Report of the Personal Insolvency Committee of the Insolvency Institute of Canada

Recommendations for Reform and Further Amendments to the Bankruptcy and Insolvency Act Personal Insolvency

JANUARY, 2001

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Introduction

The Personal Insolvency Committee (P.I.C.) of the Insolvency Institute of Canada (I.I.C.) was established to identify issues that may require amendments to the Bankruptcy and Insolvency Act and its Rules as they relate to personal insolvency related matters and to be pro-active in offering solutions to the various stakeholder groups.

At the Colloquium-Symposium hosted by the P.I.C. in Toronto on October 25, 1999, the following issues were tabled and discussed:

I. Student Loans
II. Mediation
III. Mandatory Counselling
IV. Consumer Proposals
V. Exempt Assets
VI. Other Issues

The stakeholders represented at the colloquium included Financial Institutions, Credit Unions, Office of the Superintendent of Bankruptcy, Revenue Canada, the Judiciary, Academic and insolvency practitioners. A listing of participants is attached as Appendix C.

This Report presents the results of the discussions held and the proposed recommendations or changes to the B.I.A. resulting from these discussions.

The Report will highlight the various recommendations relating the individual topics discussed at the Colloquium. Background papers supporting the recommendations are attached as Appendix B.

Recommendations Relating to Student Loans

It is recommended that the ten year rule on discharge of student loan obligations be retracted and the B.I.A. be amended to introduce a five year rule, with the five years relating to when the last student loan was obtained, rather than when the person was last a student.

It is recommended that the discharge of student loan obligations parallel the expiry of the relief measures implemented in the governments budget of 1998. Relief measures should be made available to students who can demonstrate hardship. It is recommended that the Courts should have the discretion to grant discharges where appropriate due to hardship at any time.

It is recommended that the criteria and monitoring of loans granted under the Canada Student Loans Program be examined and improved with the need for better statistical data to be developed by C.S.L.P.

Recommendations Relating to Mediation

It is recommended that the Office of the Superintendent of Bankruptcy (OSB) conduct study of mediated estates to determine:

a) Success rate to date
b) Satisfaction with the process
c) Comparison of results achieved with agreements executed through the mediation process

Recommendations Relating to Mandatory Counselling

It is recommended that the OSB conduct a study to evaluate the success of counselling initiatives.

It is recommended that individuals under long term proposals receive ongoing counselling from the trustee and that the costs be an allowable disbursement under the proposal. These budgetary check-ups should be limited to two per annum.

It is recommended that an information package regarding financial planning be developed and distributed as part of the general education and life skills of young Canadians.

Recommendations Relating to Consumer Proposals

It is recommended that the debt threshold for filing a consumer proposal be increased from $75,000 to $250,000, excluding mortgages registered on the matrimonial home.

It is recommended that the Income Tax Act be amended so that a tax year end can be created for individuals who file a proposal and therefore eliminate potential Section 80 debt forgiveness issues.

Recommendations Relating to Exempt Assets

It is recommended that federal legislation be effected to allow for the following Uniform Federal Exemptions (as a minimum) under the Bankruptcy and Insolvency Act in order to obtain uniformity:

a)	Household and Personal Effects	$10,000
b)	Tools of the Trade	$ 5,000
c)	Automobile	$ 5,000

A bankrupt would be permitted to choose between the Uniform Federal Exemption under the Bankruptcy and Insolvency Act and the applicable Provincial Exemption.

Recommendations Relating to Other Issues

It is recommended that the threshold for distributions of estate surplus be raised from $50.00 to $200.00 to facilitate administration of estates.

It is recommended that dividends of less than $25.00 be remitted to the OSB provided that creditors be notified of said distribution.

It is recommended that provision be made under the BIA to allow for interim taxation and distribution on summary administration estates.

It is recommended that the OSB amend its policy to only issue comment letters for negative comments, to allow for more efficient estate administration. These letters should be issued within a reasonable time frame, failing which the Trustee should be able to proceed to taxation.

Summary

It is the recommendation of the PIC that when further BIA amendments or issues are reviewed by the government in the near future that the aforementioned recommendations for amendments be adapted.

