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National Insolvency Forum

Halifax 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.

When asked how to improve and streamline the process, participants had a number of suggestions. Remarkably, a number of their comments related to communication issues. It is a known fact that, in many cases one of the contributing factors to bankruptcy is the breakdown of communication between the debtor and the creditor. As a way of improving the discussions between the parties, the *BIA* was amended in 1997, to introduce a **Mediation** process. The discussion opened with this subject.

While some participants agreed that the introduction of this process was a positive addition, others were totally unaware of its existence. Those who were familiar with the mediation process agreed that, although it was not necessarily less time-consuming, it did provide creditors and bankrupts with better accessibility and a way to expand their discussions of conflicts or disagreements. Moreover, participants recognized that the mediation process provided a cost-effective way to obtain additional payments without going before the courts.

The existence of the mediation process afforded to debtors and creditors in the BIA, as well as its benefits, should be further promoted and/or publicized.

On the issue of **Counselling Services** afforded to debtors by trustees, opinions were divided: while some participants agreed that there was some benefit to having a first

counselling session for an individual bankrupt, others thought that some leniency should be provided for, with respect to the second stage of counselling. In keeping with this suggestion, participants remarked that, quite often, a first-time individual bankrupt is denied his/her discharge as a result of not having complied with second stage of counselling.

It was therefore, suggested that consideration be given to introduce some discretion to permit that the second counselling session be held beyond the prescribed time line (*i.e.* not before the end of a 30 day period after the first stage and no later than 210 days following the effective date of bankruptcy in the case of a bankrupt or of the filing of a consumer proposal in the case of a consumer debtor - Directive **m** 1R2).

All agreed, however, that more information was required as to the usefulness and/or benefits of counselling sessions, particularly in cases of repeat bankruptcies, before amending the existing Directive **m** 1R2 on Counselling in Insolvency Matters. In this respect, participants unanimously agreed that a study would be useful in ascertaining the number of bankrupts who have received counselling services and for whom these services proved to be beneficial to their rehabilitation process.

It was suggested that consideration be given to permit some leniency with respect to the time line for the second stage counselling session. Furthermore, all agreed that a study should be conducted in order to ascertain the benefits and value-added of counselling services as well as its short term and long term effects on repeat bankruptcies.

On the topic of **Education**, participants remarked that having an insolvent person or a bankrupt go through the exercise of completing a monthly expense statement proved to be beneficial in that, it provided the individual with a clearer picture as to how he/she was improperly managing their money.

Generally, there seemed to be a high degree of consensus as to the need for education in the area of money management. Participants felt that the OSB and other stakeholders, including creditors should invest time, money and effort, together with provincial departments of education , in order to develop, establish and implement an educational program on budgeting and the use of credit and financial management. Some participants alluded to the fact that the lack of early education in this area represented a significant flaw in our education system.

As another form of post-education and in order to assist a former bankrupt to re-establish "good credit", some participants discussed the possibility for a financial institution to offer a loan of $1,000. These borrowed monies would be invested in some form of financial

instrument, such as a GIC or a Canada Savings Bond, which would in turn be used to secure the loan.

It was suggested that the OSB pave the way in educating young adults on budgeting and the use of credit and financial management.

In keeping with the topic of education, participants went on to discuss the issue of **Student Loans**. A large number of participants openly expressed their dissatisfaction with respect to the treatment afforded to students in this regard. Participants were primarily concerned with the changes to section 178 of the *BIA*, which increased the period for which a student loan cannot be discharged from 2 years to 10 years. Many argued that the amendment compromised a fundamental principle in bankruptcy: that of affording a debtor a clean, fresh start, free from the crushing debt load they faced prior to bankruptcy. Some participants went so far as to state that the Government had *"overreacted"* by imposing such harsh measures. Others felt that it was unlikely and unrealistic to think that former students would declare bankruptcy as soon as they graduated, in order to avoid the obligation of repaying their student loan. In spite of the fact that the amendment made to section 178 of the *BIA* emanated from the Department of Finance, rather than from the OSB, participants still felt the need to voice their wish to have the period in question reduced to five years.

It was suggested that the BIA be amended in order to provide some leniency to debtors with student loans who are experiencing financial hardship.

The discussion then shifted to issues surrounding the **Availability of Credit**. Many participants discussed the fact that it has become too easy to obtain credit, either before or after bankruptcy, and that it has also become too easy to file for bankruptcy.

