Industry Canada Industrie Canada

OSB • BSF

National Insolvency Forum

Montreal Regional Report

CAVEAT: The views expressed, suggestions made and/or the discussions summarized in this Report do not necessarily reflect the opinions and/or views of the Office of the Superintendent of Bankruptcy.

Contents

Foreword

As a result of the numerous revisions made to the *Bankruptcy and Insolvency Act (BIA)* over the past seven years, it was felt that 1999 would be an ideal time to consult with various stakeholders and practitioners regarding the operational aspects of Canada's Insolvency System. At an early stage in the process of organizing the National Insolvency Forum (NIF), we realized that, in order for these consultations to be successful in focussing on the operational aspects of the Insolvency System, it was imperative that those participating possess a high degree of practical everyday *hands-on* experience. In other words, we wanted the NIF to be a Forum devoted to those practitioners and stakeholders who are the principal users of the system and who deal with the procedures and intricacies of the insolvency system on a daily basis. It is our opinion that the forum utilized has proved to be an ideal vehicle to accomplish our objectives and that the high degree of knowledge and expertise of participants has been an invaluable component to the success of these consultations.

Our Approach to the Challenge

In keeping with our mission of providing an effective, cost-efficient and uniform national program, as well as ensuring that the existing system is streamlined to better respond to stakeholders'needs, six (6) regions were selected to participate in the NIF initiative undertaken by the Office of the Superintendent of Bankruptcy (OSB).

The following Regional Report is one of six (6) reports which outlines the highlights of stakeholders' discussions and suggestions for changes and improvement to Canada's Insolvency System. A copy of the report will be forwarded to each participant and all reports will be published on the OSB web site (http://osb-bsf.ic.gc.ca). The National Report will be published in the upcoming *Insolvency Bulletin.*

In order to ascertain what works, what doesn't work, and what improvements can be made, stakeholders were asked to voice their concerns regarding the existing insolvency system.

In order to appropriately reflect the opinions and concerns expressed by the participants and stakeholders respectively, we have divided the Report in two (2) parts: *Part I* reflects the participants' discussions as to the efficiency of our existing system, including suggestions to streamline the process for consumer insolvencies, whereas *Part II* encompasses the participants' discussions on the same subject-matters, as they pertain to commercial insolvencies.

Finally, you will note that we have included in Appendix A a summary of various papers submitted by participants, as well as a list of the participants in Appendix B, for your perusal.

Part One
Consumer Insolvencies
Summary of Discussions & Key Points

1. Efficiency of the Current System

1.1. Streamlining the Existing System

With the millennium only a few months away and given the constantly changing nature of economic activity in Canada and throughout the world, it has now become imperative that Canada maintain a strong, vibrant and equitable insolvency system. The question then becomes *How efficient is our current insolvency system ?* To this end, both consumer and commercial representatives were invited to voice their views on a number of issues regarding ways to simplify the existing process and make it less time- consuming, and more effective and cost-efficient.

The conference began by discussing the issue of **Consumer Proposals.** A number of participants felt that debtors, especially individuals in a high income bracket, should be required to file a proposal prior to declaring bankruptcy. The rationalization for such suggestion stemmed from the fact that typical consumer bankruptcies do not convey any benefits to unsecured creditors in the majority of cases.

The issue of voting with respect to proposals was also discussed. It was stated that often representatives of student loan agencies vote against consumer proposals even though such proposals provide for the full reimbursement of the student loan debt. It was suggested that the OSB take a pro-active role in addressing this situation.

> *Participants felt that individuals in a high income bracket should be required to file a proposal prior to declaring bankruptcy. Participants further suggested that the OSB take a pro-active role in addressing the situation of representatives for the student loan agency constantly voting against consumer proposals.*

Moreover, participants agreed that the existing **Credit Rating System** provides no incentive to debtors to file a proposal rather than file for bankruptcy. A representative

from a credit rating agency explained that the rating is attributed by creditors not by credit rating agencies.

As an incentive for debtors to file a proposal, it was suggested that credit rating practices be altered in order to reflect the distinction between a consumer proposal and a bankruptcy.

A number of participants questioned the mandatory nature of **Counselling Services.** Most felt that the insolvency community should be made aware of the statistics available on counselling and repeated bankruptcies. A number of questions were raised by stakeholders to this effect. *What do we know about the impact of counselling, after seven (7) years ? Is bankruptcy recidivism decreasing ? Given the cost, are we obtaining value from this program ?*

It was suggested that the OSB conduct a study in order to ascertain the value-added of the counselling program.