I

PERSONAL INSOLVENCY COMMITTEE (PIC) OF THE CANADIAN INSOLVENCY INSTITUTE OF CANADA

RECOMMENDATIONS OF THE COMMITTEE

TREATMENT OF STUDENT LOANS UNDER THE BANKRUPTCY AND INSOLVENCY ACT

The Canada Student Loans Program (CSLP)

Under this legislation, loans are granted to students based on financial need, rather than on intellectual ability, credit worthiness or expected ability to repay at the completion of the education process. Effectively, loans are approved by CSLP and are then financed by the subscribing financial institutions. Until 1995, CSLP covered all loan losses incurred, reimbursing the financial institutions in full. We understand that loan losses in 1995/1996, when approximately 321,000 students utilized CSLP, were approximately 10 to 12% of the then outstanding loans.

In 1995, CSLP negotiated with the subscribing financial institutions to pay a 5% "risk premium" and then have the financial institution absorb any further losses from these loans. For example, if a student borrowed $1,000, CSLP would reimburse $50 to the financial institution. Financial institutions, it appears, accepted this new arrangement on the theory that access to these young people would lead to future credit cards, car loans, mortgages and other loans, and the profits to be earned therefrom in the long run, would offset any additional losses of the program, beyond the 5% risk premium. Subsequently, the institutions found to their horror, that loan losses escalated dramatically, up to 50% of the entire portfolio.

Bankruptcy Act Amendments – 1992 and 1997

Meanwhile, Canadian Bankruptcy Legislation had been significantly amended in 1992. The Bankruptcy and Insolvency Act (BIA), enacted after extensive consultation with stakeholders in the insolvency process, abolished the "preferred" ranking of government, leaving government debt, including debt to CSLP, as ordinary unsecured debt. Thus CSLP would share in any recovery, pro-rata with all other trade creditors. Destitute students, both before and after 1992, sought relief from their debts, including CSLP debt, by filing for bankruptcy. Once CSLP was no longer a preferred creditor, its recoveries reduced further.

In recognition of these increasing losses, there were consultations between the government and certain insolvency stakeholders (primarily the lenders) between 1995 and 1997, which led to further amendments of the BIA effective 30 September 1997. These included an amendment to Section 178 of the BIA to the effect that CSLP obligations including obligations under similar provincial programs, were non-dischargeable for 2 years following a student's completion or

termination of studies. If a student filed for bankruptcy within the 2 year period, the student loan debt was only dischargeable once the 2 year period had expired, and provided a court so ordered.

Generally, insolvency practitioners (trustees) felt that the spirit of bankruptcy legislation was being compromised by the 2 year rule, in that one of its rehabilitative purposes is to enable an honest, but unfortunate debtor to obtain relief from debts, and a fresh start. However, insolvency practitioners supported this change on the basis that a 2 year time frame was not unreasonably onerous on debtors.

Bankruptcy Act Amendments – 1998

During the 1995 to 1997 time frame, the financial institutions were becoming increasingly alarmed as a result of the significant losses they were now seeing in their loan portfolios. We assume there were frank discussions between the government and the financial institutions voicing their concerns. Accordingly, without consultation with other stakeholders in the insolvency process, the federal government announced in the budget speech of 24 February 1998, less than 5 months after the implementation of the 2 year rule, that students would not be dischargeable by bankruptcy from any student loan obligations for 10 years. No ability was granted to courts to deal with hardship cases until after the expiry of the 10 year period. This new rule became effective on 18 June 1998.

To mitigate somewhat the impact of this provision, the Minister of Finance announced, in the same budget speech, a number of worthwhile measures to help students better manage their CSLP debt. These included deductibility of interest payments, extended repayment periods up to 15 years, and interest relief, based on formula, for up to 5 years. In situations where payments exceeded 15% of income, loan principal reductions could be sought of up to $10,000, or 50% of the loan, whichever is less. However, such reductions would not be available until 5 years had elapsed. We note, however, that none of these relief measures are available to students who have allowed their loan repayments to go into default. Further, if a former student sometime later renews studies, the 10 year period starts all over again, even for the older loans. The 10 year rule relates to the time last attended an institution, not when a loan was made or was outstanding.

Financial Hardship

The Insolvency Institute of Canada made representations to the Senate Standing Committee on National Finance by letter dated 8 June 1998, arguing against the recommended change (copy attached). The concerns expressed in our letter are as valid today as they were then. We quoted on pages 3 and 4 of our letter from “An Empirical Study of Canadians Seeking Personal Bankruptcy Protection” released in January 1998 by Saul Schwartz and Leigh Anderson of the School of Public Administration, Carleton University. Their study confirmed that student loans represent a significant debt load for many students. This is especially so for many students who, despite higher levels of education, are unable to find commensurate employment and toil at temporary, low paying jobs that barely enable them to support themselves, let alone repay significant debt. On pages 4 and 5 of our submission we pointed out a number of circumstances which cause hardship for students who had failed to better their lives notwithstanding attendances at educational institutions.

