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RECIDIVISM: The Revolving Door of Bankruptcy

Pour visionner la traduction française de cet article, visitez le http://www.cairp.ca/french/communications_advoc/spring_2009_fr.asp

Consumer debt is being accumulated at an unprecedented rate. In fact, the Bank of Canada estimates that Canadian consumers now owe more than \$750 billion to their creditors. CIBC reported that consumer debt rose by 3% in the first quarter of 2008 alone — helping to push the debt to income ratio for consumers to 130% from 122%. A portion of this debt is being generated by people who have already been discharged from a bankruptcy proceeding. Increasingly, previous bankrupts are again incurring debt to acquire these “must-have” items, often with the enthusiastic urging of highly competitive financial institutions.

It is clear that taking on more debt than one can afford to pay back is an undesirable behaviour. It most often results in the need for bankruptcy or some other insolvency

proceeding. The negative consequences include surplus income payment requirements, a severe impact on one’s credit rating and potential court sanctions for fraudulent conveyances. The financial counselling that is required through the bankruptcy process is designed to train the debtor to eliminate ill-advised behaviour.

Yet our industry has seen rising rates of recidivism (in the form of repeat bankruptcy filings) over the past decade with no signs of slowing down in the coming years. Is there anything that we can do to reduce recidivism and rehabilitate the consumer debtor?

We see five possible strategies that could help reduce recidivism over the long term.

Improve consistency of sanctions imposed in discharge orders: There

appears to be a lack of consistency in the courts where discharge orders and the sanctions imposed for various bankruptcy offences differ among jurisdictions. Certain jurisdictions are tougher on gambling offences while others are tougher on repeat bankrupts. While no two bankruptcies are the same, tougher and more consistent sanctions may provide the appropriate negative consequences necessary to reduce recidivism.

More involvement from creditors: The bankruptcy system is in place to provide the “honest but unfortunate debtor” with a second chance. In many cases of repeat bankruptcy, the issue of whether or not a debtor is “honest but unfortunate” should be examined more closely.

Creditors possess a large amount of useful information, including details of spending

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habits, pre-bankruptcy assets and income. This information may indicate that a consumer might have contributed to their insolvency, or committed a bankruptcy offence. In such circumstances, they should provide the trustee with the evidence for further investigation and/or oppose the discharge. This would allow the trustee or the court to impose the appropriate sanctions. While creditors have the right and the ability to oppose a bankrupt's discharge, in very few instances is this currently happening.

Improve or expand the counselling process: Bankruptcy is designed to be a rehabilitative process wherein consumer debtors are provided with a fresh financial start. The bankrupts are given two mandatory financial counselling sessions to help them avoid financial difficulties in the future.

It is unrealistic to assume that just two sessions with a qualified counsellor are sufficient to correct years of bad habits. When a bankrupt has a substance problem or some other addiction, we require them to attend regular counselling to deal with these issues. Perhaps we should consider the appropriateness of requiring mandatory monthly counselling over the course of the bankruptcy. This may better prepare the bankrupts to handle the constant barrage of advertising to spend money they do not have.

Education: The education system is not currently equipping our youth with the financial tools and knowledge needed to survive in a consumer society. High schools teach most of their students little to nothing about personal financial issues or budgeting. It is unlikely that anything is taught about the benefits and risks

of consumer credit. Should this not be a priority for our educational system to tackle?

The materials our educational institutions would need are already available from the Office of the Superintendent of Bankruptcy (OSB). The OSB has created a range of education aids (available on their website) to assist in the education of our youth. These various aids are mainly designed for children aged five through 15, but also include a more detailed guide for young adults attending post-secondary institutions. These materials could be made available in the public school system to assist in teaching young Canadians on how to avoid consumer debt difficulties.

Canada is a nation of diverse cultures and backgrounds. Many Canadians are born here and/or have had access to our public education system. However, a



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growing number of new Canadians have immigrated here after their formative educational years. They are immediately exposed to a consumer society that neither they nor their parents may have previously experienced. How do they learn to properly manage the credit that is thrust upon them? New Canadians should be provided with appropriate education regarding the benefits and risks of consumer credit as part of the immigration process.

Amendments to the Bankruptcy and Insolvency Act (BIA): Currently the trustee has the discretion to require an

additional 12 months of surplus income payments. This discretion is not being applied in a consistent manner within provinces, let alone across the country. But amendments to the *BIA* will standardize the surplus income requirements for both the amount to be paid and the number of months for it to be paid. This will require that all bankrupts with surplus income be treated more equitably.

However, these amendments could also exacerbate the problem of recidivism. The amendments would allow a second-

time bankrupt to receive an automatic discharge after 24 to 36 months. The term would depend on whether or not there is a surplus income requirement. This particular amendment may send mixed signals to potential second-time bankrupts. The amendment removes the risk of attendance at court if the minimum standards and duties required of the bankrupt are met. While this amendment will likely reduce the extent of court resources being used, it may be sending the wrong message to repeat filers.

Conclusions: Consumers associate bankruptcy less and less with the social stigma it once had. Access to credit from the increasingly competitive consumer debt market has led to a consumer society obsessed with buying at all costs. It is increasingly common to see second- and third-time bankrupts. Recidivism will continue to be a problem as long as society, creditors, the courts and the insolvency community allow it to be. It is time we all put the brakes on recidivism and took responsibility for implementing the changes needed to the system. **RS**

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