Industry Canada Industrie Canada

OSB • BSF

National Insolvency Forum

Calgary 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, more effective and cost-efficient.

The day began with a discussion on the **Information Given to Debtors by Trustees**. Participants commented that it was imperative for trustees to provide consistent information to debtors regarding bankruptcy matters. It was therefore suggested that debtors be provided with clear and concise written information concerning their rights, obligations and duties under the *BIA* before making an assignment in bankruptcy. Stakeholders felt that this approach would lessen the potential for disagreement or conflict months later between the bankrupt and the trustee/creditors. It was further suggested that Official Receivers be involved in the process of providing information to to debtors, where possible.

> *A comment was made to the effect that it was imperative for trustees to provide debtors with clear and concise written information concerning their rights, obligations and duties under the BIA.*

On a related issue, participants discussed *Directive **m** 6R* **Assessment of an Individual Debtor** which establishes the duties and responsibilities of trustees and administrators in performing the assessment. In this respect, some participants felt that having trustees conduct the initial assessment could lead to problems of perception or conflict of interest

and proposed that the assessment be outsourced to qualified professional counsellors, thus

ensuring transparency and impartiality.

In order to ensure transparency and impartiality, it was suggested that the assessment of an individual debtor be outsourced and performed by qualified professional counsellors rather than by trustees.

Moreover, participants involved in **Counselling** under the *BIA* commented that there was much inconsistency in the counselling services being provided and questioned the existence of the services altogether. It was therefore suggested that a standard be developed on this issue. For example, it was proposed that the first session address problems such as gambling, addictions, etc. whereas the second session could emphasize budgeting and the re-establishment of credit. It was further proposed that consideration be given to outsource the counselling sessions, thereby allowing trustees to concentrate on their professional obligation of administering bankruptcy estates. As a final comment it was suggested that the OSB conduct a study as to the benefits of counselling services (e.g., in cases of substance abuse - it was said that counselling was of little or no benefit).

It was suggested that the OSB establish a standard for counselling services as well as conduct a study on the value-added of these services.

The discussion moved to the topic of **Credit Ratings**. More specifically, participants discussed the fact that credit grantors make no distinction between those who reorganize their financial affairs under the Orderly Payment of Debts regime and those who file a consumer proposal or file for bankruptcy. A few comments were made stating that credit counsellors have been unsuccessful in their lobbying efforts to bring about change in the attitude of credit grantors in this respect. It was therefore suggested that discussion groups comprising representatives from the insolvency community (i.e. creditors, credit grantors, credit rating agencies and debtors) be established in order to propose potential solutions acceptable to all parties involved.

Participants suggested that discussion groups, comprising representatives from the insolvency community, be established in order to examine and propose solutions to the issue of credit rating, more specifically the lack of distinction in the credit rating attributed to those who reorganize their affairs under the OPD and those who file a consumer proposal or bankruptcy.

The latter discussion led to the topic of **Consumer Proposals**. One participant questioned whether the refusal of a consumer proposal should result in an automatic bankruptcy (as is

the case when a commercial proposal is rejected by creditors). While some participants felt that this approach would ensure that debtors take the process more seriously, others commented that the lack of meetings of creditors and court involvement together with the simplicity of the consumer proposal regime, make debtors less apprehensive about using this option for resolving their financial difficulties. It was, therefore, suggested that more flexibility be included in consumer proposals in instances where the debtor has difficulty in meeting his/her obligations under the proposal. It was suggested that the *BIA* be amended to confer upon the trustee the discretion to negotiate alternative arrangements of payment in cases where a debtor omits to comply with the obligations stated in the proposal.

It was also suggested that a similar provision to section 60.(1.1) which requires that source deductions be remitted in full within 6 months be included in consumer proposals.

It was proposed that consideration be given to amend the BIA in order to introduce some flexibility to the process of consumer proposals in order to confer upon the trustee the discretion to negotiate alternative arrangements of payment in cases where a debtor omits to comply with the obligations stated in the proposal.