Those of our members who are Trustees in Bankruptcy with practices including, or consisting primarily of the administration of personal bankruptcies and proposals, are unanimous that the 10 year rule represents misguided, oppressive legislation which has no place in modern bankruptcy legislation. It is based on the assumption, firstly, that improved education will in all cases lead to an improved ability to earn a living, and, secondly, that those who do not repay are miscreants seeking only to beat the system and find an easy way out.

Clearly, the first hypothesis is non-sensical. It is human nature that many young people, in the optimism of youth, make unwise choices. Some are simply not suited for the vocations they pursue, and others experience personal situations which prevent completion of their studies. Also, completion of studies is not an assurance of an improved ability of earning a living. While we can all focus on the proverbial PhD pumping gas, the reality is that there are many more non-graduates with menial jobs, and significant student loans. Further, there are also many older adults who attend business or trade schools to learn a trade or skill, and in the process incur student loan obligations of $10,000 or $20,000, or more. For various reasons, many of these "students" do not complete their studies, yet incur debt. Others find to their chagrin, that the income to be earned upon successful completion of their studies represents only a minimal improvement over their pre-schooling earning ability. Trustees have much anecdotal evidence indicating that many, many students have been unable to improve their earnings, notwithstanding lengthy attempts to obtain a better education.

As for the second hypothesis, Insolvency Practitioners see the truly hard-luck cases. Many debtors earn minimal income, yet are harassed virtually daily, both at home and at their place of employment, by debt collectors retained by federal and provincial student loans programs, or by the financial institutions administering the loans. We see many people who, in our opinion, will likely never be able to earn sufficient income to both live in a reasonable way and repay the debts they incurred in an unsuccessful attempt to better their lives. We consider it unconscienable that Canada should so easily offer significant sums of money to its citizens, many of whom may be well intentioned, but are not realistic in assessing their future income earning potential. The effect of this "largesse" is to create a hugely indebted sector of society which is then punitively indentured to the state for 10 years without an ability to shorten this "sentence", even in cases of significant hardship.

In summary, a problem exists with respect to the definition of "student". Not all "students" graduate from a degree-granting institution. Many only complete one or two years of a program. Other "students" attend diploma-granting institutions which sometimes charge high tuition and whose throughput is low. Some "students" at these institutions graduate, others do not. If they do graduate, the employment they obtain or have the potential to obtain is insufficient to address their student loan debt. Health and family circumstances change which can be a factor in the student's ability to repay, in full, the student loan obligation.

By analogy, convicted criminals committing major crimes in Canada often do not get "10 year sentences". Even if they are convicted, they have the right of appeal to a higher court. If still found guilty and sent to jail, they have the right of parole in certain circumstances. If they are not granted parole, there is still the "faint hope clause" available to them. A "student" with a

loan sometime in his/her academic life (which may bear no relationship to academic attendance) has no such rights for 10 years under the present law.

While the interest and principal relief announced by Finance Minister Paul Martin in the February 1998 budget was well intentioned, trustees find that these provisions have not been well communicated to student loan obligants, are not available to those who are in default, (and logic indicates that those are the ones who most need the relief) and appear to be ignored by the aggressive collection practices of agencies hired by those who administer the loans and who should be looking for ways to assist destitute students to make use of the relief measures implemented.

Our Recommendations

1. Abolish Ten Year Rule; Reduce to Five Years from Last Loan

The Insolvency Institute of Canada recommends the abolition of the 10 year rule and the reduction in time to 5 years from the date of the last student loan obtained. The focal point needs to be changed from when the person was last a student to when the last student loan was obtained so as to not unfairly treat someone who has continued their education at their own expense (or otherwise).

The 10 year rule makes no provision for relieving hardship for honest debtors who are unable to repay and is therefore contrary to the spirit of modern bankruptcy legislation.

2. Tie Dischargeability to Expiry of Relief Measures

The 5 year rule as recommended more appropriately ties the dischargeability of student loan obligations to the expiry of the relief measures implemented in the 1998 budget. Accordingly, if an individual is entitled in view of dire circumstances, to defer making any payments for up to 3 or 5 years, then dischargeability of the debt could await the termination of these periods of relief. In that event, the debtor should be required to meet with student loan administrators to document the realities of the student's financial position. Obviously, there should be no collection agencies involved during that period. At the expiry of the relief period, if the debtor's financial position has not improved so as to permit payments to be made, there should be an entitlement to obtain dischargeability of the student loan obligation through bankruptcy proceedings.

