

# INTRODUCTION TO THE SYMPOSIUM ON CONSUMER BANKRUPTCIES<sup>©</sup>

BY JACOB S. ZIEGEL \*

The purpose of this Symposium is to make available to a larger readership a selection of the papers and comments that were presented at the Conference on the *Contemporary Challenges of Consumer Bankruptcies in a Comparative Context* held at the Faculty of Law, University of Toronto, 21-22 August 1998. Regrettably, space constraints made it impossible to publish all the papers and comments, or a summary of the discussions that took place at the end of each session,<sup>1</sup> but I am confident that what appears in these pages is a balanced presentation of the Conference proceedings.

Several events inspired the organization of the Conference. The single most important one was the rapid escalation in the number of consumer bankruptcies over the past ten years or more. In Canada, the number tripled between 1985 and 1995.<sup>2</sup> In the United States, consumer bankruptcies, including Chapter 13 filings, reached 1.35 million in 1997.<sup>3</sup>

These rising numbers were alleged to be due to laxity in the bankruptcy systems and abusive filings by consumer debtors. In Canada, the complaints led to strong amendments in 1997 to the *Bankruptcy and Insolvency Act (BIA)*.<sup>4</sup> In the United States, powerful lobbying by creditor

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\* Professor of Law Emeritus, University of Toronto; Convenor, Conference on the Contemporary Challenges of Consumer Bankruptcies in a Comparative Context, Faculty of Law, University of Toronto, 21-22 August 1998.

<sup>1</sup> A written summary was prepared by Konstantinos Georgaras of Industry Canada. A copy is available from my office.

<sup>2</sup> See T. Craddock, "International Consumer Insolvency Statistics" (Conference on the Contemporary Challenges of Consumer Bankruptcies in a Comparative Context, Faculty of Law, University of Toronto, 21-22 August 1998) [unpublished] at 2-3.

<sup>3</sup> *Ibid.* at 6.

<sup>4</sup> See *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3 [hereinafter *BIA*], 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.

groups propelled the introduction of several congressional bills,<sup>5</sup> one of which would probably have been adopted had it not been for the intervention of the mid-session congressional elections. During the current year, new bills have been introduced<sup>6</sup> that are very similar in scope to the old ones. I am told that the prospect of one of them making it to the statute book is very good.

A third important factor that encouraged us to hold the Conference was the fact that two important empirical studies were completed in Canada between 1997 and 1998. The first, by Saul Schwartz and Leigh Anderson, was conducted under the auspices of the Office of Consumer Affairs of Industry Canada;<sup>7</sup> the second was a Social Sciences and Humanities Research Council (SSHRC) funded study by Iain Ramsay of Osgoode Hall Law School.<sup>8</sup> The Conference organizers were concerned that the studies would quickly be forgotten, as earlier studies<sup>9</sup> had been forgotten, unless an attempt was made to give them wider public exposure and serious examination in a professional environment.

Examination of the two studies was, however, only one of the objectives of the Conference. So far as we knew, this was among the first, if not the first, serious interdisciplinary conference on consumer bankruptcies to be held in Canada. We felt it important therefore that an effort should be made to examine some of the many other aspects of the contemporary scene—the structure and underlying policies of the legislation, whether the legislation was achieving its goals, and whether there were deeper social and economic realities that the legislation was not addressing.

It was natural that we should want to pursue these goals in a comparative context. It was obvious that the basic phenomena, and

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<sup>5</sup> See, for example, *Bankruptcy Reform Act of 1998* H.R. 3150, 105th Cong. (1998); and *Consumer Bankruptcy Reform Act of 1997* S. 1301, 105th Cong. (1997).

<sup>6</sup> See, for example, *Bankruptcy Reform Act of 1999* H.R. 833, 106th Cong. (1999), passed by the House of Representatives 5 March 1999; and *Bankruptcy Reform Act of 1999* S. 625, 106th Cong. (1999).

<sup>7</sup> See S. Schwartz & L. Anderson, *An Empirical Study of Canadians Seeking Personal Bankruptcy Protection* (Ottawa: Industry Canada, 1998), online: Industry Canada <<http://strategis.ic.gc.ca/SSG/ca00889e.html>> (date accessed: 4 September 1999). A summary of the survey findings appears in this Symposium: see S. Schwartz, “The Empirical Dimensions of Consumer Bankruptcy: Results From a Survey of Canadian Bankrupts” (1999) 37 *Osgoode Hall L.J.* 83 [hereinafter “Empirical Dimensions of Consumer Bankruptcy”].

