INDIVIDUAL BANKRUPTCY: PRELIMINARY FINDINGS OF A SOCIO-LEGAL ANALYSIS©

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This article presents preliminary findings from an empirical study of individuals who filed for bankruptcy in the Toronto bankruptcy district in 1994. The central findings are that bankrupts are both asset- and income-poor at the time of declaring bankruptcy, and have much higher ratios of debt-to-income than the general population. Bankrupts are not drawn solely from low status occupations, but neither are they drawn significantly from the highest status occupations. The major reasons for declaring bankruptcy are adverse employment changes and business failure. There has been a large rise in the number of women declaring bankruptcy since earlier studies in the 1970s. The author concludes that bankruptcy seemed to be providing a safety net against entrepreneurial risk and adverse employment changes. Further areas of investigation identified by the author include the role of the trustee in bankruptcy in the bankruptcy process, and the relationship between empirical studies of bankruptcy and socio-legal analysis of the use of the legal system by different groups.

Cet article présente des conclusions préliminaires d'une étude empirique des individus qui font la demande de la faillite dans la région torontoise en 1994. Les conclusions principales montrent que ceux qui font faillite sont à la fois faibles en actifs et en revenus au moment où ils déclarent leurs faillites, et ils ont une proportion plus élevée de débits par rapport aux revenus que la population en général. Ceux qui font faillites ne viennent pas uniquement des professions modestes, ni particulièrement des professions de statut le plus élevé. Les raisons principales pour déclarer la faillite sont les changements défavorables à l'emploi et la faillite des entreprises. Il y a eu une grande augmentation dans le nombre de femmes déclarant la faillite depuis les premières études dans les années 1970. L'auteur en conclut que la faillite semble pourvoir un filet de protection contre les risques d'entreprise et les changements défavorables à l'emploi. D'autres domaines de recherche identifiés par l'auteur incluent le rôle des syndics de faillite dans le processus de la faillite, et le rapport entre les études empiriques de la faillite et l'analyse socio-légale de l'utilisation du système juridique par des groupes différents.

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I. INTRODUCTION

This article is one part of a study of individual bankruptcy in Canada.[1] The study is an exploration of the role of individual bankruptcy as a safety net against life's uncertainties in a postindustrial economy with a declining welfare state. I am interested in questions such as the role of bankruptcy as a potentially welfarist institution in private law, whether a new paradigm of bankruptcy law is developing, and how this might relate to changing conceptions of the welfare state. In addition, there is the further question of how bankruptcy fits within an increasingly sophisticated system of credit-granting harnessed to information technology.

When this study was commenced in 1996, there had been no published empirical studies of individual bankruptcy in Canada since the early 1980s. There was a modest but growing newspaper coverage of apparently large increases in bankruptcy filings, and questions were being raised as to whether "too many" individuals were declaring bankruptcy, or whether it was becoming "too easy" to declare bankruptcy in the light of reforms to the *Bankruptcy and Insolvency Act* (*BIA*)[2] in 1992. Public debate on these issues seemed to oscillate between blaming consumers for the irresponsible management of their finances, or blaming aggressive lending practices by creditors for the increases in bankruptcy filings. It seemed unclear whether bankrupts should be characterized as unfortunates, amoral calculators, or inadequate

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[1] I discuss some of the broader issues in a short paper of the same name in T. Wilhelmsson & S. Hurri, eds., *From Dissonance to Sense: Welfare State Expectations, Privatisation, and Private Law* (Brookfield, Vt.: Ashgate, 1999) c. 16. See also I.D.C. Ramsay, "Models of Consumer Bankruptcy: Implications for Research and Policy" (1997) 20 J. Consumer Pol'y 269.

[2] R.S.C. 1985, c. B-3 [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. A central change in 1992 was the removal of the necessity to apply to court for a discharge for first-time bankrupts. However, it is not clear that this made much difference in practice, since the discharge hearings were often cursory and routinized.

individuals.[3] These debates were a muted refrain of the more heated controversies in the United States where, notwithstanding a booming economy, personal filings for bankruptcy in 1996 surpassed the symbolic figure of one million.

The data reported in this article are therefore a contribution to understanding the current social reality of bankruptcy. I present preliminary findings from a sample of Ontario bankrupts drawn from 1994 filings, and outline the economic and social situation of individual bankrupts, and the process of bankruptcy from the initial declaration of bankruptcy to the closing of the bankruptcy file by the trustee in bankruptcy. Part II outlines the central findings of existing social science studies in North America and how they framed the questions that I explore in the empirical data. Part III presents the data from the file study. Part IV explores the issues and questions raised by the empirical data.

The central findings outlined in Part III are that individual bankrupts are both asset- and income-poor at the time of declaring bankruptcy, and have much higher ratios of debt-to-income than the general population. They are drawn primarily from people between the ages of 30 and 50, and there has been a large increase in female bankrupts, who comprise 44 per cent of the sample. Bankrupts do not work solely in low-status occupations, but neither are they drawn from the highest status occupations; one-third are unemployed at the time of declaring bankruptcy. There is evidence that individuals have exhausted the value of existing assets—such as a home—in an effort to stave off bankruptcy. The primary reasons for declaring bankruptcy are adverse employment changes and business failure. The majority appear to be the victims of changed circumstances, and have run out of available social and economic resources to deal with these circumstances. In one-third of the sample, bankruptcy is a household, rather than an individual, decision. I conclude that bankruptcy appears to be playing its role as a safety net by providing a fresh start for individuals who are overburdened with debt and have little chance of repaying their debts. I also note that, as a consequence of current reporting practices, existing official statistics understate the number of small business bankruptcies. Analysis of the formal process of bankruptcy indicates that it is, for the great majority a routinized process, with little formal involvement of

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[3] I take this tripartite distinction from Michael Adler, who developed this distinction in relation to debt enforcement: see M. Adler & E. Wozniak, "More and Less Coercive Ways of Settling Debts" in H.M. Drucker & N.L. Drucker, eds., *The Scottish Government Yearbook 1980* (Edinburgh: Paul Harris, 1980) 161.

creditors or the courts. However, individuals pay a relatively high monetary price for using the process, although this is, in some respects, camouflaged from them by the manner in which they pay for the process.

At the outset, I enter a number of caveats in relation to these findings. While the sample is a random sample drawn from a large and diverse bankruptcy district,[4] it is not a representative sample of the Canadian or Ontario bankruptcy population.[5] In this preliminary report, I provide comparisons with the general population, but they should be treated with caution given the nature of the sample. In addition, in discussing the causes of bankruptcy I am examining the end of a process. Ideally, one would gather data on the full history of the paths that led an individual to declare bankruptcy, and compare this with a control group in the general population. I have made what I believe to be reasonable inferences about this trajectory from the data, but a full examination of the paths into and out of bankruptcy remains for the future. However, given the woeful state of systematic empirical information on individual bankruptcy and insolvency in Canada, I believe that, in conjunction with the report by Saul Schwartz in this Symposium,[6] there is now a body of findings that will provide researchers with directions for further research. At a minimum, my findings and those of Schwartz call into question the thrust of recent federal reforms, and the stereotypes suggested by influential groups—namely, that bankrupts are credit card

[4] The Toronto bankruptcy district processed just under 20 per cent of all bankruptcies in Canada in 1994. For a full discussion of my findings, see Part III, below.

[5] I will in later work compare the data with those drawn from census districts that correspond to the bankruptcy district.

[6] See S. Schwartz, "The Empirical Dimensions of Consumer Bankruptcy: Results From a Survey of Canadian Bankrupts" (1999) 37 Osgoode Hall L.J. 83. This article is based on the findings from an earlier study by Saul Schwartz and Leigh Anderson: see *infra* note 45.

abusers[7] or relatively well-off individuals who are taking advantage of the system.

In 1994, over-indebted individuals could choose to declare bankruptcy or make a consumer proposal to their creditors. The overwhelming majority of individuals chose bankruptcy. In the case of bankruptcy, an individual was required to turn over his or her non-exempt assets to the trustee, who is almost always a chartered accountant. In return, a first-time bankrupt would receive an automatic discharge of unsecured debts after nine months. The rights of secured creditors, such as home mortgagees or secured lenders on automobiles, to seize their security was unaffected by the bankruptcy. Certain debts were non-dischargeable, such as alimony, or those contracted by fraud. In addition, as a result of amendments to the *BIA* introduced in 1992, bankrupts were required to undergo two counselling sessions before their discharge, and failure to do so resulted in withholding automatic discharge.[8] A discharge was automatic only if there was no objection to discharge by a creditor, the trustee, or the Superintendent of Bankruptcy. The grounds for objection were very broad and would permit an objection in almost every case of individual bankruptcy. A consumer proposal permitted the debtor to make a proposal to creditors to pay off all or a portion of his or her debts over a period not exceeding five years. Secured creditors were not included within the scope of the

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[7] Frank Bennett, a lawyer and Co-Vice Chair of the National Bankruptcy and Insolvency Section of the Canadian Bar Association, made the following comments in his submission (5 September 1991) to the Standing Committee on Consumer and Corporate Affairs in consideration of Bill C-22, *An Act to amend the Bankruptcy Act, and to amend the Income Tax Act in consequence thereof*, 3d Sess., 34th Parl., 1992 (assented to 23 June 1992, S.C. 1992, c. 27):

> It is not uncommon for a consumer debtor, prior to going bankrupt to outfit himself or herself, take trips and run up excessive amounts of debt under credit cards. In fact, they would borrow from one credit card to pay the other.
>
> In my view that is tantamount to fraud. The debtor effectively has no intent of repaying the credit card holder. There is an abuse in the system today.
>
> I do a lot of collection work. I act for three large Canadian banks and I see excessive abuse of credit cards today.

Canada, *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations* (Ottawa: The Committee, 1989-1993) at 9:19-9:20.

[8] See *BIA*, *supra* note 2, ss. 157.1(1)-(3).

proposal.[9] Under a proposal, a debtor might keep his or her assets and avoid an actual declaration of bankruptcy.

The official premise of Canadian bankruptcy law is that, in the case of individuals, it is designed to provide a discharge of debts for the "honest but unfortunate" debtor who is then able to make a "fresh start" in life. However, there has always been some hesitation as to how "fresh" that start should be, as measured by assets and income that the debtor may shield from his or her creditors. The more ambiguous concept of "rehabilitation" or "financial rehabilitation" is often used in contemporary discussions of bankruptcy.[10]

II. EXISTING SOCIAL SCIENCE STUDIES

A. *The 1970s and Conventional Wisdom: Bankruptcy For the Working-Class Male*

Studies in the United States and Canada indicated that bankruptcy was a remedy used primarily by working-class males. The only systematic Canadian study of this period[11] outlined the following picture of the consumer bankrupt in 1977:

> Most (two-thirds) are male; in fact, many, if not most, cases of female bankruptcy are precipitated by the husband's bankruptcy. … [T]he typical consumer bankrupt would be a married male in the early to middle stages of the family life cycle with one or more children. … [T]here is some evidence that consumer bankrupts have a higher incidence of marital breakdown than the population at large.[12]

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[9] I have not discussed the possibility of a consolidation order under Part X of the BIA. This Part is not in force in Ontario, and is used by a small number of debtors. For a full discussion of the relevant legal provisions, see J.S. Ziegel, "The Philosophy and Design of Contemporary Consumer Bankruptcy Systems: A Canada-United States Comparison" (1999) 37 Osgoode Hall L.J. 205 at 249-52.

[10] See Canada, *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Ottawa: Information Canada, 1970) (Chair: R. Tassé) at 87: "We believe that, in respect of the individual debtor, the principal objective of the bankruptcy system should be to rehabilitate him and give him an opportunity to make a fresh economic start in life. Whether the debtor is good or bad should not affect his right in this regard." See also *Royal Bank of Canada* v. *North American Life Assurance Co.* [1996] 1 S.C.R. 325 [hereinafter *Royal Bank*] in which Gonthier J. stated at 337: "the first such purpose is to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors, while the second is to provide for the financial rehabilitation of insolvent persons."

[11] See J.W. Brighton & J.A. Connidis, *Consumer Bankrupts in Canada* (Ottawa: Consumer and Corporate Affairs Canada, 1982).

[12] *Ibid.* at 22.

…

> [C]onsumer bankrupts do not constitute a representative sampling of the labour force. … [C]onsumer bankrupts are drawn heavily from the lowest skill levels.[13]
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> …
>
> [Consumer bankrupts] exhibit a much higher degree of unemployment and job turnover than the population at large.[14]
>
> …
>
> [C]onsumer bankrupts are generally drawn from the lower socioeconomic groups, whether measured by income or by occupation.[15]

Wayne Brighton and Justin Connidis, the study's authors, concluded that consumer bankruptcy is "clearly a class-related phenomenon, occurring mostly among the lower levels of the working class,"[16] although there was a significant minority drawn from the higher income groups. Outstanding liabilities were not very high, so that the typical bankruptcy was that of "a low-skilled or unskilled worker forced into bankruptcy for relatively small total debt amounts."[17] Consumer and personal debt accounted for the largest portion of liabilities with the most common creditors being finance and acceptance companies. Bankrupts had few assets, and under 20 per cent were home-owners at the time of declaring bankruptcy.

Given these low asset levels, it is not surprising that unsecured creditors received little by way of dividend. In four-fifths of the cases, there was no money for distribution after the payment of the trustee's fees.[18] In almost 50 per cent of cases, bankruptcy was related to consumer debt; 14 per cent to the operation of, or the guarantee of, a business; 15 per cent to unemployment; and 14 per cent to health reasons and other misfortunes beyond the debtors' control.[19] The study concluded that, although bankrupts did not fit the image of "high rollers" walking away from their debts, the majority showed "a lack of foresight and money management ability," and their plight was partly attributable "to other deficiencies in life skills and resources which are

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[13] *Ibid.* at 24.

[14] *Ibid.* at 29.

[15] *Ibid.* at 31.

[16] *Ibid.* at 73.

[17] *Ibid.* at 75.

[18] *Ibid.* at 64.

[19] *Ibid.* at 32-34.

associated with but not limited to the lower social classes."[20] The study also concluded that creditors "must bear most of the responsibility for consumer insolvency," since they appeared to have taken few measures to detect and prevent consumer insolvencies.[21]

This study was conducted at a time when the federal Office of the Superintendent of Bankruptcy (OSB), through the Federal Insolvency Trustee Agency (FITA), provided trustee services to those who could not afford the services of a private trustee. Between one-half and one-third of consumer bankruptcies were processed under this program,[22] and Brighton and Connidis noted that those using this service had a much lower level of income than those who used private trustees.[23] Since the termination of this program in the late 1970s, a *pro bono* program has existed for individuals unable to afford a trustee. However, it appears to be rarely used. While this may demonstrate that private trustees have found innovative techniques to finance low-income bankruptcies,[24] it is also possible that fewer low-income individuals are able to access bankruptcy than in the 1970s.

There were also studies during this period of Part X of the *BIA* and the Quebec "Lacombe Law,"[25] both of which permitted debtors to consolidate their debts and repay them over time.[26] These studies showed that the overwhelming majority of debtors were male (in the Lacombe study, 83.6 per cent) who worked in either the skilled or unskilled labour categories.[27]

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[20] *Ibid.* at 77.

[21] *Ibid.*

[22] *Ibid.* at 4.

[23] Although there does exist currently a *pro bono* program, it is not on the same scale as the Federal Insolvency Trustee Agency (FITA) program: see Office of the Superintendent of Bankruptcy, *Directive No. 11: Bankruptcy Assistance Program* (issued 23 October 1986), online: Office of the Superintendent of Bankruptcy <http://strategis.ic.gc.ca/pics/br/dir11.pdf> (date accessed: 10 August 1999).

[24] See Part III(H)(3), below.

[25] See Arts. 652-659 C.C.P.

