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Mandatory Bankruptcy Counseling: The Canadian Experience

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MANDATORY BANKRUPTCY COUNSELING: THE CANADIAN EXPERIENCE

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I. INTRODUCTION

Like the United States, Canada has a relatively high rate of individual bankruptcy filings compared with other industrialized countries.¹ While there are significant differences between the bankruptcy systems of the two countries, the Canadian system has two characteristics of interest to the current United States proposals on consumer bankruptcy reform. These are the use of “means testing”² and the requirement of mandatory counseling as a condition of receiving a discharge.³

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1. See, e.g., TERESA A. SULLIVAN, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 259 (2000) (citing statistics which indicate a U.S. bankruptcy rate of 5.1 per 1000, compared with a Canadian rate of 3 per 1000 and an English and Welsh rate of 0.47 per 1000).

2. “Means testing” in Canada refers to the fact that an individual with significant “surplus income” will often have to undertake a consumer proposal involving repayments over a period of approximately three years in order to obtain relief from her debts. See Bankruptcy and Insolvency Act, R.S.C., ch. B-3, § 66.12 (1985) (Can.) [hereinafter BIA], available at <http://laws.justice.gc.ca/en/B-3/section-66.12.html> (last visited Mar. 30, 2002). For a definition of surplus income see *infra* note 12. For an explanation of means testing in the U.S., see Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, S. 420, 107th Cong. § 106 (2001); Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. § 106 (2001); A. Mechele Dickerson, *Bankruptcy Reform: Does the End Justify the Means?*, 75 AM. BANKR. L.J. 243, 273-74 (2001) and sources cited therein; KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM* 130-34 (1997).

3. BIA § 157.1 (1), (3), available at <http://laws.justice.gc.ca/en/B-3/section->

In this Article, I focus on mandatory counseling and discuss four issues concerning counseling: the nature and scope of bankruptcy counseling; its implementation in practice; existing evidence on its effectiveness; and finally, contrasting assumptions about counseling as a response to problems of debt. I conclude that the role and value of mandatory counseling remains controversial and the difficulties of providing objective measures of its success or failure ensure that a clear resolution of its success or failure is unlikely.

II. THE INTRODUCTION OF MANDATORY COUNSELING

Canada introduced mandatory counseling for bankrupts in 1992.⁴ The rationale for the introduction of counseling was to prevent repeat bankruptcies⁵ and to further rehabilitative goals of behavior modification.⁶ Creditors had lobbied for the inclusion of mandatory counseling during legislative debates.⁷ The concept of

157.1.html (last visited Mar. 30, 2002).

4. Ruth E. Berry & Sue L.T. McGregor, *Evolution of Statutory Consumer Counseling in Canada and Europe: Counseling Consumer Debtors Under Canada's Bankruptcy and Insolvency Act*, 37 OSGOODE HALL L.J. 369, 372 (1999).

5. *Id.* In Canada, unlike the U.S., there is no time restriction on repeat filings for bankruptcy. A repeat bankrupt does not, however, receive an automatic discharge and may have her discharge suspended for a period that is subject to the discretion of the judge at the discharge hearing. Studies suggest that the repeat bankruptcy rate in Canada has hovered at about 8-10% of bankrupts during the 1990's. *See, e.g., Ramsay, infra* note 10, at 65.

6. *See Berry & McGregor, supra* note 4, at 371-73.

7. *See generally* Canada. Parliament, House of Commons, Standing Committee on Consumer and Corporate Affairs. 34th Parl. 3rd Sess. No. 12 at 18-19:14, (quoting the Canadian Bankers Association as saying, "We believe financial counseling should be mandatory," and the Canadian Credit Unions as saying,

[T]he credit union system was disappointed not to find in the Act a provision that would provide for mandatory debt counseling for bankrupts . . . we believe that people make mistakes and if you can teach them that the mistakes they made led to their bankruptcy, they are less likely to make them again);

see also id. at 13:36 (quoting the Ontario Association of Credit Counseling as stating "[W]e are disappointed that the Act does not provide for . . . some level of mandatory counseling for bankrupts"). After the Parliamentary Hearings, the bill was amended to make counseling mandatory. *See id.* (noting that James

counseling was also supported by the Office of the Superintendent of Bankruptcy, the independent agency that regulates the bankruptcy process in Canada.⁸

