

MNP LTD – CONSIDERATION DOCUMENT

June 9, 2021

MNP LTD (MNP) is pleased to make a submission in response to the Office of the Superintendent of Bankruptcy's (OSB) request for comments and suggestions on how to modernize and improve the regulatory framework, enhance the effectiveness of its administration and increase accessibility to insolvency proceedings. We appreciate the opportunity to provide our comments and recommendations.

With more than 75 Licensed Insolvency Trustees serving more than 240 resident and satellite offices across the country, MNP is one of Canada's largest and leading corporate and consumer insolvency firms. Our submission discusses the concerns and challenges faced by debtors, as they navigate their debt situation and the related impact on other stakeholders.

As pandemic-related government aid and loan deferral programs begin to wind down, the latest MNP Consumer Debt Index finds the number of Canadians hovering close to financial insolvency has reached a five-year high.¹ Consequently, Canadians dealing with financial challenges may need to make difficult decisions and will require ready access to, and be well served by the insolvency system.

In the interest of brevity, we have focused our comments around three topics contained in the questions posed in the consultation. The main topics are:

- 1) Establishing National Trustee Licences
- 2) Virtual Insolvency Proceedings
- 3) Accessibility to the Insolvency System/Deemed Trust Provisions

We believe that these topics have a substantial impact on how insolvency engagements in Canada are administered. Presented below are three scenarios addressing the three topics indicative of real-life situations facing MNP's insolvency clients.

Establishing National Trustee

Scenario 1

Mary has had a difficult year due to the pandemic. At the age of 45, she is going to have to file for bankruptcy due to online gambling. She is able to access her local MNP office in her small town of Yarmouth, Nova Scotia to work with a Licensed Insolvency Trustee (LIT). Her LIT, Tom has worked in Yarmouth for 30 years and knows the area well. He also has a good understanding of the law, which differs in Nova Scotia compared to other jurisdictions. He refers Mary to local agencies, including an organization that offers services to gamblers to help them recover from their gambling addictions.

After working together for a few months, Tom is able to help Mary develop a viable consumer proposal to her creditors and also helps her keep her home.

¹ <https://mnpdebt.ca/en/resources/mnp-debt-blog/debt-index-update-mnp-3-minute-debt-break-podcast>

Recommendation

The idea of establishing a national trustee licence would allow a trustee to accept insolvency files from any Canadian jurisdiction. While on the surface this change appears to have some accessibility benefits, but there are considerable potential risks of a national trustee licence outweighing these benefits. We encourage that the OSB consider the following issues before any change in this area is made:

1. **Locality of the Debtor:** The *Bankruptcy and Insolvency Act* emphasizes the importance of the 'locality of the debtor' – that the insolvency proceeding should be filed within the area where the debtor lives, has most of their assets, and/or has a personal connection. The local provincial court also has jurisdiction over the proceedings. In addition, where public notice of a bankruptcy is required it must be published in a 'local newspaper'. The changes contemplated erode this concept – and there is a reason why it was legislated in the first place – that debtors would be served locally, and local creditors/stakeholders would be able to easily participate in the insolvency proceeding.
2. **Understanding of Local Economy:** LITs and their supporting staff understand the nature and dynamics of the local economy, and other important aspects of the community in which the debtor lives and the trustee practices – which will enhance the competent administration of the proceeding.
3. **Local Referrals:** If necessary, local practitioners have the ability and knowledge to refer debtors to local agencies to assist in other aspects of the rehabilitation of the debtor. This can include addiction/mental health issues, gambling addictions, etc. A national trustee would likely not be as connected to those agencies. LITs also have a network of legal professionals operating in the locality of the debtor who are best positioned to act as an advocate for the debtor, independent counsel to the LIT or represent the interests of other stakeholders.
4. **Decreased Access for In Person Services:** Debtors may have less in person access to their LIT if there is national trustee license. LITs may move out of rural areas, decreasing access to in-person services. If a debtor decides part way through virtual services with an out-of-province LIT that they would rather meet in person, there is less ability to do so. Local employment will also be adversely impacted if insolvency service providers move out of rural areas.
5. **Provincial Differences:** Although the *Bankruptcy and Insolvency Act* is federal, it devolves to the provinces a number of responsibilities, including establishing the kind and value of exempt assets; what constitutes a valid secured encumbrance; the impact of a matrimonial breakdown on the division of assets; claim issues specific to that province (e.g. student Loans, toll highways); local processes and procedures with government bodies and the courts; etc. In Quebec, this is particularly pronounced, as provincial law is based on civil code rather than the common-law model and often differs significantly. Some of these factors are nuanced and complex, and if a trustee is not regularly practicing in a particular province, it is difficult to see how they could become sufficiently knowledgeable to competently assess and administer files in multiple jurisdictions. An oversight due to ignorance could be costly for the debtor.
6. **Provincial Competencies:** Due to provincial differences, there are different competencies for LITs to practice in different jurisdictions. To ensure that practitioners had the qualifications to provide services in all provinces, the OSB would need to do a fulsome review of all the provincial and territorial differences as part of the trustee qualifying program.