[26] See references to these studies in Brighton & Connidis, *supra* note 11 at Appendix B; and M. Trebilcock & A. Shulman, "The Pathology of Credit Breakdown" (1976) 22 McGill L.J. 415. For a study of the Lacombe Law, see C. Masse, E. MacKaay & J. Hérard, *Vivre ou Éxister?: Étude de l'efficacité sociale juridiques d'aide aux debiteurs surendettés* (Montréal: Group de recherche en jurimétrie, Faculté de droit, Université de Montréal, 1975) [hereinafter *Vivre ou Éxister?*]. See also T. Hira, "Socio-Economic Characteristics of Families in Bankruptcy" (1982) 32 Can. Home Econ. 1.

[27] See *Vivre ou Éxister?*, *supra* note 26 at 44.

Other studies of individual debt recovery procedures, such as wage garnishment, confirmed the picture of individual debtors as working-class males. In a study of the use of wage garnishment in Hamilton, Ontario, Thomas Puckett indicated that the majority were low-income earners, employed in blue-collar occupations, and renters rather than home-owners.[28] The major reason for the inability to repay a debt among this group was a change in life circumstance such as unemployment (44 per cent). Twenty-six per cent cited imprudence, and 22 per cent claimed that their creditor had sold shoddy goods for which they had simply refused to pay.[29] Michael Trebilcock and Arthur Shulman's study of individuals who had their goods seized or wages garnisheed in 1972 indicated that almost 85 per cent were male, and 25 per cent were unemployed (compared with an average Montreal rate of unemployment of 7 per cent at that time).[30]

These Canadian studies might be compared to early United States data. A Brookings Institution study[31] found that the typical bankrupt in 1964 was a blue-collar worker, nearly 40 years old, and married with four dependants. It concluded that "he presents a picture of neither poverty nor instability."[32] The main causes of bankruptcy were identified as poor debt management, family health reasons, and interruptions in employment. There was a large disproportion of Blacks (38 per cent) among debtors. Later studies of single jurisdictions indicated that bankrupts were "the near poor," and that unanticipated medical expenses played a significant role in contributing to the financial problems of the bankrupt. Only about 15 to 20 per cent of the debtors owned their homes.[33]

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[28] See T.C. Puckett, "Credit Casualties: A Study of Wage Garnishment in Ontario" (1978) 28 U.T.L.J. 95 at 106-07.

[29] *Ibid.* at 108.

[30] See Trebilcock & Shulman, *supra* note 26 at 426-27.

[31] See D.T. Stanley & M. Girth, with V. Countryman *et al.*, *Bankruptcy: Problem, Process, Reform* (Washington: Brookings Institution, 1971).

[32] *Ibid.* at 42.

[33] See P. Shuchman, "The Average Bankrupt: A Description and Analysis of 753 Personal Bankruptcy Filings in Nine States" (1983) 88 Com. L.J. 288; and P. Shuchman, "New Jersey Debtors 1982-1983: An Empirical Study" (1985) 15 Seton Hall L. Rev. 541.

B. *Sullivan, Warren, and Westbrook: Bankruptcy and the Middle Class*

The major study of the 1980s in the United States was that of Teresa Sullivan, Elizabeth Warren, and Jay Westbrook,[34] which challenged conventional wisdom about the demography of bankrupts. Their study was based on data from ten judicial districts in three states (Texas, Illinois, and Pennsylvania), which accounted for approximately 13 per cent of all non-business bankruptcy filings in 1981. The sample included those filing under Chapter 7 (straight bankruptcy) and Chapter 13 (wage earner plan) of the United States *Bankruptcy Code*.[35] The three states were chosen because of differences in exemptions and the fact that all three have diverse economies. The authors updated their study in 1991 with further file analysis and questionnaires.

There were four important developments in their findings compared to earlier studies: (1) the conclusion that bankruptcy was a middle-class phenomenon or that bankrupts were a "cross-section of America;" (2) an exploration of the discrete sub-groups who used bankruptcy; (3) the use of debt-to-income ratios as an explanation for bankruptcy; and (4) the highlighting of local legal culture, rather than legal exemptions, as a significant explanation of debtors' choice of filing Chapter 7 or Chapter 13 bankruptcy.

The authors found that, although bankrupts earned about one-third less than non-bankrupts at the time of bankruptcy, bankrupts were employed in similar occupations and occupational categories to the general population. They concluded that "debtors are not overwhelmingly blue collar, nor are they employed in marginal jobs," that "they are not in the best middle-class jobs," and that "bankrupt debtors are our neighbours."[36] In their updated study of bankrupts in 1991 the authors concluded:

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[34] See 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) [hereinafter *As We Forgive Our Debtors*]. The authors updated their study in 1991, and some results are available in T.A. Sullivan, E. Warren & J.L. Westbrook, "Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-1991" (1991) 68 Am. Bankr. L.J. 121 [hereinafter "Consumer Debtors Ten Years Later"]; and T.A. Sullivan, E. Warren & J.L. Westbrook, "Consumer Bankruptcy in the United States: A Study of Alleged Abuse and of Local Legal Culture" (1997) 20 J. Consumer Pol'y 223 [hereinafter "Local Legal Culture"].

[35] 11 U.S.C. § 524(c) (1998) [hereinafter *Bankruptcy Code*].

[36] *As We Forgive Our Debtors*, *supra* note 34 at 102.

> [T]he users of the system are a broad cross-section of middle America. The system functions to provide middle-class debt relief … .[37]
>
> …
>
> The debtors are not the homeless nor the welfare recipients; they are not the patrons of the soup kitchens nor the jails. By and large, they are quite middle-class in background and perhaps in outlook. They are in deep financial trouble.[38]

Buttressing this conclusion was the finding that 52 per cent of bankrupts were home-owners (compared to the general population rate of home-ownership of 64 per cent), which is higher than other studies in which only 27 per cent of bankrupts were home-owners.[39] Bankrupts were more likely to have completed high school and attended college than the general population, but less likely to have completed a college degree.[40] There was one distinct difference between bankrupts and the general population—almost 20 per cent were owners of small businesses, compared with about 7 per cent in the general population.[41]

A central reason for bankruptcy appeared to be interruptions in income, since although there were not high levels of unemployment among debtors at the time of bankruptcy, many had suffered significant income volatility in the two years preceding their assignment. Sullivan, Warren, and Westbrook concluded that bankruptcy was a safety net against an unfortunate change of circumstances, which could happen to anyone through miscalculation or unemployment, and that this safety net was particularly significant in a country with the most limited forms of social security and health care insurance among the western industrialized countries. There was no obvious evidence that bankrupts had a character trait that differentiates them from the rest of the population, nor did their data indicate significant numbers of individuals abusing the system by shedding debt that they could have repaid.

Sullivan, Warren, and Westbrook underlined both the homogeneity and the heterogeneity of the bankruptcy population. Although all bankrupts had high debt-to-income ratios (the ratio of aggregate debt to annual pre-tax income) in comparison with the general population, they could also be divided into discrete sub-groups: existing

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[37] "Local Legal Culture," *supra* note 34 at 225.

[38] *Ibid.* at 234.

[39] See, for example, Credit Research Center, *Consumer Bankruptcy Study*(Lafayette, Ind.: Purdue University, Krannert Graduate School of Business, 1982) at 12. The Consumer Research Center study was based on questionnaire interviews where only two-fifths of debtors approached agreed to be interviewed.

[40] See "Consumer Debtors Ten Years Later," *supra* note 34 at 130, n. 19.

[41] See "Local Legal Culture," *supra* note 34 at 232.

and past entrepreneurs (about 20 per cent); home-owners (52 per cent); women (single filings by women constituted about 40 per cent of the single filing cases); the repeaters (3.7 per cent); medical debts (1–2 per cent); and "credit card junkies" (2 per cent, defined as credit card debt totalling more than one-half of the debtor's annual income, and where it is 75 per cent of the total unsecured debt, and the debtor is in the top 15 per cent of the absolute amount of credit card debt). Their study was the first systematic analysis of gender and bankruptcy, and drew attention to the fact that "the economic circumstances of women are the worst we have examined, and they reflect the precarious position of women not in bankruptcy."[42]

Their final conclusion related to the role of local legal culture. Much discussion of bankruptcy policy in the United States has focused on the impact of the different state exemptions for assets in creating incentives to file for bankruptcy or choose a straight discharge, rather than a repayment alternative. It had been assumed that changes in exemptions would, *ceteris paribus*, affect the propensity to file for bankruptcy since it would enter the cost-benefit calculation of a rational debtor. Sullivan, Warren, and Westbrook concluded that exemptions did not seem to influence filings. Rather, the particular local legal culture—reflected in the practices of lawyers and judges—had a decisive impact on decisions to file under either Chapter 7 or Chapter 13.[43] This conclusion questioned the validity of existing law-and-economics models of debtor behaviour,[44] and their predictions on the impact of reforms of exemption laws.

The Sullivan, Warren, and Westbrook study provided the backdrop to my study. Mention should also be made of the recent 1997 Canadian study by Saul Schwartz and Leigh Anderson, whose central findings were that bankrupts "were in severe economic straits with low incomes, poor job prospects, and a history of social assistance or unemployment insurance receipt."[45] A summary of this study is reported

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[42] *As We Forgive Our Debtors*, *supra* note 34 at 157.

[43] *Ibid.* at 246-52. For a further discussion of local legal culture, see J. Braucher "Lawyers and Consumer Bankruptcy: One Code, Many Cultures" (1993) 67 Am. Bankr. L.J. 501.

[44] For a study that incorporates the findings of Sullivan, Warren, and Westbrook into the economic model, see "A Reformed Economic Model of Consumer Bankruptcy" Note (1996) 109 Harv. L. Rev. 1338.

[45] S. Schwartz & L. Anderson, *An Empirical Study of Canadians Seeking Personal Bankruptcy Protection* (Ottawa: Industry Canada, 1998) at 18, online: Industry Canada <http:// strategis.ic.gc.ca/ SSG/ca00889e.html> (date accessed: 10 August 1999).

elsewhere in this Symposium,[46] but it is relevant to note that a central finding was that Canadian bankrupts did not seem to be drawn from the middle classes or a cross-section of the population. They differed little from the lower-income individuals described by Brighton and Connidis in their study of 1977 bankrupts. The main changes were the growth in women filers, student loan bankruptcies, and self-employed bankrupts.

III. THE FILE STUDY[47]

A random sample of bankruptcy files was drawn from the January–December 1994 files of the Toronto bankruptcy district. This is a large bankruptcy district that includes Metropolitan Toronto, large rural areas of Ontario, as well as several Northern Ontario cities. In 1994, this district processed 10,354 consumer bankruptcies and 1,556 business bankruptcies. There were also 253 consumer proposals and 33 commercial proposals.

These bankruptcies represented just under 20 per cent of all consumer bankruptcies in Canada in 1994. The sample discussed in this article represents 1,147 cases. I chose 1994 as the sample year so that the data would reflect experience under the 1992 reforms. In addition, most cases were completed when I began research in 1997. In drawing the sample, I excluded corporate bankruptcies, receiverships, and corporate and consumer proposals, but included all individual bankruptcies. I also collected basic data from a similar sample in 1997 to permit some longitudinal comparisons.

For statistical reporting purposes, the OSB divides individual bankruptcies into consumer and business bankruptcies, with a consumer bankruptcy defined as one where business debts are less than 50 per cent of total debts outstanding. I coded the recorded percentages in the files so that, in addition to analysis of the full sample of individual bankruptcies, I could analyze the consumer cases where business debts were less than fifty per cent, and also bankruptcies where the bankruptcy was coded as relating solely to consumer debt (n=956). It became clear during the file analysis that current official classifications of consumer and business bankruptcy underestimate substantially the number of

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[46] See Schwartz, *supra* note 6.

[47] See I.D.C. Ramsay, *File Study* (1998) [unpublished, on file with author] [hereinafter *File Study*]. The tables produced below are based on the data from the *File Study*, unless otherwise indicated.

business-related bankruptcies, with significant numbers of "consumer" bankruptcies being related to business failures.[48]

There were three main sources of data in the files: (1) the Statement of Affairs drawn up at the time of filing for bankruptcy; (2) a report prepared by the trustee shortly before the discharge of the bankrupt; and (3) the Statement of Receipts and Disbursements, which is filed by the trustee with the Superintendent of Bankruptcy prior to the trustee being discharged. There were also data on the Estate Information Summary, which notes whether the bankruptcy is classified by the OSB as consumer or business. I collected over 300 variables from these sources.

The question of the reliability of the data in the Statement of Affairs concerning the assets and liabilities of a debtor has been raised. The Statement of Affairs is a sworn statement under oath by the bankrupt of his or her assets and liabilities, and failure to name a creditor or declare an asset could constitute a bankruptcy offence. These data are normally entered at the time of the declaration of bankruptcy by the bankrupt, almost always in consultation with the trustee. The exact amount of all debts owed may not be known at the time, and there may be some errors in the amount of debt. A few trustees appear to enter nominal amounts simply to indicate that a debt may be owing to a particular creditor, although the exact amount is not known. Table 20, below, indicates that, in general, there is a "shrinkage" in the amount of unsecured debts between the declaration of bankruptcy and the conclusion of the bankruptcy, when the trustee files the Statement of Receipts and Disbursements. This may be accounted for partly by the fact that creditors may fail to prove their claims in bankruptcy. It is unlikely that the data sources are seriously misleading as to the state of a debtor's assets at the time of bankruptcy. It is difficult for debtors to conceal assets of any substantial nature, and interviews with trustees suggested that this was unlikely to occur. Taking into account these caveats, I think that these public sources of data are important sources of information on the asset and liability position of debtors.

The sample is not a national representative sample of bankrupts, nor a representative sample of all Ontario bankrupts, and the comparisons with the general population must be treated with caution. A focus on one large district permitted me to explore files in depth, and to develop an understanding of the limits and potential of the data in the files. I draw attention to some of these in relation to such questions as

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[48] See Table 14, below.

home-ownership[49] among bankrupts and the amounts of secured debt owing by bankrupts.[50] In a large and regionally diverse country like Canada, the economic cycle is often at different stages in different regions of the country, so regional analyses are an important part of understanding the role of bankruptcy against the background of particular regional economies.

A. *Socio-economic Demography of Bankrupts*

In this section, I present data from the file study, and I refer also to certain other studies. These include two unpublished studies, a database compiled by the OSB,[51] and a study of debt counselling by David Forde and Lance Roberts,[52] as well as the more recent study by Schwartz and Anderson.[53] I also make occasional reference to trustee interviews, which are part of a separate study of the role of trustees in individual bankruptcies based on interviews with trustees.[54]

1. Age

The median age was 37, with a mean of 38.5.[55] The largest cluster of bankrupts falls within the 30–39 age band, and this group is over-represented compared to the general population. For many

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[49] See Part III(B), below.

[50] See Table 11; and Part III(E)(1), below.

[51] See Office of the Superintendent of Bankruptcy, *Three Year Review* (1993) [unpublished, on file with author] [hereinafter *Three Year Review*]. This is a sample of about 500 cases across Canada in 1993, which was made available to me by the Office of the Superintendent of Bankruptcy. It is not clear how the cases were sampled.

[52] See D. Forde & L. Roberts, *A National Assessment of Bankruptcy Counselling Services* (1994) [unpublished, on file with author]. This is an unpublished study of bankruptcy counselling, prepared for the Office of the Superintendent of Bankruptcy, that collected selected data on the demographic characteristics of bankrupts.

[53] See Schwartz & Anderson, *supra* note 45.

[54] This study involves qualitative data obtained from detailed interviews with trustees. I have used the study by Jean Braucher of consumer bankruptcy lawyers in the United States as the reference point for developing this aspect of the research: see Braucher, *supra* note 43.