Debtors in Canada may choose to declare straight bankruptcy, resulting in a discharge of most unsecured debts after nine months, or make a consumer proposal to repay all or a portion of their debts over a period not exceeding five years.⁹ The majority of debtors who declare bankruptcy make income repayments to the estate during the nine-month period before discharge,¹⁰ primarily to pay the “fees”¹¹ of the trustee in bankruptcy. In addition, individuals with “surplus income,” as defined in the statutory

Stewart Edwards, Parliamentary Secretary to the Minister of Consumer and Corporate Affairs, stated “Making consumer counseling a condition of discharge after bankruptcy makes a great deal of sense in these days of easy credit and of ever increasing complexity in financial products”). The government regarded it as an “excellent recommendation.” *Id.*

8. See, e.g., Carol Ann Curnock, *Evolution of Statutory Consumer Counseling in Canada and Europe: Insolvency Counseling – Innovation Based on the Fourteenth Century*, 37 OSGOODE HALL L.J. 387, 397 (1999). Curnock argues that counseling was mandated because of the congruence of concern by a number of interest groups in the bankruptcy process. *Id.* at 397. In addition to meeting creditors’ interests, she claims that it would “allow the Office of the Superintendent of Bankruptcy to monitor more closely the way trustees conducted their business, while legitimizing a fee increase for going bankrupt. It would create work, or at least a credentialing process, for trustees and credit counselors.” *Id.* at 399. Berry and McGregor claim that during the late 1980’s, “several individuals within the Office of the Superintendent of Bankruptcy . . . had been quietly pushing for the integration of preventative measures to reduce the growing incidence of repeat personal bankruptcies.” Berry & McGregor, *supra* note 4, at 371 (referring in this context to a paper by a superintendent of bankruptcy); see also Wally Clare, *Repeat Bankruptcies of Consumer Debtors*, 10 INSOLV. BULL. 201 (1990).

9. Consumer proposals are regulated by Part III Division II of the BIA. In 1999, consumer proposals represented about thirteen percent of bankruptcies. See OFFICE OF THE SUPERINTENDENT OF BANKRUPTCY, ANNUAL STATISTICAL REPORT tbls. 2, 4-B (1999) (noting in Table 2 that there were 72,997 consumer bankruptcies and in 4-B that there were 9985 consumer proposals).

10. See Iain Ramsay, *Individual Bankruptcy: Preliminary Findings of a Socio-Legal Analysis*, 37 OSGOODE HALL L. J. 15, 72 (1999).

11. I use scare quotes because the bankrupt is not the client of the trustee. Further, the trustee is paid out of the estate.

guidelines,¹² are required to contribute a percentage of their income during the nine-month period.¹³ Approximately fifteen percent of bankrupts fall within this category.¹⁴ The norm for a consumer proposal is a three-year repayment plan and the average proposal offers to pay approximately fifty percent of unsecured debts.¹⁵ Whichever route is chosen, whether bankruptcy or proposal, individuals are required to undergo two counseling sessions. A failure to attend a counseling session results in a debtor not receiving an automatic discharge and requires a court application for discharge.¹⁶

There are three instances in the Canadian bankruptcy process that could be characterized as counseling, although only two are formally described as such. At the point when an individual is considering bankruptcy and has visited a trustee, the trustee is required to make a pre-bankruptcy assessment of a potential bankrupt.¹⁷ This includes an outline of the debtor's financial

12. See Office of the Superintendent of Bankruptcy Canada, *Directive No. 11R: Surplus Income* (Oct. 3, 2000), available at <http://strategis.ic.gc.ca/SSG/br01055e.html> (last visited Mar. 30, 2002) [hereinafter *Council Directive*]. Under BIA § 68(3)(a), the trustee shall fix the amount to be paid according to the "applicable standards" and to the "personal and family situation of the bankrupt." BIA § 68(2). The surplus income requirements are based on standards derived from the Canadian Low-Income Cut-Offs, available at <http://www.ccsd.ca> (last visited Mar. 30, 2002), which are used by many as an unofficial poverty line. Debtors with income of \$100 or more above this line (adjusted for the number of dependants) must pay fifty percent of the surplus to the estate and if the surplus is \$1000 or more, between fifty to seventy five percent of the surplus. *Council Directive*, *supra* note 12, at §§ 7(2)(a) – 7(2)(b).

