

# The Gendered Dimensions of Social Insurance for the "Non-Poor" in Canada

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## Citation Information

Ben-Ishai, Stephanie. "The Gendered Dimensions of Social Insurance for the "Non-Poor" in Canada." *Osgoode Hall Law Journal* 43.3 (2005) : 289-319.

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# The Gendered Dimensions of Social Insurance for the "Non-Poor" in Canada

## **Abstract**

This article emerges from an exploration of the meanings of consumer bankruptcy in the current context of Canadian society, as well as the role consumer bankruptcy plays in shaping this context. Examining consumer bankruptcy through the lens of gender relations, the claim is made that Canadian consumer bankruptcy legislation, policies, practices, and accompanying discourses are implicated in the causation and perpetuation of the conditions of marginalization and subordination endured by women who experience long-term poverty. These women are affected not only in terms of access to the bankruptcy system, but also by the broader implications of the delivery of consumer bankruptcy services and the accompanying discourses which, functioning as a form of social insurance for the middle-class, reinforce values of individualism. The increasing number of women filing for consumer bankruptcy, documented in the empirical data, is consistent with this claim, as it can be seen that middle-class women are the primary "new" beneficiaries of consumer bankruptcy in Canada.

## **Keywords**

Bankruptcy; Social security; Women--Law and legislation; Canada

# THE GENDERED DIMENSIONS OF SOCIAL INSURANCE FOR THE “NON-POOR” IN CANADA<sup>©</sup>

STEPHANIE BEN-ISHAI\*

This article emerges from an exploration of the meanings of consumer bankruptcy in the current context of Canadian society, as well as the role consumer bankruptcy plays in shaping this context. Examining consumer bankruptcy through the lens of gender relations, the claim is made that Canadian consumer bankruptcy legislation, policies, practices, and accompanying discourses are implicated in the causation and perpetuation of the conditions of marginalization and subordination endured by women who experience long-term poverty. These women are affected not only in terms of access to the bankruptcy system, but also by the broader implications of the delivery of consumer bankruptcy services and the accompanying discourses which, functioning as a form of social insurance for the middle-class, reinforce values of individualism. The increasing number of women filing for consumer bankruptcy, documented in the empirical data, is consistent with this claim, as it can be seen that middle-class women are the primary “new” beneficiaries of consumer bankruptcy in Canada.

Cet article découle de l’exploration des significations des faillites de consommateurs dans le contexte actuel de la société canadienne, ainsi que du rôle que ces faillites jouent dans la façon de modeler ce contexte. En examinant les faillites de consommateurs sous l’angle des rapports entre les sexes, on prétend que les lois, les politiques et les pratiques canadiennes et les discours qui accompagnent ces faillites de consommateurs sont impliqués dans la causalité et la perpétuation des conditions de marginalisation et de subordination endurées par les femmes marquées par une pauvreté à long terme. Ces femmes sont touchées non seulement en ce qui a trait à l’accès au système des faillites, mais également par les conséquences plus larges de la prestation de services de faillite de consommateur et des discours s’y rattachant lesquels, fonctionnant sous forme d’assurance sociale pour la classe moyenne, renforcent les valeurs de l’individualisme. Le nombre croissant de femmes qui déclarent une faillite de consommateur, documenté dans les données empiriques, correspond à cette allégation, étant donné que l’on peut constater que les femmes de la classe moyenne sont les principales « nouvelles » bénéficiaires des faillites de consommateurs au Canada.

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## I. INTRODUCTION

Bankruptcy,<sup>1</sup> like all legal processes, is constantly defined and redefined by a variety of social, political, and economic meanings that are related in various ways to the continuously changing contexts within which it operates.<sup>2</sup> Moreover, just as it is defined by the contexts in which it operates, bankruptcy in turn plays a role in shaping and reshaping those contexts. This article emerges from an exploration of the meanings of consumer bankruptcy in the current context of Canadian society as well as the role consumer bankruptcy plays in shaping this context.

The consumer bankruptcy rate in Canada grew from 0.43 per 1,000 population in 1976<sup>3</sup> to 2.66 per 1,000 population in 2003,<sup>4</sup> representing a 619 per cent increase in 27 years. The data suggest that, given the increasing number of Canadians filing for consumer bankruptcy, consumer bankruptcy is assuming greater importance in shaping the social, political, and economic contexts within which it operates.<sup>5</sup> The data also reveal that the number of women filing for bankruptcy has increased significantly in recent years to over 40 per cent of all filers.<sup>6</sup> Where gender has not previously been used as a category of analysis of the Canadian bankruptcy system, the emergence of these data has prompted an interest in exploring the nature of its role.<sup>7</sup>

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<sup>1</sup> In Canada, bankruptcy is a legal process performed under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [BLA].

<sup>2</sup> The vast majority of consumer bankruptcies in Canada are initiated by an individual, known as the debtor. Jacob S. Ziegel, "The Philosophy and Design of Contemporary Consumer Bankruptcy Systems: A Canada-United States Comparison" (1999) 37 *Osgoode Hall L.J.* 205 at 235.

<sup>3</sup> Jacob S. Ziegel, "Reservations and Dissenting Views on the Task Force Report" in Office of Superintendent of Bankruptcy Canada, *Personal Insolvency Task Force Final Report* (August 2002), online: <[http://www.strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwapj/pitf.pdf/\\$FILE/pitf.pdf](http://www.strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwapj/pitf.pdf/$FILE/pitf.pdf)> at 97 [PITF Final Report].

<sup>4</sup> Office of the Superintendent in Bankruptcy Canada (OSB), online: <<http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/en/br01360e.html>>.

<sup>5</sup> My goal is not to overstate the significance of consumer bankruptcy in this regard given the fact that in 2003 for example, Canada still saw fewer than 90,000 consumer bankruptcies. Email from Lynda Colley (OSB) (8 April 2004) [Colley]. This article, in addition to pursuing a better understanding of the workings and implications of the current bankruptcy system, also has a broader goal of reinforcing the need to approach all legal processes in this way; as sites of meaning undergoing constant resignification.

<sup>6</sup> I.D.C. Ramsay, "Individual Bankruptcy: Preliminary Findings of Socio-Legal Analysis" (1999) 37 *Osgoode Hall L.J.* 15 ["Ramsay Study"].

<sup>7</sup> By way of illustration, in 1998, citing privacy concerns, the OSB removed any reference to gender from the Statement of Affairs that a debtor is required to fill out in order to file a petition for bankruptcy. Only recently has the value of collecting such data been recognized and a question regarding a debtor's gender been put back on the Statement of Affairs. Industry Canada, *Directive No.*

In this article, I examine consumer bankruptcy through the lens of gender relations. This approach envisages gender as a set of social relations, rather than attributes of individuals, and focuses on intersections between gender and other social relations, in particular race, class, and age. My central claim is that Canadian consumer bankruptcy legislation, policies, practices, and accompanying discourses are implicated in the causation and perpetuation of the conditions of marginalization and subordination endured by women who experience long-term poverty.<sup>8</sup> These women are affected not only in terms of access to the bankruptcy system, but also by the broader implications of the delivery of consumer bankruptcy services and the accompanying discourses, which reinforce individualistic values. The documented increase in the number of women filing for consumer bankruptcy is consistent with my central claim. Consumer bankruptcy in Canada functions as a form of social insurance for the middle-class.<sup>9</sup> The

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8R3 (The *Bankruptcy and Insolvency Act* Forms) (Ottawa: The Office of the Superintendent of Bankruptcy Canada, 2002) online: <<http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwGeneratedInterE/br01180e.html>>. The November 2003 *Senate Report*, *infra* note 46, did not mention gender or raise it as an issue in the Canadian bankruptcy context. In Canada, the nature of this exploration to date has been in the context of the two major recent empirical studies. See Ramsay Study, *ibid.*, and S. Schwartz, "Results of Recent Canadian Empirical Studies: The Empirical Dimensions of Consumer Bankruptcy: Results from a Survey of Canadian Bankrupts" (1999) 37 Osgoode Hall L.J. 83, referring to Saul Schwartz & Leigh Anderson, *An Empirical Study of Canadians Seeking Personal Bankruptcy Protection* (Ottawa: Industry Canada, 1998) ["Schwartz and Anderson Study"]. Recent examples of American work in this context include: Kathy Davis, "Bankruptcy: A Moral Dilemma for Women Debtors" (1998) 22 *Law & Psychol. Rev.* 235; Karen Gross, "Re-Vision of the Bankruptcy System: New Images of Individual Debtors" (1990) 88 *Mich. L. Rev.* 1506; Karen Gross, Marie Stefanini Newman & Denise Cambell, "Ladies in Red: Learning from America's First Female Bankrupts" (1996) 40 *Am. J. Legal. Hist.* 1; Elizabeth Warren, "What is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender Neutral Topics" (2002) 25 *Harv. Women's L.J.* 19; and Sheila Driscoll, "Consumer Bankruptcy and Gender" (1995) 83 *Geo. L.J.* 461.

<sup>8</sup> In 2000, the census data on 29,105,705 Canadians revealed that 4,720,485 Canadians lived in poverty. Aboriginal people and people in single-parent families had much higher low-income rates than others and were overrepresented in low-income neighborhoods. Statistics Canada, *Incidence of Low Income Among the Population Living in Private Households, Provinces and Territories* (Ottawa: Statistics Canada, 2001), online: <[www.statcan.ca/english/Pgdb/famil60a.htm](http://www.statcan.ca/english/Pgdb/famil60a.htm)>. In the year 2002, 14.8 per cent of all Canadian women lived below the "low income cut-offs"—a set of measures published by Statistics Canada to measure poverty in Canada. Lone parent families headed by women are the largest group within this category. In comparison, 12.6 per cent of all Canadian men fit into this category. Statistics Canada, *Persons in Low Income Before Tax* (Ottawa: Statistics Canada, 2003), online: <<http://www.statcan.ca/english/Pgdb/famil41a.htm>>.

<sup>9</sup> Numerous researchers from a variety of disciplines have devoted their work to the nuances and construction of the middle-class. See e.g. Melanie Archer & Judith R. Blau, "Class Formation in Nineteenth-Century America: The Case of the Middle-class" (1993) 19 *Ann. Rev. Soc.* 17; John Myles & Adnan Turegun, "Comparative Studies in Class Structure" (1994) 20 *Ann. Rev. Soc.* 103; and Janet L. Ballantyne, "The Tax Burden of the Middle-Class Canadian" (1986) 34 *Can. Tax. J.* 671.