[55] These data are similar to the *Three Year Review*, except in relation to debtors under 30 (25 per cent were 20-30; 61.9 per cent were 30-50; 13 per cent were over 50): see *Three Year Review*, *supra* note 51.

households, this is a time in the life-cycle associated with major credit commitments to build up a stock of assets.

TABLE 1*
AGE

Age	*File Study (%)*	*Ontario (%)*†
18–29	18.9	23.5
30–39	39.8	23.5
40–49	27.7	18.8
50–59	10.3	12.6
60+	3.2	21.3
	100.0	100.0

n=1,141; missing=6
* Percentages may not add to 100 per cent due to rounding.
† Statistics Canada, *Annual Demographic Statistics* (Ottawa: Statistics Canada, 1994) at 98-99.

2. Gender

There were 55.6 per cent male and 44.4 per cent female bankrupts, compared with 49.4 per cent males and 50.6 per cent females in the general population.[56] My findings indicate a large increase in female filers since the study by Brighton and Connidis in 1977, in which there were 27 per cent single female filings and 6 per cent joint filings.[57] Their findings were in turn a large increase over studies in the early 1970s, which indicated that debtors under the Quebec Lacombe Law were 83.6 per cent male.[58]

Table 2, below, shows that 55 per cent of bankrupts were married or in a common- law relationship.[59] Marital status varied with age so that only 40 per cent of those in the 18–29 category were married and 40 per cent were single. In contrast, of those aged between 30–39 and 40–49, 56 per cent and 60 per cent, respectively, were married or living common

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56 See Statistics Canada, *Annual Demographic Statistics* (Ottawa: Statistics Canada, 1994) [hereinafter *Annual Demographics*].

57 See Brighton & Connidis, *supra* note 11 at 19.

58 See note 27, *supra*, and accompanying text.

59 There was therefore a higher percentage of married bankrupts than in the *Three Year Review* data (44 per cent), although a similar profile emerges when common-law relationships are included (7.8 per cent): see *Three Year Review*, *supra* note 51.

law. The much higher general rate of divorced individuals among the bankruptcy population (10.1 per cent), compared with the general population of Ontario (5.3 per cent),[60] may not be surprising given the potential financial problems associated with marital breakdown. Again, there were differences in divorce rates associated with different age bands. The divorce and separation rate was highest among those bankrupts between 40–49 and 50–59, where 30 per cent and 31 per cent of individuals, respectively, fell within this category. However, as I indicate later (see Table 14, below), it is rare that marital breakdown alone is a cause of bankruptcy, and it is generally the combination of marital breakdown with other factors—such as unemployment—that triggers bankruptcy.

TABLE 2
MARITAL STATUS

Status	*Per Cent*
Married	50.6
Single	18.3
Widowed	0.9
Separated	15.2
Divorced	10.1
Common Law	4.9
Total	100.0

n=1,134; missing=13

3. Dependants

Forty-seven per cent of bankrupts who were married or living in a common-law relationship had two or more dependants under 21. In the single bankruptcy population, 27 per cent of women (n=94) had one or more dependant, compared with only 5 per cent of single men (n=112).

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[60] See *Annual Demographics*, *supra* note 56 at 98-99. The "married" category in the Statistics Canada data includes those who are legally married and separated, and persons living in common-law unions. In 1994, 65 per cent of the Ontario population aged 18-64 were married. Twenty-seven per cent of individuals were single and 1.7 per cent were widowed.

4. Income

The data on bankrupts' income and expenses were obtained from the Statement of Affairs, which requires bankrupts to provide their net income, contributions by dependants, other sources of income, and the total monthly net household income at the time of declaring bankruptcy. The median, monthly household net income was $1,700. Almost 6 per cent of households reported a total net income of zero. It is possible to obtain annual income data by multiplying these data by twelve, although it should be mentioned that this involves rather strong assumptions about the continuity of employment among a group that appears subject to income interruptions.

TABLE 3
TOTAL MONTHLY HOUSEHOLD INCOME

Income ($)	*Per Cent*
0	5.9
1–999	13.7
1,000–1,999	44.6
2,000–2,999	31.4
3,000–3,999	4.5
Total	100.0
Median	$1,700.0
n=1,142; missing=5	

The bankrupts in the sample differ markedly from the general Ontario population in 1994 (see Table 4, below). The median after-tax income in Ontario was $34,561, compared with $20,400 for the bankrupt population. Less than five per cent of bankrupts had an annual net household income of more than $50,000. The Low Income Cut-Offs (LICOS) used by Statistics Canada are a widely used measure of poverty in Canada.[61] In 1994, the cut-off for a family of four was a gross income of $30,708 in cities of 500,000 or more, $26,348 for a community between 30,000 and 90,000, and $20,905 for rural areas.[62] Preliminary analysis of a sub-sample of bankrupts shows that a large percentage would fall

[61] For a useful discussion of the different measures of poverty in 1994, see National Council of Welfare, *Poverty Profile 1994* (Ottawa: National Council of Welfare, 1996).

[62] *Ibid.* at 5.

below the poverty line at the time of bankruptcy. Forty per cent of single bankrupts in Metropolitan Toronto (n=132; with a total monthly household income less than $1,002, where the poverty line for a single person is $15,479) would fall below the poverty line for urban centres with a population of over 500,000, as would a similar percentage of married couples in Toronto with two dependants under 21 (n=49; with a total household monthly income of $1,710 or less). These findings compare with a 14 per cent poverty rate for all persons in Ontario in 1994.[63]

TABLE 4*
TOTAL ANNUAL NET HOUSEHOLD INCOME

Income ($)	*File Study (%)*	*Ontario 1994 (%)*†
0–9,999	15.1	5.9
10,000–19,999	33.8	18.5
20,000–29,999	29.2	17.9
30,000–39,999	12.9	16.3
40,000–49,999	4.3	13.4
50,000–59,999	2.3	9.9
60,000–69,999	0.8	6.8
70,000+	0.9	11.4
Total	100.0	100.0
Median	$20,400.0	$34,561.0

n=1,142; missing=5
* Percentages may not add to 100 per cent due to rounding.
† Statistics Canada, *Income After Tax, Distributions by Size in Canada* (Ottawa: Statistics Canada, 1994) at 79.

The Statement of Affairs requires debtors to indicate the sources of their income. In addition to contributions from dependants, there is a column for “other” income. One-half (50 per cent) of the debtors had other income, which included private sources such as rental income, commissions, or support payments. More frequently, other income included public sources, such as unemployment insurance payments (now known as Employment Insurance payments), social assistance, child tax benefits, pensions, family allowances, disability benefits, and workers’ compensation. In those cases where there was other income, the median amount was $800, and the mean was $897 per month. For

[63] *Ibid.* at 20.

43.5 per cent of those in receipt of other income (n=246), it constituted their total household income. Larger percentages of women (58 per cent) than men (46 per cent) received other income. The percentages of bankrupts receiving some form of public support or insurance at the time of bankruptcy appears to be much higher than in the general population.[64]

5. Surplus income

Bankrupts must indicate on the Statement of Affairs whether there is a surplus or deficit in relation to the calculation of their monthly income and expenses. The majority of debtors showed a deficit at the time of bankruptcy, and almost 25 per cent had a deficit of over $400. Less than one-third of the sample had surplus income at the time of declaring bankruptcy. Of those who had a surplus (n=332), the mean surplus was $212 and the median was $105. Seventy-seven debtors had a surplus income of more than $300, comprising just over 6 per cent of the total sample.

TABLE 5
SURPLUS INCOME

Amount of Surplus ($)	*Per Cent*
1–99	49.4
100–199	15.7
200–299	11.7
300–399	7.5
400+	15.7
Total	100.0
n=332	

[64] See Schwartz, *supra* note 6 at 101.

6. Debt-to-income ratios

Debt-to-income ratios provide a rough guide of the extent of debtor difficulties.[65] These ratios represent the aggregate debts of the bankrupt divided by the total annual net income. The median total debt-to-income ratio was 2.14, and the median ratio when mortgage debt is excluded was 1.22. Although Canadians have high levels of debt-to-disposable income, the median non-mortgage debt-to-income ratio of bankrupts was over five times higher than that of the general population in 1994 (0.19 per cent). The total debt-to-income ratio was over twice the level among the general population (0.92 in 1994). The non-mortgage debt-to-income ratio is misleadingly high due to reporting practices in relation to secured and unsecured debt on the Statements of Affairs.[66] However, the general conclusion must be that bankrupts are carrying large debt burdens in relation to their incomes.

7. Employment status

At the time of filing for bankruptcy, only 63 per cent of debtors indicated that they were employed, 31 per cent indicated that they were unemployed, and 6 per cent were retired, students, disabled, or classified themselves as home-makers. The unemployment rate in Ontario in 1992 and 1993 was 10.9 per cent and 10.6 per cent, respectively, and in 1994 it was 9.6 per cent.[67] These findings underline the importance of interruptions in employment among bankrupts, a finding confirmed by other studies in Canada and the United States.[68]

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[65] The use of debt-to-income ratios is discussed by G.B. Canner, A.B. Kennickell & C.A. Luckett, "Household Sector Borrowing and the Burden of Debt" (1995) Fed. Res. Bull. 323.

[66] See Table 20, below.

[67] See Statistics Canada, *Canadian Economic Observer: Statistical Supplement—January 1996* (Ottawa: Statistics Canada, 1996) at 59, Table 40.

[68] Sullivan, Warren, and Westbrook indicated only a 7 per cent unemployment rate in their American study, but these data are complicated by the fact that, in considering employment status only, the "primary debtor" was considered in joint petitions: see *As We Forgive Our Debtors*, *supra* note 34 at 85. Data from their 1991 study indicate that in 52 per cent of all cases petitioners reported a period of unemployment for themselves, their spouses, or both during the two years before filing: see "Consumer Debtors Ten Years Later," *supra* note 34 at 131.

8. Self-employed and in business

Twenty-eight per cent of debtors described themselves as self-employed, and 24 per cent indicated that they had been in business during the five years prior to their bankruptcy. In Ontario, 13.7 per cent of the labour force was self-employed in 1994,[69] underlining the high rate of representation of this group within the bankruptcy population.

9. Occupation

Occupation is a commonly used indicator of social class. There are several reasons why it is important to understand the relationship between the use of bankruptcy and social class. Bankruptcy is a legal institution and a legal resource. One could draw a rather crude distinction between the legal process "doing things to people" (*e.g.*, the criminal process), and providing individuals with resources (*e.g.*, the introduction of Small Claims Courts). Much research suggests that the criminal justice process focuses disproportionately on offences committed by working-class and poor individuals, rather than the crimes of the powerful, and discriminates against those drawn from minority groups.[70] On the other hand, when the law provides facilities such as Small Claims Courts, they are colonized by narrow groups of professionals, small businesses, and the middle classes.[71] Individual consumers seem to have obtained, at best, modest benefits from such institutions. Bankruptcy is an institution that "does things to people,"—*e.g.*, results in the loss of assets, creates potential stigma, and so on, but it also provides potential benefits and opportunities through a "fresh start." Occupational analysis of the users of this process is therefore an important part of understanding the role of bankruptcy as a legal institution in contemporary society, how it compares with other legal institutions, and whether its use should be expanded or restricted.

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[69] See Statistics Canada, "Ontario—Selected Economic Indicators" (CANSIM) Matrix 9225, series D28724, online: Statistics Canada <http://www.statcan.ca/english/CANSIM> (date accessed: 25 August 1999); and Statistics Canada, "Ontario, Labour Force Characteristics, Three Month Moving Averages From March 1976, Seasonally Adjusted" (CANSIM) Matrix 3463, series D983003, online: *ibid.*

[70] See generally Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995) (Co-chairs: D.P. Cole & M. Gittens) c. 4, n. 24, and sources cited therein.

[71] See S.C. McGuire & R.A. Macdonald, "Small Claims Courts Cant" (1996) 34 Osgoode Hall L.J. 509.

I was particularly interested in the occupation of bankrupts because of the findings of Sullivan, Warren, and Westbrook that, although debtors earned significantly less income than the general population at the time of bankruptcy, debtors' occupations were similar to the general population, and they worked in roughly the same industries and jobs. The data on occupation are drawn from the Statement of Affairs. The entry is often not very specific. For example, in some cases an entry would simply indicate "Sales" or "Salesman" [*sic*]. I was able to obtain useable data from 824 cases.

There are a variety of measures of occupational prestige and, for the purpose of analyzing these data, I used an occupational scale known as the Pineo-Porter-McRoberts scale,[72] as this has been used by previous bankruptcy studies. Table 6, below, shows the findings on occupational status, and also those of Forde and Roberts, who collected occupational data from a national sample of bankrupts in 1994 as part of a study of debt counselling in bankruptcy. This provides a useful comparison since the data were collected in the same year as the file study, but the data were obtained from questionnaires to bankrupts.

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[72] See P.C. Pineo, J. Porter & H.A. McRoberts, "The 1971 Census and the Socioeconomic Classification of Occupations" (1977) 14 Can. Rev. Soc. & Anth. 91.

TABLE 6
OCCUPATIONAL STATUS OF BANKRUPTS USING THE PINEO-PORTER-MCROBERTS SCALE

Occupational Category	*File Study(%)*	*Forde/ Roberts(%)**	*Canada 1995(%)†*
Self-Employed Professional	0.7	0.3	1.3
Employed Professional	4.2	3.1	7.9
High-Level Management	1.9	0.9	3.3
Semi-Professionals	5.9	6.8	8.8
Technicians	1.3	1.7	1.8
Middle Management	4.9	9.1	9.8
Supervisors	6.1	2.2	2.2
Foremen/women	1.0	1.7	2.0
Skilled Clerical/Sales/Service	13.8	9.0	7.9
Skilled Crafts and Trades	12.6	12.0	9.9
Farmer	0	…	1.7
Semi-Skilled Clerical/Sales/Service	15.9	19.0	14.3
Semi-Skilled Manual	10.6	12.4	8.1
Unskilled Clerical/Sales/Service	6.4	6.1	7.8
Unskilled Manual Labourer	14.4	14.9	11.7
Farm Labour	0.1	0.9	1.6
Total	100.0	100.0	100.0

* D. Forde & L. Roberts, *A National Assessment of Bankruptcy Counselling Services* (Winnipeg: Sociometrix, 1994)
† Statistics Canada, *General Social Survey, Cycle 11: Social and Community Support (1996)* (Ottawa: Statistics Canada, 1997).

Table 6 shows that the bankrupts in the sample do not correspond to a representative cross-sample of the labour force. However, the discrepancies are larger within different categories. The top three classes (self-employed professionals, employed professionals, and high-level management) and middle management are significantly under-represented among bankrupts, while those in the skilled clerical/ sales/service category are over-represented. The latter category, which includes such occupations as real estate agents, also had a relatively high level of self-employment (34 per cent). Among the least qualified groups (unskilled labourers, unskilled clerical, and farm labour categories), there are similar percentages of bankrupts compared to the general population. There are also similar percentages among the semi-skilled categories. The data from Forde and Roberts indicate that, apart from

the top three classifications, bankrupts are not greatly dissimilar to the general population in occupational status.

It should be noted that I did not include in the occupational analysis the small number of cases of consumer proposals where the majority of debtors are generally drawn from the skilled trades and higher occupational categories, and the few cases in which individual professionals had made commercial proposals. Finally, there are some cases in the sample about which one could surmise that there had been a decline in the occupational status of an individual in the period leading up to bankruptcy. Thus a small business owner might have an occupational status as a waitress at the time of the bankruptcy.[73] It was not possible to measure the significance of this factor, although this suggests that the factor should be measured in future studies.

These findings contrast with the 1997 findings of Schwartz and Anderson that Canadian bankrupts are not a cross-section of the Canadian population, and that those in the lowest occupational levels were significantly over-represented.[74] My findings indicate also a significant change from the 1977 study by Brighton and Connidis, where there were twice as many unskilled manual labourers among the bankruptcy population as in the general work force.[75] Both of these studies used different sampling frames, so that this may be a factor accounting for the differences between the studies.