13. See Office of the Superintendent of Bankruptcy Canada, *Dealing with Debt: A Consumer's Guide* (issued June 12, 2001) available at <http://strategis.ic.gc.ca/SSG/br01035e.html#AppendixI> (last visited Mar. 30, 2002).

14. Unpublished data provided by the Office of Superintendent of Bankruptcy to the author as member of the Federal Personal Insolvency Task Force (on file with the Fordham Journal of Corporate & Financial Law).

15. Secured creditors are not included in a plan and a debtor with secured debt will often continue to make payments on the secured debt. See Tamara M. Buckwold, *Holding the High Ground: The Position of Secured Creditors in Consumer Bankruptcies and Proposals*, 37 OSGOODE HALL L.J. 277, 299 (1999).

16. See BIA § 157.1(3) (2001).

17. See Office of the Superintendent of Bankruptcy Canada, *Directive No.*

affairs, a discussion of the debtor's options, including the option of a consumer proposal, and the various rights and responsibilities of the debtor.¹⁸ This directive was introduced in response to concerns that individuals were being processed through bankruptcy by clerical personnel in trustee firms without being provided with a full explanation of their options and without an opportunity to meet a trustee.¹⁹

The first formal counseling session takes place shortly after the declaration of bankruptcy²⁰ and is titled "Consumer and Credit Education."²¹ The counselor should provide the debtor at this stage with consumer advice in "(i) money management; (ii) spending and shopping habits; (iii) warning signs of financial difficulties; and (iv) obtaining and using credit."²² The second counseling session, which takes place shortly before the discharge²³ in a straight bankruptcy is entitled "Identification of Road Blocks to Solvency and Rehabilitation."²⁴ The focus here is to follow up on the principles of money management introduced in the first session and to assure the bankrupt better understands "his/her strengths and weaknesses with regards to money management and budgeting skills."²⁵ It is also to "identify the non-budgetary causes (such as gambling abuse, compulsive behavior, substance abuse,

6R: *Assessment of an Individual Debtor* (Apr. 30, 1998), available at <http://strategis.ic.gc.ca/SSG/br01096e.html> (last visited Apr. 5, 2002).

18. *Id.*

19. In interviews with trustees, some trustees described this type of practice as the "sausage factory" form of bankruptcy processing. See Iain Ramsay, *Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy*, 74 AM. BANKR. L.J. 399, 423 (2000).

20. The counseling directive requires the initial counseling session to take place between ten and sixty days following the effective date of bankruptcy. See Office of the Superintendent of Bankruptcy Canada, *Directive No. 1R2: Counseling in Insolvency Matters*, § 6(a)(i) (Dec. 21, 1994), available at <http://strategis.ic.gc.ca/SSG/br01091e.html> (last visited Apr. 5, 2002).

21. *Id.* at §§ 7(1) & 7(2).

22. *Id.* at § 7(1)(a).

23. The second stage is to occur no later than 210 days following the effective date of bankruptcy or the filing of a consumer proposal. *Id.* at § 6 (b).

24. *Id.* at § 8.

25. *Id.* at § 8(1)(a).

employment and marital or family difficulties) that may have contributed to his/her financial difficulties; to better understand his/her behavior in financial management and consumption habits²⁶ and "to develop recommendations and alternatives for a financial plan of action."²⁷ The fee for each session is eighty-five dollars Canadian which is payable from the bankruptcy estate.²⁸ Since the estate usually comprises income payments by the debtor, one could argue that, in substance, the debtor pays for counseling. Each session is expected to last approximately one hour.

III. THE IMPLEMENTATION OF COUNSELING

There does not seem to have been any extensive planning for implementation of counseling, perhaps because mandatory counseling was only introduced during the legislative hearings.²⁹ There are three groups who undertake counseling. These are trustees in bankruptcy, estate administrators in trustees' offices who have passed the required course, and credit counseling agencies.³⁰ Reliance was placed initially on trustees in bankruptcy to carry out the required counseling as part of their duties in relation to the administration of the estate and most counseling is undertaken by trustees or individuals (estate managers) within their offices.³¹

A mandatory training course was developed for all individuals who counsel debtors. Also, all counselors are required to complete successfully an examination based on the course materials.³² The course consists of a textbook, a videocassette, a help line and a

26. *Id.* at §§ 8(1)(b)(i) & 8(1)(b)(ii).

