

# INSOLVENCY COUNSELLING— INNOVATION BASED ON THE FOURTEENTH CENTURY<sup>©</sup>

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In the fourteenth century, poverty (previously viewed as a virtue) was redefined by both church and state as illegal and immoral. This view persists in Canada today. The 1992 amendments to the *Bankruptcy and Insolvency Act (BIA)* included a provision that makes two counselling sessions mandatory for all persons going through bankruptcy. The author reviews *The BIA Insolvency Counsellor's Qualification Course* that was developed in support of this amendment, and concludes that it is not up to the task. The mandatory counselling presumes a bankrupt person's irresponsibility, addiction, and need for referral to community service agencies. However, these presumptions are based on inadequate data and unsupported assumptions about the lives and characters of bankrupt persons. They are not derived from an unbiased, accurate assessment of a bankrupt person's learning needs. The author suggests that, rather than being innovative, Canada's approach to bankruptcy perpetuates a fourteenth century stereotype of people in financial difficulty.

Au quatorzième siècle, la pauvreté (jadis vue comme une vertu) fut redéfinie par l'Église et par l'état comme étant illégale et immorale. Cette vision persiste encore au Canada aujourd'hui. Les amendements de 1992 à la *Loi sur la faillite et l'insolvabilité (BIA)* contiennent une clause qui oblige tous les gens qui sont en train de faire faillite d'assister à deux sessions de consultations. L'auteur de cet article examine «*The BIA Insolvency Counsellor's Qualification Course*» qui a été développé pour soutenir cet amendement, et elle en conclut que ce n'est pas à la hauteur de la tâche. Les conseils obligatoires présument que le fait qu'une personne fait faillite implique l'irresponsabilité et la dépendance, et que c'est nécessaire d'impliquer les agences de service communautaire. Pourtant, ces présomptions sont fondées sur des données inadéquates et sur des suppositions sans fondement quant à la vie et la personnalité des gens qui font faillite. Elles ne n'émanent pas d'une estimation impartiale et exacte de ce qu'une personne qui fait faillite devait savoir. L'auteur suggère que, plutôt que d'être innovateur, l'approche du Canada concernant la faillite ne fait que perpétuer un stéréotype du quatorzième siècle des gens qui ont des difficultés financières.

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\* Ph.D. Carol Ann Curnock recently completed a doctoral thesis based on a new source of data about bankruptcy—the voices of the bankrupt persons themselves. The model developed from this data suggests that the need to declare bankruptcy comes from a much broader range of circumstances than those presumed by current bankruptcy legislation.

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## I. INTRODUCTION

My perspective on mandatory insolvency counselling comes from nearly twenty years experience as a professional designer of program that direct troubled people to appropriate counselling. As an Employee Assistance Programs (EAP) consultant for the Addiction Research Foundation (ARF), I have helped some of Canada's largest and best-known companies implement assessment, referral, and counselling programs. Included in that client list are some of our largest financial institutions. I have also taught the principles of EAP counselling at the University of Toronto Schools of Medicine and Social Work, and the School for Addiction Studies. After a decade at ARF, I was invited by one of the major banks to establish both its occupational health department and the most all-encompassing EAP in Canada.

It was while accompanying a counselling client to a trustee in bankruptcy's office that I first became acquainted with the world of personal bankruptcy. During that first interview, Cyril Sapiro<sup>1</sup> showed me his surveys. Then he told me about mandatory insolvency counselling. I was so intrigued by the former, and so dismayed by the latter, that I decided to make the lived experience of personal bankruptcy the topic of my Ph.D. thesis.

## II. A UNIQUELY CANADIAN MODEL

In 1992, Canada became the first country in the world to officially deem personal bankruptcy both a failure to learn,<sup>2</sup> and the probable result of a psychosocial illness, by legislating mandatory

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<sup>1</sup> Cyril Sapiro, MBA, Chicago, CIPA, is a licensed trustee and sole practitioner.

<sup>2</sup> See S.M. Scott, B. Spencer & A.M. Thomas, eds., *Learning for Life: Canadian Readings in Adult Education*(Toronto: Thompson Educational, 1998).

counselling as a prerequisite for discharge from bankruptcy.<sup>3</sup> While Canada is not the only country in the world to incorporate counselling into the bankruptcy process,<sup>4</sup> it is, to date, the only country where such counselling reflects the concept of the debtor as a deviant person in need of remediation rather than information. The authors of the textbook, commissioned by the Bankruptcy Branch of Industry Canada, to prepare individuals to deliver this counselling begin their work by asserting: "Canada's innovative approach to insolvency with its focus on remedial counselling makes it a world leader."<sup>5</sup> Unique to this model is the power given to those performing insolvency counselling. Consistent with the Superintendent of Bankruptcy's counselling directive,<sup>6</sup> anyone who takes the course, reads a fifty-page chapter on counselling, and passes a true/false test, can assess and refer persons in bankruptcy to community resources for such problems as alcoholism, family dysfunction, and even mental illness.

The logic of applying individual, educational, and medical solutions to an escalating, nationwide, financial situation lies in both the source, and interpretation of, our information about persons who have declared bankruptcy in Canada. Teresa Sullivan, Elizabeth Warren, and Jay Westbrook have referred to the lack of knowledge upon which American bankruptcy law is based as "a vacuum of fact."<sup>7</sup> This is so even though the Americans have many published academic studies on personal bankruptcy in the United States.<sup>8</sup> In Canada, until very recently, our primary source of information was the federal

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<sup>3</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; and Office of the Superintendent of Bankruptcy, *Directive No. IR2: 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. IR2*].