The discussion moved from counselling to **Credit Counsellors**. It was said that it is more and more frequent to see these credit counsellors provide a debtor with advice on what to do before declaring bankruptcy. While some suggested that the *BIA* be amended to preclude such counselling by making it an offence, others advocated that an amendment was not the solution, but rather the problem was more in reaching debtors before they consult with such individuals. Some participants suggested that the OSB and the trustee community should study the increasing phenomena of so called credit counsellors, also referred to as "financial advisors".

The OSB and the trustee community should study the increasing phenomena of so called 'credit counsellors', also referred to as 'financial advisors', who provide debtors with information on how to deal with their property prior to declaring bankruptcy.

While most stakeholders were aware of the **Mediation** process under the *BIA*, they were skeptical of its benefits. In response to this comment, some stakeholders reiterated the reason for opting to introduce mediation as opposed to arbitration: mediation provides benefits with less acrimony between the parties. Creditor representatives agreed and added that by helping the parties 'mediate' a settlement, everyone benefits. Accordingly, it was proposed to promote such benefits.

It was suggested that the OSB promote the existence of the mediation process and its benefits.

Regarding **Proof of Claims** ("poc"), participants noted that it appeared that creditors were filing 'poc' less often. It was explained that where creditors thought that it was unlikely that a dividend would be distributed, they simply would not bother to file a "poc".

Accordingly, it was proposed that a notice of bankruptcy be followed by a 90-day interim report indicating whether there were any realizable assets in the bankrupt's estate which could result in the eventual distribution of a dividend. It was said that this approach would be of great assistance to all creditors in determining whether to submit a "poc". To this recommendation, a few participants added that trustees should also have the power to request a "poc" in order to verify the nature and circumstances surrounding a claim when it was suspected that related parties were involved, or that a reviewable or preferential transaction had taken place.

It was recommended that trustees be required to submit to all creditors a 90-day interim report indicating whether or not a dividend would be payable to creditors.

Participants went on to discuss the obligations and duties of a trustees. They suggested that, in disciplinary proceedings, the panels of 'judges' be comprised of various stakeholders from the insolvency community.

The discussion proceeded with the issue of **Meetings of Creditors.** While some participants were of the opinion that, in ordinary bankruptcies, meeting of creditors should be held only in cases where a prescribed threshold of creditors requested it, others suggested *status quo* arguing that these meetings afforded creditors an excellent forum to exchange information regarding a debtor's personal situation and perhaps even detect abuses and/or hidden assets.

While some participants agreed that meetings of creditors be held only in cases where a prescribed threshold of creditors required them, others suggested the status quo arguing that they offer an excellent forum for creditors to exchange information which could possibly lead to locating hidden assets.

With respect to the issue of **Student Loans**, a number of participants expressed their dissatisfaction with the amendment made to section 178 of the *BIA*. More specifically, it was their opinion that the fact student loans 'survive' the discharge was an infringement to one of the most important underlying principles of the *BIA*: granting a debtor a 'fresh start', free from the crushing burden of his/her debts. One of the primary contentions of those opposed to the recent amendment was that no study was commissioned, nor were there any consultations conducted prior to increasing the period from two (2) years to ten (10) years before the student can ask the court for the student loan to be discharged. More importantly, some participants questioned whether the measures taken were an appropriate solution to the apparent default rate for these loans. On the other hand, those who supported the amendment considered the ten (10) year period to be appropriate given the public expenditures involved in educating a young person.

Participants followed the discussion of student loans with another subject which generated a great deal of debate : **Service Standards**. This issue was discussed primarily in relation to Royal Canadian Mounted Police (RCMP) investigations. While participants felt that the time incurred to conduct an investigation (either criminal or disciplinary) was problematic, they did concede that the services in regional OSB offices had greatly improved. Accordingly, given the limited resources of the RCMP to conduct investigation, it was suggested that the focus be on deterrence. It was also suggested that, subject to approval of creditors and inspectors, the OSB resort to the use of private detectives, in order to investigate debtors and their activities as to alleged wrongdoings and that the report be forwarded to the RCMP for action. Participants proposed that the OSB and RCMP focus on prosecuting those cases which would be successful before the courts and ensure that the decisions are well publicized in the media.

It was proposed that the OSB and the RCMP focus on deterrence and prosecute only those cases which would be successful before the courts and ensure that the decisions are well publicized in the media.

1.2. The Realization of Assets & the Statement of Affairs

It was reported that the main problem concerning the **Realization of Assets** refers to the inadequacy of time and resources to pursue debtors who are not declaring all of their assets. Stakeholders added that the problem is compounded by the fact that some debtors are well aware that it is unlikely that the RCMP will investigate the improper actions of a bankrupt in a small estate.