<sup>8</sup> See I.D.C. Ramsay, “Individual Bankruptcy: Preliminary Findings of a Socio-Legal Analysis” (1999) 37 *Osgoode Hall L.J.* 15.

<sup>9</sup> See J.W. Brighton & J.A. Connidis, *Consumer Bankrupts in Canada* (Ottawa: Consumer and Corporate Affairs Canada, 1982).

therefore the problems, were substantially similar in Canada and the United States, although the legislation appears to be very different. There is also mounting evidence that North American-type problems are emerging in other common law jurisdictions with similar consumption patterns, notably Australia and New Zealand and, more debateably, the United Kingdom. We also knew that the Scandinavian countries and many other continental European jurisdictions were philosophically opposed to adopting the North American prototypes, and that this was a departure from accepted norms that merited closer examination.

We were delighted therefore to be able to attract a stellar cast of participants from the United States, and equally distinguished representatives from the United Kingdom, New Zealand, Australia, and Finland. Regrettably, we were not as fortunate in finding many accredited academics in Canada who had worked in the consumer bankruptcy area. There is no shortage of experienced Canadian trustees, and they and their associations<sup>10</sup> were very helpful to us throughout the planning of the Conference and in participating actively in it. So were the officials in the Office of the Superintendent of Bankruptcy (OSB) in Ottawa and the regional office in Toronto, notably Dave Stewart, Deputy Assistant Superintendent, who was a pillar of strength throughout. Nevertheless, with some notable exceptions, consumer bankruptcy as a serious field of academic study has so far attracted very few scholars in Canada.

## I. RECENT CANADIAN EMPIRICAL STUDIES

The Symposium generally follows the sequence of papers and comments at the Conference. The Symposium begins with a summary by Saul Schwartz<sup>11</sup> of his and Leigh Anderson's findings on Canadian consumer bankruptcy, and a much longer article by Iain Ramsay<sup>12</sup> presenting a preliminary examination of the results of his survey of Canadian bankrupts. While starting with common objectives, the two surveys adopted different methodologies and had a different geographical compass. The Schwartz and Anderson study was national in scope. However, the sample of debtors was not truly random in a statistical sense, but was based on the cooperation of a group of invited

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<sup>10</sup> Notably the Canadian Insolvency Institute (CII) and the Canadian Insolvency Practitioners Association (CIPA).

<sup>11</sup> See "Empirical Dimensions of Consumer Bankruptcy," *supra* note 7.

<sup>12</sup> See Ramsay, *supra* note 8.

trustees and their debtor clients seeking bankruptcy protection in March and April 1997.<sup>13</sup> Nevertheless, the authors are confident that the lack of randomness does not seriously affect the reliability of their results. Ramsay's findings, on the other hand, are based on a random sample of 1147 personal bankruptcies filed in the Toronto regional OSB<sup>14</sup> between January and December 1994, and included a number of what the OSB's statistics classify as non-corporate business filings.

Both studies present us with a rich mine of information about the demographics of Canadian debtors, their employment status, assets and liabilities, income from all sources, and the reasons for their insolvency. However, Ramsay's study is the more detailed of the two. I could not begin to do justice in this introduction to this wealth of social and economic data, but I do urge Canadian policy makers and others seriously interested in the debt problems of contemporary Canadian society to give the surveys the close study they deserve, and to read what Jay Westbrook has to say in his insightful commentary<sup>15</sup> on the similarities and differences between the Canadian results and the findings in the well-known American surveys by himself, Teresa Sullivan, and Elizabeth Warren.<sup>16</sup>

The following points also deserve to be noted. First, how do the Schwartz and Anderson, and Ramsay surveys compare with the results of the 1977 survey by Wayne Brighton and Justin Connidis?<sup>17</sup> Ramsay does not address the question directly, but Schwartz and Anderson are in no doubt. In Schwartz's words:

Overall, it seems that individuals seeking bankruptcy protection in 1997 were not much different from those who declared bankruptcy in 1977. They were in severe economic straits, with low incomes, poor job prospects, and a history of social assistance or unemployment insurance receipt. Like those of the Brighton and Connidis sample, the

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<sup>13</sup> The Schwartz and Anderson survey also included data about 180 debtors seeking credit counselling assistance in the spring of 1997 from credit counselling agencies across Canada: see Schwartz & Anderson, *supra* note 7, c. 4.

