Bennett on CONSUMER BANKRUPTCY:

A Practical Guide for Canadians

Bennett on CONSUMER BANKRUPTCY:

A Practical Guide for Canadians

Frank Bennett

Self-Counsel Press
(a division of)
International Self-Counsel Press Ltd.
Canada USA

Self-Counsel Press acknowledges the financial support of the Government of Canada through the Canada Book Fund (CBF) for our publishing activities.

Printed in Canada.

First edition: 2014

Library and Archives Canada Cataloguing in Publication

Bennett, Frank, 1942-, author

Bennett on consumer bankruptcy : a practical guide for Canadians / Frank Bennett.

(Self-Counsel legal series)

Includes index.

Issued in print and electronic formats.

ISBN 978-1-77040-189-1 (pbk.).--ISBN 978-1-77040-940-8 (epub).--ISBN 978-1-77040-941-5 (kindle)

1. Bankruptcy--Canada--Popular works. I. Title. II. Series: Self-Counsel legal series

KE1499.2.B45 2013 346.7107'8 C2013-908012-0

KF1524.85.B45 2013 C2013-908013-9

Self-Counsel Press
(a division of)
International Self-Counsel Press Ltd.

North Vancouver, BC
Canada

Bellingham, WA
USA

CONTENTS

NOTICE TO READERS

Laws are constantly changing. Every effort is made to keep this publication as current as possible. However, the author, the publisher, and the vendor of this book make no representations or warranties regarding the outcome or the use to which the information in this book is put and are not assuming any liability for any claims, losses, or damages arising out of the use of this book. The reader should not rely on the author or the publisher of this book for any professional advice. Please be sure that you have the most recent edition.

PREFACE

I wrote a companion book for the small- and medium-sized business debtor called *Bennett's A–Z Guide to Bankruptcy: A Professional's Handbook* published by CCH Canadian Limited in Toronto. That book is similar to this one dealing with the same topics except from a business perspective. This book is devoted entirely to consumer and small-business debtors who want to take advantage of the favourable rules for consumers. It explains the bankruptcy process and alternatives available to the consumer debtor.

Canadian bankruptcy laws continue to change. For the first-time consumer debtor, bankruptcy is an easy solution to overwhelming debt problems. For individuals who wish to repeat bankruptcy proceedings, there are more restrictions, although not severe, when using the bankruptcy system.

According to the statistics kept by the Office of the Superintendent of Bankruptcy, in the year 2001, 92,836 Canadian consumers took bankruptcy protection. There were 79,453 consumer bankruptcies and 13,383 consumer proposals. Parliament has enacted laws which encourage consumers to make deals, or proposals as they are called, to the creditors rather than go fully bankrupt. With a declining economy, and with events following September 11, 2001, there were likely to be increases in consumer insolvencies. We live in an inflated

economy, and at any given time, consumers cannot pay their credit card accounts and mortgage payments even with much lower interest rates. The recession of 2008 is continuing. In the year 2012, 118,398 consumers took bankruptcy protection. Of this number, 71,495 filed for bankruptcy and 46,903 filed consumer proposals.

People incur financial difficulties for many different reasons including marital strife or divorce, loss of job or plant closure, overextension on credit cards, death of a key person in a business, and the bankruptcy of their businesses. Our bankruptcy laws are not onerous; in fact, they encourage individuals and companies to take protection from creditors who are pressing collection of their accounts. Being bankrupt does not have serious consequences for most individuals. Being bankrupt does not even mean that the debtor loses all his or her assets. In fact, with good legal advice, some assets can be protected against creditors. It's important to see a lawyer first if you are considering filing for bankruptcy. Sometimes, certain assets can be protected; sometimes, the lawyer may advise you not to take protection.

Parliament changed the main bankruptcy laws somewhat in 1992, again in 1997, and then again in 2009 to encourage consumers and small-business debtors to make proposals to creditors rather than go bankrupt. The mechanical procedures for both proposals and bankruptcy were streamlined. Bankruptcy is no doubt the popular remedy. It is still very easy for a person to go bankrupt and it is still very easy for an individual to get discharged without too much difficulty or hardship. The system does not penalize the honest but unfortunate debtor, but it does free the debtor from most of his or her debts. However, there are few advantages for consumers to make proposals.