<sup>4</sup> See N. Huls, *Debt Counselling Institutions in Europe in Overindebtedness of Consumers in E.C. Member States: Facts and Search for Solutions* (Bruxelles: Story Scientia, 1993).

<sup>5</sup> F. Forbes Anderson *et al.*, *The BIA Insolvency Counsellor's Qualification Course 1996/97* (Ottawa: Industry Canada, 1996) at v [hereinafter *Insolvency Counsellor's Qualification Course*].

<sup>6</sup> *Supra* note 3.

<sup>7</sup> T.A. Sullivan, E. Warren & J.L. Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (New York: Oxford University Press, 1989) at 7.

<sup>8</sup> See, for example, R.O. Herrmann, "Families in Bankruptcy—A Survey of Recent Studies" (1966) 28 *J. of Marr. & Fam.* 324; H. Jacob, *Debtors in Court: The Consumption of Government Services* (Chicago: Rand McNally, 1969); D.T. Stanley & M. Girth, with V. Countryman *et al.*, *Bankruptcy: Problem, Process, Reform* (Washington: Brookings Institution, 1971); P. Shuchman & T.L. Rhorer, "Personal Bankruptcy Data For Opt-Out Hearings and Other Purposes" (1982) 56 *Am. Bankr. L.J.* 1; and Sullivan, Warren & Westbrook, *supra* note 7.

government—from the Statement of Affairs filed during bankruptcy. Information also has been generated through reinterpretation or extrapolation from the “section 161 examinations” conducted by the Official Receiver as part of the bankruptcy process.<sup>9</sup>

In a 1996 submission to the Industry Committee of the House of Commons on Bill C-5,<sup>10</sup> Jacob Ziegel and others referred to a 1982 study by Wayne Brighton and Justin Connidis as “the most significant study done in Canada to date.”<sup>11</sup> Brighton and Connidis gathered their information from a large sample of 1977 bankruptcy files. The quantitative data they processed led them to conclude that “[c]onsumer bankrupts do not fit the stereotype of high rollers walking away from their debts.”<sup>12</sup> They also found that “the amount of indebtedness is not extremely high in most cases, particularly in comparison to other families in similar stages of the family life cycle,” but the value of assets is “typically very low.”<sup>13</sup> With even \$300–\$400 to apply to their debts, these people could remain solvent.<sup>14</sup>

As part of their study, Brighton and Connidis also processed data containing the responses to questions put to the bankrupt by the Official Receiver,<sup>15</sup> even though the authors included this caveat about the reliability of their “qualitative” data: “Bankruptcy Branch officials have noted that the information must be read with caution since the answers are clearly related to how it was interpreted by the consumer bankrupt, the interviewing skills of the various Official Receivers and the amount of interpretation in recording the information.”<sup>16</sup> They also noted that in one-half of the cases two reasons were given for financial difficulties,

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<sup>9</sup> Under section 161 of the *BIA*, *supra* note 3, the Official Receiver is given the power to examine the person declaring bankruptcy, under oath, on any matters related to the bankruptcy before a discharge is issued.

<sup>10</sup> See *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act* 2d Sess., 35th Parl., 1997 (assented to 25 April 1997, S.C. 1997, c. 12).

<sup>11</sup> J.S. Ziegel *et al.*, “Submissions on Bill C-5, 1996: A Bill to Amend the Bankruptcy and Insolvency Act” (August 1996) [unpublished, archived at Faculty of Law, University of Toronto], citing J.W. Brighton & J.A. Connidis, *Consumer Bankrupts in Canada* (Ottawa: Consumer and Corporate Affairs Canada, 1982).

<sup>12</sup> Brighton & Connidis, *supra* note 11 at 76.

<sup>13</sup> *Ibid.* at 43

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.* at 10.

<sup>16</sup> *Ibid.* at 32.

and that in 10 per cent of the cases three were listed.<sup>17</sup> Despite this, they combined all this data into five mutually exclusive categories that often conflicted with their own statistics. For example, if 40 per cent of the group was unemployed when the debtors filed, and 4.6 per cent only had part-time employment, and 620 of the participants had been in their present jobs for less than one year,<sup>18</sup> is it reasonable to conclude that unemployment was a factor in only 15 per cent of the bankruptcies?

Brighton and Connidis's interpretation of the Official Receiver examination data led them to the following conclusion:

In most cases (at least three-quarters or more of the total) bankruptcy was more or less directly related to consumer debt ... about half (49%) of all reasons listed were directly related to mismanagement or excessive consumer credit.<sup>19</sup>

...

There is no doubt that a majority of consumer bankrupts are culpable for permitting their financial situation to deteriorate into insolvency. This culpability is related to a lack of foresight and of money management ability, and to other deficiencies in life skills and resources which are associated with but not limited to the lower social classes.<sup>20</sup>

“Culpability” is an interesting word; it implies not only sole and personal responsibility, but also choice and will. No extracts from the examination are included in the research report, so it is impossible to know how much reinterpretation was involved. It is probably not surprising that the bankrupt persons were deemed “culpable” by the Official Receivers since, after all, making such findings was part of their mandate: “Official Receivers are qualified in accounting, law, business, finance ... and are mandated to detect and prosecute criminal influence in commercial insolvency.”<sup>21</sup> It is difficult to imagine such a perspective not influencing the way data is interpreted.

Because Brighton and Connidis assumed that bankrupt persons knew very little about credit and that financial mismanagement was the root cause of their need to resort to bankruptcy, they concluded that the counselling of bankrupt persons was essential.<sup>22</sup> The authors' conception of counselling, though, was information on budgeting, credit, and general financial management, not remedial counselling.

