

June 9, 2021

Via E-Mail: ic.osbregulatoryaffairs-affairesreglementairesbsf.ic@canada.ca

Ms. Elisabeth Lang
Superintendent of Bankruptcy
Office of the Superintendent of Bankruptcy
155 Queen Street, 4th Floor
Ottawa, ON K1A 0H5

Re: Comprehensive Review of Directives and Regulations under the *Bankruptcy and Insolvency Act*

Dear Superintendent Lang:

The pandemic lockdown permanently changed how LITs interact with debtors and other stakeholders. For example, video meetings are now the most common meeting format for debtor assessments, counselling sessions, court hearings (in some provinces), and many other meetings.

While the OSB consultation seeks input on many specific questions, there is one primary issue:

How best can we bring about the rehabilitation of the honest but unfortunate debtor?

The answer to this question leads to the answers to the consultation questions on national licenses, consumer vs. commercial licensing, consumer protection, and accessibility.

Hoyes, Michalos & Associates Inc. is a Licensed Insolvency Trustee serving consumer debtors in Ontario. We are pleased to present a summary of our recommendations, followed by our detailed comments.

Summary of Recommendations

- 1) **Recommendation:** LIT licenses should continue to be granted provincially, with LITs permitted to apply for a license in each jurisdiction where they attest that they are competent to operate.

- 2) **Recommendation:** Directive No. 33, *Trustee Designation and Advertising*, should be amended to require LITs to designate, for each office or service area, access options available:

- In person meetings available
 - All services provided by phone or video conference; in person meetings not available at this location; for in person meetings please see our office in NearbyCity
- 3) **Recommendation:** To offer personal insolvency services in a service area, LITs should be required to provide access to both consumer proposals and bankruptcy services, and those services should be offered in proportion to the overall market.
- 4) **Recommendation:** Directive No. 6R3, *Assessment of an Individual Debtor*, should be amended so that the Assessment Certificate has disclosure similar to the BIA insolvency counselling certificates, including:
- Service delivery method: in person, video, phone
 - Location of the debtor, location of LIT during the assessment (city, province)
 - Length of the assessment **with the LIT** – less than 15 minutes, 15 to 30, 30 to 45, 45 to 60, more than an hour
- 5) **Recommendation:** To increase access for low income, no asset debtors, the Estate Information Summary should be modified to allow the LIT to designate the estate as "\$1,800 or less realizations expected", leading to the elimination of the OSB filing fee (which would become payable if realizations exceed \$1,800).
- 6) **Recommendation:** Directive No. 33, *Trustee Designation and Advertising*, should be amended to acknowledge that advertising is now predominantly online, and all online ads should contain a prominent link to the LITs primary website where full disclosure is provided (location of resident and non-resident offices, the LIT designation spelled out in full, etc.).

Detailed Commentary

The Benefits of Virtual

A LIT no longer requires a physical office, with staff, to service debtors in any given area.

There are no technical limitations to prevent a debtor from choosing any LIT in Canada, or to limit a LIT from operating in any area. Choice is good.

Virtual meetings eliminate transportation time, eliminate the need to find a babysitter, pay for parking, or even take time off work. Less travel is good for climate change. Virtual is good for debtors.

For LITs, there are significant cost savings to a reduction in physical office space. Trustee staff can be more effectively utilized, as staff can now conduct appointments across the country, wherever there is a need. Lower operating costs may make it more viable for a LIT to take on a "low dollar value" file because realizations do not have to be as significant to cover lower costs. Access for LINA and NINA debtors may improve.

The Disadvantages of Virtual

Debtors who are not comfortable with technology are disadvantaged.

Debtors who work in an open office, or a factory, may not be able to attend a phone or video meeting, and may prefer the privacy of an in-person meeting.

While physical operating costs are reduced in a virtual world, LITs will have even greater incentive to expand by "cherry-picking" high dollar value files in other jurisdictions while avoiding low dollar value files.

As a result, while debtor **choice** would increase with national, virtual LITs, debtor **access** may decline.

You Can't Put The Toothpaste Back Into the Tube

There are disadvantages to virtual meetings, but they are now a permanent fact of life. The question is not "should we allow them" but instead, "how can we provide the highest level of service to debtors?"

Operating virtually eliminates the need for local offices, so LITs with the financial resources and marketing expertise can quickly expand to service debtors anywhere in Canada, likely to the detriment of local practitioners who survived pre-pandemic due in part to the absence of non-local competition.