27. *Id.* at § 8(1)(c).

28. *See* BIA §§ 131(2) & 157.1(1) (2001). In Canada, although post-bankruptcy income is not automatically part of the estate, trustees enter into agreements with bankrupts to make income payments for the nine-month period to pay the trustee's fee. A trustee will normally ensure that the bankrupt makes sufficient payments to cover the counseling fees.

29. BIA Part III Division 2.

30. *See* Office of the Superintendent of Bankruptcy Canada, *Directive No. IR2*, *supra* note 20, § 2.

31. *See* Ramsay, *supra* note 10, at 68.

32. *See* F. FORBES ANDERSON ET AL., *THE BIA INSOLVENCY COUNSELOR'S QUALIFICATION COURSE 1996/97* (1996).

two-hour true/false multiple choice examination.³³ It is assumed that the course will take about forty hours to complete.³⁴ In addition, counselors must work under the supervision of a qualified counselor for one hundred hours.³⁵ These are the only formal credentialing requirements for bankruptcy counseling.

The course materials were developed primarily by household economists, individuals in the Office of the Superintendent of Bankruptcy, credit counselors and trustees in bankruptcy. The materials contain chapters on the bankruptcy process, interviewing and counseling, elements of money management, money in context, and "helping clients achieve their goals: creative thinking and problem solving."³⁶ There is much of interest in these materials but there are also problematic areas. For example, one critic has pointed to basic flaws in a "bankruptcy cycle" model that claims to explain the "deep" causes of bankruptcy and bankruptcy recidivism.³⁷ There is also a leitmotif running through the materials that a significant number of bankrupts have addiction problems, which does not seem to be substantiated by existing empirical data on the causes of bankruptcy.³⁸ The ideological approach of the materials is perhaps best captured by the following comment:

"Certainly there is an abundance of examples of bankruptcies occurring despite a superb ability to manage resources But most of our clients need to know that financial success is like canoeing in white water — they must learn to manage their actions in the river because they cannot manage the river itself."³⁹

In a critique of these materials, Carol Anne Curnock has commented that the material in the text is often "middle class moralizing . . . masquerading as assessment strategies."⁴⁰ Given the central role of trustees in bankruptcy in implementing the counseling directive, it is appropriate to sketch briefly their role in

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. See Curnock, *supra* note 8, at 393-97 (pointing out the basic flaws in the research which provided the basis for the "bankruptcy cycle" model).

38. *Id.* at 387.

39. ANDERSON ET AL., *supra* note 32.

40. Curnock, *supra* note 8, at 401.

the bankruptcy process. Trustees in bankruptcy, who are generally accountants, are the key figures in Canadian consumer bankruptcies.⁴¹ Although the "big five" accounting firms process about twenty-five percent of individual bankruptcies in Canada, much consumer bankruptcy work is undertaken by relatively small firms headed by one trustee.⁴² Eighty-eight percent of firms are headed by three or less trustees.⁴³ The trustee is the person to whom an individual turns for information and advice when contemplating bankruptcy.⁴⁴ Trustees advertise their services to debtors in the yellow pages.⁴⁵ They also act as administrator of the bankruptcy, representative of creditor interests, and counselor to debtors.⁴⁶ Their numerous roles raise issues of conflict of interest, particularly in the context of counseling where debtors may expect confidentiality.⁴⁷ However, if information relating to personal problems is disclosed by a debtor in the course of counseling, then a trustee would be under a duty to refer the debtor to a specialist counselor.⁴⁸

The consumer bankruptcy market is a competitive industry and many specialists have successfully routinized the process so as to ensure profitability from a large number of small estates. In my qualitative study of trustees and their practices, I found significant variations in trustees' practices in relation to the counseling sessions.⁴⁹ In some cases, trustees conducted counseling personally, while in other cases, counseling was carried out by estate administrators who had successfully completed a required training course.⁵⁰ Another group of firms contracted out the counseling sessions to credit counseling agencies.⁵¹ Some trustees provided

41. Ramsay, *supra* note 19, at 399 (exploring the role of the trustee).

42. See Unpublished Statistics, Office of the Superintendent of Bankruptcy Canada (on file with the Fordham Journal of Corporate & Financial Law).