If the student loan administrators allege impropriety on the part of the debtor, or oppose a compromise offered by the debtor pursuant to the proposal provisions of the BIA, the matter can then be dealt with utilizing existing mechanisms available under the BIA. If, for instance, student loan administrators felt the debtor could afford an additional payment of $200 per month to all of the creditors, and still maintain financial integrity for him or herself and/or their family, the matter could be mediated between the trustee, the debtor and the student loan administrator, utilizing the Office of the Superintendent of Bankruptcy and, in case of failure to reach an agreement, could be adjudicated by the courts.

3. Eligibility for CSLP Relief Measures

In our view, relief measures should be available to all students who can demonstrate hardship and the need for relief. These relief measures must be made more accessible, open, and transparent during the five year period. At present, relief is only available to those who are not in default of their student loan obligations. Obviously, relief is also needed by those who are in default.

4. Courts To Have Discretion To Grant Earlier Discharge in Certain Circumstances

Insolvency practitioners believe that courts must have discretion to grant a discharge where appropriate, even before the expiry of the available relief measures. This may be appropriate where CSLP or its collection agents unduly harass a debtor before or after the bankruptcy filing, or if there are other circumstances necessitating an early discharge. However, we concur that in many cases, and especially where young adult students are involved, discharge may not be necessary until such time as the relief measures expire and the court is satisfied that the debtor has acted in good faith with regard to the loan, and will likely continue to experience financial difficulty to such an extent that the debtor will be unable to repay the loan.

5. Review Criteria of Granting Loans Under CSLP

We believe the Canada Student Loans Program is an investment in society, and this investment has paid off over the years. Canadians are recognized as having one of the highest levels of education in the world. However, as with any investment, there are going to be losses. To minimize such losses, the criteria under the CSLP need to be examined and improved.

It appears that statistical evidence as to the success of the CSLP is weak. Better statistics need to be developed as to whether or not the program achieves the desired results, and whether the criteria of making the loans are well reasoned, properly explained to applicants, and adhered to in the administration of the program.

Conclusion

Canadians who have been "students" do not go bankrupt just to get rid of debt. Usually their debts are far in excess of what their income, and their future income potential, can possibly support. With students, student loan debt is often the result of unwise choices, or overly optimistic expectations leading to unmarketable skills. These issues need to be addressed, both by students on the one hand, and by educational institutions and governments on the other, when loans are granted, rather than when they are to be repaid.

PERSONAL INSOLVENCY COMMITTEE (PIC) OF THE CANADIAN INSOLVENCY INSTITUTE OF CANADA

II

RECOMMENDATIONS OF THE COMMITTEE

MEDIATION UNDER THE BANKRUPTCY AND INSOLVENCY ACT

Mediation within bankruptcy proceedings was introduced in April 1998. There are two opportunities to provide for mediation. The first is to attempt to achieve an agreement between a bankrupt and an opposing party on the amount of surplus income to be contributed by a bankrupt to his estate while in bankruptcy. (Section 68) The second is to reach an agreement on the terms of a bankrupt's discharge before involving the Court in an adversarial proceeding. (Section 170.1)

To date the vast majority of mediations have been with respect to surplus income determination, albeit still fewer than 100 mediations coast to coast. There have been few discharge mediations.

Initial concerns were expressed about the structure of mediations, particularly the role of the Official Receiver as mediator and the potential conflicts that may arise when the Office of the Superintendent takes an interventionist or advocacy role in an estate that eventually goes to mediation, thereby putting the mediator in a position of a potential conflict of interest. Other concerns raised were the funding of mediations, presently paid from the funds of the Office of the Superintendent, and the balance of power between the parties, particularly as Revenue Canada seems to be emerging as the creditor most frequently to resort to mediation.

Recommendation

Given the paucity of statistical evidence on user satisfaction and feedback or any comparison of agreements achieved to eventual results, it is too early to tinker with the system. The Office of the Superintendent should conduct a study of mediated estates to determine user satisfaction with the process, the success rate in achieving agreements and a comparison of results eventually achieved to the agreements that had been made.

PERSONAL INSOLVENCY COMMITTEE (PIC) OF THE CANADIAN INSOLVENCY INSTITUTE OF CANADA

III

RECOMMENDATIONS OF THE COMMITTEE

COUNSELLING OF INDIVIDUAL DEBTORS UNDER THE BANKRUPTCY AND INSOLVENCY ACT

The concept of counselling in insolvency matters came about as a result of the issuance of Policy Statement 1R2 in respect of individuals who file consumer proposals or individuals who became bankrupt after December 31, 1994.

