



**Joint Submission by the Ontario Association of Insolvency and Restructuring Professionals
and the Canadian Association of Insolvency and Restructuring Professionals**

on

Ontario Ministry of Consumer Services'

Proposal for Public Comment on Improving Consumer Protection- Debt Settlement Services
dated January 4, 2013

Submission dated: February 25, 2013

This Joint Submission is being forwarded to the Ontario Ministry of Consumer Services (the "Ministry") by the Ontario Association of Insolvency and Restructuring Professionals ("OAI RP") and the Canadian Association of Insolvency and Restructuring Professionals ("CAIRP") in response to the Ministry's call for public comment on its *Proposal for Improving Consumer Protection in respect of Debt Settlement Services*, dated January 4, 2013 (the "Proposal" or the "Regulation").

OUR CONSTITUENTS

OAI RP is a not-for-profit organization whose objectives are to attract, develop and support its members to ensure the highest degree of public confidence in, and respect for, the integrity, objectivity and competence of our members, and the integrity and value of the system of insolvency administration throughout Ontario. Our members act as trustees in bankruptcy, administrators of consumer proposals, trustees in proposals, receivers, agents for secured creditors, monitors and consultants in issues of insolvency. Our members are trained and trusted to find creative and practical solutions to financial problems. OAI RP currently has over 400 members, representing the vast majority of licensed trustees in bankruptcy in Ontario.

CAIRP is a national professional organization representing over 900 general members acting as trustees in bankruptcy, administrators of consumer proposals, Trustees in Proposals, receivers, agents, monitors, and consultants in insolvency matters, as well over 400 articling members, and 200-plus corporate, life, and inactive members. A not-for-profit corporation, CAIRP was created in 1979 to advocate a fair, transparent, and effective system of insolvency/restructuring administration throughout Canada. CAIRP and its members are committed to professionalism, trustworthiness and objectivity. As the representative organization for more than 95% of Canada's practicing licensed trustees, CAIRP offers an informed perspective on the issues relating to the effective functioning of the bankruptcy and insolvency system and related matters.

OUR OBJECTIVES

OAI RP and CAIRP are committed to maintaining the highest professional standards among our members and to protecting the interests of all financially distressed persons including consumer debtors who find themselves financially challenged by an overwhelming burden of debts.

There has been broad media coverage on the business practices of certain Debt Settlement Companies ("DSC") that have set up operations in Ontario and other provinces, some of whom were prohibited from doing business in the United States.

It is our understanding that complaints have been lodged with the Ministry of Consumer Services by consumers who have suffered hardship as a result of false and misleading claims of certain DSC's. Our members, through their professional practices have also encountered individuals who have suffered such hardship and representative examples can be shared with the Ministry, if requested.

As organizations, which upholds their respective members to the highest standard of professionalism, we share many of the Ministry's concerns regarding the debt settlement industry that has grown in Ontario over the past several years, and the practices of certain DSC's including: the publicity or push in the media by various DSCs perceived by many individuals to have been misleading and for which they have complained to the Ministry of Consumer Services of Ontario; assertion of upfront fees being charged by DSC's without any guarantee of success or what success is; and the lack of adequate disclosure and protection for consumers. Generally speaking, the consumer debtors affected or influenced by the publicity or push by DSCs may not be aware of the different options available to them to manage their financial difficulties. Thus when faced with such a situation, it is difficult for them to assess the varying quality of services offered by various non-licensed operators offering DCS in Ontario and across the country, As a result, it becomes impossible for these consumers to determine the best course of action for their particular financial problem.

We applaud the Ministry's concerns and the proposed initiative to protect consumers by way of the proposed regulation. Notwithstanding the recent cabinet shuffle, we are of the view that this important initiative should be continued with vigor to afford Ontario consumers with protections similar to those instituted in many other provinces across Canada.