Moreover, even though it was conceded that 'virtual banks' were a contributing factor in lower financing and credit rates, participants also recognized that all financial institutions shared the responsibility for empowering debtors with accessible easy credit. As a remedy to the current situation, it was suggested that, as a consequence of filing for bankruptcy, discharged debtors be subject to limited credit for a period of one year following the declaration of bankruptcy or, alternatively, for a period of one year following their discharge.

It was suggested that discharged debtors be subject to limited credit for a prescribed period as a way to circumvent the existing situation of "easy credit".

On the issue of **Proof of Claims** ("poc") participants suggested that in some cases, this requirement be forgone, especially, in summary administration bankruptcies. Most agreed that completing a "poc"could sometimes be tedious and time consuming. Others suggested that "Schedule A" of the "poc" be eliminated and replaced with a declaration by the creditor attesting that he/she agreed with the amount stated by the bankrupt in the Statement of Affairs ("SOA"). In such cases, there would be no need for a "poc" unless a dividend was eventually distributed. For those cases where a dividend was likely, it was suggested that the trustee send a "*Notice of Dividend*" containing a *sunset clause*[1].

It was suggested that in some cases, the necessity for creditors to submit a proof of claim be waived; alternatively, it was proposed that "Schedule A" be eliminated and replaced with a declaration by the creditor attesting that he/she agreed with the amount(s) stated by the bankrupt.

Finally, on the issue of **Credit Rating Practices**, many participants expressed dissatisfaction as well as concerns with the current practice. Participants urged credit rating representatives to change their practice in order that the rating attributed reflect the distinction between those debtors who choose to file a proposal and those who opt for bankruptcy. It was said that the current rating system makes little or no distinction between the two, thereby sending the same message to creditors: the individual seeking credit is a high risk.

In response to these comments, representatives from credit rating agencies explained that it is not they who attribute the rating to an individual's file, but rather the creditors who do so based on the individual's financial history. A representative from a credit rating agency further added that credit rating agencies are not at liberty to change the rating attributed by a creditor because the information upon which the rating is based is not "owned by the credit rating agency" but by the creditor.

A participant added that debtors and bankrupts can place a letter on their credit file explaining the particular circumstances and reasons for defaulting on their obligations. It was suggested that such a letter might mediate in their favor when they re-apply for credit.

[1] *A 'sunset clause' is defined as a statute or provision in law that requires periodic review of the rationale for the continued existence of the particular law or the specific administrative agency or other governmental function.*

Participants urged lenders and credit grantors to change their existing credit rating practice, in order to reflect the distinction between those individuals who choose to file a proposal and those who opt for bankruptcy.

1.2. The Realization of Assets & the Statement of Affairs

In discussing the issue of **Realization of Assets**, participants agreed that oftentimes, the most important aspect, and often the most susceptible to controversy about the realization of assets, is the issue of valuation. Participants also noted that those items which debtors perceive as valuable are often those which have a minimal market value (e.g., motor vehicles, coin and stamp collections, electronic equipment, etc.). Accordingly, participants suggested that before realizing on an asset, trustees should be required to obtain both a liquidation value and a market value. Where a conflict between the debtor and the creditor ensued, as to the value of the asset in question, participants suggested that the parties resort to some form of mediation to resolve the conflict.

Moreover, on the issue of **Statement of Affairs** participants agreed that it was the most important document in the bankruptcy. It was, therefore, reiterated that trustees must comply with the requirement of subsection 19.(3) of the *BIA*, and thoroughly verify the bankrupt's statement of affairs as it was purported that oftentimes, debtors selectively choose to omit to declare certain assets.

Participants commented that the issue of valuation, was the most important aspect regarding the issue of realization of assets. They further reiterated the importance for trustees to comply with subsection 19.(3) of the BIA which provides that the trustee shall verify the bankrupt's statement of affairs.

Part Two
Commercial Insolvencies
Summary of Discussions & Key Points

1. Efficiency of the Current System

1.1. Streamlining the Existing System

The same questions were put to commercial and corporate participants about ways to improve the existing insolvency system and making it more efficient and less time-consuming.

On the subject of **Meetings of Creditors**, it was suggested that a provision be adopted similar to that which exists for consumer proposals and establishes a threshold for holding meetings. It was proposed that such meetings be held only in cases where at least twenty-five per cent (25%) of creditors requested it.