The current system allows for a trustee to hold more than one provincial license where this is warranted – with approval and oversight by the OSB to ensure that the practitioner is sufficiently well versed in the additional area within which they want to practice. This approach, compared to a national approach, will continue to service debtors better.

As noted above, MNP is a national firm, maintaining offices in both urban and rural markets. In consulting with thousands of debtors across the country, we have not received feedback to suggest that any particular market is underserved by LITs necessitating the change to issuing licenses on a national basis.

Virtual Insolvency Proceedings

Scenario 2

Mei-Ling, age 75, is in need of insolvency services after her husband of 40 years passes away. She is relieved to learn that she can visit MNP's office in her home near Port Alberni, BC. She doesn't own a computer, and if she did, the internet speed in her area isn't good enough to allow for successful video calls. With her hearing loss, she understands better when meeting in person rather than over the telephone. Mei-Ling regularly visits the office to talk to her MNP LIT, Graham. She trusts him, having lived in the same town for many years, and he is able to help her through a difficult time.

Recommendation

Due to the pandemic, the OSB temporarily suspended the requirement that LITs meet in-person with each debtor that proceeds with an insolvency engagement, allowing trustees to sign insolvency engagements instead using video conferencing and electronic signature software. This gave MNP insight into how a virtual system might work. There were some benefits, including reduced trustee and debtor travel time, and less travel related costs.

However, MNP discovered there were significant challenges and risks pertaining to video conference assessments, including:

1. **Affordability:** MNP has found throughout the pandemic that there are still many individuals who are not able to afford technology. Debtors may not have a computer or internet access in their home. This creates a gap in accessing services.
2. **Inability to Use Technology:** Debtors with access to technology may not have the skills to use it effectively. This is a barrier to services for seniors and rural populations. This is particularly evident in complex insolvency cases where they need to interact virtually or convey e-documents.
3. **Internet Access:** In many rural areas there is no access to broadband internet. If there is access, the upload and download speeds are often not sufficient for video calls.
4. **Accessibility for Disabilities:** Accessing technology can be difficult for some disabled Canadians, including those with vision loss or hearing loss. For example, one client of MNP's has a cochlear implant, and has difficulty hearing/understanding recorded or electronically conveyed speech. She relies in part on lip-reading and always needs to be seen in person.

5. Trust and Rapport: The debtor is making a significant life-changing decision to file a bankruptcy or proposal, and there is a trust element involved – it can be difficult to build trust and rapport with someone you have not met personally. Our team, Canada-wide, has noticed that this seems to affect debtor commitment, compliance, and rehabilitation during the process.
6. Cyber Security: A potential risk of using technology for transferring insolvency information and data is cyber security. Cyber attacks have been increasing in recent years, and debtor’s personal financial information is in danger of being shared when not properly protected. While MNP has all the proper protocols in place for cyber security, debtors who are not as technologically savvy may be open to hackers.
7. Debtor Confusion: During the pandemic, some LITs found that debtors were confused as to who they were meeting with via video conferencing. Virtual services may cause debtor confusion, between LITs and less regulated debt consultants.