The Regulatory Response

The OSB has two options:

First, they could attempt to slow down the inevitable growth of the big firms, but that would be like attempting to support the local blacksmith in the age of the automobile. Those efforts will ultimately prove fruitless.

The other option is for the OSB to Go Big.

In Canada, we have five Big Banks. To counterbalance their power, we have a very robust regulatory regime.

The same approach is necessary to regulate the big LIT firms. The OSB must adopt a strategy that acknowledges that the Big Firms will get bigger but the OSB should create a regulatory environment that ensures all stakeholders are protected.

Our recommendations to achieve this follow.

National Licensing

Currently LIT licenses are issued for a specific geographic region, generally a province. With virtual meetings, geography is no longer relevant; a Zoom call can be done from anywhere, to anywhere.

While technology is borderless, people are not. Local expertise matters. When advising a debtor, a LIT should understand the provincial exemption limits and local court procedures, and should be familiar with local service providers where a referral is necessary (tax preparers, mortgage brokers, addiction counsellors, etc.). All creditors are not national, and thus an understanding of local creditors is essential to provide comprehensive advice to debtors.

How should we balance national scope with local expertise?

Recommendation: LIT licenses should continue to be granted provincially, with LITs permitted to apply for a license in each jurisdiction where they attest that they are competent to operate.

Just as a LIT must apply for permission to operate a resident office (by attesting that they have adequate facilities and staff resources), a LIT should be able to apply for a license to operate in multiple jurisdictions, provided they attest to their knowledge of provincial legislation, and their familiarity with local stakeholders (courts, creditors, counsellors, etc.).

Choice vs. Access

A large firm can "cherry-pick" the profitable files, potentially leaving debtors in remote areas with limited access to a full range of insolvency services. A debtor has no difficulty finding a LIT to administer a simple, high dollar value proposal; every LIT is happy to take on that file. Access is an issue for low-dollar value complex files.

For example, the debtor operated a sole proprietorship, now closed. They have numerous outstanding government filings (income tax, HST) and a long list of unique creditors who may not be familiar with the bankruptcy process and require significant time from the LIT to answer their questions. The debtor decides to "take a year off to recharge" so they go live with their family. Therefore, they will have no surplus income or any potential asset realizations for trustee fees and distributions to creditors. The LIT must pay the OSB filing fee and other administration costs and will likely devote many hours to administering the file, but under section 156.1 of the Act and Rule 58.1(1), the court may limit the trustee's remuneration to \$1,800.

So, given a choice between spending dozens of hours on a file to perhaps recover \$1,800 and simply declining to accept the file, refusing to accept the file is the obvious option. Rejecting a

debtor is more difficult when they have travelled to your office for the meeting and are sitting in front of you; if they are on the phone, it's much more straightforward.

If a LIT can only source files from their town, they will be inclined to take whatever files they can get, because every dollar is marginal revenue that can go towards covering their fixed costs.

But if an LIT can source files from an entire province, or country, and has lower physical fixed office costs, it's much easier to focus on the easier, profitable files and decline the more cumbersome, less profitable files.

Balance the Interests of the LIT and Debtor

How then can the needs of the debtor be balanced with the business considerations of the LIT?

One option would be to mandate that an LIT can only take on files where they have a resident or non-resident office. That would prevent a trustee from instantly operating across the entire province, region or country.

While that appears to be a simple solution, it would be impossible for the OSB to regulate.

Operating Area - How do you define the operating area?

If the LIT has a resident office in downtown Toronto, can they take on a file from the west end of Toronto? Mississauga? Milton? Hamilton? Kitchener?

Before the pandemic, there were thousands of people every day who commuted from distances an hour or more away to jobs in the city. Would those debtors be denied service because, while the LIT has a resident office in the same office building they work in downtown, they don't have an office in the city where they are resident, and therefore they are disqualified from service?

The e-filing system is based on the residential address of the debtor, so it is currently impossible for a LIT licensed in Ontario to e-file a file for a debtor in Quebec. The OSB system could be modified to allow a LIT to be licensed in a district, instead of a province, to ensure that LITs are operating where they have resident or non-resident physical offices, but even that is problematic. How do you deal with border issues? The east end of Brampton is a five-minute bus ride from the west end of Toronto, but with district licensing, a LIT licensed in the Toronto district could not serve a debtor five minutes away.