As is noted by Iain Ramsay in the "Ramsay Study", *supra* note 6 at 40, class is an important but elusive concept in North American consumer bankruptcy research. In Elizabeth Warren, "Financial

data demonstrate that middle-class women are the primary “new” beneficiaries of consumer bankruptcy in Canada.

Gender relations, in conjunction with other asymmetrical power relations, are necessarily involved in the social construction of the current users of the consumer bankruptcy system, how bankruptcy services are delivered to such debtors, and the impact of the existing model for the delivery of consumer bankruptcy services on the construction of poverty in Canada. As Shelley Gavigan has observed, the face of poverty in Canada is not gender neutral: it is a single mother living on sub-poverty income derived either from social assistance or low wages.<sup>10</sup> Poverty derives from underlying inequalities. In Canada, consumer bankruptcy ideology and practice contribute to and perpetuate these inequalities that are simultaneously class-, gender-, age-, race-, and ability-based.<sup>11</sup>

Part II provides a brief genealogy of the meanings of consumer bankruptcy and analyzes the contemporary Canadian context in which

Collapse and Class Status: Who Goes Bankrupt?” (2003) 41 Osgoode Hall L.J. 115, Professor Warren notes that more than 90 per cent of Americans consider themselves working-class or middle-class. She suggests that in the bankruptcy context, the most helpful indicators for separating those in chronic poverty from the middle-class are home ownership status, education, and occupation.

<sup>10</sup> “Poverty Law and Poor People: The Place of Gender and Class in Clinic Practice” (1996) 11 J.L. & Soc. Pol’y 167 at 169.

<sup>11</sup> According to the National Council of Welfare, a significant determinant of poverty in Canada is family type. Unattached women 65 and older had a poverty rate of 45.6 per cent in 2001, the highest rate for any family type for the second year in a row. Single-parent mothers under 65 had the second highest rate at 42.4 per cent. Women have consistently higher poverty rates than men in the case of unattached persons and single parents. The most glaring difference in 2001 was the gap between the poverty rate of 42.4 per cent for single-parent mothers and the rate of 19.3 per cent for single-parent fathers. The gap between women and men is greater for persons 65 and older than it is for younger adults; in recent years it has been in the order of two to one. In 2001, the poverty rate for senior women was 21.2 per cent and the rate for senior men was 11.1 per cent. Poverty rates also vary with education level. The 2001 poverty rate for unattached individuals with less than a high school education was 59.2 per cent, compared to a rate of 21.9 per cent for those with a bachelor’s degree from university. Families where the major income earner had less than a high school education had a poverty rate of 16.4 per cent, compared to 4.2 per cent for families where the major income earner had a bachelor’s degree. Canada, Minister of Social Development Canada, National Council of Welfare, *Poverty Profile 2001*, <online: [http://www.nwcnbcs.net/htmldocument/reportpovertypro01/PP2001\\_e.pdf](http://www.nwcnbcs.net/htmldocument/reportpovertypro01/PP2001_e.pdf)> [*Poverty Profile 2001*]. While the 2001 report indicated that immigration also had a significant impact on poverty rates, it did not provide data broken down by sex. The 1999 profile showed that while women born in Canada have a pre-tax poverty rate of 37.9 per cent and men born in Canada have a poverty rate of 11.0 per cent, women who immigrated to Canada between 1990 and 1999 had a poverty rate of 43.6 per cent and men who immigrated during this period had a poverty rate of 37.0 per cent. Aboriginal status also has a significant impact. The 1995 poverty rate for Aboriginals age 15 and over was 42.7 per cent for women and 35.1 per cent for men. This is greater than double the rates for non-Aboriginal women and men. Canada, Minister of Social Development Canada, National Council of Welfare, *Poverty Profile 1999*, online: <[http://www.nwcnbcs.net/htmldocument/reportpovertypro99/Introduction\\_e.htm#\\_Toc500047782](http://www.nwcnbcs.net/htmldocument/reportpovertypro99/Introduction_e.htm#_Toc500047782)> [*Poverty Profile 1999*].

consumer bankruptcy operates. Part III sketches the structure and operation of the Canadian consumer bankruptcy system. Part IV explores the characteristics of current users of the consumer bankruptcy system that emerge from a re-examination of existing Canadian empirical studies. Part V considers the implications of the current structure of the delivery of consumer bankruptcy services for the construction of poverty in Canada. Part VI provides a brief conclusion.

## II. GENEALOGY AND CONTEXT

Since the initial introduction of bankruptcy as a discharge of individual debts in 1705, bankruptcy law has often functioned to differentiate citizens deserving of protection from financial failure from those undeserving of such protection. In this process, prevailing cultural discourses surrounding self-determination and autonomy have been affirmed.<sup>12</sup> The existence of the “fresh start” provided by bankruptcy has been justified as benefitting all citizens by ensuring that the bankrupt debtor can become a productive member of society again.<sup>13</sup> For example, in the legislative debates surrounding the introduction of the bankruptcy discharge in England in 1705, it was recognized that deserving debtors experienced life’s contingencies in a manner that was consistent with working towards economic progress.<sup>14</sup>

In England, individual bankruptcy and the benefit of a discharge was originally available only to traders. It was later expanded in England in the nineteenth century to others who were thought to exhibit the “trader mentality” of temperance, industry, and frugality.<sup>15</sup> In the United States, it was the emancipation of slaves in 1861 that led to the abolition of the trader

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<sup>12</sup> Prior to the creation of the bankruptcy discharge in 1705 in England, and for a period of time in tandem with this new form of bankruptcy, defaulting debtors were criminalized, tortured, or imprisoned. During these periods, the “others” of the criminalized form of debt collection reflected the ideas of the middle-class, while the debtor going through the criminalized process often represented the marginalized classes. In this way, while going through the criminalized collection process was at odds with the prevailing ideologies of the middle-class, the process served to affirm the prevailing ideologies. See Donald R. Korobkin, “Bankruptcy Law, Ritual and Performance” (2003) 103 *Colum L. Rev.* 2124 at 2134.

<sup>13</sup> Melissa Jacoby, “Generosity Versus Accessibility: Bankruptcy, Consumer Credit and Health Care Finance in the US” in Johanna Niemi-Kiesiläinen, Iain Ramsay & William Whitford, eds., *Consumer Bankruptcy in Global Perspective* (Portland: Hart, 2003) 283 at 291.

<sup>14</sup> Robert Weisberg, “Commercial Morality, the Merchant Character, and the History of the Voidable Preference” (1986) 39 *Stan. L. Rev.* 3 at 30.

<sup>15</sup> *Ibid.* at 33.

requirement for consumer bankruptcy.<sup>16</sup> The expansion was premised on the view that whites should be free from slavery to their debts just as blacks were no longer slaves to them.<sup>17</sup> In Canada, the trader/non-trader distinction with respect to voluntary consumer bankruptcy was removed with the creation of Canada's first federal bankruptcy legislation, the *Bankruptcy Act 1919*.<sup>18</sup> In that context, evidence was given in the Senate that "there is a large class of people, for example, professional men ... whose credit is largely based upon moral grounds."<sup>19</sup> There was also significant American influence on the move to eliminate the trader distinction in Canada; it was thought that Canadian debtors would flee to the United States if bankruptcy legislation did not apply to them because they were not "traders."<sup>20</sup>

The only large-scale empirical study of Canadian consumer bankrupts conducted during the 1970s suggested that consumer bankruptcy was resorted to primarily by the lowest skilled lower "working class" males.<sup>21</sup> In contrast, one of the two most recent major empirical studies on consumer bankruptcy illustrates that consumer bankruptcy is not dominated by the poor, the working class, or long-term economic failures.<sup>22</sup> Rather, consumer bankruptcy is, for the most part, a middle-class phenomenon.<sup>23</sup> Both Canadian studies also identified the increasing number of women filers as an issue in need of further study.<sup>24</sup>

<sup>16</sup> Korobkin, *supra* note 12 at 2142.

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

<sup>18</sup> S.C. 1919, c. 36; the *Insolvent Act*, S.C. 1875, c. 16, repealed S.C. 1880, c.1, s.8(1) as cited in Thomas G.W. Telfer, "The Canadian Bankruptcy Act of 1919: Public Legislation of Private Interest?" (1994) 24 *Can. Bus. L.J.* 357 at 387.

<sup>19</sup> *Senate Debates* (28 May 1919) at 592 as cited in Telfer, *ibid.* at 388.

<sup>20</sup> Telfer, *ibid.* at 367.

<sup>21</sup> J.W. Brighton & J.A. Connidis, *Consumer Bankrupts in Canada* (Ottawa: Consumer and Corporate Affairs Canada, 1982).

<sup>22</sup> "Ramsay Study", *supra* note 6. The Schwartz and Anderson Study reports that, based on the occupational information in their sample, consumer bankrupts continue to be drawn from the lowest occupational skill levels. "Schwartz and Anderson Study," *supra* note 7 at 101. This conclusion stands in contradiction to a middle-class description of consumer bankrupts in the current context. However, given that the Study's account of occupation applies to the point immediately before filing, as well as a consideration for the year prior to filing, other symbols of a middle-class existence are also important. These symbols include middle-class pursuits such as owning a home, obtaining student loans and starting a business, activities in which the Study reports a significant number of bankrupts are engaged. This data is discussed further in Part IV.

<sup>23</sup> J.L. Westbrook, "Comparative Empiricism" (1999) 37 *Osgoode Hall L.J.* 143 at 151; "Ramsay Study", *ibid.*

<sup>24</sup> "Ramsay Study", *supra* note 6 at 17 and "Schwartz and Anderson Study", *supra* note 7 at 93.



The current political and economic context in Canada is marked by a number of factors related to the rise of the neo-liberal<sup>25</sup> state that are relevant to my consideration of consumer bankruptcy and gender. Privatization of government services in Canada has increased significantly in recent years. As in other Western democracies, social spending has been limited and an emphasis on self-reliance has been promoted as an appropriate response to poverty and inequality. Some commentators have highlighted the demise of the welfare state in conjunction with the rise of the neo-liberal state as central to the current organization of Canadian society. For example, the authors of *Privatization, Law and the Challenge to Feminism*<sup>26</sup> draw attention to the impact of the emergence of the neo-liberal state, characterized in particular by processes of privatization, on the structure of gender relations.

