Overview and Guidelines Relating to Trustee Professional Conduct Proceedings

Purpose

This document provides an overview of the process followed by the Office of the Superintendent of Bankruptcy (OSB) when conducting an investigation into the professional conduct of licensed insolvency trustees (LIT) and when making a decision concerning an LIT licence. More specific information can be found in the associated Directive No. 31R, Procedure Governing Trustee Professional Conduct Proceedings.

Objective

A primary objective of the OSB is to promote and ensure compliance with professional standards that apply to the LIT profession. The OSB is committed to effectively investigating and resolving allegations and concerns of professional misconduct by LITs through a fair, expeditious, transparent, interactive and efficient process. The OSB will place priority on resolving professional conduct matters informally where appropriate, in a mutually agreeable manner, at the earliest stage possible during the process.

Background

The Superintendent of Bankruptcy (the Superintendent) has the authority under the Bankruptcy and Insolvency Act (BIA) to:

- issue a licence to an LIT once satisfied that the applicant is qualified (section 13 of the BIA);
- investigate the conduct of an LIT (paragraph 5(3)(e) of the BIA); and
- make a decision affecting an LIT’s licence (cancel, suspend, impose conditions or limitations pursuant to subsection 14.01(1) of the BIA).

Note that where the Superintendent suspends or cancels an LIT’s licence pursuant to subsection 13.2(5) of the BIA, such matters are not subject to a hearing and are decided under subsection 13.2(6) of the BIA.

The Superintendent may appoint any person to make any inquiry or investigation of estates or other matters to which the BIA applies pursuant to paragraph 5(3)(e) of the BIA. Consistent with the OSB’s professional conduct investigation (PCI) process, the Superintendent assigns the roles of inquiry, investigation and prosecution to the Deputy
Superintendent, Operations (referred to below as Deputy Superintendent) to ensure the Superintendent’s impartiality when adjudicating an LIT professional conduct proceeding. Detailed information regarding a PCI is not shared with the Superintendent until the PCI report and/or the settlement agreement is sent to the Superintendent for adjudication.

**Professional Conduct Investigation**

An investigation into an LIT’s professional conduct is initiated by an investigator when, for example, there is information to suggest the LIT has not properly performed the duties of an LIT or there has been improper administration of an estate or lack of compliance with the BIA, the *Bankruptcy and Insolvency General Rules* or Directives issued by the Superintendent.

As part of the investigation, the investigator:

- informs the LIT in writing that an investigation is being undertaken;
- gathers and assesses evidence in relation to the allegations against the trustee (fact-finding);
- provides periodic status reports to the LIT, at least every six months;
- reviews the investigation results with the LIT; and
- determines, in consultation with the Deputy Superintendent, if the findings are sufficiently serious to support a recommendation for sanctions against the LIT’s licence.

Following the fact-finding process and related analysis, the investigator may conclude that the evidence does not warrant any sanctions against the LIT’s licence. In these circumstances, the LIT is informed that the investigation will not proceed further.

If the investigator concludes the evidence warrants sanctions against the LIT’s licence, the investigator will prepare a draft professional conduct report.

The draft report will be considered at an investigation review committee meeting chaired by the Deputy Superintendent, to validate findings and identify possible terms for resolution of the matter. The Deputy Superintendent may decide to forego this meeting when it is warranted by circumstances.

At various stages during the investigative process, the investigator will communicate with the LIT in an effort to resolve the matter under investigation in a mutually agreeable manner. The occasions for resolution may include, but are not limited to:

- the inception of the investigation;
- the conclusion of fact-finding; or
• after review of a draft professional conduct report.

If it is possible to reach an agreement that may bring the matter or elements of it to a close, the proposed agreement will be forwarded to the Superintendent for consideration.

**Mediation by a Third Party**

Following the investigation, if there is no agreement to conclude the matter, the parties will have the opportunity to participate in mediation by a third party. If both parties agree to mediation, a mediator will be named. A roster of mediators for this purpose will be maintained by the OSB Registry.

It should be noted that any mediated agreement between the parties cannot contain a clause of non-publication of the decision of the Superintendent.

In the most serious professional conduct cases, there may be little or no room for compromise or for a confidential settlement agreement. In such circumstances, the Deputy Superintendent would signal this fact to the LIT to allow them to make an informed decision on proceeding with mediation or not.

If mediation is declined, or does not resolve the matter, the notice to the LIT is prepared and delivered to the LIT and to the Superintendent.