It was also suggested that with today's technology, means alternative to physical attendance of meetings be recognized in the *BIA* as viable options (e.g., tele-conferencing, video-conferencing, etc.). Generally, participants were favorable to the idea. Others, however, cautioned that in some cases, where there is a large number of creditors, this type of meeting might not be feasible.

It was suggested that alternative means to physical attendance of meetings be recognized as viable options and implemented as a course of action.

On the issue of **Information to Creditors**, most participants felt that the current time frame for disseminating information to creditors was problematic. More specifically, creditors felt that they did not have the necessary information, in a timely manner, to enable them to determine whether or not to participate in the bankruptcy. It was, therefore, proposed that trustees be required to submit to all creditors a 90-day interim report detailing the debtor's assets. It was said that this approach would enable creditors to determine whether or not to submit a proof of claim. This suggestion was welcomed by most of those present, particularly by small unsecured trade creditors who felt that they are sometimes not kept informed of the bankrupt's state of affairs.

Participants suggested that trustees be required to submit to all creditors a 90-day interim report detailing the debtor's assets, in order that they may determine whether or not to file a proof of claim.

2. Current Issues in Commercial Insolvencies

2.1. Unpaid Suppliers

Most participants agreed that section 81.1 of the *BIA* did not afford **Unpaid Suppliers** the protection it was intended to provide. As a result, it was purported that a large number of creditors are currently being taken advantage of. Some advocated that the reason for this was that trustees were using the *LIFO*[2] accounting method rather than the *FIFO*[3] accounting method. Some participants went so far as to state that the ineffectiveness of section 81.1 had become a borrowing power for debtors in financial difficulty. It was, therefore, proposed that the provision be amended in order to provide a specified time frame where unpaid suppliers could reclaim and/or repossess their goods or supplies. It was suggested that the time frame for doing so be calculated from the time of bankruptcy, rather than from the date of delivery of the goods or supplies.

Moreover, it was suggested that the terms "same state" and "identifiable" in section 81.1 be clarified and/or repealed as these terms further encumbered the rights of unpaid suppliers in that, in some cases where the supplies or goods have been modified, even slightly, the court has ruled that the goods are no longer "identifiable" and therefore, the unpaid supplier is precluded from the intended protection of section 81.1 of the *BIA*. Participants further added that there are social costs involved when suppliers do not get paid, resulting in a cascading effect or chain reaction of bankruptcies.

It was further noted that the main problem when dealing with this issue is that it is becoming increasingly difficult for banks to know when a client is insolvent or experiencing financial difficulties, and even more difficult to know when to intervene or to take a more pro-active role. For example, clients will hide liabilities, such as tax liabilities and other unpaid source deductions which can often be quite substantial. To date there exists no practical way of knowing the current tax liability of a client. Moreover, even if the banks do receive monthly, quarterly and yearly reports, it becomes nearly impossible to be current with all the information received as it is not uncommon to have one loans officer supervising 200 loans.

It was suggested that section 81.1 of the BIA be reviewed and reworded in order to afford unpaid suppliers appropriate protection for their goods and/or supplies.

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2 *LIFO (last in, first out) a method of identifying and valuing inventories which assumes that last goods purchased are the first ones sold and therefore, the goods left in inventory at the end of the year are assumed to be those first purchased.*

3 *FIFO (first in, first out) a method of accounting for inventory which assumes that goods are sold in the order in which they are purchased.*

2.2. Asset Rollovers

The issue of **Asset Rollovers**, commonly referred to as "flip-flops", was generally not considered a bankruptcy issue *per se* but rather one of public perception.

While some participants argued that they saw no problem with a former owner of a corporation re-acquiring the company's assets under a different corporate entity, provided that the assets were rolled over at the best market value, others opposed this type of transaction altogether, and suggested that the *BIA* be amended to specifically preclude such transactions. In relation to this suggestion, another participant added that other statutes, such as the *Assignment and Preferences Act*, address the issue of fraudulent asset rollovers. This being so, the question raised was who will pay for this process ?

It was suggested that the BIA be amended in order to specifically address the issue of 'asset rollovers'.

2.3. Receiverships

Participants commented that, in certain circumstances, the requirements of Part XI of the *BIA* regarding **Receiverships** were onerous and expensive, particularly when dealing with small estates. It was also mentioned that there are very little sanctions for those who do not comply with the requirements of Part XI. Moreover, business community representatives stated that they expected that receivers be qualified and accountable for their actions. One participant proposed that all receivers be licensed trustees[4]. In response to this suggestion, banking representatives commented that such a requirement would merely add to costs and would not be economically feasible, especially in cases where the estates are very small.

