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## Counselling Consumer Debtors under Canada's Bankruptcy and Insolvency Act

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## Counselling Consumer Debtors under Canada's Bankruptcy and Insolvency Act

### Abstract

If no attempts are made to determine the monetary and non-monetary reasons for bankruptcy or its recurrence, debtors may be more likely to choose bankruptcy, or remain in the cycle of bankruptcy. Credit counselling is one mechanism that can assist consumers in paying back debts without resorting to bankruptcy, thereby preventing repeat bankruptcies and heavy debt loads in the future. Canada passed a major milestone in 1992, becoming the first country to make financial counselling mandatory prior to the granting of an unconditional discharge from personal bankruptcy. This article describes the history of the policy analysis involved in making consumer education an integral part of insolvency counselling.

### Keywords

Canada. Bankruptcy and Insolvency Act; Bankruptcy; Consumer credit--Law and legislation; Finance, Personal; Canada

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# COUNSELLING CONSUMER DEBTORS UNDER CANADA'S *BANKRUPTCY AND INSOLVENCY ACT*®

BY RUTH E. BERRY\* & SUE L.T. MCGREGOR\*\*

If no attempts are made to determine the monetary and non-monetary reasons for bankruptcy or its recurrence, debtors may be more likely to choose bankruptcy, or remain in the cycle of bankruptcy. Credit counselling is one mechanism that can assist consumers in paying back debts without resorting to bankruptcy, thereby preventing repeat bankruptcies and heavy debt loads in the future. Canada passed a major milestone in 1992, becoming the first country to make financial counselling mandatory prior to the granting of an unconditional discharge from personal bankruptcy. This article describes the history of the policy analysis involved in making consumer education an integral part of insolvency counselling.

S'il n'y a pas de tentatives pour déterminer les raisons monétaires et non-monétaires de la faillite et de sa réapparition, les débiteurs seraient plutôt enclins à choisir la faillite, ou bien rester dans le cycle de la faillite. La consultation est un mécanisme qui pourrait aider les consommateurs à repayer leurs dettes sans avoir recours à la faillite, prevenant ainsi à la répétition des faillites, et le surendettement dans l'avenir. Le Canada a posé un jalon important en 1992, en étant le premier pays à rendre la consultation financière obligatoire avant d'accorder une décharge inconditionnelle de la faillite personnelle. Cette article décrit l'histoire de la politique impliquée dans l'éducation des consommateurs afin que celle-ci fasse partie integrante de la consultation de l'insolvabilité.

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## I. INTRODUCTION

If no attempts are made to determine the monetary and non-monetary reasons for bankruptcy or its recurrence, debtors may be more likely to choose bankruptcy, or remain in the cycle of bankruptcy.<sup>1</sup> Credit counselling is one mechanism that can assist consumers in paying back debts without resorting to bankruptcy, thereby preventing repeat bankruptcies and heavy debt loads in the future.

Canada passed a major milestone in 1992, becoming the first country to make financial counselling mandatory prior to the granting of an unconditional discharge from personal bankruptcy.<sup>2</sup> This article describes the history of the policy analysis involved in making consumer education an integral part of insolvency counselling.

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<sup>1</sup> See W. Clare, "Repeat Bankruptcies of Consumer Debtors" (1990) 10 *Inso. Bull.* 201.

<sup>2</sup> See *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 157.1 [hereinafter *BIA*], as am. by *An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 58.

## II. 1992 REVISION OF BANKRUPTCY LAW IN CANADA

Canada has had bankruptcy legislation applicable to consumers since 1919.<sup>3</sup> The legislation was amended several times during the interwar period, and completely revised in 1949.<sup>4</sup> The *Bankruptcy Act, 1949* was substantially amended in 1992, and one of the important changes was the introduction of mandatory counselling for consumer bankrupts or debtors,<sup>5</sup> as a precondition for an unconditional discharge.<sup>6</sup> As with most policy issues, many people worked behind the scenes, setting the stage for the change to federal legislation. As early as 1984, several individuals within the Office of the Superintendent of Bankruptcy (OSB) at Consumer and Corporate Affairs Canada (CCAC, now Industry Canada) had been quietly pushing for the integration of preventative measures to reduce the growing incidence of repeat personal bankruptcies. At that time, 10 per cent of the 35,000 bankrupts were repeat bankrupts, and third-, fourth-, and even fifth-time repeaters were becoming more common.<sup>7</sup> In contrast, during the early 1970s, repeat bankruptcies were relatively rare and, where they occurred, attracted special attention.<sup>8</sup>