In this book, I give basic information to consumer and small-business debtors about the bankruptcy system. Lawyers, accountants, and financial planners and counsellors may find the book a good primer to Canada's bankruptcy laws. In an office setting, I would take the individual consumer debtor through one or two interviews before recommending whether first, the client is a candidate for protection, and second, if so, how to go about it. I always ask the client for three pieces of paper: first, a list of assets; second, a list of debts or liabilities; and lastly, a list of questions. These lists focus the client on the problem at hand. With this information, I can give legal advice about the effects of bankruptcy on each of the assets and

liabilities, as well as give answers to all the questions posed. Sometimes, the consumer debtor does not want to go into bankruptcy, and in these cases, some form of proposal or restructuring with the creditors may be possible.

It sounds easy. For most people, bankruptcy is a quick and easy solution to debt problems.

For the most part, individuals —

- want to know when they can get their credit cards back;
- want to know when it's over; and
- do not care about the forms and formality, they just want to get credit again.

I hope that I take the mystique out the bankruptcy process and that more people will better understand how the system can work for them.

In preparation of this edition, I wish to thank Irving Burton, Jordan Rumanek, and Karen Adler, experienced trustees in bankruptcy in Toronto for their thoughtful comments and suggestions. I also wish to thank Eileen Velthuis, my critical editor who asked many skill-testing questions in her review of the book.

Frank Bennett
Toronto

Chapter 1
WHAT IS BANKRUPTCY?

This book offers a review of the bankruptcy process for individuals, primarily consumer debtors, who are in financial difficulty. This book does not review the bankruptcy process for small-business corporations. (Corporations cannot be consumers, but small-business persons may be able to take advantage of consumer bankruptcies and proposals; more on that later.) For readers who are interested in small corporate bankruptcies, see *Bennett's A–Z Guide to Bankruptcy: A Professional's Handbook* published by CCH Canadian Limited in Toronto.

In this chapter, the individual who may be facing bankruptcy can review the general outline of the bankruptcy process. It raises questions, the answers with which the consumer should consider before going into bankruptcy. Subsequent chapters expand each of the specific areas, and more. While bankruptcy is considered a last resort remedy for financial woes, the individual should first consider all remedies in dealing with debt including re-financing assets such as residential homes and condominiums; obtaining credit counselling; entering into some form of consolidation plan or order to pay something over time; making of a consumer proposal under the *Bankruptcy and Insolvency Act* to his or her creditors; or some other informal arrangement with his or her creditors. As a result of amendments to

bankruptcy legislation over the last 20 years, these options can be more viable than going straight into bankruptcy.

Bankruptcy is for individuals who have significant debt. An individual shouldn't necessarily consider bankruptcy for amounts under $100,000. First-time bankrupts get a "get out of jail free card" right away. Over a lifetime, they will not get the same concession if they file again. Repeat bankruptcy is on the rise with consumers and for individuals who may have some assets of value and for individuals who are self-employed, it is best to see a lawyer first before seeing a trustee in bankruptcy. While all lawyers have professional training and must be licensed by the Law Societies across Canada to practise, the individual should seek counsel from a lawyer who has experience in the bankruptcy and insolvency field. The initial or subsequent visit to review the individual's financial affairs may lead one not to file for bankruptcy at all, but rather to negotiate some other settlement. In addition, the individual may have a valuable asset that may be lost in a bankruptcy. As will be discussed, the trustee in bankruptcy works for both the debtor and the creditors. The trustee is also an officer of the court and responsible to the court and to the Office of the Superintendent of Bankruptcy, the licensing body for trustees. Therefore, it is very difficult for a trustee to advise a debtor not to proceed with some form of insolvency protection when the individual is experiencing financial difficulties.

1. Defining Bankruptcy

Bankruptcy is a legal process which an individual debtor can take to protect himself or herself from creditors who are taking legal action to collect their accounts and debts.

Creditors may send letters and call the individual on a regular basis to pay the account, or more likely, creditors employ collection agencies who consistently call the individual. Ultimately, the creditor commences a lawsuit to collect, and if the individual does not have an adequate defence, the creditor obtains judgment. This judgment can be enforced easily through garnishment proceedings against the individual's employer. This may finally force the debtor into bankruptcy.