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<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* at 28, 30.

<sup>19</sup> *Ibid.* at 34.

<sup>20</sup> *Ibid.* at 77.

<sup>21</sup> Office of the Superintendent of Bankruptcy, Confidential memo (undated) [on file with author].

<sup>22</sup> See Brighton & Connidis, *supra* note 11 at 76-77.

### A. *Bankruptcy Branch Research*

The justification for giving insolvency counsellors the power both to give financial advice and to refer bankrupt persons for so-called psychosocial problems is found in a 1988 study by members of the Bankruptcy Branch. Only some of the conclusions of this study have been published,<sup>23</sup> but without reference to research hypotheses, numbers of participants, methods of investigation and analysis, or actual data. Only after I saw this work reproduced in the *Insolvency Counsellor's Qualification Course* textbook, with the information that it was based on interviews with “nearly 1000” people,<sup>24</sup> did I realize it was being designated as researched “fact” and not just personal opinion. It took me months, and the help of the Bankruptcy Branch and the Canadian Insolvency Practitioners Association (CIPA), to track down any information about this study.

### B. *Hypothesis of the Study*

Clues to the hypothesis animating the study appeared in a four-page memo citing a proposed project to take place from “April to December of 1988.” This document expresses the following belief: “[A] major cause of first-time bankruptcy for individuals can be directly linked to a compulsive behaviour in a family member (gambling, alcohol, drugs etc.). It is my further belief that repeat bankruptcies are primarily attributable to the same kinds of compulsive behaviour in a family member.”<sup>25</sup>

This opinion was based on the premise that personal bankruptcy is entirely a personal phenomenon, the result of compulsivity, a trait inherited from one’s family. The role of the economy, the government, the creditors, the professionals one turned to for advice, or any other factor external to the bankrupt person, were not considered in the investigation. It is hardly surprising then that the roots of bankruptcy were found to be entirely personal to the individual debtor.

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<sup>23</sup> See W. Clare, “Repeat Bankruptcies of Consumer Debtors” (1990) 10 *Insolv. Bull.* 201.

<sup>24</sup> *Insolvency Counsellor's Qualification Course* *supra* note 5 at 116.

<sup>25</sup> Office of the Superintendent of Bankruptcy, Confidential memo (undated) [on file with author].

### C. Methodology of the Study

The Bankruptcy Cycle claims to represent the study's findings in chart form, and is included in the *Insolvency Counsellor's Qualification Course* textbook with comments to that effect.<sup>26</sup> Actually, a memo outlining how this research was conducted indicates that the "findings" antedated the data collection:

The case studies are based on 45 minute interviews of the bankrupt. *Each bankrupt was given a copy of the model "The Bankruptcy Cycle" and asked to study it for about 10 minutes prior to the interview.* The interview itself essentially followed the "model" with the insertion of relevant questions as we went along.<sup>27</sup>

While the data collected in the study have not been published, a memo entitled "Study in Respect of the Causes of Personal Bankruptcy in Canada" was given to me. The first page contains the following information: "For our final report we will have completed more than 200 profiles on which our analysis and recommendations will be based."<sup>28</sup> This is considerably fewer than the "nearly 1000" interviews described in the counselling textbook.

### D. Problems With the Methodology

Research conducted in this way forces participants to place themselves in the model, and thus, to accept it as legitimate. However, there are serious flaws within the model itself, such as the underlying assumption of the preeminence of parental patterns on learning within the family, a theory which has been refuted elsewhere.<sup>29</sup> Furthermore, the researchers offer no definition of their own terms of reference. Consider the first benchmark in this model, "Inadequate family role model": What does this mean? Were their parents convicted felons? Did they go bankrupt themselves?

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<sup>26</sup> See *Insolvency Counsellor's Qualification Course* supra note 5 at 117. See also Figure 1 in the Appendix, below, for a reproduction of the Bankruptcy Cycle.

<sup>27</sup> Office of the Superintendent of Bankruptcy, Confidential memo (undated) [emphasis added, on file with author].

<sup>28</sup> *Ibid.*

<sup>29</sup> See, for example, J. Kaufman & E. Zigler, "Do Abused Children Become Abusive Parents?" (1987) 57 *Am. J. Orthopsychiatry* 186; and S. Lamb, *The Trouble With Blame: Victims, Perpetrators, and Responsibility* (Cambridge, Mass.: Harvard University Press, 1996).

The researchers did not take the precaution, axiomatic in social science research, of testing their findings against macro data. They accorded their assumptions particular significance for the researched group without comparison to the rest of society. This is a common mistake. In her study of bankrupt persons in Manitoba, Tahira Hira expressed surprise that the people she interviewed did not know the interest rate on their revolving charge accounts, and based her assessment of their need for counselling on that fact.<sup>30</sup> While no study of general public knowledge about interest rates existed in 1978, a 1997 study of all Canadians, not just the young, poor, uneducated ones that Hira studied, found that 58 per cent of credit card holders did not know the interest rate on the card they used most often.<sup>31</sup>

The second precursor to bankruptcy, “Problems with schooling,” is similarly undefined in the study. Did the debtors not get straight As? Did they have disciplinary problems? Did they leave without graduating? With respect to this last point, even though adults of all ages were questioned, no account was taken of the fact that the “normal” school-leaving age in Canada has changed considerably over the past sixty years. A person in his or her 60s who left school at age fourteen in the 1930s may have been a normal high school graduate for his or her age cohort, but would be termed a “dropout” in the 1980s. As to the classification of “Early marriage or living relationship,” again no definition is given of “early.” The same objection applies to this analysis as to the comment about schooling. The age at which the “average” Canadian marries has changed over the years. In this instance, too, no marriage data about non-bankrupt persons was collected. With respect to “living relationships,” the incidence of common-law relationships has been a growing phenomenon in Canadian society, and has increased threefold since 1982.<sup>32</sup>

Anyone perusing this model must question its assumptions in terms of today’s reality and ask what differentiates a “psychosocial problem” from a norm. In terms of divorces and common-law relationships, does this chart not actually record observer misinterpretation and mis-labelling of rapidly changing social norms and practices? This attempt to catalogue distinct characteristics that lead to

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<sup>30</sup> See T.K. Hira, “An Evaluation of the Small Debtors Program in Manitoba” (1980-81) 11 *Man. L.J.* 101.