It was hoped that a standardized approach to the rehabilitation of debtors would reduce repeat bankruptcies. In the 1980s, CCAC arranged for the major credit granters in Canada to help fund the development of a film on consumer credit education (estimated to cost \$160,000). The then Assistant Superintendent of Bankruptcy conducted an in-house analysis of why consumers entered into, and repeated, bankruptcy.<sup>9</sup> Between 1988 and 1991, a standardized consumer education program was developed, and presented to each bankrupt

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<sup>3</sup> See *Bankruptcy Act, 1919* (Can.), 9 & 10 Geo. V, c. 36.

<sup>4</sup> See *Bankruptcy Act, 1949* (Can.), 13 Geo. VI, c. 7.

<sup>5</sup> In Canadian law, a consumer who enters bankruptcy is called a "bankrupt." A consumer debtor who makes a consumer proposal is described as a "debtor." In this article, we use the terms debtor and bankrupt interchangeably. Where a bankruptcy occurs, the bankrupt's non-exempt assets are liquidated and the proceeds are distributed among the creditors—a process that usually takes nine months if the consumer undergoes counselling. A consumer proposal is available where the consumer owes less than \$75,000, not including realty mortgages, and the creditors agree to a plan to pay off the debts within five years or less. The assets are not liquidated: see *BIA, supra* note 2, Part III, Division 2.

<sup>6</sup> See *ibid.* s. 157.1(3).

<sup>7</sup> See Clare, *supra* note 1 at 201.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.* at 202.

during the Official Receiver's examination. However, in 1991, there was a change of Superintendents, and the initiative to develop the film was abandoned. The emphasis shifted from rehabilitation to education of debtors. Soon afterwards, a counselling directive<sup>10</sup> was added to the 1992 amendments to the *Bankruptcy and Insolvency Act (BIA)*.<sup>11</sup>

Under the new law, a trustee is obliged to provide, or make arrangements for, counselling for an individual bankrupt. A trustee may also provide counselling for a person related to an individual bankrupt, in accordance with the directives issued by the Superintendent of Bankruptcy. The cost of the counselling is met out of the bankrupt's estate, according to a prescribed tariff. A bankrupt who refuses or neglects to receive counselling is not eligible for an automatic discharge.<sup>12</sup>

Financial counselling uses skills and information to assist clients in understanding and changing their behaviour with respect to financial management, consumption, and lifestyle. Clients acquire experience in using all types of resources, including remedial counselling, to gain, regain, and then maintain economic security. Clients are encouraged to experience and participate in a process of strategizing and planning their future, identifying and understanding their financial objectives, and effectively managing their resources to reach those objectives.<sup>13</sup>

The intent of the counselling directive is to provide trustees and independent counsellors (*i.e.*, those working in private credit-counselling agencies) with directions on how to implement the revised *BIA*, so that the debtor is assisted in (1) learning how to handle money; (2) understanding the causes of bankruptcy; (3) keeping his or her financial affairs in better order; and (4) avoiding bankruptcy in the future. The counselling is designed to provide the debtor with advice on debt

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<sup>10</sup> See Office of the Superintendent of Bankruptcy, *Directive No. 1R: Counselling Directive* (issued 1 June 1993), online: Office of the Superintendent of Bankruptcy <<http://strategis.ic.gc.ca/SSG/br01091e.html>> (date accessed: 25 June 1999) [hereinafter *Directive No. 1R*]. The directive has the same legal effect as a law or regulation.

<sup>11</sup> *Supra* note 2. This brief overview is based on an interview with M. Salyzyn (23 May 1997).

<sup>12</sup> See *BIA*, *supra* note 2, ss. 157.1(1)-(3). See also F. Bennett, *Bankruptcy and Insolvency Act With Draft Regulations* (North York, Ont.: CCH Canadian, 1992); and M. Salyzyn, "Financial Counselling Within Canada's New Bankruptcy Law" (Association for Financial Counselling and Planning Education Conference, Charleston, S.C., October 1992) (Upper Arlington, Ohio: Association for Financial Counselling and Planning Education, 1992) 1.