In relation to this policy initiative it was felt appropriate by the committee to raise several questions in respect of this initiative.

Should there be mandatory counselling in all individual insolvency situations

As a result of Policy Statement 1R2, it has been mandatory for two counselling sessions for all individual bankrupts and individuals who filed consumer proposals. The counselling initiative was enacted to assist and educate debtors on good financial management (Session 1) and to identify non-budgetary causes of insolvency and where appropriate make referrals to the appropriate agencies (Session 2).

The question arises as to whether or not counselling should be mandatory for all individual debtors. It has been the experience of many trustees that counselling is simply not necessary for many individuals, and further, many individuals will not benefit from counselling in any event.

As noted above, the counselling initiative has been in force for five years and we are not aware of any studies or data that has been gathered to assess as to whether or not the counselling initiative has been successful (Certainly benchmarks with respect to what is success will be required).

Recommendation

It is the recommendation of the PIC that an in depth study be conducted or continued with respect to the evaluation of the success of the counselling initiatives.

Individuals filing Division I Proposals

When the counselling program commenced, individuals filing Division I Proposals were excluded from the mandatory counselling provisions.

It is been the experience of trustees that in many cases, individuals filing Division I Proposals were more in need of counselling than the low wage earner Division II Proposal debtors. It has

been observed that Division I Proposals were generally professionals, self employed, high income earners that for the first time were confronting the fact that their life style was a result of overspending and that they had not come to terms with budgeting.

Recommendation

Recommendation of PIC that individuals filing Division I Proposals should also be included in mandatory counselling.

As noted elsewhere in the recommendations in this report, should the limit ($75,000.00) for individuals filing Division II Proposals be increased to a higher number, we continue to recommend that individuals filing Division I Proposals counselling should be mandatory

The Committee further reviewed other issues directly related to the counselling initiative.

It is recommended by the Committee members that should individual debtors, particularly in long term proposals, request additional or ongoing counselling (long term financial counselling or "Budgetary Checkups" that these sessions perhaps limited to two per annum) should be allowed as a chargeable disbursement under the proposal.

The Committee further recommends that as counselling is really education of individual debtors, and that the problem is essentially one of lack of education and the Committee strongly recommends the incorporation of financial planning as part of the General Education and Life Skills Programs for young Canadians. It was generally felt early education is the best tool to assist individuals with proper financial management

PERSONAL INSOLVENCY COMMITTEE (PIC) OF THE CANADIAN INSOLVENCY INSTITUTE OF CANADA

IV

RECOMMENDATIONS OF THE COMMITTEE

CONSUMER PROPOSALS UNDER THE BANKRUPTCY AND INSOLVENCY ACT

Background

Prior to November 30, 1992, if an individual debtor wished to formally settle with his/her creditors, only Division I of the Bankruptcy and Insolvency Act was available as a modus operandi. Division I proposals more properly apply to commercial settlements and reorganizations or to complicated personal financial circumstances. There was no simple medium for the individual debtor who had uncomplicated financial affairs to settle with his or her creditors.

With the amendments to the Bankruptcy and Insolvency Act of November 30, 1992, Division II proposals under Section 66 of the BIA were proclaimed into effect. The characteristics of the Division II proposals as set out in the 1992 amendments may be primarily summarized as follows:

- Consumer debtor must be an individual, natural person who was not a bankrupt.
- Stay of Proceedings applied to all creditors, except secured creditors.
- Secured creditors could not be bound in a class under a consumer proposal.
- A $75,000 ceiling applied for debts to be compromised, excluding a mortgage on a matrimonial home.
- No meeting of creditors unless required by creditors with claims of 25% in value of the proven claims requested or the meeting was requested by the Official Receiver.
- Deemed acceptance by creditors and deemed acceptance by the Court in specific circumstances.
- Streamlined administrative procedures.
- Specific fee tariffs for consumer proposals set out in the Rules to the BIA.

The result of these streamlined consumer proposal procedures was a substantial increase in proposals made by individuals over the next five year period. Generally, on average, in Canada there are approximately 10 consumer proposals for every 100 personal bankruptcies.

In the next round of amendments to the BIA, which occurred effective September 30, 1997 and April 30, 1998, there were some minor changes to the Division II consumer proposal sections. Primarily, these changes dealt with administration issues as opposed to matters of substance. For example, some of the 1997/98 amendments dealt with:

- Natural persons who were bankrupts could file consumer proposals.