Finally, it was proposed that the OSB review the reporting requirements for receiverships in order to evaluate whether or not some leniency could be incorporated in the system, in certain circumstances.

Participants suggested that the provisions dealing with receiverships be reviewed in order to ascertain whether or not the requirements imposed can be exempted in certain circumstances.

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[4] *During the discussions which preceded the last round of legislative amendments of 1997, representatives for the Canadian Insolvency Practitioners Association were unsuccessful when they recommended to Parliament this specific requirement.*

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.

In February 1997, the OSB received permission to function as a *Special Operating Agency* responsible for overseeing, amongst other things, the administration of all matters which fall under the *BIA*, as well as to ensure that funds and assets were re-allocated in a positive and fair manner. Although amendments made to the *BIA* during the 1992 and 1997 Reform have come a long way to improve Canada's insolvency system, during the course of the NIF round-table discussions the OSB was apprized of a number of outstanding issues which warrant our attention in order to further improve the system. We have attempted to paraphrase those suggestions made by both consumers and commercial bankruptcy representatives, in the following Executive Summary.

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.

When asked *How to improve and streamline the process*, participants had a number of suggestions. The discussion opened with the subject of **Mediation.** Surprisingly, a number of participants were unaware of the existence of this process. Those who were familiar with mediation agreed that it was a cost-effective way of obtaining additional payments, yet was not necessarily less time-consuming. It was also suggested that the existence of the mediation process and its benefits be further promoted and/or publicized.

With respect to the issue of **Counselling Services,** it was suggested that a study be conducted on the benefits of such services. It was also suggested that consideration be given to introduce some leniency to the existing process, in order to permit that the second counselling session be held beyond the prescribed time frame.

Education was also discussed and stakeholders suggested that the OSB pave the way to educating young adults on budgeting, the use of credit and the aspect of financial management.

The subject of education could not be discussed without also touching on the issue of **Student Loans**. Those advocates who believe that all bankrupts deserve a 'clean fresh start' suggested that section 178 of the *BIA* be further amended to provide leniency in cases where individuals with student loans are experiencing true financial hardship.

With respect to the **Availability of Credit**, participants suggested that discharged debtors be subject to limited credit for a prescribed period as a way to circumvent the existing situation of "easy credit".

On the question of **Proof of Claims**, it was suggested that in some cases, the necessity for creditors to submit a proof of claim be waived; alternatively, it was proposed that "Schedule A" be eliminated and replaced with a declaration by the creditor attesting that he/she agreed with the amount(s) stated by the bankrupt.

From this ensued a discussion regarding **Credit Rating Practices** where participants urged lenders and credit grantors to change their existing credit rating practice, in order to reflect the distinction between those individuals who choose to file a proposal and those who opt for bankruptcy.

With respect to the **Realization of Assets and the Statement of Affairs**, participants commented that the issue of valuation was the most important aspect regarding this issue. As well, participants reiterated the importance for trustees to comply with subsection 19.(3) of the *BIA* which provides that the trustee shall verify the bankrupt's statement of affairs.

When asked about the efficiency of our insolvency system, corporate and commercial participants were concerned with the issue of **Meetings of Creditors** and suggested that alternative means to physical attendance of meetings be recognized as viable options and implemented as a course of action.

Regarding the issue of **Information to Creditors**, a large number of participants commented that oftentimes they did not have the necessary information, in a timely manner, to enable them to determine whether to participate in the bankruptcy and file a "poc". In order to remedy this problem, it was suggested that trustees be required to submit to creditors a 90-day interim report, indicating whether a dividend was likely to be paid.

On the issue of **Unpaid Suppliers**, participants agreed that section 81.1 did not afford the protection is was intended to provide. Accordingly, it was suggested that the provision be reviewed and reworded in order to afford unpaid suppliers appropriate protection for their goods and/or supplies.

The issue of **Asset Rollovers** was next discussed by the participants. Some stakeholders commented that they did not see any problem with such transactions provided the assets where re-acquired at the best possible value. Others, however, were clearly opposed to such transactions and proposed that consideration be given to amend the *BIA* in order to address this issue.