On the subject of **Statement of Affairs** ("SOA"), comments related to the verification and accuracy of the SOA was the prevalent concern amongst stakeholders. To this end, it was suggested that trustees further investigate the declarations made by debtors as to their truthfulness in addition to obtaining proper valuation for said assets. As a general observation, participants agreed that more rigorous standards were needed in this respect.

Participants proposed that there be more rigorous standards regarding the verification of the accuracy of the statement of affairs in obtaining proper valuation of the property of the bankrupt.

Part Two
Commercial Insolvencies
Summary of Discussion & Key Points

1. Efficiency of the Current System

1.1. Streamlining the Existing System

The second day of discussions began by addressing the issue of **Commercial Proposals**. A few participants stated that, although Cash Flow Statements ("CFS") were required in order that creditors ascertain the short-term viability of the debtor, it was their opinion that this mechanism was not a reliable and/or useful 'tool'. Participants observed that the lack of rules in this area resulted in unrealistic projections being made in the CFS. Stakeholders wanted to see more information as to the causes of insolvency included in the CFS and that more emphasis be placed on the reorganization plan itself.

It was suggested that the content of the CFS be revised in order to provide more reliable and useful information to creditors.

The latter discussion led to the issue of **Interim Receivers** in commercial proposals. It was suggested that the mandate of a trustee be similar to that of a receiver when he/she accepts to act in a proposal on behalf of a debtor and that such powers be vested

automatically upon the filing of a notice of intention or upon the filing of the proposal. Some participants considered that this approach would be helpful in order to ensure that debtors did not take advantage of a stay of proceedings to liquidate goods, or enter into reviewable transactions, hide assets, or otherwise hinder the rights of unpaid suppliers. Other participants felt that this vesting of powers not be automatic given the expenses involved. Rather it was suggested that it be left to creditors to decide as they are the ones who ultimately be responsible for these fees. Another approach suggested was that the debtor be required to sign a type of inventory statement upon filing a notice of intention or a proposal.

It was suggested that upon the acceptance to act in a proposal, the trustee be vested with powers similar to those of a receiver or alternatively that the debtor be required to sign an inventory statement upon filing a notice of intention or a proposal.

Commercial and corporate representatives shared the same views as their consumers counterparts with respect to the issue of **Meetings of Creditors** in that, most felt that these meetings were important and useful and should not be eliminated as a matter of course. Some participants further suggested that these meetings be captured electronically and/or recorded where possible, that the meetings be held at the OSB office in order to convey a more neutral setting.

The participants felt that the meeting of creditors are important and useful and suggested that they be held at the OSB offices in order to convey a more neutral setting.

Comments were made to the effect that the swearing of the **Proof of Claim** ("poc") (property) was not necessary. However, this subject-matter was said to be a non-issue if the OSB proceeds to implement the OSB's *Service Provider Initiative* which will link courts, creditors, trustees and the OSB, as well as allow that "poc" be electronically filed and that dividends be paid via Internet.

With respect to the issue of **Statements of Receipts and Disbursements** (SRD), a number of participants questioned the necessity for a trustee to obtain the courts approval of the SRD. Many felt this requirement to be time-consuming and unnecessary, especially once inspectors had approved it and where the OSB did not object. Therefore, it was suggested, as a means of avoiding a court appearance, to have this approval done via tele-conferencing. Some participants, however, cautioned against the fact that creditors or interested parties not be denied their right of appearing before the court when a disagreement or a serious question arose.

Once the SRD has been approved by inspectors and the OSB, participants questioned the necessity for the court appearance. As well, participants suggested that consideration be given to permit that the taxation be done by tele-conferencing.

Finally, some participants advocated that the requirement of publishing a notice of bankruptcy be re-examined as it was alleged that, in some cases, the publication of a notice in a local newspaper was ineffective.

2. Current Issues in Commercial Insolvencies

2.1. Unpaid Suppliers

When asked to comment on the current issues in commercial insolvencies, participants had different views regarding the application and wording of section 81.1 of the *BIA* which refers to **Unpaid Suppliers**. Many stakeholders considered that this provision was virtually ineffective. It was explained that the intended objective of section 81.1 was to protect a prevalent form of suppliers (of concrete and tangible goods), which were often the most important nonetheless vulnerable creditors to the abuse of debtors. It was reported that there now exists a host of intangible services which are becoming more and more important yet are not captured by section 81.1 of the *BIA*. Other participants argued that concrete, tangible supplies can easily be converted into cash to pay off other creditors, however, the same could not be said of intangible services and as such there was no need to extend protection to suppliers of services.

Moreover, some participants observed that oftentimes trustees contest the claims of unpaid suppliers and that this situation had been worsened by the recent court's restrictive interpretation of the words "same condition" and "identifiable".