<sup>14</sup> In addition to the Greater Toronto Area, the Toronto office covers a very wide rural area, extending as far north as Timmins, Sault Ste. Marie in the northwest, and including the Durham region to the east.

<sup>15</sup> See J.L. Westbrook, "Comparative Empiricism" (1999) 37 Osgoode Hall L.J. 143.

<sup>16</sup> See, in particular, 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); and 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.

<sup>17</sup> See Brighton & Connidis, *supra* note 9.

debtors in our sample do not seem to be exploiting bankruptcy laws in order to relieve themselves of debts.<sup>18</sup>

This ought to put to rest the pre-1997 creditor complaints. However, both the Schwartz and Anderson, and Ramsay surveys show a percentage of debtors—not a large percentage, but not an insignificant one either<sup>19</sup>—with incomes above the Low Income Cut-Off (LICO) figures used by the OSB in determining surplus incomes<sup>20</sup> for the purpose of section 68 of the *BIA*. Schwartz does not tell us how these more affluent debtors should be dealt with; perhaps he did not feel it was part of his remit. Nevertheless, the question strikes at the heart of the debate over means testing and the fresh start policy which has generated so much controversy in the United States.

A second observation is that the Schwartz and Anderson results show major differences in the demographics and debt structures of the 1977 and 1997 debtors. In particular, women, single (lone) parents, and self-employed persons have catapulted into prominence<sup>21</sup> in the later study, as have student loans among types of debt. Student loans for young debtors under thirty were a significant factor in 45 per cent of the cases, and accounted for 50 per cent or more of the total indebtedness in 28 per cent of the cases.<sup>22</sup> Debts to Revenue Canada rank fourth in the Schwartz and Anderson survey of median debts.<sup>23</sup> It would be helpful to know the composition of the Revenue Canada debts and whether, among self-employed debtors, it is the temptation “to borrow” taxes owing to the federal government that accounts for the frequency of Revenue Canada claims.

A third point worthy of notice is a methodological one. A critical item of information collected in both surveys—the reasons for the debtor’s financial problems—is based on the debtor’s answer or the trustee’s assessment. The responses rank loss of job or reduced income as second in importance (together with credit cards) among the

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<sup>18</sup> “Empirical Dimensions of Consumer Bankruptcy,” *supra* note 7 at 107.

<sup>19</sup> Cf. the post-April 1998 data collected by the OSB for the Toronto region and for all of Canada cited in 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 227, n. 92.

<sup>20</sup> See “Empirical Dimensions of Consumer Bankruptcy,” *supra* note 7 at 96; and Ramsay, *supra* note 8 at 33-34.

<sup>21</sup> See “Empirical Dimensions of Consumer Bankruptcy,” *supra* note 7 at 107-18.

<sup>22</sup> *Ibid.* at 117. For a masterful analysis of the general structure of, and problems associated with, student loans in Canada, see S. Schwartz, “The Dark Side of Student Loans: Debt Burden, Default, and Bankruptcy” (1999) 37 *Osgoode Hall L.J.* 307.

<sup>23</sup> See “Empirical Dimensions of Consumer Bankruptcy,” *supra* note 7 at 106, Table 6.

precipitating factors.<sup>24</sup> It is open for consideration whether the ranking can be taken at face value. It is natural for a debtor to ascribe his or her financial difficulties to an external event, rather than to difficulties in balancing his or her budget. Similarly, where the trustee is the source of the information, the trustee may feel it is not his or her job to grill the debtor to determine the precise cause of the debtor's downfall.

In a different context, the danger of relying on aggregated numbers and uncorroborated claims are also signalled by Michael Adler<sup>25</sup> and Wayne Brighton<sup>26</sup> in their comments on the survey results. Adler urges the use of multivariate analysis to determine the relative importance of insolvency contributing agents.<sup>27</sup> In a similar vein, Brighton emphasizes the need for longitudinal analyses of individual debtor histories for a proper understanding of the pathology of contemporary consumer insolvencies.<sup>28</sup>

## II. MEANS TESTING AND THE FRESH START PHILOSOPHY

At first sight, a bankrupt debtor's right to a fresh start without the encumbrance of having to forego any of the debtor's future income appears to be a critical divide between the long-standing bankruptcy philosophy in the United States, and the dominant ethos in Canada, England, Australia, and other Commonwealth jurisdictions. So, not surprisingly, it attracted a lot of attention at the Conference and occupies much space in the Symposium articles.

