Overview of 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 a trustee and when making a decision concerning a trustee’s licence. More specific information can be found in the associated Directive No. 31, Procedure Governing Trustee Professional Conduct Proceedings.

Objective

The primary objective of the OSB is to promote and ensure compliance with professional standards that apply to the trustee profession. The OSB is committed to effectively investigating and resolving allegations and concerns of professional misconduct by trustees 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 a trustee once satisfied that the applicant is qualified (section 13 of the BIA);
- investigate the conduct of a trustee (paragraph 5(3)(e) of the BIA); and
- make a decision affecting a trustee’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 a trustee’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 process, the Superintendent assigns his roles of inquiry, investigation and prosecution to the Deputy Superintendent to ensure the Superintendent’s impartiality when adjudicating a trustee professional conduct proceeding. Detailed information regarding a trustee professional conduct investigation is not shared with the Superintendent until disclosed prior to the pre-hearing.
Professional Conduct Investigation

An investigation into a trustee’s professional conduct is initiated by an OSB employee (the investigator) when, for example, there is information to suggest that the trustee has not properly performed the duties of a trustee 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 trustee in writing that an investigation is being undertaken;
- gathers and assesses evidence in relation to the allegations against the trustee (fact-finding);
- provides a status report to the trustee at least every six months;
- reviews the investigation results with the trustee; and
- determines, in consultation with the Deputy Superintendent, if the findings are sufficiently serious to support a recommendation for sanctions against the trustee’s licence.

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

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

The draft report will be considered at an investigation review committee meeting chaired by the Deputy Superintendent, in order 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 trustee 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 from a roster maintained by the OSB Registry.
If mediation is declined, or does not resolve the matter, the notice to trustee is prepared and delivered to the trustee and to the Superintendent.

Notice to Trustee

The notice to trustee pursuant to subsection 14.02(1) of the BIA sets out the powers that the Superintendent may exercise, with reasons identifying the relevant issues, the nature of the evidence against the trustee, the potential consequences to the trustee, and affords the trustee a reasonable opportunity for a hearing. The trustee 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 a trustee fails to request a hearing, the adjudicator may proceed without further notification to the trustee.

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
155 Queen Street, 4th Floor
Ottawa ON K1A 0H5
Telephone: 613-941-2694
Facsimile: 613-946-9205
Teletypewriter: 1-866-694-8389
Email: OSB-Registry-Registre-BSF-OSB-BSF@ic.gc.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/panel 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. 31, Procedure Governing Trustee Professional Conduct Proceedings. A hearing is normally preceded by a pre-hearing or case-management discussion. The disclosure of all relevant documents is provided 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 trustee has requested a hearing and intends to make oral representations, a notification of the hearing is posted on the OSB’s website and in each division office of the OSB 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 interest 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 trustee 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 and in each division office of the OSB.

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 and may be judicially reviewed by the Federal Court.