On the issue of **Education**, many believed that young Canadians would benefit from a program designed to encourage sound habits on the proper use and management of credit. The federal government was seen as a stakeholder that could act as a motivator in establishing such a program on a national basis. Prior to such a program being available in schools, many participants felt it was incumbent upon stakeholders to fill the current void by volunteering to appear in schools to provide budgeting and credit management education.

As another form of pre-bankruptcy education, some participants felt that debtors should consult a credit counsellor in order to seek advice on other options than bankruptcy or filing a proposal before attending the office of a trustee.

On the issue of education, many believed that young Canadians would benefit from a program designed to encourage sound habits on the proper use and management of credit.

The topic of education could not be addressed without discussing **Student Loans**. On this issue most comments made pertained to the fact that consideration should be given to afford some leniency in cases of financial hardship. Participants felt that every bankrupt with a student loan should be judged according to their own circumstances. Others

suggested that the repayment of student loans should take place within the *Income Tax Act* by way of imposing a mandatory assignment of income tax and GST refunds. As a general observation, there was a sense amongst participants that alternative methods of repayment had not been considered and that consultations amongst stakeholders on this issue had been non-existent.

As a general observation, most participants disagreed with the recent amendment and felt that the government had not consulted prior to increasing the period for which a debtor cannot be discharged from a student loan from two (2) years to ten (10) years.

Finally, on the question of **Advertising Practices** of trustees it was mentioned that certain advertisements lack good taste and are sometimes misleading or, seem to encourage individuals to declare bankruptcy. The OSB consider introducing a "good taste" criteria for advertising practices.

Participants observed that certain advertisements lack "good taste" and are sometimes misleading or seem to encourage individuals to declare bankruptcy. It was therefore suggested that a "good taste" criteria be established in advertising by trustees.

1.2. The Realization of Assets & the Statement of Affairs

On the subject of the **Statement of Affairs** (SOA) and realization of assets, there seemed to be a high degree of consensus that a revised SOA should be sent out to creditors when material inaccuracies are identified. There was also a general observation that trustees should exercise more diligence in verifying the statement of affairs.

In terms of the **Realization of Assets**, participants seemed more preoccupied with the process in which realization takes place. With respect to the valuation of homes, it was felt that trustees should obtain appropriate appraisals as there are often important discrepancies between the value stated in the SOA and the actual market value. Accordingly, it was proposed that trustees hire a professional evaluator for the appraisal of a residence. Alternatively, a less expensive option would be to obtain a copy of the tax assessment certificate from the City of Calgary, for example, which can be obtained on the City's web Site. The tax assessment valuation of homes has proven to be quite accurate according to the experience of a few participants.

It was suggested that trustees be more diligent in verifying the statement of affairs and that they obtain appropriate appraisals for assets such as real estate. It was also proposed that a revised statement of affairs be sent out to creditors when material inaccuracies are identified.

2. Service Standards

Participants were generally satisfied with OSB **Service Standards** and the manner in which the OSB was operating as a Special Operating Agency as well as with the Service Provider Initiative. However, with respect to investigation and disciplinary issues, many were of the opinion that there was a lack of deterrence mechanisms for both trustees who fail to maintain professional obligations and debtors who do not comply with their duties and obligations under the *BIA*.

It was further proposed that trustees be required to advise, within a specified time frame, creditors when taking possession of secured assets. It was suggested that this be done as soon as possible in order to avoid incurring costly storage fees.

Participants commented that there was a lack of deterrent mechanisms for both trustees who fail to maintain professional obligations and debtors who do not comply with their duties and obligations under the BIA.

Part Two
Commercial Insolvencies

1. Efficiency of the Current System

1.1. Streamlining the Existing System

The same questions were put to commercial and corporate participants regarding ways to improve the existing insolvency system and making it more efficient and less time consuming. **Meetings of Creditors** were first discussed. It was suggested that important cost and time savings could be achieved if meetings were held later in the process in order to ensure that creditors have sufficient information regarding the realizable assets of debtors.

Moreover, participants agreed that meetings of creditors were useful and important and should not be eliminated as a matter of course. In support of their position, the following reasons were given: they permit that inspectors be appointed, if need be; they provide an exchange of information between trustees and creditors which may lead to identifying inappropriate behaviour, as well as allow creditors to voice their opinions and provide instructions to trustees.