- Joint consumer proposals were made possible.
- The frequency of distribution in a consumer proposal could be set out in the proposal.
- Various notification periods were extended form 30 days to 45 days.
- Various other minor administrative amendments.
- Consumer proposal tariff amended and addressed in Rule 129 of the BIA.

Discussion

It is clear that, generally, the consumer proposal provisions in Division II of the BIA work very well except for some areas of concern.

Two major areas which the PIC of the Institute wishes to recommend for amendments and which are discussed under the Recommendations section are:

- Eligibility to file a consumer proposal – "the ceiling".
- Income tax issues.

There are a number of other areas which have been discussed and considered by the PIC but which either cannot or should not be ingrained in the BIA in order to be effective in practice. Certain of these considerations for discussion include the following.

The issue of credit ratings for an individual who files a consumer proposal should be more attractive to the individual than if he or she filed an assignment in bankruptcy. Clearly, the present ratings of accounts do not particularly favor consumer proposals and do not differentiate enough those individuals who make consumer proposals over personal bankruptcies. The creditors and the credit rating agencies must be encouraged to review their procedures and processes so as to upgrade ratings for persons who file consumer proposals.

The PIC discussed whether there should be a minimum floor for the filing of consumer proposal, such as, a dividend of 20 percent of the proved claim. This type of analogy could then be a determining factor in assessing whether an individual could file a viable proposal when the question is asked in the Section 170 Report for a personal bankruptcy. After some discussion, we felt is best left to the creditors as to whether a proposal was viable in terms of the proposal contract that they consider at the time of voting.

The PIC considered whether it would be appropriate to amend section in the BIA so that secured creditors could be bound by a consumer proposal. After some discussion, and given the nature of the secured debts in a consumer proposal, that is, mostly secured loans on vehicles or perhaps mortgages on matrimonial homes, it was felt that arrangements with these types of secured creditors may be best made outside a formal process.

The PIC discussed whether consumer proposals should conclude as a deemed assignment in bankruptcy if the creditors or the court did not approve the proposal or if the proposal was annulled at some later date when in default. The PIC, in the end, felt that the process should be as simplified as was intended and that there should be no deemed assignment in bankruptcy at the earlier stages of approval, that is, the creditor and court stage. Further, we felt that the

annulment stage should be left as it presently is and that the creditors, or indeed the debtor, can determine whether a bankruptcy action needs to occur and, therefore, there would be an initiation of such action required by a party.

Recommendations

Number 1

The major recommendation of the PIC is that eligibility or the terms of the amount of debt that is considered as to whether one can file a consumer proposal should be increased from the present amount of $75,000 to a new ceiling of $250,000, excluding the mortgage on the matrimonial home.

It is our belief that the increase in this ceiling will sweep in most of those individuals whose affairs are not particularly complicated but simply have debts in excess of $75,000 and, under the present system, must use Division I of the BIA to settle their debts. Another factor that might be considered is where a substantial portion of the debt making up the ceiling (say, 50 percent) must be personal debt as opposed to business debt. One might also consider in the eligibility process where one's income was substantially derived from wages from employment where tax was deducted at source or other similar period payments such as pensions and other government payments or where income was derived as a share of professional income or self-employment income where quarterly installments were required.

There is some support for this large increase in the eligibility ceiling as it is the committee's understanding that the amount suggested would be consistent with the ceiling proposed in the United States of America.

It is important to note that debts can easily exceed the present $75,000 level when one is trying to assess and quantify values for contingent claims, unliquidated claims, lease obligations, and joint debts with other parties. Some of these types of obligations may never, in fact, become real obligations but yet their quantification in a consumer proposal may cause the amount to be considered to be in excess of the present $75,000.

Number 2

The second area which the PIC recommends for amendment to the extent possible is the treatment of income and income tax under the Income Tax Act.

It is the PIC's recommendation that the Income Tax Act be amended so that consumer debtors have the same benefits as they would have in personal bankruptcy in that pre-proposal and post-proposal tax years are specified so that Revenue Canada, Taxation properly assess amounts owing and refunded as presently does not occur in the present system. In short, legislation should create a tax year in a consumer proposal like a personal bankruptcy which would lead to the ability to better fund consumer proposals out of the tax deferred assets such as RRSP's.