Another problem was said to be the notices of intention. Participants felt that the stay of proceedings, which takes effect upon the filing of a notice of intention, does not confer any rights to unpaid suppliers permitting them to reclaim unpaid goods delivered to a debtor. Consequently, debtors oftentimes take advantage of the stay of proceedings to liquidate goods and subsequently pay other creditors, particularly those who possess personal guarantees against the principles of a debtor company.

Two remedies were proposed to address the aforementioned problems. First, it was proposed to amend the *BIA* in order to provide better protection to unpaid suppliers in cases of re-organizations. Failing this, it was proposed that all unpaid goods be automatically segregated and accounted for, with the proceeds of sale placed in trust for

the benefit of unpaid suppliers. Where debtors did not comply with these requirements, directors would be held personally responsible. Other participants proposed a more global protection which would apply within thirty (30) days following the date of bankruptcy and extend to suppliers of services as well.

It was proposed to amend the BIA in order to improve its effectiveness and provide better protection to unpaid suppliers in cases of reorganizations.

2.2. Receiverships

With respect to **Receiverships**, the main criticism was that the provisions which refer to the latter are too expensive to comply with and the filing requirements were onerous in smaller estates. Accordingly, it was suggested that a threshold be established in terms of dollar amounts and that, any receivership under the prescribed threshold be exempt from complying with the requirements of the *BIA*. Comments were made to the effect that in smaller receiverships, individuals who act as receiver do not bother with these mechanisms and that many receiverships are not being declared.

It was suggested that a threshold be established in terms of dollar amounts and that any receivership under the prescribed threshold be exempted from complying with the requirements of the BIA.

Part Three

The Time For *Action*

As you are aware, Phase I of the *Bankruptcy and Insolvency Reform* emerged in 1991 with *Bill C-22*. Phase II culminated in the enactment of *Bill C-5*, which was based largely on the Bankruptcy and Insolvency Advisory Committee (BIAC) recommendations in April 1997. Having now completed the National Insolvency Forum for the six (6) identified regions, the OSB must now draw from the numerous suggestions, a selected few which will be comprised in the Action Plan for the coming millennium.

The OSB will base its selection on various criteria such as the feasibility of the suggestion, the resources necessary to implement the suggestion, and whether the suggestion is in keeping with Government and/or OSB objectives and priorities.

Part Four

Executive Summary

Fiscal constraints and the pervasive question of *What taxpayers are getting in return for their investment in various government programs* have prompted the questioning and rethinking of traditional approaches to the role of government and how it does business.

While it is true that Integrity is the cornerstone of our insolvency system, it is also true that information on performance and efficiency is required for good management and effective governance. Knowing how well programs are doing is increasingly essential to managing today's public sector, as our government faces resource reductions and a citizenry that continues to expect good value from its government.

Although amendments made to the *BIA* during the 1992 and 1997 reforms have come a long way in improving Canada's insolvency system, during the course of the NIF round-table discussions, the OSB was made aware of a number of outstanding issues which warrants its attention in order to further improve the system. We have attempted to paraphrase those suggestions and recommendations made by both consumer and commercial insolvency representatives, in the following Executive Summary.

When asked *How to improve and streamline the process*, consumer representatives had a number of suggestions. The debate began with the issue of **Consumer Proposals**. A number of participants felt that all debtors, especially those in high salary brackets, should be required to file a proposal prior to declaring bankruptcy. Participants felt that individuals in a high income bracket should be required to file a proposal prior to declaring bankruptcy. Participants further suggested that the OSB take a pro-active role in addressing the situation of representatives for the student loan agency constantly voting against consumer proposals.

Moreover, as an incentive for debtors to file a proposal, it was suggested that credit rating practices be altered in order to reflect the distinction between a consumer proposal and a bankruptcy.

Stakeholders further proposed that the OSB undertake a study regarding the impact of **Counselling** and its value-added to the insolvency process.

From counselling, the discussion shifted to an increasingly alarming topic : **"Credit Counsellors/Financial Advisors"**. It was reported that it is more and more frequent that these individuals provide advice to debtors before they declare bankruptcy. Accordingly, it was proposed that the OSB and the trustee community study the increase phenomenon of "credit counsellors/financial advisors".

As well, it was suggested that the OSB promote the existence of the **Mediation** process and its benefits.

Regarding **Proof of Claims**, participants proposed that the *BIA* be amended to require that trustees submit to all creditors a 90-day interim report indicating whether or not a dividend would be payable to creditors.

On the subject of **Meeting of Creditors**, opinions were divided. While some participants agreed that such meetings be held only in cases where a prescribed threshold of creditors required them, others suggested the *status quo* arguing that they offer an excellent forum for creditors to exchange information which could possibly lead to locating hidden assets. **Student Loans** were next discussed. On the one hand, some stakeholders disagreed with the recent amendment to paragraph 178.(1)(g), increasing the period from two (2) years to ten (10) years, for which a student loan is not discharged. On the other hand, some participants supported the amendment and considered the ten (10) year period to be appropriate given the public expenditures involved in educating a young person.