<sup>13</sup> See C.J. Pulvino & J.L. Lee, *Financial Counselling: Interviewing Skills* (Dubuque, Iowa.: Kendall/Hunt, 1979); and F.L. Williams, *Theories and Techniques in Financial Counselling and Planning: A Premier Text and Handbook for Assisting Middle and Low Income Clients* (West Lafayette, Ind.: Purdue Research Foundation, Purdue University, 1991).

resolution options to reduce recidivism, impart financial management skills, and develop a better understanding of the causes of insolvency. In order to ensure that bankrupts will benefit from counselling, the process was originally comprised of three stages: financial assessment, counselling, and consumer education. While the first two stages were mandatory, the third stage—consumer education—was optional.

After the counselling directive had been in effect for one year, the Superintendent of Bankruptcy commissioned a national survey to determine the perceived impact of the counselling process, including consumer education. To facilitate the design, implementation, and analysis of the study, the Superintendent formed a Working Group<sup>14</sup> that was charged with determining how well the counselling was working, and how the respondents viewed it. Part III of this article reports on some of the deliberations of the Working Group, which led to the revised counselling directive and a new directive, both of which became effective in January 1995. Parts IV and V discuss the consumer education process.<sup>15</sup> Part VI describes the impact of the Working Group's recommendations on the revised counselling directive, and Part VII discusses future developments in the bankruptcy process.

### III. DELIBERATIONS AND RECOMMENDATIONS OF THE WORKING GROUP

The original deliberations of the Working Group centred on the goals of reducing recidivism, and improving the rehabilitation and education of the consumer.

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<sup>14</sup> The authors were members of the Working Group, and continue to be involved with it.

<sup>15</sup> Other papers have reported on other aspects of consumer counselling. All working papers and discussion frameworks shaping and reflecting the deliberations of the Working Group are available from the authors. See also S.L.T. McGregor & R.E. Berry, "Canada's Experience With Mandatory Counselling for Bankrupts—A National Study" (Association for Financial Counselling and Planning Education Conference, New Orleans, L.A., 8-11 November 1995) (Upper Arlington, Ohio: Association for Financial Counselling and Planning Education, 1995) 32 [hereinafter "Canada's Experience With Mandatory Counselling"]; S.L.T. McGregor & R.E. Berry, "New Directions in Canadian Bankruptcy Policy: Mandatory Bankruptcy Counselling—A National Study" (Atlantic School of Business Conference, Sydney, N.S.W., 2-4 November 1995) 228 [unpublished, on file with authors]; S.L.T. McGregor & R.E. Berry, "A Model of Government-Industry-Academic Collaboration: Mandatory Bankruptcy Counselling Policy in Canada" (1997) 21 *J. Consumer Stud. & Home Econ.* 41; and S.L.T. McGregor & R.E. Berry, "Mandatory Financial Counselling for Bankrupts in Canada" (1997) 8 *J. Fin. Couns. & Plan.* 9 [hereinafter "Mandatory Financial Counselling"].

### A. *Recidivism*

When the counselling directive was introduced, personal bankruptcies had increased at a compound annual rate of 7.9 per cent each year from 1990 to 1995.<sup>16</sup> Wally Clare estimates that, prior to 1992, close to 10 per cent of Canadian bankrupts were repeat bankrupts.<sup>17</sup> Clare suggests several reasons for the repeat bankruptcies, including a lack of consumer education about borrowing and the use of credit. Often, Clare maintains, debtors' personal finances had been troubled for years, and some debtors lived from payment to payment with little hope of clearing their debts.<sup>18</sup> This situation, perhaps typical of many repeat bankrupts, indicates that some debtors do not know how to change or control the underlying factors of financial instability—factors that, in some cases, can inevitably lead to bankruptcy.

Clare also notes that second bankruptcies are an indication that “our bankruptcy system is not responding effectively to the inadequate knowledge and financial skills of first time bankrupts,”<sup>19</sup> and that “[t]oo often we miss the opportunity to identify problems or teach new skills to people who are having difficulty coping in a tough, complex world.”<sup>20</sup>

### B. *Rehabilitation*

Although it is the term conventionally used in the bankruptcy context, “rehabilitation” does not convey the same meaning to everyone.<sup>21</sup> In the United States, rehabilitation refers to retaining all assets and repaying debts out of future income through a trustee (much like Canada's consumer proposal); liquidation entails a trustee converting assets to cash and distributing the proceeds on a prorated basis. In the Canadian counselling directive, rehabilitation is assumed to mean gaining or regaining money management competency or control. Initially, the Working Group felt that the term rehabilitation needed

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<sup>16</sup> See MEPA/MEA Consultants, *The Recent Rise in Bankruptcies* (Ottawa: Industry Canada, 1996) at K1.