The enlargement and sanctification of the private sphere, including the family and the market, and the limiting of the public sphere, has disproportionate effects on women, who are poorer than men, more likely to be caregivers to the elderly and children, and more vulnerable to domestic violence. In emphasizing the ideal of the market citizen,<sup>27</sup> who must be self-reliant and take responsibility for risks to her and her family's well-being, neo-liberalism singles out those women who are more likely to be persistently poor from among women who, in general, experience a greater risk of poverty than men.<sup>28</sup> Citizens are expected to turn to the private sphere of family and the market to have their needs met, and public programs and services have been eliminated. The result is that women are providing increased unpaid care for children, spouses, the elderly, and others. The financial impact is felt most harshly by women who do not also participate in the market, or who are unable to turn to family members who are market participants for financial support.

The private sphere in the neo-liberal state has been described by the defining norms of partiality and exclusion.<sup>29</sup> However, the language surrounding the private sphere has rendered these characteristics invisible

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<sup>25</sup> In "The Moral Hazards of Neo-Liberalism: Lessons from the Private Insurance Industry" (2000) 29 *Economy and Society* 532, Richard Ericson, Dean Barry and Aaron Doyle articulate the key tenets of neo-liberalism that I adopt in this article. The key tenets include: minimal state, market fundamentalism, risk-taking, individual responsibility, and acceptance of inequality.

<sup>26</sup> Brenda Cossman & Judy Fudge, eds., (Toronto: University of Toronto Press, 2002).

<sup>27</sup> Judy Fudge & Brenda Cossman, "Conclusion" in Cossman & Fudge, *ibid.*, 403 at 409.

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

<sup>29</sup> Janet Mosher, "The Shrinking of the Public and Private Spaces of the Poor" in Joe Hermer & Janet Mosher, eds., *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood, 2002) 43 at 44.

by shifting the focus away from social arrangements that support the conditions necessary for self-reliance, such as childcare and stable employment, to blaming less well-situated people for their inability to achieve self-reliance.<sup>30</sup> Accordingly, the costs of oppression have not been fully appreciated in the current context.

The contemporary role and meaning of consumer bankruptcy is best understood as an institution of the emerging neo-liberal state. The norms of both partiality and exclusion are present. The interests of the middle-class are preferred and protected and the poor are excluded in the current model. Consumer bankruptcy in Canada is an experience that is available primarily to those Canadians who experience financial failure while taking the forms of risk characteristic of middle-class or entrepreneurial life. These risks include purchasing homes and acquiring new consumer goods such as cars, televisions, furniture, and appliances, as well as obtaining post-secondary educations, saving for retirement, and starting small businesses.<sup>31</sup> The goal of Canada's consumer bankruptcy system is to insulate such Canadians and their families from the experience of long-term poverty. At the same time, consumer bankruptcy in Canada takes part in preserving and affirming a neo-liberal regime where inequalities that result are seen as a matter of choice.

The limited judicial rhetoric from the Supreme Court of Canada discussing consumer bankruptcy and the two recent government reports on the topic provide evidence of the current ideological construction of consumer bankruptcy in Canada that is linked to and informed by consumer bankruptcy in practice. Within this ideological framework, consumer bankruptcy is viewed as a way to assist those who try, but fail, to achieve

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<sup>30</sup> *Ibid.* at 48-49.

<sup>31</sup> The construction of consumer bankruptcy in the Canadian media, which is beyond the scope of this article, provides an account of the types of goods and risks that individuals purchase and seek prior to filing for consumer bankruptcy in Canada. See Geoff Matthews "Living Large Big Problem" *Ottawa Sun* (15 April 2004) 51 (Lexis) (suggests that goods such as furniture, cars, boats, and televisions—now easier to obtain thanks to low interest rates—good job prospects and easy credit opportunities, are linked to consumer bankruptcies); Tara Perkins "We're in Debt More Than Ever: Rise in Interest Rates Could Send Canadians Over the Edge" *Toronto Star* (9 January 2004) A01 (Lexis) (suggests that with either increasing interest rates or decreasing home prices, homeowners who have taken on "record levels of indebtedness" due to recent low interest rates may be at risk of bankruptcy); Ellen Roseman "Canadians' Debt Loads Just Keep Getting Higher" *Toronto Star* (7 October 2003) D1 (Lexis) (suggests that easier consumer credit such as extended interest-free credit periods from furniture stores and lower minimum payment requirements from credit card companies are increasing bankruptcy risk. Increased spending on cars and suburban homes by double-income families has also put the middle-class at risk); Derek Abma "Bankruptcy Stats on Rise" *Ottawa Sun* (10 July 2003) 47 (Lexis) (suggests that record amounts of debt due to credit card purchases and real estate refinancing is putting Canadians at risk of bankruptcy. Recent lay-offs in the hi-tech sector and people with jobs taking on more debt than they can support are also responsible for many bankruptcies).

certain circumscribed goals sanctioned by neo-liberal imperatives of individual choice and self-determination—in particular, pursuit of a post-secondary education<sup>32</sup> and saving for retirement. Judicial and government discourse about using the bankruptcy process to encourage pursuit of these goals expresses one central concern: to adjust debt relations between private entities in a way that minimizes the costs to the public purse when a citizen does not provide for his and his family's economic well being.

In each of the two most recent Supreme Court of Canada cases dealing with the issue of what constitutes property of the bankrupt in a bankruptcy, the judiciary's primary concern was with protecting the bankrupt's ability to provide for his and his family's economic well-being. In *Marzetti v. Marzetti*<sup>33</sup> and in *Royal Bank of Canada v. North American Life Assurance Co. ("Royal Bank")*,<sup>34</sup> the Supreme Court of Canada was called upon to determine whether the property in question was beyond the reach of the bankrupt's creditors. The property at issue in each case—a post-bankruptcy income tax refund in *Marzetti* and RRSP<sup>35</sup> funds that had been transferred into an RRIF<sup>36</sup> in *Royal Bank*—were claimed by the bankrupts to be necessary in order to provide for the welfare of their wives or former wives. In both cases the ideal of the market citizen who looks after his own welfare and his family's welfare was emphasized in reaching the decision that the property at issue was exempt from reach by the bankrupt's creditors.

In *Marzetti*, Justice Iacobucci, writing for the Court, stated:

My opinion is, furthermore, fortified by public policy considerations ... when family needs are at issue, I prefer to err on the side of caution ... it is appropriate to have "regard to the family responsibilities and family situation of the bankrupt." This demonstrates, to my mind an overriding concern for the support of families.<sup>37</sup>

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<sup>32</sup> See Stephanie Ben-Ishai, "One Paradox of the Bankruptcy Fresh Start: Government Student Loans" Ann. Rev. Insolvency L. [forthcoming in 2005].

<sup>33</sup> [1994] 116 D.L.R. (4th) 577 [*Marzetti*].

<sup>34</sup> [1996] 132 D.L.R. (4th) 193 [*Royal Bank*].

<sup>35</sup> In the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1, s.146 [ITA], an RRSP is defined as "a retirement savings plan accepted by the Minister for registration for the purposes of this Act as complying with the requirements of this section."

<sup>36</sup> In the ITA, s.146.3, an RRIF is defined as "a retirement income fund accepted by the Minister for registration for the purposes of this Act and registered under the Social Insurance Number of the first annuitant under the fund."

<sup>37</sup> *Supra* note 33 at 601-02.

Similarly, in *Royal Bank*, Justice Gonthier, writing for the Court, held that:

[T]he policy of exempting life insurance investments and policies from execution or seizure under the BIA, where family members are designated as beneficiaries, is sound. Given the importance of insurance in providing for the welfare of dependants upon the death of the insured, an insurance policy may be characterized as a necessity. In Saskatchewan, as in the other provinces, many other necessities are excluded from the property of a bankrupt which is subject to execution or seizure by creditors. Examples include food, fuel, clothing, household items, tools of a trade (the *Exemptions Act*, R.S.S. 1978, c. E-14, s. 2), farm buildings, farming equipment, and livestock (the *Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1, s. 65). One might well characterize exempt property collectively as the "bare minimum" which a bankrupt is entitled to maintain in order to facilitate his or her rehabilitation following bankruptcy.<sup>38</sup>

The rhetoric in both *Marzetti* and *Royal Bank* is consistent with the intensification of the enforcement of private support obligations in other areas of Canadian law, such as social welfare law and family law.<sup>39</sup> As in these other legal processes, in the context of bankruptcy the discourse surrounding the importance of "family" has been used to redirect women's economic dependency from the public to the private sphere. In *Marzetti*, the post-income tax refund at issue was used to pay support obligations to the former wife of the bankrupt rather than being made available to other creditors of the bankrupt. In *Royal Bank*, the RRSP at issue was used to support the bankrupt's wife, rather than being made available to other creditors. In both cases, the judicial rhetoric contributes to an understanding of women's poverty as a private family matter caused by the inability of the male breadwinner to provide. This is problematic when mapped onto the face of poverty in Canada, which is disproportionately represented by single mothers and their children.

Echoing the judicial discourse of self-reliance, the two most recent government reports on consumer bankruptcy devoted substantial space and time to dealing with issues that affect or are affected by other government policies intended to encourage self-reliance as a response to reduced government spending. Within this category, both reports focused in particular on addressing the treatment of student loans owed by bankrupts and the status of RRSPs held by bankrupts. Both of these central points of discussion focus on typical middle-class goals and approaches to achieving self-reliance, such as seeking a post-secondary education and saving for retirement, that have been affected by recent government cutbacks.

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<sup>38</sup> *Supra* note 34 at 200.

<sup>39</sup> Brenda Cossman, "Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project" in Cossman & Fudge, *supra* note 26, 169 at 169.

The first of the two reports was produced by the Personal Insolvency Task Force (PITF), which released its final report in August 2002.<sup>40</sup> The PITF was an advisory group with the mandate to suggest ways of reforming the personal insolvency provisions of the *BIA*.<sup>41</sup> The immediate motive behind the creation of PITF was the requirement, imposed by Parliament, that the OSB report on the effects of the 1997 amendments to the *BIA*.<sup>42</sup> A related goal was that the *PITF Final Report* would serve “as a form of bench-marking by positioning Canada and comparing the Canadian insolvency system with that of Australia, USA and the UK while respecting the fundamental policy and flavour which characterize the personal insolvency system in Canada.”<sup>43</sup>

The *PITF Final Report* recommended reducing the length of time before a former student could enter the bankruptcy process and discharge or no longer owe their student loans to the government from ten years to five years after the end of their studies.<sup>44</sup> With respect to RRSPs, the *PITF Final Report* recommended that RRSPs that are converted to locked-in RRSPs or annuities that are not accessible until after retirement not be available for division among the bankrupt’s creditors in bankruptcy.<sup>45</sup> The discussion behind each of these recommendations noted how government policy in education and tax legislation has promoted individual financial responsibility and limited reliance on the public purse. In each instance individual responses have been promoted as a means to deal with government cutbacks. That is, while tuition costs for post-secondary education have increased, government student loans have also increased. Similarly, while employer-funded pensions have been disappearing and government provision of retirement benefits cast into doubt, RRSPs have been promoted by way of government tax incentives as vehicles for employed Canadians to save for their retirement.