On the issue of **Service Standards**, participants proposed that the OSB and the RCMP focus on deterrence and prosecute only those cases which would be successful before the courts and ensure that the decisions are well publicized in the media.

With respect to the issue of **Realization of Assets and Statement of Affairs**, the prevalent concern of stakeholders was that of the verification of the accuracy of statement of affairs. Accordingly, participants suggested that trustees be required to further investigate declarations made by debtors as to their truthfulness and obtain proper valuation of the assets.

When asked about the efficiency of our insolvency system, corporate and commercial participants were concerned with the issue of cash flow statements in **Commercial Proposals**. The main observation was to the effect that there exists no clear rule regarding CFS which resulted oftentimes in unrealistic projections. Most participants agreed that more information on the causes of bankruptcy were needed in the CFS and that its content should be revised in order to provide more reliable and useful information to creditors.

On the issue of **Interim Receivers**, it was proposed that upon accepting to act in a proposal, trustees be vested with powers similar to those of a receiver or alternatively that the debtor be required to sign an inventory statement upon filing a notice of intention or a proposal.

With respect to **Meetings of Creditors**, it was again reiterated that these meetings are important and useful in providing an excellent forum for creditors to exchange information and suggested that they be held at the OSB offices in order to convey a more neutral setting.

On the issue of **Statement of Receipts and Disbursements**, a number of participants questioned the necessity for a trustee to obtain the court approval. Many felt this requirement to be time-consuming and unnecessary, especially once inspectors had approved it and where the OSB did not object. It was suggested that this process be de-judicialized or, alternatively approved via teleconferencing.

When asked to comment on the current issues in commercial insolvencies, participants raised serious issues regarding the ineffectiveness of section 81.1 of the *BIA* which deals with **Unpaid Suppliers**. Comments were also made to the effect that the situation had worsened with the court's recent restrictive interpretation of the terms "same condition" and "identifiable". It was also purported that debtors oftentimes file a notice of intention simply to benefit from the stay of proceedings in order to liquidate goods, provided by unpaid suppliers in order to pay other creditors with said proceeds. As a redress mechanism, it was suggested that the *BIA* be amended in order to afford better protection to unpaid suppliers.
Finally, regarding the requirements of the *BIA* for **Receiverships** it was proposed, as a possible remedy to the issue of cost involved, to establish a threshold in terms of dollar amount, and that any receivership under the prescribed threshold be exempt from complying with said requirements.

Part Five

Conclusion: The Way *Ahead*

The publication of this report marks an important step in the OSB's commitment to streamline and improve Canada's Insolvency System.

This series of NIF conferences has provided the OSB with insightful information on how to improve the existing Insolvency System. The OSB will now begin considering which suggestions can be implemented in the absence of legislative amendments through the issuance of *Circulars*, *Directives* and voluntary codes of conduct. With the next legislative review in 2002 just around the corner, proposals requiring legislative changes to the *Bankruptcy and Insolvency Act* will be formally submitted to the Corporate Law Policy Directorate of Industry Canada.

It is with your co-operation, through this type of round-table discussion that the OSB, together with Industry Canada, will continue striving towards a business-like bankruptcy service which provides high-quality, trusted, timely and efficient services.

We would like to reiterate our gratitude for your participation in the National Insolvency Forum (NIF). The Montreal Conference was well attended and the suggestions for change and improvement to Canada's Insolvency System were very much appreciated.

Thank you, once again.

APPENDIX A

SUMMARY OF DISCUSSION PAPERS SUBMITTED BY PARTICIPANTS

DISCUSSION PAPER #1
Submitted By: The Canadian Bankers Association

CONSUMER BANKRUPTCIES AND PROPOSALS

STREAMLINING (Consumer proposal)

- Subsection 66.12 (2) of BIA should be amended to allow creditors to oppose a debtor moving from Division I to Division II. This will make it clear that debtors who have no intention of going through with a proposal cannot stop proceedings under one Division of the BIA and move to another Division, frustrating creditors in the process.

- Subsection 128 (1.1) of BIA should be amended to require due diligence on the part of the trustee in providing full names and addresses of any persons holding security interests. For example, if an incorrectly addressed notice is received by a large organization, it may well find itself outside of the thirty-day response period and lose its security.

- Section 66.2 of the BIA, regarding supervision of consumer debtors' affairs should be amended to remove the requirement for obtaining the consent of the consumer.