<sup>17</sup> See Clare, *supra* note 1 at 201.

<sup>18</sup> *Ibid.* at 202-03.

<sup>19</sup> *Ibid.* at 203.

<sup>20</sup> *Ibid.* at 210.

<sup>21</sup> See, for example, A.C. Sullivan & D.D. Worden, “Rehabilitation or Liquidation: Consumers' Choices in Bankruptcy” (1990) 24 J. Consumer Aff. 69.

clarification and modification. It was felt that the use of the term rehabilitation could not be dismissed as simple semantics. Rehabilitation is defined as "restoration to a state of good management, solvency, or a condition of health."<sup>22</sup> *Habilitation*, on the other hand, implies making someone more capable by training or imparting a skill, rather than restoring something that had been lost.

Based on this analysis, the group at one point recommended that the three objectives of the counselling directive should be changed to read "advice, education and *habilitation*." Canadian counselling experts felt that rehabilitation implied regaining something that had been lost (which was not always the case), while education aimed at the first-time acquisition of a skill, or learning how to use a skill in a new situation (which was more often the case).

### C. Education

Education was a basic component of one of the sessions required in the original 1992 counselling directive, and was treated as different from rehabilitation or habilitation. The educational goals of financial counselling are to assist consumers in examining their values, attitudes, and beliefs, and to help them find solutions to the financial and personal problems responsible for their insolvency.

Consumer education comprises the three overarching concepts of decisionmaking, resource management, and citizen participation. Consumer decisionmaking is influenced by unique personal factors, the specific family context, and the larger environment. Resource management comprises financial planning, money management, prudent purchasing habits, and conservation. Ideally, the consumer, in his or her capacity as citizen, has a sound working knowledge of the political process and knows how to make his or her voice heard in government and business. If consumer education is to meet the counselling directive's goal of improving the financial well-being of debtors, the program should aim to improve debtors' skills in planning purchases based on income, resources, and financial goals.<sup>23</sup>

Consumer education was intended to help debtors acquire money management and budgeting skills, as well as information in the areas of home economics, spending and shopping habits, warning signs

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<sup>22</sup> *Webster's Dictionary*, 7th ed., s.v. "restoration."

<sup>23</sup> See R. Bannister & C. Monsma, *Classification of Concepts in Consumer Education* (Cincinnati: South-Western, 1982).

of financial difficulties, the use of credit, and the implication of credit reporting services. Until consumers themselves ask for consumer education, it makes sense for government to promote the objectives of consumer education. This intervention hopes to produce more competent buyers and financial managers, and to instil a better understanding of the economy.<sup>24</sup> Of course, consumer education is only the start of a continuing process. It is designed to alter the consumer socialization process,<sup>25</sup> understood to mean the processes by which people acquire skills, knowledge, and attitudes relevant to their functioning in the marketplace.<sup>26</sup> Any consumer education program should provide a framework for analyzing problems and choosing solutions under ever-changing conditions. The fundamental goal of consumer education (and of the counselling directive) is to enable individuals to achieve more stable personal finances, now, and in the future.<sup>27</sup>

#### IV. JUSTIFICATION OF MANDATORY CONSUMER EDUCATION

In the original 1992 counselling directive, personal and money management counselling were mandatory, but consumer education was at the debtor's option. Based on a 1994 national study,<sup>28</sup> the Working Group recommended that consumer education become a mandatory component of the counselling directive, occurring prior to counselling. This position was also strongly endorsed by professional counsellors.

The Working Group argued that making consumer education mandatory could support the ambitious goal of preventing recidivism. Many other groups did not agree with this position. Fifty-four per cent of

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<sup>24</sup> See E.S. Maynes & American Council on Consumer Interests Research Committee, eds., *The Frontier of Research in the Consumer Interest: Proceedings of the International Conference on Research in the Consumer Interest* (Columbia, Miss.: American Council on Consumer Interests, 1988) [hereinafter *The Frontier of Research*].

<sup>25</sup> See R.E. Vosburgh, "Improving Consumer Education: A Joint Concern" (1992) 4:2 *Adv. Consumer Int.* 34.