In his article, John Honsberger,<sup>29</sup> a distinguished Toronto bankruptcy scholar and practitioner, traces the history of Canada's discharge policy and throws his influential support in favour of an American-style fresh start policy. He complains that "[a] maximum of

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<sup>24</sup> See *ibid.* at 92, Table 2. Note, however, that "the debt repayment process" (6.1 per cent), "general inability to repay loans" (6.5 per cent), and "consumer credit" (18.8 per cent) grounds, added together (31.4 per cent), substantially exceed loss of job or reduced income (18.8 per cent) in importance.

<sup>25</sup> See M. Adler, "Reactions to Empirical Studies" (1999) 37 Osgoode Hall L.J. 127 [hereinafter "Reactions to Empirical Studies"].

<sup>26</sup> See W. Brighton, "Reactions to Recent Canadian Empirical Studies on Consumer Bankruptcies" (1999) 37 Osgoode Hall L.J. 137.

<sup>27</sup> See "Reactions to Empirical Studies," *supra* note 25 at 133.

<sup>28</sup> See Brighton, *supra* note 26 at 142.

<sup>29</sup> See J.D. Honsberger, Q.C., "Philosophy and Design of Modern Fresh Start Policies: The Evolution of Canada's Legislative Policy" (1999) 37 Osgoode Hall L.J. 171.

effort, verbiage, rules, conditions, penalties, guidelines (both administrative and judicial), rationalizations, and struggle are used to produce a minimum of definite and understandable results, and to produce for [Canada] the most expensive system in the world.”<sup>30</sup> This harsh verdict is bound surely to provoke a lot of controversy.

In my own article<sup>31</sup>—which attempts to canvass a much broader range of comparative issues affecting the fault lines of Canada-United States bankruptcy regimes—I too criticize the rigidity and complexities of the creditor-driven 1997 amendments to the *BIA* imposing a surplus income payment requirement.<sup>32</sup> I indicate my preference for the maintenance of the previous judicially administered system of conditional, suspended, and absolute discharges, and retention of the trustee’s discretionary power to determine how much of the debtor’s surplus income the debtor should be required to hand over.<sup>33</sup> However, I do not question the morality of a qualified discharge system. My concern, rather, is to avoid the state becoming a collection agent for the consumer credit industry and the industry’s lax lending standards.<sup>34</sup>

This brings me to Elizabeth Warren’s lively critique (originally delivered as an after-dinner Conference address)<sup>35</sup> of the lobbying efforts and legislative tactics of the United States credit industry. I am not sure how committed she remains to an unadulterated fresh start philosophy. She has made it clear on other occasions that she is strongly opposed to an industry-driven means testing formula which, in her opinion, would be very expensive to administer, yield marginal results, and deter deserving debtors from seeking bankruptcy relief much more than it would curb debtor abuses. Still, it is possible that she paints with too broad a brush, and that she might be persuadable on the basis of Commonwealth experience that a civilized surplus-income payment scheme can be devised which does not simply become an adjunct of the credit industry.

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<sup>30</sup> *Ibid.* at 188.

<sup>31</sup> See Ziegel, *supra* note 19.

<sup>32</sup> See *BIA*, *supra* note 4, s. 68; and Ziegel, *supra* note 19 at 222-27.

<sup>33</sup> See Ziegel, *supra* note 19 at 248.

<sup>34</sup> *Ibid.* at 228.

<sup>35</sup> See E. Warren, “The Changing Politics of American Bankruptcy Reform” (1999) 37 *Osgoode Hall L.J.* 189.

Karen Gross,<sup>36</sup> for her part, in responding to the Conference papers by John Honsberger and me, reflects on the motives of those who feel the need “to shame” defaulting debtors by denying them an easy discharge. She postulates that the attitude may be linked to the centrality of money in Western culture.<sup>37</sup> I recognize that shaming is a pervasive mechanism adopted in many societies to show disapproval of conduct inimical to established values. However, I question whether such psychological and moral imperatives drive creditors in Canada to oppose easy discharge laws. I would have thought myself that their concern is much more about maintaining the integrity of the credit system than about sending delinquent debtors into purgatory. How else do we explain the readiness of creditors to welcome back a discharged debtor, and creditor pressure for debtors to reaffirm pre-bankruptcy debts?