Taking bankruptcy protection protects the individual debtor from further collection tactics. Bankruptcy involves a transfer of most of the debtor's assets to a licensed trustee who sells them and

distributes the monies amongst the debtor's creditors. The debtor, however, can keep some exempt assets such as RRSPs. A debtor may be an individual person, a partnership, or a corporation. Bankruptcy wipes out, or releases most of the debts to creditors when the bankrupt obtains his or her discharge and allows the bankrupt to start all over again. The honest but unfortunate bankrupt person is generally entitled to a fresh start.

The bankruptcy process is governed by the *Bankruptcy and Insolvency Act* which is a federal statute. This statute was first enacted in Canada in 1919 and has been amended several times. The Act is the same throughout Canada and applies equally in Newfoundland and Labrador as it applies in British Columbia or in any of the territories.

The effect of taking bankruptcy proceedings is like waving a magic wand over the debtor's creditors as it makes most legal proceedings to collect debts disappear. Taking bankruptcy protection relieves an individual debtor of his or her debts and provides instant relief and protection from creditors, collection agencies, and their lawyers who are suing the debtor. Taking bankruptcy protection stops collectors from collection agencies telephoning, faxing, emailing, and harassing the debtor. Taking bankruptcy protection stops employers from deducting monies from the debtor's salary for the benefit of seizing creditors. For both the individual and the corporation, once bankruptcy happens, it feels as if a dark cloud over the debtor has lifted and disappeared.

After an individual goes into bankruptcy, creditors are generally prevented from taking legal actions against the debtor or against the debtor's property. By operation of law, creditors are prevented from taking lawsuits, seizures, garnishments against the debtor's wages, distress and similar related proceedings against the debtor without special permission of the court. The *Bankruptcy and Insolvency Act* provides an honest debtor with relief against overbearing creditors and affords the debtor with a second, and in some cases a third, chance to establish himself or herself.

Once a debtor takes bankruptcy protection, the process under the law also allows for the orderly and fair distribution of a bankrupt person's non-exempt assets amongst all the debtor's creditors according to a scheme of priority. Exempt assets are assets that the individual can keep if he or she files for bankruptcy. They would include, for example, tools of trade and household furnishings up

to certain amounts, and registered retirement savings funds. Non-exempt assets for individuals are assets that are over and above certain thresholds. For example, the individual will be able to keep registered retirement savings funds except for monies invested within one year before bankruptcy. More about exemptions in section **6.** and in Chapter 6.

The *Bankruptcy and Insolvency Act* sets out a priority scheme so that there is seldom any argument about the distribution of monies once the assets are sold. The provisions under the Act prevent creditors from scrambling to seize assets. It allows a debtor who is overburdened with debt, but has some assets, to transfer them to a trustee who will then sell and distribute the proceeds in a fair and equitable manner. This transfer of title to the assets happens automatically when the debtor takes protection. In practice, the consumer debtor rarely has any assets of value except for his or her salary. As a result, there is seldom any distribution of dividends to creditors. In short, bankruptcy allows the honest debtor to start all over again without the burden of debt.

2. Read This Book First!

Many people who go through the bankruptcy process do not need to consult a lawyer. Their affairs are neither technical nor complicated. These types of debtors are generally employees who lost their jobs through plant closures, business bankruptcies, receivership, or for other causes, and they are now unable to service the monthly debt to credit card holders such as VISA, MasterCard, and American Express, and to pay the mortgages on their homes.

However, if there are more serious financial problems which the debtor can identify from the list in section **3.**, and the debtor falls within one or more of them, then it is advisable to see a lawyer first. Once the debtor files for bankruptcy, the debtor is technically in bankruptcy and except in the rarest of cases, the debtor will not be able to reverse the process. If the debtor has any doubts about going into bankruptcy, again the debtor should s*ee a lawyer first*. The debtor should not sign any bankruptcy papers unless the debtor is satisfied of the consequences and is prepared to deal with them once in bankruptcy.

After seeing a lawyer, the debtor may have other remedies available to resolve the financial difficulties at which time the debtor may elect not to file for bankruptcy. This decision as to whether to file for

bankruptcy is critical as once the debtor files for bankruptcy protection, the date becomes a focal point for many objectives under the Act. These are discussed throughout the book.