The *PITF Final Report* was relied upon heavily in the most recent government report on bankruptcy, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangements Act* (the “*Senate Report*”) released in November 2003 following months of evidence offered primarily by lawyers, bankruptcy trustees,

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<sup>40</sup> *PITF Final Report*, *supra* note 3. Members of the PITF included bankruptcy trustees, OSB representatives, creditor representatives, bankruptcy judges and academics (*ibid.* at 81-83).

<sup>41</sup> *Ibid.* at 1.

<sup>42</sup> *Ibid.* at 79.

<sup>43</sup> *Ibid.* at 81.

<sup>44</sup> *Ibid.* at 11.

<sup>45</sup> *Ibid.* at 19.

creditor representatives, academics, and credit counselors.<sup>46</sup> The general substance of the PITF's recommendations on student loans and RRSPs was adopted in the *Senate Report*.<sup>47</sup> The *Senate Report* noted that both recommendations were necessary as they were in the "public interest."<sup>48</sup>

Both of Canada's leading academics in the field of consumer bankruptcy law felt that the *PITF Final Report* did not meet the demand for a comprehensive analysis of the consumer bankruptcy system set out by the Standing Senate Committee on Banking, Trade and Commerce during the passage of the 1997 legislative amendments to the *BIA*.<sup>49</sup> In particular, Iain Ramsay criticized the *Final Report* as limited in scope given the fact that the PITF was composed of "insiders" within the insolvency community, with a limited research budget that did not permit a "sound evaluation of public policy."<sup>50</sup>

In the process of constructing the deserving bankrupt—that is, one who is worthy of financial protection in the form of consumer bankruptcy services—as one who has taken "valid" risks to deal with specific forms of public cutbacks, the *PITF Final Report* and the *Senate Report*, like the judicial rhetoric, contribute to constructing long-term poverty. Unlike the middle-class, the poor do not have vehicles such as student loans<sup>51</sup> and RRSPs<sup>52</sup> available to them to respond to government policies that most affect their daily lives. The recommendations made by the government reports on consumer bankruptcy fail to address policies such as reductions in health care spending and provisions for child care and elder care, policies that

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<sup>46</sup> Canada, Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: 2003), online: <<http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/bank-e/rep-e/bankruptcy-e.pdf>> [*Senate Report*].

<sup>47</sup> *Ibid.* at 29.

<sup>48</sup> *Ibid.* at 28.

<sup>49</sup> Reservations and Dissents to the *PITF Final Report* are found at Annex 3, pp. 93-102 of the *PITF Final Report*.

<sup>50</sup> *Ibid.* at 94.

<sup>51</sup> Ontario, Post-Secondary Review (Toronto: Queen's Printer for Ontario, 2004), online: <<http://raereview.on.ca>> (The Rae Report). Rae notes that students currently enrolled in Canadian universities are mainly well-off students, who can afford to pay higher tuition. Students have responded by arguing that high fees and guaranteed debt after graduation are driving away everyone else.

<sup>52</sup> According to Jim Stanford, an economist at Canadian Auto Workers, lacking disposable income affects Canadians' ability to take advantage of RRSP subsidies. In 1995, only 22 per cent of Canadian taxfilers earning less than 50,000 dollars contributed to RRSPs. Among taxfilers earning between 50,000 and 100,000 dollars, 68 per cent contributed to RRSPs. Among those earning over 100,000 dollars, 77 per cent contributed to RRSPs. "RRSP Follies, Part I: Fat Cats" (February 1999), Online: Canadian Auto Workers <<http://www.caw.ca/news/factsfromthefringe/issue5.asp>>.

affect the creation and regulation of debt for many Canadians, low-income women in particular.

Despite the fact that the government reports fail to take into account the perspectives of low-income Canadians, the reports, and their contribution to the ideological construction of consumer bankruptcy, do have significant implications for Canadians living at or below the poverty level. For example, in sharp contrast to how the goal of protecting the public purse has been used in the government reports on consumer bankruptcy to enhance bankrupts' rights so that they can achieve self-reliance, this same goal has been used to construct the poor as lazy, unmotivated, and deceptive in the welfare context.<sup>53</sup> The government reports, together with the judicial rhetoric on consumer bankruptcy, contribute to creating a separate paradigm for dealing with the poverty risks of the middle-class and the poverty risks of the poor. Bankruptcy is constructed as a "normal consequence of normal causes"<sup>54</sup> that can be located in the current social, political, and economic contexts within which Canadians operate. This process entrenches the separate paradigm for low-income Canadians, wherein their economic difficulties are constructed as the result of personal failure or misconduct rather than an admirable attempt to achieve self-reliance.

### III. THE CANADIAN CONSUMER BANKRUPTCY SYSTEM

Most bankruptcy scholars and practitioners in Canada would agree that the primary goals of consumer bankruptcy are to give honest but unfortunate debtors a "fresh start" in life and to ensure that their creditors receive maximum repayment.<sup>55</sup> The vast majority of consumer bankruptcies in Canada are initiated by debtors<sup>56</sup> seeking protection under the liquidation

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<sup>53</sup> Janet Mosher, Patricia Evans & Margaret Little, Final Report of Research Findings from the Woman and Abuse Welfare Research Project, "Walking on Eggshells: Abused Women's Experiences of Ontario's Welfare System" (Toronto: York University, 2004) at 80, online: <[http://www.yorku.ca/yorkweb/special/Welfare\\_Report\\_walking\\_on\\_eggshells\\_final\\_report.pdf](http://www.yorku.ca/yorkweb/special/Welfare_Report_walking_on_eggshells_final_report.pdf) > ["Mosher Report"].

<sup>54</sup> Interestingly, this was the very construction of debtors that Paul Rock advocated for in his early work on the construction of debtors and deviance in England in the period prior to the availability of consumer bankruptcy and the accompanying fresh start to both traders and non-traders. Paul Rock, *Making People Pay* (London: Routledge & Kegan Paul, 1973) at 285.

<sup>55</sup> Iain Ramsay, "Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada" (2003) 53 U.T.L.J. 379 at 386 [Ramsay, "Interest Groups"].

<sup>56</sup> "Ramsay Study", *supra* note 6 at 41. In addition to liquidation bankruptcies, which are the primary subject of this paper, an option that is available to high-income debtors is a consumer proposal where all or a portion of the debtor's debts are paid off over a period of five years. In Canada, this

provisions under Part II of the *BIA*. The debtor begins the process by meeting with a licensed bankruptcy trustee<sup>57</sup> who plays the primary, day-to-day decision-making role in the consumer bankruptcy process.

In Canada, the consumer bankruptcy bar is virtually non-existent, with the exception of a few corporate bankruptcy lawyers who, as an adjunct to their practice, serve high-income professionals in the consumer context. Further, specialized bankruptcy judges do not exist in Canada. The only members of the judiciary who are familiar with the day-to-day workings of the bankruptcy system in Canada are bankruptcy registrars. Bankruptcy registrars have the power under the *BIA* to hear discharge hearings that determine whether the bankrupt has completed the bankruptcy process and is entitled to a discharge.<sup>58</sup> These “quasi” judges have low status and limited power, and regularly complain of being overworked.<sup>59</sup> Currently there is only one bankruptcy registrar who serves the entire Toronto area.<sup>60</sup> The bankruptcy trustee is a private practitioner who is regulated and licensed by the OSB to perform the often conflicting roles of counselling the debtor, maximizing the returns to the creditors from the bankrupt’s estate, and fulfilling his or her duty to administer the bankruptcy while maintaining the integrity of the *BIA*.<sup>61</sup>

While the trustee plays the most significant day-to-day decision-making role in the consumer bankruptcy process, the OSB plays the most significant regulatory role in the delivery of bankruptcy services, as compared to the courts and the legislatures, which have played increasingly more limited roles.<sup>62</sup> The OSB is responsible for:

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option has come under scrutiny in the context of the conflicting role of the trustee, and the financial incentives for trustees that have been added as a result of the 1997 amendments to the *BIA* to encourage trustees to push debtors into this process over the liquidation option. One of the consequences of the 1997 amendments to bankruptcy legislation in Canada has been a sharp increase in the number of consumer proposals, which have grown from 5 per cent to 14 per cent of all bankruptcy filings. Reliable empirical data on the failure rate of such proposals has not yet been collected. See Iain Ramsay, “Reservations and Dissents” in *PITF Final Report*, *supra* note 3 at 95. The OSB reports that in the 1995-1997 period, 62 per cent of consumer proposals were successful. However, the explosive growth of proposals began in 1998, and the OSB does not have statistics on the success rate of these proposals at this time. See OSB Newsletter, December 2004, online: <<http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/en/br01475e.html#footnotes2>>.

<sup>57</sup> Ziegel, *supra* note 2 at 235.

<sup>58</sup> Ramsay, “Interest Groups”, *supra* note 55 at 299.

<sup>59</sup> *Ibid.* Comments to the author from practitioners to whom these comments are regularly made.

<sup>60</sup> The name of the bankruptcy registrar is Mary Sproat. Telephone contact with Joan White, Clerk Coordinator, Bankruptcy Court (14 May 2004).

<sup>61</sup> *PITF Final Report*, *supra* note 3 at 2.

<sup>62</sup> Ramsay, “Interest Groups”, *supra* note 55 at 394.



- Supervising the administration of estates in bankruptcy, commercial reorganizations, consumer proposals, and receiverships;
- Maintaining a publicly accessible record of bankruptcy and insolvency proceedings;
- Recording and investigating complaints from creditors, debtors, and members of the general public regarding possible wrongdoing by someone involved in the insolvency process;
- Licensing of private sector trustees to administer estates and the appointment of administrators of consumer proposals; and
- Setting and enforcing professional standards for the administration of estates.<sup>63</sup>

Since 1997, the OSB has operated as a Special Operating Agency.<sup>64</sup> Accordingly, it is run like a business, accountable to its “clients”<sup>65</sup> and intended to be self-financing primarily through the vehicle of the statutory levy that is deducted from any proceeds once a bankrupt’s property has been sold and prior to the distribution of those proceeds to the bankrupt’s creditors. The directives that are issued by the OSB have legal force and in many instances significant changes to the consumer bankruptcy system are made by way of the issuance of directives rather than through the full legislative process.<sup>66</sup>

Bankruptcy is not a remedy for the poor in Canada. For many potential filers the trustee fees are barriers to the utilization of the consumer

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<sup>63</sup> *BIA supra* note 1, ss. 5–12. This summary was taken from the OSB’s own description of its duties at “About the Office of the Superintendent of Bankruptcy”, online: Office of the Superintendent of Bankruptcy <<http://strategis.ic.gc.ca/epic/internet/inbsf-OSB.nsf/en/br01010e.html>>. Section 5(2) of the *BIA* provides the OSB with the mandate to “supervise the administration of all estates and matters to which this Act applies.” To fulfill its legislative mandate, the OSB has developed a mission statement, which it describes as: “To provide an effective, cost-efficient and uniform national program that will ensure compliance with the *BIA*, to maintain a sound policy and regulatory base which permits adjustments to the law in response to changing conditions, and to encourage the participation of private-sector stakeholders in order to achieve efficiency in estate administration.”