TRUSTEE OFFICES

- A better consistency on the part of the trustee in addressing the spirit and intent of the legislation would improve the effectiveness of the BIA. The CBA recommends a consistent direction to trustees that they should immediately retrieve all collateral and credit cards and advise banks immediately of these measures.

- Some trustees take possession of collateral and often store it in private locations which incurs exorbitant storage costs for the financial sector. In addition, the delay in notifying the creditor of the fact of possession and location of the collateral exacerbates the problem.

DISCUSSION PAPER #2
Submitted By: Equifax

QUALITY, TIMELINESS AND COSTS OF INFORMATION RECEIVED BY THE OSB

- Only about one half of the information is received in a form which allows it to be added to the Equifax database in an automated fashion. The OSB should put procedures into place which ensure that information entered by department officials for circulation to both the general public and the credit reporting agencies is as accurate and complete as possible. In addition, it would be helpful if the OSB would provide information such as "trade style" and "trade names" when an individual who has operated an unincorporated business is filing under the BIA.

- Bankruptcy-related information must be delivered in a timely and accurate manner if it is to be a useful tool to credit grantors. This information must be made available on a real time basis. The OSB should consider converting their system to allow for such information to be sent on a daily basis via the Internet.

- Several months ago, the OSB imposed a very substantial user fee for obtaining bankruptcy-related information. The OSB should opt to maintain the current rates it charges for information. These increased funds should be reinvested in a manner that will ensure enhancement of the product being delivered.

ON-LINE CREDITOR AND DEBTOR LISTS

- This information should be made public immediately upon same being compiled by the appointed receiver or trustee. Such information should be made available by means of a universally accessible web site at no charge to the general public. The current system tends to favour one class of creditor over others. The OSB initiative should strive to ensure greater equity in the dissemination of information, a concept which certainly would be appropriate and fair.

WORKING PAPER #3

Submitted by : Hélène Doré, National Bank of Canada.

(I) ELECTRONIC DATA TRANSFER

To reduce delays between each communication and reduce amount of paperwork, both from trustee to creditors and from creditors to trustee.

(II) MINIMUM AMOUNT NECESSARY TO DECLARE BANKRUPTCY

Should be raised from $1,000 to 20% of annual income in short-term debt, i.e. debt payable in one year, such as *taxes, credit card, credit line.*

(III) REPEATED DISCHARGE APPLICATION

	1st bankruptcy	2nd bankruptcy	3rd bankruptcy	4th bankruptcy
Payment	9 months	18 months	27 months	36 months
Discharge	Registrar	judge	judge	judge

(IV) CONSUMER PROPOSAL

Maximum amount should be increased to $150,000.

(V) STANDARDIZE REGULATIONS

For example : after tax return filing, Revenue Canada sends refund to trustee for distribution to creditors. Revenue Quebec sends refund directly to consumers.

(VI) DIVIDEND CHEQUES UNDER $10

All dividend cheques under $10 should be eliminated and the total of such cheques returned to the Superintendent of Bankruptcy.

(VII) DISCIPLINARY MATTERS

Organize forum or meeting annually with a survey and identify and assess trustees whose questionable conduct warrants investigation by the Superintendent.

DISCUSSION PAPER # 4
Submitted By: The Corporate Law Policy Directorate, Industry Canada

This paper outlined the consultations and policy development process that Industry Canada intends to pursue during the next phase of reform to the BIA and CCAA, and will discuss some of the key issues that will need to be addressed in the latest phase.

PROCESS

In the first phase of bankruptcy reform, a two-stage process was followed. In the first stage, an Advisory Committee on Bankruptcy and Insolvency was created by the Minister of Consumer and Corporate Affairs. The Committee was tasked with examining the bankruptcy and insolvency system, assessing possible reforms and recommending amendments to the *Bankruptcy and Insolvency Act*. This was followed by a second stage, of largely bilateral consultation and negotiations between the Department of Consumer and Corporate Affairs and insolvency stakeholders. The result was Bill C-22, which finally emerged in 1991. The bilateral consultation process employed in the second stage of Phase 1 proved cumbersome and inefficient.

In Phase 2, Industry Canada sought to overcome this by carrying out its consultation through a Bankruptcy and Insolvency Advisory Committee (BIAC) in which all key insolvency stakeholder groups were represented. BIAC was tasked with providing for the exchange of advice and information, identifying insolvency issues and proposing solutions and providing feedback on government policy and legislative proposals, in addition to building a consensus to facilitate change. Phase 2 culminated in the enactment of Bill C-5, which was based largely on the BIAC recommendations, in April 1997.