Lawyers are generally not able to list themselves in the telephone directory or advertise to the public by specialty or expertise unless they are certified as such experts by their provincial or territorial law society. Therefore, if the debtor has serious financial problems, it is necessary to go to a general practitioner in law or an accountant and if that professional cannot answer the questions, the debtor should request a referral to a bankruptcy and insolvency lawyer. Alternatively, the debtor may call the Law Society or the Canadian Bar Association and they may be able to suggest a number of lawyers who practise in this area. It is very important to deal with a lawyer who specializes in this area, as these types of lawyers have special knowledge and skill and they will save the debtor time and expense and usually give advice more quickly. However, if the debtor consults a general practitioner, he or she will have to review the law in the area and advise the debtor on questions. This may be time consuming and may be as or more expensive even though the general practitioner may come out with the same answers and give the same advice as the specialist.

In short, if there are no valuable assets, the debtor is likely a consumer debtor and will not require the services of a lawyer. However, if the debtor has substantial debt, has many valuable assets, or is a high wage earner or is self-employed, the debtor should see a lawyer first before filing for bankruptcy.

At this stage, the debtor should sit down and review this book and prepare questions to ask the lawyer if the debtor chooses to see one first, or questions to the trustee if the debtor goes directly to a trustee's office. In either case, the debtor should clearly understand the process before making an assignment into bankruptcy.

3. Learning about Bankruptcy before It Happens

Almost every consumer debtor who is having financial difficulty and is not paying bills on time knows that he or she is in financial difficulty and is headed for bankruptcy unless there is a sudden influx of money. Debtors do not have to be mathematicians to know they can't pay their bills. Once consumer debtors realize that they have

more money going out of their bank account monthly than coming into their bank account, that they are no longer paying their bills in ordinary course, they may realize they are probably headed for bankruptcy. Usually, paying off one credit card with another is a typical signal of financial sickness. It's just a matter of time until the credit card companies catch up on their collections and drive the individual to see a trustee in bankruptcy.

Consumer debtors who can't pay their debts now, and consumer debtors who know they won't be able to pay them in the near future, need financial assistance.

There are two well-known tests for bankruptcy. First, there is the cash-flow test; that is, whether the debtor is generally unable to pay the bills as they come in. Most suppliers of credit give their customers some time to pay the bills. Usually it is about 30 days from the time the supplier sends the bill. Give or take a few days either way, the debtor has about 20 days to pay the bill in full. If the debtor does not pay the bill, virtually all suppliers charge interest on overdue accounts which can range from 12 percent to more than 40 percent per annum. Take Bell Canada, for example: At the time of writing this book, if an individual does not pay on time, Bell Canada charges 42.58 percent per annum! With interest rates that high, it is easy to see how one can face financial instability quickly.

The second test to determine whether the consumer debtor is headed for bankruptcy is called an asset test; namely, the debtor would not have sufficient assets if all his or her assets are sold at a fairly conducted sale under legal process to pay the debts.

Let me give three examples of the asset test. First, everyone knows that when you drive a new car off the lot, the value of the car depreciates significantly in excess of 20 percent minutes later.

Likewise, with jewellery which is often marked up 300 to 500 percent of its wholesale value: It's one thing to buy an engagement ring at a jewellery store for $1,000 plus tax and it's another thing to pawn it for a few hundred dollars months later.

Last, there is no value in used clothing. While a new suit may have cost more than $1,000, it has virtually no value on resale. So, when adding up a debtor's assets, the debtor must be fully aware that his or her assets will fetch a very low dollar.

Most consumer debtors who are unable to pay their bills tend to be thoroughly optimistic that their problems will go away or that tomorrow will be different and that things will change. Unfortunately, almost all of these consumer debtors are wrong. Tomorrow comes and goes and the problems surrounding the debtors continue to increase to the point where the debtors want to be put out of their misery. This rarely happens to the personal debtor as the creditor usually stands back and attempts to collect from the debtor by some lawful means. Consumer creditors seldom force the consumer debtor into bankruptcy. Instead, they assign their accounts to a collection agency which is paid a commission on collections. Collectors are notorious for harassing people, suing in Small Claims Court, and then garnisheeing or attaching the debtor's wages. Collectors do not earn a living by putting consumers into bankruptcy. Their job is to squeeze the consumer into paying something every month under the threat of seizure and/or threat of bankruptcy.