<sup>64</sup> Ramsay, “Interest Groups” *supra* note 55 at 394. Professor Ramsay describes such Special Operating Agencies as part of the “new public management movement” of the late 1980s and defines their purpose as “intended to have greater autonomy from government rules, operate more like business, and be answerable to their clients.”

<sup>65</sup> *Ibid.* at 395. Clients are defined as creditors, insolvent businesses and individuals, or potential lenders and investors.

<sup>66</sup> *Ibid.* at 394.

bankruptcy system.<sup>67</sup> In Canada, the median trustee remuneration for individual bankruptcy cases filed in 1994 in the Toronto district was 1,491 dollars, which is first taken out of the estate.<sup>68</sup> Given the fact that most estates do not have any assets, the shortfall is generally recovered by way of a voluntary agreement with the debtor to make payments to the trustee during the bankruptcy period.<sup>69</sup> The debtor will generally obtain such funds by filing an income tax return for pre-bankruptcy periods or borrowing money from family or friends. Usually included in such an agreement is a stipulation that failure to make the payment entitles the trustee to seek a conditional discharge order against the debtor requiring the debtor to continue to make payments beyond the typical nine-month bankruptcy period.<sup>70</sup>

In 1972, at a time when the number of consumer bankruptcies began to rise in Canada and the supply of private bankruptcy trustees was limited, the OSB developed a publicly administered bankruptcy program, known as the Federal Insolvency Trustee Agency, for individuals who could not afford a private bankruptcy trustee.<sup>71</sup> Despite the fact that this program was used by one-third to one-half of consumer bankrupts, at the urging of the private trustee community, the program was abolished in 1979.<sup>72</sup> The impetus from the trustees to abolish the program came from their realization that they could earn a profit on a consumer bankruptcy, even if the bankrupt had no assets. Ramsay quotes one trustee as stating, “[Trustees] realized that their fees did not depend on the assets of the bankrupt but they could get a very nice fee just out of income tax refunds and so on.”<sup>73</sup>

Following the termination of the Federal Insolvency Trustee Agency, the OSB developed a Debtor Assistance Service where participating trustees agree to provide consumer bankruptcy services at reduced or no cost to those who cannot find a trustee willing to take their cases. Pursuant to this service, the OSB will help a debtor find a trustee if the debtor’s debts are mostly personal rather than business-related; the debtor can demonstrate that she or he has made at least two attempts to find a trustee; and the

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<sup>67</sup> Iain Ramsay, “Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy” (2000) 74 Am. Bank. L.J. 399 at 407 [Ramsay, “Market Imperatives”].

<sup>68</sup> *Ibid.* at 427.

<sup>69</sup> *Ibid.*

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

<sup>71</sup> Ramsay, “Interest Groups”, *supra* note 55 at 388.

<sup>72</sup> *Ibid.* at 388.

<sup>73</sup> Ramsay, “Market Imperatives”, *supra* note 67 at 408.

debtor is not in prison.<sup>74</sup> Despite the OSB's commitment to forwarding such a debtor's bankruptcy registration forms to a bankruptcy trustee within two business days and ensuring access to the bankruptcy process within 30 days, this program is rarely used. Ramsay suggests that "[w]hile this demonstrates that private trustees may have found innovative techniques to finance low-income bankruptcies, it is also possible that fewer low-income individuals have access to bankruptcy than in the 1970s."<sup>75</sup> The most recent empirical data on consumer bankrupts suggest that the latter is more likely than the former.

For debtors who are able to access a bankruptcy trustee, the first step following the initial meeting with the trustee involves the debtor working with the trustee or the trustee's staff to fill out a Statement of Affairs, which is an official Form<sup>76</sup> that provides the reasons for the debtor's financial problems and a full inventory of the debtor's current economic circumstances. The trustee or the trustee's staff will then file the Statement of Affairs with the OSB on the debtor's behalf. An automatic stay of all collection activity against the debtor and the debtor's estate is imposed.<sup>77</sup> The trustee is responsible for selling the bankrupt's property, subject to exempt property deemed provincially to be a necessity of life,<sup>78</sup> and distributing the proceeds among creditors of the debtor.<sup>79</sup> If there are assets remaining after secured creditors have been paid and statutory exemptions claimed, certain unsecured creditors will be given priority ahead of other unsecured creditors.<sup>80</sup> Spousal support and child support creditors are included in this category.<sup>81</sup>

Upon completion of a bankruptcy, all pre-bankruptcy debts of the consumer debtor are discharged (or no longer owing) with certain

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<sup>74</sup> See "About the Office of the Superintendent of Bankruptcy", *supra* note 63.

<sup>75</sup> *Ibid.* at 408.

<sup>76</sup> *BIA, supra* note 1, s. 158(d), Form 79.

<sup>77</sup> In Canada, the stay against secured creditors is not automatic. The stay does not affect secured creditors who are entitled to realize on their security unless expressly restrained from doing so by the court. *BIA, supra* note 1, s.69.3(2).

<sup>78</sup> *BIA, supra* note 1, ss. 67(b) and 67(b.1).

<sup>79</sup> The situation in Canada is slightly different than in the American context where the typical liquidation bankruptcy ends with no assets available for distribution to the debtor's unsecured creditors. Iain Ramsay reports that in 24.2 per cent of the consumer bankruptcy cases he studied, there were no assets to distribute and that the median creditor dividend for unsecured creditors was 3.22 per cent. "Ramsay Study", *supra* note 6 at 73.

<sup>80</sup> *BIA, supra* note 1, s. 136.

<sup>81</sup> *BIA, supra* note 1, s. 136(d.1).

exceptions.<sup>82</sup> The exceptions to discharge in Canadian consumer bankruptcy legislation include spousal and child support.<sup>83</sup> At a minimum, nine months must lapse between when the automatic stay is created and the automatic discharge is granted, subject to objection by the trustee, the debtor's creditors, and the OSB.<sup>84</sup>

#### IV. THE DATA ON CONSUMER BANKRUPTCY

Academics argue from the data on consumer bankruptcy filings that Canadians file for bankruptcy because of unfortunate life changes beyond their control. In the face of persistent attacks on the consumer bankruptcy system in Canada by creditor groups and others who claimed that bankrupts were wealthy frauds or negligent abusers of the process,<sup>85</sup> academics conducting empirical studies of consumer bankruptcy in Canada actively sought to determine the demographic characteristics of those filing for bankruptcy and their reasons for so doing. The Canadian academics who held the view that the consumer bankruptcy system was not being abused or subject to intractable problems with moral hazard were gratified by findings that indicated that reasons for filing corresponded with life's contingencies from which all citizens could at any given moment suffer—primarily, relationship breakdown, job loss, and ill health.<sup>86</sup>

In addition to determining the reasons for filing for consumer bankruptcy, both of the two most recent major Canadian empirical studies on consumer bankruptcy also set out to test the hypothesis that bankrupts were doing worse financially than the general Canadian population and accordingly were deserving of bankruptcy protection. The authors of both studies conclude that this is indeed the case.<sup>87</sup> For the academics who conducted these studies these findings legitimated the use of the consumer bankruptcy system by its current users. The data from the Ramsay Study also show that the current users of the consumer bankruptcy system are generally Canadians who, outside of temporary financial failure, fit the criteria of belonging to the middle class—a class to which the academics writing on bankruptcy overwhelmingly belong, and are thereby inescapably partial to.

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<sup>82</sup> The discharge is discretionary and subject to the Guidelines issued by the Superintendent in Bankruptcy: *BIA*, *supra* note 1, ss. 168-180.

<sup>83</sup> *BIA*, *supra* note 1, s. 178(1)(c).

<sup>84</sup> *BIA*, *supra* note 1, s. 168(1).

<sup>85</sup> For example, banks and other institutions involved in the credit card industry.

<sup>86</sup> "Schwartz and Anderson Study", *supra* note 7 at 121 and "Ramsay Study", *supra* note 6 at 60-61.

<sup>87</sup> "Schwartz and Anderson Study", *supra* note 7 at 121 and "Ramsay Study", *supra* note 6 at 76-78.

The reality is that many Canadians are more vulnerable to financial insecurity and poverty than the Canadians represented in the data in the two major empirical studies<sup>88</sup> and remain trapped in that position. As Udo Reifner rightly points out “over-indebtedness is not even a common feature of situations such as unemployment,”<sup>89</sup> which may result in bankruptcy. Further, “debt-free individuals who are unemployed or ill are significantly worse off than those with debt.”<sup>90</sup> Low-income members of the Canadian population include those on social assistance and those in minimum and low-wage jobs.<sup>91</sup> While the bankrupts who appear in the Canadian studies may not be doing as well financially as some Canadians, many are actively engaged in middle-class pursuits. Unlike many low-income individuals, many bankrupts own or have owned homes, have tried and failed at starting a new business, or have tried to obtain a post-secondary education.<sup>92</sup>

Bankrupt Canadians experience poverty on a temporary and shallow basis as compared to low-income Canadians. That is, bankrupt Canadians may live at or just below the poverty line for a brief period, whereas low-income Canadians live significantly below the poverty line for extended periods of time.<sup>93</sup> Single mothers and their children in Canada experience

<sup>88</sup> “Ramsay Study”, *supra* note 6 and “Schwartz and Anderson Study”, *supra* note 7.

<sup>89</sup> Udo Reifner, “‘Thou Shalt Pay thy Debts’: Personal Bankruptcy Law and Inclusive Contract Law” in Niemi-Kiesiläinen, Ramsay & Whitford, eds., *supra* note 13, 143 at 146.

<sup>90</sup> *Ibid.*

<sup>91</sup> Canada, National Council of Welfare, *Income for Living?* (Ottawa: Minister of Public Works and Government Services Canada, 2004) at 3 [*Income for Living*].