<sup>26</sup> See S. Ward, "Consumer Socialization" in H.H. Kassirjian & T.S. Robertson, eds., *Perspectives in Consumer Behaviour* (Glenview, Ill.: Scott Foresman, 1980) 380.

<sup>27</sup> See *The Frontier of Research*, *supra* note 24.

<sup>28</sup> See D.R. Forde & L.W. Roberts, *A National Assessment of Bankruptcy Counselling Services* (Winnipeg: Sociometrix, 1994) [hereinafter *A National Assessment*]; and D.R. Forde & L.W. Roberts, *A Socio-Demographic Profile of Consumer Bankrupts in Canada* (Winnipeg: Sociometrix, 1994).

the trustees and counsellors, and 37 per cent of bankrupts felt that consumer education should be left to the trustee's recommendation: 40 per cent of the trustees wanted to leave consumer education discretionary at the bankrupt's option; and only 5 per cent of the trustees and 25 per cent of bankrupts favoured consumer education being made mandatory.<sup>29</sup>

However, additional results from the 1994 study convinced the Working Group to insist that consumer education become mandatory. Only 36 per cent of the bankrupts attended the consumer education session; 22 per cent opted not to attend; and of the rest who did not attend, 72 per cent were not aware that consumer education was an option. Eighty-two per cent of the time, the consumer education session was conducted in the trustee's office (either by the trustee or someone else in the office) and, 18 per cent of the time, it was done outside of the office by an independent counsellor hired by the trustee's office. When the session was conducted in the trustee's office, most of the time it was on an individual basis (rather than in a group session). To a lesser extent (11 per cent of the time), the consumer education sessions were conducted over the telephone. In 47 per cent of cases, the session lasted for less than half an hour. Despite this delivery mode, and the fact that over one-half of the trustees felt they needed more information on what was involved in consumer education and money management, fully two-thirds of bankrupts who received consumer education felt that it increased their knowledge and skills in handling money.<sup>30</sup>

## V. RECOMMENDATIONS FOR THE CONSUMER EDUCATION PROCESS

### A. *Standardized Consumer Education Workshops*

The Working Group proposed that consumer education entail a standardized one- to two-hour group workshop. This workshop would supplement information gathered during the intake session, related to issues such as wage garnishment, co-signing, credit rating, taxes, fees, and discharges. A standardized consumer education workshop can be particularly beneficial for remote clients who require off-site delivery. This off-site delivery could be provided by a qualified third party (not

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<sup>29</sup> See *A National Assessment*, *supra* note 28 at 5.

<sup>30</sup> *Ibid.* at 6-7.

necessarily a counsellor). Such third parties could include home economists, accountants, social workers, and high school or adult education teachers, provided they had training in credit education and money management, and had been certified and appointed by the Official Receiver.

To ensure standardized content in the consumer education sessions, the Working Group recommended that the OSB strike a committee to develop the content and format of the workshop. The Working Group recommended that the committee be comprised of a consumer educator, as well as credit reporting, credit granting, and collecting stakeholders to ensure the credibility of the curriculum.

### *B. Size of Workshop Groups*

If the counsellor wished to use a group format to deliver the consumer education, the Working Group recommended that the size of the group vary from twenty to forty, since no counselling was involved. The group could be smaller for logistical reasons, but the intent was to accommodate the non-counselling nature of the session by having larger groups if desired.

### *C. Timing*

One member of the Working Group proposed that the consumer education workshop should be held before the first meeting of creditors (assuming a meeting of creditors was held at all). The rationale for this timing was that the consumer would then be better informed about the credit granting process, the roles of credit reporting and collecting agencies, signs of credit abuse, credit and money management, budgeting and record keeping, etc. The debtor might also experience less isolation as he or she attempts to resolve his or her personal financial issues. Consumer education could be perceived as a neutral and non-threatening introduction to the rest of the counselling process, which would deal with the non-budgetary causes of insolvency,<sup>31</sup> as well as very intimate and sensitive financial and personal situations. Assessing both money management skills and non-budgetary causes of bankruptcy could provide a better insight into the reasons for recidivism and, on a

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<sup>31</sup> The non-budgetary causes were identified as gambling abuse, compulsive behaviour, substance abuse, or employment and marital/family difficulties.

positive note, provide habilitation and education that might enable the debtor to break out of the cycle of bankruptcy.