Perhaps LITs could be licensed by postal code. The LIT could apply to be licensed for all postal codes within an appropriate travelling distance from their resident office. Perhaps in Toronto that would be all postal codes within a standard one-hour drive; in Northern Ontario it may be all postal codes within a one-hour plane ride. That system would be fair, but would be administratively difficult for the OSB, as the e-filing system would have to be programmed with all postal codes (including new ones that are created regularly) and require adjustment for each office opened or closed by a LIT.

Definition of Office – if the LIT has access to a meeting room at a local law firm, does that qualify as an office? Or is a stand-alone facility with permanent staff required?

Physical LIT Presence - if the LIT does have a stand-alone office with a full-time qualified BIA insolvency counsellor, is there a requirement for attendance at the office by the LIT? If the LIT is only physically present in the office once per year, is that sufficient?

This issue is complex. The OSB could mandate very restrictive office requirements:

- LIT must have a physical office
- The LIT must attend the office on a pre-agreed schedule (daily, weekly, etc.)
- The LIT is licensed only for specific postal codes

Alternatively, the OSB could continue with the existing approach: LITs are licensed in a province, and can offer services anywhere in the province. Under this approach, LITs should be required to clearly advertise their service delivery options, so that the debtor can make an informed decision. This is our recommended approach.

Recommendation: Directive No. 33, *Trustee Designation and Advertising*, should be amended to require LITs to designate, for each office or service area, access options available:

- In-person meetings available
- All services provided by phone or video conference; in-person meetings not available at this location; for in-person meetings, please see our office in NearbyCity

By fully disclosing to the debtor whether in-person meetings are available, the debtor can decide which service delivery option they prefer and choose a LIT accordingly.

OSB Regulation

Some firms will inevitably take advantage of technology and expand significantly, leading to the demise of smaller firms that do not have access to the same level of technology, marketing expertise, and financial resources.

As has happened in many industries (banking, automobiles, grocery stores, cellphones, etc.), three to five dominant firms will file most personal insolvencies in Canada.

As the industry consolidates, the OSB must change their focus from regulating a large number of small and medium-sized firms to a focus on regulating a limited number of large firms.

The first step will be for the OSB to implement consistent national policies and procedures. The OSB is not consistent in their interpretation of the *Act* across the country. While this is a somewhat trivial example, the note disclosure required on a Statement of Receipts and Disbursements varies considerably among different OSB regional offices. Other variations are more significant.

Next, a robust set of rules must be created **and enforced**. Directive 28R, the Non-Resident Office Directive, could be interpreted as requiring a LIT to, at a minimum, have a non-resident

office in the jurisdiction where they are accepting files. If that is the intention of the Directive, then enforcement provisions should be added where LITs do not comply.

Third, references in Directives to "files" being kept in the "LIT's resident office" are moot, as files are now electronic and are stored "in the cloud."

Finally, once the directives and rules are finalized, they must all be strictly enforced, to ensure a "level playing field" for all LITs.

Given that national, virtual LITs will naturally gravitate towards rejecting low-dollar, complex files, how can the OSB ensure access for all debtors?

Minimum Service Standards should be a LIT license condition. For example:

- To prevent "cherry-picking," where a LIT only does high dollar value proposals, LITs should be required to provide full service. For example, if in the LIT's region last year 65% of consumer insolvencies are proposals and 35% are bankruptcies, LITs should be required to be similar to the local average. Perhaps the range is plus or minus 50%, so at least 18% of a LITs files would be required to be personal bankruptcies, thus preventing a LIT from only filing proposals.
- A pre-determined percentage of assessment and counselling sessions should be conducted in person. Until the pandemic is over, it is impossible to determine what this percentage should be, but likely it will be greater than zero.

To enforce these standards, the Assessment Certificate should be expanded to include information similar to that which appears on the counselling certificates (Appendix A and Appendix B). Suggested additions to the Assessment Certificate would consist of:

- Service delivery method: in-person, video, phone
- Debtor acknowledgement that they were offered an in-person meeting
- Length of the assessment **with the LIT** – less than 15 minutes, 15 to 30, 30 to 45, 45 to 60, more than an hour

Recommendation: To offer personal insolvency services in a service area, LITs should be required to provide access to both consumer proposals and bankruptcy services, and those services should be offered in proportion to the overall market.