Although Sullivan, Warren, and Westbrook concluded that American bankrupts did not differ markedly in occupational prestige from the general population, their data did indicate a significant under-representation in the professional/technical and manager/administrator classes, and significantly larger percentages of occupations requiring lower skill levels.[76] When this modification is taken into account—and recognizing the difficulties of comparing data that use different occupational coding schemes—their data are not sharply different from my findings or from those of Forde and Roberts.

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[73] I am indebted to Jay Westbrook for suggesting the importance of attempting to find this "occupational decline" in the sample.

[74] See Schwartz & Anderson, *supra* note 45 at 11; and Schwartz, *supra* note 6 at 101.

[75] It may be relevant that the Brighton and Connidis study included as part of the sample debtors who had declared bankruptcy under the FITA program, which made bankruptcy available to those who could not afford the services of a private trustee. Although there exists still a *pro bono* program for debtors, it is not clear from discussions with trustees that it functions on the same scale as did the FITA program.

[76] See *As We Forgive Our Debtors*, *supra* note 34 at 87, Table 5.1.

A more difficult issue is to interpret the occupational findings in terms of social class. An initial analysis might be attempted by adopting a broad-brush classification of contemporary societies as consisting of four main classes: (1) a professional-business class; (2) a class of small-scale independent business people; (3) a working class with white- and blue-collar segments; and (4) an underclass.[77] Using this classification, I would conclude that individual bankrupts are drawn primarily from the working class and, to a lesser degree, from the category of small-scale independent business people. The working-class category would include such categories as skilled and unskilled clerical occupations, sales occupations, as well as those lower in the occupational scale, such as supervisors and some semi-professionals.

Michael Adler, in his comments on my Conference paper, made some very helpful suggestions on further sources for analyzing the occupational class of bankrupts.[78] In particular, he drew attention to Will Hutton's analysis of contemporary employment patterns in terms of risk and insecurity, and the growth of insecurity of employment among a large percentage of the labour force.[79] The high rate of representation of self-employed individuals in the sample, and the high levels of unemployment at the time of bankruptcy, suggest that insecurity of occupation may be an important factor within the sample. As I indicate below, few bankrupts have substantial assets to cushion them against unforeseen circumstances.[80]

Since bankruptcy is part of the process of debt recovery, it might be useful to compare the occupations of bankrupts with individuals who have individual debt enforcement action taken against them. There are, unfortunately, few recent Canadian studies on this question, but the studies of the 1970s noted in Part II, above, painted a picture of a blue-collar male debtor who was subject to significant income interruptions. My data suggest that bankrupts are drawn from a wider cross-section of society than those against whom individual debt action is taken. There is also an important difference between individual debt enforcement and bankruptcy. In the former situation, the debtor is usually an involuntary participant. In contrast, almost every bankruptcy is initiated by the individual debtor, so that it is a voluntary choice. Although a declaration

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[77] This classification is suggested by R.M. Unger, *What Should Legal Analysis Become?* (New York: Verso, 1996) at 14.

[78] See M. Adler, "Reactions to Empirical Studies" (1999) 37 Osgoode Hall L.J. 127.

[79] See W. Hutton, "High Risk Strategy" *The [Manchester] Guardian* (30 October 1995) 2-2.

[80] See discussion in Part III(C), below.

of bankruptcy may often be a response to extreme pressure, it still differs from the situation in which a creditor enforces a debt against an individual. This difference means that the bankruptcy choice might be studied as part of the broader socio-legal literature that studies individual remedy-seeking, and the use of the legal system and professionals by individuals.[81] Since most studies suggest a reluctance by individuals to turn to third parties (such as lawyers) for help in relation to consumer disputes,[82] an important research question is why individuals do turn to a bankruptcy trustee.

B. *Home-ownership*

At this point, it is appropriate to consider the issue of home-ownership. The purchase of a home requires individuals to pass a relatively rigorous credit screening, compared with other purchases, so that home-ownership is often difficult to achieve for those in marginal or unstable economic circumstances. Twenty-five per cent of debtors listed a house (real property) as an asset on their Statement of Affairs. There was geographic variation within the sample of those debtors with a Toronto postal code having a home-ownership level of 15 per cent. These data indicate a much smaller percentage of home-owners in the sample than the general population of Ontario (65 per cent owners), Canada (64 per cent), or Toronto (58 per cent).[83] Five debtors (0.4 per cent) owned mobile homes. The median value of the home at the time of bankruptcy was $109,000.

The data from the Statement of Affairs indicate only those individual bankrupts who were home-owners at the time of declaring

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[81] We might compare here the profile of a bankrupt with those individuals who seek the advice of credit counselling agencies. In 1994, 19,355 individuals sought the advice of credit counselling agencies in Ontario. Their average gross family income was $26,835, average total debt was $14,619, and average number of debts was 5.4. These data tell us that bankrupts had higher levels of debt and similar incomes to individuals visiting counselling agencies. However, further analysis would be necessary to understand the relationship between the two groups: see Ontario Association of Credit Counselling Services, *Annual Report 1995*(Toronto: Ontario Association of Credit Counselling Services, 1995).

[82] See, for example, N. Vidmar, "Seeking Justice: An Empirical Map of Consumer Problems and Consumer Responses in Canada" (1988) 26 Osgoode Hall L.J. 757; and I.D.C. Ramsay, "Consumer Redress Mechanisms for Defective and Poor-Quality Products" (1981) 31 U.T.L.J. 117.

[83] See Statistics Canada, *Household Facilities by Income and Other Characteristics, 1994* (Ottawa: Statistics Canada, 1994) at 30, 56 [hereinafter *Household Facilities by Income*]; and W. Baker & B. Herring, with Statistics Canada, *PCensus: 1991 Census—Example Lifestyle, Toronto* (Vancouver, B.C.: Tetrad Computer Applications, 1992).

bankruptcy. They do not tell us about individuals who had their home seized, or who disposed of it in the period leading up to a declaration of bankruptcy. Fortunately, the Statement of Affairs requests that the debtor provide data on assets that have been seized or disposed of in the period up to five years before the declaration of bankruptcy. Existing Canadian studies have not incorporated these data into their analyses of the asset position of a bankrupt. I collected these data and, excluding those individuals owning homes at the time of bankruptcy, estimate that 20 per cent of debtors had disposed of their homes, or had their home seized, in the period preceding bankruptcy. This would bring the home-ownership level close to the findings of Sullivan, Warren, and Westbrook in relation to American bankruptcies (who reported a home-ownership level of 52 per cent, and 7.5 per cent for those owning mobile homes).[84]

Assuming that this estimate is correct, it suggests a much higher home-ownership level for this sample than suggested by other studies. It is possible that this was an idiosyncratic sample that reflected the real estate collapse in Ontario in the late 1980s and early 1990s. In addition, a number of those "owning" homes may have been using them solely as an investment vehicle, and this may have also boosted the home-ownership level. The data from the 1997 files will permit me to test this hypothesis. However, any study that restricts home-ownership analysis to ownership at the time of bankruptcy will underestimate those bankrupts who were home-owners in the period preceding bankruptcy. My findings are also significant in relation to analysis of the social class of bankrupts. Previous studies, such as that of Brighton and Connidis, drew attention to the low levels of home-ownership as one factor in the argument that bankrupts were drawn from the lower working class or marginal sections of society. My data indicate that bankrupts may be somewhat closer to a representative sample of the population, at least in relation to home-ownership, than we had previously thought. Home-ownership does not mean (in Canada) that one is well-off, but might be taken as a signal that there are a substantial number of bankrupts who are not drawn from an underclass or marginal social group.

I have not completed analysis of the mortgage levels of the home-owners, but it would appear that, in the majority of these cases, the first mortgage exceeded the value of the property as recorded on the Statement of Affairs. In addition, there were 91 home-owners with second mortgages, 14 with a third mortgage, and 3 with a fourth

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[84] See *As We Forgive Our Debtors*, *supra* note 34 at 129.

mortgage.[85] Many bankrupt home-owners faced the problem of "negative equity" in their home.

Bankruptcy appears to be one method of addressing the problem of negative equity, and any deficiency judgment that results from a creditor exercising its power of sale if an individual defaults on repayments. Significant numbers of home-owning bankrupts appeared to have large deficiencies that would be discharged as unsecured debt in the bankruptcy process.[86] In some Western provinces, debtors are protected against deficiency judgments so that the creditor must look solely to the collateral for satisfaction of the debt.

It appears that a number of bankrupts were able to remain in their homes, notwithstanding the bankruptcy. On a number of the Statements of Trustees' Receipts and Disbursements it was noted specifically that the debtor was continuing to pay the mortgage, and remained in the home. Bankruptcy may help a debtor to remain in his or her home since, having discharged unsecured debt in the bankruptcy, the debtor is in a better position to pay the mortgage. Paradoxically, the debtor with no equity in the home may be in a better position than one with equity, since the latter would have to pay the trustee to release the trustees' interest in the home. The use of bankruptcy as a device to stay in the home is also fraught with difficulty, since an over-optimistic debtor who remains in the home through the bankruptcy, and then is subsequently unable to repay, will lose his or her home, and be faced with a deficiency judgment.

The findings on the extent of home-ownership among bankrupts suggest that greater attention should be paid to the relationship between bankruptcy and housing law and policy, particularly the causal link between mortgage debt and bankruptcy. This might include the role of interest rate spikes, and the unwillingness of lenders to renew first or second mortgages. (Most home mortgages in Canada are for terms no longer than five years.)

Finally, there is the normative issue of how much protection should be provided to home-owners in bankruptcy. To the extent that Canada has had a housing policy, a central plank has been the promotion of home-ownership as the primary means of tenure, even for individuals of modest means. Rental housing is a secondary form of tenure, and there is little public housing. Home-ownership is both an investment and a way of life. As an investment, it is for many individuals

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[85] It is possible that some of these mortgages related to the small number of home-owners who also owned a cottage (9) or land (4).

[86] See Table 14, below.

the most important method of saving for their retirement. In addition, the loss of a home is not merely a material loss, but may be the loss of a way of life. One trustee expressed this very vividly:

> You have to realize that from the viewpoint of the [bankrupt] I'm not talking of a house. I am talking a whole way of life. I'm talking of a whole way of living. I am suggesting they should change their way of living … . [T]he house is where the children have their friends, where their children go to school, where the woman, if she's not working, has her social contacts, where they have their neighbours. It's not the house, it's the whole way of life, I'm talking about.[87]

In any political decision on the extent of protection for home-owners, it is necessary to balance the social costs of losing a home against the argument that, if there are restrictions on seizure of this asset, then there may be less credit available to marginal credit risks. The extent of this impact is an empirical question, but some research suggests that existing restrictions on mortgage repossession rights have a relatively modest impact on credit price and availability.[88]

C. *The Structure of Assets and Liabilities*

The data presented here are drawn from the Statement of Affairs, and the report filed by the trustee shortly before discharge under section 170 of the *BIA*. In the Statement of Affairs, the trustee or debtor inserts the value of the debtor's assets under a number of headings, including cash; furniture; personal effects; cash surrender value of life insurance policies; stocks; real property including cottages and land; automobiles, motorcycles, snowmobiles, and recreational equipment; estimated tax refunds; tools of the trade; and other assets. Debtors are entitled to retain certain assets, and under the *BIA* these exemptions are determined by reference to the relevant provincial legislation. The exemptions in Ontario are modest, including $2,000 for furniture and household goods; $1,000 for the "necessary and ordinary wearing apparel" of the debtor; and for tools and chattels (such as an automobile) ordinarily used in the debtor's business, profession, or

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[87] Trustee Interview #12 (29 June 1998) [on file with author].

[88] For a discussion of the impact of protective provincial legislation, see Alberta Law Reform Institute, *Mortgage Remedies in Alberta* (Edmonton: Alberta Law Reform Institute, 1994); and M.H. Schill, "An Economic Analysis of Mortgagor Protection Laws" (1991) 77 Va. L. Rev. 489 at 491: "home mortgage loan interest rates are relatively insensitive to the existence of mortgagor protection laws."

calling, up to $2,000.[89] There is the possibility of an exemption for Registered Retirement Savings Plans (RRSPS), provided they are associated with a life insurance policy.[90] There is no home or homestead exemption, contrasting with Western provinces such as Alberta, which has the most liberal exemption in Canada ($40,000).[91]

Table 7, below, reflects the value of assets without deducting for mortgages or other forms of security. The majority of bankrupts have assets valued at less than $5,000 at the time of bankruptcy, and about 37 per cent have assets less than the provincial ceiling on furniture of $2,000. The majority of individuals with assets over $20,000 are represented by home-owners, and it must be remembered that this asset will often be fully mortgaged. It is clear that debtors, at the time of bankruptcy, have few assets to turn over to their creditors.

TABLE 7
TOTAL ASSETS

Assets ($)	*Per Cent*
0	10.6
1–1,000	16.9
1,001–2,000	14.4
2,001–5,000	18.9
5,001–10,000	7.0
10,001–20,000	4.8
20,001–50,000	2.9
50,001–100,000	8.0
100,001–200,000	12.9
200,000+	3.6
Total	100.0

n=1,143; missing=4

[89] See *Execution Act*, R.S.O. 1990, c. E-24, s. 2.

[90] For further discussion on the complexities in relation to the eligibility of RRSPS, see L.W. Houlden & G.B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, vol. 1, 3d ed., looseleaf (Toronto: Carswell, 1998) at F§42.

[91] See *Civil Enforcement Regulation*, Alta. Reg. 276/95, s. 37(1)(e).

1. Automobile ownership

Forty-seven per cent of bankrupts owned at least one automobile. This is significantly less than the general population in which 77 per cent of Ontario households owned one or more automobiles in 1994.[92] The Ontario data do not provide an exact comparison since they relate to household rather than individual ownership, and it is possible that a partner of a bankrupt might own an automobile. There was a higher level of ownership among males (53 per cent) compared with females (43 per cent), and single women had the lowest level at 29 per cent. In 44 per cent of cases where a bankrupt owned an automobile it was partially or totally secured. It is possible that, in these cases, a bankrupt might be able to retain the automobile by continuing to pay the secured lender. The median exchange value of the automobile was $1,000, and $3,500 in those cases where the automobile was secured.

Under the Ontario *Execution Act*, automobiles are exempt, up to a value of $2,000, as tools of the trade if they are "ordinarily used by the debtor in the debtor's business, profession, or calling."[93] In only 25 per cent of cases where an individual owned one automobile was it classified as exempt, and in only 16 per cent of cases (17 out of 105) was the second automobile exempt. Interviews with trustees suggest that a debtor may be able to retain an automobile as exempt if the trustee takes a liberal (versus a strict) approach to the interpretation of the "tools of the trade" exemption.

2. Furniture and personal effects

Only 760 debtors reported a positive value for furniture, and almost 99 per cent of debtors listed a value of $2,000 or less. Of the 1.3 per cent over $2,000, several cases were joint filings, so that the asset levels reflected the exemptions for two people. It is therefore extremely rare for any bankrupt to have furniture valued at over the personal exemption limit. A similar pattern may be found in relation to personal effects (see Table 9, below).

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[92] See *Household Facilities by Income*, *supra* note 83 at 56.

[93] *Execution Act*, *supra* note 89, s. 2(3).