43. *Id.*

44. Ramsay, *supra* note 19, at 399.

45. *Id.* at 409.

46. *Id.* at 399.

47. *Id.* at 454-55.

48. *Id.*

49. *Id.* at 443.

50. *Id.*

51. *Id.*

consumers with pamphlets and questionnaires to be filled in before counseling.⁵² These questionnaires vary in detail and length from relatively brief information on budgeting to a quite extensive package of materials on budgeting and credit information (such as information on credit ratings). There also appeared to be variations among trustees in the time spent on counseling, with thirty to forty-five minutes per session being the norm.⁵³ In determining how long a counseling session should last, trustees would discriminate among debtors based on a trustee's perception of the debtor and the reason for bankruptcy.⁵⁴ One trustee stated that he would spend much longer with an unsophisticated individual who needs help than with a sophisticated individual who had been downsized.⁵⁵

There was general skepticism among trustees as to the value of counseling.⁵⁶ Even a trustee from a large accounting firm, one that had invested significant resources in the development of counseling, was skeptical about its value.⁵⁷ There were several reasons for this lack of enthusiasm among trustees. A common theme was the mismatch between the assumptions of the counseling directive and the reasons for bankruptcy.⁵⁸ In many cases, the trustees stated that the reason for bankruptcy was not financial mismanagement but loss of income or other change of circumstance.⁵⁹ In addition, some trustees expressed the view that they were not competent to probe the "deeper" causes of debt as required by the counseling directive and that counseling compromised their independent role in processing bankruptcies.⁶⁰

It is not clear whether the introduction of counseling has made a significant difference in the practice of many trustees.

52. *Id.* at 422, 443.

53. *Id.* at 443.

54. *Id.* at 445.

55. *Id.*

56. *Id.* at 443.

57. "[V]ery few people believe in the counseling process. I think that most people believe it's another way of getting \$85 and so you spend another fifteen minutes and get them to sign a certificate, and get on with it." *Id.*

58. *Id.* at 441.

59. *Id.*

60. *Id.* at 445-46.

Counseling sessions could be tacked on to other required meetings with a debtor, so that counseling may not have altered significantly the office routine. Perhaps reflecting the above comments, the Insolvency Institute, a group composed of trustees and lawyers that models itself on the National Bankruptcy Conference in the U.S., has questioned whether counseling should be mandatory for all debtors.⁶¹

Trustees may delegate counseling to credit counseling agencies,⁶² and there is a variety of credit counseling agencies in Canada.⁶³ In English Canada, the most common model for such agencies is a non-profit agency that receives significant financing from creditors. This funding takes the form of a percentage of remittances (twenty-five percent) in administering voluntary repayment plans, and income from bankruptcy counseling augments this income.⁶⁴ They may also charge clients a percentage of remittances (usually ten percent) paid by the client on repayment programs. In contrast, Quebec's main credit counseling agency, the ACEF, is funded by the government and charities and

61. "The question arises as to whether or not counseling should be mandatory for all individual debtors. It has been the experience of many trustees that counseling is simply not necessary for many individuals, and further, many individuals will not benefit from counseling in any event." REPORT OF THE PERSONAL INSOLVENCY COMMITTEE OF THE INSOLVENCY INSTITUTE OF CANADA, RECOMMENDATIONS FOR REFORM AND FURTHER AMENDMENTS TO THE BANKRUPTCY AND INSOLVENCY ACT PERSONAL INSOLVENCY PROVISIONS 12 (Jan. 2001). In contrast, the Office of Superintendent of Bankruptcy in reporting on stakeholder consultations on reforms, states that "on the subject of Counseling Services to debtors, opinions were varied: while many participants agreed that there was some benefit to having counseling sessions; some thought that there should be greater flexibility with respect to the timing of the second stage of counseling." THE NATIONAL INSOLVENCY FORUM, NATIONAL REPORT 15 (Mar. 2000).

62. See *Council Directive*, *supra* note 12 (including within the definition of "qualified counselor" an "independent counselor authorized by the trustee . . . who has obtained the qualifications and skills to provide financial counseling to a debtor").