Receiverships were the final topic on the agenda. The general comment in this respect was that the requirements of Part XI of the *BIA* were onerous and expensive, particularly when dealing with small estates. Therefore, participants suggested that the provisions dealing with receiverships be reviewed in order to ascertain whether or not the requirements imposed can be exempt in certain circumstances.

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, consistent with its mandate.

We would like to reiterate our gratitude for your participation in the National Insolvency Forum (NIF). The Halifax 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

STREAMLINING (Consumer proposals)

- 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.

DISCUSSION PAPER # 3
Submitted By: The Canadian Bankers Association

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

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

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

IX) INTELLECTUAL PROPERTY

C 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 SUPPLIERS

C 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.

DISCUSSION PAPER #4

Submitted By: Ron W. Whiting of Nova Scotia Business and Consumer Services, Consumer and Commercial Relations - Debtor Assistance Branch

I) Counselling [Reference to Section 66.13(2)(a) and (b) of the BIA]

Existing time frames for counselling sessions are not realistic.

C Administrator/debtor should decide on a time frame of within one year.
C Sessions should not be less than thirty days apart.
C Counselling to be optional and/or be part of the Consumer Proposal as a condition.
C Time frame should be:
(1) 1st session within 60 days of court approval;
(2) 2nd session flexible prior to completion of Consumer Proposal.

C A Directive change would be necessary to accomplish this and would apply only to Consumer Proposals.

II) Notifications under section 66.27 of the BIA

Improved communications to creditors

C Send status report to creditors after Consumer Proposal ratified by the court.
C Creditors with liabilities of less than $250.00 should be provided with a copy of the Consumer Proposal. Since the creditors are bound by the provisions of the Proposal, they should be fully aware of all circumstances.

III) Debtor/Revenue Canada Taxation

Revenue Canada is given a priority under the BIA re: Consumer Proposal.

C Debtors are currently not required to file a cut off income tax return until the date the Consumer Proposal is filed. If debtors owe money, they have to pay Revenue Canada outside the Proposal. This seems unfair as they are getting a priority over other creditors.
C The suggestion would be to issue a Directive instructing debtors to file a cutoff income tax return up to the date of the filing of the Proposal which will level the playing field. This will allow any tax owing to form part of the Consumer Proposal, and if there is a refund, these monies could form part of the Proposal for the benefit of all creditors.
C Amend the Insolvency circular issued Jan. 21, 1993, "Income Tax Returns", to reflect this recommendation.

IV) Filing Assessment Certificate

Assessment Certificate contains unnecessary information about other financial advice received by debtor

C Revisit Assessment Certificate and eliminate this question.

V) Duties of Administrator

Administrator's Report needs more information

C Expand the report to include:
(1) other mandatory requirements;
(2) why the proposal is more beneficial than a bankruptcy (provide numbers).
C Make changes through Circular or Directive

VI) Proof of Claim

The BIA states no Status Report is needed following ratification by creditors and the Court.

• Why does the new Proof of Claim form give creditors the option to request these Status Reports?

C Who is to decide what a substantial change is? Can we change the Proof of Claim form to eliminate this option?

Creditors are permitted to file a Proof of Claim anytime during the life of a Consumer Proposal.

C This procedure reduces the dividends to other creditors and creates additional work for the Administrators.

C Recommendation: Proof of Claim to be filed within three months after Proposal notification, otherwise creditors cannot claim their dividends.

C Should be considered when BIA is reviewed in two and a half years.

VII) Budget Information to Creditors

Creditors do not receive a detailed breakdown of the Budget information

C Administrators of Consumer Proposal should send a detailed budget in place of the existing budget section contained in the SOA.

C Make changes through Directive.

VIII) Delinquent Payments/Additional Creditors

Reduction/Increase in the amount of dividend received

C Give explanation on the trustee's Statement of Receipts & Disbursements as to why there is a variance in the amount of the dividend.

C Make changes through Circular or Directive.

IX) Division II - Consumer Proposal

Problem with definition of who can file a Division II Consumer Proposal (ie. limit of $75,000)

C Change definition of consumer debtor to eliminate the dollar figure, and replace it with a definition which provides that if less than 20 percent of a consumer's debt is attributable to business liabilities, then the debtor may file a consumer proposal.

C Make changes through an amendment to Regulations or to legislation.

X) Credit Ratings (Credit Reporting Agencies)

Credit Agencies rate Consumer Proposal as R-9, giving the debtor no incentive to file a Consumer Proposal.