TABLE 8
FURNITURE

Value ($)	*Per Cent*
0	33.4
1–500	11.8
501–1,000	19.1
1,001–1,500	9.1
1,501–2,000	25.2
$2000+	1.3
Total	100.0
n=1;141 missing=6	

TABLE 9
PERSONAL EFFECTS

Value ($)	*Per Cent*
0–249	65.4
250–499	10.2
500–749	1.9
750–999	21.0
1,000+	1.5
Total	100.0
n=1,138; missing=9	

These data reflect the fact that, in the trustee's view, the exchange value of household goods is small and that, given the additional costs of realization, it is not worthwhile to attempt to realize on these assets. In interviews with trustees, there was near unanimity in their view that debtors would rarely have goods within this category worth realizing. Sample comments included:

> It would be a very rare situation that I would have somebody to go value something in somebody's house.[94]
>
> …
>
> So what I'll say to them is—they're sitting opposite me—if you had a garage sale tomorrow and you put all your belongings on your lawn, what would you get? And if anybody could say they would get more than $2,000, I think they're wrong.[95]

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[94] Trustee Interview #3 (4 July 1997) [on file with author].

[95] Trustee Interview #5 (October 1996) [on file with author].

…

> Do you have … antiques? Did you just refurnish? Do you have expensive stereo equipment? If they answer no to all these, then we just put in a Statement of Affairs that they have household furniture anywhere up to $2,000. … I can't think of a time when we have had to actually get an appraisal.[96]

3. Stocks, RRSPs, and life insurance policies

Thirteen per cent of bankrupts owned stocks (n=150) at the time of declaring bankruptcy, and this was usually held in the form of an RRSP. The median value for those with stocks was $1,650 (mean $7,349), with 25 per cent owning stocks valued at more than $7,000. The report made by the trustee shortly before discharge indicated that 87 debtors held a RRSP with a median value of $2,200 (mean $6,334), and in 27 cases these were classified as exempt from seizure.[97] Less than 3 per cent of debtors (14) indicated a cash surrender value for a life insurance policy as an asset. More men than women held stocks or RRSPS (61 per cent to 39 per cent). Those in the top three occupational categories were over-represented in ownership of these assets, while those in the unskilled occupational categories were under-represented in stocks and RRSP ownership. It is difficult to obtain accurate data on the percentage of households in the general population that own RRSPs, mutual funds, and stocks. A well-known investment firm estimates that perhaps 30–40 per cent of households owned mutual funds in 1997[98] and, in 1995, 35 per cent of all eligible tax filers made a contribution to an RRSP.[99] Even if some bankrupts may have liquidated their holdings before bankruptcy, there is an under-representation of ownership of these assets by bankrupts.

In relation to other categories of assets, 12 debtors owned a motorcycle; 6 owned a snowmobile; 51 owned tools of the trade with a median value of $1,000; 12 owned land with a median value of $47,500; 98 had cash (median of $250); and 13 had other assets (median value of $600).

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[96] Trustee Interview #16 (9 January 1997) [on file with author].

[97] In Ontario, an RRSP will be exempt from seizure if it is in a plan associated with a life insurance policy that designates irrevocably certain family members as beneficiaries.

[98] See G. Stromberg, *Investment Funds in Canada and Consumer Protection: Strategies for the Millennium: A Review* (Ottawa: Industry Canada, 1998) at 3, where the author cites to information provided by C.I.B.C. Wood Gundy.

[99] See *The Canadian Year Book* (Toronto: A. Hewett, 1999) at 194.

Bankruptcy is based on the concept of the bankrupt turning over his or her non-exempt assets to creditors in return for receiving a discharge of his or her debts. My findings are that few individual bankrupts have any substantial assets at the time of bankruptcy to turn over to their general creditors.

4. Human capital: income contributions

One significant finding is that a majority of debtors made income contributions to the estate while they were undischarged bankrupts, notwithstanding the fact that in 1994 post-bankruptcy income did not automatically fall into the estate. These payments were usually based on a formal or informal arrangement with the trustee, and may require monthly payments by the debtor. The trustees' Statements of Receipts and Disbursements indicated that in 782 cases (from a possible base of 973 completed cases; see Table 18, below) where such a payment was made, the median amount was $936. These income contributions are, apart from income tax refunds, the most significant "asset" that most debtors will contribute to the estate. They are also the most substantial part of the trustee's "fee" for processing the bankruptcy. The question might be asked, how are individuals able to find the income to make these payments, given their parlous financial state? In some cases the payments may be contributed by relatives. In addition, it must be remembered that because a declaration of bankruptcy stays enforcement action by unsecured creditors, a debtor will be able to divert any income being used to pay these debts into payments to the estate.

These income payments undermine a sharp distinction that is sometimes drawn between a "straight bankruptcy," where individuals turn over their assets, and a proposal, in which a debtor retains assets but makes income repayments. Most debtors in straight bankruptcies have no assets to make available to their creditors, but will be attempting to make income repayments during the period of nine months in which they are undischarged bankrupts.

D. *Assets and Exemptions*

Exemptions of certain property from seizure are a central aspect of the "fresh start" in bankruptcy, and the rationales for exemptions are those of minimum economic security, welfare substitution, and family values. The last objective has been stressed in recent Supreme Court of

Canada cases, and mirrors the growth of a privatization rhetoric that stresses individual rather than communal responsibility.[100]

In *Royal Bank*, for example, the Supreme Court of Canada considered the case of a medical doctor who had transferred assets from an RRSP into a Registered Retirement Investment Fund (RRIF), and whether this was a void settlement under section 91(2) of the *BIA*.[101] In protecting this asset from seizure, the Court stressed the importance of this exemption as a method of ensuring that the bankrupt could provide for the welfare of his dependants. There is a sharp difference between the picture of the bankrupt in this case and that of the sample. Self-employed professionals constitute under 1 per cent of the sample. Few bankrupts have assets, such as RRSPS or RRIFS, that they can shield from their creditors to provide for their families. Yet the absence of protection for an automobile, except in the narrow circumstances defined by the *Execution Act*, means that unemployed bankrupts may be disadvantaged in seeking employment, and may face high substitution costs (such as taxis) to commute to work, obtain groceries, and transport children. The absence of significant public transportation outside the Greater Toronto Area underlines this problem.

E. *Liabilities*

I collected data on outstanding debts from the Statement of Affairs, the section 170 report,[102] and the trustees' Statement of Receipts and Disbursements. Over 40 per cent of bankrupts had total liabilities less than $30,000, and almost one-third had liabilities over $100,000, which is represented primarily by mortgage debt. There were differences in liabilities within the sample, depending on whether a bankrupt was classified as a business bankruptcy (business debt more than fifty per cent of total liabilities), or was a "pure consumer" debtor

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[100] See, for example, *Royal Bank*, *supra* note 10; and *Marzetti* v. *Marzetti*, [1994] 2 S.C.R. 765, Iacobucci J. There is often a connection between welfare substitution and family values. Writers have pointed to the trend towards privatization of welfare, where individuals are held responsible for assuring the welfare of themselves and their families.

[101] See *Royal Bank*, *supra* note 10.

[102] Section 170(1) of the *BIA*, *supra* note 2, states that a trustee shall prepare a report on (1) the affairs of the bankrupt; (2) the causes of his or her bankruptcy; (3) the manner in which the bankrupt has performed the duties imposed on him or her under the *Act* or court orders; (4) whether the bankrupt has been convicted of any offence under the *Act*; and (5) any other facts or circumstances that would justify the court's refusal of an unconditional order of discharge.

(classified by the Superintendent of Bankruptcy as a bankruptcy where none of the debts relate to the operation of a business).

TABLE 10
TOTAL LIABILITIES: ALL DEBTORS, CONSUMER DEBTORS, AND BUSINESS DEBTORS

	All Debtors	*Pure Consumer($)*	*Business($)*
Mean	134,067	86,943	497,757
Median	41,363	32,649	118,500
Std. Deviation	573,402	165,235	1,790,414
25th Percentile	16,868	15,001	38,786
75th Percentile	137,825	114,419	360,310
n=	1,136	946	101
	missing=11	missing=10	

Table 10, above, highlights the contrast between consumer bankrupts with a relatively modest median level of debt, and individual business bankrupts with a much higher level of debt. The absolute level of debt for many bankrupts may not seem high. For example, 10 per cent of bankrupts have less than $10,000 in total outstanding debts. Analysis of this sub-group (n=115) shows a high level of unemployment (over 50 per cent), low levels of household income, and almost one-third drawn from the unskilled labour occupations. There were almost equal numbers of male and female debtors within this category. It is therefore the relative level of debt-to-income and future occupational prospects that is of crucial importance in the bankruptcy decision.

TABLE 11
TOTAL LIABILITIES BROKEN DOWN BY CREDITOR TYPE AND SECURITY HELD AT THE TIME OF BANKRUPTCY

Creditor	*Total ($)*	*Secured ($)*	*Unsecured ($)*
Banks	54,462,938	31,696,276	22,530,052
Trust Cos.	22,223,308	12,409,820	9,813,488
Finance Cos.	10,221,073	2,099,604	8,121,469
Auto Finance Cos.	1,148,901	476,939	671,962
Auto Lease	602,753	207,570	395,183
Other Lease	637,556	22,801	614,755
Credit Union	1,478,879	281,772	1,197,107
Mortgage Cos.	8,205,970	4,771,087	3,727,910
All Purpose Credit Card	4,954,579	…	4,954,579
Retail/Gas Credit Card	2,158,097	…	2,158,097
Stores	6,142, 731	…	6,142,732
Insurance Cos.*	4,168,957	…	…
Caisse Populaire	425,379	158,600	266,779
Collection Agency	145,286	…	145,286
Landlord	63,038	…	63,038
Professional Services Legal/Medical	1,869,440	…	1,869,440
Other Professionals	670,130	…	670,130
Revenue Canada	8,928,044	…	8,928,044
Student Loan	954,759	…	954,759
Municipality	450,278	…	450,278
Goods & Services Tax	1,020,959	…	1,020,959
Employment Insurance	133,477	…	133,477
Utilities	300,498	…	300,498
Other Government	1,596,619	…	1,596,619
Litigation Judgment	2,344,484	…	2,344,484
Individuals*	12,254,751	…	…
Others*	4,692,758	…	…
Total	152,255,642	52,124,469	79,071,125

* The breakdown of secured and unsecured claims are not known for the cases of insurance companies, individuals, and others.

Table 11, above, indicates the breakdown of debts by creditor type, and also indicates the extent to which creditors held security over the assets of the debtor at the time of bankruptcy. Debts owed to

financial institutions represent over two-thirds of total debt outstanding.[103] Government debts constitute just under 10 per cent of total debts, with Revenue Canada the largest government creditor. If one scans the creditors in descending order, there is a broad distinction between the professional creditors (at the top), which calculate and spread risks on an aggregate basis, and the "reluctant" creditors[104] (further down), such as professionals, landlords, government agencies, and those with litigation judgments against the bankrupt. There is also a large amount of outstanding debt owing to "individuals." This category was sometimes difficult to code in the field work, but appears to include both private lenders and others such as friends or relatives.

1. Secured credit and debt

An important method of reducing risk for a creditor is to take security over the assets of a debtor. My initial analysis of the Statement of Affairs suggested that 42 per cent of debtors have secured debt. This was similar to the OSB data, which had also used the Statement of Affairs as a data source.[105] These findings contrast with American studies, which generally show a high level of secured debt among bankrupts.[106] However, I soon discovered that reliance on the presentation of secured and unsecured debt in the Statement of Affairs, without further analysis, underestimates the amount of secured debt. This is because of the reporting system on the Statement of Affairs where debts are reported as secured or unsecured. The Statement of Affairs will reveal those creditors who are partially secured, but it will not indicate whether a debt, recorded as unsecured, is in fact a deficiency claim on a secured asset. Other sources in the files may not always reveal these data. It is not easy to provide a precise percentage of the amount of debt originally secured. I think (based partly on clear indications in the files and educated estimates) that at least 70 per cent of files will have claims that were originally secured. Table 11 shows that many financial creditors are

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[103] In 1994, banks held 65 per cent of the consumer credit market, finance companies and credit unions each held 9 per cent, and trust and mortgage loan companies held 6 per cent: see Bank of Canada, *Bank of Canada Review* (Ottawa: Bank of Canada, 1994).

[104] See discussion of reluctant creditors in *As We Forgive Our Debtors*, *supra* note 34 at 293.

[105] See *Three Year Review*, *supra* note 51.

[106] See, for example, *As We Forgive Our Debtors*, *supra* note 34 at 307, Table 17.2, which shows that 70 per cent of the debts listed in bankruptcy were secured.

under-secured at the time of the bankruptcy, with the banks being the least under-secured.

2. Specific debts

a) *Banks and other financial institutions*

In 58 per cent of cases, individuals owed at least one debt to a chartered bank. The median liability for bank debts, where the value was known at the time of bankruptcy (n=693), was $14,500 (with a mean of $82,195). There was a large variation here, with 25 per cent owing less than $5,000 and 25 per cent owing more than $70,500. Bank debt constituted, on average, 36 per cent of total liabilities, and in 25 per cent of cases represented 75 per cent or more of total liabilities.

Sixty per cent of debtors owed debts to other financial institutions, and of those cases where the debt was known at the time of bankruptcy, the median amount was $15,700 and the mean $71,604. Debts to financial institutions (excluding credit cards and retail debts) were owed by debtors in 83 per cent of cases. Thus, in 17 per cent of cases individuals had no debts to financial institutions.

b) *Credit card debts*

Credit card debts included debts owing on general purpose cards, retail credit cards, and gas credit cards. Eighty-one per cent of bankrupts owed debts on credit cards, with debtors having an average (median) of three cards at the time of bankruptcy. The mean debt outstanding was $7,615 and the median was $4,800. Twenty-two per cent owed more than $10,000 on credit cards. I coded the general credit card debt (such as Visa and Mastercard) separately from retail credit card debt and gas credit card debt. Almost two-thirds of bankrupts owed money on a retail credit card (60 per cent), with a median debt of $1,857 outstanding. The interest rate on unpaid retail credit cards may often be close to 30 per cent, so that any outstanding debt may cumulate quickly if it is not paid on time. Data provided by the Canadian Bankers Association shows that there were 35.2 million Visa and Mastercard credit cards in circulation in October 1998, and that 45 per cent of these

cards were carrying outstanding balances.[107] A survey in 1997 indicated that 74 per cent of Canadians own a bank credit card and 52 per cent own a department store credit card.[108] There is not a large difference in general credit card ownership between bankrupts and the general population, although almost 10 per cent more bankrupts own a retail credit card.

There has been much discussion of the role of credit card debt in relation to bankruptcy.[109] The file study shows that the actual amounts owing on credit card debt are not large in absolute terms and that total credit card debt represents a small percentage of total debt outstanding. However, we do not know the extent to which credit card debt may trigger a bankruptcy because of the high interest charges on overdue accounts. We might estimate that credit cards are the last source of unsecured credit for both individual business and consumer bankrupts, and it is probably this phenomenon that has stimulated claims by creditors and their representatives that debtors "run up" large credit card debt just before bankruptcy.

Twenty-two per cent of debtors with credit card debts owed more than $10,000 in such debt, and 80 per cent of this group possessed four or more cards (see Tables 12 and 13, below). In one-third of these cases, credit card debt constituted over 50 per cent of total liabilities. Among this sub-group (n=71), only 38 per cent owed debts to banks, and only 50 per cent had any debts to financial institutions. None owned a home, and they had a median total liability of $22,850 (the mean was $26,190) and median total assets of only $1,100. Their median annual income was slightly lower than the general sample at $17,376. They were of a similar age to other bankrupts, with a slightly higher percentage of men to women than in the general sample (60 per cent men to 40 per cent women). Thirty-six per cent were married, 27 per cent were single, and 30 per cent were separated or divorced. In 39 per cent of cases, an adverse employment change was cited as a cause of bankruptcy by the trustee. These data might provide some support for the hypothesis that,

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107 See Canadian Bankers Association, "Fast Stats—Credit Cards" (31 October 1998), online: Canadian Bankers Association <http://www.cba.ca/eng/Statistics/Faststats/ faststs.htm#F> (date accessed: 10 August 1999).