<sup>31</sup> See “Making the Grade—American Express Survey Reveals Just How Much Canadians Don’t Know About Credit” *Canada NewsWire* (20 February 1997), online: NEXIS (News, WIRES).

<sup>32</sup> See E. Carey, “Unwedded Bliss! Living Together Now the Norm” *The Toronto Star* (26 March 1997) A1, online: NEXIS (News, TSTAR).

bankruptcy actually undermines the contention that bankrupt persons are a differentiated group.

The financial information on the chart also repudiates its premise. The percentage of people paying cash in this country for houses, cars, and furniture is exceedingly small, and has decreased steadily since the Second World War.<sup>33</sup> Having little savings, experiencing problems making ends meet, and even borrowing from family and friends: these findings are consistent with what almost every other researcher into this topic has found in the last forty years. Furthermore, poverty, whether long standing or the result of income interruption, plays a significant role in debt default and bankruptcy. This is true not only in Canada,<sup>34</sup> but equally in the United States and Australia.<sup>35</sup> Very real poverty was discovered, but totally ignored by the designers of the chart.

The arrow shape of the “Bankruptcy Cycle” implies that all the life events, problems, and feelings occur unremittingly and sequentially. That is, personal characteristics within the life of the bankrupt person will lead to financial problems, without the intervention of any external event. Employment and health problems are not included until near the end of the series, as if somehow insolvency led to unemployment and not the other way around. Assumptions about spending are mixed in with the collection process, and these are intermingled with gambling, drug abuse, and medical problems, as if connections between all—or even any—of these events were established facts. The only aspect of this chart that, in my view, is accurately denoted as inexorable is that debt problems lead to the collection process, which leads to the need to resort to bankruptcy.

There are other problems about this unpublished study. It is unclear how many insolvent debtors were interviewed, how many conformed to the so-called psychosocial characteristics, what percentage

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<sup>33</sup> See Canada, *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Ottawa: Information Canada, 1970) (Chair: R. Tassé); and J.S. Ziegel, “Canadian Perspectives on the Challenges of Consumer Bankruptcies” (1997) 20 *J. Consumer Pol’y* 199.

<sup>34</sup> See M. Trebilcock & A. Shulman, “The Pathology of Credit Breakdown” (1976) 22 *McGill L.J.* 415; and T.C. Puckett, “Credit Casualties: A Study of Wage Garnishment in Ontario” (1978) 28 *U.T.L.J.* 95.

<sup>35</sup> See Herrmann, *supra* note 8 at 326; M. Siporin, “Bankrupt Debtors and Their Families” (1967) 12 *Soc. Work* 51; Jacob, *supra* note 8; Stanley & Girth, *supra* note 8; D. Caplovitz, *Consumers in Trouble: A Study of Debtors in Default* (New York: Free Press, 1974); Shuchman & Rhorer, *supra* note 8; Sullivan, Warren & Westbrook, *supra* note 7; and, for Australia, M. Ryan, *The Last Resort: A Study of Consumer Bankruptcy* (Aldershot, U.K.: Avebury, 1995).

had one or two, or none, of the life events, problems, or characteristics mentioned. Despite these shortcomings, the study has been accepted as authoritative, and reproduced in a government document, the *Insolvency Counsellor's Qualification Course*<sup>36</sup> as researched fact. Even more destructively, its suppositions have entered the realm of quotable truth and are represented as such in the public media. John Armstrong, Deputy Superintendent of Bankruptcy, was quoted as saying, "People will say they went bankrupt because they lost their job, then you find there was a spousal separation, or gambling or substance abuse."<sup>37</sup> Such statements presume a proven connection between bankruptcy and so-called psychosocial problems. They also assume that two negative events cannot happen simultaneously in a person's life, and presume to make untenable, personal statements to the contrary. In the field of social psychology, this practice is known as "actor observer divergence." In other words, observers see their own behaviour as situationally motivated, while seeing the behaviour of others as the result of deep-seated personality characteristics.<sup>38</sup>

#### E. *The Source of the Model*

This concept of bankruptcy mimics the disease theory of addiction in which recovery from compulsive behaviours hinges on overcoming shame, denial, and the practice of assigning blame to others. Traditional recovery models, which have their foundation in the Twelve Steps outlined in *The Big Book*<sup>39</sup> are premised on the inaccuracy of the addicted person's perception of his or her own reality, and are designed to overcome denial by removing all legitimacy from the external elements used to excuse indulgence in addictive behaviour. Logically then, recovery stems from trusting others who wish to help, and from recognizing that the source and responsibility for one's problems are personal.

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<sup>36</sup> *Supra* note 5.

<sup>37</sup> E. Beauchesne, "Over the Brink" *Toronto Star* (30 January 1997) E1, online: NEXIS (News, TSTAR).