#### D. *Keeping Education and Counselling Separate*

The Working Group recommended that the consumer education session and the non-budgetary counselling session not be held on the same day. The Working Group also recommended that, after an initial certificate had been signed, signifying that the debtor was in a legal state of bankruptcy or had made a consumer proposal, the trustee or private counsellor should provide the bankrupt with a handout outlining the topics to be covered in the consumer education workshop, and the nature and purpose of the counselling stage. This practice would serve to familiarize debtors with the different phases of the process, and provide them with preliminary reading material before the counselling session. The trustee could also elect to distribute such additional financial management brochures as were available. In fact, 53 per cent of trustees indicated that they thought it very important for debtors to receive more information on money management skills and consumer education.<sup>32</sup>

#### E. *Workshop Content*

The Working Group felt that the counselling directive should concentrate on family resource management, rather than all the traditional consumer education components, including consumer decisionmaking in the marketplace, and taking steps to influence the factors affecting consumer decisions. Ideally, all three components are part of an integrated consumer education program.<sup>33</sup> However, the group was of the view that maintaining the focus on family resource management could provide increased motivation for debtors, promoting their empowerment and autonomy, while minimizing their stress.

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<sup>32</sup> See *A National Assessment*, *supra* note 28 at 9.

<sup>33</sup> See Bannister & Monsma, *supra* note 23; and J.R. Robinson, "The Content of a College-University Course in Consumer Education" in *The Frontier of Research*, *supra* note 24, 857.

## F. Fees

Once the consumer education session had been completed, the second counselling certificate would be signed off by the trustee and bankrupt, enabling them to move into session three of the process—personal counselling. It was recommended that the fee for consumer education be the same, regardless of whether the session was attended solely by the bankrupt or by family members as well.

## VI. IMPACT OF RECOMMENDATIONS ON THE REVISED 1995 COUNSELLING DIRECTIVE

Almost all of the recommendations from the 1994 Working Group were adopted in two directives that became effective in January 1995. The details of these revisions are described below. The first directive<sup>34</sup> is designed to provide directions for inquiring about the debtor's property and financial status, and to determine the best legal and non-legal options for the debtor. The second, revised counselling directive<sup>35</sup> is designed to set the standards for mandatory consumer education and personal counselling sessions.

### A. Timing, Size, and Fee of Consumer Education Workshops

Consumer education is now a mandatory part of the bankruptcy process, and must occur before counselling. As before, it can occur individually, or in groups of no more than twenty. The fee is still the same whether the bankrupt attends the session alone, or if members of the bankrupt's family attend as well. As of 1998, the range of persons who may attend has been expanded to include a person who is financially associated with the debtor. The session must occur between ten and sixty days after the date of bankruptcy, or after the debtor has made a consumer proposal. Although the Working Group

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<sup>34</sup> See Office of the Superintendent of Bankruptcy, *Directive No. 6: Assessment Directive* (issued 21 December 1994). This directive has since been replaced with a revised directive: see Office of the Superintendent of Bankruptcy, *Directive No. 6R: Assessment Directive* (issued 30 April 1998), online: Office of the Superintendent of Bankruptcy <<http://strategis.ic.gc.ca/SSG/br01096e.html>> (date accessed: 18 August 1999).

<sup>35</sup> See Office of the Superintendent of Bankruptcy, *Directive No. 1R2: Counselling Directive* (issued 21 December 1994), online: Office of the Superintendent of Bankruptcy <<http://strategis.ic.gc.ca/SSG/br01091e.html>> (date accessed: 25 June 1999) [hereinafter *Directive No. 1R2*].

recommended that the consumer education workshop be introduced before the first meeting of creditors, the 1995 revisions mandated that it occur within ten days following this meeting.<sup>36</sup> The 1995 counselling directive provides no minimum length for the session; however, one to two hours was recommended by the Working Group.

### B. *Training Insolvency Counsellors*

The consumer education sessions are not yet fully standardized. Anecdotal evidence suggests that sessions can vary from asking whether the bankrupt thinks he or she needs consumer education, to handing out pamphlets, to full, one- to two-hour sessions.<sup>37</sup>

Although the Working Group recommended that any qualified person should be authorized to deliver the consumer education session, the revised counselling directive specifies that only those who have taken the recently implemented *BIA Insolvency Counsellor's Qualification Course* are allowed to deliver the session.<sup>38</sup> This required course may introduce greater consistency into the sessions. The consumer education session still contains information on money management, spending and shopping habits, warning signs of financial difficulties, and obtaining and using credit. The session also continues to focus on family resource management over decisionmaking and consumer advocacy.