108 See Angus Reid, *Canadians and Credit: Report Prepared for Ernst & Young* (Toronto: Ernst & Young, 1997), online: Ernst and Young <http://www.eycan.com/isr/surveys/credit.doc> (date accessed: 2 July 1999).

109 See, for example, L.M. Ausubel, "Credit Card Defaults, Credit Card Profits, and Bankruptcy" (1997) 71 Am. Bankr. L.J. 249, which demonstrated that high credit card profitability in the United States was correlated with increases in bankruptcy.

for this group, credit cards were the last source of credit that debtors were able to access before the necessity of declaring bankruptcy.

TABLE 12
TOTAL CREDIT CARD DEBT

Debt ($)	*Per Cent*
1–999	12.2
1,000–1,999	11.9
2,000–2,999	8.8
3,000–3,999	10.7
4,000–4,999	8.7
5,000–5,999	7.9
6,000–6,999	6.0
7,000–7,999	4.7
8,000–8,999	3.5
9,000–9,999	3.0
10,000+	22.5
Total	100.0
Median=$4,800	
n=927	

TABLE 13
TOTAL NUMBER OF CREDIT CARDS

Credit Cards	*Per Cent*
1	22.9
2	20.0
3	18.1
4	12.3
5	8.0
6	5.6
7	5.4
8	2.6
9	2.4
10+	2.6
Total	100.0
n=932	

Forty-four per cent of debtors had at least one retail store debt that did not appear to be attributable to a credit card; among this group, the mean debt was $12,225 and the median debt was $1,595.

c) *Debts owed to professionals and landlords*

One-hundred and thirty bankrupts owed debts to professionals, with a mean of $11,693 and a median of $1,000. Twenty-five per cent owed less than $300 and 25 per cent owed more than $5,900. Only 20 debtors owed rent to landlords, with a mean of $3,150 and a median of $1,750.

d) *Government debts*

The primary creditor here was Revenue Canada, to whom 34 per cent of debtors owed debts. In those cases where the outstanding debt was known at the time of bankruptcy (n=388), the median debt was $4,000 and the mean $22,982. Twenty-five per cent owed less than $1,000, and 21 per cent owed more than $20,000 to Revenue Canada. In the cases over $20,000, there was an opposition to discharge in 17 of the 82 cases (9 by creditor and 8 by trustee). It is surprising that there should be such a high number of debts to Revenue Canada, since the great majority of individual wage-earners receive refunds from Revenue Canada. These data are another indicator of the extent to which this sample of bankrupts includes individuals who may be engaged in business or self-employed.

Debtors had liabilities in relation to a number of other government creditors. These included the Goods and Services Tax (GST) (5 per cent), Employment Insurance and Department of Employment and Immigration (3.4 per cent), Municipalities (13 per cent), Community and Social Services (0.9 per cent), Canada Housing and Mortgage Corporation (CHMC) (0.6 per cent), and other government bodies (9.8 per cent). While the total amount of debt outstanding to government agencies is significantly less than that owed to financial institutions, the government is a reluctant creditor in many individual bankruptcies. Two-hundred and thirty-seven debtors owed debts to utilities.

e) *Student loans*

Nine per cent of bankrupts had student loan debts, with a mean of $8,759 and a median of $6,000. Eighteen per cent of bankrupts had student loan arrears of $15,000 or more. In over 27 per cent of these cases (n=18), there was an opposition to discharge, with the majority of oppositions being instituted by the student loan creditor. A striking finding in relation to student loan debt was that over twice as many women as men had student loan debt (74 compared with 35), and women had slightly higher levels of student loan debt.

f) *Litigation judgment*

There were a very small number of cases where there was a large litigation judgment identified in the Statement of Affairs. Of these 5 cases, 4 resulted in an opposition to discharge by either the creditor (3) or the trustee (1). The nature of the discharge was conditional in 1 case, with the debtor required to pay $25,000; in the remaining 3 cases, 1 debtor consented to judgment, and 2 received suspended discharges.

g) *Individuals and other debts*

Three-hundred and eight debtors (23 per cent) owed one or more debts to individuals, with a mean of $33,000 and a median of $8,584. I have not concluded coding these individual cases, but a significant number appear to be private lenders. There were 22 per cent of debtors with other debts, with a mean of $19,879 and a median of $2,000.

F. *Causes of Bankruptcy as Perceived by Trustees*

Trustees are required by the BIA to record their opinion on the causes of the bankruptcy.[110] This is usually a one- or two-sentence explanation. In some cases, there is merely the statement "unable to pay debts as they come due," while in others there will be a reference to multiple causes, such as "unemployment, loss of income, financial mismanagement," or "unemployment and excessive borrowing," with no

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[110] See BIA, *supra* note 2, s. 170(1)(b).

attempt to rank the causes. There is obviously a question of judgement here, and different trustees may interpret the cause of bankruptcy in a different manner. After discarding explanations that stated only "unable to pay debts as they come due," I developed a coding scheme that attempted to capture both single- and multiple-cause bankruptcies. If a trustee mentioned more than one cause, such as "marriage breakdown and unemployment," this was coded as "marriage breakdown and … ." It would not be coded under any of the single-cause categories, such as adverse employment change or marital breakdown. Thus, the coding separated multiple causes of bankruptcy from cases in which a single cause, such as unemployment, was identified. No case was coded under more than one category.[111] Table 14, below, outlines the causes for the full sample and for pure consumer debtors.[112]

There are several important points flowing from the findings reported in Table 14. First, adverse employment change dominates as a single cause of bankruptcy. This category included loss of employment, loss of spousal employment, and long-term unemployment. These findings may be related to the high level of unemployment in the sample. Second, there is a large number of business-related bankruptcies. In addition to business failure, the guarantee cases invariably related to a failed business, and it would be appropriate to describe a real estate investment failure as a failed business venture. The relatively large number of bankruptcies related to personal guarantees for business debts deserves further investigation, in the light of the concerns that have been raised in recent years over the circumstances in which such guarantees are given by spouses and family members of the business owner.[113] Third, "pure" credit overextension represents a subset rather than a major cause of bankruptcy. In many cases, there was a combination of loss of income and overextension. The category of "inadequate income" also deserves some comment. This included references to inadequate and insufficient income, as well as "low income." It is not always clear whether the trustee is indicating that the cause of insufficient income was credit overextension. It could also relate

[111] Jay Westbrook, in his comments on my draft paper, noted that it was not clear whether cases had been coded under more than one category: see J.L. Westbrook, "Comparative Empiricism" (1999) 37 Osgoode Hall L.J. 143 at 146, n. 18. I have take the opportunity to add this sentence to make it clear that no case was coded under more than one category. This was intended to identify single- and multiple-cause bankruptcies.

[112] For a definition of "pure consumer" debtor, see discussion in Part III(E), above.

[113] See B. Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Oxford: Clarendon Press, 1997).

to the problems of a subset of debtors making ends meet on low incomes. Marriage breakdown was rarely a single cause; it was usually combined with another cause, including unemployment, the costs of divorce, loss on the sale of home, and depression. There was also a sub-category of cases in which debtors declared bankruptcy because there was a deficiency on the sale of their home. These were almost invariably cases where a creditor had exercised its power of sale in relation to the bankrupt's home. Coupled with the role of real estate investment failures, they illustrate the impact of volatility in real estate markets in contributing to increases in bankruptcy.

TABLE 14*
CAUSES OF BANKRUPTCY AS PERCEIVED BY TRUSTEES

Cause	*All Debtors (%)*	*Pure Consumer Debtors (%)*
Adverse Employment Change	24	28
Business Failure	14	10
Overextension	9	10
Inadequate/Insufficient Income	9	10
Loss of Income and Overextension	9	8
Marital Breakdown and …	8	6
Loss on Sale of Home/Deficiency Claim	6	6
Real Estate Investment Failure	5	6
Guarantor	5	4
Adverse Employment Change Related to Health	4	3
Tax Liability	3	3
Mismanagement of Finances	2	3
Marital Breakdown	2	2
Other	…	…
Total	100	100
n=819	n=684	

* Percentages may not add to 100 per cent due to rounding.

The majority of bankruptcies appear to be caused by an unfortunate change in life circumstances, such as adverse employment changes or business failure. There are a minority of cases of fiscal imprudence, and the inadequate income category raises the question of the connection between chronically low income and bankruptcy. Most individuals appear to be the casualties of the severe downturn in the

Ontario economy during the late 1980s and early 1990s, which precipitated high rates of unemployment, a large shake-out of many small businesses, and a severe drop in real estate values.

Among consumer bankrupts, there is also a dominance of adverse employment changes. What is surprising is the significant number of consumers who identify business failure and personal guarantees (the vast majority of which are given in relation to small businesses) as a cause of bankruptcy. Combined with those classified as real estate investment failures, clearly more than 10 per cent of pure consumer debtors might be more appropriately classified as business-related cases.

G. *Specific Categories of Bankrupts*

Bankrupts are not a homogenous group, and one of the valuable contributions of the studies by Sullivan, Warren, and Westbrook was their analysis of differing sub-groups of bankrupts. We have already noted the large number of self-employed individuals in the sample. In this section I offer some preliminary findings on three further groups of bankrupts: women, repeaters, and household bankruptcies.

1. Women in bankruptcy

The file study indicates an increase in women who file for bankruptcy compared with those studied by Brighton and Connidis in the 1970s. Women may file as single individuals, as separated or divorced persons, or with their partner. A general comparison of male and female filers indicates similar incomes and liabilities, higher numbers of women not in the labour force or unemployed, and a slightly younger median age for female bankrupts (38 for males, and 36 for females). I was interested in pursuing the more finely grained analysis of female filers, first adopted by Sullivan, Warren, and Westbrook, in which women filers are analyzed under the categories of married and unmarried (*i.e.*, not currently married or living common law, including women who were separated, divorced, or widowed). I adopted these categories, and added also a category of individuals who identified themselves as single (*i.e.*, never married or common law).

Single women (n=96) appeared to be slightly better off financially than single men (n=112). Single women earned a median monthly income of $1,243, while single men earned $1,076. Single men

and women had a similar median age (31), which was significantly younger than the general population of bankrupts (38). Single women had slightly higher levels of assets (median for women, $1,500; for men, $1,450), and also a marginally higher level of home-ownership (8 women owned a home, compared with 4 men). Single women had slightly higher levels of employment than single men (64 per cent of women employed compared with 59 per cent of men). Single women were far more likely to have dependants than single men, with 27 per cent of women having one or more dependant, compared to only 5 per cent of men in this category. In terms of occupations, only 4.2 per cent (n=3) of single women were unskilled labourers, compared with 22 per cent (n=19) of men, and 28 per cent of single women were in skilled clerical occupations, compared with 5.9 per cent of men.

There was a similar pattern within the larger "unmarried" category, with women again having higher median monthly incomes than men ($1,380 to $1,250), and a slightly higher level of assets including homes. Women in this group also had a much higher number of dependants under 21. Forty-nine per cent had one or more dependant, whereas only 23 per cent of men had one or more dependants.

The final category for analysis was married women. One of the striking findings here was the extent to which women in these households were dependent on their partner's income and other income support. Only 49 per cent of married women were employed, and their individual net monthly income was a median of $494. Seventy-one per cent of males in this category were employed, with a median individual monthly income of $1,395. There were two or more dependants under 21 in 41 per cent of these households. Sullivan, Warren, and Westbrook found that married couples in bankruptcy were generally one-income families,[114] and my findings seem to suggest a similar pattern in this sample.

The general file study findings in relation to gender and bankruptcy differ from those of other studies, which indicated that women bankrupts were generally in worse economic circumstances than men. However, although single and unmarried women are slightly better off than their male counterparts, they have higher numbers of dependants—a fact that would in many cases place them in a worse economic situation than their male counterparts.

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[114] See *As We Forgive Our Debtors*, *supra* note 34 at 156.

2. Household bankruptcies

Since 1992, it has been possible for related persons to file a joint bankruptcy where their debts are substantially the same.[115] One rationale for this measure was the reduction of costs to a household declaring bankruptcy. A significant finding in the study was the extent to which it is households, rather than individuals, that are declaring bankruptcy. This did not appear initially from the file data, which indicated that only 8 per cent of filings were recorded as joint filings. However, a bankruptcy file often indicated a cross-reference to a bankruptcy for a person with the same surname as the debtor, and this was usually the next file. The great majority of these cases represented married debtors. I discovered therefore that trustees often processed two bankruptcies for related individuals, and thus coded these as "joint but separate." These filings accounted for approximately 26 per cent of all filings. In 86 per cent of the cases, the parties were married, 6 per cent were separated or divorced, and 5 per cent were in a common-law relationship. Household bankruptcies therefore constitute about 34 per cent of the sample.[116] Within this group, there is a higher level of home-ownership (39 per cent at the time of bankruptcy), a higher median monthly income ($2,031), and higher levels of total assets (40 per cent with over $21,000 in assets).

Trustees whom I interviewed were, in general, unenthusiastic about joint filings, and some seemed to interpret the legislation as requiring identical liabilities. It is also true that joint bankruptcies are less profitable than two separate bankruptcies, and this was mentioned as a disincentive by a number of trustees. These findings underline the central role of the professional practices of trustees in the bankruptcy process, who may undermine legislative objectives, such as the reduction of costs for households declaring bankruptcy. Recognition of the household bankruptcy also suggests the need to think more

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[115] See BIA, *supra* note 2, s. 155(f); and Office of the Superintendent of Bankruptcy, *Directive No. 2: Joint Filing* (issued 7 December 1992), as revised by *Directive No. 2R: Joint Filing* (issued 19 December 1997), online: Office of the Superintendent of Bankruptcy <http://strategis.ic.gc/SSG/br01092e.html> (date accessed: 10 August 1999).

[116] In the United States, Sullivan, Warren, and Westbrook found that 57 per cent of their filings were joint filings (restricted to husband and wife): see *As We Forgive Our Debtors*, *supra* note 34 at 149.

systematically about the impact of bankruptcy on the family unit and family assets.[117]

3. Repeaters: previous bankrupts

Repeat bankruptcies are of interest for several reasons. In Canada, unlike the United States, there is no limitation on the frequency with which one may declare bankruptcy. In addition, the repeat bankrupt is often a symbolic figure in debates on bankruptcy, pictured alternatively as the smart operator using bankruptcy as a "fiscal car wash," or the inadequate person with personality disorders. The latter image seems to have had some influence on the introduction of counselling in 1992,[118] since it was assumed that counselling might prevent this repeat behaviour.

Eight per cent of the sample were previous bankrupts, and four individuals, or 0.4 per cent of the sample, had been bankrupt on two previous occasions. I was interested in knowing when this group had previously filed for bankruptcy, and I obtained these data for the great majority of repeaters. Table 15, below, indicates the date of when the bankrupts were discharged on their first bankruptcy.

TABLE 15
PREVIOUS BANKRUPTCY: DATE OF DISCHARGE

Date	*Per Cent*
Before 1 January 1980	18.3
1 January 1980–31 December 1984	32.4
1 January 1985–31 December 1989	30.5
1 January 1990–30 December 1993	18.3
Total	100.0
n=82; missing=13	

Fifty per cent of previous bankrupts were discharged at least nine years before their second bankruptcy. We were able to obtain the

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[117] See A. Clarke, "Insolvent Families" in H. Rajak, ed., *Insolvency Law: Theory and Practice* (London: Sweet & Maxwell, 1993) 83.

[118] See BIA, *supra* note 2, s. 157.1(1). See also Office of the Superintendent of Bankruptcy, *Directive 1R2: Counselling in Insolvency Matters* (issued 21 December 1994), online: Office of the Superintendent of Bankruptcy <http://strategis.ic.gc.ca/SSG/br01091e.html> (date accessed: 5 August 1999).

causes of the first bankruptcy in only 27 cases. The following were indicated as the causes: business failure (8); investment failure (1); marital breakdown (5); adverse employment change (8); over-extension (5); Revenue Canada (1); injury, illness, or accident (4); and garnishee (1). The two most frequent causes were business failure and lack of employment, followed by over-extension.