### III. CONSUMER PROPOSALS, CHAPTER 13, AND OTHER ALTERNATIVES TO STRAIGHT BANKRUPTCIES

We in Canada have never thought deeply about alternatives to straight consumer bankruptcies. Part X of the *BIA*,<sup>38</sup> which the federal government reluctantly adopted in 1966 at the behest of Alberta and Manitoba, is only a debt repayment scheme, and therefore does not appeal to the great majority of insolvent debtors who have no means, or only very limited means, to pay their debts. The Canadian federal government hoped that the consumer proposal provisions in Part III, Division 2, adopted as part of the 1992 amendments to the *BIA*,<sup>39</sup> would encourage more consumers to opt for composition of their debts. It did not achieve this purpose and, prior to the 1997 amendments coming into operation, the number of consumer proposals never exceeded around 5 per cent of the number of straight bankruptcies. The reason was simple enough; Part III, Division 2 did not offer sufficient incentives to offset the attraction of consumers being able to obtain an unconditional discharge from their debts nine months after bankruptcy.

One obvious area where a more perceptive proposal regime could have made a difference is with respect to the treatment of secured

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<sup>36</sup> See K. Gross, “Demonizing Debtors: A Response to the Honsberger-Ziegel Debate” (1999) 37 *Osgoode Hall L.J.* 263.

<sup>37</sup> *Ibid.* at 271-72.

<sup>38</sup> See *An Act to amend the Bankruptcy Act* S.C. 1966, c. 32.

<sup>39</sup> See *BIA*, *supra* note 4, as am. by *An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof* S.C. 1992, c. 27, s. 32(1).

debts. However, as Tamara Buckwold points out in her excellent article,<sup>40</sup> the 1992 drafters failed to appreciate this. As a consequence, Canadian secured creditors are as free to repossess their collateral where the debtor files a proposal as they are where the debtor goes into bankruptcy, regardless of the importance to the debtor of retaining the collateral to provide a roof for the debtor's family, or to be able to drive to work. By way of contrast, William Whitford's exposition<sup>41</sup> shows that Chapter 13 of the United States *Bankruptcy Code*<sup>42</sup> makes it much easier for the debtor to retain collateral and to engage in "lien stripping" by redeeming the collateral at its market value instead of paying the full amount still owing to the creditor.

Nevertheless, as Jean Braucher tells us in her short but powerful article,<sup>43</sup> Chapter 13 has not fulfilled its mission either. True, it attracts about one-third of all consumer bankruptcy filings, but over 60 per cent of approved plans are never consummated.<sup>44</sup> Braucher blames the high failure rate on misconceived pressure by bankruptcy judges and local bankruptcy attorneys on debtors to opt for a Chapter 13 plan where there is no reasonable prospect of the debtor being able to make payments to unsecured creditors.<sup>45</sup> She apparently supports Elizabeth Warren's proposal to the National Bankruptcy Reform Commission for one bankruptcy option, but, regrettably, does not provide Canadian readers with enough details to enable them to determine whether a similar suggestion could work in the Canadian context.

In Canada, the future of Part III, Division 2 also remains problematic. Since the 1997 amendments to the *BIA* came into force, there has been a major increase in the number of consumer proposals, but it is not clear what drives the momentum. Trustees' self-interest is presumably an important factor because trustees benefit considerably

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<sup>40</sup> See T.M. Buckwold, "Holding the High Ground: The Position of Secured Creditors in Consumer Bankruptcies and Proposals" (1999) 37 Osgoode Hall L.J. 277.

<sup>41</sup> See W.C. Whitford, "Secured Creditors and Consumer Bankruptcy in the United States" (1999) 37 Osgoode Hall L.J. 339.

<sup>42</sup> See 11 U.S.C., ch. 13 (1998) [hereinafter *Bankruptcy Code*].

<sup>43</sup> See J. Braucher, "Options in Consumer Bankruptcy: An American Perspective" (1999) 37 Osgoode Hall L.J. 155.