Sometimes, a consumer debtor is lucky. A creditor will put the debtor into bankruptcy. But this costs money and creditors are very reluctant to "spend good money after bad" (meaning there is little or no chance of recovery). A creditor will force a consumer debtor into bankruptcy if the creditor believes that the debtor has stashed away money or other assets, or if the debtor has recently gifted some property, such as a summer cottage or RRSP, to a spouse, partner, or children. Most other times, the consumer debtor has to take the steps to go bankrupt; that is, file for voluntary bankruptcy, or technically, file an assignment in bankruptcy as the pressure becomes impossible to bear.

How does the individual consumer know that he or she is insolvent or soon to be bankrupt under the bankruptcy system? There are many early warning signs, each of which may not be the final straw that forces the issue, but added up, the signs generally point to a course of direction which is virtually irreversible: bankruptcy.

Early warning signs for consumers include:

- Loss of a job.
- Marital or partnership separation.
- Over-extension of credit cards.
- Use of one credit card to pay the other ("robbing Peter to pay Paul").

- Running out of money just after payday.
- Unanticipated large expenditures.
- Failing to pay the credit card balances in full each month.
- Harassment by several creditors or collection agencies.
- Impulse buying for merchandise that is really unnecessary, and using credit cards for payment.
- Garnishment of wages.
- Gambling or substance addiction.

If the consumer is having difficulty in making ends meet on a regular basis, then he or she will qualify to go bankrupt. Unless the consumer takes proceedings authorized by the Act, the consumer is not technically bankrupt: The individual is insolvent. Insolvency means the person is unable to pay his or her debts in the ordinary course. All bankrupts are insolvent persons, but not all insolvent persons are bankrupt. An insolvent person can continue to work, be employed, or carry on business until creditor harassment becomes intolerable. Then the debtor may take protection under the *Bankruptcy and Insolvency Act*. Bankruptcy generally lasts for a minimum of nine months, and in serious cases where creditors object to the bankrupt's discharge, for several years, and in some cases, the bankrupt never gets discharged. See Chapter 3 for the time sequence involved in bankruptcy.

The following are ways that a consumer can go bankrupt under the *Bankruptcy and Insolvency Act*.

First, the consumer can make an "assignment." An Assignment is the document that transfers or conveys all of the consumer's assets to a person called a trustee in bankruptcy. This trustee in bankruptcy is licensed by the federal government in Ottawa, namely the Department of Industry, pursuant to the *Bankruptcy and Insolvency Act*. The trustee in bankruptcy administers the consumer's affairs by collecting and selling all the assets and ultimately paying the proceeds to creditors under a prescribed formula. More about the trustee in bankruptcy and distribution later.

The assignment is a voluntary act by the consumer debtor; that is, the debtor does it by himself or herself without going to the courts. Much of this book is devoted to assignments by debtors.

The second way a person can go bankrupt under the Act is by being put into bankruptcy by one or several creditors. If this happens, it is called an involuntary bankruptcy. The creditor issues a legal proceeding called "an application for a bankruptcy order."An application is like a statement of claim issued by a creditor in the Superior Courts in each of the provinces and territories to collect a debt, except in the case of an application, the creditor is suing on its own behalf and on behalf of all creditors. In fact, it is really a class action of all creditors against the consumer debtor.

The application alleges that the debtor owes a sum of money, that the debt has not been paid, that there are other creditors who are also owed money, and that for the benefit of all creditors, the consumer debtor should be placed into bankruptcy. The consumer debtor has the right to defend the application, and after a short period of time, there is a trial to determine whether the consumer debtor should be placed into bankruptcy. If the application is successful, the court then makes what is called a "bankruptcy order"against the consumer debtor; in other words, the court issues an order that simply places the consumer debtor into bankruptcy.

This remedy is used by creditors who do not get paid and who take the legal steps to put the debtor into bankruptcy. The process is adversarial; that is, there is a legal dispute which is heard before a judge. After the hearing, the judge decides one way or another. This hearing or trial can be costly for both sides if the consumer debtor can and wants to defend on good grounds. Creditors do not generally force consumer debtors into bankruptcy as there are rarely substantial assets to administer and the expense of doing so would be borne by the application creditor. However, a consumer debtor will rarely defend the application for a bankruptcy unless the consumer debtor is concerned about some asset or assets that may have questionable exemptions.