Previous bankrupts were older than the general sample, with a median age of 44. The median monthly income was slightly higher at $1,917. The median total liabilities were also higher at $49,959. Fewer had credit card debt, with only 68.5 per cent showing one or more credit-card debt, and a slightly smaller percentage owned a home (21 per cent). The reasons for the repeat bankruptcy did not differ markedly from the general sample. The significant numbers of repeat business failures emphasize the high-risk nature of small business and self-employment.

It is also relevant to mention that previous bankrupts were subject to greater official scrutiny in the bankruptcy process. There is no automatic discharge for a repeat bankrupt,[119] and a larger proportion of creditors objected to the discharge of repeaters. In addition, a much higher number than in the general sample were subject to an official examination by the official receiver (47 per cent of repeaters, compared with 14 per cent in the general sample).

H. *The Bankruptcy Process*

The bankruptcy documents provide information on the formal aspects of the process, from the assignment in bankruptcy until the debtor is discharged. They also include data on pre-bankruptcy actions taken by creditors and by the bankrupt.

1. Pre-bankruptcy activity

The Statement of Affairs requires a bankrupt to indicate whether any assets have been seized or disposed of in the year preceding bankruptcy, and to indicate any dispositions of real estate in the five years preceding bankruptcy. Eighteen per cent had disposed of assets within twelve months of bankruptcy and, in 14 per cent of cases, assets had been seized by creditors. Twenty-seven per cent had disposed of real estate within five years of their bankruptcy. These findings record both

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[119] See *BIA*, *supra* note 2, ss. 168.1(1), 172(2)(a), 173(1)(j).

the limited number of cases in which formal collection actions had been instituted against a bankrupt in the year preceding bankruptcy, and the significant number of individuals who had sold or disposed of real estate in the five years preceding bankruptcy. The trustees included within this category some "forced disposals" that were further to the exercise of a power of sale by a mortgage holder.

The majority of pre-bankruptcy seizure actions involved homes under power of sale,[120] and repossession by a secured creditor of an automobile. There were a small number of wage garnishments by finance companies or Revenue Canada. It is not surprising that there was little attempt by unsecured creditors to seize the personal property of a debtor, given our earlier findings on the asset position of debtors. In addition, wage garnishment would not be relevant against the large numbers of debtors who were unemployed, and would be difficult to use against the self-employed. We can conclude that, in the overwhelming majority of cases, seizure of assets was by secured creditors who would be able to exercise self-help remedies, or the relatively swift power of sale of real estate.

A striking finding is the number of voluntary and forced disposals of real estate in the period leading up to bankruptcy. While there may be many reasons for the disposal of a home (moving, family breakdown, attempting to evade creditors by transferring assets to a relative or friend), a not uncommon notation on the Statement of Affairs was "sold home … debtor used portion … to maintain living expenses and sustain life," or "proceeds from sale went to pay creditors," or "sold house further to separation … funds spent on paying bills and living expenses for ex-spouse."[121]

These findings are of interest in understanding the relationship of bankruptcy to the individual debt collection process. Bankrupts might be viewed as a subset of those individuals who have their wages garnisheed or their general assets seized under writs of execution. The evidence suggests, however, that we cannot assume this to be true given the limited number of formal actions taken by creditors against bankrupts.

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[120] Ontario permits a power of sale procedure that is more advantageous to a secured creditor than the more drawn-out procedure of foreclosure. Seizure under power of sale is not permitted in certain provinces and many American states.

[121] *File Study*, *supra* note 47.

2. From assignment to discharge

An overwhelming number of individual bankrupts (98.3 per cent) make a voluntary assignment in bankruptcy rather than being petitioned into bankruptcy by a creditor. This is itself of interest since much socio-legal work on consumers, and in particular consumer-debtors, has stressed the relative passivity of debtors in the face of debt collection measures, and an unwillingness to turn to third parties for advice or help. The actual processing of the assignment in bankruptcy may often be done by a trustee, but the individual will have had to make the decision to visit a trustee in bankruptcy. Most existing literature on remedy-seeking by consumers suggests that individuals are reluctant to turn to third parties when they have a consumer problem. "Avoidance" is often a common response to problems. The dominance of major life changes, such as unemployment and business failure, in the reasons for bankruptcy provide some support for the argument that it is only when avoidance becomes impossible under the pressure of major problems that individuals turn to the third-party trustee.

In 1994, there was an automatic discharge for a first-time bankrupt nine months after an assignment.[122] In addition, there is a summary administration procedure for bankrupts where the realizable assets of a bankrupt will be $5,000 or less after deduction of the claims of secured creditors.[123] This procedure is, as its name implies, a more streamlined process that is subject to a fixed tariff of fees, and also permits joint bankruptcies by individuals whose affairs might be treated as one estate. The overwhelming majority of files in the sample were summary administration, with 2 per cent converting to ordinary administration. An additional requirement since 1992 has been that an individual must submit to two counselling sessions as a condition of receiving his or her discharge.[124] The main steps in the process after the assignment are the creditors' meeting, which is often combined with the initial counselling session, the requirement of a section 170 report by a trustee, and a second counselling session shortly before discharge. There is also the possibility of an official examination of the debtor by the

122 See BIA, *supra* note 2, s. 168.1(1).

123 *Ibid.* s. 49(6).

124 See *supra* note 118.

official receiver, and there may be an objection to discharge that will trigger the need for a judicial hearing.[125]

It appeared from the files that the process was relatively routinized for the great majority of debtors. Although there was a requirement of a creditors' meeting, there appeared to be some form of creditor participation in these meetings in a very small number of cases. There was an official examination of the debtor by the official receiver in 14 per cent of cases, and an opposition to discharge in 14 per cent of cases.

3. Discharge and opposition to discharge

Under the *BIA* there are several potential grounds for objection to discharge that may result in the refusal, suspension, or granting of a conditional discharge.[126] Almost all individual debtors could potentially be subject to objection on the ground that the "assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of his unsecured liabilities." The overwhelming majority of debtors fall within this category. However, Table 16, below, indicates that there was an opposition to discharge in only 14 per cent of cases, and that in only 5 per cent of cases was there an opposition by a creditor. The majority of oppositions are brought by trustees, and I found that in many of these cases, where there is an opposition, it is withdrawn before the date for hearing.

TABLE 16
OPPOSITION TO DISCHARGE

Opposing Party	*Per Cent*
Superintendent of Bankruptcy	0.3
Creditor	5.7
Trustee	8.6
Unopposed	85.4
Total	100.0
n=1,118; missing=29	

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[125] See *BIA*, *supra* note 2, ss. 158(c) (official examination), 168.1(1) (envisaging possibility of objection to discharge).

[126] See *ibid.* s. 173(1).

Why do trustees oppose discharge? The section 170 report, prepared shortly before discharge, usually provided some information here. An occasional comment was that the "debtor has failed to make a payment … as per the voluntary agreement."[127] Trustee opposition appears to be used in a significant number of cases as a method of ensuring that there will be sufficient assets to pay the trustee's "fee." This was confirmed in interviews with trustees, where there were differing views as to the propriety of this practice. In the Toronto bankruptcy district, there were long delays in 1994 in obtaining a court hearing date, so that an opposition could be made and withdrawn without the necessity of actually appearing before the registrar or a judge. Thus, one trustee who indicated a practice of objecting to discharge, if a debtor did not pay money into the estate as promised, commented:

> I tell the bankrupt I am opposing because you haven't paid my fee … now once we file the opposition the discharge does not happen, but there is often a six-month period or more before that gets to court. That gives the bankrupt time to give me what I want, and I just take back [the opposition] … and they usually fix it up in the end.[128]

The practice of trustees objecting to discharge because of non-payment of fees is controversial, and there are varying local practices by bankruptcy registrars on this question. I have been informed that registrars in Vancouver and Montreal will not permit trustees to recover their "fees" in this manner.[129] These aspects of local legal culture will affect trustees' practice in how they ensure that they are paid by bankrupts.

I have not analyzed comprehensively the data on discharge oppositions and their outcomes. It appears, however, that creditors opposed discharge primarily in the case of business-related bankruptcies and real estate investment failures, and these were generally cases where there was either a substantial debt (over $50,000), or allegations of fraud. These comprised the majority of objections. There were a small number of Canada Student Loan objections (9). However, there were no objections by credit card companies, only one by a consumer retailer, and a small number by consumer finance companies. For the ordinary consumer debtor who does not have a large deficiency on a mortgage

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[127] *File Study*, *supra* note 47.

[128] *Supra* note 96.

[129] J.H. Todd, "Address" (Conference on the Contemporary Challenges of Consumer Bankruptcies in a Comparative Context, Faculty of Law, University of Toronto, 21-22 August 1998 [unpublished]. John Todd is a practising trustee in bankruptcy.

and owes primarily consumer debts, it would appear that there is little likelihood of creditors objecting to discharge. One might presume that this reluctance to oppose is based on a cost-benefit analysis in relation to the returns from individual cases; any money paid into court on a successful opposition will be shared with other creditors.

In the case of an opposition to discharge, any money paid into the estate is for the benefit of all creditors. I was not able to track in the files those cases where an individual creditor attempted to have his or her debt survive bankruptcy by an allegation that the debt had been obtained by fraud. Nor do the file data inform us of the practices of "repeat player" creditors in dealing with bankrupt consumers. A major concern in the United States has been the practice of creditors obtaining reaffirmations of debts that have been discharged in bankruptcy. There is anecdotal evidence of this occurring in Ontario, but I do not know the extent of the practice.[130]

In 1994, bankruptcy was, for the vast majority of debtors, a routinized administrative process in which they would not have to face their creditors or appear in court. The fact that the process is routinized, however, does not mean that it is not a traumatic process for the bankrupt, just as "no fault" divorce does not necessarily reduce the trauma of marital breakdown.

I. *Asset Realization*

The data on asset realization are incomplete, since some files were not complete in 1998. In the 973 cases where I have collected data, the mean total receipts were $3,475, and the median $2,433. In over 40 per cent of cases, the receipts were $2,000 or less. Tables 17 and 18, below, indicate the receipts and the sources of these receipts.

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[130] I was informed that a legal firm in Toronto that acted for creditors had sent letters to debtors asking them to reaffirm their debts. In addition, there is reference to reaffirmation in a journalist's account of his bankruptcy: see J. Smith, "Zero and Counting—How I Went Bankrupt: A Model of Our Times" *This Magazine* (August 1992) 33.

TABLE 17
TOTAL RECEIPTS

Receipts ($)	*Per Cent*
0–999	7.5
1,000–1,999	32.8
2,000–2,999	19.6
3,000–3,999	13.9
4,000–4,999	8.2
5,000–5,999	4.1
6,000–6,999	4.1
7,000–7,999	3.3
8,000–8,999	1.4
9,000–9,999	2.0
10,000+	3.1
Total	100.0

n=973

TABLE 18
SOURCE OF RECEIPTS

	Number	*Mean ($)*	*Median ($)*	*Std. Dv. ($)*
Payments by Debtor	782	891	936	694
Conditional Order	20	3,167	925	5,741
Pre-Bankruptcy Income Tax	508	1,185	834	1,250
Post-Bankruptcy Income Tax	773	1,145	797	1,042
Other Tax	140	1,537	544	5,090
GST	562	479	356	1,964
Sale of Motor Vehicle	207	816	500	1,202
Sale of Other Assets	81	1,760	590	3,303
Other Receipts	271	982	$275	2,036

n=973

The data in Table 18 reveals large variations in the amounts received, so that the data on means are likely to be influenced by a number of large outliers. The main sources of receipts in 1994 were payments by debtors and the pre- and post-bankruptcy income tax returns. Pre- and post-bankruptcy income tax returns constitute 17 per

cent and 26 per cent, respectively, of total receipts, while payments by debtors represent 20 per cent, and GST represented 7.9 per cent of receipts. Sales of motor vehicles or other assets occur in a much smaller percentage of cases. It is relevant to note that "sale" of the motor vehicle does not necessarily mean that the debtor has lost the use of the automobile. In a number of cases, the trustee sells the automobile back to the bankrupt, or the bankrupt will get a friend or relative to bid for it. In some cases the payment will be by instalments. In at least 10 per cent of cases where an automobile was sold, there was a clear indication in the file that it had been sold back to a debtor. Similarly, the "sale of other assets" would often include the case where a bankrupt with equity in a home has made some contribution to the estate from his or her equity.

1. Costs of administration

Before unsecured creditors receive a dividend, preferred creditors must be satisfied, which in the vast majority of individual files is represented by the expenses and remuneration of the trustee. (There is also the levy of the Superintendent of Bankruptcy.) The trustees' disbursements included the filing fee of $50 and counselling fees of $170. In 6 cases, legal fees were payable. The median trustee remuneration is $1,491 (mean $1,569), with 25 per cent receiving less than $1,200 and 25 per cent over $1,800.

Table 19, below, shows the amount available for distribution to unsecured creditors. The median amount available for distribution to unsecured creditors was $558, and the mean was $1,639. In 24.1 per cent of cases, there were no assets to distribute. Expressed as a creditors' dividend, the median dividend was 3.22 per cent, and the mean was 12.5 per cent. In 10 per cent of cases, over 24 per cent was paid as a dividend. In 10 cases, more than 100 per cent was available for distribution. Although the dividends are in general very modest, there are fewer "no asset" cases than in American studies.

TABLE 19
AMOUNT AVAILABLE FOR DISTRIBUTION TO UNSECURED CREDITORS

Amount Available ($)	*Per Cent*
0	24.1
1–499	23.7
500–999	13.1
1,000–1,499	9.3
1,500–1,999	6.7
2,000–2,499	4.7
2,500–2,999	3.2
3,000–3,499	1.8
3,500–3,999	2.2
4,000–4,499	2.4
4,500–4,999	1.3
5,000+	7.0
Total	100.0
Median=$558	
n=974	

TABLE 20
RATIO OF UNSECURED PROVED DEBT TO UNSECURED DECLARED DEBT

Unsecured Proved Debt as a Percentage of Declared Debt (%)	*Per Cent*
0–25	12.6
25–50	15.3
50–75	18.3
75–100	24.9
1–200	21.6
200+	7.4
Total	100.0
n=908	

Table 20, above, indicates the ratio of unsecured proved debt (*i.e.*, where creditors file a proof of claim in the bankruptcy) to unsecured debt declared by the debtor in his or her Statement of Affairs.

This shows that, in over 70 per cent of cases, the unsecured declared debt is equal to or higher than the amounts ultimately claimed by creditors. It suggests that some unsecured creditors do not file proof of a claim in bankruptcy, perhaps based on a cost-benefit calculation of the small amount that they would recover on individual files. It is also the case that, in 29 per cent of cases, the Statement of Affairs understates the amount owing by the bankrupt. In these cases, there were higher numbers of bankrupts who had indicated ownership of a home on their Statement of Affairs (38 per cent compared with 25 per cent), and the inflation in proved claims may be partly accounted for by mortgage holders seizing the home after the declaration of bankruptcy, and making a later claim for a deficiency.

J. *Financing Bankruptcy: What Price Does the Debtor Pay?*

It may be useful to examine the process in terms of the financial price that the debtor pays to use bankruptcy, since one might assume that, along with the non-financial costs (which might be significant), this will affect its use by individuals. A debtor must give up non-exempt assets and pay a filing fee of $50. There is also a fee of $170 for two counselling sessions. In order to use the bankruptcy process, the debtor must find a trustee to process the bankruptcy. It is sometimes stated that the "cost" of bankruptcy is $1,200, since this is a common amount that trustees quote to potential bankrupts. It is also common to refer to this as the "fee," even though the bankrupt is not the client of the trustee, and the fee is determined by a tariff that is a percentage of assets realized. The trustee will generally require the debtor to make a voluntary payment into the estate. This may be $1,200, or it may be less if there is expectation of an income tax rebate. Payments for the fee are often spread over several months and, in some cases, the trustee may require a third-party guarantee of the fee. The debtor will generally be required to contribute to the estate any pre- and post-bankruptcy income tax return, the amount of which may often not be known at the time of bankruptcy. In addition, if the debtor owns an automobile that is not secured, he or she may have to give it up, keep it in return for an income payment, or arrange for a friend or relative to pay. It is possible that a payment will be required if the debtor has some equity in his or her home. It is not clear how much bargaining goes on between trustee and bankrupt over these issues, but at least one trustee indicated that there would be bargaining over fees.