<sup>92</sup> In the “Ramsay Study”, *supra* note 6 at 37, 59, Ramsay notes that 15 per cent of bankrupts in his sample owned homes at the time they filed for consumer bankruptcy and he estimates that an additional 20 per cent disposed of their homes before filing. He further notes that 9 per cent of bankrupts had student loan debts and 24 per cent operated a business during the 5 years prior to bankruptcy. In the “Schwartz and Anderson Study,” *supra* note 7 at 106, 111, 117, the authors found that 25 per cent of bankrupts in their sample were self-employed in the 5 years prior to filing for bankruptcy, 25.3 per cent had student loans at the time of filing, and 14.4 per cent were homeowners at the time of filing. The 2001 census data show that 66 per cent of housing stock in Canada was owner-occupied. Canadian Housing Observer (Ottawa, Canadian Mortgage and Housing Corporation, 2004) online: <[http://www.cmhc-schl.gc.ca/en/cahoob/pocaho2004/pocaho\\_002.cfm](http://www.cmhc-schl.gc.ca/en/cahoob/pocaho2004/pocaho_002.cfm)>.

<sup>93</sup> *Poverty Profile 2001*, *supra* note 11. The family types that experienced the greatest depth of poverty in 2001 were two-parent families under 65 with children under 18, who fell an average of 10,265 dollars below the poverty line, and single-parent mothers under 65 were next at 8,886 dollars below the line. Unattached women and men under 65 were also high on the list. *Poverty Profile 2001* did not report on the duration and risk of poverty by sex. *Poverty Profile 1999* reported that the family types that experienced the greatest depth of poverty were single-parent fathers under 65 who fell, on average, 8,796 dollars below the poverty line, couples under 65 with children who fell, on average, 8,689 dollars below the poverty line, and single-parent mothers under 65 who fell, on average, 8,459 dollars below the poverty line. Single-parent mothers tend to experience poverty for the longest duration of time and are most likely to experience it at some point in their life with 75.6 per cent experiencing it for one year

the greatest depth of poverty.<sup>94</sup> In Ontario, for example, a single mother earning a low wage has on average only 2,149 dollars a year remaining to cover everything else after paying child-care costs and average rent for the year.<sup>95</sup> For low-income Canadians, the costs of obtaining rental apartments and child care overwhelm their budgets. However, both items are essential to entering and staying in the work force. Where such expenses are met, it is frequently at the cost of obtaining essentials such as food, clothing, transportation, and basic household goods.

All Canadians are potentially vulnerable to financial instability brought on by contingencies such as relationship breakdown, job loss, and ill health. However, many citizens who are less well-equipped financially, or disadvantaged in other respects, do not have access to the Canadian bankruptcy system as a possible means to deal with them. Indeed, the experience of these Canadians is actually *worsened* by the very existence of the current Canadian consumer bankruptcy system.

The existing academic interpretations of the Canadian data on who is filing for consumer bankruptcy narrate the reasons for filing as resulting from external, structural, and inevitable risks.<sup>96</sup> These interpretations distance bankruptcy and the current users of the consumer bankruptcy system from low-income members of the Canadian population who face similar risks, but who are often missing the basics such as child care and affordable housing necessary to financial recovery.<sup>97</sup> When faced with risks such as ill health, job loss, or relationship breakdown, such Canadians frequently must choose what to give up—a bus pass, and therefore the opportunity to look for work or go to school, good quality food, and thus their family's health, or safe and adequate accommodation.<sup>98</sup>

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or less during a six year sample period, 57.0 per cent experiencing it for more than three years during this period, and 41.7 per cent experiencing it for all six years. Unattached individuals age 65 and over are the second most likely to experience poverty with 59.1 per cent experiencing it for one year or less, 46.0 per cent experiencing it for more than three years, and 31.6 per cent experiencing it for all six years.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Income for Living*, *supra* note 91 at 54.

<sup>96</sup> See “About the Office of the Superintendent of Bankruptcy”, *supra* note 63.

<sup>97</sup> In “Review Essay: Narrating Bankruptcy/Narrating Risk” (2003) 98 *Nw. U.L. Rev.* 303, John Fabian Witt makes this claim in the U.S. context. Witt suggests that the narrative of risk in the bankruptcy context in the U.S. as compared to the narrative of working class or poor risk provides evidence for the claim that bankruptcy is subject to a political dynamic distinct from that surrounding insurance programs and safety nets characteristic of the welfare state. See also Ericson et al., *supra* note 25.

<sup>98</sup> *Income for Living*, *supra* note 91 at 60.

The Canadian data make it clear that the boundary policed<sup>99</sup> and reproduced by consumer bankruptcy does not reflect a division between those in financial peril and those who are financially secure, but rather reflects and takes part in an ideological construction of difference. Bankruptcy differentiates between the debtor who aspired to a middle-class Canadian existence and the debtor who lives on the margins of society. There is also a gendered dimension to this boundary, albeit one that is hidden by existing interpretations of the increasing number of women filing for consumer bankruptcy that render invisible the existence of differences amongst women. To illustrate this point I turn now to three examples drawn from the empirical data on which women in Canada are filing for consumer bankruptcy.

First, the Canadian data suggest that women who can fit into or respond to the constraints and strictures of a middle-class Canadian existence within the current neo-liberal model by starting businesses or attempting to pursue a post-secondary education are overrepresented in consumer bankruptcy. Key commonalities among all bankrupts include high incidence of student loan debt and high incidence of those who have attempted to start a business.<sup>100</sup> Ramsay notes that 9 per cent of bankrupts in his sample had student loan debts, and 24 per cent operated a business during the 5 years prior to bankruptcy.<sup>101</sup> In the Schwartz and Anderson Study, the authors found that 25 per cent of bankrupts in their sample were self-employed in the 5 years prior to filing for bankruptcy and that 25.3 per cent had student loans at the time of filing.<sup>102</sup>

Second, the data demonstrate that married women are overrepresented in consumer bankruptcy in Canada. Out of the 505 female bankrupts in Ramsay's sample, 81 per cent were married, and out of the 1147 bankrupts in the sample, 35.7 per cent were married women. Ramsay reports that the majority of married women in bankruptcy are part of single-income families and not employed outside of the home.<sup>103</sup> Only 49 per cent of these women were employed and their median individual net monthly income was 494 dollars. The data reflect the general trend of the dismantling

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<sup>99</sup> I have adopted this notion of "policing boundaries" from Donald R. Korobkin's account of American bankruptcy law as a ritualistic process that embodies a mode of meaning by which our culture responds to irreparable loss and impasse. See *supra* note 12.

<sup>100</sup> "Ramsay Study", *supra* note 6 at 37 and "Schwartz and Anderson Study", *supra* note 7 at 118.

<sup>101</sup> "Ramsay Study", *ibid.* at 37, 59.

<sup>102</sup> "Schwartz and Anderson Study", *supra* note 7 at 36, 41. Comprehensive data broken down by gender, marital status, and dependent bankrupts who attempted to start a business and failed prior to bankruptcy or who had student loans before filing for bankruptcy is not currently available.

<sup>103</sup> "Ramsay Study", *supra* note 6 at 63.

of the model of the male breadwinner earning a “family wage,”<sup>104</sup> such that men do not earn enough income to support a family. At the same time, as a result of government cutbacks in combination with the ageing population, women have been called upon to care for the elderly and children and to look to their husbands, ex-husbands, and the labour market for wages. The fact that this result has led such married women to file for bankruptcy has been criticized because “mere subsistence requires husbands and wives to work, leaving families vulnerable when they lose a wage-earner to death, illness, injury, divorce or unemployment.”<sup>105</sup> The reality is that middle-class white heterosexual women who had a claim to the “family wage” in the first place have felt this change unevenly.<sup>106</sup> These are the married women who are overrepresented in the data on consumer bankruptcy.

The example of married women illustrates that women who previously had a claim to dependency on the “family wage” are increasingly turning to consumer bankruptcy to deal with the competing demands of a neo-liberal state that has eliminated the “family wage” while simultaneously increasing the amount of unpaid work many women are doing to care for children and the elderly. However, a third category of women—those, such as single mothers, who have never had a claim to a “family wage” and are still responsible for this unpaid social reproductive labour—is not disproportionately represented in consumer bankruptcy as one would expect.

At the time that the Ramsay Study was conducted, the total number of female heads of households in the general population was approximately 846,000;<sup>107</sup> and the total number of adult women and men in the population was 29,251,285.<sup>108</sup> Accordingly, women who lived alone with children in Canada represented 2.89 per cent of all adults in Canada.<sup>109</sup> At the time that the study was conducted, 56.4 per cent of Canadian families headed by single mothers or 477,144 families in total, fell below the low-income cut-offs

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<sup>104</sup> The “family wage” was part of the Keynesian Welfare State. It was premised on the “sexual division of labour in which men’s wages would cover the majority of the costs of an economically dependent wife and children while women would shoulder the work of caring for others, much of which, especially the care of young children, would not be paid.” Cossman & Fudge, “Introduction” in Cossman and Fudge, *supra* note 26, 3 at 12.

<sup>105</sup> Bruce C. Mann, “Failure in the Land of the Free” (2003) 77 Am. Bank. L.J. 1 at 7.

<sup>106</sup> Cossman & Fudge, “Introduction” *supra* note 104.

<sup>107</sup> *Statistics Canada*, Annual Demographic Statistics 1995 (Ottawa: Statistics Canada, 1996) at 135.

<sup>108</sup> *Ibid.* at 64.

<sup>109</sup> *Ibid.* at 64-65. In 1994 there were 14,757,207 women in Canada and 11,274,426 women over 18.



established by Statistics Canada.<sup>110</sup> The Ramsay Study reported that 26 of the bankrupts in his sample of 1147, or only 1.2 per cent of all of the bankrupts in his sample and 27 per cent of the female bankrupts in his sample fell into the category of single mothers with children.<sup>111</sup> Further, out of all bankrupts not more than 40 per cent reported falling below the low income cut-off rates.<sup>112</sup> Single women in the sample earned a median monthly income of 1,243 dollars and had a median of 1,500 dollars in assets; 8.3 per cent owned homes, and 61.4 per cent were employed.<sup>113</sup>

These data suggest that the poorest members of one group of the most economically disadvantaged groups in Canada are not finding their way into bankruptcy, let alone coming anywhere close to proportional representation in bankruptcy. At the same time, the increasing role that the delivery of consumer bankruptcy services is playing in affirming the norms of self-reliance serves to exacerbate the plight of many single women and their children, who in the absence of child care and stable employment face significant obstacles in achieving such goals.