C Information remains on credit file history for 7 years (in the case of an R9 rating) from the

date of completion of the Consumer Proposal rather than from the date of filing the proposal. Often the situation is harsher if the debtor files a proposal than a bankruptcy (in the case of an R7 rating, the period of time is three years).

C Commencement of the seven years should be from the date the proposal is filed rather than from the date of completion.

C OSB should approach the Credit Rating agencies with these suggestions.

XI) Further Comments on the efficiency of the current system and service standards:

C Need for better educated and more experienced Official Receivers.
  < This would assist in the timeliness in responding to enquiries and correspondence.

C Need to educate the creditors at the national level.
  < regarding the pros and cons of consumer lending, insolvency, etc., and;
  < easy accessibility of credit, i.e. credit cards, lines of credit, escalating debt - credit grantors must appreciate the impact of their policies.

DISCUSSION PAPER #5
Submitted by: Mike Salyzyn of Salyzyn & Associates Limited (Nova Scotia), Trustees in Bankruptcy

I) SURPLUS INCOME/SUPERINTENDENT'S STANDARDS

Many debtors want to forgo certain items in their budget in an effort to make a reasonable consumer proposal or provide for surplus income under a consumer bankruptcy. Because of the Superintendent's Standards, in some cases debtors could pay more readily.

C They could do so on a voluntary basis.
C The debtor/bankrupt should sign a document to that effect.
C May allow more consumer proposals, more surplus payments, more dividends to creditors.
C Would necessitate a Circular/Directive to affect this change.

II) PROOF OF CLAIM

A proof of claim is sent to all creditors, who are expected to file one before a meeting of creditors in order to participate and to become eligible to receive dividends, a process which can be quite time consuming.

C No requirements for creditors to file proof of claim unless:

(1) they are a secured creditor; or
(2) they wish to have a meeting of creditors.

C If dividend anticipated, proof of claim would be sent to creditors before distribution.
C This could be accomplished by changes to BIA, or
C Advise creditors by circular that a directive will be issued requiring the trustee to send a proof of claim if a dividend is anticipated and that creditors need not send in a proof of claim initially unless trustee requests same.

III) ASSESSMENT CERTIFICATE

The bottom part of this form asks debtor if he/she received advice regarding their financial situation.

C Delete this portion of Assessment Certificate as it is a confusing topic to discuss with the debtor and always results in a "No".
C Amend Directive to reflect change.

IV) COUNSELLING

What type of evaluations have been done on the quality and effectiveness of counselling since 1992?

C Establish a uniform agenda and/or presentation to be implemented by Qualified Insolvency Counsellors and evaluated by the OSB.
C Notification in counselling directive setting out the quality of material presented at these sessions.

V) REALIZATION OF ASSETS

A trustee must convert an estate from a Summary to an Ordinary Administration in cases where he or she realizes on an asset and has fees and expenses connected with the sale of the asset: this entails the possibility of holding a meeting of creditors, appointing inspectors, publication of bankruptcy in a newspaper, etc.

C If asset is sold under the Summary tariff of $10,000 net, then trustee need not convert the estate.

C In such situations the trustee would be required to file with the OSB a detailed breakdown of invoices, fees and expenses of the sale. This would save much time and expense for the estate.

VI) PREVENTIVE MEASURES

Rise in recidivism and consumer bankruptcies; consumer credit escalating

- C Quality insolvency counselling for debtors/bankrupts.
- C Speaking engagements by OSB staff and creditors on preventing insolvencies.
- C Counselling and speaking engagements to schools and organizations given by trustees.
- C Insolvency Cousellors should provide counselling and speaking engagements.
- C Collaboration of creditors in establishing a system for the reporting of all credit applications to an agency.
- C Superintendent to negotiate with national credit groups for acceptable solution to credit checks.
- C Superintendent/stakeholders should develop standard educational package.

VII) CREDITOR EDUCATION

Creditors have different knowledge levels with respect to their rights and responsibilities under the BIA. Creditors have different knowledge levels when dealing with a trustee or administrator. This causes considerable time to be spent by trustees/administrators in educating lenders on a one-on-one basis.

- C Establish national information line for creditors.
- C Give seminars to creditors.
- C Creditors to appoint "experts" in consumer insolvencies.
- C Creditors should centralize their collection activities to allow for quicker and better handling of credit applications.
- C Superintendent to investigate/establish National Information Line.
- C Creditors should approach Trustees/Administrators/Superintendent to conduct information seminars for their staff.
- C Creditors should implement in-house policy to control insolvent accounts.