<sup>38</sup> See E.E. Jones & R.E. Nisbett, "The Actor and the Observer: Divergent Perceptions of the Causes of Behaviour" in E.E. Jones *et al.*, eds., *Attribution: Perceiving the Causes of Behaviour* (Morristown, N.J.: General Learning Press, 1972) 79.

<sup>39</sup> See Alcoholics Anonymous, *The Big Book* (New York: Alcoholics Anonymous World Services, 1976).

Erroneously equating insolvency with addiction and bankruptcy with “hitting bottom”—the point at which addicted persons become willing to learn—negates the legitimacy of the insolvent person’s ability to perceive his or her own reality. In this way, poverty, insolvency, unemployment, or illness become functions of attitude, independent of economic, social, or historic context. This diagnosis is not just open to the charge of decontextualization, denying the existence and impact of external factors, but, by turning insolvency into a disease process, is actually guilty of something much more sinister. By denying the legitimacy of personal interpretation, all reasons become excuses, all blame rests with the individual, and all problems become strictly a function of the mind. This conveniently absolves all external factors of any role in the problem. The economy, employers, creditors, and governments—none of these sources can be held responsible for bad parenting and personal inadequacies.

#### F. *Impact of the Cycle Theory*

The power of this theory over the lives of Canadians should not be underestimated by those who dismiss it for its lack of scientific method. The study was among the factors which influenced the decision to include mandatory counselling in the 1992 amendments to the *Bankruptcy and Insolvency Act (BIA)*.<sup>40</sup> Barbara Godin, Vice President of the Bank of Nova Scotia, explained that creditors had been lobbying for the inclusion of counselling in the bankruptcy process for some time. She also informed me that “this research into the causes of bankruptcy had greatly influenced their thinking.”<sup>41</sup> Bankruptcy was then legislated as a failure to learn, and education became part of the bankruptcy process. Both the creditors and the authors of the subsequent counsellor’s textbook accepted the material as authoritative. What was the source of this unquestioning acceptance? Well, partially, it was historical.

#### G. *Innovations Based on the Fourteenth Century*

The long tradition of assuming that those in financial difficulties possess immoral and other unattractive characteristics, and are therefore

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<sup>40</sup> Interview with B. Godin (12 March 1997).

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

in need of social control,<sup>42</sup> goes back in western European culture to the fourteenth century. Surprising as it may seem now, being poor has not always implied emotional depression, low aspirations, low status, and low self-esteem. For the post-exilic Hebrews and the early Christians, the poor were the faithful remnant, beloved by God and “the saints,”<sup>43</sup> and this designation had moral implications. However, coincidental with the end of feudalism, redefinitions within the Church stripped the poor of their previous blessedness,<sup>44</sup> while making them the responsibility of the state.<sup>45</sup> The end of feudalism meant the disappearance of the patron to whom victims of misfortune could previously turn for help.<sup>46</sup> The land-owning classes, losing their control over the labour force, and being concerned with public order and the maintenance of the existing social hierarchy, then passed the Poor Laws. They outlawed poverty, making it a punishable offence and reducing anyone in that condition to the status of being “not quite human.” By the sixteenth century, hunger was described as due only to idleness, and poverty was the result of moral fault.<sup>47</sup> This characterization has persisted into the twentieth century.<sup>48</sup> What being “not quite human” means can be found in descriptions of those not in the middle class, and the description repeatedly contains the same list of faults:

A surprisingly large proportion of [the public] appear to think of the lower class as a rather despicable group. Poor character and low morals, drink, crime, lack of ability, low intelligence, shiftlessness, laziness, lack of ambition or motivation, menial labour etc., all indicate the disesteem in which this group is held.<sup>49</sup>

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<sup>42</sup> See J.P. Gibbs, *Norms, Deviance, and Social Control: Conceptual Matters* (New York: Elsevier North Holland, 1981) c. 3.

<sup>43</sup> See C.I. Waxman, *The Stigma of Poverty: A Critique of Poverty Theories and Policies* (New York: Pergamon Press, 1983).

<sup>44</sup> *Ibid.* See also J. Hagan, *The Disreputable Pleasures: Crime and Deviance in Canada* 2d ed. (Toronto: McGraw-Hill Ryerson, 1984).

<sup>45</sup> See Waxman, *supra* note 43 at 72.

<sup>46</sup> See K. de Schweintz, *England's Road to Social Security: From the Statute of Labourers in 1349 to the Beveridge Report of 1942* (Philadelphia: University of Pennsylvania Press, 1943) at 3.

<sup>47</sup> See W.K. Jordan, *Philanthropy in England, 1480-1660: A Study of the Changing Pattern of English Social Aspirations* (London: Allen & Unwin, 1959).

<sup>48</sup> See Waxman, *supra* note 43 at 77-85. This process is well understood and is represented in popular culture. The lyrics “we’re depraved on account we’re deprived,” from Leonard Bernstein’s *West Side Story* sums up the thinking exactly.

<sup>49</sup> R. Centres, *The Psychology of the Social Classes: A Study of Class Consciousness* (New York: Russell & Russell, 1961) at 95.

The “discovery” that people in financial difficulty have “psychosocial” problems is simply an update, in late twentieth century language, of the received wisdom of the last six hundred years of Western culture.

#### H. *Why Was This Model Accepted in the 1990s?*

This model was found acceptable, and counselling based on this concept was mandated, because doing so created an ideal situation in which the stakeholders in personal bankruptcy (a category which does not include bankrupt persons) could have their priorities met. There had been Canadian research allegedly proving the need for counselling since the early 1980s. The creditors wanted it. It would allow the Bankruptcy Branch to monitor more closely the way trustees conducted their business, while legitimizing a fee increase for going bankrupt. It would create work, or at least a credentialling process, for trustees and credit counsellors. Finally, counselling was a “motherhood” solution. Anyone suggesting it was automatically seen to be “doing the right thing.” At a time when the media was full of horror stories about the escalating rates of bankruptcy, the opportunity to kill that many birds with one stone was too tantalizing to be missed.