When the data on women who are in bankruptcy in Canada are examined further, it is evident that Canada's consumer bankruptcy system if it worked perfectly at the material level,<sup>114</sup> would insulate only those women who can fit into, or respond to, the constraints and structures created by dominant neo-liberal ideologies as distinct from the experience of long-term poverty.

## V. THE DELIVERY OF CONSUMER BANKRUPTCY SERVICES

The manner in which the current model for the delivery of consumer bankruptcy services encourages middle-class Canadians to focus on achieving self-reliance, and at the same time provides those Canadians with some of the conditions necessary for achieving that goal, encourages thinking that blames those who cannot achieve self-reliance for their own circumstances. This occurs at the very point in time at when middle-class Canadians who file for bankruptcy, and who may have tended to believe in

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<sup>110</sup> Statistics Canada, *Low-Income Persons, 1980-1996 (Low-Income Cut-offs, 1992 Base)* (Ottawa: Minister of Industry, 1997) at 9, online: <<http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/13-569-XIB/0009613-569-XIB.pdf>>.

<sup>111</sup> "Ramsay Study", *supra* note 6 at 63.

<sup>112</sup> *Ibid.* at 34.

<sup>113</sup> *Ibid.* at 62, 63.

<sup>114</sup> This is not a claim that is put forward in this article. However, the system does provide significant material benefits to many debtors who find their way into the system.

a meritocracy, may be better situated to understand the supportive social conditions that are necessary to achieve their past successes and the costs of not having such arrangements in place.

The current model for the delivery of consumer bankruptcy services in Canada reflects both a free-market model and an increased delegation of decision-making authority to private agents.<sup>115</sup> The delivery of consumer bankruptcy services in Canada has been increasingly based on uniform, predictable, market-serving terms that middle-class Canadians have learned to identify and are familiar with. Consumer bankruptcy services are delivered in a manner that ensures that bankrupts do not need to undergo significant transformations of identity and that bankrupts' positive self-conceptions are protected.<sup>116</sup>

Underlying the current model for the delivery of consumer bankruptcy services is the perspective that bankruptcy concerns private matters that are not and should not be subject to public scrutiny because they do not harm society as a whole. For example, in response to attempts to streamline and facilitate the sharing of information among various government offices and thereby increase the efficiency of the bankruptcy system, bankrupts' privacy rights have been increasingly protected. One instance of such protection is the recently enacted federal privacy legislation that prevents the use of Social Insurance Numbers by the OSB, even though this is the primary form of identification of individuals in Canada.<sup>117</sup> This commitment to privacy, and in particular to ensuring that the status of bankruptcy can be concealed by the bankrupt, stands in contrast to the way

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<sup>115</sup> The PITF considered the delivery of consumer bankruptcy services in Canada and concluded that in order to make personal bankruptcy procedures as efficient as possible without compromising the integrity of the process, interested parties should be given the ability to choose their own level of involvement in the consumer bankruptcy process on a "by exception rather than by rule" basis. The task force recommended simplification of the creditor notification process with regard to, for example, creditor meetings and notification of bankruptcies. Essentially, the recommendations provide for flexibility in creditor interventions where the presumption is in favour of less involvement. Further, the recommendations would routinize the tasks required of the trustee in bankruptcy and their interactions with debtors. Examples of such efforts are already underway. For example, since 2003, bankruptcy trustees have been able to e-file consumer bankruptcies. The PITF made recommendations for a more streamlined system as a means to address this issue. However, the recommendations aim to ensure that individuals who currently can access the bankruptcy system will continue to be able to do so. See *PITF Final Report*, *supra* note 3 at 79-80. At the same time, the mandatory counseling requirements under the *BIA* have been described as evidence of individualization or a practice of crafting individual solutions for bankrupts. See Ramsay, "Market Imperatives", *supra* note 67 at 400. Accordingly, the current consumer bankruptcy process may be described as both highly routinized and individualized, depending on which aspects of the process are considered.

<sup>116</sup> See Rock, *supra* note 54 at 1-25. Rock makes a similar observation about the nature of debt collection in the 1960s in England.

<sup>117</sup> Form DC905, Bankruptcy Identification Form, Canada Customs and Revenue Agency.

that another Canadian system intended to deal with financial insecurity, the welfare system, operates, insofar as it is experienced by those who interact with it, as a waiver of privacy.<sup>118</sup> Under the current model for the delivery of consumer bankruptcy services, privacy is experienced as a right, something to which “all” Canadians are entitled. Unlike temporarily impoverished middle-class Canadians in bankruptcy, low-income Canadians who are dependent upon the state for welfare forfeit this right.<sup>119</sup>

A recent study of women and the welfare system in Ontario describes women’s experience of welfare as “with rare exceptions, punitive, harsh and deeply stigmatizing.”<sup>120</sup> The women in the study describe a web of suspicion and surveillance which includes extensive documentation demands, the need to verify and prove everything, the insistent calls to report to the office, home visits, and scrutiny of their intimate relationships as regular aspects of their welfare experience.<sup>121</sup> Underpinning this lack of privacy is the welfare paradigm in which welfare is conceived of as unnecessary dependence and a burden on the public purse.<sup>122</sup> In contrast, as is demonstrated by the judicial, government, and academic discourses that construct consumer bankruptcy, bankruptcy is not conceived of as dependence, rather it is a way of returning to a self-reliant position after suffering from unfortunate external events. At the same time, as is demonstrated in the judicial rhetoric, bankruptcy is an important part of the neo-liberal agenda that rests on privatizing the dependency of citizens who are excluded from the market.

Under the current model for the delivery of consumer bankruptcy services, a person skilled in financial matters, the bankruptcy trustee, is available for hire, to render consistent and predictable decisions. The bankrupt can schedule the few private meetings that are required with the trustee or his staff at a pre-arranged time that fits her schedule. In contrast, the welfare recipient can be called into the welfare office at any given time

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<sup>118</sup> See e.g. Ian Morrison & Margaret H. Little, “The Pecker Detectors are Back: Regulation of Family Form in Ontario Welfare Policy” (1999) 34 *Journal of Canadian Studies* 110, discussing the recent intensification of the state’s surveillance of poor mothers’ relationships and contact with men. See also *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.) where the Court of Appeal for Ontario held that the definition of spouse under Family Benefits Act capturing relationships that are not spousal discriminates on grounds of sex, marital status, and receipt of social assistance in violation of s. 15 of the *Charter*. The violation was not justified under s. 1 of the *Charter*. Leave to appeal was granted by the SCC. *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*, [2003] 1 S.C.R. ix, 222 D.L.R. (4th) vi.

<sup>119</sup> “Moshier Report”, *supra* note 53 at 53.

<sup>120</sup> *Ibid.* at 5.

<sup>121</sup> *Ibid.* at 56-57.

<sup>122</sup> *Ibid.* at 50.

without regard to her schedule or responsibilities.<sup>123</sup> Bankrupts generally report high levels of satisfaction with the trustee services they receive.<sup>124</sup> In contrast, many welfare recipients report that in their interactions with the welfare system they are constantly treated as suspected criminals.<sup>125</sup>

In addition to the right to privacy and the nature of the bankrupt's interactions with the bankruptcy trustee, a review of the protections and processes that the consumer bankrupt encounters brings into sharp focus the fact that, far from being *analogous to* the experience of poverty outside of bankruptcy, consumer bankruptcy in fact operates *in opposition to* it.<sup>126</sup> In *Poor Bashing*, Jean Swanson identifies several themes in how low-income Canadians describe living in poverty for an extended period of time.<sup>127</sup> Swanson highlights how the word "dependency" is used to justify others telling poor Canadians what to do as if they are childlike or personally flawed in some way.<sup>128</sup> Welfare policies focus on rewarding work, without any regard for the amount of work required to get by on low wages or welfare, including washing clothes by hand, walking instead of taking the bus, going to rummage sales instead of stores, and looking for paid work.<sup>129</sup> Poverty limits any ability to plan for the future—items like homes, RRSPs and savings accounts are outside the reach of poor people whose income security can be limited to knowing that they will not be evicted for the next two months.<sup>130</sup> The jobs available to low-income individuals are typically low-wage, part-time, and irregular, with poor working conditions.<sup>131</sup> Often work is at the expense of proper child care.<sup>132</sup> Poor people are discriminated

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<sup>123</sup> *Ibid.* at 56.

<sup>124</sup> See EKOS Research Associates Inc., "Debtors Survey" (Powerpoint presented to the OSB Management Advisory Board, 19 June 2003). More than 90 per cent of survey respondents indicated that it was important to them that their trustee treat them fairly, answer all questions, explain their obligations and duties, protect their rights, and explain the consequences of bankruptcy. More than 85 per cent of respondents were satisfied that their trustees had met these expectations.

<sup>125</sup> "Mosher Report", *supra* note 53 at 67.

<sup>126</sup> In "Re-Vision of the Bankruptcy System: New Images of Individual Debtors", *supra* note 7 at 1532, Karen Gross suggests that the "data about women debtors underscore the povertization of women generally or as characterized by some, the feminization of poverty."

<sup>127</sup> Jean Swanson, *Poor-Bashing: The Politics of Exclusion* (Toronto: Between the Lines, 2001).

<sup>128</sup> *Ibid.* at 74.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.* at 80.

<sup>131</sup> *Ibid.* at 76.

<sup>132</sup> *Ibid.*

against by their families, banks, and in seeking employment.<sup>133</sup> They are more likely to be depressed and sick.<sup>134</sup> Employment training programs for the poor are guided by the philosophy that the individual is somehow defective because she is unable to find a job.<sup>135</sup> Further, the emphasis on the word “fraud” in welfare discourse has criminalized poverty and the act of legally claiming welfare when in need.<sup>136</sup>

In contrast to Swanson’s description of poverty in Canada, the period between the debtor’s filing for bankruptcy and receiving a bankruptcy discharge is an insulated space that has recently been described in the United States as where “middle-class people encounter themselves, reflected in the familiar mirror of middle-class standards and excuses.”<sup>137</sup> This period is guided by the perspective that middle-class Canadians will be forgiven for unemployment, divorce, ill health, credit card bills, or the costs of supporting a family. The protections provided to the bankrupt, by way of the automatic stay, the statutory exemptions, and the bankruptcy discharge, ultimately leading to a “fresh start,” are aimed at ensuring that the bankrupt is able to remain outside of the struggles of poor Canadians who are perceived as *irredeemably dependent*, financially disenfranchised members of society. There is a clear demarcation between the bankrupt citizen who has suffered from structural misfortune while engaging in responsible risk-taking, and the permanently poor Canadian.