Recommendation: Directive No. 6R3, *Assessment of an Individual Debtor*, should be amended so that the Assessment Certificate has disclosure similar to the BIA insolvency counselling certificates, including:

- Service delivery method: in-person, video, phone
- Debtor acknowledgement that they were offered an in-person meeting
- Length of the assessment **with the LIT** – less than 15 minutes, 15 to 30, 30 to 45, 45 to 60, more than an hour

Low Dollar Bankruptcies

A significant impediment to insolvency system access is the cost to the LIT of providing that service. If a debtor has no expected surplus income, and no realizable assets, the maximum a trustee may collect from the bankrupt is \$1,800 (pursuant to [paragraph 156.1 of the Act](#), and [paragraph 58.1\(1\) of the Rules](#)). If a LIT projects that the time and expenses required to complete the administration of the estate will exceed \$1,800, the LIT will be reluctant to take on the file.

The LIT is required to pay a [filing fee on a summary administration](#) of \$78.18 (or \$156.37 if the bankrupt was previously bankrupt), so if the trustee collects \$1,800 from the bankrupt, the trustee pays \$78.18 for the filing fee and \$175.99 in HST, for net receipts to the trustee of approximately \$1,546. From that \$1,546 the trustee must gather the necessary information from the debtor, prepare the documents, perform the assessment, conduct two BIA insolvency counselling sessions, prepare and file a minimum of two tax returns, prepare and file a final statement of receipts and disbursements, and complete any other required estate administration procedures. If the bankrupt does not complete their duties and a court discharge hearing is required, the trustee incurs additional time and expenses.

To encourage LITs to take on low dollar value files, a field on the Estate Information Summary could be added to allow the LIT to designate the file as "\$1,800 or less realizations expected", and with that designation the LIT would not be required to remit the OSB filing fee. If, when the final R&D is prepared, the realizations exceed \$1,800 (or some pre-determined limit), the filing fee would be required.

Recommendation: To increase access for low income, no asset debtors, the Estate Information Summary should be modified to allow the LIT to designate the estate as "\$1,800 or less realizations expected", leading to the elimination of the OSB filing fee (which would become payable if realizations exceed \$1,800).

Debtor Assistance

The purpose of the insolvency process in Canada is to bring about the "rehabilitation of the honest but unfortunate debtor" while treating all other stakeholders fairly.

What makes a debtor "unfortunate?" It is a combination of circumstances (job loss, illness, divorce) and a lack of resources to deal with their circumstances. Everyone who loses their job does not go bankrupt, but if a job loss is combined with a lack of savings, or insufficient income support from previous savings, family or government, or a lack of knowledge, job loss can be financially catastrophic, leading to insolvency.

Lack of knowledge is often referred to as a lack of "financial literacy," and financial literacy is more than simply understanding how to do "financial math" like calculating a compound interest rate.

Knowledge is the ability to discover and understand alternatives and objectively evaluate those alternatives to arrive at an appropriate decision.

Evaluating options is very difficult when financial problems arise, because debtors have likely not faced similar situations in the past (if this is their first job loss, or illness, or divorce), and therefore they have no experience in how to research and evaluate alternatives.

So what does a debtor in a financial crisis do?

How does a debtor respond to a collection call threatening legal action?

A sophisticated debtor, such as a big company, will consult their external advisors (accountants, lawyers) to assess options and formulate a response.

An individual debtor, with no financial resources they can devote to hiring a qualified expert, is forced to turn to family, friends, and the public sphere.

In the past, the "public sphere" included your local union representative or shop steward, or your local religious leader, or a local not-for-profit social service or credit counselling agency.

Today, only a tiny fraction of the working population is a union member, and the pandemic of 2020 dramatically reduced in-person attendance at religious services, further reducing religious affiliation in Canada, the continuation of a multi-decade trend. Small, local not-for-profit credit counselling agencies, once the dominant advisors to Canada's debtors, no longer exist, all now absorbed into three large, national organizations that have conducted all of their meetings primarily by phone for years. Financial pressures have virtually eliminated budgeting and other financial advisory services, replaced by the more profitable Debt Management Plan that generates revenue for the agency but is no longer a source of financial education for debtors.

Our firm, Hoyes, Michalos & Associates Inc., has attempted to fill the financial literacy gap by publishing hundreds of well researched and informative educational articles and publishing hundreds of informational videos, [long-form documentaries](#) and podcasts (for free, and with no ads) in an attempt to inform the public. In addition, the Superintendent of Bankruptcy has also, on a small scale, attempted to provide some [educational resources](#).