Our challenge in Phase 3 is to establish a consultation and policy development process that retains the many benefits of the BIAC process while addressing some of the issues left unresolved. Industry Canada is planning a two-stage policy development/ consultation process. In the first, pre-consultation stage, the Department will produce a series of discussion papers for distribution to insolvency stakeholders in 1999-2000. These papers will set out the issues which we believe must be addressed to ensure that our current insolvency laws provide a modern, efficient and effective legal framework. During the second stage, stakeholders will be invited to submit their comments, their own priority issues and position papers. Policy review sessions will then be held in various localities across Canada as warranted by the subject matter. The policy review sessions will be a key element of the consultation process.

Sessions will focus on getting stakeholder concerns and views as to how issues should be addressed. We expect the first round of policy review sessions to be completed early next year. The Department will then revise its discussion papers and arrange a second set of review sessions later in 2000. This process may be repeated for additional issues and policies through to the end of 2001, at which time a final report will be drafted. This process will allow for effective participation by non-experts and regional stakeholders. Furthermore, it will force the development of feasible preliminary options with respect to contentious issues and an initial overall review of the major elements of insolvency law in Canada.

SOME KEY ISSUES

A) CONSUMER ISSUES

1. Exemptions for RRSPs and personal property

Both issues will be discussed: whether to exempt RRSPs in bankruptcy, and whether to replace the current personal exemption provisions, that adopt provincial rules, with a

federal code.

2. Availability of credit, and debtor and creditor responsibility for high consumer debt

The issues are whether, and if so how, to discourage easy credit for high risk consumer debtors and whether, through legislation, to impose responsibility on consumer debtors or lenders or both.

3. Student loans

The 1997 and 1998 amendments to the BIA enacted a non-dischargeability period for student loan debts. However, student representatives have been critical of it and the Canadian Federation of Students has announced its intention to challenge the extension under the Charter of Rights.

B) COMMERCIAL ISSUES

4. Stays of Proceedings in Commercial Reorganizations

The BIA provides that the court may lift a stay imposed on a creditor in a BIA proceeding if it is satisfied that the creditor will be materially prejudiced. The issue is whether to establish more precise rules regulating the availability of stays in Canada.

5. Contractual Rights in Reorganizations and Bankruptcies

In Phase 3 we need to examine whether to further modify existing rules or to establish specific rules governing termination or adoption or enforcement of other types of contracts, including technology contracts, collective agreements and supply contracts.

6. Debtor Financing During Reorganizations

Obtaining financing is a critical concern of debtors seeking to reorganize under the BIA or CCAA. An issue for Phase 3 is whether to provide stronger protection to providers of credit to insolvent debtors during BIA or CCAA reorganizations in order to enhance the availability of credit.

7. Consolidation of the BIA reorganizations scheme and the CCAA

The question has been raised as to the need for a separate statute to deal with reorganizations of large corporations. The question is whether to bring the CCAA into Part III of the BIA.

8. Director/officer responsibilities

Directors are exposed to liability for specific types of claims, such as tax and wage claims,

under a variety of federal and provincial statutes. Most directors' liability legislation gives directors due diligence defences against liability. One issue is whether to provide stronger protection to directors in insolvency cases to encourage directors to continue guiding a company through a restructuring. Another issue is whether to provide additional constraints on directors whose conduct is below a certain standard. Another could be to provide for disqualification of directors and officers who are responsible for bankruptcies.

9.Vantage Securities

The task now is to determine the facts of this complex case to see if they raise issues whose resolution requires amendments to the BIA.

C) PRIORITIES

10. Crown priorities - Workers Compensation Board (WCB) claims and tax claims

Difficult Crown priority issues remain outstanding for Phase 3: federal and provincial treasuries want stronger protection for GST and sales tax claims. Some provinces want better protection for property tax claims and WCB claims. On the other hand, the private sector remains opposed to any expansion of Crown priorities and has expressed some concern about recent legislation intended to strengthen existing priorities.

11. Wage claims

The question remains as to whether and, if so how, to provide better protection to wage earners in their employers' bankruptcy and who should bear the cost - other creditors through a super priority provision or taxpayers (and if so, which taxpayers - employers, employees or taxpayers generally?) through a fund.

12. Unpaid supplier claims

The provisions concerning unpaid suppliers have been criticized as providing limited and uncertain protection - they apply to goods only, not services and only if the goods have

not been altered or resold since delivery. The issue is whether to improve the status of supplier claims in bankruptcies and reorganizations.

13. Consumer liens

We need to consider whether there is a need to improve the status of claims of consumers for goods paid for but not delivered by insolvent businesses.

14. Wage assignments

When the Phase 2 amendments were before Parliament, the credit unions, who rely on wage assignments as security, sought to have the 1992 amendments repealed and wage

assignments again made enforceable in bankruptcy. They also stated that wage assignments were one of the few types of security which many of their customers could give and that restrictions on it reduced the credit available to those customers. The issue in Phase 3 is whether to reinstate the enforceability of wage assignments in bankruptcies.