If one includes only the post-bankruptcy income tax return and voluntary payments, then many bankrupts will "pay" more than $1,200. For example, for those debtors who both made voluntary payments and had a post-bankruptcy income tax return, the median combined amount was $1,733 and the mean was $2,036. This is a substantial amount of money for a person in the financial position of most bankrupts. However, at the time of filing for bankruptcy, many bankrupts will not have to hand over any assets. Apart from an automobile, they will not lose any personal property, and they may be able to keep the automobile on a promise to make payments to the trustee. They will, in many cases, have to make a down payment towards the bankruptcy, but the balance will also be a promise. One of the most significant assets that they will lose, the money from income tax returns, is an expectation. If this is $1,000, they do not have to give up $1,000, but merely forego the expectation. There is much psychological-economic literature that indicates that individuals value more highly an existing asset in their possession than the same asset viewed as a lost expectation.[131] It is possible, therefore, that the existing method of financing bankruptcy may reduce the impact of the relatively high price on the willingness of an individual to use bankruptcy.

The payments to the trustee will represent the total financial costs that a bankrupt will have to pay, since individual bankrupts in Canada are rarely represented by lawyers. There is no consumer bankruptcy bar similar to that in the United States. These data suggest that the cost of a bankruptcy in Ontario in 1994 was higher than in the United States. Jean Braucher indicates in her study that the legal fees for a bankruptcy ranged from a low median of US$300–$350 in Dayton, Ohio, to a median of US$700–$750 in Austin, Texas.[132] Even with the addition of the filing fee in the United States, it would seem that Ontario bankrupts pay more than their American counterparts.

IV. SUMMARY AND DISCUSSION

It appears that, for many individuals in this sample, bankruptcy provided a valuable safety net against the consequences of the severe downturn and structural adjustment of the Ontario economy in the late

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[131] For a general discussion of this effect, see J.D. Hanson & D.A. Kysar, "Taking Behavioralism Seriously: The Problem of Market Manipulation" (1999) 74 N.Y.U. L. Rev. 630 at 673.

[132] See Braucher, *supra* note 43 at 547.

1980s and early 1990s. To describe the bankrupts studied here as cases of "consumer" bankruptcy is something of a misnomer, since not only are significant numbers of consumer bankruptcies related to the operations of small business, but the description "consumer" bankruptcy implies, in popular understanding, a close relationship between consuming (or over-consuming) credit and bankruptcy, with the accompanying image of the overspending consumer. The data indicate, rather, that changes in income are the major reason for most bankruptcies. A central factor here is adverse employment change. In addition, the substantial numbers of bankruptcies related to the downturn in the real estate market do not fit stereotypes of the consumer running up large credit card debts. Nor are the cases of complications arising from marital breakdown explicable as simple cases of overextension. There are also indications that, for a sub-group of the sample, inadequate income may be a continuing problem. These data suggest that individual bankruptcy files provide a signal of economic problems, which are often attributable to broader economic and social forces. Bankruptcy policy is unlikely to have an impact on these broader forces, and is primarily a safety net against entrepreneurial risk and unstable employment.

There are few bankrupts among the highest status occupations, but bankrupts are not clustered at the bottom of the occupational scale. There is also a higher level of home-ownership among our sample of bankrupts than indicated by other Canadian studies, which may be accounted for partly by the methods of data collection used in these studies. The file study does provide some support for the Sullivan, Warren, and Westbrook thesis that bankruptcy is not concentrated among a marginal group of individuals, but is a remedy used by a relatively broad section of "ordinary individuals." For more than one-third of the sample, bankruptcy is a household rather than an individual decision.

Although the absolute amount of debt owed by many bankrupts is not high, there is little evidence to indicate that bankrupts are in a position to repay a substantial portion of their debts at the time of bankruptcy. They have extremely high debt-to-income ratios compared with the general population. Only 6 per cent had "surplus income" of more than $300 at the time of bankruptcy and, in these cases, there was a higher level of creditor opposition to discharge (9 per cent), and larger income amounts paid into the estate by the bankrupt. At the time of bankruptcy, few bankrupts have substantial personal property to turn over to their creditors, and a plausible hypothesis is that those who did have assets have exhausted them in an attempt to stave off bankruptcy.

The great majority of bankrupts do manage to make an income contribution to their estate while they are undischarged bankrupts. There is little evidence from the data that there are substantial numbers of individuals who can pay their debts, but are successfully using the system as a method of "washing out" their debts. Those with substantial surplus income were more likely to be subject to an objection to discharge by their creditors, and high-status debtors (those within the top three occupational categories) or repeaters were more liable to be subject to the scrutiny of an official examination by the Superintendent of Bankruptcy (25 per cent and 47 per cent respectively) than other debtors. It is unclear what triggers the bankruptcy decision, but the dire financial position of individuals at the time of bankruptcy suggests that it is being used as a last resort. Much socio-legal literature indicates a reluctance on the part of consumers to turn to third parties, such as lawyers or courts, to deal with their disputes, and there is no evidence at present to indicate that the decision to declare bankruptcy is an exception to this literature. Following from this observation is the question, are too few individuals using bankruptcy? This is a question that goes beyond the scope of this article.

There has been much discussion of the causes of the rising rates of personal bankruptcy in Canada and the United States in recent years. Many writers have pointed to the close relationship between the growth in individual debt outstanding, high debt-to-disposable income ratios, and the increase in personal bankruptcy.[133] The financial vulnerability of many individuals to changes in their economic circumstances is reflected in my findings on employment change as a major cause of bankruptcy. The low levels of savings-to-income in the general population undercut the margin of safety against changes in economic circumstances.[134] This necessary condition of high debt levels is encouraged by governmental economic policy and credit institutions. Governmental measures to increase "consumer confidence" in the economy mean simply that the government is encouraging more individuals to take on debt. Reducing controls on mortgage ratios will lead to an increase in bankruptcy when there is the inevitable downturn in the economy. In the context of the

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[133] See Ziegel *supra* note 9; and Schwartz, *supra* note 6.

[134] In a recent report, the Canadian Council on Social Development charted the financial vulnerabilty of consumers in terms of low savings rates and high debt-to-income ratios: see Canadian Council on Social Development, *Personal Security Index 1999: How Confident Are Canadians About Their Economic Well-Being?* (Ottawa: Canadian Council on Social Development, 1999) at 10-11, online: Canadian Council on Social Development <http://www.ccsd.ca/pr/psihle.htm> (date accessed: 5 July 1999).

causes of bankruptcy, attention has often focused in the United States on the role of credit card debt. In the sample, it represented a small percentage of the total debts outstanding. However, we do not know how credit cards were used by bankrupts. If they are being used as income substitutes after an unfortunate change of economic circumstances, or as a method of continuing to finance an ailing business, they are a very expensive form of credit, and could be a significant triggering device for bankruptcy.

The file study indicates that greater investigations should be made into the practices of financial institutions in taking guarantees from individual business owners and their spouses, the protection for home-owners in financial difficulties, and the social costs and benefits for greater protection of the family home. I have underlined the high-risk nature of self-employment and small business, and one wonders why government statistics deliberately understate the "bad news" about small business, since a reasonable estimate is that at least 15–20 per cent of bankrupts classified as "consumer" bankruptcies are in fact related to the operation of a small business. There has been much celebration of the role of self-employment and small business in the new economy, but based on this study, individuals pay a high personal price for business failure. One is tempted to make the obvious comparison with large corporate bankruptcies, where limited liability shields individuals from the full consequences of failure. In addition, individuals who use credit cards to keep their small businesses afloat may be viewed quite differently from the management of corporations that use employees' income tax withholdings as a method of artificially swelling the capital of an ailing company.[135] Given the special place that small businesses seem to have in present-day Canadian consciousness, policymakers should view individual bankruptcy as part of small-business policy.[136]

As readers may be aware, in 1997, reforms to the BIA created greater obligations on trustees to ensure that individuals paid money into the bankruptcy estate, and attempted to channel more debtors into making proposals rather than declaring straight bankruptcy.[137] This was

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[135] In the recent Supreme Court of Canada case of *Royal Bank* v. *Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, the corporation had failed to remit tax deductions for employees to Revenue Canada in a desperate bid to swell the capital of the ailing company. I am not aware that any directors were prosecuted for embezzlement or misappropriation of funds.

[136] See discussion of this point in *As We Forgive Our Debtors*, *supra* note 34 at 119-21.

[137] See BIA, *supra* note 2, s. 68, as am. by *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12, s. 60. For further discussion of this provision, see Ziegel, *supra* note 9 at 224.

based on the perception that it was too easy for individuals to go bankrupt, and that more higher-income individuals should be contributing income to their estate. There was no serious empirical basis for these policy changes, just as there was no empirical basis for the introduction of mandatory counselling in 1992, or the "ritual degradation" ceremony, which requires bankrupts to hand over credit cards to their bankruptcy trustee to be cut up and returned to the credit card companies.[138]

However, even if the articles in this Symposium had been published before 1997, it is not clear that it would have made any difference to policymaking. Bankruptcy policymaking in Canada is not a rational process based on careful socio-economic analysis. Like much of commercial and consumer credit law, it may be best understood in terms of interest group analysis, rather than rational policymaking. This is a trite observation, but it is only recently that scholars have begun to analyze commercial law from this perspective. One of the characteristics of bankruptcy policy is that its technical detail has meant that it has been dominated by insiders—trustees, lawyers, and creditors, with interventions occasionally by consumer groups. Thus, it was a combination of creditors, counsellors, and a receptive Superintendent of Bankruptcy that resulted in the controversial counselling requirements in 1992.[139] The federal Department of Finance was influential in the process leading to the prohibition on discharge of student loan debts introduced in 1998.[140] There is rarely any voice for the individual bankrupt within this process. There is also a symbolic nature to bankruptcy policymaking. Changes are often driven by stereotypes of consumers abusing credit cards or affluent students casually discharging their student loans. Policymaking is often a contest over the construction of the social reality of bankruptcy. Studies such as this one and the one by Schwartz may at least make it more difficult to justify changes based on stereotypes without any factual foundation. There is clearly a need for more systematic ongoing research on the bankruptcy process.

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[138] See BIA, *supra* note 2, s. 158(a.1); and Office of the Superintendent of Bankruptcy, *Directive No. 3: Duties of the Bankrupt to Deliver Credit Cards to the Trustee* (issued 7 December 1992), online: Office of the Superintendent of Bankruptcy <http://strategis.ic.gc.ca/SSG/br01093e.html> (date accessed: 10 August 1999).

[139] For a further discussion of this topic, see C.A. Curnock, "Insolvency Counselling —Innovation Based on the Fourteenth Century" (1999) 37 Osgoode Hall L.J. 387.

[140] See BIA, *supra* note 2, s. 178(1)(g)(ii), as am. by *Budget Implementation Act, 1998*, S.C. 1998, c. 21, s. 103.

A central actor in the bankruptcy process is the trustee, and it is necessary to understand the relation of trustees to bankrupts, and the influence of professional practices on the processing of bankrupts. Consumer bankruptcy is an industry, and many trustees have routinized consumer bankruptcy into a profitable system of high-volume processing. The sample shows that a number of small- and medium-sized firms are processing large numbers of individual bankruptcies, with only one or two of the large accountancy firms involved in this area. This was confirmed by interviews with many of these trustees, who indicated that a single trustee could handle over thirty files per month, and that some of the firms, which had further routinized their procedures through the use of para-legal staff,[141] could process significantly higher numbers. The file study provides glimpses of the different practices of trustees. Some trustees processed joint bankruptcies while others did not; some opposed discharge to obtain their fee, while others disapproved of this practice. Interviews with trustees suggested that some would bargain over fees while others would not, while some would be more debtor oriented than others. None of these findings would be surprising to socio-legal scholars who have studied the extent to which professionals mediate the needs of their clients with their professional self-interest, often sacrificing the former to the latter.[142] The Canadian trustee in bankruptcy plays a peculiar role, since he or she is an officer of the court and a representative of the general creditors of the debtor. At the same time, trustees advertise widely to consumers that they are the people to turn to if individuals are unable to repay debts, and are often perceived by creditors to be too close to debtors.

There is also the issue of local legal culture which has been discussed in American studies. In Canada, this would include the relationship between trustees, and the local OSB and the Registrars in Bankruptcy. It appears that there are different practices, both within the different districts in Ontario and throughout the country. A central issue is how this affects the terms and availability of bankruptcy for individuals. This relates to the more general issue of the experience of bankruptcy from the viewpoint of the bankrupt. We know little about this, and the bankrupt appears as an object rather than a subject in much

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[141] The technically correct name for these individuals is "estate manager." I use "para-legal" since this will be more familiar to most readers.

[142] See, for example, S. Macaulay, "Lawyers and Consumer Protection Laws" (1979) 14 L. & Soc'y Rev. 115; and W.L.F. Felstiner, "Justice, Power, and Lawyers" in B.G. Garth & A. Sarat, eds., *Justice and Power in Sociolegal Studies* (Evanston, Il.: Northwestern University Press, American Bar Association, 1998) 55.

discussion and analysis. If bankruptcy is a consumer remedy, then how well informed are bankrupts of what occurs in bankruptcy and of what their options are? What happens to individuals after bankruptcy? Do they obtain a "fresh start" or is it merely a respite in a continuing battle with debt problems? The difficulties of obtaining such information should not prevent it from being an important focus for future research.

Finally, socio-legal study of bankruptcy must be related to other studies of the operation of the legal system and law in society. Existing studies of bankruptcy have focused primarily on outlining the distinction between the law in books and the law in action and, as we might expect, there is a difference between them. This is hardly novel to those working in the area of law and society, and we do need to understand more how findings on bankruptcy—a legal construction related to social issues of debt and debt repayment—relate to socio-legal analysis of other areas, such as the use of the legal system by different social groups, the way in which professionals interact with clients, and the symbolic and instrumental role of law in legitimating common sense ideals about bankruptcy and debt. In a path-breaking work written in the early 1970s, Paul Rock described debt collection as an institution of "low visibility."[143] This conclusion is certainly true in Canada, as measured by academic interest, the availability of reliable government statistics, and studies of such issues as mortgage repossessions, debt collection, or bankruptcy. Yet it is an area of both practical and theoretical interest concerning a fundamental aspect of contemporary capitalism—the credit system—which affects intimately the lives of ordinary Canadians.

When I drove home after editing this article, I noticed a bumper sticker on a pick-up truck saying, "I owe, I owe—it's off to work I go." The increasing sophistication of the credit system in recent years, and the trend towards further liberalization and competition in the consumer credit market, may result in further penetration of credit in high-risk markets. But there is also much volatility in this system, which is subject to periodic crises. While rereading part of this article on the causes of bankruptcy, I was reminded of a comment by David Harvey on the propensity of capitalism to crisis, where he remarked that "these crises entail … the devaluation, depreciation and destruction of capital. And that is never a comfortable process to live with—particularly since it also entails the devaluation, depreciation and destruction of the labourer."[144]

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[143] See P. Rock, *Making People Pay*(Boston: Routledge & Kegan Paul, 1973).

[144] D. Harvey, *The Limits to Capital*(Oxford: Basil Blackwell, 1984) at 97.