

Comparative Consumer Insolvency Regimes

A Canadian Perspective

Jacob S Ziegel

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COMPARATIVE CONSUMER INSOLVENCY REGIMES —A CANADIAN PERSPECTIVE

All modern legal systems with advanced economies must address the question of how to respond to the needs of insolvent consumers whose burden of debt greatly exceeds their capacity to repay within a reasonable time frame. This study surveys comparatively the insolvency regimes currently in place or likely to be adopted in the foreseeable future in Canada, the United States, Australia, England and Wales, Scotland, Scandinavia and a representative group of Western countries on the continent of Europe.

Modern legal systems have two basic alternatives in providing relief for over-committed consumers. The first, which involves restricting the enforcement of individual creditor remedies, is a method with which this study is not concerned. Where the consumer is seriously insolvent and owes money to many creditors, a different approach is required—a collective solution to debtor's problems—and this, the solution provided by modern insolvency systems, is the focus of this study.

To Roy and Catherine Goode
In deep friendship

Preface

When historians come to write the social, economic and legal history of Western societies in the last quarter of the 20th century, they will surely be struck by the rapid increase in the number of overcommitted consumer debtors and by the equally rapid growth in the outstanding volume of consumer credit. Overcommitted debtors create many problems, legal and non-legal, but the single most pressing question is how to provide relief from the burden of debt. This comparative study examines the consumer insolvency regimes of Canada, the United States, Australia, England and Wales, Scotland, and, collectively, Western European continental countries to see how they have responded to the new challenges either by revising existing insolvency laws or by developing alternatives to traditional bankruptcy solutions.

This book is a revised and updated version of a report prepared by me for Industry Canada in 2000 in preparation for the third round of amendments to Canada's bankruptcy and insolvency legislation.¹ My hope is that the study may also be of interest to a wider readership given the commonality of the problems and the lessons national regimes can learn from each other in devising appropriate solutions, statutory and otherwise.

A study of the legal rules is only a small part of a rich and complex tapestry in which social, economic, legal and political factors are all immensely important for an understanding of contemporary insolvency cultures. It would be presumptuous, however, for me to claim that I have captured all the nuances and subtleties distinguishing the different consumer insolvency regimes. That would have required a book several times as long and lengthy research visits to each of the countries under review other than Canada. The subject moreover is very dynamic and each month brings news of a new legislative project, task force reports, empirical studies, and a new set of statistics. In short, this book is a comparative study in progress whose contents will continue to change so long as there are a significant number of consumer insolvents.

I owe a very large debt to the many individuals, organizations and government agencies who have assisted me in the preparation of this study and I hope I will be forgiven if I only list some of them. In Canada, Dave Stewart, senior project leader, Office of the Superintendent of Bankruptcy, and his two associates, Lynda Colley and Stephanie Cavanagh, were outstanding in responding to my requests for a seemingly endless supply of tables and other data. Prof Iain Ramsay of the Osgoode Hall Law School and Prof Saul Schwartz of Carleton University were generous in sharing with me their expertise in the insolvency

¹ I retained the copyright to the report.

area. I also benefitted greatly from the opportunity to meet with many trustees in bankruptcy, too numerous to mention by name, both in Toronto and in other parts of Canada. My neighbour Dr Eric Koch gave up several Saturday afternoons helping me translate some of the German language documents.

In Australia, my important sources of information included David Bergman, adviser, policy and legislation, Insolvency and Trustee Service Australia, and other ITSA officials, Prof Rosalind Mason of the University of Southern Queensland (who also allowed me to reproduce a table appearing in chapter 4 of this book), and Jan Pentland, chairperson, Australian Financial Counselling and Credit Reform Association, and Dr Martin Ryan of La Trobe University.

The United States was a particularly rich and vital source of information and assistance. My many contacts there included Prof Jean Braucher of the University of Arizona College of Law, Edward M Flynn, policy analyst, Executive Office for United States Trustees, Prof Karen Gross of the New York Law School, Henry Sommer, a former legal aid lawyer in Philadelphia with deep knowledge of insolvency law problems affecting the poor, and Prof William Whitford of the Wisconsin University Law School, who read an earlier version of the study and made many helpful suggestions. No listing of US sources would be complete without an acknowledgment of the great debt all researchers in this area owe to the remarkable pioneering work of Professors Terry Sullivan, Elizabeth Warren and Jay Westbrook.