This being so, participants did suggest that in complex files, trustees be vested with the discretion to delay the first meeting of creditors, if need be. Moreover, in those cases where it was clear that no dividend would be distributed to unsecured creditors, trustees could opt not to hold any meetings at all.

As well, alternative methods of holding meetings were suggested, such as conference calls. It was further suggested that the use of web sites, video-conferencing and e-mail could also eventually assist the trustee in holding meetings of creditors.

Some participants suggested that **Official Receivers** (OR) should chair all meetings of creditors as it was felt that the OR is often seen as being more objective and independent than the trustee given that they do not necessarily represent a vested interest in the process. It was said that adopting such an approach may put creditors more at ease. As an additional comment on the role of the OR, it was proposed that OR examinations be conducted more often as a cost-effective way of obtaining additional information regarding the bankrupt's assets.

It was suggested that trustees be vested with the discretion to delay the first meeting of creditors if need be, or opt not to hold any meetings at all, in certain circumstances. It was further proposed that alternative methods of holding meetings be contemplated.

The discussion then turned to the **Powers and Jurisdiction of Registrars and Masters**. Participants stated that judges tend not to be as accessible as registrars. Moreover, it was noted that there are currently only five (5) judges assigned to bankruptcy matters in the province of Alberta. Since registrars often possess a great deal of expertise in bankruptcy matters, it was suggested that the insolvency system would be greatly streamlined if more registrars were appointed. It was also proposed to extend their jurisdiction to cover certain matters under the *Companies' Creditors Arrangement Act (CCAA)*.

As a way to streamline the process, it was suggested that more registrars be appointed and that their powers be expanded.

The discussion on the efficiency of the current system continued with stakeholders turning their attention to other **Miscellaneous Issues**.

OSB Web Site: Creditor representatives recommended the creation of a separate OSB web site that would answer most questions from creditors pertaining to the insolvency process, their rights and their obligations under the *BIA*.

Payroll Deductions: A similar provision to section 60. (1.1) which requires that source deductions be remitted in full within 6 months be included in consumer proposals.

Debtor in Possession Financing: The *BIA* and the *CCAA* should provide clear rules regarding the financing of companies during reorganizations as case law on this issue remains uncertain.

Definition of "contiguous": Subsection 14.06(7) regarding priority of crown claims for environmental damage should clearly define the word "contiguous" in "damage affecting contiguous real property".

2. Current Issues in Commercial Insolvencies

2.1. Unpaid Suppliers

The discussion on the issue of **Unpaid Suppliers** was quite brief. Most participants were of the view that section 81.1 was largely ineffective and should be amended in order to afford unpaid suppliers better protection. Moreover, a large number of creditor representatives believed that the current time line for reclaiming goods was inadequate and should be lengthened. Most agreed that if we are to keep section 81.1, the terms "same state" and "identifiable" must be clearly defined in a way that will permit commercial certainty and effective protection to suppliers against the "bulking-up" of goods by unscrupulous debtors in the throes of insolvency.

Most participants agreed that section 81.1 of the BIA was ineffective and should be amended in order to afford unpaid suppliers better protection.

2.2. Asset Rollovers

Most participants believed that the issue of **Asset Rollovers** was largely one of perception. They reasoned that as long as the best possible market value is obtained for the assets in question, it becomes immaterial if the purchaser happens also to be a shareholder, director or officer of the bankrupt business. The question which did preoccupy some participants was how to ensure that the receiver, trustee or liquidator receive the best price possible for the assets in question while maintaining a high degree of transparency throughout the transaction. All agreed, however, that mechanisms need to be devised to identify those asset rollovers which are fraudulent. Accordingly, it was suggested that the *BIA* be amended to introduce mandatory reporting requirements for asset rollovers undertaken in either a bankruptcy or a receivership. Alternatively, a simpler approach could be to require the court approval for all asset rollovers. Participants felt that this would certainly add a much needed element of transparency to the process.

It was proposed that the BIA be amended to introduce mandatory reporting requirements for asset rollovers undertaken in either a bankruptcy or a receivership.