These factors make access to technology for many people, and particularly amongst disabled, elderly, and rural populations, a challenge. According to comments made at the Annual Canadian Association of Insolvency and Restructuring Professionals (CAIRP) conference, it is our understanding that results of the recent OSB survey shows that approximately 70% of debtors say that they want insolvency proceedings to return to face-to-face. MNP is one of the largest insolvency firms in Canada, and what we hear from the debtors is that they value having us in their local towns and being able to access services in person, as it improves access for everyone. MNP has the capabilities to provide services online if specifically requested by the client, but a move to a strictly virtual system will disadvantage many Canadians and reduce their access to the insolvency system.

Accessibility to the Insolvency System/Deemed Trust Provisions

Scenario 3

Mohammad owns Shakespeare Printing Company, a small printing company in Ontario, and the company has not been doing well during the pandemic. With subsidy programs ending soon, he approaches MNP to get help on what he should do next. The Company has equipment valued at approximately \$30,000, accounts receivable estimated at \$25,000 and payroll source deduction obligations of \$200,000.

Mohammad approaches Alejandra, an LIT in MNP’s Waterloo office. Mohammad is concerned about his potential personal exposure to Canada Revenue Agency (CRA) on account of the unpaid source deductions. He is also concerned about the ability of his 10 long-tenured employees to recover unpaid vacation pay and termination pay.

Shakespeare Printing Company can file for bankruptcy, but Alejandra explains to Mohammad that the equipment and receivables are subject to CRA’s deemed trust claim. CRA will sometimes entertain the idea of entering into an Administrative Agreement with the LIT whereby it agrees to permit the LIT to recover the costs of realizing the assets from assets otherwise subject to CRA’s deemed trust. However, before CRA will consider entering into such an agreement, it requires Shakespeare Printing Company to file for bankruptcy and for the LIT to provide certain information, including, among other things, an appraisal of the assets.

Alejandra explains that before she can file the bankruptcy, she will require a third party to provide a retainer to cover the costs of performing the minimum statutory obligations, including the costs of administering the Wage Earner Protection Program, since CRA's statutory priority may preclude Alejandra from recovering her Trustee fees from the company assets.

Mohammad does not have means of providing the LIT with any form of retainer and his only option is to walk away from the business. There is no potential for his business or assets to be sold as potential buyers would be unable to receive the company assets free of the CRA source deductions claim. Accordingly, CRA receives no money despite its priority to the assets, as they have limited ability to liquidate the assets. His employees are also not able to benefit from Wage Earner Protection Program (WEPP), which would be triggered upon bankruptcy. Everyone loses in this situation and without any transparency or official finality to the demise of the business, everyone suffers even more.

Recommendation

Access to the insolvency system could be enhanced, and stakeholders, including CRA, could benefit if the LIT has a standing agreement from CRA whereby all Trustees have priority for reasonable trustee/receiver fees above CRA's deemed trust.

Currently, the LIT, and not CRA, is at risk that the assets do not produce sufficient recoveries to indemnify it for payment of its fees and expenses. Practitioners are first required to file the bankruptcy and take possession of the bankrupt's assets. In certain cases, the LIT enters into occupation of the bankrupt's leased premises subjecting it to personal liability for occupation rent in the process, without being guaranteed that CRA will enter into an administrative agreement with the LIT.

MNP is of the view that changes to the treatment of the deemed trust will enhance the ability of small and medium sized enterprises gaining access to the insolvency system and potentially enhance recoveries for stakeholders, including displaced employees and CRA. With these deemed trust provision changes, we will be able to help smaller businesses and encourage economic recovery.

Conclusion

MNP appreciates the OSB's efforts to improve the regulatory framework and increase accessibility for consumers. This comes at a time when the COVID-19 pandemic has put many consumers and small businesses in difficult financial situations. They will need the help of trustees to put their debt behind them and help grow Canada's economy post-pandemic.

For questions or further comments, please contact:

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