<sup>44</sup> *Ibid.* at 162. Readers should recall that all proceedings under the United States *Bankruptcy Code* are treated as bankruptcy proceedings, regardless of the chapter under which the proceedings are brought. In the Canadian *BIA*, on the other hand, only proceedings under Part II of the *Act* are characterized as bankruptcy proceedings. Commercial and consumer proposals are spared the "ignominy" of being labelled just another form of bankruptcy.

<sup>45</sup> See Braucher, *supra* note 43 at 164.

from the revised fee tariff introduced since the amendments. Debtors too may feel that if they are going to be forced to make surplus income payments if they opt for straight bankruptcy, they are better off making their own payment proposals, while keeping their assets and avoiding the stigma of bankruptcy, assuming it is still a stigma. However, debtors under Part III, Division 2 may have miscalculated if it transpires that debtors making surplus income payments under section 68 can obtain an unopposed discharge at the end of nine months, while Part III, Division 2 debtors in comparable financial circumstances will have to continue making payments for the full duration of the proposal.

#### IV. THE ROLE OF CONSUMER CREDIT COUNSELLING

As the number of consumer bankruptcies has escalated, so too has interest in establishing credit counselling facilities. Ruth Berry and Susan McGregor have long had a professional interest in the area. In their joint Symposium article,<sup>46</sup> they trace the evolution of the OSB's policy on credit counselling, culminating in the adoption of mandatory counselling requirements in the 1992 *BIA* amendments as preconditions to the debtor's entitlement to a bankruptcy discharge.<sup>47</sup>

The requirement—apparently the first in a common law jurisdiction—is now in its ninth year. However, we still have no reliable assessments of its practical effectiveness. Nor do we know whether counselling as a pedagogical exercise can ever fully achieve its purpose when it has to contend daily with the “Buy Now, Borrow Now, Pay Later” saturation advertising of the credit industry. The structure and contents of credit counselling also deserve close analysis. In her article, Carol Curnock,<sup>48</sup> who has studied the subject closely, expresses strong misgivings about the danger of treating debtors in trouble as social misfits or suffering from personality disorders—an approach, one hopes, that has now been firmly laid to rest.

In her comment on the Berry and McGregor Conference paper, Johanna Niemi-Kiesiläinen<sup>49</sup> contrasts the European philosophy with

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<sup>46</sup> See R.E. Berry & S.L.T. McGregor, “Counselling Consumer Debtors Under Canada's *Bankruptcy and Insolvency Act* (1999) 37 *Osgoode Hall L.J.* 369.

<sup>47</sup> See *BIA*, *supra* note 4, s. 157.1.

<sup>48</sup> See C.A. Curnock, “Insolvency Counselling—Innovation Based on the Fourteenth Century” (1999) 37 *Osgoode Hall L.J.* 387.

<sup>49</sup> See J. Niemi-Kiesiläinen, “The Role of Consumer Counselling as Part of the Bankruptcy Process in Europe” (1999) 37 *Osgoode Hall L.J.* 409.

the North American approach to credit counselling. In North America, she asserts, the goal is to teach consumers to become better consumers and to acquire greater financial skills, while the European aim (if I understand it correctly) is to decrease the debtor's dependence on credit and to oblige the debtor to live without credit altogether during the frequently long period of a debt repayment plan. The contrast is a powerful one. Nevertheless, one wonders how even low-income European consumers can be expected to survive without access to some forms of credit in a post-industrial internet-driven consumption society, and whether it is reasonable to ask them to do so.

#### V. THE OVERSEAS DIMENSION: WHAT CAN CANADA AND THE UNITED STATES LEARN FROM OTHER COUNTRIES?

This brings me to the last set of the Symposium articles subsumed under this title. There is rhetorical flourish to the question, "What Can Canada and the United States Learn from Other Countries?" but I believe the answer is, a great deal. A careful study of Rosalind Mason's very informative article on the Australian developments<sup>50</sup> shows a striking parallel with Canada in the rapid growth of consumer bankruptcies in Australia over the past decade, as well as responsive consumer bankruptcy legislation, including the adoption of mandatory income contribution rules. To a significantly lesser extent (and understandably so given a much smaller population base), this also appears to be true of New Zealand's developments, as described in Paul Heath's article.<sup>51</sup> New Zealand too has experienced a marked increase in the number of consumer bankruptcies since the deregulation of the financial sector in 1984, and the introduction of credit cards in the early 1980s. The lesson in both countries, it appears, as it is in North America, is that credit casualties are the inevitable consequence of free market economies.