2.3. Receiverships

Two recommendations were made on the topic of **Receiverships.** First, it was suggested that only trustees should be permitted to act as receivers as they are professionals and considered officers of the court. They are, therefore, answerable for their actions to their professional organization and to the OSB. It was felt by some participants that this would go a long way to ensure that all of the requirements under Part XI of the *BIA* are complied with. Secondly, the requirements were said to be onerous and expensive for small receiverships. Accordingly, it was recommended that smaller receiverships be exempted from complying with said requirements, or alternatively, that smaller estates benefit from a more streamlined procedure that could apply to receiverships where the amounts in question are under $100,000.

It was suggested that smaller receiverships be exempted from complying with the requirements of Part XI, or alternatively, that they benefit from a more streamlined procedure that could apply to receiverships where the amounts in question were under $100,000.

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 made by both consumer and commercial insolvency representatives, in the following Executive Summary.

When asked *How to improve and streamline the process*, consumers representatives had a number of suggestions. The discussion opened by talking about **Information Given to Debtors by Trustees**. More specifically, it was stated that trustees must ensure that they provide clear and concise information to debtors who are considering to file for bankruptcy.

Participants discussed the **Assessment of an Individual Debtor** (Directive **m**6R) and suggested that the assessment be outsourced and performed by qualified professional counsellors rather than by trustees in order to ensure transparency and impartiality to the process.

Moreover, participants involved in the **Counselling** under the *BIA* commented that there was much inconsistency in counselling services being provided and therefore suggested that the OSB establish a standard for such services as well as conduct a study on the value-added of these services.

With respect to the issue of **Credit Ratings**, it was suggested that the OSB attempt, by organizing discussion groups, to bring a solution to the problem of current credit rating practices which make no distinction between individuals who reorganize their debts under the OPD regime, consumer proposals and those who file for bankruptcy.

On the question of **Consumer Proposals**, it was suggested that consideration be given to introduce some flexibility to the process enabling the trustee to negotiate alternative means of payment in cases where a debtor omits to comply with the obligations stated in the proposal.

On the subject of **Education**, most participants believed that young Canadians would benefit from a program designed to encourage sound habits on the proper use and management of credit.

The topic of education could not be addressed without discussing **Student Loans**. As a general observation, most participants disagreed with the recent amendment and felt that the government had not consulted and/or considered alternative methods of repayment of student loans, prior to increasing the period for which a debtor cannot be discharged from a student loan from two (2) years to ten (10) years.

On the issue of **Advertising Practices**, participants observed that certain advertisement lacked good taste and were sometimes misleading. Accordingly, it was suggested that a "good taste" criteria be established in advertising by trustees.

With respect to **Realization of Assets and the Statement of Affairs**, participants suggested that trustees be more diligent in verifying the statement of affairs and that they obtain appropriate appraisals for assets such as real estate. It was also proposed that a revised statement of affairs be sent out to creditors when material inaccuracies are identified.

Finally, on the question of **Service Standards**, participants commented that there was a lack of deterrent mechanisms for both trustees who fail to maintain professional obligations and debtors who do not comply with their duties and obligations under the

BIA.

When asked about the efficiency of our insolvency system, corporate and commercial participants were concerned with the issue of **Meetings of Creditors**. Although participants agreed that meetings of creditors were important and useful and should take place as a matter of course, they did suggest that the trustee be vested with the discretion to delay the meeting or choose not to hold meetings at all, in certain circumstances and that alternative methods of holding meetings be contemplated.

On the issue of **Powers and Jurisdiction of Registrars and Masters** it was suggested, as a way to streamline the process that more registrars be appointed and that their powers be expanded.

Participants went on to briefly discuss the issue of **Unpaid Suppliers**. The primary observation was to the effect that section 81.1 of the *BIA* was said to be largely ineffective and did not grant suppliers sufficient time to reclaim unpaid goods. Most participants agreed that both terms "same state" and "identifiable" needed to be defined in order to afford commercial certainty and effective protection to unpaid suppliers.

With respect to **Asset Rollovers**, most participants felt that this issue was largely an issue of perception. As a way of ensuring transparency, it was proposed that the *BIA* be amended to introduce mandatory reporting requirements for all individuals who undertake an asset rollover in either a bankruptcy or receivership.