PERSONAL INSOLVENCY COMMITTEE (PIC) **V**
OF THE CANADIAN INSOLVENCY INSTITUTE OF CANADA

RECOMMENDATIONS OF THE COMMITTEE

PERSONAL EXEMPTIONS UNDER THE BANKRUPTCY AND INSOLVENCY ACT

Existing Provincial Exemptions

The *Bankruptcy & Insolvency Act* (BIA) provides for exemptions of a Bankrupt with regard to those as prescribed under the various Provincial Legislations. The lowest level of exemptions exists in Ontario, with personal effects exempt up to a value of $1,000, household effects exempt up to a value of $2,000 and tools of the trade exempt up to a value of $2,000. (There are other exemptions for farmers which are so rarely used that they will not be dealt with in this paper). The highest exemption exists in the western provinces providing for a homestead exemption in the amount of $40,000; while, in Quebec, there is a blanket exemption of $10,000 which does not specify the type of asset being exempted.

The various provincial exemptions have evolved based on differing philosophies within the provinces. For example, in Alberta in its earlier years of economic development, farming was the primary business from which the homestead exemption would naturally evolve. In Ontario there has been a resistance to such an exemption. As reported in the recent Ontario Law Reform Commission Report, it was felt that this type of exemption would be discriminatory against renters. There is also resistance to the blanket $10,000 exemption as exists in Quebec. The concern would be that by not categorizing the exemption, a Bankrupt would have assets exempt that may be "frivolous" or at least, not in the spirit of those types of assets that one might maintain to provide for a "minimum of economic security".

Justification for Exemptions

In a background paper prepared by Andrew C. Dekany, LL.B., for the Institute in October, 1999, he refers to the fundamental concept in the United States of a "fresh start" to provide a minimum of economic security to a debtor and the debtors family, which is considered as more important than the interest of creditors. His paper also refers to the National Bankruptcy Review Commission on property exemptions, wherein it states "Exemptions preserve citizens' ability and incentive to earn and pay taxes." Further, that " Exemptions also find justification as a substitution for social welfare and for protecting family values by preserving certain assets for not only the individual Bankrupt but his or her family as well.

Finding a Balance

Generally, Bankruptcy Legislation must be balanced as between a system that weighs the rights of the creditors against the rights of a debtor to achieve financial rehabilitation. The Insolvency

Legislation should not be so "easy" as to encourage a long line up of those wanting to declare bankruptcy. However, neither should it be so difficult, nor offer so little opportunity for rehabilitation, that those who legitimately need it's protection cannot obtain a reasonable level of "economic security" in obtaining a fresh start. Our Courts, as a matter of social policy, have tipped the balance on occasion towards the debtor by stating that "when weighing the rights of the creditor against the rights of the debtor to achieve financial rehabilitation, the debtor's rights shall rank supreme".

In considering legislative amendments to the *Bankruptcy & Insolvency Act* for uniform exemptions, the legislation must not restrict the rights of creditors to the extent that it would affect negatively commerce and the availability of funds advanced by financial institutions or otherwise. On the other hand, the concepts of a "fresh start" and providing a "minimum of economic security" for the betterment of society in general, is a long held concept in Canada and in other modern societies.

Minimum Economic Security

In accepting the precepts that a fresh start also requires exemptions that provide for a minimum of economic security, then the question is, what is the minimum?

Most would concede that the exemptions in Ontario are far too minimal and that the Provincial Executions Act in which they relate to, is far outdated.

The Personal Insolvency Committee of the IIC had a general consensus that the amounts should be increased and that the categorization of the types of assets exempt should be specific (unlike the Quebec type of exemption). Further, that no matter where a person lives in Canada, that in Bankruptcy there should be a "Uniform Federal Exemption" under the BIA that would allow a Bankrupt to choose either the Federal Exemption or the Provincial Exemption.

Recommended Federal Exemptions

The following are the minimum Federal Exemptions recommended under the BIA:

- Household and Personal Effects $10,000
- Tools of the Trade $ 5,000
- One Automobile $ 5,000

The first two categories of Household and Personal Effects along with Tools of the Trade are simply an increase in the existing exemption amount. The addition of one automobile up to a value of $5,000, has been introduced in recognition of the fact that in the vast majority of today's cases, an automobile has become a necessity. If for no other reason than the need to get from ones residence to ones place of work. This automobile exemption is also intended for the unemployed as it is recognized that to not have an automobile would substantially hinder opportunities to gain employment.

Anti-Abuse Measures

The Ontario Executions Act provides that should an exempt asset not be paid for then it loses its exempt status. This would appear to be a very practical anti-abuse measure and consideration should be made to include a similar provision under any "Uniform Federal Exemptions" under the BIA.