### III. THE CREDENTIALLING PROCESS

The mandatory course that equips one to perform the mandatory counselling consists of (1) a textbook; (2) a videocassette or CD ROM; (3) a helpline through which a telephone number, fax number, and email address are given; and (4) a two hour, true/false and multiple-choice final examination. There is no instructional component, and the course is presumed to take some forty hours to complete.<sup>50</sup> There are no educational or experiential requirements for the course; the sole entry requirement is the \$500 tuition fee.<sup>51</sup>

The course, which promises to deliver the “basic knowledge and skills required to be a competent remedial Bankruptcy and Insolvency Act (BIA) insolvency counsellor,”<sup>52</sup> makes no provision for either skill acquisition or development. This text-based format lacks the elements normally considered essential to produce competence. While a

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<sup>50</sup> See *Insolvency Counsellor's Qualification Course* *supra* note 5 at x.

<sup>51</sup> Interview with Admissions Officer, Ryerson University (10 January 1997).

<sup>52</sup> *Insolvency Counsellor's Qualification Course* *supra* note 5 at ix.

videotape with some skits could possibly pass for demonstration, the practice, criticism or feedback, and supervision normally considered essential in any skills development process<sup>53</sup> are entirely absent from the curriculum. Essentially, purchasing the text and passing the exam constitute the credentialling process, completed by the issuance of a certificate of competence. If not the entire object of the exercise, at least one of the results of mandating counselling has been to provide credentialling for those not experiencing the problem.

Not only does the course not provide for counselling skills development, but the second skill set needed to fulfil the requirements of the counselling directive—assessment and referral—are not provided for either. There are a number of elements in the text that could actually prove detrimental to the counselled debtors. Even rudimentary assessment information is either absent or, if present, misleading. For example, consistent with what seems to have been the original vision of the Bankruptcy Branch study, alcoholism features prominently in the course. The first case study involves “a typical insolvent” whose monthly budget includes \$150 for alcohol. The text suggests referral of “Mr. Adams” for a drinking problem on the sole evidence of this expenditure: “If the counsellor felt it appropriate, the Adamses may be referred to a community agency that deals with issues such as Mike’s possible drinking problem.”<sup>54</sup>

Diagnostic information about alcoholism is available in three forms in the literature pertaining to this subject: (1) by volume in terms of measured standard drinks consumed over a measured period of time, as in the work of Martha Sanchez-Craig;<sup>55</sup> (2) in terms of life effects, as in *The Big Book*<sup>56</sup> published by Alcoholics Anonymous; or (3) through the EAP’s tradition of work performance deficits.<sup>57</sup> For reasons related to the variable cost of alcoholic beverages, the diagnostic information is never given in dollar amounts. Besides, at current prices, if Mr. Adams is drinking either beer or wine (\$10 per bottle), the dollar amount given

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<sup>53</sup> See D. MacKeracher, *Making Sense of Adult Learning* (Toronto: Culture Concepts, 1996).

<sup>54</sup> *Insolvency Counsellor’s Qualification Course* *supra* note 5 at 16.

<sup>55</sup> See M. Sanchez-Craig, *Saying When: How to Quit Drinking or Cut Down: An ARF Self Help Book* (Toronto: Addiction Research Foundation, 1993).

<sup>56</sup> *Supra* note 39.

<sup>57</sup> See E.M. Jellinek, *The Disease Concept of Alcoholism* (New Haven, Conn.: Hillhouse Press, 1960); and H.M. Trice & P.M. Roman, *Spirits and Demons at Work: Alcohol and Other Drugs on the Job* (Ithaca, N.Y.: Cornell University, 1972).

puts his consumption at the rate published as non-problematic by ARF.<sup>58</sup> If he shares any of the alcohol with his spouse, this amount would put him below this level.

There are many other comments in the text that would similarly lead the prospective insolvency counsellor to inappropriate assessments. For example, in a paragraph entitled "Urban versus Rural Living," the following statement is made: "It is known that urban families tend to spend more money than those living in a rural setting."<sup>59</sup> This is explained not in terms of the well established higher cost of living in urban areas,<sup>60</sup> but in terms of "closeness to shopping malls," which creates a "tendency to spend" that "creeps up over time."<sup>61</sup> Another paragraph entitled "Illiteracy—Reading Between the Lines," in which 1990 Statistics Canada findings on illiteracy are quoted, ends with the statement: "The findings ... suggest that many Canadians do not appreciate the need to read."<sup>62</sup> In another section entitled "Immigrant Consumers," the prospective counsellor is informed that some foreign-born Canadians differ permanently from "the rest of Canadians ... due to cultural and background characteristics that cannot or will not be overcome."<sup>63</sup> The text also contains this statement: "[A] relatively low religious commitment to a major denomination ... could explain why someone would want but lack control over their finances."<sup>64</sup>

Can we imagine the federal government printing a document containing similar statements about any other group? Do the various multicultural organizations in Canada appreciate that new Canadians "overcome" not being born here? Clearly this is just middle-class moralizing, bordering on racism, and masquerading as assessment strategies.

Other questionable aspects of the text include contradictions in the information given to the reader. For example, the text contains

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<sup>58</sup> See The Addiction Research Foundation, the Ontario Public Health Association & the Association of Local Public Health Agencies, *Alcohol and Your Health: Low Risk Drinking Guidelines* (Toronto: The Addiction Research Foundation, 1997).