The final issue discussed was that of **Receiverships**. It was suggested that only trustees be permitted to act as receivers. As well, it was proposed 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*.

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 recommendations 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, recommendations 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 these types of round table discussions 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 thank you once again for having participated in the National Insolvency Forum (NIF). The Calgary Conference was well attended and the suggestions for change and improvement to Canada's Insolvency system were very much appreciated.

Thank you, once again.

Summary of Discussion Papers/Submitted by Participants

DISCUSSION PAPER #1
Submitted By: The Canadian Bankers Association

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.

DISCUSSION PAPER # 3
Submitted By: The Canadian Bankers Association

COMMERCIAL BANKRUPTCIES & 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.

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

This paper outlined the consultation 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.

THE 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 consultations 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 retain 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-consultations 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. One such constraint could be to restrict the ability of principals of a bankrupt company to acquire its assets and set up a business again. 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: Faye Forbes Anderson, PHEc, AFC, CFP

COUNSELLING SESSIONS

Consumer bankrupts pay $85.00 for individual counselling sessions, based on an average national cost of one hour for a financial counsellor's services. Some trustees provide one hour of good financial counselling for their clients. Others spend ten minutes reviewing compliance with bankruptcy requirements, while others rely on a video with a two-minute follow up. Clearly, some standards are needed.

- Each counselling session must be a minimum of one hour.
- The one-hour minimum requirement must apply to group and individual sessions.
- No exceptions should be permitted without a detailed letter from the trustee describing attempts to engage that specific client in counselling, the topics broached, and the outcomes.
- Have bankrupts sign their counselling certificate which states that the session was at least one hour long.
- The OSB could conduct periodic spot checks calling bankrupts to ensure that there was no coercion from trustees to have them sign.

DISCUSSION PAPER #6

Submitted By: Godfred Okyere, FCI, Branch Services Manager, Associates Financial Services of Canada Limited

I) ASSIGNMENTS FOR BANKRUPTCIES AND CONSUMER PROPOSALS

It is very easy for Canadian consumers either to file for bankruptcy or undertake consumer proposals. Most consumers do not exhaust all available options geared towards the continuation of their debt obligations.

- Credit counsellors should advise consumer debtors of these options before consenting and approving consumer proposal applications.
- There should be a clause in the BIA which rejects or declines all debts incurred three months or less before assignment for bankruptcy or a consumer proposal.

II) REPEAT BANKRUPTCIES

On the issue of repeat bankruptcies, applicants should be discouraged from, and punished for, abusing their credit privileges.

- All second claimants must be reported to all credit reporting agencies, such as Equifax and Trans Union.

- Such claimants should be suspended from any form of consumer credit privileges.

III) BANKRUPTCY AGENCIES, TRUSTEES AND CREDIT COUNSELLORS

The role of bankruptcy agencies, trustees as impartial mediators between consumer creditors and claimants is suspiciously in disrepute with a cross-section of consumer granting and financing agencies. The arguments advanced in support of such views are the fact that the City of Calgary and other cities in Western Canada have seen a dramatic increase in different forms of advertising by these agencies. The controversy is that such entities are businesses whose goal is to generate income to offset their expenses: however, in the course of such activity most consumer creditors are of the opinion that bankruptcy agencies and trustees have compromised their position of neutrality in favour of debtors.

- These agencies should play a more important role as teachers and counsellors with added emphasis on the education of claimants and the many options available to them, with an emphasis placed on the long-term penalties to be paid when declaring bankruptcy or filing a consumer proposal.

IV) REALIZATION OF ASSETS

Most consumer creditors encounter numerous difficulties in their attempts to realize pledged or secured chattels due to either misunderstandings of the Bankruptcy and Insolvency Act or the deliberate desire of the bankrupt not to surrender the secured collateral at stake.

- Trustees need to reeducate the bankrupt on the need to voluntarily surrender all pledged collateral indicated on the collateral forms attached to the Proof of Claims document. They should make the claimants aware of the legal implications in disposing of or replacing any of the secured chattels.
- Bankrupts with unregistered conditional sales contracts should be made legally bound to surrender the article in question if it is proven that there is an outstanding balance owing on the item at the time of bankruptcy.