COMMENTS ON MINISTRY'S PROPOSAL

We provide the following specific comments on the proposed regulations:

1. Definition of debt settlement services ("DSS")

We agree with the broad definition of DSS that has been proposed as a means of ensuring that the proposed regulation will apply to all current and potential future debt settlement services operators that are assisting debtors with an arrangement to manage their debts through a consolidated payment schedules in Ontario.

The inclusion in the definition of DSS of both profit or not-for-profit operators that manage debt settlement for consumers, is one which we strongly agree upon.

It should be further noted that certain DSC's that advertise and operate in Ontario are in fact located in other provinces or outside of Canada. We recommend that the proposed regulations explicitly include all DSC's that render any services to individuals which reside within Ontario,

regardless of where DSC are incorporated or where their business operations (including call centers) are located.

A specific clarifying exemption is sought for OAIRP/CAIRP members who have the CIRP (Canadian Insolvency Restructuring Professional) designation and are licensed to act as trustees in bankruptcy and administrators of consumer proposals by the Superintendent of Bankruptcy and regulated by the *Bankruptcy and Insolvency Act* ("BIA")¹.

Licensed trustees in bankruptcy, are subject to strict regulation, which includes prescribed fees and a professional code of conduct, both as part of the regulation² and as part of their membership to CAIRP³. In light of this, and to avoid any ambiguity, we believe that trustees in bankruptcy licensed under the BIA should be specifically exempted from the proposed regulation.

2. Prohibit advance payment of fees for debt

We fully support the proposal that the advance payment of fees be prohibited and that debtors only be required to pay fees upon actual results being achieved. This is consistent with the banning of the practice of charging upfront fees in various other provinces in Canada, including Alberta⁴ and Manitoba⁵ and the United States.

We recommend that the timing of the ability of DSC's to take fees be clarified, so as to avoid any potential abuse. As a suggestion, the definition should include what constitutes a settlement offer being accepted and the benchmarks that will trigger payment of fees. Consideration should be given to the following:

- We recommend that there be two conditions necessary for the payment of fees to be triggered. Firstly, DSS operators be required to obtain a written acknowledgement from the creditor(s) accepting the negotiated terms of settlement and secondly, the consumer has made at least one payment pursuant to the accepted terms of settlement.
- Careful consideration should be given to the possibility of partial settlements and how and when these would trigger eligibility for fees. We would like to draw a parallel to Consumer Proposals, which are filed pursuant to provisions of the *Bankruptcy and Insolvency Act* (BIA),⁶ where all creditors are bound by an accepted Consumer Proposal. The possibility exists that DSC's may only be able to arrange a settlement with certain creditors and not with others. This could leave debtors with continuing financial

¹ R.S.C. 1985,c.B-3

² Code of Ethics for Trustees, Section 34 -53 of the Bankruptcy and Insolvency General Rules

³ www.cairp.ca

⁴ Fair Trading Act, COLLECTION AND DEBT REPAYMENT PRACTICES REGULATIONS, Section 12.1(2);

⁵ The Consumer Protection Act, C.C.S.M. c. C200 Section 20.1(1).

⁶ Bankruptcy and Insolvency Act L.R.C. (1985) ch. B-3, Section 66.11 to 66.4.

hardship if certain debts are compromised but other debts remains outstanding and financial problems are not fully resolved.

3. Limit fees for DSS

We support the proposal that there should be a limit on fees charged by DSC's. The Regulation also makes a distinction between credit counseling that results in a schedule of payments to creditors and the newer debt settlement model that seeks to negotiate a reduction in the debt owing. The proposed fee structure is set accordingly and the 2-tier fee model suggested in the proposal is agreeable, subject to the caveats below.

We express concern that a fee calculation for DSS based on the debt owed at the time the consumer entered into an agreement, could potentially provide an incentive for unscrupulous DSS providers to overstate debts or suggest that debtors increase their debts prior to entering into an agreement. In other words, debtors may be influenced by unscrupulous operators to increase their credit which is not in the best interests of debtors or creditors. Furthermore, we recommend that the fee calculation be based on the amount owed as per the creditors attestation.

