Repeat Bankruptcies and Recent Developments in Canadian Consumer Bankruptcy Law

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Overview of Presentation

• 1. Statistics on Number of Consumer Insolvencies
• 2. Recent appellate cases which have emphasized the importance of the fresh start
• 3. Overview of 2009 Amendments
• 4. Repeat Bankruptcies
• 5. Future Reform Issues
Denial of Driver’s Licence and Bankruptcy: Recent Appellate Decisions

• Some provincial statutes permit provinces to deny a driver’s licence for failing to pay certain sums of money.

• May a province deny a person a driver’s licence for failing to pay a fee even when the amount owing has been discharged in bankruptcy?
Re Moore (2013), 7 CBR 6th 167 (Ont. CA)

• From a debtor's perspective, and indeed society's, financial rehabilitation is a primary goal of the bankruptcy regime.

• At its heart, permitting a creditor to insist on payment of pre-bankruptcy indebtedness after a bankruptcy discharge frustrates a bankrupt's ability to start life afresh unencumbered by his or her past indebtedness.

• [O]ne of the purposes of bankruptcy legislation is to give debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."
Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act) (2014), 9 CBR (6th) 278 (Alta. CA)

• From time to time people become overwhelmed with their debts, resulting in an inability to function productively in the economy.

• The reason for their bankruptcy may be more or less their own fault, and may attract a greater or lesser level of personal criticism.

• However, the bankruptcy laws recognize that it is in society's best interest to give those persons a "fresh start":

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Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act) (2014), 9 CBR (6th) 278 (Alta. CA)

• moral disapprobation has little or no role to play in the analysis.

• Apart from the debts listed in s. 178(1) that survive a discharge,

• Parliament has seen fit to provide a fresh start to all manner of bankrupts,

• no matter how undesirable their pre-bankruptcy behaviour may have been.
The Lead up to the 2009 Reforms

• Personal Insolvency Task Final Report (2002)

Overview of First Time Bankruptcy

• Unless opposed

• a first time bankrupt

• will obtain an automatic discharge

• 9 months after the date of bankruptcy
Bankrupts with Surplus Income: 2009 Amendments

• Bankrupts with surplus income will be required to wait 21 months after the date of bankruptcy for a discharge.

• During the 21 month period bankrupts will remit surplus income to the trustee, BIA s. 168.1
Bankrupts with High Income Tax Debt: 2009 Amendments

• Bankrupts with high income tax debt (200k, including principal, interest and penalties)

• (representing 75% or more of their unsecured debt) are not eligible for an automatic discharge and application for discharge is required.

• On application the court is not able to grant an absolute discharge, s.172.1
Student Loans as Non Dischargeable Debt

• 1997 – 2 year exception to discharge, no possibility of hearing for 2 years.

• 1998 – Increased to 10 years, no possibility of hearing for 10 years.

• 2009 Reforms – Reduce exception to discharge period to 7 years; allow for a hardship hearing after 5 years.
<table>
<thead>
<tr>
<th>Year</th>
<th>% of Total Consumer Bankruptcies</th>
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<tbody>
<tr>
<td>2010</td>
<td>14.99</td>
</tr>
<tr>
<td>2011</td>
<td>15.57</td>
</tr>
<tr>
<td>2012</td>
<td>16.11</td>
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The Repeat Filing Rate for Consumer Bankruptcies
Percentage of Total Consumer Bankruptcies in Province filed by Debtors who have been Bankrupt on One or More Prior Occasion(s)
<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Filings</th>
<th>% filed</th>
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</thead>
<tbody>
<tr>
<td>All consumer B</td>
<td>71495</td>
<td>100</td>
</tr>
<tr>
<td>1 or more prior B</td>
<td>11518</td>
<td>16.11</td>
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<tr>
<td>2\textsuperscript{nd} bankruptcy</td>
<td>10456</td>
<td>14.63</td>
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</tr>
<tr>
<td>5\textsuperscript{th} bankruptcy</td>
<td>9</td>
<td>0.01</td>
</tr>
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Legislative Framework

• Prior to 2009 all repeat bankruptcies were treated the same way under the BIA.

• A repeat bankrupt was not entitled to an absolute discharge.

• The court was required to either refuse or suspend the discharge impose a conditional order.

• Third or subsequent bankruptcies continue to be governed by this regime.
Legislative Framework

• The 2009 amendments established a default automatic discharge regime for second time bankrupts.

• Bankrupts without surplus income are entitled to an automatic discharge 24 months after the date of bankruptcy (unless opposed).

• Bankrupts with surplus income are entitled to an automatic discharge 36 months after date of bankruptcy (unless opposed).
The New Second Time Bankruptcy Regime

• For 2010 filings, 84% of all second time consumer bankrupts received an automatic discharge after 24 months.

• For 2010 filings, only 168 consumer bankrupts with surplus income received an automatic discharge after 36 months.

  – This represents 2% of all discharges granted for second time consumer bankrupts in 2010.
Three or More Bankruptcies

• When there are three or more bankruptcies:

• A court may not grant an absolute discharge but must either refuse, suspend or order a conditional discharge.
Competing Policy Objectives

• One of the often-cited purposes of bankruptcy law is to permit the rehabilitation of the debtor “as a citizen, unfettered by past debts.”

• *Industrial Acceptance Corp v Lalonde*, [1952] 2 SCR 109 at para 34
Competing Policy Objectives

• In the case of multiple bankruptcies,

• “the Court’s focus shifts from a rehabilitative one to one of concern for the integrity of the system, protection of creditors and as a brake against future assignment.”

• *Re Pitre* (2009), 60 CBR (5th) 108 at para 26 (Sask QB).
24 Month and 36 Month Automatic Discharge Regime

- The 24 month or 36 month waiting period for second time bankrupts

- perhaps represents a compromise between

- the competing objectives of rehabilitation and the integrity of the bankruptcy system.

- But when there are 3 or more bankruptcies it is difficult to reconcile the two objectives.
Repeat Bankruptcy Jurisprudence

• The balance between rehabilitation and the integrity of the system is tested when a debtor repeats patterns of financial misbehavior over two or more bankruptcies.

• Perhaps the most common and overriding theme in the reported case law is the tendency of a debtor to fail again for the same or similar reasons as the prior bankruptcy.
A common problem with repeats “is that they fall back into their bad practices once they get out. They convince themselves they won’t make the same mistake.”

Debtors simply do not “learn from the initial bankruptcy” and “fail again for the same reasons as their first bankruptcy.”
Mandatory Counselling

• Parliament introduced mandatory counselling:

  • “to help avoid repeat personal bankruptcies by providing debtors with information and education on financial management.”

Mandatory Counselling

If bankrupts were truly gaining financial skills through the mandatory counselling programme one would expect that misuse of credit would play a much lesser role in the cause of a repeat filing.

A review of the jurisprudence confirms that many bankrupts simply fail a second or subsequent time for the same or similar reason that caused the prior bankruptcy.

If mandatory counselling was working as it was intended one would expect that the overall repeat filing rate would be decreasing and not increasing.
2014 Reform Discussion Paper

- 1. protection of consumer deposits
- 2. responsible lending
- 3. license denial regimes
- 4. reaffirmation agreements
- 5. bankruptcy exemptions
- 6. student loan provisions