63. The following comments are based on the excellent survey of credit counseling agencies in Canada by Andrew Dekany, *Consumer Debt Counseling in Canada* (2000) (unpublished LL.M. research paper on file with the Fordham Journal of Corporate & Financial Law).

64. *Id.*

does not accept funding from creditors or debtors since the agency is concerned with retaining its independence.⁶⁵ There are, however, privatization pressures on government funding of counseling agencies, so that one might predict that the first model outlined above may become increasingly common. A central question therefore concerns the independence of the agencies from creditors. In a review of credit counseling in Canada, Andrew Dekany concludes that for "a combination of historical and financial reasons agencies are more and more assuming a 'dual' role whereby they also represent the interests of creditors."⁶⁶

These comments underline the importance of determining who will deliver credit counseling and how this will be fitted within the bankruptcy process, where counseling must be provided within the constraints of ensuring a profitable turnover of debtors. There is a tension between the idea of counseling as an individualized process and the routinization of the consumer bankruptcy process. Certainly the time devoted to counseling in the Canadian process is modest, although not substantially dissimilar from U.S. debtor education programs.⁶⁷

There is also the influence of the values and interests of intermediaries in administering a counseling program. For example, a major credit counseling service in Canada indicates in its annual report that "more and more consumers [are considering] personal bankruptcy as a 'quick fix' to their financial woes. Fortunately, we have been able to help almost 3,000 individuals . . . to avoid bankruptcy."⁶⁸ The differences among individual trustee practices will also affect the nature of the counseling received by a debtor. None of these points are remarkable or novel. There is substantial economic and socio-legal literature on the role of

65. *Id.*

66. *Id.*

67. See Jean Braucher, *An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown*, 9 AM. BANKR. INST. L. REV. 557 (2001) (describing a mandatory one day program in Fort Worth, Texas, a required two hour course in Greensboro, North Carolina, and a voluntary course in Columbus, Ohio including four two-hour classes spread over four months).

68. CREDIT COUNSELING SERVICE OF METROPOLITAN TORONTO, ANNUAL REPORT 5-6 (1996).

intermediaries that suggests that all intermediaries bring with them a baggage of interest and values and that this may be problematic where the intermediaries are providing services to a relatively vulnerable clientele.⁶⁹ If we recognize that the concept of a “neutral intermediary” is a myth, then the challenge is to ensure that, at a minimum, there is clarity as to the objectives of a counseling program and a method of monitoring outcomes to determine success or failure.

IV. ASSESSING THE EFFECTIVENESS OF COUNSELING

There have been two reviews of bankruptcy counseling. An initial review was undertaken shortly after its implementation.⁷⁰ This report was based on interviews with bankrupts who had undergone counseling, as well as interviews with trustees and private counselors.⁷¹ Trustees were of the view that counseling would have, at best, a moderate or non-existent influence on bankrupts’ understanding of the causes of bankruptcy, knowledge of financial management, and ability to be productive in the future.⁷² Almost two-thirds of trustees thought that counseling made little or no difference to a bankrupts’ understanding of how the bankruptcy affected their creditors or their willingness to act in a financially responsible manner in the future.⁷³ Trustees also indicated that the introduction of counseling had required little increased expenditure in their practices and that they rarely referred individuals to other counselors for counseling on non-financial problems.⁷⁴

In contrast, bankrupts were much more enthusiastic than trustees about the success of counseling. Fifty-one percent of bankrupts thought that counseling improved their knowledge

69. See, e.g., Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993).

70. See D. FORDE & L. ROBERTS, *A NATIONAL ASSESSMENT OF BANKRUPTCY COUNSELING SERVICES* (1994) (on file with the Fordham Journal of Corporate & Financial Law).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

about handling their money and sixty eight percent reported that counseling would have a considerable or extensive effect on their ability to avoid future bankruptcy.⁷⁵ Sixty-seven percent thought that it would have a considerable or extensive impact on their ability to keep their financial affairs in order in the future.⁷⁶ Finally, seventy-one percent thought that counseling would have a considerable effect on their willingness to act in a responsible manner in the future. Overall, sixty percent rated the bankruptcy counseling as very useful.⁷⁷