Last, a consumer debtor may consider making a deal or settling with his or her creditors. Governed by the *Bankruptcy and Insolvency Act*, this process is called a "proposal."A proposal is a contract or an agreement by a consumer debtor and the creditors to pay something less, as a general rule, than the full amount that is owing to the creditors. There are many rules under the Act that apply to consumer proposals.

Here is an example of a consumer proposal: The consumer debtor may offer (and the creditors may choose to accept) 40 cents

on every dollar that is owed. If the consumer debtor owes $100,000 to all his or her ordinary creditors, the debtor may propose to pay $40,000 with the result that the debtor will be relieved or discharged from paying the balance of $60,000. If the creditors vote against the terms of the proposal or say "no,"then the consumer debtor is not automatically put into bankruptcy. If the creditors vote "yes"or in favour of the proposal, the consumer debtor will not be put into bankruptcy, but the debtor is bound by the terms of the agreement. In these cases, the creditors will accept the good intention and good faith of the consumer debtor to make a deal, thereby the consumer debtor avoids bankruptcy and going through the bankruptcy process from meetings to discharge.

Over the last 20 years, the federal government has amended the *Bankruptcy and Insolvency Act* several times to permit a consumer debtor to take advantage of the provisions relating to consumer proposals. Division II of Part III of the Act specifically deals with consumer proposals. The consumer proposal is discussed later in this book, and particularly, in Chapter 10. It is the recommended solution if the consumer debtor has gainful employment. Creditors will receive something rather than nothing in a bankruptcy; the consumer debtor then is not bankrupt.

3.1 Qualifying for bankruptcy

The consumer debtor must meet certain conditions under the *Bankruptcy and Insolvency Act* in order to go bankrupt:

- The consumer debtor must owe at least $1,000 to any of his or her creditors.
- The consumer debtor must commit "an act of bankruptcy."

While there are many acts of bankruptcy, the usual one connected to consumers is that the consumer must be unable to meet the regular bill payments to creditors according to their terms. For example, if the debtor does not pay his or her bills within 30 days as promised, then the debtor is unable to pay those debts in the ordinary course; or the debtor must not have enough property which, if sold at a fair market sale, would be sufficient to pay all the creditors in full. For instance, if the debtor were to list all his or her personal possessions and then have a liquidator value them, the likelihood is that their total value would be very low compared to the size of the debt.

If the consumer debtor meets these two conditions, the consumer debtor is considered insolvent. The consumer debtor then qualifies to go bankrupt voluntarily or he or she can be put into bankruptcy by any one of the creditors if the creditors are willing to go to court to do it.

3.2 Alternatives to bankruptcy

While the consumer debtor may qualify under the criteria above, he or she may wish to avoid bankruptcy if it is possible. Many debtors do not want to go bankrupt as they consider bankruptcy to be irresponsible and a failure financially.

They may also consider their reputation in the community and the stigma attached to bankruptcy, although that factor seems to be diminishing over the last 30 years.

Last, but not least, debtors want to protect their credit rating. Once in bankruptcy, it may take years to re-establish credit to what it was formerly.

There are alternatives to bankruptcy and the consumer should carefully consider them before going bankrupt:

- The consumer debtor may make a deal or enter into a proposal with his or her creditors.
- The consumer debtor may be able to obtain a debt consolidation loan from one bank so that he or she can pay all the other creditors on a minimum monthly payment.
- The consumer debtor may obtain a consolidation order in Small Claims Court, or in some provinces an order directing payments to creditors.
- The consumer debtor's income may increase to cover the carrying charges and pay some principal.
- The consumer debtor's expenses may decrease.

4. Exempt Property

When the consumer debtor goes bankrupt, all of the property that is owned by the debtor and property that the debtor inherits or acquires after bankruptcy up to the time the debtor gets out of bankruptcy automatically belongs to the trustee in bankruptcy without any need

or requirement to transfer or register ownership, except for real estate. The trustee in bankruptcy must sell the debtor's eligible or non-exempt property and then distribute the sale proceeds amongst the creditors. Eligible property includes all kinds of property wherever it is whether inside or outside Canada. Property that is acquired by the bankrupt after bankruptcy up to the time of discharge is called "after-acquired" property. It usually includes wages, commissions, inheritances from family members, and winnings from lottery tickets.