Summary

The recommendations for these "Uniform Federal Exemptions" under the BIA are seen as the minimum requirements to achieve to some degree the purpose of economic security, for a debtor coming out of the system with a fresh start. These exemptions are needed, (in the opinion of the Committee), as the minimum required to help protect the family and provide for the maintenance of employment so that a person may contribute to society in a more beneficial way.

PERSONAL INSOLVENCY COMMITTEE (PIC) **VI**
OF THE CANADIAN INSOLVENCY INSTITUTE OF CANADA

RECOMMENDATIONS OF THE COMMITTEE

OTHER ISSUES CONSIDERED
UNDER THE BANKRUPTCY AND INSOLVENCY ACT

Currently, the threshold at which the estate surplus after payment of the Trustee's fees is paid to creditors is $50.00. In many estates there is only a nominal amount beyond this amount. Both the creditor representatives present and the trustees felt that this threshold should be raised to a higher number, perhaps $200 to simplify the administration from both sides. Quite often the cost of receiving a small cheque exceeds the actual amount of any benefit. So long as the creditors received a notice so that they could close their file on the individual debtor, no additional benefit was perceived to result from receiving a small cheque. These funds should be available to defray the cost of operations of the OSB.

Small Dividend Cheques

There was a general consensus that preparing and processing dividend cheques for less that $25.00 was a negative for both the Trustee and the creditors. It was felt that economies for both could be realized by simply having such small amounts remitted to the OSB (which would benefit the funding of the OSB), provided that creditors received a notice of the conclusion of the estate in order that they could close their files.

Secured Creditors in Consumer Proposals

Under the existing regime, to the extent that creditors have security over assets of the debtor, they are dealt with separately from unsecured creditors. The effect of this is that some creditors wait until unsecured debt is reduced by way of a proposal and once this has been done, use this opportunity to negotiate a much better deal (for themselves) which often works to the detriment of the proposal.

This is most prevalent where debtors have obtained consolidation loans at high interest rates in the period preceding bankruptcy from finance companies and pledged their household furnishings and effects as collateral. Some jurisdictions have a requirement that where a secured creditor plans on seizing an asset that would otherwise be exempt, the creditor must first pay the amount of the exemption to the debtor prior to seizing the security. Accordingly, it is only the residual after the exemption that is available as security. In other jurisdictions, the creditor must elect whether they wish to take their security or participate in the proposal. While the dollars involved with respect to these issues are not large, the impact on the administration of what are otherwise supposed to be "fast track proposals" and the debtors themselves can be substantial.

Interim Taxation, Summary Administration

In many estates there is often a considerable time period that passes before all assets can be realized. In these cases there should be provision for the Trustee to have interim taxation and distribution of the funds on hand so that creditors may receive funds as assets are realized during the course of the administration.

OSB Comment Letters

There was a general consensus that comment letter should be reserved for negative comments only. The Trustee should be able to assume once a specified period of time had lapsed that the OSB had no comments to make. This would simplify matters from the OSB's standpoint and allow the Trustee to complete the administration of the estate on a more timely basis.

PERSONAL INSOLVENCY COMMITTEE (PIC)
OF THE CANADIAN INSOLVENCY INSTITUTE OF CANADA

List of attendees at the Colloquium held at the Ontario Club on October 25, 1999.

Attendees	**Representing**
David Stewart	Superintendent of Bankruptcy
Ken Page	Insolvency Lawyer
Jacob Ziegel	University of Toronto Law School
Dianne Winters	Department of Justice
Master Murray Ferron	Registrar in Bankruptcy
Jeff Cauchi	Niagara Credit Union
Tom Lumsden	Royal Bank of Canada
Bob Klotz	Insolvency Lawyer
Will Kirchner	Trans Canada Credit
Frank Kisluk	PIC – Co-organizer of Colloquium
Ted White	PIC – Co-organizer of Colloquium
Uwe Manski	PIC
Chuck Zizzo	PIC
Jim Cringan	PIC
George Lomas	PIC
Rea Godbold	PIC
Paul Goodman	PIC – Chairman
Trent Craddock	Industry Canada
Saul Schwartz	Carleton University
Iain Ramsay	Osgoode Hall Law School
Lindsay Frank	Revenue Canada
Bill Foster	PIC
Andrew Dekany	Insolvency Lawyer
David Baird	IIC
Josee De Menezes	Industry Canada