V) CONSUMER PROPOSALS AND CREDIT COUNSELLORS

Consumer proposals are not considered favourably by creditors due to the fact that they give the debtor a false sense of meeting his or her debt obligations to the consumer creditors in question. Furthermore, the quarterly payments received from credit counsellors are not sufficient for moving a particular account into a higher delinquency category and eventual write-off or charge back. It is normal practice within the consumer financing and granting institutions to always charge off all accounts under consumer proposals.

Experience has also shown alarming discrepancies in the statements provided to the credit counsellors compared with the credit statements completed with creditors on either credit application forms or at the time of loan closure.

- In all situations where the applicant's total debt load is more than $10,000, the proposal should be refused and the applicant forced into an assignment for bankruptcy.
- All consumer proposals should be reported in detail to all credit reporting agencies. The report must indicate the total liabilities at the commencement of the proposal and the individual disbursement of funds to all affected creditors.
- Also, it is suggested that credit counsellors must report claimants' place of employment, salary, trade or job titles. This information should then go to each creditor listed on the application and also be reported to all credit reporting agencies - with full disclosure at hand, this will "weed out" the abusive proposals.
- It is recommended that all credit counsellors request copies of previously completed credit or financial statements from all consumer creditors listed by the applicant to help ensure

that fraudulent practices are minimized or eliminated.

VI) SERVICE STANDARDS

In view of the diversity of the consumer credit granting and financing industry, it is difficult if not impossible for the OSB to establish common service standards for the consumer credit industry. However, there should be some common service standards for the industry with regard to the types of customers, products and collateral.

- All trustees should notify creditors first by fax, then by mail to enable all creditors to suspend their dealing with the bankrupt.
- Stakeholders should embark upon a concerted effort to promote "credit education" in our high schools and colleges. These are the periods during which young people are exposed to credit privileges.

DISCUSSION PAPER #7

Submitted By: Glenis Shanks, Director, Fresh Start Money Management & Debt Counselling Services Ltd.

I) INCREASE IN BANKRUPTCY FILINGS

Few people are taught money and debt management in school or at home. Access to "easy" credit and "buy now, pay later" plans has created an instant gratification society, with few people living within their means.

There is less stigma associated with bankruptcy than there was 30 years ago.

Large-scale corporate downsizing in recent years resulted in many sole proprietor businesses being opened and for many reasons these are failing. This has contributed to the shift from business to consumer bankruptcies.

Many students who successfully completed their studies have been unable to find meaningful, well paid work to enable them to repay their student loans. The ten-year rule has now closed their options under the BIA.

- Creditors have an ethical obligation to tighten up limits granted to individuals and stop the practice of continually increasing the limits.
- Creditors have an ethical obligation to help curb the "instant gratification" phenomenon that currently exists.

- Federal and provincial government could institute a repayment of student loans as a deduction from pay like income tax. Those earning a low wage would have a small amount deducted. Those earning good salaries would have more taken off.
- The ten-year rule on student loans and bankruptcy should be dropped in favour of reviewing each case on its own merits.

II) INTAKE PROCEDURES AND FOLLOW-UP

Many trustees see clients only once, discussing their situation, completing a budget, outlining alternatives and completing the bankruptcy or proposal documents all in that sitting.

Many clients complain that once they sign bankruptcy or consumer proposal papers, trustees/administrators do not keep them informed of progress on their files.

Debtors often indicate that they feel "brushed off" and unimportant once they have signed up and wonder why they are paying such high fees for poor service.

Intake is often handled by less experienced staff which causes misunderstandings about procedures and obligations of the bankrupts and trustees/administrators.

Many clients are confused by the calculation of monies to be paid over the Superintendent's Standards of cost of living.

- The OSB should interview a sampling of past and current clients across Canada for their input on intake procedures, counselling sessions and other concerns, and incorporate their suggestions in the reforms.
- Spot checks of all trustee firms/qualified counselors may help to standardize intake/follow-up procedures.
- Clients should be treated with businesslike respect.
- Making the existing system less time-consuming could go at cross-purposes to client and creditor understanding of procedures and responsibilities.
- Including a short "cool-off" period between the first meeting and sign-up may allow debtors to investigate their options; the trustee would also benefit as clients who return would be committed to that alternative.
- More time needs to be spent explaining the calculation of payments over the Superintendent's Standards.