Regarding the 15% top tier fee structure that is proposed for member agencies of the Ontario Association of Not-For-Profit Credit Counseling Services ("OACCS"), we query why the Ministry has proposed that OACCS members be treated differently from other operators. We understand that other not-for-profit operators may also have similar accreditations to those of the OACCS. As such, it would seem more logical and fair that special dispensation not be provided for just one group but that all suitably qualified groups receive equal treatment under the regulation.

Thus, we recommend that the proposed legislation instead provides for the 15% top tier fee structure to apply for individual operators that are approved by the Ministry, as opposed to the blanket approval that is currently proposed in the Ministry's Proposal document. This approach would give the Ministry time and flexibility to review the various accreditation programs and credentials of individual operators as part of an approval process. This recommendation will also allow other equally qualified providers to be approved even if they belong to a different association.

We understand that some of the not-for-profit credit counseling operators receive payments from creditors in the form of donations based on the amount they collect for each arrangement. We further understand that this amount can be as high as \$22 for every \$100 collected. Accordingly we recommend that such payments, donations or any consideration for services rendered received by operators be included in the calculation of the fee limit, and that operators be required to disclose to debtors the total fees, donations and other consideration that they will

be receiving as a result of the debt repayment agreement so that debtors can evaluate their options with full knowledge of the total costs involved.

Donations are a cost to be borne by creditors and it is likely that they will factor that into their recovery analysis. If a consumer has to pay a 10% fee and the DSS provider receives an additional 22% in donations from the creditors, the total cost is actually 32%. It is our understanding that consumers may not currently be aware of the fact that up to 22% of collections are received as “donations” by the DSS provider. Full disclosure of all costs including donation, gifts and any other type of payment is helpful for consumers when considering alternatives such as a consumer proposal, where the cost is \$1,500 plus 20% of the moneys distributed to creditors under the consumer proposal.⁷ Lastly, all information concerning the total cost needs to be disclosed to the consumer in order to provide them with the necessary information to determine if the fees/consideration charged is within the amounts prescribed under the legislation.

4. Ensure set aside funds are under consumer control

We support the proposed protection afforded to the debtor’s funds under these provisions. Consideration should be given to the detailed regulations prescribed in other provinces, such as Alberta, to ensure that trust accounts are properly maintained and with adequate controls⁸.

We further recommend that the trust fund for Ontario consumers be maintained in Ontario. This ensures that the bank account remains within the Ministry’s jurisdiction in Ontario.

5. Require clear disclosure of all key contract terms and a 10 day cooling off right

We fully support these provisions which will provide the debtor with a clearer understanding of the time frames involved in the negotiation process.

The Proposal suggests that “*no contract should have a term longer than three years in duration*”. We are concerned that the proposed three year limit on any DSS agreement may be too short. Our understanding is that credit counseling debt management programs were traditionally negotiated over a 4 year time period. We believe that in the appropriate circumstances, debt management programs can provide a viable solution to many debtors. Thus, the imposition of a three year limitation on these programs may hinder their viability.

⁷ Section 129 of the Bankruptcy and Insolvency General Rules

⁸ Alberta Regulation 194/1999 Fair Trading Act COLLECTION AND DEBT REPAYMENT PRACTICES REGULATION, paragraphs 16 - 18

6. Require mandatory disclosures of consumers' rights and risks

We strongly support these provisions. This view is supported by the experience of many of our members who have reported meeting debtors who are not fully aware of the risks of using debt settlement services, as highlighted in the proposed regulations.

We recommend that the customer's signature be required to appear next to the mandatory statement. The alternate suggestion of providing a notice on the first page, referencing the mandatory statement which is to be found elsewhere, is not optimal in our view. Some vulnerable debtors may not always take the time to read through a lengthy contract. Therefore, we do not believe the first page referencing where the notice can be found is effective disclosure for the protection of consumers.