D) OTHER ISSUES

15. Adopting the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvencies

UNCITRAL developed a Model Law on Cross-Border Insolvencies, which was adopted by the U.N. General Assembly in late 1997. Canada was an active participant in the UNCITRAL discussions. During Phase 3, we need to consider whether we should adopt the UNCITRAL Model Law on Cross-Border Insolvencies.

16. Consolidation of legislation governing insolvencies of financial institutions

The Winding-Up and Restructuring Act has been substantially amended to make it an adequate vehicle for financial institution liquidation. Given that Finance has the lead on whether to further modernize the WURA, what Industry Canada needs to consider is whether to restrict the application of the Winding-Up and Restructuring Act to financial institutions.

17. Trustee Liability

The 1997 amendments, including provisions protecting a trustee who carries on the business of a debtor or continues employment of the debtor's employees from liability for claims arising before his appointment, have been criticized as being ineffective to protect a trustee. In this round of reform, we need to examine whether to address the issues raised by St. Marys Paper by providing further protection to trustees and receivers.

18. Preferences and Settlements

The issue for Phase 3 is whether to consolidate and modernize Sections 91 to 101 of the BIA in the way the 1975-84 omnibus bills would have made more far reaching changes to those provisions.

DISCUSSION PAPER # 5
Submitted By: The Canadian Bankers Association

COMMERCIAL BANKRUPTCIES AND PROPOSALS

I) STREAMLINING

- There should be common service delivery standards for Insolvency Professionals. Banks

find a wide variety in the quality and timeliness of reports received from IPs which makes it difficult for banks to respond and participate effectively in the process.

- Brief interim reports should be made available to all creditors indicating progress made in finalizing the bankruptcy.

- An updated asset and liability report should be provided after claims have been proven and assets have been formally appraised or investigated.

- Attendance at a meeting of creditors should not be necessary, except in cases of fraud, missing assets, etc.

- Time frames for voting on a proposal seem too short as it appears the documents are not always mailed promptly.

II) RECEIVERSHIPS

- Registration and compliance with the receivership provisions of the BIA are onerous for some businesses. In many instances, the cost of appointing a receiver to meet BIA requirements exceeds the realizable value of the assets held as security.

III) ENVIRONMENTAL LIABILITY

- The CBA opposes any "super-priority" liens which change the priority scheme that is relied upon by secured creditors.
- The scope of any super-priority for environmental clean-up costs must be strictly limited
- Limiting the super-priority on a site-by-site basis to the "affected property" only, is the best solution.
- The words "is contiguous thereto" [subsection 14.06(7)] should be replaced by "has a common boundary therewith".

IV) INTERNATIONAL INSOLVENCIES

Any BIA international insolvency amendments should not:

- interfere with the discretion of Canadian judges;
- impact on the flexibility of courts to deal with debtors and assets located in Canada;
- facilitate the importation of foreign bankruptcy laws;
- introduce uncertainty into domestic lending transactions or the taking of security;
- constitute leading edge cross-border insolvency legislation.

V) DEBTOR IN POSSESSION FINANCING

- The courts are now exercising inherent jurisdiction to grant super-priority charges over existing lenders to secure financing for businesses that are now under reorganization. It will be important for the banks as lenders that the criteria for such super-priority financing be better defined in restructuring legislation.

VI) DIRECTORS' OBLIGATIONS

Directors should:

- be given a degree of protection in insolvency situations from strict liability for claims such as wages and source deductions which can arise without the fault of the directors;
- have a fiduciary duty to consider the interests of creditors as well as shareholders.

VII) LEASING

- Clearer and more consistent rules governing leases of personal property should be developed. For example, there is considerable uncertainty as to what happens when a lessor goes bankrupt. It is unclear to what extent lessors are secured creditors for the purposes of the BIA and the CCAA. There is no process for retaining or disclaiming personal property leases. Addressing these issues should simplify leasing financing.

VIII) PRIORITIES

- The new super-priority for source deductions should be limited to current assets.

- The bankruptcy scheme of claims priorities should apply in receiverships.

IX) INTELLECTUAL PROPERTY

- Reform in the area of intellectual property rights would enhance both the lending process and the insolvency process, given the growing importance of intellectual property rights in many businesses.

X) UNPAID SUPPLIER

- Complete removal of the "unpaid suppliers" provision from the BIA (sec. 81.1): this provision has a negative impact on the availability of credit as it reduces the ability of borrowers to pledge inventory as security for advances of credit, thereby curtailing access to inventory and operating financing.

ANNEXE B

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