### C. *Effectiveness of Counselling*

During the first quarter of 1995, the OSB retained a private firm to poll five types of stakeholders—creditors, trustees, court officials, provincial proposal administrators, and OSB staff—about various aspects

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<sup>36</sup> See *ibid.* As of 1998, a meeting of creditors is no longer mandatory in the summary administrations of estates: see *BIA*, *supra* note 2, s. 155 (d.1)(i).

<sup>37</sup> This information was gleaned from conversations with various debtors, trustees, and counsellors across Canada.

<sup>38</sup> See *Directive No. 1R2*, *supra* note 35; and F. Forbes Anderson *et al.*, *The BIA Insolvency Counsellor's Qualification Course 1996/97* (Ottawa: Industry Canada, 1996). The course contains modules that train counsellors to recognize the needs of diverse clients and to teach a variety of skills, including creative problemsolving and decisionmaking. The modules aim to enable counsellors to better gauge money management styles; attitudes towards money, indebtedness, and solvency; family conflict/cooperation and money; changing family structures and demographics on a national basis; individual family and life transitions (e.g., career changes, divorce, retirement); warning signs of addictive and destructive behaviour; and techniques for handling crisis and change.

of the consumer insolvency system.<sup>39</sup> Three questions related to the perceived impact of counselling were asked. Sixty-one per cent of credit counsellors felt that counselling was very beneficial (25 per cent) or considerably beneficial (36 per cent).<sup>40</sup> Fifty-five per cent also felt that counselling contributed extensively (11 per cent) or considerably (44 per cent) to clients' understanding of the causes leading up to their bankruptcy.<sup>41</sup> Forty-eight per cent of consumer proposal administrators shared the same sentiment.<sup>42</sup> Forty-nine per cent of counsellors agreed that counselling extensively (3 per cent) or considerably (46 per cent) affected consumers' ability to keep their finances in better order, and 36 per cent of proposal administrators agreed that counselling would have a considerable effect on their clients' future financial management skills.<sup>43</sup> However, while 61 per cent of counsellors felt that counselling was beneficial, only 20 per cent of creditors agreed.<sup>44</sup> It is worth noting that counselling had only been in place for about twenty-four months—too short a period to tell whether counselling had been effective to prevent recidivism. Also, later in 1995, the counselling sessions were changed, so that consumer education was mandatory and took place before counselling.

#### D. *Socialization Factors*

External factors, including sudden unemployment, changes in marital status, and retirement, can affect an individual's solvency.<sup>45</sup> It is probably safe to assume that many aspects of a bankrupt's socialization process have contributed to his or her accumulation of unmanageable debts.<sup>46</sup> Problems in not understanding contracts, credit arrangements, rights and responsibilities as borrowers, or even the rudimentary skills of

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<sup>39</sup> See Office of the Superintendent of Bankruptcy, "Re-engineering Consumer Bankruptcy and Insolvency Systems: A National Assessment" (1995) 15 *Insol. Bull.* 117.

<sup>40</sup> *Ibid.* at 122.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* at 123.

<sup>44</sup> *Ibid.* at 122.

<sup>45</sup> See Williams, *supra* note 13.

<sup>46</sup> See B.E. Poduska, *For Love and Money: A Guide to Finances and Relationships* (Pacific Grove, Cal.: Brooks/Cole, 1993).

developing a spending plan that is compatible with income, can affect the soundness of a individual's money management system.

### E. *Financial Behaviour Can Change*

One recent study confirmed that financial education can change behaviour, and that the change can prevail after completion of an education program.<sup>47</sup> These findings are encouraging, but research needs to determine if those who have attended counselling after 1992 become repeat bankrupts. The pending study commissioned by the Superintendent of Bankruptcy will hopefully yield data that answers this question. Preliminary findings indicate that a large majority of bankrupts (80 per cent) feel they gained considerable or extensive benefit from the consumer education process.<sup>48</sup> They also feel that they would be more able to be financially responsible in the future.<sup>49</sup> Debtors with fewer resource management skills were found to make more changes after the financial education programs than those with more skills.<sup>50</sup> Support for this finding is provided by the fact that it was lower-income bankrupts with high school education or less (80 per cent) who agreed that consumer education was very helpful.<sup>51</sup> Consumer education seems to be making a difference.