DISCUSSION PAPER #6

Submitted By: Roger D. Noel, B.Comm., A.C.I. of The Credit Institute of Canada

I) 30-Day Goods [Section 81.1]

a) Identification of 30 - day goods

- C In the world of commerce, only a limited number of goods bear a serial number which enables positive identification. The vast majority of goods sold do not bear a serial ID. The whole process of specific identification is impossible for the vast majority of unsecured trade suppliers. The 30-day goods claim, for unsecured creditors that do not specifically identify their products, should also enjoy the same level of protection. They should be given a super-priority position, or preferred status, amongst creditors.

b) Retroactivity. When Notice of Intention or Proposal is filed

- C The provision for insolvent debtors to file a Notice of Intention to file a proposal, which creates a stay of proceedings of 30 days, eliminates any benefit that unsecured creditors might receive under Section 81.1.

II) RESTRICTIONS ON OFFICERS OF BANKRUPT COMPANIES WHICH ARE NOT DISCHARGED

C Officers of limited companies that declare bankruptcy should also have a restriction on their ability to become an officer or director in another company. Currently, no legislation prevents them from starting another company within days of an insolvency.

III) ABUSES OF THE ACT

C Some individuals and companies are quick to take the benefit of the Act, without accepting all of their obligations under the Act. There appears to be no way for the court to deal with abusers, other than to oppose their discharge. The courts should be empowered to set aside the bankruptcy, putting the creditors back in their original position. The courts could annul the bankruptcy in any situation where an insolvent person benefits benefit the statute, without honouring his/her obligations. Examples of such abuses could include failing to attend the required counselling sessions, failing to submit a monthly budget and failing to disclose assets that are part of the insolvent's estate.

IV) ACCESS TO INFORMATION

C The current process of providing a notice of creditor's meetings in a local newspaper is very costly and inefficient. It should be replaced with a central registry system handled by the OSB. The savings realized in advertising costs could be applied to general revenues of the OSB. The OSB could provide free access to the Internet service to check for insolvent debtors. This service could be updated daily.

HALIFAX PARTICIPATION LIST/PARTICIPATION LIST IN BOTH SESSIONS

Charles Walker
Office of the Superintendent of Bankruptcy

Rodger D. Noel, ACI
The Credit Institute of Canada

Joel Heft
Equifax Canada Inc.

Tim Hill
Registrar in Bankruptcy

Sandy DiGiacinto
Registrar in Bankruptcy

Michael A. Salyzyn
Salyzyn & Associates Limited

Delores Howell
Office of the Superintendent of Bankruptcy

Andrew Woodrow
Office of the Superintendent of Bankruptcy

Mr. Justice David MacAdam
Supreme Court of Nova Scotia

Lloyd Hart
Credit Union Atlantic

Marc Mayrand
Office of the Superintendent of Bankruptcy

Constable Scott Hirtle
Royal Canadian Mounted Police

Professor John Chamard
Faculty of Commerce, Saint Mary's University

Dan Shea
Revenue Canada

Lindsay Frank
Revenue Canada

François Deleseleuc
Royal Canadian Mounted Police

CONSUMER SESSION PARTICIPANTS

Michael Venner, CIP
Canadian Insolvency Practitioners Association

Ron Whiting
Western Region Business and Consumer Services Access Nova Scotia

Douglas Rideout
Insolvency Software Systems Inc.

Professor Sue L.T. McGregor
Department of Human Ecology
Mount Saint Vincent University

Paul G. Goodman
The Insolvency Institute of Canada

Will Roach
Royal Bank of Canada

Carol McFarlane
Equifax Canada Inc.

Mark S. Rosen
The Canadian Bar Association

Tom Walsh
The Canadian Bankers Association

COMMERCIAL SESSION PARTICIPANTS

Peter D. Wedlake, LL.B, CIP
Canadian Insolvency Practitioners Association

John S. McFarlane, Q.C.
The Insolvency Institute of Canada

Bruce Clarke
The Canadian Bar Association

Bob Binns
Equifax Canada Inc.

Wayne King
Royal Bank of Canada

Inspector Ian Atkins
Royal Canadian Mounted Police

John Weare
The Canadian Bankers Association

Brian Anderson
The Canadian Bankers Association

Don Arsenault
Revenue Canada