However, not all property goes to the trustee. In each province and territory, there are exemptions for bankrupts. These exemptions provide that the consumer debtor, now the bankrupt, can keep certain kinds of property. In other words, creditors cannot seize this type of property. While this is covered a little later in the book, in Chapter 6, the consumer debtor should note that he or she can keep most of the wages, vehicles, tools of the job, generally all clothing, furniture, pension funds, RRSP money with the exception of money deposited within the last year before bankruptcy, insurance proceeds, and proceeds arising out of a personal injury action.

5. Protection Against Lawsuits

Once the consumer debtor is in bankruptcy, a creditor who has a claim provable in the bankruptcy is stopped or prevented from starting any lawsuit or continuing any lawsuit against the bankrupt or the bankrupt's property. The bankruptcy operates as a stay of legal proceedings by most creditors. These creditors have a right to look to what property the bankrupt had at the time of bankruptcy for payment. They are not entitled to take any legal proceedings against the bankrupt except with the permission of the court. This permission is rarely given except in the cases of fraud, misrepresentation, or with respect to the enforcement of a support order or in the case of a motor vehicle claim where there is insurance coverage. Bankruptcy does not stop or stay criminal investigations or contempt proceedings.

Secured creditors can enforce their security against the bankrupt. They do not need the court's permission to repossess the person's property after bankruptcy. For example, a secured creditor could seize the bankrupt's vehicle if payments are in arrears or a secured creditor could foreclose on the bankrupt's home for arrears of mortgage payments or taxes.

Therefore, the bankrupt can be assured that the sheriff or bailiff will not seize his or her assets or take garnishment proceedings without a special court order being made.

5.1 Wage assignments

Many consumer bankrupts give creditors a wage assignment as security for loans. A wage assignment is an agreement between the debtor and the employer which gives the employer the right to deduct amounts from the debtor's wages to pay a creditor who has a judgment. When a consumer debtor goes into bankruptcy, the wage assignment does not continue. Instead, the bankrupt is now required to pay a portion of his or her surplus income to the trustee in bankruptcy for distribution to all the creditors.

5.2 Licences

Sometimes, a consumer debtor may hold a licence under legislation that regulates the industry. For example, a consumer debtor may require a real estate broker's licence, a licence to sell securities, a licence to sell used vehicles, and other types of licences that are issued by provincial and federal governments. Each type of licence has to be reviewed under its applicable legislation to see what happens on bankruptcy. The consumer debtor should consult the governing body that issues and regulates the licence before making an assignment into bankruptcy. Some legislation allows an undischarged bankrupt to continue earning a living while other legislation prohibits the bankrupt from using the licence until there is a discharge. In some cases, a consumer debtor who files an assignment may not be able to obtain a fidelity bond. This may also affect any renewal of the licence. In such a case, the consumer debtor should consider filing a consumer proposal so that the licence can be preserved.

For example, a lawyer who goes bankrupt in Ontario may continue to practise, but an undischarged lawyer in Ontario cannot maintain a trust account. The lawyer must therefore work with another lawyer as such trust accounts are monitored by the Law Society of Upper Canada. However, if a public accountant goes bankrupt, the accountant loses his or her licence during bankruptcy.

Therefore, it is necessary for the consumer debtor to review the legislation governing the licence that is held before making an assignment in bankruptcy as without a licence the consumer debtor

may lose his or her job temporarily, and may have some difficulty in getting the licence back after discharge.

6. Costs

In 2000, there were 75,137 consumer bankruptcies in Canada and 12,392 consumer proposals. In 2010, there were a total 135,008 consumer bankruptcies in Canada of which 42,314 made proposals. In 2011, there were a total of 122,999 consumer bankruptcies of which 45,006 made proposals. In most of these consumer bankruptcies, the trustee's fees ran about $1,800 and up. Under the *Bankruptcy and Insolvency Act*, there is a prescribed tariff for trustees in performing services for little- or no-asset bankruptcy estates. If the consumer debtor needs a lawyer, the costs will usually be based on an hourly rate. A consumer debtor should be able to get good competent legal advice on bankruptcy matters for less than $1,500. Of course, if there are special problems, the costs are likely to be higher. Therefore, most consumer debtors should have or be able to raise about $3,300 if they want to use the services of a lawyer and a trustee to go bankrupt.