7. Prohibit misleading advertising

We strongly support the proposed regulations with respect to advertising and agree that any advertising must be based on accurate, identifiable and supportable information. Debtors are vulnerable when dealing with excessive debt loads and are susceptible to false claims made in advertising as to the results that can be delivered and credentials of the operators.

The practice followed by some DSS operators of including a government symbol or reference to a "government approved program" in their advertising or on their websites is an attempt to boost credibility in the debtors' mind and should be expressly prohibited.

We also recommend that DSC's only be permitted to advertise the specific services that they provide, without reference to providing other services for which they are not licensed such as bankruptcy or consumer proposal services.

8. Establish standards of conduct

In addition to the practices proposed by the Ministry which we endorse, we recommend that:

- DSS providers be prohibited from receiving any fees, donations or any other consideration from creditors in excess of the established fee limits and disclosure of these being made to the debtors.
- DSC's be prohibited, directly or indirectly, from paying to a third party a commission, compensation or other benefit in order to obtain a debt settlement services engagement or from accepting, directly or indirectly from a third party, a commission, compensation or other benefit for referring work relating to a debt settlement services engagement.
- To ensure quality standards and compliance with the Regulation, we recommend that all DSC's be required to be licensed or registered under the proposed regulation.

- DSC's should have the same Ontario ownership requirements and bonding requirements as Collection Agencies operating in Ontario.

9. Remedies and enforcement

The effectiveness of the proposed regulation will be impacted by the ability to enforce the regulation and, where required, impose meaningful penalties as a deterrent. We recommend that specific penalties for non-compliance with the regulations be determined and specifically outlined in the regulation. In our view, the requirement to refund excess fees alone is not punitive enough to be an effective deterrent. Repeat offenders should have licenses or registrations to act as a DSC suspended or revoked.

We understand that the Ministry has not yet determined whether it will implement the proposed improvement to consumer protection by regulation, or whether it will introduce a combination of legislation and regulations. We believe that the Ministry needs to give itself as much authority as possible to ensure that the proposed regulations have maximum force and effect and that non-compliers will be subject to strict enforcement regimes and penalties for non-compliance.

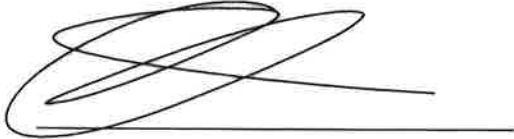
CONCLUSION

OAIRP and CAIRP applaud the Ministry's initiative in proposing the regulation of debt settlement service operators in Ontario. We appreciate the Ministry's interest in hearing from stakeholders on this important issue. Our organizations are committed to advancing the practice of insolvency administration and the public interest related to the insolvency system, and as such, we are committed to maintaining an open and ongoing dialogue with the Ministry.

We would be pleased to discuss our comments further and work with the Ministry to ensure that effective regulation is implemented in Ontario with respect to debt settlement services, to ensure the best protection for consumers.

Our comments and recommendations are respectfully submitted on February 25, 2013.

**ONTARIO ASSOCIATION OF
INSOLVENCY AND RESTRUCTURING
PROFESSIONALS**

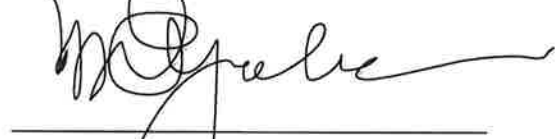


Per: Allan Nackan CA•CIRP
President

416-496-3732

anackan@farberfinancial.com

**CANADIAN ASSOCIATION OF
INSOLVENCY AND RESTRUCTURING
PROFESSIONALS**



Per: Mark Yakabuski B.A. (Hons.)
President and Chief Operating Officer

416-204-3243

Mark.yakabuski@cairp.ca