The researchers also distinguished the effect of the education and occupational status of the bankrupts on their views of the value of counseling.⁷⁸ Those in the semi-skilled and unskilled categories found counseling to be more valuable than those in higher occupational categories in relation to its impact on preventing future bankruptcy, knowledge of handling money, and ability to keep financial affairs in order and act in a financially responsible manner in the future.⁷⁹

These findings are of interest for several reasons. They indicate that bankrupts seem to find counseling valuable and that satisfaction with the counseling varies across social class. Studies of debtor education in the U.S. seem to confirm that individuals appreciate debtor-education programs.⁸⁰ It would be interesting to probe why debtors appreciate counseling. For example, it may reflect the fact that they have had the opportunity to discuss their problems with a sympathetic listener. In addition, there is the dissonance between trustees' and debtors' views of the value of the process. This dissonance does not seem to be as strong in the case of credit counselors who appear slightly more enthusiastic about the potential impact of counseling on the future financial stability of a debtor.⁸¹ It is not clear whether trustees are skeptical of the

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. See Braucher, *An Empirical Study*, *supra* note 67, at 19.

81. A survey of credit counselors conducted by the Office of the Superintendent of Bankruptcy found that forty-nine percent of credit counselors thought that counseling had an extensive or considerable effect on debtors'

value of the process because counseling challenges their knowledge and professional status. Since many trustees are accountants they will rarely have had training in counseling.

A second study of the effectiveness of counseling was completed recently as part of a current review of personal insolvency.⁸² While the draft findings of this study record a similar enthusiasm among debtors for counseling, they suggest also that those providing counseling are more optimistic about its overall utility with over forty percent of counselors believing that counseling is very useful.⁸³ However, there is a substantial difference between trustees and counselors in their assessment of counseling, with fifty-five percent of counselors rating counseling to be very useful versus thirty percent of trustees.⁸⁴ This might suggest that those whose primary vocation is counseling are significantly more optimistic about its impact.

The difficulties of providing an objective assessment of the impact of counseling led a recent Task Force on Personal Insolvency in Canada to contract with Equifax, a major credit bureau, to provide data on the current credit profiles of individuals who had declared bankruptcy pre-1992 and post-1992 (i.e. pre- and post-counseling).⁸⁵ The data in this study provides valuable information on the credit situation of bankrupts a number of years

ability to keep their financial affairs in good order in the future. *See Re-engineering Consumer Bankruptcy and Insolvency Systems: A National Assessment*, 15 *INSOLV. BULL.* 117, 123 (1995), available at <http://strategis.ic.gc.ca/pics/br/vol15no02n03e.pdf> (last visited Mar. 25, 2002). It should be mentioned, however, that only three percent thought that it would have an extensive effect and forty-six percent thought that it would have a considerable effect. *Id.*

82. *See* CONSULTING AND AUDIT CANADA, *EVALUATION OF THE MANDATORY COUNSELING PROGRAM* (Draft, Nov. 2001) (on file with the *Journal of Corporate & Financial Law*).

83. *Id.* at 21

84. *Id.* at 22.

85. "A counseling study involving Equifax to look at the profile of discharged bankrupts" was proposed in 2001. *See* Personal Insolvency Task Force – Record of Decision of Meeting Held in Montreal, Jan. 28-29, 2001 and resulting Personal Insolvency Task Force Reports, available at http://strategis.ic.gc.ca/sc_mrksv/bankrupt/engdoc/creditors.html (last visited Mar. 9, 2002).

after declaring bankruptcy.⁸⁶ The study did not provide, however, any significant and unambiguous indication as to the beneficial impact of counseling.

V. ASSUMPTIONS ABOUT THE NATURE OF COUNSELING

Bankruptcy is not the only situation where individuals in Canada are required to undergo some type of "counseling" program as a condition for receiving a state benefit. For instance, drivers with bad driving records or unemployed individuals⁸⁷ may be required to undergo counseling sessions. Counseling takes place in many contexts such as mental health, vocational guidance, employee assistance, and addictions. It is often provided to individuals in transition, e.g., married to divorced, addict to straight. There are many different models of counseling with one writer suggesting at least four hundred distinct models of counseling which vary from psychotherapy to informal counseling done by volunteers.⁸⁸

In the literature on counseling, writers draw attention to the continuing tensions between social control and empowerment in the counseling process.⁸⁹ A continuing critique of counseling is of its social control aspects, reflecting its origins in mental health counseling where it functioned as a method of controlling individuals who were seen as disruptive.⁹⁰ At the same time some view counseling as empowering individuals to realize their own potential and personal freedom. Feminist and minority groups have argued that it can be used to develop a critique of existing social norms.