While these efforts are helpful, if you are a debtor, hoping to solve your financial problems by getting a loan, or finding some other as yet undiscovered solution, do you want to take advice from a Licensed Insolvency Trustee or the government agency that has the word "Bankruptcy" in their name?

No.

But you don't have to look too far afield for assistance because every day, in your Facebook feed (or Instagram, or TikTok) is a friendly ad for a company that can help you with your money problems.

They offer many services (loans, consumer proposals), and they have great reviews, and best of all, they are NOT a bankruptcy trustee. They have other options. So you contact them, and they are very helpful and friendly, and they are able to diagnose your problem quickly. They have a solution: it's called a consumer proposal, and all you have to do is take a \$2,000 cash advance on

your credit card to pay their fee, and they will select a trustee for you and negotiate a great settlement with your creditors.

And so you pay the fee, and the consumer proposal is filed, and you think you have solved your problems.

But you have not solved your problems, because the creditors may vote against your proposal, or they may request additional information, or you may discover that it wasn't explained to you that your student loans won't be discharged, or your mother who co-signed your big loan remains liable for it, or CRA is objecting because your taxes were not filed, and then you wonder why you paid \$2,000 for what appears to be bad advice, but by the time you realize your error, it's too late.

And then you wonder, if a Licensed Insolvency Trustee could have advised me in advance on these possible problems, why don't they advertise on Facebook and Instagram and TikTok?

The answer is simple: an unlicensed, unregulated debt consultant can advertise wherever and whatever they want. They can make false claims. They can lie. They can say they offer advice on consumer proposals, even though they are not qualified to do so, and there are no consequences to their lies.

They also have virtually unlimited advertising budgets, because advertising is their only significant operating expense. They don't provide a service, so they don't require offices, staff, or other expensive infrastructure.

In contrast, a Licensed Insolvency Trustee requires staff and office space to meet with debtors, prepare documents, liaise with creditors, and disburse funds, which is costly, and they are very heavily regulated. [Directive 33](#) states that any message that a Licensed Trustee transmits is considered advertising and includes:

"Advertisements on television, radio, in print, on the Internet and also includes banners, pop-up messages and websites."

The requirements for a LIT are extensive: They must at all times:

"...identify themselves using the professional designation "Licensed Insolvency Trustee" or the acronym "LIT" in all communications. "

The LIT must not say anything that is "likely to confuse" and they must not refer to themselves as a "specialist in a specific type of insolvency appointment", even if they are a specialist in a specific type of insolvency appointment.

If an LIT wants to sponsor the traffic report with a 5-second "cold read" by the announcer on the radio, they can't say "Today's traffic report sponsored by Hoyes Michalos, call us today" because that 5 second "tag" did not say "Licensed Insolvency Trustee".

The vast majority of Canadians access the internet on their mobile device, and therefore an ad on Facebook, or any other website, is only a few square centimetres. In that tiny area, it is impossible to use the words Licensed Insolvency Trustee, or even just the LIT abbreviation, while also conveying information that is informative but not confusing.

Summary information, by its very nature, is confusing.

We, therefore, have a system where the only licensed and regulated professionals are effectively prevented from communicating with the public, while the unlicensed, unregulated scammers can operate with impunity.

Is it any wonder that, based on the [Office of the Superintendent of Bankruptcy's own data](#), in 2016, the debtor paid an unlicensed debt consultant for advice in 17% of all consumer proposals filed. The average fee paid was \$2,400, so on those 9,660 files, debtors paid over \$23 million in fees for advice they didn't require to debt consultants who did not have the professional qualifications to provide that advice.

In 2019, the year before the pandemic, consumer proposal filings were 32% higher than in 2016 and given the increased reliance on the internet for debtors to find information and the increased preponderance of debt consultants, debtors may likely be paying well over \$30 million per year for inaccurate, unregulated advice.

A review of the [professional conduct decisions](#) released since this study was completed does not indicate that any trustee firms were subject to any formal censure for encouraging the acceptance of files referred by debt consultants, and therefore the temptation for trustees to continue to accept files from debt consultants continues.

It could be argued that "you can't regulate the unregulated," and that is true. For example, the Superintendent of Bankruptcy cannot terminate the license of a debt consultant because they are unlicensed.