If the consumer debtor has any doubts about bankruptcy or its effects, it is advisable to see a lawyer first before filing as once the consumer debtor files for bankruptcy, it is virtually impossible to annul or reverse its effect.

If the consumer debtor does not have any assets to pay the trustee or a lawyer, then it is possible that the trustee may obtain a guarantee or a cash retainer from a family member or from a friend of the consumer debtor. The guarantee operates only if the trustee is unable to recover property or realize any monies from the property that the bankrupt earns after bankruptcy up to the time of discharge. The guarantee should be in writing and the guarantor, the family member or friend, should read the guarantee very carefully so that it is understood at what is being signed. Trustees usually require that their money be paid before formal proceedings take place.

It is also possible for the consumer debtor to access the Bankruptcy Assistance Program supervised by the Office of the Superintendent of Bankruptcy if the consumer does not have a family member or friend to assist. However, the consumer must first make attempts to retain the services of two private licensed trustees, not be involved in any commercial businesses, and not have any surplus income. If the consumer debtor qualifies, the consumer debtor can

contact the local office of the Superintendent where a bankruptcy analyst will designate a participating trustee to administer the bankruptcy or proposal.

7. Information You Will Need to Share at a Bankruptcy Interview with a Trustee or Lawyer

Bankruptcy laws generally provide that transactions entered into by a debtor within five years of the date of bankruptcy require review by the trustee on behalf of the creditors. The trustee is concerned about property that the consumer debtor had, what the consumer debtor received for it when it was transferred, and where it is today. It is improper, generally, for a consumer debtor to give away property or transfer property at less than its fair value at a time when the consumer debtor is having financial difficulties and cannot readily pay his or her creditors. If the consumer debtor does not have sufficient assets at the time of the transfer or gift, then it is possible that the trustee or the creditors may move to set aside that transfer. If the transfer is set aside, the property re-vests in the name of the consumer debtor and thereafter the trustee or creditors can force its sale. Accordingly, a careful review of all assets should be made within five years of the projected date of bankruptcy. This would include the following:

- Full particulars about the consumer debtor including:
  - surname, given names, nicknames
  - address including postal code
  - telephone and fax numbers, email addresses
  - driver's licence number
  - social insurance number (show card)
  - date of birth, with birth certificate
  - passports, citizenship, or landed immigrant papers
  - marital status, and where appropriate, separation agreement, divorce order, support order
  - dependents' names, relationship, and ages
  - occupation

- name of employer including telephone and fax numbers, email address, and postal address
- salary, wages, or other remuneration
- full particulars of spouse, partner, or friend including names, date of birth, and social insurance number
- income tax returns for the last five years

- Full particulars of all assets in Canada and elsewhere, including:
  - cash, bank accounts
  - insurance policies for life and property, and names of beneficiaries and relationship
  - furniture and furnishings
  - securities including stocks, guaranteed investment certificates (GIC), shares of public and private companies
  - bonds, over the last five years including brokerage statements
  - vehicles, licence plates, ownership, and insurance particulars
  - real estate
  - leasehold
  - equipment
  - receivables and IOUs
  - personal assets including collections having a value of more than $500, collections of silver, crystal, gold, coins, liquor, guns, art, and artifacts
  - credit cards
  - copies of net worth statements provided to any bank, lender, or other creditor
  - copies of pass books or bank statements in the consumer debtor's name alone or jointly with others
  - copies of all credit card statements in the consumer debtor's name
- Full particulars of all debts including names of creditors in alphabetical order, addresses, and amounts outstanding.

- RRSP, RRIF, and other pension statements for the last five years including documentation with respect to any change in the names of beneficiaries. The trustee and creditors cannot attach RRSPs except for monies invested within one year of bankruptcy.
- Full particulars of all dispositions and transfers of property within 12 months of taking protection and within 5 years of taking protection.
- Delivery of all credit cards, ownership registrations, mortgages, title deeds, guarantees, insurance policies, tax returns, and all other documents evidencing ownership and debt.