<sup>59</sup> *Insolvency Counsellor's Qualification Course* supra note 5 at 181.

<sup>60</sup> See Statistics Canada, "Incidence of Low Income Among the Population Living in a Private Household, 1991 and 1996 Census, Census Metropolitan Areas," online: Canadian Statistics <<http://www.statcan.ca/english/Pgdb/People/Families/famil60f.htm>> (date accessed: 23 June 1999).

<sup>61</sup> *Insolvency Counsellor's Qualification Course* supra note 5 at 181.

<sup>62</sup> *Ibid.* at 211.

<sup>63</sup> *Ibid.* at 213.

<sup>64</sup> *Ibid.* at 196.

statements such as the following, contrary to the core premise upon which the need for insolvency counselling is founded: “Certainly there is an abundance of examples of bankruptcy occurring despite a superb ability to manage resources. Some clients are simply victims of circumstances beyond their control and must resort to bankruptcy regardless of excellent financial management.”<sup>65</sup>

Further, terms are used without definitions being provided, and advice is given without providing criteria for such judgements. A section entitled “When to Refer” contains this advice: “Counsellors should refer whenever they become aware of the client’s emotional, physical, or psychosocial maladjustment to financial crisis,” or “when the client shows clear signs and symptoms of addiction, mental illness, violence, family problems, or abuse.”<sup>66</sup> For other members of Canadian society, the making of such judgements requires long periods of education and special licensing, or in specific instances, expertise gained through personal experience (such as an alcoholic in recovery urging a practising alcoholic to attend Alcoholics Anonymous). The Ontario *Regulated Health Professions Act, 1991* makes it very clear that degrees in medicine and/or psychology are required to assess mental illness.<sup>67</sup> More importantly, whether the assessor is a professional, or an amateur with knowledge from lived experience, the consequent decisionmaking on the part of the client is voluntary, since, in either case, the counsellor cannot impose legal sanctions. This is not the case with trustees in bankruptcy.

Later in the textbook, the authors advise, “the client must always feel that he or she has a choice to accept or reject a referral.”<sup>68</sup> This advice is given even though the bankrupt person does not have the right to reject the counselling in the first place, except at the risk of being denied a discharge from bankruptcy. Understanding one’s rights in such a context (where a medical assessment can be made without the debtor’s permission) demands considerable sophistication—a sophistication that, by the government’s own definition, the bankrupt is not considered to possess.

In the sections entitled “Direct referrals” and “Dealing with a client’s reluctance,” the authors advise that “[y]ou must always have the client’s signed consent to make a direct referral or to contact another

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<sup>65</sup> *Ibid.* at 119.

<sup>66</sup> *Ibid.* at 73.

<sup>67</sup> See *Regulated Health Professions Act, 1991* S.O. 1991, c. 18, ss. 27(1)-(2).

<sup>68</sup> *Insolvency Counsellor’s Qualification Course* *supra* note 5 at 73.

service about the client.”<sup>69</sup> The text also suggests that, if the client is reluctant, “[y]ou should spend some time addressing the client’s fears and concerns about the particular service and dispelling any negative perceptions.”<sup>70</sup> In a telephone interview with Edward Taylor, a lawyer with the Canadian Human Rights Commission, he informed me that obtaining voluntary consent under mandatory conditions is “at best a contradiction in terms” and that, even under voluntary conditions, “a person cannot contract out of his or her fundamental rights.”<sup>71</sup> He cited case law to support his position.<sup>72</sup> If this principle is applied to insolvency counselling, then public policy is not being observed in the case of bankrupt persons being assessed and then referred to another agency, unless counsellors also have the professional qualifications, and are subject to restrictions which protect all other Canadian citizens in a client-counsellor situation.

A very real power relationship exists between a trustee in bankruptcy and an undischarged bankrupt person. The relationship between them is not one of professional and client.<sup>73</sup> The writers of the text continually refer to the person being counselled as a “client,” which is not the case. The bankrupt person pays the trustee, but the trustee’s mandate is to act in the creditor’s best interests, not necessarily the bankrupt’s best interests. The text never explains how the trustee is supposed, ethically or cognitively, to change “bankrupts” into “clients” for the purposes of counselling, and then to switch them back to bankrupts after the sessions.

One of the skills concomitant to professional counselling is appropriate record keeping.<sup>74</sup> Normally, when a person in Canada gives private information to a professional in a counselling capacity, the confidences disclosed, and the opinions formed by the counsellor, are protected by the codes of ethics of the various professional bodies. For example, the Canadian Association of Social Workers,<sup>75</sup> and the College

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<sup>69</sup> *Ibid.* [emphasis omitted].

<sup>70</sup> *Ibid.*

<sup>71</sup> Interview with E. Taylor (4 February 1997).

<sup>72</sup> See, in particular, *Ontario Human Rights Commission v. Borough of Etobicoke* [1982] 1 S.C.R. 202.

<sup>73</sup> See *BIA*, *supra* note 3, ss. 16-38.

<sup>74</sup> See M.E. Cavanagh, *The Counselling Experience: A Theoretical and Practical Approach* (Illinois: Waveland Press, 1982).

<sup>75</sup> See Canadian Association of Social Workers, *The Social Work Code of Ethics* (Toronto: Canadian Association of Social Workers, 1994) at 14-17.

of Psychologists of Ontario,<sup>76</sup> have adopted specific regulations for the maintenance of client confidentiality. While the textbook prescribes copious note taking on the part of the insolvency counsellor,<sup>77</sup> and includes the statement that “[c]lients should be assured in the interview that what transpires between you and the client will be held as confidential (except as required by law),”<sup>78</sup> there is no provision for the confidentiality of these notes.