However, other professions do enforce regulations when unlicensed parties blatantly and systematically violate them. For example, Health Canada (like the Office of the Superintendent of Bankruptcy, an agency of the Federal government of Canada) [actively pursues complaints, takes strict disciplinary action, and publishes the results](#). This is a good model that the Superintendent of Bankruptcy could follow.

Recommendation: Directive No. 33, *Trustee Designation and Advertising*, should be amended to acknowledge that advertising is now predominantly online, and all online ads should contain a prominent link to the LITs primary website where full disclosure is provided (location of resident and non-resident offices, the LIT designation spelled out in full, etc.).

Simple, Summary Administration Files

Given that video assessments and BIA insolvency counselling sessions are likely to be a permanent service delivery option, it is expected that LITs will close most of their in-person offices, and will focus on more profitable files (high dollar bankruptcies and consumer proposals) and will be reluctant to do low realization files.

A possible solution to this reduced service would be for the OSB to do these "simple" files directly. The debtor could complete a form on the OSB website. If specific criteria are met (income threshold, assets, creditors, etc.), the debtor could file a Short Form Summary

Administration Bankruptcy (SFSAB). There would be no asset realizations, so no dividends would be distributed, so creditors would simply acknowledge receipt of the SFSAB notification, and the debtor would be discharged in due course. A notification would be sent to CRA that the debtor will file their taxes. No income verification would be necessary so that the debtor could be discharged in nine months provided no additional facts are discovered, and there are no creditor oppositions.

LITs would strongly support this system, because they would no longer feel a moral obligation to assist low-income, no asset debtors; they could refer them to the OSB website, thereby saving considerable time and expense.

Some debtors would also support this system, because all they would need to do is fill out a form, and they would be done.

The question, of course, is whether or not such a system would assist with the rehabilitation of the honest but unfortunate debtor? Is eliminating debts sufficient, or is rehabilitation more complex?

Does meeting with a LIT help the debtor, or is a meeting superfluous?

Is it necessary to meet with a doctor to treat a medical problem, or is a web app sufficient?

How does a debtor become a low income, no asset debtor? In most cases, something has happened. They have lost their job, had a medical issue, gone through a relationship break up, and in some cases suffered severe trauma, including physical and emotional abuse.

The job of a LIT is to not only make a list of the debts but also to understand the underlying causes of the financial problems. This obligation is specifically enumerated in Directive No. 6R3, *Assessment of and Individual Debtor*, where in subparagraph 7(2) the LIT is required to "evaluate the extent and nature of the problems facing the debtor" and in 9(g) the LIT is required to review the "type and nature of counselling adapted to the debtor's needs that will be offered to assist in rehabilitation". In simple terms, filing insolvency is not simply a mathematical exercise. The LIT has a duty to actively assist in the rehabilitation of the honest but unfortunate debtor. The OSB's Directives require it. Can this be done with Artificial Intelligence? An app? Or is the role of the LIT critical to this process?

We believe that there is no substitute for the professional expertise and guidance of a LIT.

When considering changes to the *Act* and *Directives*, we believe it is essential to ensure that debtors in Canada continue to receive the advice and guidance of Licensed Insolvency Trustees to bring about the rehabilitation of the honest but unfortunate debtor.

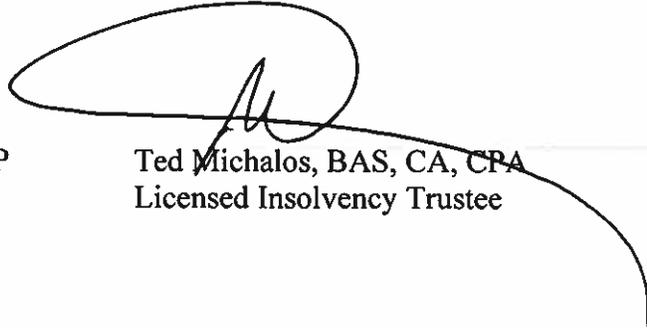
We thank you for the opportunity to submit our comments, and would be pleased to answer any questions or provide any further information at your request.

Regards,

Hoyes, Michalos & Associates Inc.
Licensed Insolvency Trustees



J. Douglas Hoyes, BA, CA, CPA, CBV, CIRP
Licensed Insolvency Trustee



Ted Michalos, BAS, CA, CPA
Licensed Insolvency Trustee