III) MANDATORY COUNSELLING SERVICES

Clients are paying $85 per counselling sessions, however there are no set time frames for completion, nor specifics that need to be covered in each session to ensure good value for their money.

Many trustees/administrators and qualified counselors feel "out of their league" and uncomfortable conducting these sessions.

Some trustees place clients in front of a video or spend very little time with them – a video is non-interactive and has very little "rehabilitative value" – clients need to have

one-on-one counselling that is relative to their personal financial circumstances if change is to occur.

Many trustees /administrators/qualified insolvency counselors use the sessions to update their files, rather than use the time to the client's benefit.

As there is no follow-up by the OSB regarding completion of the counselling sessions within the time frames set out in the Act, many are not completed within those guidelines and no penalty ensues for debtor or trustee firm.

- Follow-up by the OSB to ensure counselling sessions are consistent in content, completed within the time limits and provide value for the debtor's money.
- More specific counselling session information needs to be developed to ensure the debtors have basic tools to manage their finances more effectively.
- Outsourcing the counselling sessions to qualified counselors who do money and debt counselling for a living would accomplish a number of things:
  - The counselling would be done by those who are knowledgeable and enjoy that aspect of their work.
  - It would allow trustees to redeploy staff into other productive areas such as intake and file maintenance.
  - Contract workers would do the scheduling of appointments, freeing staff in the trustees' office.
  - Self-employed, qualified counselors often have more flexible work hours to see clients out of normal working hours so that they do not miss work to attend the counselling sessions.
- Discussing obtaining and using credit and warning signs of financial difficulties, as well as the non-budgetary causes of insolvency, should be moved from the first counselling session to the second.
- Telephone counselling should be standard in remote areas to reduce costs for all concerned and self-help correspondence courses could be used in cases where there are extenuating circumstances preventing the client from attending a personal interview.

IV) REALIZATION OF ASSETS

Many clients express frustration in their counselling sessions that months later the assets, mostly vehicles, have not been repossessed by the creditor, nor has the trustee/administrator kept in touch in this regard. Most want to know if they can still use the vehicle and whether they should keep paying insurance and maintenance.

There is also confusion when household goods are placed as security as to whether clients should keep paying the creditor.

The debtors often have no skills in identifying the value of their goods: what role does the trustee/administrator play here and how can the process of valuing be fair and speeded

up?

- Most often it is not worthwhile financially for a creditor to repossess household goods. Perhaps they need not take the goods as security in the first place.

V) FORMS

Form 65 (Income and Expenses Statement) omits many expenses that debtors will have over the insolvency period, especially if on a consumer proposal. The "Other" category is too broad, especially for the majority of clients who have never budgeted.

This form also contains terminology which might not be understood by all debtors, such as "Aesthetic Services", "Debts where stay has been lifted by the Court", "Discretionary" and "Non-Discretionary Expenses".

- Development of examples of record-keeping forms and other tools which would assist in the budgeting process.
- If the intent of the first and second counselling sessions is truly rehabilitative, more expense categories need to be added to Form 65, including planning for unexpected expenses.

VI) EDUCATION: A SHARED COMMITMENT

- Creditors must take an ethical lead in reducing credit use.
- All levels of government could offer grants and increased funding to private practitioners and other stakeholders to promote money and debt management skills in Canada.
- Churches through pre-marriage and discussion groups should put more emphasis on money and debt management as the correlation between separation, divorce and financial difficulties is high.
- Educate employers to recognize money and debt management problems in workers and make early referrals to counselors who may be able to impart the necessary skills to keep them solvent.
- Encourage organizations to be pro-active in offering money and debt management sessions for staff as part of wellness programs.
- Government funded programs could include money and debt management components e.g. HRDC, social service agencies.
- More in-depth training and mentorship of qualified counselors.

APPENDIX B

CALGARY PARTICIPANT LIST/PARTICIPACTION IN BOTH SESSIONS

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