling a file of equal complexity deserves equivalency of compensation given the same degree of work effort.

Why would an equal work effort be rewarded differently just because the dollar amount of debt differs?

For example, if there were 5 unsecured creditors in a consumer proposal receiving payments over 60 months, under the current 20% LIT compensation per debt dollar:

- a Debtor with a proposal debt of \$15,000 would compensate the LIT \$3000, while
- another Debtor with a proposal debt of \$40,000, would earn the LIT \$8000 in compensation.

This example also illustrates the nature of the conflict of interest in that the more debt that is repaid, the higher the level of compensation that the LIT receives. This compensation difference represents a monetary incentive to potentially cause a consumer proposal amount to be higher than what the Debtor can reasonably afford to pay. When unreasonable proposal payments are struck, it can lead to the failure of the proposal to be successfully repaid and completed by the Debtor. This could be the underlying cause of the high failure rate of proposals – perhaps, the debt amount and resultant payments were simply unaffordable for the Debtor from the outset.

Thus, not only would a flat rate compensation method eliminate the inherent conflict of interest that LITs face, but it can also benefit the entire insolvency system. More consumer proposals could achieve a greater success of completion due to more realistic and affordable proposal payments for the Debtor.

Misleading Advertising

The OSB accuses the debt advisory marketplace of inappropriate advertising, yet the advertising of OSB's own LITs are the most unsettling. This is very concerning given that the OSB has rules concerning advertising and a Code of Ethics that LITs should be complying with.

There is a great deal of disingenuous advertising by LITs that paint a false picture of the insolvency industry, particularly concerning what the work of an LITs entails, who the LIT works for and why, and how an LIT gets paid. Many of the LIT advertising messages seem artfully deceitful and purposely misleading.

Debtors are confused and misguided because they are routinely hoodwinked by LIT advertising that makes false claims, such as:

- The LIT works “for the Debtor”,
- The LIT can “eliminate debt”,
- The LIT “reduces debt by 80%”,
- The LIT states there is “no cost to the Debtor”,
- The LIT states “no cost to you as a citizen”.
- The LIT can “clear your debts with One affordable monthly payment”,
- The LIT states debt reduction “by up to 70% and sometimes even more”,
- The LIT says a proposal advantage is “a partial refund, without interest on your debts”,
- The LIT can “eliminate debt today”,
- The LIT says a proposal can “legally force creditors into the settlement”,
- The LIT states “no additional payments from you, as we are paid by a government tariff”,
- The LIT states “with a consumer proposal, you pay no professional fees”,
- The LIT states “the consumer proposal is free and there are no upfront costs”,
- The LIT states “debt free in 30 minutes”,
- The LIT show online calculators that indicate monthly proposal payments of \$58.33 for \$10,000 of debt and \$97.20 if your debt is below \$10,000,
- The LIT states “your debt worries will be gone!”,
- The LIT states “savings” re a consumer proposal,
- The LIT states use of consumer proposal as “increased popularity”,
- The LIT indicates “government-approved program”
- The LIT not mentioning that they are an LIT.
- The LIT states they “work for the Debtor”,
- The LIT states “No hidden fees, we are paid by government tariff”,
- The LIT states “Federally Licensed Program”.

The OSB must enact stronger advertising and disclosure rules and enforcement of them so that Debtors are given only clear, honest, and comprehensive information that describes the services that an LIT provides, for whom the LIT works and how the LIT is compensated for their work.

5. Statistically Speaking – The Need to Modernize Data and Metrics

The BIA lacks reference to accountability and communication to the public, stakeholders, and industry, nor does it indicate a rigorous responsibility for thought leadership concerning the review and effectiveness of the insolvency system, including individual LITs.

Performance measurement systems with methodologies that include objective performance metrics and reporting would ensure transparency, reduce the potential for bias and enable industry and Debtor knowledge and awareness.

CDA recommends a regulatory modernization of data, metrics, and statistics with respect to the Insolvency system with requirements for full and timely publication of this information, for complete transparency.

This would include introducing a new framework of objective performance measurement methodologies, metrics, and reporting processes for consistent application across all aspects of the Insolvency system, in order to:

- Determine the effectiveness of individual Insolvency Trustees (LITs) who work with insolvent Debtors and provide consumer insolvency services;
- Determine the effectiveness of persons who perform Insolvency Counselling sessions with insolvent Debtors;
- Illustrate whether the Insolvency system is successful at generating improved short, mid, and long-term outcomes, such as beneficial financial habits for Debtors who have undergone consumer insolvency. This would include post-discharge follow-up information at the one, three and five-year anniversary of discharge to help determine the applied learnings and outcomes as a result of the Insolvency process;
- Provide in-depth information and data analysis about consumer insolvencies so that better comparisons can be made on behalf of Debtors as they try to navigate the *Bankruptcy and Insolvency Act*; and
- Provide a systemic avenue for Debtors to formally evaluate and express their views regarding their experience with the Insolvency practitioners that provided them with insolvency services.

The benefit of introducing the aforementioned framework is that OSB will be better positioned to develop more informed future Directives for the Insolvency system, that are based on accurate data and the subsequent analysis of it, to drive its decision-making and to replace flawed, assumptive-based thinking.

As part of this modernization effort, the OSB's financial literacy mandate needs to be strengthened with assumed best practices scrutinized and improved on behalf of Debtors.

Through working more closely with CDA and other stakeholders, the OSB could bring improved consistency to specific aspects of the consumer Debtor experience, including the introduction of clear and bias-free fee structures.

6. SUMMARY

As the voice of the Debtor and industry advocate that supports and acts for Debtors, the Canadian Debtors Association is eager to work with legislators and regulators to participate and collaborate in the development of enhancements to future legislative changes and frameworks.

Thank you for the opportunity to contribute to the OSB's comprehensive review of directives and regulations under the *Bankruptcy and Insolvency Act*.

CDA is confident that our commentary and recommendations can be of benefit to all stakeholders of the insolvency system, including Debtors.

If there are any questions or clarification needed with respect to our submission, please let me know and I would be happy to assist.

Respectfully submitted,



Henrietta Ross

Appendix: About the Canadian Debtors Association (CDA)

Canadian Debtors Association – the industry advocate that supports and acts solely for Debtors.

CDA is a national non-profit organization that is committed to helping individuals and families to optimize their financial well-being.

Building a better Debtor experience, particularly for those who are financially vulnerable, is CDA's transformational vision for Debtors in Canada.

This means introducing better structures, supports and the care that is needed for Debtors to successfully recover from financial breakdown and insolvency.

The CDA is well-equipped to examine industry and Debtor issues, consider practical, meaningful, and innovative solutions and present thoughtful recommendations to introduce, enhance and improve legislation, regulation, policies, systems, and practices.

More information about the Canadian Debtors Association can be found at www.debtorsvoice.org.