One example of the line that is drawn between bankrupt and low-income Canadians is found in a comparison of statutorily defined “necessities of life” for a bankrupt and for a welfare recipient. During the bankruptcy period, the bankrupt is able to retain all income below the poverty line or the low-income cutoff line.<sup>138</sup> Further, in Ontario, for example, the debtor is allowed to retain the following items in bankruptcy: 5 thousand dollars for clothing, 10 thousand dollars for furnishings, 10 thousand dollars for tools for livelihood (not including farming), 25 thousand dollars for farmers’ tools, and a motor vehicle not exceeding the

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<sup>133</sup> *Ibid.* at 83.

<sup>134</sup> *Ibid.* at 84.

<sup>135</sup> *Ibid.* at 75-86.

<sup>136</sup> *Ibid.* at 79.

<sup>137</sup> Korobkin, *supra* note 12 at 2158.

<sup>138</sup> A person is deemed to be low-income if her income is less than half of the median income in her metropolitan area, adjusting for family size. In a city of 500,000 and over, the after-tax income cut-offs are as follows: 1 person: 16,348 dollars; 2 persons: 19,948 dollars; 3 persons: 25,230 dollars; 4 persons: 31,424 dollars. Andrew Heisz & Logan McLeod, *Low-Income in Census Metropolitan Areas, 1980-2000* (Ottawa: Statistics Canada, 2004), online: <<http://www.statcan.ca/english/research/89-613-MIE/2004001/definition.htm>>.

prescribed amount or where none is assigned, 5 thousand dollars.<sup>139</sup> In contrast, in Ontario present welfare rates for a single person are equivalent to 35 per cent of the poverty line.<sup>140</sup> Further, if a single person is in receipt of Ontario Works benefits she receives a maximum of 520 dollars a month and is allowed a maximum asset level of 520 dollars a month.<sup>141</sup>

The private and financially sheltered process that the consumer bankrupt encounters indicates to the bankrupt that she has engaged in the type of lifestyle that merits protection against long-term poverty. During the bankruptcy period, the bankrupt's own commitment to engaging in middle-class or entrepreneurial life, as compared with a life of poverty that she has left behind in the temporary space of bankruptcy, is re-affirmed. In contrast, society's perpetual "other," who is poor or unemployed because of so-called bad decisions, experiences financial insecurity in a public and vulnerable manner, reflecting a view that, as a matter of public policy, the risks faced by low-income individuals should not be protected against too generously because of the perverse incentives such protections may foster.

In the academic, government, and judicial discourse surrounding consumer bankruptcy, little recognition has been given to the fact that it operates, both within and outside the process of filing for and discharging bankruptcy, to reinforce the privilege of those who can successfully achieve financial self-reliance. The model for the delivery of bankruptcy services in Canada has served to re-inscribe and legitimate existing social divisions on the basis of factors such as immigrant status, race, and class. This is achieved by using the bankruptcy process to assist those who have failed in very specific ways to achieve self-reliance, without any recognition of the fact that the conditions for both achieving and attempting to achieve self-reliance are distributed unevenly on the basis of factors such as race, class, immigrant status, and gender, or that self-reliance itself represents a specific ideology, rather than a universally held understanding of how one ought to live one's life.

The focus on the self-reliance ideal in the delivery of consumer bankruptcy services has operated as part of a social environment that allows the relationship between oppression and poverty to be ignored and tolerated. We need to ask whose interests are harmed and whose interests are served by the existing model for the delivery of consumer bankruptcy services. For example, it is critical that we gain a better understanding of the central actors—namely the trustees—involved in the delivery of consumer

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<sup>139</sup> "Mosher Report", *supra* note 53 at 76.

<sup>140</sup> *Ibid.* at 13.

<sup>141</sup> *Ibid.*

bankruptcy services. An understanding of who these trustees are and how they use their substantial discretion in delivering consumer bankruptcy services is important not just for understanding the consumer bankruptcy process, but also for considering the construction of poverty more generally.

Canadian academics have noted the conflicting roles that the trustee—as administrator of the bankrupt estate, representative of creditor interests, and counsellor to the bankrupt—plays.<sup>142</sup> Academics have begun to challenge the myth of the neutral intermediary, noting that the trustees' various values and perspectives on bankruptcy may be problematic where they are counselling vulnerable clients.<sup>143</sup> These challenges to the existing model for the delivery of consumer bankruptcy services are important, but do not sufficiently make visible the role of trustees in both the ideological construction of consumer bankruptcy and the practical operation of the current model.

The existing critiques of the current model for the delivery of consumer bankruptcy services are complicated by an understanding of the bankruptcy trustee's role in the construction of the consumer bankrupt subject. The role of the trustee in ascribing meaning to gender on the basis of factors such as class, age, and health in the process of a consumer bankruptcy needs to be acknowledged. In addition, the significance of the trustee's own identity as a gendered, racialized subject with specific class and other affiliations cannot be overlooked. Aside from variance in views on bankruptcy and credit, in the existing critiques, the trustee has been conceived as a neutral, rational subject, and his partiality and particularity have thereby been concealed. In fact, it is known that bankruptcy trustees are overwhelmingly male and are on average over 50.<sup>144</sup> Trustees generally operate independently and have a staff with whom the bankrupt interacts more frequently or as frequently as she or he interacts with the trustee

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<sup>142</sup> *Ibid.*; Ramsay, "Market Imperatives", *supra* note 68 at 399.

<sup>143</sup> "Mosher Report", *supra* note 53 at 13; Carol Ann Curnock, "Insolvency Counselling—Innovation Based on Fourteenth Century" (1999) 37 *Osgoode Hall L.J.* 387.

<sup>144</sup> In 2003, 749 bankruptcy trustees administered bankruptcy files. Out of these, 15 per cent of trustees were female, representing an 8 per cent increase in the number of female trustees over 11 years. The average age of a bankruptcy trustee was 50.2. This represents a 4.8-year increase from 1992 figures, while the average age of the population increased by 2.6 years in that period. Richard Archambault & Martin Blais, "Demographic Profile and Workload of Trustees in Bankruptcy" (Powerpoint presented to the OSB, February 2004) at 5, 11. Out of the women who filed a summary administration consumer bankruptcy in 2003, 82 per cent dealt with a male trustee and 18 per cent dealt with a female trustee. Out of the men who filed a summary administration consumer bankruptcy in 2003, 83 per cent dealt with a male trustee and 17 per cent dealt with a female trustee. See Colley, *supra* note 5.

following the initial meeting.<sup>145</sup> At the time of writing, there do not appear to have been any efforts by academics or the OSB to collect statistics on the staff at trustees' offices. Accordingly, it is also necessary to understand more about who these individuals who work in trustees' offices are and to recognize the roles they play in both the delivery and construction of consumer bankruptcy in Canada.

## VI. CONCLUSION

In this article I have argued that Canadian consumer bankruptcy thought and practice operate in direct relation to a particular set of norms promoting economic self-reliance, and in opposition to persistent poverty. I have argued on this basis that the way that consumer bankruptcy is experienced has profound implications for the life chances and experiences of marginalized citizens, in particular women, in Canadian society. This article has focused on unpacking who is in bankruptcy, in particular which women are in bankruptcy, and how bankruptcy services are delivered in order to better understand the implications of consumer bankruptcy for the experience and construction of poverty in Canada. I conclude on this basis that systemic reforms aimed at increasing access to consumer bankruptcy are not sufficient.

It is quite likely that increased access to the Canadian bankruptcy system for those women who identify themselves or are identified as poor—women “with no skills and no prospects”<sup>146</sup>—would result in a challenge to neo-liberal ideologies that suggest that if we work hard we can all become economically self-sufficient and productive members of society. This challenge would come from the fact that despite the “fresh start” that bankruptcy provides, it is not realistic to believe that such women will one day become economically self-sufficient unless other societal factors are

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<sup>145</sup> Each trustee handled an average of 179 files compared with 137 files in 1992. Given the high number of files handled by each trustee and the fact that in 2003, 71 per cent of trustees report working without another trustee, in reality the bankrupt will spend significant time interacting with the trustee's staff. Archambault & Blais, *ibid.* at 3. In a telephone survey commissioned by the OSB of 1,118 randomly selected Canadians who filed for bankruptcy between 1 April and 1 June 2002, 53 per cent of bankrupts reported dealing mostly with the trustee, 33 per cent reported dealing mostly with the trustee's staff, and 12 per cent reported dealing with both equally. “Debtors Survey”, *supra* note 124.

<sup>146</sup> This is not my language. In “Financial Collapse and Class Status: Who Goes Bankrupt” (2003) 41 *Osgoode Hall L.J.* 115 at 147, Elizabeth Warren uses this phrase, arguing that “these [American] data make it clear that the sharp rise in bankruptcy filings cannot be attributed to the large number of chronically poor debtors—people with no skills and no prospects—who end up in financial collapse. The data presented here make it clear that, whatever their current economic circumstances, the families in bankruptcy share many of the same educational, and home buying experiences as other middle-class Americans.”



addressed. Greater access for low-income women to the Canadian consumer bankruptcy system as it is now designed will not cure non-credit-based societal problems, such as the lack of employment opportunities, good public transportation, or affordable child care, to name a few. The Canadian bankruptcy system, as it is currently constituted, is ill-equipped to address these issues, and women who experience persistent poverty will, in many instances, have been unable to engage in a formal credit-based lifestyle where consumer bankruptcy could provide financial relief.

My findings in this article suggest that an important element in remedying the systemic inequalities that are both produced and perpetuated by the existing understanding and practice of consumer bankruptcy is to include consumer bankruptcy in future research on legal processes and institutions that are shaped by and shape gender and other social relations of inequality. We need further empirical data on consumer bankrupts that take into account the differences among women that have so far been elided by focusing on a supposedly universal subject.

Together with further theoretical insights on these data, this research may lead to a form of bankruptcy decision-making wherein explicit attention is paid to the impact of values and norms surrounding non-credit-based societal problems on the consumer bankruptcy system, and in turn, the consumer bankruptcy system's contribution to the creation of these norms and values. Inclusion of a broader range of actors in the consumer bankruptcy decision-making and research process, and greater attention to the voices and experience of marginalized Canadians may contribute to a better understanding of the implications of the construction and delivery of consumer bankruptcy services for those living on low and insecure incomes. At the same time, however, we must resist treating low-income individuals and communities as fixed and static subjects, and work to ensure that decisions surrounding the bankruptcy process affirm the permanently partial nature of all identities and allow for flexibility and change in those subject positions.