### F. *Evidence of Behavioural Change*

Flora Williams suggests a number of criteria that indicate financial management success. These criteria include meeting goals set at the planning session; ability to handle problems; proactive decisionmaking; seeking resources or professional help; establishing policies, rules, and expectations of family members; seeking information to make good decisions; paying bills on time, and in the correct amount; reconciling bank statements; establishing an emergency fund; planning for unexpected needs; good management of work and family; managing

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<sup>47</sup> See K.P. Varcoe & J. Wright, "Financial Education Can Change Behaviour" (1991) 3:2 *Adv. Consumer Int.* 14.

<sup>48</sup> See *A National Assessment*, *supra* note 28; "Canada's Experience with Mandatory Counselling," *supra* note 15; and "Mandatory Financial Counselling," *supra* note 15.

<sup>49</sup> See *ibid.*

<sup>50</sup> See Varcoe & Wright, *supra* note 47.

<sup>51</sup> See *A National Assessment*, *supra* note 28 at 30.

possible risks to maintain a chosen lifestyle; and assessing human resources available to offset the lack of, or to enhance, limited financial resources.<sup>52</sup> The Working Group recommended that these criteria should be kept in mind when gauging the success of mandatory consumer education for bankrupts.

## VII. FUTURE DEVELOPMENTS

The issue of standardized consumer education for bankrupts is currently receiving the attention of the Superintendent of Bankruptcy, who has commissioned a study of the impact of consumer education on bankrupts. The survey will investigate the length, content, and delivery of sessions. It will also attempt to determine whether debtors' situations changed after the sessions. The Subcommittee for Counselling Evaluation, formed by the OSB in 1997, has been meeting, but (as of May 1999) has not yet issued a request for proposals. When the study is completed, it will provide a better idea of what should be included in a standardized consumer education session to best accomplish the empowerment of the individual debtor.

There is also a movement within the OSB to privatize the functions associated with the bankruptcy process. On 14 February 1997, the OSB gained Treasury Board approval to become a Special Operation Agency within Industry Canada. This change in status may allow private contractors to oversee the day-to-day functions of the OSB, and provide a decentralized and potentially less standardized operation. The new service will attempt to measure such things as the cost of bankruptcies, the workload of bankruptcy officers, the speed of debtor discharges, dividends as a percentage of realizable assets, and the amount of fraud in the bankruptcy system.<sup>53</sup>

## VIII. CONCLUSION

Before the 1992 amendments to the *BIA*, Canadians received no rehabilitation assistance during the bankruptcy process. There was no formalized effort to determine monetary, social, family, or personal causes of bankruptcy. There has been a marked and ongoing concern for

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<sup>52</sup> See Williams, *supra* note 13.

<sup>53</sup> See Office of the Superintendent of Bankruptcy, *Framework Document* (Ottawa: Office of the Superintendent of Bankruptcy, 1997).

the level of personal bankruptcies in Canada, and for the degree of, and reasons for, recidivism. A record 85,297 consumer bankruptcies occurred in Canada in 1997, up 7 per cent from 1996.<sup>54</sup>

This article has reported on the successful process of bringing financial counselling and consumer education, albeit not yet perfectly, to bankrupt Canadians. Mandatory exposure to consumer and credit education early in the counselling process exposes bankrupts to constructive credit management, budgeting, and record-keeping skills, and it diminishes the sense of isolation. Furthermore, by incorporating consumer education before the counselling process, bankrupts are better sensitized to the merits of the next phases of counselling. This new control and empowerment could lead to fewer repeat bankruptcies, better educated consumers, and rehabilitation of those debtors teetering on the edge, or in the cycle, of bankruptcy.

As other jurisdictions, notably Sweden, are moving towards the goal of instituting mandatory counselling for bankrupts, the Canadian experience should provide useful benchmarks for policy development. The current consideration of privatizing aspects of the bankruptcy process that are now handled by government raises many interesting issues for the future.

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<sup>54</sup> See Office of the Superintendent of Bankruptcy, "The National Insolvency Forum—Canada's Insolvency System: Working Together in the New Millennium" in *Spring 1999: National Insolvency Forum: Halifax May 4-5* (Ottawa: Industry Canada, 1999) 1 at 2.