**Notice to LIT**

The notice to LIT pursuant to subsection 14.02(1) of the BIA sets out the powers the Superintendent may exercise, with reasons identifying the relevant issues, the nature of the evidence against the LIT, the potential consequences to the LIT, and affords the LIT a reasonable opportunity for a hearing. The LIT must advise the Superintendent in writing if he/she would like a hearing and whether he/she intends to make oral or written submissions. If an LIT fails to request a hearing, the matter may proceed without further notification to the LIT.

**OSB Registry**

All documents and correspondence regarding professional conduct proceedings shall be sent to the Registry at the following address:

Office of the Superintendent of Bankruptcy Registry
410 Laurier Avenue West, 2nd Floor
Via 235 Queen Street
Ottawa ON K1A 0H5
Telephone: 613-941-2694
Facsimile: 613-946-9205
Teletypewriter: 1-866-694-8389
Email: ic.osbregistry-greffebfsf.ic@canada.ca
Delegation

The Superintendent may decide to adjudicate the matter or may delegate that authority pursuant to subsection 14.01(2) of the BIA. For the purposes of this document, all references to the “adjudicator” refer to the Superintendent or the individual to whom that authority has been delegated.

Hearing Process

The process for conducting a hearing is determined by the adjudicator and is set out in sections 14.01 and 14.02 of the BIA and in Directive No. 31R, *Procedure Governing Trustee Professional Conduct Proceedings*. A hearing is normally preceded by a pre-hearing or case-management discussion. All relevant documents are to be disclosed in advance of the pre-hearing, as directed by the adjudicator. At a pre-hearing, the adjudicator seeks to narrow the issues to be decided, ensure all relevant information has been prepared and shared by both parties, ensure expectations for the hearing process are well understood, and establish timelines.

Where the LIT has requested a hearing and intends to make oral representations, a notification of the hearing is posted on the OSB’s website naming the parties, the date, time and location of the hearing.

As per paragraph 14.02(2)(c) of the BIA, the adjudicator shall deal with the matters set out in the notification of hearing as informally and expeditiously as the circumstances and a consideration of fairness permit. The investigator has the burden of proving the allegations on a balance of probabilities.

Record

In accordance with subsection 14.02(3) of the BIA, the notification of hearing, any summary of oral evidence, and the documentary evidence received, form the record of the hearing. The record is public, except where the adjudicator determines that there will be no disclosure on certain matters if the interests of a third party or the public outweigh public access. The record is maintained by the OSB Registry.

Publication of the Decision

The decision of the adjudicator, with reasons, will be provided to the LIT no later than three months after the conclusion of the hearing, in accordance with subsection 14.02(4) of the BIA. The decision will be posted on the OSB’s website.

Review by the Federal Court

Pursuant to subsection 14.02(5) of the BIA, the decision is deemed to be a decision of a federal board, commission or tribunal that may be reviewed pursuant to the *Federal Courts Act*. 
Principles for Professional Conduct Decision-Making

The following key principles are to be borne in mind in the context of Professional Conduct Investigations (PCI) and related settlement agreements:

- Deterrence is an objective of the OSB’s Compliance Programs;
- Generally speaking, the ultimate outcome or decision of a PCI should not remain confidential and should be published on the OSB’s website with sufficient details to allow stakeholders to understand the nature and scope of the non-compliance and deter similar non-compliance in the future;
- A sanction should be proportionate to the non-compliant conduct, taking into consideration:
  o The impact on the integrity of the insolvency system;
  o The impact on individual stakeholders;
  o The extent to which the LIT and/or LIT firm knew or ought to have known the conduct was non-compliant;
  o The degree to which the LIT and/or the LIT firm profited from the non-compliant conduct;
  o The duration of the non-compliance;
  o Any mitigating factors, including the speed and extent of corrective action, cooperation and acknowledgement of the wrongdoing by the LIT and/or LIT firm.
- A sanction requiring restitution to the estate(s) for distribution to affected creditors pursuant to paragraph 14.01(1)(f) of the BIA should always be given due consideration in preference to the payment of an amount to the Receiver General for Canada;
- Investigations conducted by the OSB should be undertaken in a timely manner in order to conclude matters as quickly as possible in the circumstances;
- Settlement agreements should not be put into effect until endorsed by the adjudicator and they should, under no circumstances, be submitted for endorsement after they have already been carried out.