There are, according to one writer, several potential pressures

86. *Id.*

87. In the *Labour Market Directorate*, Human Resources Development Canada ("HRDC") outlines its employment assistance services. HRDC indicates that "[a]ssistance may also include counseling." HUMAN RESOURCES DEVELOPMENT CANADA, LABOUR MARKET DIRECTORATE, available at <http://www.hrdc-drhc.gc.ca/dept/guide/hri2.shtml> (last modified May 23, 2001).

88. See JOHN MCLEOD, AN INTRODUCTION TO COUNSELLING 4 (1993).

89. *Id.* at 16.

90. *Id.*

towards conformity and control in counseling.⁹¹ First, there are the values of the counselors as to what is acceptable behavior. This is coupled with the observation that since counselors are often middle class, their values will affect their approach to counseling. Second, there is the potential influence of who is paying for the counseling. Finally, there is the tendency of counseling not to raise questions about the status quo because it individualizes problems rather than raising systemic issues.⁹² For example, the metaphor in the Canadian counseling materials that analogize a debtor to a person canoeing in white water may downplay the relevance of why the river is so disruptive for many individuals who declare bankruptcy, and the role of human agency in creating these conditions. There is also the issue of the power dynamic between counselor and the client. While some counseling stresses the idea of client empowerment, in practice much counseling may be similar to a doctor/patient relationship where there is an authority figure. Because the bankruptcy process appears complex and requires expertise to navigate debtors may rarely have independent information that would allow them to challenge the advice of a counselor or trustee.⁹³

Notwithstanding these observations on the potential problems associated with counseling, bankruptcy is a traumatic event for most individuals that may have a significant impact on their health and well-being. Bankruptcy professionals have always performed a counseling function and there is therefore a case to be made for the provision of services to help address this trauma. If bankruptcy is increasingly viewed as a safety net then there is clearly a case for applying a model of "positive welfare,"⁹⁴ where welfare is viewed not merely as an issue of income transfer but rather as raising issues of prevention, education, and regulation. Given the wide variety of causes of bankruptcy, it may be that greater attention in counseling should be paid to providing individuals with advice on

91. *Id.*

92. *Id.* at 17.

93. See Ramsay, *supra* note 19, at 453 (citing to Section III: Discussion and Comparison).

94. See ANTHONY GIDDENS, *BEYOND LEFT AND RIGHT: THE FUTURE OF RADICAL POLITICS* 18, 227-28 (1994).

issues such as how to obtain better employment.

Policymakers should consider seriously the fact that many debtors find education and counseling programs valuable and according to Jean Braucher, "they appreciated being treated with respect and given a sense of positive purpose."⁹⁵ It is possible that a central benefit of counseling was not the content of the courses but simply the fact that a bankrupt had an opportunity to tell her story. In a different context, studies of small claims courts have suggested that many litigants are frustrated because they are unable to tell their "story" to the court and that the law required the story to be told in a way that was quite different from their understanding of the events.⁹⁶ Perhaps bankruptcy counseling should provide greater opportunities for bankrupts to tell their stories, rather than being viewed primarily as an exercise in behavior modification. It is unlikely, however, that an agency would be willing to devote resources to such an open-ended project where there were difficulties in measuring directly its cost/effectiveness.

VI. CONCLUSION

In conclusion, we lack a clear verdict on the value of mandatory counseling for bankrupts in Canada. It is certainly unlikely that counseling will be abolished, but there remains some doubt as to whether the process should be mandatory for all bankrupts. In addition, the issue of who should deliver counseling and the values that should inform the counseling process are appropriate topics for further review. These considerations are of utmost importance and must be addressed during legislative proposals for counseling.

95. See Braucher, *An Empirical Study*, *supra* note 67, at 19.

96. See generally JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES AND RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990).

Notes & Observations