Michael Adler<sup>52</sup> seems to question the comparability of the North American developments and developments in the United

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<sup>50</sup> See R. Mason, "Consumer Bankruptcies: An Australian Perspective" (1999) 37 Osgoode Hall L.J. 449.

<sup>51</sup> See P. Heath, Q.C., "Consumer Bankruptcies: A New Zealand Perspective" (1999) 37 Osgoode Hall L.J. 427.

<sup>52</sup> See M. Adler, "The Overseas Dimension: What Can Canada and the United States Learn From the United Kingdom?" (1999) 37 Osgoode Hall L.J. 415 [hereinafter "The Overseas Dimension"].

Kingdom, since he points out that the per capita consumption of consumer credit in the United Kingdom is only about two-thirds that in Canada, and the personal bankruptcy rate is only about one-sixth of the Canadian rate.<sup>53</sup> These are indeed puzzles that deserve closer attention and, for what they are worth, I put forward some possible explanations. One is that the British bankruptcy statistics do not include the substantial number of administration orders (a simple form of debt adjustment available to British consumers with a modest debt package) made under the English *County Courts Act 1984*.<sup>54</sup> Another is the much higher cost of going bankrupt in England. This may be contrasted with Scotland's experience in the mid-1980s when, following the government's decision to provide public funding for "small asset" cases, the number of personal bankruptcies soared.<sup>55</sup> Other possible factors are the continuing importance of class structures in England, and a more subdued credit environment.

The real eye opener for North Americans, as described in Johanna Niemi-Kiesiläinen's article,<sup>56</sup> is the persistent hostility of most continental European countries to even moderately hospitable consumer bankruptcy laws, and the strong preference for debt adjustment, counselling, and consumer education remedies. She ascribes this difference between the North American and European approaches to a difference in philosophies. North Americans believe that a free market economy must absorb its casualties through generous discharge policies. Europeans, in contrast, interpret overindebtedness as personal failures to be cured by subjecting debtors to rigorous economic disciplines lasting, in some European countries, for as long as seven years. It seems too that Europeans feel greatly threatened by a liberal bankruptcy policy, and see no need for it in societies that offer such generous welfare benefits as are available in Europe.

One may question some of these assumptions and attitudes—so evocative of nineteenth century debates in England, Canada, and the United States over the relaxation of the then bankruptcy laws—but they cannot also fail to provide much food for thought, which is exactly what the Conference was meant to do.

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<sup>53</sup> *Ibid.* at 420.

<sup>54</sup> (U.K.), 1984, c. 28.

<sup>55</sup> See "The Overseas Dimension," *supra* note 52 at 417-18.

<sup>56</sup> See J. Niemi-Kiesiläinen, "Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?" (1999) 37 *Osgoode Hall L.J.* 473.

## VI. CONCLUSION

It remains for me to offer heartfelt thanks to an army of helpers and many generous benefactors. The Conference could not have been held without the financial sponsorship and moral support of the Office of Consumer Affairs of Industry Canada, the Canadian Insolvency Institute, the Canadian Insolvency Practitioners Association, the Osgoode Hall Law School, and the Faculty of Law, University of Toronto. We also received greatly appreciated financial assistance from Tory, Tory, DesLauriers and Binnington, and Osler, Hoskin and Harcourt, both in Toronto, and from the Law Commission of Canada in Ottawa. Martha Hundert, David Bronskill, Liu Yu, Trevor Hoffmann, and Sari Shmulevitz were among the students who were immensely helpful before and during the Conference. My legal assistant, Dace Veinberga, discharged many of the organizational chores with her usual exemplary skill.

I am no less grateful to Bruce Ryder, Editor-in-Chief, and the Board of Editors of the *Osgoode Hall Law Journal* for agreeing so readily to the publication of the Symposium. The student editors of the *Journal* toiled all summer long to ensure that the contributions met the *Journal's* exacting standards of accuracy and literacy. The crucial touchstone of this effort is whether the Symposium will encourage the further research, scholarship, and analysis of all aspects of contemporary consumer bankruptcy problems for which there remains so much scope in Canada. I am hopeful.