The Canadian Insolvency Practitioners Association does not have a set of guidelines for the protection of material divulged during insolvency counselling, nor does it have the power to take disciplinary measures against any member who violates the confidences of a bankrupt person.<sup>79</sup> The text states that all case notes become “part of the estate file.”<sup>80</sup> While the text gives examples of notations written in a nonjudgemental style and explains that “clients have the legal right to see their files,”<sup>81</sup> it does not point out that bankruptcy files are a matter of public record, and are open to inspection by creditors. The whole exercise degenerates into farce when suggestions are made to videotape or audiotape the sessions,<sup>82</sup> and when it is pointed out that counselling can be done in groups of twenty<sup>83</sup> or over the telephone<sup>84</sup> if the bankrupt person lives in a remote area.

#### IV. RECOMMENDATIONS

In my view, the research upon which the concept of counselling for bankrupt persons was based was not calculated to lend credence to the model it purportedly produced. Nowhere in the insolvency literature is there support for the notion that the need for bankruptcy is inherited; bankruptcy resulting from psychosocial problems only applies to an extremely small minority of debtors. For this reason, the cycle theory

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<sup>76</sup> See College of Psychologists of Ontario, *The Standards of Professional Conduct* (Toronto: College of Psychologists of Ontario, 1996), principle 2 at 16-17; principle 7 at 20-21.

<sup>77</sup> See *Insolvency Counsellor's Qualification Course* *supra* note 5 at 64-66.

<sup>78</sup> *Ibid.* at 64.

<sup>79</sup> Interview with N. Kondo, President, CIPA (19 December 1997).

<sup>80</sup> *Insolvency Counsellor's Qualification Course* *supra* note 5 at 65.

<sup>81</sup> *Ibid.* [emphasis omitted].

<sup>82</sup> *Ibid.* at 54.

<sup>83</sup> *Ibid.* at 74.

<sup>84</sup> *Ibid.* at 79-80.

model should be discarded. The whole notion of the trustee as a counsellor for problems other than financial ones should be dropped entirely. For the same reasons, no credence should be given regarding the model's assumptions about the preponderance of alcoholism, drug abuse, gambling, poor role models, or "living relationships" in the lives of those who find themselves in need of bankruptcy. The course, which purports to train counsellors to perform these assessments, should either be abandoned or revamped to augment the professional skills of the trustee to assess financial problems.

However, this does not preclude the need for some form of professional counselling. Both my own investigations into this area and those of Martin Ryan<sup>85</sup> found evidence that insolvency and bankruptcy often have a deleterious effect on both health and personal well-being. If our government does indeed wish to take steps to facilitate emotional and physical recovery, it should signal to the professionals most capable of handling such problems that the person in question is experiencing bankruptcy. Creating insolvency counsellors to play the roles of assessment and referral agents or counsellors, and trying to educate them to do both, seems an unnecessary duplication of resources. Also, it creates unwarranted risks to give insolvency counsellors extraordinary powers over the well-being of bankrupt persons—powers they would not be considered qualified to have if the person were not bankrupt. Would it not be more helpful to require, for the estate file, a letter from the debtor's personal physician stating that he or she is aware of the bankrupt person's financial difficulties? No medical information would be required, so there would be no contravention of the existing medical confidentiality legislation. Given the fact that the bankruptcy process normally takes a minimum of nine months, and that it is thought prudent to visit one's physician annually, this would not create an undue burden on the medical system.

Ryan finds, as I have also found, that bankruptcy is a traumatic experience for many debtors, and that they could benefit from having someone to speak to about their difficulties.<sup>86</sup> Rather than the present format, would it not seem more efficient to inform social workers, psychologists, psychiatrists, and family therapists about the basic fundamentals of what a personal bankruptcy entails? Information about the availability of such trained help could then be given by trustees to all their clients. In this way, trustees would not have to perform the task of

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<sup>85</sup> See Ryan, *supra* note 35.

<sup>86</sup> *Ibid.*

determining who is in need of such help and who is not. This approach would provide bankrupt persons with the opportunity to avail themselves of professional advice with a guarantee of confidentiality, and also the opportunity for ongoing treatment if it is necessary.

This is not to deny that trustees have a vital role to play in the education of bankrupt persons and in facilitating their recovery from bankruptcy. My research found overwhelming evidence of the profound effect a trustee can have on the psychological “fresh start” of the bankrupt person. For this reason, the trustee’s first meeting with a bankrupt person (presently called the “first counselling stage” in the Superintendent’s Directive)<sup>87</sup> should certainly be retained. A second session, designed to teach budgeting and money management skills and how the debtor can re-establish credit after discharge, should also be retained at the combined discretion of the bankrupt and the trustee. The nature of that session should be determined by the needs of the debtor, and the trustee should help the debtor make that assessment in the first session.

By creating a mythology about what is wrong with Canadians in bankruptcy, we have missed an opportunity to be of service, not only to the individual, but also to our society as a whole. Canadians in bankruptcy need information, advice, support, and help to re-establish their lives, their self-esteem, and their ability to function as citizens. While publicly pillorying them with updated versions of fourteenth century condemnations may provide emotional satisfaction for some, such practices are ultimately counterproductive for the majority. If bankruptcy legislation is really about a “fresh start,” then whose purpose does it serve to burden these people with unproven assumptions of inadequacy, alcoholism, or “psychosocial” problems?

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<sup>87</sup> See *Directive No. 1R2* *supra* note 3.

## APPENDIX

### FIGURE 1\* THE BANKRUPTCY CYCLE

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