My list of English acknowledgments is only slightly shorter and encompasses Registrar Stephen Baister, Royal Courts of Justice, London, Prof Iain F Fletcher of University College, London, Steve Hill, a senior insolvency practitioner in London, Anna Lee of the Lord Chancellor's Office, Peter Joyce, former Inspector General of the Insolvency Service and his successor Desmond Flynn, and Andy Woodhead and Mike Norris, two officers in the policy section of the Insolvency Service. I am grateful too to Dr Jane Phipps, project officer, Oxfordshire Money Advice Project, and Teresa Perchard, head of social policy, National Citizens Advice Bureaux, for providing me with access to some very important recent English reports.

In Scotland, Prof Michael Adler was my academic contact and George Leslie Kerr, former Accountant in Bankruptcy and Maureen McGeown, Deputy Accountant in Bankruptcy were most helpful with reports and other data. In Scandinavia and Germany, my principal contacts were Dr Johanna Niemi-Kiesilainen of the University of Helsinki and Dr Udo Reifner in Hamburg and his colleague Dr Helga Springeer. Dr Reifner and Dr Niemi-Kiesilainen also kindly allowed me to reproduce tables wholly or partially prepared by them and appearing in chapter 7 of this book.

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Jacob Ziegel
July 2003

Abbreviations

AFCCRA	Australian Financial Counselling and Credit Reform Association
AIB	Accountant in Bankruptcy (Scotland)
AITA	actual income threshold amount
BA	Commonwealth Bankruptcy Act (Australia)
Bankruptcy Court (US)	US Federal Court of first instance responsible under the US Bankruptcy Code for adjudicating disputes and for supervising and giving directions to trustees and others
BIA	Bankruptcy and Insolvency Act, RSC 1985, c B-3, as amended (Canada)
BIA III.1	Part III Division 1 of the BIA dealing with consumer proposals
BIAC	Bankruptcy and Insolvency Advisory Committee (Canada)
BITA	base income threshold amount
BLAA	Bankruptcy Legislation Amendment Act 2002 (Australia)
BRO	bankruptcy restriction order
CAIRP	Canadian Association of Insolvency and Restructuring Professionals
CIPA	Canadian Insolvency Practitioners Association (name changed in 2001 to CAIRP)
Cork Committee	English government-appointed committee chaired by Sir Kenneth Cork and responsible for the Cork Report
Cork Report	<i>Report of the Review Committee on Insolvency Law and Practice</i> (London, Cmnd 8558, June 1982)
DTI	Department of Trade and Industry (British government department responsible, inter alia, for consumer protection and insolvency legislation)
EOUST	Executive Office for United States Trustees
EU	European Union
FCC	Federal Court of Canada
FITA	Federal Insolvency Trustee Agency
GAO	General Accounting Office (United States)
IA	Insolvency Act 1986, as amended (England)
Industry Canada	Canadian government department responsible for the administration of and changes to Canada's insolvency legislation

Industry Canada Report	<i>Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act</i> (September 2002)
InSG	<i>Insolvenzgesetz</i> (German Insolvency Law 1994, as amended)
Insolvency Service	English government agency responsible for the administration and enforcement of the Insolvency Act 1986, as amended
IPA	income payment agreement
IPO	income payment order
ITSA	Insolvency and Trustee Service Australia
IVA	individual voluntary arrangement
LAO	liquidation of assets order
LICO	low income cut off standard
NBRC	National Bankruptcy Review Commission (United States)
NCAB	National Citizens' Advice Bureaux (England and Scotland)
NCBJ	National Conference of Bankruptcy Judges (United States)
NCCUSL	National Conference of Commissioners on Uniform State Laws (United States)
OPPSA	Ontario Personal Property Security Act, RSO 1990, c P 10, as amended (Canada)
OR	official receiver
OSB	Office of the Superintendent of Bankruptcy (Canadian government agency responsible for the administration of the BIA and the appointment and supervision of trustees in bankruptcy)
OT	Official Trustee (Australia)
PITF	Personal Insolvency Task Force (Canada)
R3	Association of Business Recovery Professionals (UK)
RA	reaffirmation agreement
RRSP	registered retirement savings plan
RT	registered trustee (Australia)
SLC	Scottish Law Commission
Task Force Report	Report of the Personal Insolvency Task Force (Ottawa 2002)
TDI	total disposable income

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